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Canada Gets the Short End of the TRIPS Stick: Rethinking Article 70 and the Overall Applicability of TRIPS

*by Robert Druzeta**

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Introduction

Prior to the Agreement Establishing the World Trade Organization ("WTO Agreement")[1], the 1980s signaled a turning point for the U.S. economy, as significant competition from abroad eroded the dominance of its manufacturing industry.[2] At the same time, increasing numbers of companies in the U.S. started to focus on developing and refining technologies, with intellectual property (IP) becoming a substantial portion of the value of these modern businesses.[3] Together, these changes led to a transformation of the strength of U.S. industry from traditional manufacturing into one founded upon knowledge and information.

While the U.S. was undergoing these economic changes, the Uruguay Round of multilateral trade negotiations (the precursor to the WTO Agreement) was well underway.[4] The negotiations focused on revamping the rules governing international trade and sought to extend the scope of multilateral agreements to encompass non-traditional items of trade, beyond mere trade in goods, in order to expand trade disciplines. In light of the economic pre-eminence of IP in the U.S., it is not surprising that the main proponent for the inclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[5] during the negotiations was the U.S.,[6] the largest worldwide investor in research and development.[7]

TRIPS essentially requires member countries to provide a minimum level of protection for IP. Today, the importance of IP to modern businesses in the U.S. continues to increase. For example, IP licensing royalties from abroad (not including sales) in 1986 totalled $8 billion, while in 1998 this value grew to $37 billion.[8] In addition to this revenue, actual sales of protected products, including U.S. pharmaceuticals, are also becoming increasingly significant; U.S. pharmaceutical companies alone generate more than $40 billion annually from foreign

* The author would like to thank Professor Chi Carmody, at the University of Western Ontario, for his comments and insight.

[1] Agreement Establishing the World Trade Organization, April 1994, 33 I.L.M. 1125 [WTO Agreement].

[2] Peter M. Gerhart, "Reflections Beyond Compliance Theory – TRIPS As a Substantive Issue" (2000) 32 Case W. Res. J. of Int'l L. 357 at 367.

[3] Michelle M. Nerozzi, "The Battle Over Life-Saving Pharmaceuticals: Are Developing Countries Being 'TRIPed' By Developed Countries?" (2002) 47 Vill. L. Rev. 605 at 616.

[4] The Uruguay Round continued from 1986 to 1993.

[5] Annex 1C of the WTO Agreement, *supra* note 1 at 1197 [TRIPS].

[6] Judy Rein, "International Governance Through Trade Agreements: Patent Protection for Essential Medicines" (2001) 21 NW. J. of Int'l L. & Bus. 379 at 383.

[7] Mary Atkinson, "Patent Protection for Pharmaceuticals: A Comparative Study of the Law in the United States and Canada" (2002) 11 Pacific Rim Law & Policy Journal 181 at 183.

[8] John H. Barton, "The Economics of TRIPS: International Trade in Information-Intensive Products" (2001) 33 Geo. Wash. Int'l L. Rev. 473 at 486.

sales.[9]

Despite protecting the commercial value of intellectual effort, the inclusion of TRIPS as part of the WTO Agreement was regarded as highly controversial. Those opposed to TRIPS were primarily developing countries that had rudimentary or non-existent IP protection within their jurisdictions. One of the most important contentions of these countries involved the claim that IP protection would hinder access to badly needed medicines[10] by artificially inflating prices above the marginal cost of manufacture.[11] For example, 89% of people infected with HIV/AIDS live in countries ranked in the lowest 10% in terms of Gross National Product (GNP),[12] making it difficult for them to afford proper medication. Rationally, it does not make sense for countries where these individuals live to protect the income of foreign drug manufacturers at the expense of their population's health.

Nevertheless, the fear of closed borders, coupled with the promise of reduced barriers to agricultural and textile products, enabled the U.S. and its supporters to eventually convince developing countries to accept TRIPS as part of the WTO Agreement.[13] Along with the General Agreement on Tariffs and Trade (GATT)[14] and the General Agreement on Trade in Services (GATS),[15] TRIPS now forms the backbone of the WTO Agreement, and all Members are required to comply with its provisions. Furthermore, any disputes regarding TRIPS are subject to the Dispute Settlement Understanding (DSU)[16] and can ultimately result in retaliation.[17]

Apart from the increasing importance of defining the various substantive requirements that TRIPS imposes on Members,[18] it is equally important to determine *when* the TRIPS provisions must be applied. Overall application is provided for by Article 70. Before the requirements of TRIPS can be applied, Article 70 must be scrutinized to determine the extent or reach of IP protection that must be incorporated. To date, the most important decision interpreting the general applicability of TRIPS is *Canada – Term of Patent Protection*.[19]

This paper evaluates the Appellate Body's interpretation of Articles 70.1 and

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[9] *Ibid.* at 473.

[10] Nerozzi, *supra* note 3 at 618.

[11] See Barton, *supra* note 8 in general.

[12] Nerozzi, *supra* note 3 at 605.

[13] Gerhart, *supra* note 2 at 370.

[14] Which is incorporated by Paragraph 1(a) of the General Agreement on Tariffs and Trade 1994, in Annex 1A of the WTO Agreement, *supra* note 1 at 1154 [GATT].

[15] Annex 1B of the WTO Agreement, *supra* note 1 at 1167 [GATS].

[16] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 of the WTO Agreement, *supra* note 1 at 1226 [DSU].

[17] TRIPS Article 64. Nevertheless, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Complaint by European Communities)* (1999), WTO Doc. WT/DS27/ARB/ECU at 31 (Panel Report) suggests that to suspend TRIPS obligations, WIPO approval must be obtained, which is unlikely. Despite this, if a developing country fails to comply with TRIPS, sanctions against IP may not be effectual, and the DSU Article 22 allows trade sanctions against goods or services. In this case, WIPO would not have to be consulted. This is likely the prevalent situation between developing countries and developed countries.

[18] See Nerozzi, *supra* note 3 at 615. For instance, developing countries interpret TRIPS Article 27 as allowing for broad exceptions to patent rights, while developed countries favour narrow interpretations. By no means are the TRIPS obligations defined with certainty.

[19] *(Appeal by Canada)* (2000), WTO Doc. WT/DS170/AB/R (Appellate Body Report) [hereinafter *"Can.-Patent"*]. See also *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (Appeal by India)* (1997), WTO Doc. WT/DS50/AB/R (Appellate Body Report), which also deals with Article 70 of TRIPS but involves narrow issues concerning Articles 70.8 and 70.9.

70.2, and discusses the interaction between various provisions of Article 70. It also evaluates the resultant impact of the decision on Canada. For context, the paper begins with a brief overview of the function of TRIPS in the overall scheme of the WTO Agreement.

The Role of TRIPS as Part of the WTO Agreement

Identifying the immediate effects of TRIPS is relatively straightforward. Members are required to provide minimum levels of protection to various forms of IP, as identified in the agreement. Seven categories of IP are enumerated, including the traditional categories of copyright, trademark and patent. The more complicated issue involves identifying the *purpose* or objective of TRIPS and the repercussions it has on international trade.

Unfortunately, there is no consensus when attempting to define the "goal" of TRIPS. Opinions vary widely: some claim that TRIPS is designed to stop piracy, while others argue that it is designed to act as an agent of growth for developing countries.[20] Despite these disparate views, accurately defining the goal of TRIPS is essential when interpreting its provisions. It is suggested that, if the objectives of the WTO Agreement (i.e., an increase in general welfare)[21] and the methods used to achieve these goals are kept in mind (i.e., that GATT facilitates the exchange of goods and GATS facilitates the exchange of services), the purpose of TRIPS can be seen as a method for facilitating the international exchange of knowledge. By requiring Members to implement basic levels of protection, a uniform regulatory environment is created in which knowledge (an intangible) can be bought and sold across borders in the same way as ordinary goods. The "uniqueness" of these intangibles is maintained through the implementation of legislation in each separate jurisdiction, and individuals are effectively prevented, for a limited period of time, from using the knowledge without permission.[22] Of course, anyone is free to create "new" knowledge, for which they are afforded the same protection by the various member states. If this perspective is adopted, it is arguable that TRIPS promotes the conversion of intellectual effort into a commodity for which, depending on its usefulness, a trading price can be established. In turn, this exchange of knowledge helps increase the overall welfare of society.

However, most knowledge is not held for its own sake; it is eventually applied and becomes embodied in tangible goods. This can create tensions between the various trading regimes under the WTO Agreement. For instance, on one hand, GATT supports trade liberalization and world competition; efficiently manufacturing and selling *goods* is encouraged. On the other hand, TRIPS acts as a trade barrier that prevents free trade in *goods that embody IP*; temporary monopolies are granted that distort the free-market price of such goods. In this way, there appears to be a conflict between the operation of GATT and TRIPS.

Conceptually however, this is not the case if the underlying subject matter of each trade regime is correctly identified – recognizing that the tangible good is distinct from the IP. Once this dichotomy is sorted out, a proper application of the TRIPS provisions only concerns the IP, not the physical good. For example, TRIPS does not allow for trade restrictions on cassette tapes (i.e., tangibles), but allows for restrictions on the trade of protected music (i.e.,

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[20] See Gerhart, *supra* note 2, in which he outlines the views of several academics. The Preamble to TRIPS is probably the source of this confusion, as it is largely incoherent.

[21] See the Preamble to the WTO Agreement, *supra* note 1 at 1144.

[22] Essentially, knowledge is traded across borders, while the *protection* of the knowledge is territorial. This is analogous to property rights in tangibles. Objects move across borders, while rights are territorially based.

intangibles).[23] When the various layers of "commodities" are identified, the obligations under GATT and TRIPS can be paired with their distinct subject matters, and no conflict results. Practically speaking however, since in many situations the IP is inextricably linked to the tangible good, IP protection can act as an effective trade barrier to goods that embody protected subject matter.[24] Still, it remains important to differentiate between the subject matter that is addressed respectively by GATT and TRIPS, to maintain the inter-operability of the two trade regimes.[25]

It is arguable that a more fundamental problem arises internally from the design of the TRIPS regime itself. TRIPS requires Members to grant temporary monopolies, which inevitably cause trade distortions in the IP marketplace.[26] These monopolies eliminate competition between "identical" ideas, even if they are developed independently.[27] It is therefore arguable, on a conceptual level, that the TRIPS monopolies do not promote the efficient exchange of knowledge and are contrary to trade liberalization. Nevertheless, it is also arguable that over the long term, the increased innovation that IP protection fosters can actually encourage competition.[28] Granting monopoly rights to reward and protect the development of socially useful ideas seems to be the only plausible way to create an incentive for creators.[29]

In summary, it can be argued that the goal of TRIPS is to create a uniform regulatory environment that facilitates the exchange of knowledge. This environment is created by requiring Members to provide minimum levels of protection within their respective jurisdictions. The interaction of TRIPS with the other trade disciplines of the WTO Agreement, such as GATT, may create tensions, but it is suggested that if each regime is properly applied to its respective subject matter, conceptually no problems arise. However, the temporary grant of monopolies, which is internal to TRIPS, can result in distortions in the IP marketplace. Nonetheless, monopolies are needed due to the inherent limitations involving the protection of intangibles and are generally consistent with the goals of the WTO Agreement.

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[23] Strictly speaking, TRIPS requires domestic legislation to provide for a minimum level of IP protection. The restrictions on trade only arise *indirectly* through domestic legislation, that can allow for border control concerning unlicensed IP, as well as control over unlicensed IP within the country.

[24] However, note that the various IP legislation can limit the use of IP rights for such purposes. For instance, patent legislation can provide for mandatory licensing.

[25] This is presently an area of debate surrounding pure e-products, such as e-books. Some suggest that GATT is applicable to e-products since they can be likened to physical products, while others suggest that only GATS applies, since the e-product is likened to a pure service. Both arguments, surprisingly, ignore the subject matter and applicability of TRIPS. See Stewart A. Baker *et al*, "E-Products and the WTO" (2001) 35 Int'l Lawyer 5.

[26] Monopolies generally always cause trade distortions and market inefficiencies. Theoretically, this happens because a rational monopolist maximizes profit by producing an output quantity where marginal revenue equals marginal cost. However, in a monopoly situation, as quantities increase, the marginal revenue decreases faster than demand, and the point of maximum profit for the monopolist occurs when less product (and therefore higher price) is produced, when compared with the perfectly competitive situation. See Ernest Gellhorn & William E. Kovacic, *Antitrust Law and Economics in a Nutshell*, 4th ed. (St. Paul, MN: West Publishing Co., 1994) at 61-66.

[27] Oftentimes, technology develops simultaneously in different places, and it seems unfair to grant a temporary monopoly to the first person who succeeds, if others are very close behind.

[28] See William A.W. Neilson, Robert G. Howell & Souichirou Kozuka, "Intellectual Property Rights and Competition Law and Policy: Attempts in Canada and Japan to Achieve a Reconciliation" (2002) 1 Wash. U. Global Studies L. Rev. 323 at 333. Indeed, a condition for granting patent rights involves complete public disclosure.

[29] This is obviously due to the ease of duplication of IP. Interestingly, technological methods are being developed that allow for individual self-help in preventing the use of IP. This is especially true in the field of software, where encryption technologies can render programs useless unless the proper decryption key is obtained. Perhaps in the near future, monopolies will no longer be needed to protect some forms of IP.

The Decision: Canada – Term of Patent Protection

Throughout the 1980s, patents registered in Canada were given a 17-year term of protection, counted from the date of their grant. This was also incorporated in the North American Free Trade Agreement (NAFTA),[30] which allows parties to choose between offering a 17-year term of protection counted from the date of *grant*, or a 20-year term of protection counted from the date of *filing*.[31] To ensure overall conformity with the agreement, Canada was required to make some changes to its legislation before January 1, 1994.[32] When implementing these changes, the federal government also chose to alter the term of patent protection to 20 years from the date of filing.[33] The amendments left unchanged the term of protection for patents filed before October 1, 1989,[34] but patents filed on or after that date were given a 20-year term measured from the date of filing.[35] These different types of patents were respectively referred to as "Old Act patents" and "New Act patents."

Approximately two years after the NAFTA amendments, on January 1, 1996, TRIPS became applicable to Canada. It seemed that Canada's legislation on the term of patent protection was in conformity with the 20-year term required by Article 33 of TRIPS. However, in 1999, the U.S. challenged the Canadian regime and suggested that TRIPS required *all* patents existing in Canada to receive a minimum 20-year term of protection, counted from the date of filing. Interestingly, this only applied to approximately 40% of the Old Act patents; the term of protection for the other 60% was greater than the minimal requirements of TRIPS.[36] Official consultations through the WTO commenced in 1999 and a Panel was established to hear the dispute.[37] The Panel decided in favour of the U.S., finding that the Canadian legislation was not in conformity with the obligations required by TRIPS.[38] Canada appealed. The Appellate Body heard the dispute and rendered its decision on September 18, 2000.[39]

Analysis of the Appellate Body's Reasoning

The Appellate Body started with the presumption that Article 70 determines the overall applicability of the TRIPS provisions.[40] It purported to take a contextual approach when interpreting the various provisions, by identifying the purpose of the Article from its title: "Protection of Existing Subject Matter."[41] Unfortunately, this title merely outlines what the provisions address, not whether particular subject matter will or will not be protected. The meaning of the title

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[30] North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States, December 1992, 32 I.L.M. 289 [NAFTA].

[31] NAFTA gives the choice of either method. See c.17, Art.1709:12. Interestingly, the U.S. kept its term of protection as 17 years from the date of grant.

[32] See NAFTA, *supra* note 30 at c.22, Art. 2203.

[33] It is possible that this was done in foresight of the requirements that were eventually imposed by TRIPS, which was concurrently being negotiated. The Final Act was agreed to on April 15, 1994, which was after the amendments. Nevertheless, TRIPS negotiations were well underway.

[34] See Canada's *Patent Act*, R.S.C. 1985, c.P-4, s. 45.

[35] *Ibid.*, s. 44.

[36] *Can.-Patent, supra* note 19 at para. 5. To be more precise, the statistic refers to patents in existence on October 1, 1996 rather than those in existence on January 1, 1996.

[37] A Panel was requested by the U.S. on July 15, 1999. See *Canada – Term of Patent Protection (Request for the Establishment of a Panel by the United States)* (1999), WTO Doc. WT/DS170/2.

[38] The Panel rendered its decision on May 5, 2000. See *Canada – Term of Patent Protection* (2000), WTO Doc. WT/DS170/R (Report of the Panel).

[39] *Can.-Patent, supra* note 19.

[40] *Ibid.* at para. 49.

[41] See the title of Article 70.

is equivocal.[42] Nevertheless, the Appellate Body decided that the title confirmed the focus of Article 70 is to bring within the scope of TRIPS existing subject matter, which included Old Act patents.[43]

Throughout the decision, surprisingly, the interactions of the various provisions of Article 70 were not addressed. The Appellate Body focused on the relationship between the first two paragraphs, and did not mention the interactions of Articles 70.6 and 70.7, despite arguments by both Canada[44] and the United States.[45] Since the Appellate Body's analysis was limited in scope, it is difficult to consider the determination as presenting a contextual approach to the whole of Article 70.

a) Analysis of Article 70.1

The Appellate Body decided that Article 70.1 was a general provision that covered "acts which occurred" before the application of TRIPS, and it excepted them from obligations required by the agreement. The definition of "acts" included both public and private acts, such as the grant of a patent (public) or the filing of a patent (private).[46] A further distinction was drawn between *acts* and *rights* created by acts.[47] The Appellate Body mentioned that it was of fundamental importance to distinguish between the act of granting a patent and the rights that resulted from the grant.

Immediately after distinguishing between acts and rights, the Appellate Body conflated the two by suggesting that *acts* were not complete if *rights* derived from the acts still existed.[48] This reasoning was applied to patent grants, and it was concluded that if patent rights still existed, the act of granting was not complete and the Article 70.1 exception was not triggered, since it only applied to "acts which occurred."[49] Although not clearly articulated by the Appellate Body, this reasoning seems to be analogous to a contractual agreement, in that a contract is a continuing act until it comes to an end.

Of course, Canada argued that the act of granting a patent was completed when the patent was issued, and that the exception under Article 70.1 was applicable.[50] This argument also seems to be analogous to a contractual agreement; the act of *entering* into a contract is discrete and complete, despite the ongoing contract. However, the Appellate Body did not like the sweeping consequences that this would have had for existing patents. If Canada's interpretation was adopted, all of the existing Old Act patents would be covered by the Article 70.1 exception, and none of the TRIPS obligations would be applicable. The Appellate Body simply rejected this in favour of its own interpretation.[51]

Unfortunately, the Appellate Body's reasoning effectively nullifies the application of Article 70.1. Article 70.1 creates *exceptions* to obligations for completed acts, and must be read in conjunction with the other provisions of Article 70. For instance, Article 70.3 precludes obligations regarding all subject matter that has fallen into the public domain (i.e., not protected) when TRIPS becomes applicable. This effectively covers actions that eliminate protection, such as expropriation or "completed acts" such as expired terms of protection, as long as they occur before the application of TRIPS. If the

[42] For instance, a provision stating that existing Old Act patents are *not* protected under TRIPS would be consistent with the title.
[43] *Can.-Patent*, *supra* note 19 at paras. 58 and 60.
[44] *Ibid.* at para. 15.
[45] *Ibid.* at para. 36.
[46] *Ibid.* at para. 54.
[47] *Ibid.* at para. 56.
[48] *Ibid.* at paras. 59 and 60.
[49] As per the Appellate Body's previous reasoning, *ibid.* at para. 58.
[50] *Ibid.* at para. 13.
[51] *Ibid.* at para. 59.

Appellate Body's interpretation of Article 70.1 is accepted, it becomes increasingly difficult to find an act that is excepted by Article 70.1, yet not by Article 70.3. Basically, this leaves either Article 70.1 or Article 70.3 redundant.

b) Analysis of Article 70.2

With the Appellate Body's interpretation of the operability of the Article 70.1 exception, the outcome of the analysis of Article 70.2 was already predetermined. Article 70.2 gives rise to obligations for all existing and protected subject matter at the date of application of TRIPS, unless otherwise provided for by other Articles. Since the Old Act patents were in existence and protected, and the exception of Article 70.1 did not apply, the full ambit of TRIPS obligations were applicable.

It is interesting to note that, at this point of the analysis, the presumption against retroactivity was considered, rather than during the discussion of the Article 70.1 exception.[52] Canada argued that the obligations under Article 70.2 would be applied retroactively if exceptions were not allowed for the Old Act patents. This led the Appellate Body to consider Article 28 of the Vienna Convention on the Law of Treaties.[53] Article 28 provides that treaty provisions do not bind a party in relation to (a) acts which took place, or (b) facts which took place, or (c) situations which ceased to exist before the date of the entry into force of the treaty with respect to that party.[54] It is suggested the Appellate Body erred when it concluded that this provision should be interpreted to mean that if a situation *did not* cease to exist (i.e., was ongoing), then the treaty provisions should apply.[55] However, the Appellate Body may have relied on other unarticulated factors to reach this conclusion,[56] but surprisingly the disjunctive "or" between the conditions in Article 28 was also ignored. According to Article 28, even if a continuing situation exists that may give rise to obligations, if an act took place and was completed, then obligations should not arise. This returns us to Canada's argument that the act of issuing a grant is discrete and separate from the ongoing obligations regarding the grant. Even if the grant for existing patents was ongoing, the *issuance* of the grant for Old Act patents was concluded before the application of TRIPS and no obligations should arise.

The Appellate Body's interpretation also presents difficulties interacting with Article 70.7. Article 70.7 allows for pending applications of registrable IP, including patents, to be amended to allow for any enhanced protection as a result of the application of TRIPS. This implies that without Article 70.7, pending patents do not receive any benefits arising from TRIPS. Despite this implication, the Appellate Body's reasoning would suggest that pending patents would not fall under the Article 70.1 exception, since they would be considered ongoing (i.e., acts which are not completed). Hence, pending patents would be included under Article 70.2, which requires the TRIPS obligations to be applied to subject matter that "comes subsequently to meet the criteria for protection." If the Appellate Body's interpretation is adopted, Article 70.7 also becomes redundant.

c) Understanding the Decision

The problems with the Appellate Body's interpretations would have become apparent if the interaction of the Article 70 provisions was considered. As mentioned, both the U.S. and Canada argued that

[52] See Art. 28 of the *Vienna Convention on the Law of Treaties*, July 1969, 8 I.L.M. 679.
[53] See *Can.-Patent, supra* note 19 at paras. 70-74.
[54] Generally in the form: "if A or B or C, then No Application."
[55] Generally in the form: Since "if C, then No Application," then it is reasonable to conclude "if Not C, then Application." See *Can.-Patent, supra* note 19 at para. 72.
[56] For instance, despite the *logical* flaw, it may be *reasonable* to assume that treaty provisions apply to ongoing actions.

various provisions would be nullified if certain interpretations were adopted, so it is surprising that only Articles 70.1 and 70.2 were addressed. As well, as part of the contextual approach, prior decisions have required that any adopted interpretation must give meaning and effect to all terms of a treaty.[57]

The narrow approach taken by the Appellate Body is largely inexplicable. Perhaps on a political level, an important factor in the decision was the relative importance of TRIPS to technology-producing countries, such as the United States. For instance, the U.S. has been particularly vigilant in monitoring international compliance with the TRIPS provisions because of the importance of IP to its economy. Since the implementation of the WTO Agreement, the U.S. has been responsible for requesting consultations involving TRIPS in approximately 65% of the cases.[58] Similarly, the U.S. accounts for approximately 64% of the requests for establishing Panels that involve TRIPS disputes.[59] If the Appellate Body adopted Canada's interpretation and found that all registrable IP protected before the adoption of TRIPS was not included, the U.S. and other technology-producing countries would have been placed in an untenable economic position on a global level. Repercussions of the decision would extend well beyond the mere dispute at hand. Realistically, the Appellate Body's decision was probably well considered, as it avoided the political fallout that would have ensued.

A Suggested Interpretation of the Article 70 Provisions

A contextual interpretive approach would have considered the interaction of all the Article 70 provisions. As well, special attention should have been given to the presumption against the retroactive effect of treaties, a principle enshrined in Article 28 of the Vienna Convention on the Law of Treaties. The following is a suggested interpretation that takes into account the interactions of the various paragraphs.

Article 70.1 should be interpreted as an articulation of the non-retroactivity principle. It gives a general exception to all obligations arising from prior acts, which includes the grant of patents or the creation of works subject to copyright. It should be seen as a sweeping rule that allows the prior affairs of Members to be excepted from the obligations arising from TRIPS.

Despite the general non-retroactivity rule regarding actions that is articulated in Article 70.1, Article 70.2 addresses existing subject matter at the time TRIPS becomes applicable. *Subject to any exceptions*, existing subject matter only gives rise to obligations if it is protected or if it subsequently meets the criteria for protection.[60] Since prior actions are inextricably linked to existing subject matter, the general exception of Article 70.1 would seem to preclude obligations regarding *all* subject matter that has ties to the past.

Nonetheless, if a distinction is drawn between IP that requires registration (e.g., patents) and IP that does not require registration (e.g., works covered by copyright), a different conclusion can be drawn. Certain subject matter can come to be protected *independently* from acts prior to the application of TRIPS. This includes all IP that does not require registration, such as works protected by copyright. As long as a work is in existence (i.e., existing subject matter), it becomes protected at the date TRIPS comes into force, assuming a Member's legislation

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[57] See *Japan- Taxes on Alcoholic Beverages (Appeal by Japan)* (1996), WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R at 11 (Appellate Body Report).

[58] This information was obtained by searching the WTO website: WTO <http://www.wto.org>. The U.S. accounts for 15 of the 23 requests for consultations.

[59] *Ibid.* The U.S. accounts for seven of the 11 requests for Panels.

[60] See the first sentence of Article 70.2.

is in conformity.[61] This protection is independent of any prior acts. Hence, any prior acts that fall under the Article 70.1 exception are irrelevant, since independent obligations arise the moment TRIPS becomes applicable. Even though there is a connection between prior acts and presently existing subject matter, the fact that subject matter exists is enough to afford protection.

When this concept is applied to IP that requires registration, a different result ensues. As discussed, registrable IP is linked to the past and ought to be covered by the Article 70.1 exception. On the date that TRIPS becomes applicable, the criteria under Article 70.2 that give rise to obligations do not need to be considered, since the exception is in place. For instance, existing Old Act patents were undeniably protected subject matter at the time TRIPS came into force in Canada, but they are excepted by Article 70.1 from requiring TRIPS obligations.

Unfortunately, IP that requires registration must meet certain qualifications to be granted protection. In the case of patents, *independent protection* cannot be obtained, since the patent has already been publicly disclosed and the subject matter cannot be newly protected. This is an inherent limitation imposed by the different requirements applicable to most registrable IP.

While the distinction between registrable and non-registrable IP is somewhat finessed, this distinction is hinted at within Article 70.2 itself. The last sentence explicitly deals with copyright, a form of non-registrable IP. From this, Article 70.2 must apply to copyright and, arguably, to other non-registrable IP. On the other hand, Article 70.7 specifically deals with registrable IP and extends protection afforded by TRIPS to circumstances where applications for registration are pending. Article 70.7 can be seen as an explicit exception to the non-retroactivity principle articulated in Article 70.1. For Article 70.7 to have effect, registrable IP that is connected to prior acts cannot otherwise be included by Article 70.2. It seems that this distinction between registrable and non-registrable IP must be incorporated by the first sentence of Article 70.2, so that meaning can be given to the various provisions of Article 70.

Outcome of the Decision

The Dispute Settlement Body adopted the decision of the Appellate Body on October 12, 2000 and recommended that Canada bring its legislation into conformity. Canada agreed to comply, but insisted that 14 months would be needed because of the extensive amendments that would be required. The U.S. disagreed, as it felt that Canada was stalling, and made a request for arbitration on December 20, 2000.[62] After hearing arguments from both Members, the arbitrator decided that Canada was required to comply within 10 months from the date the decision was adopted by the Dispute Settlement Body.[63] With one month to spare, Canada enacted new legislation that came into force on July 12, 2001.[64]

Interestingly, the new legislation only applies to Old Act patents that were existing on the date it came into force. On October 1, 1996, there were approximately 93,937 Old Act patents that expired before the minimal

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[61] Also note that Article 70.3 only creates an exception for subject matter that has fallen into the public domain, and not for subject matter that is presently protected or (arguably) subject matter that was never protected.

[62] *Canada – Term of Patent Protection (Request by the United States for Arbitration under Article 21.3(c) of the DSU)* (2000), WTO Doc. WT/DS170/8.

[63] *Canada – Term of Patent Protection (Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes)* (2001), WTO Doc. WT/DS170/10 at para. 67 (Award of the Arbitrator).

[64] See Industry Canada's website, "Government Of Canada brings Patent Act into conformity with obligations under the World Trade Organization", online: Strategis <http://strategis.ic.gc.ca/sc_mrksv/cipo/new/bill_s17-e.html> [Strategis].

term required by TRIPS,[65] while by July 12, 2001, the government of Canada claims that only 45,000 Old Act patents remained which were affected by the decision.[66] From these statistics, an estimated 850 Old Act patents that would have gained added protection expired each month that Canada delayed.[67] The government of Canada also claims that only 25 commercially significant pharmaceutical patents were extended, with an average extension period of six months.[68] Other than patents concerning pharmaceutical products, most patents are apparently valueless toward the end of their term of protection.[69]

The Canadian government, possibly to minimize public concern, also suggested that the *loss of savings* that will result from the extension is insignificant; less than one-tenth of 1% of drug sales over the eight-year period until 2009.[70] This statement is misleading. Of greater importance than the loss of savings to consumers is the outflow of Canadian dollars into the economy of the United States. While a net loss of *savings* can be estimated at $125 million,[71] a rough estimate of the outflow of Canadian dollars due to the extension is $400 million.[72] For instance, the 11-month patent extension of the cholesterol-lowering drug Pravachol®, which is owned by an American company,[73] has been estimated to be worth $110 million in sales.[74] By any standard, the amount of lost savings and outflow of dollars are significant and cast a perspective over the rationale of the dispute. Perhaps Canada's appeal and length of time to comply were well considered.

In any case, the entire dispute, from the initial application to the actual implementation of domestic legislation, was resolved within two years.[75] When compared to the length of time it usually takes to resolve a simple litigation matter in either the U.S. or Canadian courts, this is a testament to the astounding efficiency of the WTO dispute settlement process.[76]

Conclusion

The Appellate Body's determination of the overall applicability of TRIPS leaves some uncertainty about the expression of several Article 70 provisions. Nevertheless, since a comprehensive examination of Article 70 was not conducted, the possibility exists

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[65] *Can.-Patent, supra* note 19 at para. 5.
[66] Strategis, *supra* note 64.
[67] The calculation: (93,937 - 45,000) / 57.5 months = 851
[68] Strategis, *supra* note 64.
[69] *Ibid.*
[70] *Ibid.*
[71] This information was obtained from the "Patented Medicine Prices Review Board, Annual Report 2000" at 16, online: Patented Medicine Prices Review Board <http://www.pmprb-cepmb.gc.ca/english/pdf/ar2000/ar00e6.pdf >, which indicates that in 2000, sales of drugs totalled $10 billion. As well, over the past decade sales have increased annually by just over 10% on average. From this, the total drug sales over the eight-year period until 2009 can be estimated at $125.7 billion, and "one-tenth of one percent" totals $125 million.
[72] According to a conversation on April 11, 2002 with Mr. Eric Dagenais from Industry Canada, who helped compile the website statistics, the maximum amount of lost savings was calculated under the assumption that generics enter the market immediately, capture the full market share, and cost consumers 30% less. Assuming that all of the patents are U.S.-owned and all funds flow out of Canada, from the estimate of lost savings ($125 million), it can be extrapolated that the total cost to Canada was (125/30%) = $416 million. This is a *rough* figure that does not factor-in income taxes, payments to Canadian employees, etc., which all function to keep money inside of Canada.
[73] Bristol-Myers Squibb Company.
[74] See "Bill S-17: An Amendment To The Canadian Patent Act To Extend The Term Of Old Act Patents" (20 June 2001), online: Bereskin & Parr <http://www.bereskinparr.com/publications/update/update_bill_S17.html>.
[75] The Request for a Panel was filed on July 15, 1999 and Canada implemented legislation on July 12, 2001.
[76] In Canada, a regular litigation matter can run several years, with an appeal increasing this time to half a decade. Appealing up to the Supreme Court of Canada can take a full decad.

that all of the provisions may indeed find expression. The issue remains open.

Despite this possibility, criticisms will persist over how the interpretation was arrived at and what factors were considered. As time progresses, however, an alternative interpretation of Article 70 may lose importance. Assuming that most developed countries are presently Members, within 20 years only "New Act"-type patents will exist. As developing countries eventually become Members, it is unlikely that many will have pre-existing patent or IP registration regimes, so a similar argument will not be rekindled. However, at the end of the day, it remains that Canada will continue to be affected by the decision for the next eight years.

Appendix

TRIPS Article 70
Protection of Existing Subject Matter

1. This Agreement does not give rise to obligations in respect of acts which occurred before the date of application of the Agreement for the Member in question.

2. Except as otherwise provided for in this Agreement, this Agreement gives rise to obligations in respect of all subject matter existing at the date of application of this Agreement for the Member in question, and which is protected in that Member on the said date, or which meets or comes subsequently to meet the criteria for protection under the terms of this Agreement. In respect of this paragraph and paragraphs 3 and 4, copyright obligations with respect to existing works shall be solely determined under Article 18 of the Berne Convention (1971), and obligations with respect to the rights of producers of phonograms and performers in existing phonograms shall be determined solely under Article 18 of the Berne Convention (1971) as made applicable under paragraph 6 of Article 14 of this Agreement.

3. There shall be no obligation to restore protection to subject matter which on the date of application of this Agreement for the Member in question has fallen into the public domain.

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6. Members shall not be required to apply Article 31, or the requirement in paragraph 1 of Article 27 that patent rights shall be enjoyable without discrimination as to the field of technology, to use without the authorization of the right holder where authorization for such use was granted by the government before the date this Agreement became known.

7. In the case of intellectual property rights for which protection is conditional upon registration, applications for protection which are pending on the date of application of this Agreement for the Member in question shall be permitted to be amended to claim any enhanced protection provided under the provisions of this Agreement. Such amendments shall not include new matter.

Profiling the *Anti-terrorism Act*: Dangerous and Discriminatory in the Fight Against Terrorism

by John Boccabella

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Introduction

On September 11, 2001, citizens of the United States suffered the worst terrorist attack on domestic soil in their nation's history. The U.S. authorities identified the perpetrators as members of a terrorist organization of Arab/Muslims. The threat of terrorism being brought, quite literally, so close to home called for the Canadian government to respond at both the administrative and legislative levels. What has resulted is a unique situation in the law: the practice of "profiling" by race or religion and the new federal *Anti-terrorism Act*[1] interact in a way that poses a threat to the equality rights of Arab/Muslim Canadians.[2]

There is significant speculation that the need for heightened national security has resulted in the employment of a policy of profiling[3] to help the authorities identify and investigate possible terrorist threats. The targeting of Arab/Muslims for investigation, based on their race or religion, is cause for an array of concerns. Profiling not only poses a risk to the civil liberties of the targeted individual, it stigmatizes the Arab/Muslim community as a whole.

The *Anti-terrorism Act* has the effect of broadening both the substantive definition of criminal activity and the state's investigative power, while significantly reducing levels of accountability. In doing so, this legislation risks breaching a variety of protected rights as defined by the *Canadian Charter of Rights and Freedoms* ("*Charter*").[4] Of particular concern in this paper is the potential for the violation of section (s.) 15 equality rights concerning the potential discrimination against Arab/Muslims.

Specific concerns with the *Anti-terrorism Act* are that it uses an overly broad definition of terrorism, provides for the reduction or elimination of rights under the *Access to Information Act*,[5] and reduces government accountability by limiting judicial review. These concerns create an unacceptably high risk of alienating and stereotyping Arab/Muslim Canadians by race and/or religion.

Despite the possibility that this legislation may infringe civil liberties guaranteed under the *Charter*, the government is confident that the legislation would be considered by a court to be demonstrably justified in a free and democratic society, and would therefore be saved under s. 1. It is arguable that any infringement on the rights of Arab/Muslims

[1] *Anti-terrorism Act*, S.C. 2001, c.41.

[2] There is some difficulty in discerning the specific characterization for those people who are likely susceptible to human rights abuse following September 11, 2001. Distinctions made on race, religion or nationality may facilitate stereotyping. For the purposes of this paper, I will refer to Arab/Muslims as those affected, although in reality, the scope may be broader.

[3] Law enforcement may use profiling in a number of ways to focus investigation. For the purposes of this paper, the profiling referred to is that employed based on race or religion.

[4] *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*].

[5] *Access to Information Act*, R.S.C. 1985, c.A-1 [*Access to Information Act*].

in Canada would be so justified given the security risk of terrorism arising from the Middle East. However, that a law may be saved under s. 1 of the *Charter* does not mean that justice is being reached in the best possible manner. Profiling, within a context of extensive state power exercised with limited accountability, may lead us unknowingly to accept grave abuses to fundamental human rights. While discretion may be a necessary component of the anti-terrorism legislation, the importance of legislation that provides the maximum amount of protection for rights cannot be overstated. Where infringement of civil liberties is necessary, it remains unacceptable without accountability.

The aim of this paper is, first, to gain a meaningful perspective on the state of the law with respect to profiling and the new anti-terrorism legislation. After the true potential for harm from the interaction of these aspects is identified, a constitutional analysis will be used to establish whether a legal justification for the condition of the law exists. Finally, the paper will take a deeper look at some of the surrounding policy issues to help discern what better options may be available.

The State of the Law After September 11

Profiling's Renewed Prominence

There is some difficulty in assigning an exact meaning to the concept of "profiling". For the purposes of this analysis, it will be adequate to define profiling as "allowing the use of race or ethnicity to play a decisive role in the decision of whether to subject an individual to further investigation."[6] It has been alleged for some time that domestic police have employed this practice in targeting minority groups on a smaller scale through local police enforcement.[7] Profiling has traditionally elicited criticism from academics, public interest groups, and concerned citizens for its unfair treatment and the resulting over-representation of profiled minority groups within the penal system.[8]

Despite the known risk, in the aftermath of the September 11 attacks, a number of media sources report an emerging demand for the use of racial profiling, in the interest of national security. It has been observed that profiling has enjoyed a "renewed prominence" following the attacks.[9] Indeed, the headlines for one *National Post* article on October 5, 2001 was "Ontario denies anti-terror policy is racist: Retired General says checking Arabs 'common sense'." This article specifically refers to the suggestion of retired Major-General Lewis MacKenzie, then security advisor to former Ontario Premier Mike Harris, that profiling would be an acceptable law enforcement strategy to fight terror.[10] An editorial in that same newspaper two weeks earlier stated the opinion that "it would be criminally negligent if Air Canada did not engage in profiling."[11] These opinions reflect the actual directives given to port-of-entry immigration and customs officials at the same time. As reported in *The Globe and Mail*, those officials were directed to target men with technical training and links to certain "conflict" countries.[12] We can only speculate on how and where profiling is currently

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[6] Sujit Choudhry, "Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the *Charter*," in *The Security of Freedom: Essays on Canada's Anti-terrorism Bill*. ed: R. Daniels, P. Macklem and K. Roach. (Toronto: University of Toronto Press, 2001) at 367.

[7] *Ibid.* at 369.

[8] *Ibid.* at 367.

[9] *Ibid.* at 367.

[10] Sarah Schmidt "Ontario denies anti-terror policy is racist: Retired General says checking Arabs 'common sense'" *National Post* (5 October 2001) A5.

[11] "Profiles in Prudence," Editorial, *National Post* (20 September 2001) A17.

[12] Estanislao Oziewicz "The Brink of War: Border alert targets pilots, Canadian guards told to watch for men with technical training and links to 16 'conflict' countries" *The Globe and Mail* (19 September 2001) A1.

being employed by government officials, but the available evidence and common sense seem to indicate that profiling is occurring to some degree.

This analysis is not meant specifically as an argument on the merits of profiling as a policy, or on its effectiveness. It simply acknowledges its existence. There is an argument that profiling, even if imperfect, is a logical response to a threat perceived to be from a group identifiable by race. Particularly given the ensuing military response to the terrorist attacks and the proclamation of the "War on Terror," it is logical to conclude that feelings of hostility toward North Americans may be exacerbated. That being the case, it is also logical to conclude that at least some special attention will be given to those citizens and non-citizens with ties to nations that we ourselves have chosen to identify as the "enemy."

Legislating a Response to Terrorism – The Anti-terrorism Act

The *Anti-terrorism Act* has the effect of broadening the net under which abuses of discretion may take place, while at the same time reducing the state's level of accountability. The *Anti-terrorism Act*, through an amendment to the *Criminal Code of Canada*,[13] is the first legislation to define "terrorist activity." Section 83.01 of the *Criminal Code* outlines an expansive and broad definition for "terrorism." Particularly notable is subclause (b)(11)(e), which encompasses as criminal any action that: causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C).
Clauses A to C read:

A) causes death or serious bodily harm to a person by the use of violence,
B) endangers a person's life,
C) causes a serious risk to the health or safety of the public or any segment of the public.

Critics of the *Act* state that under this definition, many acts of civil disobedience which are unlawful but certainly not terrorist in nature could, if the *Criminal Code* were interpreted broadly enough, be captured as criminal and render individuals susceptible to the broad investigatory powers of the *Act* as the legislature never intended. Former Minister of Justice Anne McLellan acknowledged the existence of an overbreadth problem prior to the last amendment, stating that, while it is not the intent of the legislature, the *Act* as it is worded does not take into account that some "unlawful activities ... do not amount to terrorism."[14] Despite the most recent amendments, critics maintain that this overbreadth problem persists. The problem has two levels. First, as noted, the legislation may be interpreted and misused to capture activity not intended by the legislature, particularly due to the ambiguity in what constitutes "serious disruption," and the application of this standard to the idea of "any segment of the public." On a deeper level, this overbreadth problem serves to widen the net under which profiling may operate unfairly against Arab/Muslims individually and contribute to the stigmatization of that community in general.

The overbreadth problem may be a result of simple drafting failures on the part of the government, or a necessary evil that is inherent in legislation of this type. Either way, the *Anti-terrorism Act* makes very clear the government's priority of effectively policing terrorism and its willingness to sacrifice civil liberties to attain that effectiveness.

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[13] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 [*Criminal Code*].
[14] Alexandra Dorstal, "Casting the Net too Broadly: The Definition of 'Terrorist Activity' in Bill C-36" (2002) 60 (1) U.T. Fac. L. Rev. 69 at para. 4.

Another critique of the *Act* is its allowance for the total restriction of access to information. Through an amendment to the *Access to Information Act*, the *Anti-terrorism Act* provides that, in situations where the Attorney General issues a prohibition certificate in accordance with s. 38.13 of the *Canada Evidence Act*,[15] the *Access to Information Act* will not apply, or will cease to apply with respect to any applications for information being requested.[16] This provision alienates the public from the benefits usually provided by access to information legislation (i.e., accountability and fairness in administrative decision-making). Additionally, and possibly of greater concern is the possibility that this amendment may hide the fact that information is being protected altogether.[17]

Beyond restricting access to information, other provisions of the *Anti-terrorism Act*, regarding the power to investigate and prosecute, reveal diminished accountability in these processes. An example of this may be seen in the provisions allowing for the creation of a "list of terrorists". This power is specifically conferred by amendment in s. 83.05 of the *Criminal Code*, which states [emphasis added]:

> 83.05 (1) The Governor in Council may, by regulation, establish a list on which the Governor in Council may place any entity if, on the recommendation of the Solicitor General of Canada, the Governor in Council is satisfied that there are *reasonable grounds to believe* that
>
> (a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or
>
> (b) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a).
>
> (1.1) The Solicitor General may make a recommendation referred to in sub section (1) only if the Solicitor General has reasonable grounds to believe that the entity to which the recommendation relates is an entity referred to in paragraph (1)(a) or (b).

Subsection 6 provides that judicial review of entities[18] assigned to this list may occur in private with limited participation of the party assigned to the list, or their counsel, and without opportunity to test the evidence of the Crown. It reads [emphasis added]:

> (6) When an application is made under subsection (5), the judge shall, without delay
>
> (a) *examine, in private, any security or criminal intelligence reports considered in listing the applicant and hear any other evidence or information that may be presented by or on behalf of the Solicitor General and may, at the request of the Solicitor General, hear all or part of that evidence or information in the absence of the applicant and any counsel representing the applicant,* if the judge is of the opinion that the disclosure of the information would injure national security or endanger the safety of any person;
>
> (b) provide the applicant with a statement summarizing the informa-

[15] **Canada Evidence Act*, R.S.C. 1985, c.C-5. This paper was last updated in March of 2002. It does not reflect developments in the law since that time.

[16] *Anti-terrorism Act*, s. 87

[17] Lorne Sossin, "The Intersection of Administrative Law with the Anti-terrorism Bill" in Daniels, Macklem & Roach, *supra* note 6, 419 at 426.

[18] Entities are defined in s. 83.01(1) of the *Criminal Code* as including a "person, group, trust, partnership or fund or an unincorporated association or organization."

> tion available to the judge so as to enable the applicant to be reasonably informed of the reasons for the decision, without disclosing any information the disclosure of which would, in the judge's opinion, injure national security or endanger the safety of any person;
> (c) provide the applicant with a reasonable opportunity to be heard; and
> (d) determine whether the decision is reasonable on the basis of the information available to the judge and, if found not to be reasonable, order that the applicant no longer be a listed entity.

Profiling and the Anti-terrorism Act Amendments: A Dangerous Interaction

Although subsections (b) to (d) provide for some due process, it is evident that, to a large extent, discretion may be exercised beyond the reach of the party affected. Discretionary decisions in these and other sections of the statute appear to rely on the official having a "reasonable grounds to believe" before he or she takes action. (See author's emphasis in s. 83.05(1), earlier.) This term of art has been examined by the Federal Court in the context of language to the same effect arising in the *Immigration Act*.[19] In *Re Ikhlef*,[20] the court considered a certificate issued by the Solicitor General of Canada and the Minister of Citizenship and Immigration for the removal of Mr. Ikhlef in accordance with the *Immigration Act*. In examining the "reasonable grounds for belief" standard, the court followed the recent decision in *Qu v. Canada (Minister of Citizenship and Immigration)*[21] and *Chiau v. Canada*,[22] stating that, "'reasonable grounds' is a standard of proof that, while falling short of a balance of probabilities, nonetheless connotes a bona fide belief in a serious possibility based on credible evidence."

Judicial review under this standard is greatly hindered through the lack of opportunity to test evidence. It has been observed that "because [judicial] involvement may take place in secret, behind closed doors, and without an opportunity for further review or appeal, the judicial capacity to provide accountability for government decision making is limited."[23] There may be little review of any actual merit. Effectively, it is not the acts of the party being reviewed. Rather, the scope of review is limited to the adequacy of the data-collection of the administrative body.[24] As indicated by the language in the case law, it is the bona fides of the belief in the evidence that gets tested, not necessarily the evidence itself. In this context, it may be seen that the "reasonable grounds" standard prescribed by the *Criminal Code* may be closer to one of patent unreasonableness. The resulting danger is the potential for extensive investigation and the exercising of administrative discretion to significantly affect the economic and civil liberties of individuals without any thorough assessment of merit.

Profiling and the *Anti-terrorism Act* amendments need to be examined as a functional whole to fully grasp the potential for abuses to civil liberties. This combination increases the propensity for abuses of rights in two ways. First, broadening the definition of "terrorist activity" greatly increases the net within which unwarranted investigation, accusation and charges may take place. Second, the broad investigative powers and lack of procedural safeguards to those investigative processes provide a cloak through which the low standard for these actions can be met. Indeed, the processes available to a party in challenging the

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[19] *Immigration Act*, R.S. 1985, c.I-2, s. 19. [*Immigration Act*].
[20] *Re Ikhlef*, [2002] F.C.J. No. 352.
[21] *Qu v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1945 (C.A.).
[22] *Chiau v. Canada*, [2001] 2 F.C. 297 (C.A.).
[23] Sossin, *supra* note 17 at 429.
[24] Sossin, *supra* note 17 at 424.

findings of a state official may be made unavailable at the government's discretion. As noted, applications for access to information may be denied categorically. Likewise, judicial review is subject to being limited in scope through the application of s. 83.05(6)(a) (quoted earlier). This section provides that, at the request of the Solicitor General, where the judge is of the opinion that disclosure may harm the interests of national security, the judge may "hear all or part of that information in the absence of the applicant and any counsel representing the applicant." Despite the remainder of the provisions in the same section providing for a summary of the information available and a "reasonable opportunity to be heard,"[25] absence from the hearing presents serious obstacles to any effective testing of evidence. The issue of denial of full participation in proceedings also arose in *Re Ikhlef*.[26] Despite objections from counsel for the accused, the court held that "evidence that was heard by and presented to the Court in the absence of the person concerned and his counsel cannot be disclosed to them since that would be injurious to national security and to the safety of persons."

Unfortunately, the reality is that these laws will likely be applied primarily to Arab/Muslims through profiling. Certainly, even in the early days of this legislation, it has been shown that a likely consequence will be the assignment to the noted "list of terrorists."[27] The consequences for those assigned to this list are far-reaching, as is evident from the case of Mr. Liban Hussein, a Canadian citizen from Somalia.[28] Mr. Hussein was designated a "terrorist entity" in the fall of 2001. He was immediately jailed and his assets were frozen. Further, it was illegal for anyone to have financial dealings with him. He was cleared of all allegations and removed from the list in June 2002, but in spite of that he lost his business, income, and future prospects. Mr. Hussein's story not only illuminates the *Act*'s enormous potential for intrusion on human rights, but demonstrates how the designation of "terrorist" can stigmatize an individual long after the 'official' label is removed.

In profiling Arab/Muslims for investigation or for designation as a "terrorist" under the *Anti-terrorism Act*, the government may act without providing access to any of the background information, and with judicial review conducted in private and away from public scrutiny. Any evidence obtained under these broad powers is available to the Crown, the immigration department, or the Canadian Security Intelligence Service ("CSIS"). This process specifically targets a group of people based on race and, through an overly broad definition, may label them as "terrorists." One of the frightening aspects of this situation is that the unreasonable denial of rights of Arab/Muslims may occur while government officials act in good faith. The legislation simply does not supply the real checks and balances required to provide the best guarantee for fair decisions.

The government has very recently shown the great lengths of discretionary power it is prepared to employ to combat terrorism. On August 1, 2002, media reports revealed that CSIS had recently "facilitated the transfer" of Canadian citizen Mansour Jabareh to the U.S. for questioning.[29] The transfer became public after a leak to NBC News in the U.S. For several days, little was known about the circumstances surrounding the transfer, the crimes of the accused, or the condition of the accused in American

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[25] *Criminal Code*, s. 83.05(6)(c).
[26] *Supra* note 20.
[27] Updated versions of this list may be viewed online: <<www.osfi-bsif.gc.ca/eng/publications/advisories/index_supervisory.asp?#Supter>>.
[28] Alan Borovoy, "Civil Liberties: Security's Serpentine Coils: Ottawa has broad powers to detain suspected terrorists, but those who prove innocent are still pariahs," *The Globe and Mail* (1 August 2002) A21.
[29] Wesley Wark, "What's going on here?" *The Globe and Mail* (5 August 2002) A11.

custody. In the aftermath, it was revealed that Mr. Jabareh was captured first in Oman on suspicion of involvement with terrorist organizations in the Middle East. However, what is still unknown is why Canadian authorities did not complete the questioning of the suspect in Canada and then disseminate the information to interested governments accordingly. The title of the article reporting on that issue – "What's Going on Here?" – is representative of a major criticism concerning the *Anti-terrorism Act*. As will be addressed later, accountability for actions taken in this "War on Terrorism" is a key to ensuring that security *and* fairness prevail. Canadians, especially Arab/Muslim Canadians, should not be subjected to the speculation surrounding the discretionary actions of government agencies carried out under this new statutory scheme. Not least, it is disturbing to note that without a leak to the media, this incident may likely have been kept from public attention altogether. It may be more prudent for the legislature to find ways to minimize the risk of this occurring instead of creating allowances for it.

Beyond the impact the *Anti-terrorism Act* may have on an individual citizen, it could have an enormous potential impact on Arab/Muslim Canadians as a community, both citizens and non-citizens alike. The importance of that impact cannot be overstated. As will be discussed in the legal analysis, this process not only threatens to bring about unwarranted stigmatization of individuals, it threatens to stigmatize the Arab/Muslim population as a whole.

Constitutional Analysis

Observing the current state of the law and the potential for the abuse of civil liberties obviously gives cause for concern. If profiling by race or religion is being employed in conjunction with the *Anti-terrorism Act* amendments, it is very likely that a court would find a breach of s. 15 rights to equality.

The government has noted the possibility for *Charter* breaches in a number of areas of the *Anti-terrorism Act*, conceding that it is relying on a deferential court to find that the "balance between individual and collective security [has] shifted,"[30] and, accordingly, that the *Act* is demonstrably justified in a free and democratic society, and therefore constitutional within the scope of s. 1.

Section 15: Right to Equality

The difficulty with any legal analysis of profiling is that profiling is not an officially recorded policy. Despite the evidence that it is occurring, there are no regulations or any legislation prescribing its usage. Profiling is carried out at an operational level through the discretionary powers of various administrators. It may be evident only in verbal instructions to subordinates, and possibly in internal memoranda. Its existence is problematic to prove, and therefore difficult to challenge. However, whether this policy could effectively be challenged or not, a *Charter* analysis of profiling is essential in examining its interaction with the legal system, *Charter* values, and, consequently, Canadian society.

The test for establishing a breach of s. 15 right to equality has recently been described by the Supreme Court of Canada in *Law v. Canada ("Law")*.[31] In assessing whether there has been a s. 15(1) breach, the court will take a purposive and contextual approach in examining three central issues:

- whether a law imposes differential treatment between the claimant and others, in purpose or effect,
- whether one or more enumerated or analogous grounds of discrimination are the

[30] Lorraine Weinrib, "Terrorism's Challenge to the Constitutional Order," in *The Security of Freedom: Essays on Canada's Anti-terrorism Bill*. ed: R. Daniels, P. Macklem and K. Roach. (Toronto: University of Toronto Press, 2001) at 94.

[31] *Law v. Canada*, [1999] 1 S.C.R. 497.

basis for the differential treatment, and
• whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.[32]

It is apparent that the first two steps of this test are fulfilled. As noted, profiling is by definition the differential treatment – in this case, the targeting for identification and investigation – of an individual based on their belonging to a certain group. The policy of profiling Arab/Muslims satisfies the second branch of the test, since both race and religion are enumerated grounds. As with most s. 15 challenges, the crux of the breach issue would fall on the third branch, and whether this distinction is discriminatory.

In assessing whether a distinction amounts to discrimination, the court would employ an objective/subjective standard in inquiring whether a reasonable person in circumstances similar to the complainant would suffer harm to their sense of human dignity. The non-exhaustive definition of "human dignity" from *Law* states:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.
>
> Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legiti mately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?[33]

The court has identified a number of contextual factors to be balanced in examining the effects of a limitation of rights on human dignity.[34] The court will consider the pre-existing disadvantage, vulnerability or stereotyping of a group, the relationship between the grounds for distinction and the claimant's characterization of the circumstances (i.e., whether the distinction takes into account the needs of the complainant), any ameliorative purpose or effect of the legislation, and the nature of the interests affected. It is important to note that, in the application of these factors, the court will not consider them exhaustive, nor any of them singly determinative.

Applying the above factors to profiling reveals ample arguments for the position that profiling is indeed a breach of s. 15(1) right to equality. Of most significance is the propensity for stereotyping. It has been noted that the practice of profiling fits neatly into the legal concept of stereotyping which effects harm to "human dignity" as examined above:

> [Stereotyping] is an over-generalization – that is, an assumption that all members of a group possess certain undesirable traits that some mem bers of those groups possess, when in fact some, or many, do not. The

[32] *Ibid.* at para. 88.
[33] *Ibid.* at para. 53.
[34] *Ibid.* at para. 62.

> harm to human dignity – what transforms the use of stereotypes into discrimination – is that doing so has the effect of stigmatizing all members of that group, by promoting the view that they are somehow less worthy of respect and consideration, because they all possess the undesirable trait in question.[35]

Profiling does not merely have the effect of stereotyping, it actually employs stereotyping as its basis for utility. An assessment of the other factors reveals little reason to believe that the deleterious effect of stereotyping would be counterbalanced to save this practice as non-discriminatory. Profiling in the sense it is being used does not take into account the needs of the distinguished group. In fact, it willingly sacrifices them. Nor is there any ameliorative purpose to the practice. In assessment of the final factor (i.e., the nature of the interest affected), profiling and the accompanying stigmatization of Arab/Muslim Canadians denies full membership in Canadian society. The court has held this interest as critical and important to protect.[36]

Section 1 Analysis

If, as predicted, profiling through the *Anti-terrorism Act* provides for a breach of s. 15, a s. 1 analysis becomes crucial. The specific concerns about the overly broad definition of terrorism may be challenged for vagueness, and therefore not "prescribed by law." The framework for the remainder of the s. 1 analysis is derived from *R. v. Oakes ("Oakes")*[37]. The *Oakes* test places the onus on the government to establish that a sufficiently important purpose justifies violating *Charter* rights.[38] The government must establish (a) that the objective of the limitation is pressing and substantial, and (b) that those rights are limited by means that are reasonable and proportional to the importance of the objective. This proportionality test is examined in three branches by evaluating (i) the rational connection of the practice with the objective, (ii) whether the limiting practice or law is of minimal impairment, and (iii) the balance between the deleterious effects of the legislation with its objective and/or any salutary effects of the legislation.

It should be noted that to aid in the *Oakes* analysis, the court will first characterize the objective of the legislation. Additionally, the court may apply the *Oakes* factors with more or less rigour, depending on the circumstances.

(a) Overbreadth Concerns

The concern that the definition of terrorism prescribed by the *Criminal Code* is overly broad may support an argument that this portion of the *Act* is not "prescribed by law." In *R. v. Therens*,[40] the Supreme Court of Canada described the essence of this portion of s. 1 as requiring that distinctions imposed by law not be arbitrary. The court held that guidelines which are overly vague are of no force or effect. In *Osborne v. Canada (Treasury Board)*,[41] the court elaborated on this concept, stating that vagueness was possible in two ways. First, in cases where such a degree of uncertainty exists that the law has no actual function, and second, where such overbreadth exists that it would be impossible to establish a reasonable limit vital to the rest of the s. 1 analysis. Taken at face value, this overbreadth critique may

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[35] *Supra* note 6 at 371.
[36] *Supra* note 31 at para. 74.
[37] *R. v. Oakes*, [1986] 1 S.C.R. 103.
[38] *Supra* note 37.
[39] This branch of the proportionality test was modified by *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835.
[40] *R. v. Therens*, [1985] 1 S.C.R. 613.
[41] *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69.

seem to be the anti-terrorism legislation's *Charter* Achilles heel. Arguments against the overly broad definition of terrorist activity contained within s. 83.01 of the *Criminal Code* are based on the exact sort of parade of horribles with which courts are concerned in the overbreadth analysis. The broad discretion granted to administrators of the *Act* makes it hard to discern exactly where violations of civil liberties might start and end. Identifying these starting and ending points is made even more difficult by the 'cone of silence' built into the investigation and trial proceedings through the provisions of the *Act* which lower government accountability.

Despite overbreadth concerns, it should be noted that the court has shown a willingness to go soft on the overbreadth analysis of legislation, stating that absolute precision is not required where there is some evidence that the legislation requires allowances for discretionary elements.[42] Given the concerns for security following September 11, it is almost certain that the judiciary would consider legislation combating terrorism as warranting this broad discretionary power.

Oakes Test

(a) Rigour Considerations

As previously noted, the court may apply the *Oakes* factors with more or less rigour, depending on the circumstances:

> [T]he test must be approached in a flexible manner. The analysis should be functional, focussing on the character of the classification in question, the constitutional and societal importance of the interests adversely affected, the relative importance to the individuals affected of the benefit of which they are deprived, and the importance of the state interest.[43]

It has been further suggested that "[t]his flexibility may mean that variations will emerge to influence the intensity of the review for infringements to equality rights."[44]

In this situation, it may be expected that the court would relax its scrutiny in an effort to show deference to the government and its efforts for the protection of national security. The political climate, even the collective psychology of the nation, has been shocked into guardedness by the threat of terrorism. The "importance of the state interest," being in this case one of national security, cannot be underestimated. However, the argument that a threat to national security should relax the rigour with which *Oakes* is applied can also be turned on its head. The fact that such a charged environment (with respect to terrorism) exists at the present time is also a compelling factor in heightening the risk and effect of discrimination against Arab/Muslims. This argument may help support the proposition that *Oakes* be applied more intensely.

(b) Characterization of the Issue

Prior to the actual application of the *Oakes* formula, the court will also characterize the objective of the legislation. It has been noted specifically in equality cases, that the "characterization of the government's purpose or objective ... plays a key role in both determining if there is a discriminatory distinction and in assessing whether the government can demonstrate a pressing and substantial interest and proportional means."[45]

The court allows itself a great deal of flexibility in determining this characterization. However, in any circumstance involving the

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[42] *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.
[43] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 198.
[44] Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 *Can. Bar Rev.* 299 at 338.
[45] *Ibid.*

Anti-terrorism Act, it can be predicted with some confidence that the characterization of the objective of the legislation will embody the need for national security. This characterization would likely reflect the Preamble to the *Act*, which specifically notes that the purpose of the *Act* is to combat terrorism and ensure the safety of Canadians through enhancing the country's ability to "suppress, investigate and incapacitate terrorist activity," including the "financing, preparation, facilitation and commission of acts of terrorism."[46]

(c) Oakes Formula: (i) Pressing and Substantial

In *Oakes*, the court held that, to justify any breach of constitutional rights, the law in question must "relate to concerns which are pressing and substantial."[47] This stage of the test has played a limited role in determining litigation, since courts are usually prepared to show deference to the legislature's ability to pursue policies of its choosing. It has been observed that "[e]ven when in issue the Court rarely weighs the wisdom or propriety of a proffered legislative purpose."[48] Given the sociopolitical climate following the terrorist attacks, even in the face of evidence of profiling, legislation characterized as having the objective of protecting national security would be virtually guaranteed to be found pressing and substantial.

(d) Oakes Formula: (ii) Proportionality Test

(i) Rational Connection

The rational connection test examines whether the means employed are rationally connected to the desired objective of the legislation. This stage of the *Oakes* test is also used relatively sparingly. Examples of decisions rejecting legislation at this stage include *Andrews v. Law Society of British Columbia ("Andrews")*[49] and *Miron v. Trudel ("Miron")*[50]. In *Andrews*, the court found no rational connection between citizenship and the competency to practice law. In *Miron*, it was held that no rational connection existed between marital status and motor vehicle benefits.

Opponents of profiling may argue that this policy, due to its ineffectiveness as a policing tool, is actually not rationally connected to the objective of national security. Critics of the practice maintain that profiling by race or religion may well be of little use in identifying potential threats to national security, as these threats tend to move under the profiling radar, whether as part of Middle Eastern terrorist organizations or Texas Militia. If that opinion about the actual ineffectiveness of profiling is valid, this practice only serves to increase scrutiny of non-terrorist Arab/Muslims. That noted, a contrary line of reasoning exists: that profiling by race or religion in the context of this particular conflict can practically aid authorities in focusing their resources, since the "enemy," to some degree, is identifiable on those grounds.

The fulfillment of this branch of the test may largely depend on the specific evidence available on the actual means and effectiveness with which profiling is being employed. If it is employed in the broad context of the *Anti-terrorism Act*, it is likely the government would link profiling and the *Act* together and argue that a rational connection to national security does indeed exist.

(ii) Minimal Impairment

This stage of the *Oakes* test requires that any law breaching a *Charter* protected right do so in a manner so as to infringe that right as little as possible. It is on this ground

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[46] Preamble, *Anti-terrorism Act*.
[47] *Supra* note 37 at para. 69.
[48] *Supra* note 44 at 341.
[49] *Supra* note at 43.
[50] *Miron v. Trudel*, [1995] 2 S.C.R. 418.

that the majority of s. 1 litigation is determined, and it would seem that any challenge with reference to the *Anti-terrorism Act* would be no exception.

While on its face the minimal impairment test calls for as little infringement as possible, case law has determined that in actuality, a range of discretion exists which allows for legislation to survive so long as it impairs as little as reasonably possible.[51] A weak point of this statutory scheme lies in the unreasonable denial of procedural rights. As discussed, sections of the *Act* allow for the absolute denial of access to information, and minimal judicial review. Addressing concerns about national security is a critical objective of this legislation, but there are better options available that could achieve the same end without limiting accountability. For example, an alternative to completely barring a party's attendance from a hearing would be to provide for a form of voir dire, requiring the party's absence only on certain issues. While this still may not provide standard procedural protection, it would enhance the protection of rights by allowing for the direct hearing of a greater portion of the evidence, therefore increasing the opportunity to effectively respond or test that evidence.

Some critics of the new legislation have gone so far as to say that it is unnecessary in its entirety, because all activity contributing to terrorism was already illegal in Canada. It is arguable that what is required is not new legislation allowing for processes that infringe civil liberties, but simply more resources allocated to the law enforcement process already employed, including those checks and balances existing within this system.

Case law indicates that where the law calls for the total exclusion of rights, such law is in jeopardy with reference to the minimal impairment standard.[52] While the amendments in the *Anti-terrorism Act* do not totally exclude basic procedural rights, they may represent an unsatisfactory level of infringement where a process with increased protections could achieve the same ends.

Unfortunately for those caught within this process, the law does not demand perfection respecting minimal impairment, only reasonableness. Much has been made during this analysis of the dual effect of profiling through the *Anti-terrorism Act* being not only confined to the individual, but also serving to stigmatize the community sharing those profiled traits more generally. The courts have helped construct an understanding of the seriousness of this implication through extensive discussions on human dignity and stereotyping, such as those found in *Law*. Procedural safeguards must not only be assessed in the protection they afford an individual, but also in the protection they afford a race or religion. The court must take up this challenge.

Despite the need for national security, the court should demand more of the government in protecting citizens from racism: it should find that due to the lessening of procedural safeguards and government accountability, this legislation fails the *Oakes* test on the minimal impairment ground.

(iii) Deleterious Effects Versus Objective/Salutary Effects

It has been noted that this stage of the *Oakes* test is rarely determinative. Factors considered here generally reflect the rationale employed in the previous steps.[53] If a court were to pass the legislation through the minimal impairment stage by finding that the procedural safeguards and level of government accountability were adequate, it is likely that the court would find the potential for discrimination arising from these problems in the *Act* not to be of such a

[51] *Supra* note 44 at 347.
[52] *Supra* note 44 at 346, citing *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.
[53] *Supra* note 44 at 347.

deleterious nature as to outweigh the benefits for national security.

Improvements in Policy for Improvements in Law

An examination of the state of the law does not simply end with a constitutional analysis. The potential for abuse of rights may be assessed beyond strict legality and the *Oakes* framework by looking into the underlying premises and assumptions surrounding the government's actions. Examining the policy behind the state of the law may help reveal better alternatives.

On the enactment of the *Anti-terrorism Act*. the government defended the *Act* on four grounds.[54] First, the government claimed that the new *Act* meets *Charter* muster. Second, it claimed that this legislation is necessary to fulfill international obligations. Third, the government noted that many allied countries had enacted similar legislation. And finally, it claimed that the new legislation provides greater protection than the *War Measures Act*.[55]

While it may be argued that there is some logic behind these defences, in total they are unsatisfactory in addressing concerns with this *Act*. Granting for a moment that the *Anti-terrorism Act* is constitutional, simply because a piece of legislation passes *Charter* muster – with a judiciary bent to deference – does not mean that the government has found the best alternative. "Adequate" is not "optimal," and whether the law demands it or not, "optimal" is exactly the standard for which the government should strive, especially when opening the doors to abuses of fundamental freedoms.

In reference to fulfilling international obligations, it is valid that Canada share in the responsibility to minimize the threat of terrorism for its international allies. However, international obligations must coincide with national interests. There is nothing inherent in fulfilling international obligations that excludes accountability. Fulfilling international obligations while concurrently doing the utmost to protect fundamental rights is a realistic expectation and should be a sought-after goal.

The government's proposition that justification for the *Anti-terrorism Act* be found in the fact that other governments have enacted similar legislation is illogical in two ways. First, it begs for opponents of the *Act* to ask what the government would do if all of the other governments jumped off a bridge. Second, criticism of the *Act* is not necessarily aimed at its existence, or even its type, but its subtleties, processes, and even exclusions relative to our *Charter* and distinct societal values, which are *not* common to those of other nations.

The government also alluded to the quality of this legislation in protecting rights by comparing it to the *War Measures Act*, referring to the legislation employed during World War II, under which Japanese-Canadians were stripped of their property and relocated from their homes to internment camps. This was among the most embarrassing and extreme incursions of human rights propagated by Canada in its history. While it is applauded that the current government seeks to afford greater protections than were afforded under the application of the *War Measures Act*, this is such a low standard, given the history of its use, as to constitute no standard at all.

What the government has thus far failed to address is that there exists a very realistic expectation that national security may be protected in an accountable manner. In fact, accountability is especially important given the risks associated with the stigmatization of non-terrorist Arab/Muslims. If this is the case, then the question must be asked: why is the

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[54] *Supra* note 30 at 94.

[55] Weinrib makes special note that only the *War Measures Act* is alluded to and that there is no mention of the *Emergencies Act*, which replaced it in 1988.

government choosing to adopt legislation that provides for the lessening of accountability within its processes?

With respect specifically to profiling, the simplest reason for not openly acknowledging its usage is likely the very fact that profiling by race or religion is regarded by so many with such disdain. From a political standpoint, the government likely would rather avoid this sensitive debate altogether. Instead, the government has opted to enact legislation that allows profiling to occur in the shadows, beyond control, and in the realm of "discretion," allowing government and citizens alike to either ignore or outright deny its existence. This option is dangerous because the impact of profiling will not be monitored, and, worst of all, will go unmitigated.

With reference to the *Anti-terrorism Act*, a possible reason why the legislative response to terrorism is wrought with vagueness and non-accountability is because the foreign policy leading to its creation may also be characterized this way. We as Canadians are experiencing a new terrorist threat. Through our American neighbours, the impact of problematic foreign relations has been brought close to home. Whatever arguments exist on the value of American foreign policy, and whatever opinions may circle concerning what should be done about the conflict in Afghanistan and the Middle East generally, at least this much should be conceded: we are allied with the Americans and other members of the "coalition" insofar as this conflict goes. We are allied geographically and economically, and we share a democratic ideology with mutual goals for protection. Even on a moral level, there is a clear and acceptable duty that Canada protect citizens of any country in the world from terrorism, in so much as we ensure that we detect dangerous activities within our borders and do not allow terrorism to harbour and prepare while we remain willfully oblivious. This is an international obligation worth fulfilling. Realistically though, it is important to admit that the practical meaning of this international obligation, given Canada's geographical location and the recent terrorist attacks, is an obligation to the U.S. This being the case, acknowledging an international obligation to the U.S. is significantly different than simply adopting the American view toward the conflict. The President of the U.S., George W. Bush, has made strong declarations about his country's purposes, and more pointedly, about the extent to which the U.S. is willing to retaliate for the terrorist attacks on its people. The Americans have chosen a military response to this problem. Whether this response is a solution or exacerbation of this conflict remains to be seen. The Preamble of the *Anti-terrorism Act* correctly reflects a need for international co-operation in fighting terrorism. There can be no doubt that this is the case. However, Canada should be wary in simply taking on the Americans' fight. In the international "War on Terrorism," Canada needs to very clearly define its role for itself.

Until the Canadian government identifies the manner and extent to which it wishes to participate in the American crusade, there will be fundamental difficulties in drafting legislation which is anything but vague. Important questions remain as to Canada's exact role in this conflict. Is the goal of Canada only to ensure that terrorism does not have a nest within its borders? If so, do we require troops in combat? Are we at war? Are we at war with another nation? Answering these questions definitively can be the beginning of specific policies and accountable legislation. Although the Preamble to the *Anti-terrorism Act* provides some guidance about its purpose, the government must make a more proactive and precise statement about its goals with respect to the overall conflict.

If the reality of the situation dictates that authorities need to focus investigation through profiling by race or religion, such an unfortunate necessity should be openly

acknowledged. The law currently allows for profiling to go on away from detection and beyond monitoring for abuse. There is an underlying message sent by legislation that allows for the potential of undetected abuse of human rights: that such abuse is somehow acceptable.

A very damaging aspect of profiling is the stigmatization of those people belonging to the group being profiled. The effects of any further stigmatization of Arab/Muslims will be especially acute, given the social climate under the terrorist threat and the propensity for the fear elicited by these attacks to foster racism. The courts have acknowledged that the primary harm of discrimination comes from the loss of human dignity on the part of those people through the exacerbation of a stereotype. Public acknowledgement of these issues will allow for public information. Stigmatization of a group of people, and racism in general for that matter, flows from the public to the stigmatized group. The government could greatly help mitigate ill effects of not just profiling, but the ill effects felt as a result of this entire conflict by openly addressing the new dynamic between the investigation of Arab/Muslims in Canada and the protection of their rights. This is one way to help counter stigmatization at its source to protect Arab/Muslims from discrimination. An equally important means of protection is a simple apology, and a promise that no infringements on their rights will be perpetrated any further or longer than is necessary to meet set and specific goals for the security and safety of all Canadians.

Counteracting the deleterious effects of profiling in this way cannot occur effectively if the process is hidden. Its existence should be acknowledged and its employment specifically and openly discussed in scope and form. This discussion should include detailed explanations of the policy to Arab/Muslim Canadians and include input from groups such as the Canadian Arab Federation, the National Council on Canadian Arab Relations, and the National Council on Canadian Arab Relations. Through an acknowledgement of profiling, the government could work toward ensuring that, if it was carried out, profiling would be done only when and where necessary, and in a professional manner of utmost respect and minimal incursion on human dignity.

Conclusion

Generally, there is widespread acceptance of prioritizing national security. However, there is a valid concern that the *Anti-terrorism Act* unnecessarily infringes upon fundamental rights. While sacrificing civil liberties in the interest of security may be justified, sacrificing civil liberties in a manner that exposes them to more harm when less would suffice, is not. Unnecessary abuse of rights must be protected with procedural and substantive law to protect against the ultimate irony of circumventing the same rights that we seek to protect. If we require profiling by race, religion or nationality, even if only for a limited time, the processes facilitating investigation of this nature must be open and accountable to minimize the potential for harm through discrimination.

Author's note:

This paper was last updated in March of 2002. It does not reflect developments in the law since that time.

Toward a Theory of the Duty of Fair Representation

by Morgana Kellythorne

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Introduction

The duty of fair representation (DFR) is expressly included in statutory labour law in British Columbia,[1] as it is in the United States and many other jurisdictions in Canada. Further, the DFR is an implied statutory term when it is not expressly included. The DFR is intended to hold unions to an acceptable standard of care in representing individual bargaining unit members. This appears to recognize individual rights in the collective bargaining framework, and attempts to secure and balance them against collective interests. However, broad recognition of the DFR, and indeed the very term itself, is misleading. First, although the DFR is a widespread feature of labour law, labour relations boards rarely grant DFR applications by complainants. Second, the DFR is not a positive duty to represent an individual member fairly, but instead, a more narrowly construed negative obligation to avoid the most egregiously culpable aspects of poor representation.

The aim of this paper is to illuminate the development of the DFR and the discourse surrounding it, in the wider context of pluralism ideology.

Overview

The paper focuses on the duty of fair representation in B.C., but draws on experiences elsewhere, because the development of the DFR has strong similarities in all jurisdictions. First, I will set out the 'nuts and bolts' of the DFR: its historical origins and the broad outline of its jurisprudential interpretation. However, the 'macro' structures of the legal process are mediated and given concrete expression by lower-level engagements.[2] Thus, I will turn to the procedure governing processing of DFR complaints, their frequency and success rates, and the experience of complainants in the process. As it has developed, both the macro and the micro levels of the DFR have created a narrow obligation that is rarely enforced on application, despite the high number of complaints. The complainants are dissatisfied, and at the same time, mistrusted by the other players.

Second, I will examine academic comment on the DFR. Commentators have viewed the DFR through the paradigm of a conflict between collective and individual rights, and debated the correct balance between the two that is necessary to preserve the stability of the collective bargaining system. They have brought attention to pragmatic considerations underlying the desirability of either a broad or a narrow construction of the duty. This commentary, however, does not adequately explain the development of the DFR.

Third, I will step outside of the academic debate on the DFR to seek a fresh perspective on the role it plays and the dilemmas it poses in the collective bargaining system. To do so, I will draw on

[1] *Labour Relations Code*, R.S.B.C. 1996, c.244, s. 12 [*LRC*].

[2] Andrew Goldsmith, "Process, Power, and 'Consent': Some Notes Towards a Critical Theory of Collective Bargaining" (1987) 7 Windsor Y.B. Access Justice 21 [Goldsmith].

wider theoretical literature, particularly Andrew Goldsmith's 'processual' methodology. He suggests a framework for analysis that focuses on the material and ideological practices of power in the collective bargaining regime. In this light, the DFR has posed major strategic and symbolic dilemmas, which have led commentators to sometimes use extreme language. A further consequence has been distrust of the DFR's destabilizing potential, evinced by its infrequent application.

Historical Origins of the DFR

The DFR originated in the 1940s in the American case, *Steele v. Louisville & Nashville Railroad*.[3] The U.S. Supreme Court stated that the DFR is an obligation inherent in the statutory grant of exclusive representation status to a trade union, because "the exercise of a granted power to act on behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf."[4] The trade union in question excluded black members of the bargaining unit and denied them seniority rights. The Supreme Court was faced with a dilemma, as it sought to combat this blatant racism without the assistance of anti-discrimination legislation, which did not yet exist.[5] Thus, the identification of an inherent statutory DFR was outcome-driven in the face of a concrete legal problem, and drew on elements of trust law.[6]

In the U.S., the DFR then expanded beyond providing protection from racial discrimination in negotiation of collective agreements, and was applied to unions' processing of grievances and application of terms of existing collective agreements. By 1962, the National Labor Relations Board decided that a violation of the duty constituted an unfair labour practice.[7] Finally, in 1967, the U.S. Supreme Court expressed the duty in a positive test in *Vaca v. Sipes*: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is *arbitrary, discriminatory, or in bad faith* [emphasis added]."[8] The *Vaca v. Sipes* test remained a cornerstone of the DFR after its importation to Canada.

In Canada, enacting the DFR was first recommended in the Woods Task Force Report, which stated that a union should be able to show that it acted in good faith if it chose not to pursue a member's grievance or acted contrary to his or her interest.[9] The first Canadian court to adopt the view that a union's exclusive representation rights impose a DFR was the B.C. Supreme Court in 1969, which in *Fisher v. Pemberton* cited *Vaca v. Sipes* approvingly.[10] Ontario, however, was the first province to enact an express statutory DFR, in a 1971 amendment to the Ontario *Labour Relations Act*. B.C. followed suit in 1973.[11] Today, eight jurisdictions in Canada expressly include a DFR: Ontario, B.C., the federal jurisdiction, Alberta, Quebec, Saskatchewan, Manitoba, and Newfoundland.

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[3] *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944) [*Steele*].
[4] *Steele* at 202.
[5] David Surmon, "Fair Representation in Canada: All for One and One for All" (1984) 22 Alta. L. Rev. 507 at 510 [Surmon].
[6] James E. Jones, Jr., "The Origins of the Concept of the Duty of Fair Representation" [hereinafter "Jones"] in McKelvey, Jean T., ed., *The Duty of Fair Representation* (Papers from the National Conference on the Duty of Fair Representation, New York City, April 28 and 29, 1977), (Ithaca, N.Y.: New York State School of Industrial and Labor Relations, 1977) at 25 and 27 [McKelvey].
[7] *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), enforcement denied, 326 F. (2d) 172 (2d Cir. 1963).
[8] *Vaca v. Sipes*, 386 U.S. 171 (1967) at 190.
[9] *Woods Task Force Report* (Canadian Industrial Relations, 1968) at 104, cited in Surmon at 509.
[10] *Fisher v. Pemberton* (1969), 8 D.L.R. (3d) 521 (B.C.S.C.) at 540-541 [*Fisher*].
[11] *Labour Code of British Columbia*, S.B.C. 1973, c.122, s. 7.

The Law

BC Statutory Law

Today, section 12 of B.C.'s *Labour Relations Code* states that:

> (1) A trade union or council of trade unions must not act in a manner that is arbitrary, discriminatory or in bad faith
>
> (a) in representing any of the employees in an appropriate bargaining unit, or
>
> (b) in the referral of persons to employment whether or not the employees are members of the trade union or a constituent union of the council of trade unions.[12]

In 1993, s. 13 was added in response to recommendations from a Sub-Committee of Special Advisors appointed by the Minister of Labour to review the then-*Industrial Relations Act*. To screen out "unmeritorious" complaints,[13] s. 13 established a gatekeeping requirement that complainants first establish a *prima facie* case that a contravention has "apparently occurred," prior to the Board serving a notice of complaint on the trade union and inviting a reply.[14]

Doctrine

The following outline of the doctrine of the DFR as it has developed jurisprudentially pertains particularly to B.C. However, there are few variations among Canadian jurisdictions or over time: it is remarkable how static the doctrine has been over the past 25 years. The purpose is not to provide a detailed exploration of the case law, but instead, a broad sense of when the DFR comes into play, the substantive standard of care required, and the remedies available.

(a) Legal Context

In general, there is no direct civil action possible in the courts to bring grievances, as courts will not hear a claim that "depends upon the interpretation of [a] collective agreement."[15] However, in B.C., courts in the early 1980s briefly began entertaining tort actions for negligent handling of grievances.[16] This foray was reinforced when the Supreme Court of Canada found the existence of a common law DFR in *Canadian Merchant Service Guild v. Gagnon ("Gagnon")*.[17] However, developments in this area were halted in *Mulherin v. United Steelworkers of America, Local 7884*, when a five-member panel of the Court of Appeal held that there was no common law DFR in the province, since it was subsumed by the introduction of an express statutory DFR with an accompanying remedial mechanism.[18] Subsequently, the Supreme Court of Canada in *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, stated that, although the DFR exists at common law, it is ousted by statutory provisions that constitute a "complete and comprehensive scheme ... such that resort to the common law is duplicative ...."[19] Thus, the DFR is not enforceable through the courts where express statutory provisions create both duty and remedial mechanism, as in B.C. The courts then defer to the labour relations board.

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[12] *LRC*, s. 12.

[13] Sub-Committee of Special Advisors, *Report and Recommendations on the Industrial Relations Act* (11 September 1992) at 1, cited in Thomas R. Knight, "Recent Developments in the Duty of Fair Representation: Curtailing Abuse in British Columbia" Labour Arbitration Yearbook (1996/97, 151) at 154 [Knight, "Abuse"].

[14] *LRC*, s. 13. See exact phrasing and details ahead in discussion of the complaint process.

[15] *Hamilton Street Railway Co. v. Northcott* (1966), 58 D.L.R. (2d) 708 at 710 (S.C.C.).

[16] *Stoyles v. United Steelworkers of America, Local 7619* (1984), 55 B.C.L.R. 107 (C.A.).

[17] *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509 [*Gagnon*].

[18] *Mulherin v. United Steelworkers of America, Local 7884* (1987), 37 D.L.R. (4th) 333 (B.C.C.A.).

[19] *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298 at 1317.

(b) Circumstances

A variety of circumstances may create DFR scrutiny. A complainant may allege that the negotiation of collective agreement terms by the union and the employer favour one group over another. The DFR may also be used to scrutinize the practice of 'trading off' grievances during the contract negotiation. During reconciliation of seniority interests in mergers or layoffs, one group of employees may get the short end of the stick. A union may fail to pursue a policy or individual grievance. A union may have sought a sanction against an employee with the employer, for failing to fulfill union obligations. An unpopular member may feel wronged by a union or union official, whether in the grievance process or in other dealings.[20]

In general, few reported cases exist in which an employee alleges that a trade union violated the DFR by discriminating on prohibited grounds: most DFR discrimination complaints are based on employment status or trade union membership.[21] The largest group of complaints relates to grievance processing.

(c) Substantive Standard of Care

In *Gagnon*, the Supreme Court of Canada set out five principle features of the duty of fair representation:

> 1. The exclusive power conferred on a union to act as spokesperson for the employees in the bargaining units entails a corresponding obligation on the union to fairly represent all employees in the unit.
> 2. When the right to process a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
> 3. The union's discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and its consequences for the employee on the one hand and the union on the other.
> 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
> 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.[22]

However, the criteria for finding a DFR are applied narrowly, and the union is entitled to balance political and strategic considerations in deciding not to pursue a grievance. The B.C. Labour Relations Board has adopted the statement that " ... the union's function is to resolve ... competition by reaching an accommodation or striking a balance. The process is political. It involves a mélange of power, numerical strength, mutual aid, reason, prejudice, and emotion."[23] Thus, it is expected that employees unhappy with their union will access the union's political mechanisms to remedy the situation: they can seek election, vote out members, choose another union, or decertify.[24]

In scrutinizing a union's accordance with the DFR, the labour relations board does

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[20] This list of potential circumstances is found in Raymond Brown, "The Duty of Fair Representation and the Resolution of Conflicts under Section 68 of the Labour Relations Act of Ontario" (1984) 4 Windsor Y.B. Access Justice 3 at 7.

[21] M.Kaye Joachim, "The Meaning of 'Discriminatory' in the Duty of Fair Representation" (1999) 7 Can. Lab. & Emp. L.J. 91 at 104 [Joachim].

[22] *Gagnon* at 527.

[23] *Rayonier Canada (B.C.) Ltd.*, [1975] B.C.L.R.B. 40/75; 2 Can. L.R.B.R. 96 at 204 [*Rayonier*].

[24] *Board of Trustees, School District No. 39 (Vancouver)*, [1981] 1 Can. L.R.B.R. 267, B.C.L.R.B. 2/81.

not hold the union to a correctness standard. The union may be wrong about the merits of the employee's grievance, and can even be simply negligent in its handling of the grievance.[25] The test for *arbitrariness* is elastic. "Arbitrary" does not cover conduct that is inept, negligent, unwise, insensitive or ineffectual, but encompasses that which is "superficial, capricious, implausible or shows lack of interest."[27] The test for *discrimination* requires evidence of actions influenced by factors contrary to the *Human Rights Code*.[28] Finally, the test for an allegation of *bad faith* requires objective evidence that there is no reasonable explanation for a union's handling of a matter other than personal hostility, political revenge, or dishonesty.[29] Thus, the doctrinal bar for a breach of the DFR is a high one.

(d) Remedies

In brief, the remedy for a DFR breach is usually to order that the complainant's grievance be put through the grievance procedure on its merits, or for the union to take the claim to arbitration. This may be a hollow victory, since a union thus admonished might pursue the victorious complainant's grievance less than zealously, while carefully fulfilling pro forma requirements. However, the Federal Court of Appeal recently affirmed a labour relations board's use of the equitable remedy of requiring a union and employer to reopen contract negotiations on the point disputed by the complainants.[30]

DFR Complaint Procedure in B.C.

The doctrine regarding the DFR appears to be somewhat narrow, but doctrine does not represent the concrete experiences of the rank-and-file with DFR claims, nor does it provide a total picture of DFR's role in the collective bargaining system. Further insight is provided by a description of the process followed by DFR complaints to the labour relations board.

When a worker makes a DFR complaint to the labour relations board, a file is opened and the Deputy Registrar requests particulars from the complainant, if needed. There is a one-year statutory limit on filing DFR claims. It may take time and correspondence before the file is considered complete enough to enter the case management system and move to the adjudication stage. A letter to the trade union and the employer confirms receipt of the complaint and gives them a copy of the application. At this point, a 'panel' of one Vice-Chair determines if there is a *prima facie* case, in accordance with s. 13. S. 13 states that:

> (1) If a written complaint is made to the board that a trade union, council of trade unions or employers' organizations has contravened s. 12, the following procedure must be followed:
> (a) a panel of the board must determine whether or not it considers that the complaint discloses a case that the contravention has apparently occurred;

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[25] *Franco and Hospital Employees Union and North and West Vancouver Hospital Society*, B.C.L.R.B. B90/94, Case No. 13997 (reconsideration of IRC No. C244/92) at 293-294.
[26] *Adams et al., and IWA-Canada, CLC, Local Union 1-85 and Macmillan Bloedel Ltd.*, B.C.L.R.B. B213/94, Case No. 13289.
[27] *Charles Morgan and Registered Psychiatric Nurses' Association of British Columbia*, [1980] 1 Can. L.R.B.R. 441; B.C.L.R.B. 89/79 at 454 [*Morgan*].
[28] *Rayonier*.
[29] *Campbell (Re)*, [1997] B.C.L.R.B. 324; *Pepin (Re)*, [1997] B.C.L.R.B. 26.
[30] *Via Rail Canada Inc. v. Cairns*, [2001] 4 F.C. 139.

> (b) if the panel considers that the complaint discloses sufficient evidence that the contravention has apparently occurred, it must
>
> (i) serve a notice of the complaint on the trade union, council of trade unions or employers' organization against which the complaint is made and invite a reply to the complaint from the trade union, council of trade unions or employers' organization, and
>
> (ii) dismiss the complaint or refer it to the board for a hearing.[31]

If a *prima facie* case is found, the complaint moves forward to a determination on its merits. Submissions are invited from the employer and the union. Most cases are adjudicated on the basis of file materials and written submissions, although a minority may receive an oral hearing if material facts are in dispute in the filed submissions. When a decision is issued, the parties are informed of appeal avenues via s. 141, which provides for reconsideration applications to be reviewed by a panel of three Vice-Chairs.[32] The process is lengthy: the average time in B.C., from date of the complaint to initial decision (i.e., without reconsideration) is 236 days, compared to 74 days for s. 6 grievances of dismissals.[33] Overall, the process for DFR complaints in B.C. is cumbersome and unusually lengthy. It is not a welcoming procedure for lay applicants.

The process varies in other jurisdictions, with B.C. at the far end of the spectrum when it comes to bureaucracy and length. Ontario and Alberta make more use of mediation, for example. In Alberta, there is a 90-day limitation period on filing complaints.[34] In Ontario, the average complaint takes just 57 days, while in Alberta the average is 161 days.[35] While commentators in these jurisdictions have also stated that the system is "cumbersome" and not suited to individuals, B.C. is an extreme illustration.

Frequency and Success of DFR Complaints

B.C. experiences a high volume of DFR complaints, which appears to be increasing. In 1990, the B.C. Labour Relations Board disposed of 94 DFR complaints;[36] in 1999, it disposed of 228 DFR complaints. In 1999, DFR applications accounted for 7.3% of those filed with the Labour Relations Board, not an insubstantial proportion.[38] However, DFR complaints account for an even higher proportion of reconsideration applications: 27.1% in 2000.[39] Thus, complaints are frequent and becoming more so, and one party or the other is dissatisfied enough in a high proportion of cases to apply for reconsideration.

The success rate of DFR complaints is consistently and dramatically low. From 1975 to 1994, between 0% and 7% of DFR applications were granted each year in B.C.[40]

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[31] *LRC*, s. 13.
[32] A description of the s. 12 process in B.C. is found in Ritu Mahil, "A Review of the Duty of Fair Representation Complaint Resolution Process of the British Columbia Labour Relations Board" [unpublished, archived at University of Victoria, Faculty of Law, Professor John Kilcoyne] (Draft, March 2000) at 10-12 [Mahil].
[33] Mahil 24 and 69.
[34] Mahil 26-27.
[35] Mahil 20.
[36] Knight, "Abuse" at 154.
[37] Mahil 53.
[38] British Columbia Labour Relations Board, "Application and Certification Data." online: <www.lrb.bc.ca/reports/application_certification_ data.htm> [App Data].
[39] British Columbia Labour Relations Board, *"2000 Annual Report"* online: <www.lrb.bc.ca/reports> [*2000 Report*].
[40] Knight, "Abuse" at 154.

Of 1,789 DFR complaints handled in those years, just 60, or 3%, were granted.[41] The pattern has continued in more recent years: for example, of the 199 applications filed in 2000, three were granted.[42] This differs from the Labour Relations Board's rate of granting other types of applications. On a range of unfair labour practice complaints filed in 2000, the success rate of applications was closer to 20%.[43] Furthermore, the Labour Relations Board is no more inclined to grant DFR applications on reconsideration. In 2000, 36 applications for reconsideration involved DFR complaints, but only two succeeded, or just over 5%.[44] By contrast, the general success rate of reconsideration's in 2000 was 16%.[45] Finally, this pattern accords with other jurisdictions. In Ontario, just two of 238 applications in 1990 succeeded.[46] In Alberta, between 1989 and 1994, 5% of applications were granted.[47] Clearly, most bargaining unit members who file complaints about the quality of their union representation have little chance of succeeding, although they may not initially be fully aware of that fact.

Experiences of Complainants

There is little information from complainants about their experiences with the DFR process, although commentators have speculated on their motives for filing DFR applications. The small amount of feedback available indicates strong disappointment and dissatisfaction, given that, after a lengthy and sometimes incomprehensible experience, most complainants' applications were rejected. In a survey, former complainants stated that they had expected shorter processing times and were distressed at the deterioration of their relationship with the union as they waited for the matter to be resolved. The s. 13 *prima facie* case requirement was problematic, since many of them interpreted letters stating that they had met the burden as meaning that their complaint had been successful. Instead, there were months to go until a final, negative decision.[48] When asked why they believed there were so many s. 12 complaints, former complainants indicated the lack of good union jobs, and union representatives who were too busy to sit down and discuss the grievance process. From this, one can infer that complainants often were desperate to regain a union position upon layoff or firing, and that they found it upsetting when the union dropped or settled their grievance with little communication.[49] Finally, they pointed out that it was difficult for individuals to hire lawyers, or to deal with the application process without them.[50]

Some commentators have speculated on the political motivations of DFR complainants.[51] Others have suggested that labour relations boards have, for political reasons, come to the belief that most DFR complaints lack merit and are simply instances of manipulation by individual workers.[52] Thomas R. Knight has argued that most complaints are without substance, and are made by individuals attempting to secure

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[41] Knight, "Abuse" at 154.
[42] *2000 Report.*
[43] Mahil at 53.
[44] Mahil at 24.
[45] *2000 Report.*
[46] Joachim at 119
[47] Howes at 138.
[48] Mahil at 38.
[49] Mahil at 39.
[50] Mahil at 39.
[51] See for example, Knight, "Abuse."
[52] Joachim at 120.

power in the grievance process or to inflict political damage within the union.[53] He speculated that the dramatic increase in the number of complaints abandoned by complainants after the enactment of s. 13 is due to their having had "their bluffs called."[54] It has been suggested that the low success rate of DFR complaints itself fuels a belief among labour relations boards that most applications lack merit and are an attempt to abuse the system.[55] Feedback from actual complainants, however, fails to demonstrate Machiavellian motives: it points, instead, to a layperson's frustration with an unhelpful process in the face of critical life changes.

Commentators on the Duty of Fair Representation

Academic and policy comment on the DFR has fallen into two basic camps: those who argue for a narrow construction of the duty, and those who would grant a wider construction or even individual carriage of grievances. The debate is generally framed in terms of the correct balance between collective and individual rights in the collective bargaining regime. Bernard Adell has noted an apparent paradox between the predominantly "anti-majoritarian" functions of the broader legal system and the "collective thrust of much of our modern labour law," which views minority legal rights as mere "verbal disguises for the preservation of economic privilege."[56] All commentators operate within the paradigm of the binary opposites of "collective" versus "individual," attempting to find the balance between them. To aid their arguments, they marshal pragmatic considerations and point to the potential consequences of falling too far on the wrong side of the binary.

Arguments for a Narrow Construction of Individual Rights

Commentators who believe that the duty of fair representation should be narrowly construed argue that a broad recognition of individual rights is antithetical to collective bargaining, as a participatory form of democracy.[57] Furthermore, collective bargaining is only able to make gains for individual union members through union solidarity and the union's role as exclusive bargaining agent. Too much recognition of individual rights would impede good labour relations. It would undermine the union's role in developing a coherent jurisprudence on key collective agreement provisions, by leading to ad hoc claims and divergent rulings.[58] The prestige and authority of the union would be undermined, furthering dissenting factions and instability. If individual carriage of grievances were allowed, the union might look ineffective if individuals achieved better results at arbitration.[59] If the duty of fair representation were broadened, unions would be forced to carry to arbitration grievances that they knew lacked merit, to avoid a DFR complaint.

This view has been supported by the work of Thomas R. Knight, who surveyed union representatives about their experiences with DFR, and argued that

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[53] Thomas R. Knight, "The Role of the Duty of Fair Representation in Union Grievance Decisions" (1989) 42 Relations Industrielles/Industrial Relations 716 [Knight, "Role"].
[54] Knight, "Abuse" at 158.
[55] Joachim at 120.
[56] Bernard Adell, "Collective Agreements and Individual Rights: A Note on the Duty of Fair Representation" (1986) 11 Queen's L. J. 251 at 251 [Adell].
[57] See, for example, Lars Apland and Chris Axworthy, "Collective and Individual Rights in Canada: A Perspective on Democratically Controlled Organizations" (1988) 8 Windsor Y.B. Access Justice 44 at 77 [Apland and Axworthy].
[58] Archibald Cox, "Individual Enforcement of Collective Bargaining Agreements" (1957) 8 Lab. L. J. 850 [Cox], cited in Timothy J. Christian, "The Developing Duty of Fair Representation" (1991) 2 Labour Arbitration Y.B. 3 at 4 [Christian].
[59] Cox cited in Christian at 4.

individual workers threaten to proceed with DFR claims to extract political leverage in the union and that unions are forced to press unmerited grievances as a result.[60] One union representative suggested that individuals threaten and file DFR complaints for "nuisance value or perhaps getting even with whomever, *management or union* [emphasis added]."[61] However, even in Knight's survey, 75% of those surveyed indicated that threats to file DFRs were "rarely" made, and only 3.4% of union representatives "often" or "very often" proceeded as a consequence to arbitration with a grievance that they would rather have withdrawn.[62] Despite these not overly alarming statistics, this is a frequently cited concern, both with the current state of the DFR and with any suggested broadening of individual rights. The terms "abuse" and "manipulation" are often used to describe the results of increased individual rights in the DFR arena.[63]

As viewed by these commentators, the ultimate result of broad individual rights in the collective bargaining regime is negative for both unions and management. The current collective bargaining regime encourages settlement of grievances prior to arbitration as the most efficient and effective result for both parties. With broader individual rights, more grievances would be arbitrated, whether carried by individuals or by half-hearted unions protecting themselves from complaints. This would clog the system, adding time and expense for both parties.[64] Employers could not assume that a grievance had been resolved after dealing with the union about it, leading to commercial instability and uncertainty, which would undermine the collective bargaining regime.[65]

Arguments for a Broader Construction of Individual Rights

Fewer commentators argue for a broad construction of individual rights vis-à-vis union representation in the grievance process, and they are divided as to the appropriate degree of individual autonomy. As a philosophical umbrella for those who would grant more weight to individual rights, Clyde Summers has stated that they should take precedence because "collective bargaining is not merely a private device to serve ... collective needs but also has the purpose of improving the dignity and worth of the individual."[66] Bernard Adell has recommended that any grievor covered by a collective agreement have the right to carry any grievance to arbitration independently if the union will not proceed with it. He argues that when the law grants somebody a substantive right, it ought to provide a procedural means of enforcing that substantive right.[67] Thus, where the union will not ensure compliance with the collective agreement, individuals need access to the grievance/arbitration process. Adell does recommend retaining the DFR as a potential claim against a union regarding negotiation of the collective agreement.[68] By contrast, Paul Weiler suggests the 'critical job interests' doctrine, whereby individual rights prevail in unjust dismissal claims, given

[60] Knight, "Role."
[61] Knight, "Role" at 723.
[62] Knight, "Role" at 723.
[63] An ever-popular Canadian argument also comes into play: holding up the example of a highly litigated American counterpart to be avoided in this country; see Surmon at 509-510.
[64] For example see Knight, "Role" at 718; Christian at 4. This phenomenon has also been observed in the U.S.: see Robert J. Rabin, "The Duty of Fair Representation in Arbitration" in McKelvey 84 at 85.
[65] Surmon at 510.
[66] Clyde Summers, "Individual Rights in Collective Agreements and Arbitration" (1962) 37 N. Y. U. L. Rev. 362 at 410, cited in Christian at 5.
[67] Adell at 255.
[68] Adell at 259.

dismissal's role as "a kind of industrial capital punishment."[69] Timothy Christian suggests that the involvement of critical job interests should attract a greater degree of scrutiny.[70] Adell finds the distinction unhelpful, pointing out that job tolerability and job-level grievances are also important to individuals. Raymond Brown does not step outside of the DFR framework, but recommends higher guarantees of procedural fairness, allowing self-financed access to arbitration to members who have been dismissed at the request of the union.[71] He proposes expanding the DFR to serve as a penalty for union incompetence, since the duty is an institutional one and the union should bear responsibility for its personnel's negligence.[72] Clearly, those arguing for a broader understanding of individual rights in the DFR context are scattered along a wide spectrum.

Pragmatic arguments raised by this group vary depending on where they fall on the spectrum of recommended solutions. Those who simply support a more inclusive DFR suggest that its enforcement will prod unions to improve their grievance-processing training for representatives. This is partially supported by Knight's survey results.[73] Trade unions would also be deterred from violating rights, and the integrity of collective agreement procedures would be maintained. Those who recommend individual carriage of grievances point out that it will decrease the need for trade unions to build up files to protect themselves.[74] Adell does not foresee a system packed with individual complaints, but not because he believes unions would necessarily improve their responsiveness to their membership. Somewhat perversely, his argument for individual rights under the collective agreement is grounded in a reassurance that the system would not become overburdened because "aggrieved individuals" (the "persistent and cantankerous") would soon learn that the cards were stacked against them without union support, and would be deterred from pursuing grievances by the cost of self-financing.[75]

As Adell's deterrence argument underscores, the proponents of greater individual rights in the grievance and/or the DFR process largely share similar discursive strategies and material priorities as those arguing for a narrow construction of individual rights. A debate with an apparently broad spectrum of opinion in some ways is in fact as narrow as the current interpretation of the DFR itself.

Toward a Theoretical Framework for the Duty of Fair Representation?

Current academic literature on the duty of fair representation does not satisfactorily illuminate the following characteristics of its development and role, perhaps because the literature itself forms part of the problematic discourse surrounding the duty:

- The statutory language and jurisprudence related to the DFR set a narrow test for violations of the duty, and a high onus is placed on complainants.
- The process for bringing a DFR complaint is cumbersome, lengthy, and full of hurdles for the applicant.

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[69] Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980) at138, cited in Christian at 6.
[70] Christian at 6.
[71] Raymond Brown, "The Duty of Fair Representation and the Resolution of Conflicts under Section 68 of the *Labour Relations Act* of Ontario" (1984) 4 Windsor Y.B. Access Justice 3 at 44 [Brown, "Resolution"].
[72] Raymond E. Brown, "The 'Arbitrary,' 'Discriminatory,' and 'Bad Faith' Tests under the Duty of Fair Representation in Ontario" (1982) 60 Can. Bar Rev. 412 at 439 [Brown, "Tests"].
[73] Knight, "Role" at 730.
[74] Adell at 255.
[75] Adell at 256.

- The labour relations board handles a high volume of DFR complaints, but the vast majority of applications are dismissed.
- Former complainants indicate the dissatisfaction that might be expected from laypeople disappointed both by the union's lack of communication and poor handling of a grievance, and by the unwelcoming and unhelpful process they thought would secure them a remedy. However, commentators frequently portray complaints as almost universally unmerited and brought by manipulative power-seekers.
- Academic comment on the DFR ranges along a spectrum, from advocating increased individual rights to arguing for an even narrower construction of the duty. However, commentators share similar preoccupations with the efficiency of the collective bargaining and arbitration regime, and similar characterizations of potential complainants.

For a helpful perspective on these factors, it is necessary to step outside the literature on the DFR and seek a broader theoretical framework. Andrew Goldsmith has suggested adopting a "processual methodology" to address the dialectic of control within the "potentially fluid, dynamic" management/labour relationship.[76] He argues for a fully theorized understanding of the workings of power in both its material and ideological practices, and warns us that employee 'consent' to the justness of collective bargaining is socially constructed and far from straightforward.[77] To investigate the shifting dialectic of control, it is necessary to focus on "low-level exchanges" as well as on the macro level of statutes and appellate jurisprudence. His analytical framework proves useful in the context of the evolution of the DFR. The DFR and its surrounding discourse can be situated within an ideology that sets the limits of what is considered "fair, reasonable, possible at work," thus undermining "the possibility of alternative views of the enterprise."[78]

Goldsmith identifies more than one type of power at work in the management/labour relationship, and suggests thinking about collective bargaining in terms of the "power outcomes" for the distribution of organizational power, arising in often mundane, cumulative ways.[79] The narrowness of the DFR and the dismissiveness of commentators regarding complainant concerns reinforce the funneling of potentially disruptive grievances through the management/labour relationship. Despite the invocation of a delicate balance between collective and individual rights, the cumulative effect of jurisprudence, statute provisions, labour relations board decisions, process concerns, and academic discourse is to minimize the concerns of individual workers and valorize the necessity of trust in their union representation.

A cornerstone of industrial pluralism ideology is the grant of exclusive bargaining agent status to democratic unions. This has benefits for the unionized employer in the form of commercial stability and certainty, which is preferable to dealing with a plethora of grievances brought by individual employees. However, Goldsmith points out the co-existence of more than one type of power, contributing to the construction of employee consent to the collective bargaining regime. 'Power over' is limited and can only be increased at another's expense. However, 'power to' is potentially expandable, allowing collective bargaining to deliver not only economic but political goods to employees, who achieve 'power to' in interstices of organizational 'space'.[80] At

[76] Goldsmith at 25-26.
[77] Goldsmith at 25.
[78] Goran Therbon, *The Ideology of Power and the Power of Ideology* (London: Verson, 1980) [Therbon] at 18, in Goldsmith at 38.
[79] Goldsmith at 29.
[80] Goldsmith at 34-35.

the same time, power can also be exercised subtly, through the "avoidance or limitation of express conflicts altogether, the *'mobilization of bias'*."[81] For example, one can identify the mobilization of bias against carriage of individual grievances that cumulatively could threaten the stability of the collective bargaining regime, in which the fundamental 'power over' remains with the employer. Thus, the power relations of collective bargaining promote the social construction of employee consent to industrial pluralism ideology.

Issues in the collective bargaining relationship fall into one or more of four categories, according to Goldsmith: (1) major strategic issues, which pose a "genuine challenge to the power resources of those who dominate the process that determines policy,"[82] (2) minor strategic issues, (3) marginal issues, and (4) symbolic issues that are seen "subjectively by one or both parties... as significant to power relations."[83] The vehemence with which DFR complaints are negatively characterized and rejected is symptomatic of their position at the heart of major strategic and symbolic issues. The power resources of the union derive from its role as exclusive bargaining agent. In addition, it has received 'power to' in being granted discretion about whether or not to carry forward employee grievances. In effect, the union's role in the grievance process renders it a level of "secondary management" in workers' lives.[84] The power resources of individual union members also to a large extent reside in their ability to act collectively. Finally, the balance of 'power over' held by the employer could be disrupted by validation of individual employees' rights to challenge the union's 'final say' on grievances. The intersection of major strategic and symbolic issues thus accounts for much of the stringently narrow construction of the DFR, and the shared discursive strategies of those who favour both a broader and a stricter definition.

It must be noted that while Goldsmith's framework focuses exclusively on the collective bargaining regime, in practice, bargaining unit members sit atop the hierarchy of Canadian workers. The determination of appropriate bargaining units and the certification process historically favoured full-time male breadwinners in large manufacturing and infrastructure sectors.[85] Thus, maintenance of exclusive bargaining authority through the narrowness of the DFR also has served to shore up the strength of unionized workers in the hierarchy by maintaining the benefit to the employer of dealing with a workforce that speaks with one voice. At the same time, maintenance of the hierarchy has also benefited the employer by preserving a pool of inexpensive labour that is predominantly female and often part-time.

Ideology in the workplace "offer[s] partial definitions of events which are supported by actual concrete circumstances and practices," narrowing the possibility of discussing alternatives.[86] Because they are "partial," ideological strategies are often unrecognized and contradictory, but appear to be common sense by according with experiences, even while obscuring the fundamental reality of 'power over' in the workplace.[87] Thus, the pragmatic

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[81] Goldsmith at 30.
[82] Peter Bachrach & Morton S. Baratz, *Power and Poverty: Theory and Practice* (New York: Oxford University Press, 1970) at 47-48, cited in Goldsmith at 32.
[83] Goldsmith at 32-33.
[84] The term is from Ian Hunter, "Individual and Collective Rights in Canadian Labour Law" (1993) 22 Man. L.J. 145 at 145 [Hunter].
[85] Judy Fudge, "Rungs on the Labour Law Ladder: Using Gender to Challenge Hierarchy" (1996) 60 Sask. L. Rev. 237. (QL) [Fudge].
[86] Therbon at 18, cited in Goldsmith at 38.
[87] Goldsmith at 34 and 38.

considerations marshaled by commentators on the DFR have a common-sense appeal that legitimizes their ideological function. At the same time, the explanations offered by commentators are partial and contradictory, as illustrated by the circular logic that views almost all complaints as politically motivated and unmerited *because* of the high rate of dismissal of applications, despite the fact that the narrowness of the test excludes many complainants who have been poorly represented. However, this partial explanation may appear to be a "descriptive account of workplace relations,"[88] according with some experiences of persistent and unjustified complainers. Because of the seemingly common-sense consequences of increasing individual rights for union members without disincentives, commentators are reluctant to disturb the balance of power and explore alternatives to industrial pluralism ideology.

Hegemony is an order in which "one concept of reality is diffused throughout society."[89] It is a process that requires constant repetition and reformulation, adjusting to challenges by recognizing conflicting subordinate demands and making limited concessions to form a "compromise equilibrium" that nevertheless does not jeopardize fundamental control.[90] Thus, Goldsmith identifies collective bargaining as an institutionalized mechanism for adjustments in support of hegemony, and at the same time, a limited source of challenges with the logical possibility of radicalness.[91] This radical possibility accounts for some of the managerial distrust of collective bargaining.

Conclusion

Recognizing a narrow, negative obligation termed the DFR concedes to conflicting demands that challenge the hegemony underlying pluralism ideology: the DFR complaint process provides an institutionalized mechanism for limited readjustments. The rhetorical acknowledgement of the conflicting pulls of individual and collective rights in jurisprudence and commentary stops far short of jeopardizing the balance of power. Yet institutional and rhetorical recognition of the most basic duty of fair representation is necessary to the maintenance of hegemony, since the dissatisfaction of individual employees with their position in the hierarchy holds radical potential. In discussing judicial deferral to the union's perceived need for exclusive bargaining authority and internal solidarity, Ian Hunter has observed that "compelled solidarity is not real solidarity, and that unions in the long run do not gain from such compulsion."[92]

The power dynamic of the collective bargaining regime thus functions ideologically and materially to avoid utilizing a broadly conceived DFR to prod unions to develop 'real solidarity,' which could threaten the fundamental 'power over' of the workplace.

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[88] Goldsmith at 34.

[89] G. Williams, "Gramsci's Concept of 'Egemonia'" (1960, 4) Journal of the History of Ideas at 587 [Williams], cited in Goldsmith at 40.

[90] Williams at 161, cited in Goldsmith at 41.

[91] Goldsmith at 43.

[92] Hunter at 145.

Greening the International Human Rights Sphere? Environmental Rights and the *Draft Declaration of Principles on Human Rights and the Environment*

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"Human society cannot function independently of the natural environment."[1]

Introduction

A vital connection exists between the natural environment and fundamental human rights. Basic survival of the human species is inherently linked to the healthy functioning of natural ecosystems, from which the essential components of daily life are directly and indirectly derived. The linkage between the environment and human rights has been recognized internationally in numerous human rights instruments. It formed the basis of a United Nations ("UN") sub-commission study on human rights and the environment in the early 1990s. The UN Special Rapporteur submitted her final report in 1994. Appended to her report was a *Draft Declaration of Principles on Human Rights and the Environment* ("the Draft Declaration").

Despite these efforts, and seemingly widespread recognition of the connection between human rights and the environment, formal recognition of "environmental rights" on a global level remains elusive. While the concept still generates occasional debate in international legal and political spheres, the *Draft Declaration*, which was designed to comprehensively address the environmental dimensions of human rights, has all but disappeared from the human rights agenda. The reasons for this are unclear.

This examination begins with a contextual overview of environmental rights. The paper continues with an outline of the history and current status of the *Draft Declaration*, followed by a general analysis of the document. The paper explores arguments advanced by both supporters and critics of the rights-based approach, and briefly discusses two variations of the *Draft Declaration*'s framework. In the end, however, the most viable way to address the relationship between environmental issues and human rights may not be the "greening" of the international human rights sphere.

Environmental Rights in Context

Before investigating environmental rights in detail, it is first necessary to locate environmental rights within the broader human rights context. The current analytical framework, developed by Karel Vasak, classifies rights into chronological "generations." This method is not without its critics,[2] but there are generally believed to be three generations of rights.

The first generation, civil and political rights, emphasizes the liberty of the individual, which is to be protected from state intervention. Rights such as the right to

[1] Neil A.F. Popovic, "In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment" (1996) 27:3 Colum. H.R.L. Rev. 487 at 487 [Popovic, "Commentary"].

[2] See Dinah Shelton, "Human Rights, Environmental Rights, and the Right to Environment" (1991) 28 Stan. J. of Int'l L. 103 at 122-123. Critics contend that the generational analysis is problematic in two ways: it does not account for examples where second-generation rights preceded those of the first generation, and it offers no guidance as to when a claim should be considered a human right.

life and security of the person fall under this heading. The second generation encompasses economic, social and cultural rights. Essentially claims to social equality, these rights include rights to education and an adequate standard of living, and require state intervention for their assurance. The third and final generation of rights are also called solidarity rights, since collective international action is required for their realization.[3] Environmental rights, the right to peace, and the right to self-determination are among those included.

It has been argued that third-generation rights exist to enhance and facilitate the rights of the first and second generations.[4] In this way, solidarity rights become almost a form of global policy goal. Environmental rights are uniquely suited to this formulation. While the health of the global environment cannot be significantly influenced by the actions of a single state, the environmental transgressions of that same state may affect the life and health of people around the world.[5]

Environmental rights per se continue to defy a single, substantive definition, which may prove to be the greatest obstacle to international recognition. At a minimum, various adjectives are inserted to qualify the right. Among many other things, the right to environment has been framed as a right to a clean, safe, healthy, healthful, liveable or ecologically balanced environment. These adjectives are also often combined, as in the right to a healthy and ecologically balanced environment. All of these variations convey a general belief that environmental quality should be preserved, either for human beings or for the ecosphere itself. Environmental quality may entail: clean air, water and soil; freedom from environmental hazards; and the preservation of ecosystem biodiversity and reproductive capacities. The *Draft Declaration* defines environmental rights as the environmental components of existing human rights, like rights to life and work.[6] In this sense, environmental rights influence the whole spectrum of recognized human rights.

Unlike definition, which remains problematic, the justification for constructing environmental rights is quite clear. The degradation of the natural environment poses threats to a broad range of human rights, from the right to life, to participatory rights, to the right to an adequate living standard.[7] In preventing people from securing minimum requirements for survival, environmental degradation also impedes people's ability to enjoy and exercise other human rights.[8] Faced with deciding between feeding a family whose subsistence farm was decimated by drought, and voting in a local election, most individuals would agree there is effectively no choice. As one commentator observes, "environmental degradation erodes freedom because it limits the range of choices for people today and for future generations."[9]

Gradual realization of the serious consequences for human rights posed by environmental degradation prompted a discourse of environmental rights in the 1970s. The *Stockholm Declaration*, from the UN Conference on the Human Environment in June 1972, is generally acknowledged as

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[3] Prudence E. Taylor, "From Environmental to Ecological Human Rights: A New Dynamic in International Law?" (1998) 10:2 Geo. Int'l Envt'l L. Rev. 309 at 318-319.

[4] Jennifer A. Downs, "A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right" (1993) 3 Duke J. of Comp. & Int'l L. 351 at 358 (WL).

[5] *Ibid.* at 385.

[6] Neil A.F. Popovic, "Pursuing Environmental Justice with International Human Rights and State Constitutions" (1996) 15 Stan. Envt'l L. J. 338 at 347-348 (Lexis) [Popovic, "Environmental Justice"].

[7] Shelton, *supra* note 2 at 112.

[8] Downs, *supra* note 4 at 351.

[9] Malcolm J. Rogge, "Human Rights, Human Development and the Right to a Healthy Environment: An Analytical Framework" (2001) 22:1 Canadian Journal of Development Studies 33 at 46.

the first articulation of the connection between human rights and the environment. Although the *Stockholm Declaration* does not explicitly create a right to environment, it strongly implies that the exercise of other human rights requires basic environmental health.[10] The preamble outlines environmental concerns:

> *We see around us growing evidence of man-made harm in many regions of the earth: dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources...*[11]

and Principle 1 responds to these concerns by asserting that:

> *Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.*[12]

This expansive statement was significantly narrowed by the *Rio Declaration* of the UN Conference on Environment and Development in 1992: "[Human beings] are entitled to a healthy and productive life in harmony with nature."[13] A more eco-centric articulation of the connection between human rights and the environment is found in the 1982 *World Charter for Nature* (the "*Charter*"). Drafted by the International Union for the Conservation of Nature, and subsequently adopted by the UN General Assembly, the Charter was intended to serve as an international standard against which human management of nature could be evaluated.[14] The *Charter* uses language that situates human beings and civilization within an ecosystem context. Its preamble describes humans as "part of nature" and civilization as "rooted in nature," before affirming that "[e]very form of life is unique, *warranting respect regardless of its worth to man*, and, to accord other organisms such recognition, man must be guided by a moral code of action."[15]

Some allege that the *Stockholm* and *Rio* declarations generated more confusion than clarity. This claim states that Principle 21 of the *Stockholm Declaration* contradicts the rights enumerated in Principle 1 by reinforcing the supreme sovereignty of states over their natural resources. On a similar note, the *Rio Declaration* is said to frame environmental responsibility in terms compatible with sustainable growth and development.[16] These allegations open a wider debate on hierarchies of rights. Current space does not permit an examination of these concerns, but they underlie every discussion of environmental rights.[17]

At present, there are four alternative rights-based approaches to achieving environmental protection. The first reinterprets existing rights to incorporate standards of environmental quality – a

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[10] Shelton, *supra* note 2 at 112.
[11] *Stockholm Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 (1973), pmbl., para. 3, in Patricia W. Birnie & Alan E. Boyle, *Basic Documents on International Law and the Environment* (Oxford: Oxford University Press, 1995) at 2.
[12] *Ibid.*, princ. 1, at 4.
[13] *Rio Declaration of the United Nations Conference on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev.1 (1992), princ. 1, in Birnie & Boyle, *supra* note 11 at 10.
[14] Birnie & Boyle, *supra* note 11 at 15.
[15] *World Charter for Nature*, G.A. Res. 37/7, U.N. GAOR, U.N. Doc. A/RES/37/7 (1983) pmbl., para. 3(a), in Birnie & Boyle, *supra* note 11 at 16 [emphasis added].
[16] David Smith, "Clean Air and a Clean Environment as Fundamental Human Rights" (1999) 10 Colorado J. of Int'l Envt'l L. and Policy 149 at para. 7 (WL).
[17] See Taylor, *supra* note 3 at 319ff. for a discussion of rights hierarchies.

"greening" of human rights. The second involves greater use of procedural rights to increase participation in environmental decision-making. The third approach advocates the creation of a substantive human right to a safe, healthy or sustainable environment. The last approach focuses on the intrinsic value of nature, championing the rights of nature itself.[18] The *Draft Declaration* incorporates all but the final approach.

The Draft Declaration

History and Current Status

In 1989, a group of non-governmental organizations ("NGOs") convinced the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (the "Sub-Commission")[19] to establish a study on the connections between human rights and the environment. The Sub-Commission operates under the UN Commission on Human Rights (the "UNCHR"), which endorsed the Sub-Commission's request to appoint a Special Rapporteur for the study in 1991. Ms. Fatma Zohra Ksentini, an Algerian human rights lawyer and member of the Sub-Commission, was subsequently appointed.[20]

Ksentini prepared a preliminary report in 1991 and progress reports in 1992 and 1993. She submitted her final report in August 1994. In her preliminary report, Ksentini found the idea of new ecological rights more attractive than modifying existing human rights to incorporate environmental concerns. She felt that the third approach "would take up more completely the ecological challenges confronting [humankind], while giving the beneficiaries of those rights the legal means of protection that any recognized right confers."[21] In May 1994, a group of international experts in human rights and international environmental law met in Geneva at the request of U.S.-based public interest environmental law firm Earthjustice (formerly the Sierra Club Legal Defense Fund). Together, these experts produced the *Draft Declaration* that was submitted as Annex I of Ksentini's final report.[22]

The final report recommended establishing a centre to address human rights and the environment, as well as appointing another Special Rapporteur, this time under the UNCHR. Whereas an appointee under the Sub-Commission is only authorized to study issues generally, an appointee under the UNCHR has powers to investigate allegations of violations, as well as to examine, monitor and publicly report on human rights violations. Ksentini also called for the UN to adopt norms consolidating a right to environment, based on the *Draft Declaration*.[23]

To date, there has been no movement on any of Ksentini's recommendations, nor have the final report or the *Draft Declaration* been substantively discussed. Efforts to incite discussion on the *Draft Declaration* by NGOs have been wholly unsuccessful.[24] Although the UNCHR asked state governments, NGOs and specialized agencies to submit comments on the final report in 1995 and 1996, it only received eight replies. At the UNCHR's 1997 session, NGOs and some governments lobbied for the creation of a permanent human rights and environment mechanism. Their attempts failed, and the UNCHR postponed further discussion on

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[18] Taylor, *supra* note 3 at 338.

[19] In 1999, the name was changed to the Sub-Commission on the Promotion and Protection of Human Rights. See online: UN Sub-Commission on the Promotion and Protection of Human Rights <http://www.unhchr.ch/html/menu2/2/sc.htm>.

[20] Popovic, "Commentary," *supra* note 1 at 490.

[21] Reprinted in Shelton, *supra* note 2 at 131.

[22] Popovic, "Commentary," *supra* note 1 at 492.

[23] Caroline Dommen, "Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms" (1998) 11:1 Geo. Int'l Envt'l L. Rev. 1 at 33.

[24] *Ibid.* at 33-34.

human rights and the environment until 1999. The UNCHR also asked that its consideration of these issues be submitted to the UN General Assembly for their 1997 follow-up session to the Rio Conference. That was not done, nor was the report brought to the attention of the UN Environment Programme, the Development Programme, or other relevant bodies.[25]

The above reports, and a further report on human rights and the environment prepared for the UNCHR's 1999 session, do not appear to be available on the Sub-Commission or UNCHR websites. There is no mention of the *Draft Declaration* on any UN home page. An Internet search generates only two links to the *Draft Declaration*, both of which are wholly independent of the UN.[26] It is possible to obtain a copy of the final report from a UN depository, but for a document whose authors sought wide circulation to generate discussion,[27] the *Draft Declaration* is conspicuously absent from places where it could achieve this goal.

Structure and Content

Neil Popovic, one of the creators of the *Draft Declaration*, explains that it was drafted in five parts without using descriptive titles, so that the principles contained in the *Draft Declaration* were not forced into pre-defined categories. Nonetheless, Popovic acknowledges that the document is basically organized as follows:

- ***Preamble:*** *Reflects inspiration from basic principles of international human rights and international environmental law.*
- ***Part I:*** *General Concepts*
- ***Part II:*** *Substantive Environmental Human Rights*
- ***Part III:*** *Procedural Environmental Human Rights (participatory rights)*
- ***Part IV:*** *Duties Corresponding to Environmental Human Rights*
- ***Part V:*** *Special Considerations (to inform meanings throughout the document)*[28]

The Preamble provides guidance about the themes underlying the *Draft Declaration*. It is firmly grounded in established principles and instruments of international human rights law, and emphasizes the "universality, indivisibility and interdependence of all human rights, which ensure balance and preclude relativistic attempts to devalue certain principles."[29] Also of note is the clear articulation of a reciprocal relationship between human rights and environmental degradation, and how each affects the other.[30]

The general approach of the *Draft Declaration* relates environmental protection issues to the established framework of human rights. The authors place particular emphasis on the rights to life and health; the right to non-discrimination; the right to work and to equally benefit from natural resources; and the more controversial rights, to development and self-determination. Almost all human rights, however, are encompassed by various principles in the *Draft Declaration*. Popovic justifies the approach by arguing that it reflects the human consequences of ecological disruption and the stake that affected people have in avoiding or remedying that disruption. The rights model

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[25] *Ibid.* at 34.

[26] See online: The University of Minnesota Human Rights Library <http://www1.umn.edu/humanrts/instree/1994-dec.htm>; The Fletcher School of Law and Diplomacy's Multilaterals Project <http://www.tufts.edu/departments/fletcher/multi/www/1994-decl.html>.

[27] Popovic, "Commentary," *supra* note 1 at 603.

[28] *Ibid.* at 498.

[29] *Ibid.* at 500-501.

[30] *Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned, Human Rights and the Environment: Final Report Prepared by Ms. Fatma Ksentini, Special Rapporteur*, U.N. ESCOR Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994) at para. 248, 251, cited in *ibid.* at 501.

used, he asserts, "treats the physical environment not as an abstract value, but instead in terms of its relationship to people."[31]

The *Draft Declaration* is comprehensive, so each aspect of it cannot be addressed in this examination.[32] To highlight both problematic and progressive features of the *Draft Declaration* as it currently stands, the following section provides an overall analysis of its contribution to the debate on human rights and the environment.

Analysis

From its Preamble, the *Draft Declaration* shows promise. It is guided by major international human rights instruments, including the Universal Declaration of Human Rights (the "UDHR"), the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights. The *Draft Declaration* also references the *Stockholm* and *Rio* declarations and the *World Charter for Nature*. The document states its recognition of rights to self-determination and sustainable development, and it creates a link between these rights and the right to a "secure, healthy and ecologically sound environment."[33] Once past the opening, however, several issues begin to detract from this positive start.

The *Draft Declaration* consists of 27 principles, through which it attempts to address virtually every major aspect of human rights law contained in other human rights instruments. A sampling of the principles is illustrative. Principle 14 addresses indigenous peoples' rights to control their own lands and resources, and their right to protection from impairment of those resources. The same sentiment is captured by the *Draft Declaration* on the Rights of Indigenous Peoples.[34] In a similar vein, Principle 11 speaks to a qualified right not to be evicted as a result of decisions affecting the environment. General freedom from eviction is covered by an International Labor Organization Convention.[35] The remainder of the *Draft Declaration* is directed at everything from cultural rights (Principle 13), to participatory rights (Part III), to the duty of state governments to control transnational corporations (Principle 22). The result is a document that reads like a "kitchen-sink" approach to environmental human rights, rather than a focused attempt to strengthen the connection between human rights and environmental protection.

It is argued that international negotiations are highly prone to becoming a "garbage can" of policy problems because of the constant redefinition inherent in the process.[36] The *Draft Declaration* appears to have fallen into this same trap. In a self-professed attempt to "cover most aspects of human life"[37] and conclusively demonstrate the pervasiveness of the natural environment in human society, the *Draft Declaration* nearly eradicates any possibility for recognition of environmental rights independent of an existing human right. It is difficult to see what the *Draft Declaration* adds if the environmental component of these human rights could essentially just be read into existing instruments. This may partially

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[31] Popovic, "Environmental Justice," *supra* note 6 at 340.
[32] For a full discussion of each principle in the *Draft Declaration*, please see Popovic, "Commentary," *supra* note 1.
[33] *Draft Declaration of Principles on Human Rights and the Environment*, pmbl., in U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Human Rights and the Environment: Final Report*, Annex I, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994), online: Draft Declaration of Principles of Human Rights and Environment (1994) <http://www1.umn.edu/humanrts/instree/1994-dec.htm> [*Draft Declaration*].
[34] Popovic, "Commentary," *supra* note 1 at 541-542.
[35] *Ibid.* at 533-534.
[36] Miranda A. Schreurs & Elizabeth Economy, "Domestic and International Linkages in Environmental Politics" in Miranda A. Schreurs & Elizabeth Economy, eds., *The Internationalization of Environmental Protection* (Cambridge: Cambridge University Press, 1997) 1 at 14.
[37] Popovic, "Commentary," *supra* note 1 at 602.

explain why the *Draft Declaration* has failed to generate more discussion.

The effective relegation of environmental issues to a sort of "gloss" on recognized human rights is almost certainly a function of the deliberate attempt to fit the *Draft Declaration* into the existing human rights framework. The "gloss" is particularly apparent in Principle 16: "[a]ll persons have the right to hold and express opinions and to disseminate ideas and information regarding the environment."[38] Is the basic guarantee of freedom of expression in article 19 of the UDHR[39] somehow insufficient for environmentally related information? This is the sentiment implied by Principle 16 of the *Draft Declaration*. One is left wondering if the *Draft Declaration*'s broad-brush approach actually detracts from valid claims to environmental rights.

The *Draft Declaration* also contains few obligatory statements. The majority of the text is framed as affirmative "rights to" a particular condition. Some obligations arise under Part IV of the *Draft Declaration*, but these are mostly aimed at state governments. This raises a further concern with the *Draft Declaration* – that of guidance for ensuring that the enumerated rights are respected. While it is possible that the authors intended the creation of guidelines for implementation to be part of subsequent discussions on the document, there is no such indication in either the *Draft Declaration* or in Popovic's elaborate treatment of it. One place where lack of guidance is particularly problematic is in Part V of the *Draft Declaration*. Principle 25 directs that special consideration shall be given to "vulnerable persons and groups,"[40] yet nowhere in the text is there a definition of who fits the label "vulnerable." While Popovic does an admirable job of outlining those who fit the description in his article,[41] it may not be as clear for anyone reading the text alone. On one hand, this omission allows for flexible arguments as to who would qualify. Unfortunately, it also presupposes that readers will possess the knowledge and the ability to construct those arguments. In the same way, there is no indication of a standard for what constitutes "a secure, healthy and ecologically sound environment."

The *Draft Declaration* further provides very little guidance for those whose rights are violated. While it is recognized that the *Draft Declaration* was designed as a statement of general principles rather than as a binding agreement, it provides in Principle 20 that "[a]ll persons have the right to effective remedies and redress in administrative or judicial proceedings for environmental harm or the threat of such harm."[42] Under Principle 22, the state is charged with adopting measures for providing adequate remedies, but does this mean that an affected individual has recourse only to domestic mechanisms? Is there a right of appeal to a body outside of the state? If so, must all domestic remedies be exhausted before such an appeal is filed? The answers to these questions remain unclear.

Finally, while setting ambitious goals for social equality, the *Draft Declaration* does not address the differential capacities of states to enact and observe the Principles. States have an obligation under Principle 22 to adopt measures that are necessary to effectively implement the rights in the *Draft Declaration*. Is a developing country's obligation to fulfill the "right to safe and healthy food and water adequate to [a person's] well-being"[43] on par with that of a developed country? Will this lack of

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[38] Draft Declaration, *supra* note 33, princ. 16.
[39] *Universal Declaration of Human Rights*, Dec. 10, 1948, G.A. Res. 217A (III), U.N. GAOR, U.N. Doc. A/810 (1948) article 19, cited in Popovic, "Commentary," *supra* note 1 at 549.
[40] *Draft Declaration, supra* note 33, princ. 25.
[41] See Popovic, "Commentary," *supra* note 1 at 592-599.
[42] *Draft Declaration, supra* note 33, princ. 20.
[43] *Ibid.*, princ. 8.

recognition in the *Draft Declaration* for the particular challenges faced by developing nations prevent some interested nations from becoming signatories? Again, the answers are uncertain.

These criticisms do not mean that the *Draft Declaration* is without merit. On the contrary, several aspects of the document have significant potential. The imposition of duties for individuals, state governments and international organizations to protect environmental resources under Part IV is a much-needed articulation of the responsibilities that must attach to environmental rights. Although the creation of specific duties in human rights instruments is not a new concept,[44] the *Draft Declaration* specifically addresses the importance of *collective* duties in the environmental context. The shared nature of the obligation is critical where, as here, one person's derogation from an environmental duty has the potential to interfere with everyone else's rights.[45]

Another welcome addition to articulated principles is the provision for remedies and redress for environmental harm or the threat of environmental harm. Principle 20 legitimizes the harm caused by environmental degradation by recognizing the need to provide compensation. The wording of the provision also allowed the authors to include the precautionary principle in the *Draft Declaration*. By affording judicial or administrative redress for the threat of harm, an individual could secure an injunction against possible environmental degradation, without bearing the burden for *conclusive* proof of harm. This is especially significant given the uncertainty that pervades human understanding of nature's processes.

The closest the *Draft Declaration* comes to expressing an independent right to environment is Principle 2: "[a]ll persons have the right to a secure, healthy, and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible."[46] As it is written, this right stresses the importance of environmental quality as a basic element of the quality of human life. Popovic defines "a secure, healthy and ecologically sound environment" as one that is sufficiently free of human intervention to maintain its essential natural processes and sustain biodiversity and human life.[47] His definition commands respect for the intrinsic needs of the natural environment. While his expression of the right is unfortunately not embedded in the text, it is, at least, a start.

The interdependence aspect of Principle 2 also warrants comment. An interdependent interpretation of rights obviates any argument based on a rights hierarchy. For example, if the right to economic development is interdependent with the right to a healthy environment, it cannot be treated as a higher priority. In this construction, "each right informs and moderates the others,"[48] preventing arguments of differing social values or state domestic policy from relegating rights that require more effort to a place of subservience. Any formulation of environmental rights will benefit from this interpretation.

On the whole, the *Draft Declaration* disappoints. It lacks a strong expression of the individual legitimacy of environmental rights that is necessary to refocus international attention on specific challenges posed by continued human destruction of

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[44] The *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic and Social Rights*, and the *African Charter on Human and Peoples' Rights* all include specific duties. See, generally, Popovic, "Commentary," *supra* note 1 at 566-567.

[45] Popovic, "Commentary," *supra* note 1 at 567.

[46] *Draft Declaration, supra* note 33, princ. 2.

[47] Popovic, "Commentary," *supra* note 1 at 504.

[48] *Ibid.* at 508.

the natural environment. By framing environmental concerns as simply component parts of existing human rights, actual protection of the environment receives little energy. The *Draft Declaration* does, however, make several positive contributions. Specific duties establish the framework for the collective action necessitated by environmental issues. Provisions for redress of environmental harms emphasize the gravity of environmental degradation and validate the use of the precautionary principle.

In summary, the *Draft Declaration* is a starting point on which to build further efforts to achieve international recognition of the connection between human rights and the environment.

Supporters of the Human Rights Approach

Approaching environmental protection through the international human rights sphere and its mechanisms does have its strengths. Some argue that the benefits of the rights-based approach confirm the *Draft Declaration* as the appropriate channel through which to address environmental issues. For these supporters, the next step toward achieving international environmental rights is the creation of a judicial body to deal specifically with violations of those rights.

The human rights approach draws strength from its basis in international law and its connection to the UN. As one author observes, the most important role of international law in a global society is its function as "the expression of fundamental norms (or values) among peoples."[49] Proponents hope that using this background to address environmental issues will lead to the desired scale of international recognition for the importance of environmental protection. At the same time, a link to the UN process provides a crucial element for creating legitimacy and enforceability of a right within the international community.[50] As one frequently quoted observer has noted, a right becomes a right when the UN General Assembly says so.[51] Association with the UN also provides access to its almost unique service as a forum for raising consciousness and mobilizing politics,[52] both of which are essential for the realization of environmental protection.

In the international community there is an existing, generally widespread recognition of obligations to protect and promote human rights. This could also work to the benefit of environmental issues, in the sense that acceptance of new obligations may be easier if they are connected to existing ones. It is important to note that the UDHR did not represent the existing state of international human rights law when it was adopted.[53] The current paucity of international environmental rights law should therefore not prevent the creation of a standard toward which states can work.

The most significant benefits accruing from this approach are the remedial possibilities available to *individuals* through human rights mechanisms. As a general rule, international law is concerned only with states, so human rights mechanisms "are virtually unique in offering avenues of redress for individuals or groups wishing to appeal beyond their own state in cases of harm that constitute a violation of their

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[49] Edith Brown Weiss, "The Emerging Structure of International Environmental Law" in Norman J. Vig & Regina S. Axelrod, eds., *The Global Environment: Institutions, Law, and Policy* (Washington, DC: Congressional Quarterly Press, 1999) 98 at 102.

[50] Downs, *supra* note 4 at 355.

[51] Richard B. Bilder, "Rethinking International Human Rights: Some Basic Questions" (1969) Wisconsin L. Rev. 171 at 173, cited in Shelton, *supra* note 2 at 122.

[52] Dommen, *supra* note 23 at 48.

[53] Louis Henkin et al., *International Law: Cases and Materials*, 2nd ed. (St. Paul, MN: West, 1987) at 114-115, cited in Downs, *supra* note 4 at 359.

rights."[54] There are two reasons why this is particularly important in the environmental context. First, the worst victims of environmental harm tend to be "those with the least political clout, such as members of racial and ethnic minorities, the poor, or those who are geographically isolated from the locus of political power within their country."[55] The possibility of seeking redress independent of the state is crucial for these people. Second, environmental problems rarely respect national borders. The ability to seek redress outside of the domestic jurisdiction thus becomes very significant. There is, however, a caveat to this benefit: individuals must generally exhaust all domestic remedies first, or must show why domestic redress is not a feasible solution in the circumstances of the particular case.[56]

To address the concern that environmental rights terminology, such as a "clean" or "safe" environment, is simply too nebulous to be justiciable, supporters of this approach draw attention to other human rights terms, like self-determination, which were originally just as imprecise. They maintain that, through public consciousness, these terms can be given meanings in a concrete social and historical context.[57] Similarly, in response to concerns of potential conflict between environmental rights and the right to development, champions of the human rights approach assert that the construction of development and environmental protection as mutually exclusive is artificial and damaging. Human development, they argue, is greatly dependent on the existence of natural resources that can be transformed into basic goods.[58] These, in turn, are used to build more sophisticated capacities. In this way, development and preservation of the environment become tightly linked, and the "short-term benefits reaped from environmental degradation pale in comparison to the long-term impacts of stripping the environment of its productive capacity."[59]

Confident of the strengths of a rights-based approach to environmental protection, advocates push for the creation of an enforcement mechanism unique to environmental rights – in short, an international environmental court. At present, there is no international judicial mechanism capable of assessing environmental damages or fashioning remedies to compensate for transborder harm.[60] While the International Court of Justice (the "ICJ") did set up a special chamber for environmental matters in July 1993, it has yet to deal with a purely environmental conflict.[61] The ICJ is also limited to hearing actions submitted by states.[62] The concept of an international environmental court is not a recent invention. In 1989, the International Congress on Efficient Environmental Law and Setting Up an International Court for the Environment Within the United Nations (the

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[54] Dommen, *supra* note 23 at 3.
[55] *Ibid.*
[56] Shelton, *supra* note 2 at 113-114.
[57] *Ibid.* at 135.
[58] Rogge, *supra* note 9 at 34.
[59] Popovic, "Commentary," *supra* note 1 at 488.
[60] Kenneth F. McCallion & H. Rajan Sharma, "Environmental Justice Without Borders: The Need for an International Court of the Environment to Protect Fundamental Environmental Rights" (2000) 32:3 Geo. Wash. J. of Int'l L. and Economics 351 at 352.
[61] Michael Faure & Jürgen Lefevere, "Compliance with International Environmental Agreements" in Vig & Axelrod, *supra* note 49, 138 at 151. For the chamber to be used, one state would need to file a claim against another, playing essentially a whistle-blower role. Where environmental issues are concerned, the probability of this is quite small, since most states are reluctant to expose their own domestic environmental practices to international scrutiny.
[62] McCallion & Sharma, *supra* note 60 at 359.

"International Congress") recommended the approval of an international convention establishing a human right to the environment. At the same time, the International Congress set out guidelines and procedures for an international court to which individuals and groups could bring environmental claims.[63] The International Congress expressly articulated the need to create a separate and independent court:

> *[W]e must have an International Court for the Environment that draws moral and legal strength not from countries, but from individuals who are the real holders of a universal human right.... They must have a court at their disposal that has the power to impose itself on all individuals and countries because it judges in the name of the international community–i.e., for the whole of mankind today and for future generations.*[64]

If this course of action is followed, the groundwork has effectively already been laid. An international environmental court would consolidate all the benefits cited by supporters of the rights-based approach to environmental protection, providing redress for individuals in an internationally sanctioned setting.

Critics of the Human Rights Approach

Critics of the rights-based approach to environmental protection have several misgivings. The first concern stems from the nature of the rights system. Even at its best, it remains largely dependent on the will of states, which must not only sign the rights instruments, but which are also primarily responsible for ensuring that rights are protected according to internationally established standards. This puts a lot of faith in states' willingness to cooperate. Critics caution that if the international agenda is at odds with domestic priorities, state cooperation may not materialize.[65]

Another criticism relates to the conviction that proliferation of new rights will devalue those already in existence.[66] Since both the human rights and the general environmental fields currently experience significant treaty congestion problems,[67] this may be a very real fear. Ecosystem-minded critics fear that coupling environmental protection with human rights will result in a merely "interpreted" right which would "carry neither the clout nor the binding legal status necessary for the effective enforcement and implementation of environmental programs and standards."[68] In reality though, these critics are far less numerous than those whose mainstay argument is the seemingly ageless "trees versus jobs" dichotomy.

For these critics, human rights and environmental protection are fundamentally conflicting values. The main platform for the assertion is the right to economic development. Essentially, this argument constructs the interaction between economic development and environmental rights as a zero-sum game. The consequence of this construction is usually to draw lines between developed and developing countries, with the latter questioning all environmental initiatives as the former's attempts to limit economic development and maintain the existing status quo of dependency.[69] Recognizing environmental rights would only serve to inflame the conflict further and,

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[63] Downs, *supra* note 4 at 373.
[64] *Ibid.*
[65] Schreurs & Economy, *supra* note 36 at 8.
[66] Shelton, *supra* note 2 at 121.
[67] It is estimated that more than 900 international legal instruments include one or more provisions concerned with the environment. Human rights provisions are even more numerous. See Weiss, *supra* note 49 at 111.
[68] Downs, *supra* note 4 at 378.
[69] Norman J. Vig, "Introduction: Governing the International Environment" in Vig & Axelrod, *supra* note 49, 1 at 6.

in their opinion, since the conflict cannot be reconciled, it should not be permitted.

Among numerous other criticisms of the rights-based approach are persistent concerns about state sovereignty and compliance. Present human rights schemes only charge states with responsibility for persons within and subject to state jurisdiction. Environmental rights issues that transcend borders would require a broad extension of state liability,[70] which will most certainly be unpopular. Related to this, there is no current articulation of a compliance scheme for environmental rights. A right whose violation incurs no consequence is effectively without substance, since there is little incentive to promote respect.[71] Ensuring compliance with environmental rights may be further complicated by the extent to which realization requires behavioural change, which may be costly both to individuals and the state.[72] If compliance cannot be ensured or enforced, the right is an empty promise.

Critics of the rights-based approach to environmental protection have diverse angles of concern, but they would nonetheless all maintain that international recognition of environmental rights would prove problematic beyond any possible worth.

Variations on the Human Rights Approach

Some commentators see the value in recognizing environmental rights, but would advocate different methods from those used in the *Draft Declaration*. Two variations on the international human rights approach are frequently proposed, and both warrant more detailed consideration than can be presented in this brief summary. Unfortunately, even a cursory inspection of either "alternative" reveals a perhaps inevitable inability to address the same shortcomings of the human rights approach that detract from the promise of the *Draft Declaration*.

The first variation is a systems-based approach to environmental protection. Arguing that the rights-based approach is inherently utilitarian, since it is premised on "human" rights, proponents of a systems-based approach believe that an emphasis on the connections between constituent parts of an integrated whole would make it possible to see the protection of nature for nature's sake as ultimately beneficial for humans.[73] Essentially, a systems-based approach advocates adopting a different unit of reference. Rather than focusing on an individual human to whom environmental human rights should accrue, the focus shifts to the larger ecosystem in which the human is situated.

Viewed in this context, advocates argue that it becomes impossible to support the false and damaging dichotomy between human interests and the intrinsic value of nature. Each individual element of the ecosystem must be valued and protected as essential to the functioning of the whole, which in turn creates the critical foundation for human survival.[74] In addition, each ecosystem is itself part of a larger whole, and the concept can be abstracted to encompass the entire planet, if not the known universe. Proponents believe that by shifting the focus to a level of abstraction where the connection between environmental and human functioning may be open to less skepticism, they can prevent individual ecosystem components from being isolated in terms of their particular utility to humans.[75] While in the short run this may seem like protection of nature for the sake of the continued functioning of a natural system, the ultimate justification is still couched in terms of subsequent benefit for

[70] Shelton, *supra* note 2 at 134.
[71] Taylor, *supra* note 3 at 351.
[72] Faure & Lefevere, *supra* note 61 at 144.
[73] Shelton, *supra* note 2 at 110.
[74] *Ibid.*
[75] *Ibid.*

humans. What happens if humans somehow manage to completely circumvent their dependencies on the natural world? Without an ultimate justification that implicates humans, is there a residual rationale for protecting the system, at any level? Regrettably, since the systems-based approach does not create this independent rationale, it is unclear what this variation actually adds.

The second variation, which uses regional or domestic rather than international mechanisms, gives a more positive first impression. At the domestic level, there is already a considerable basis on which to build. Virtually every national constitution enacted since 1970 addresses environmental issues at some level.[76] The Brazilian Constitution, for example, includes the following provision: "[e]veryone has the right to an ecologically balanced environment, which is a public good for the people's use, and is essential for a healthy life. The Government and the community have a duty to defend and to preserve the environment for present and future generations."[77]

Supporters of this shift in scope and application submit that regional systems, like the European Union, are a better focus for efforts to establish broader consistency, as they generally possess a common tradition and common interests.[78] Bargaining and debates at the domestic or regional level usually involve a smaller group of participants, many of whom will share knowledge of both the areas concerned and the interests at stake. This familiarity with the issues may give regional and domestic processes a head start and a better foundation from which to proceed. Both national and regional mechanisms may also contribute to the "bottom-up" creation of international law: as recognition of environmental rights grows at the lower levels, it motivates the creation of a general principle in international law.[79]

Beyond the first impression, however, the second variation suffers a similar fate to that of the first. There is little consideration of the environment outside the sphere of its utility for humans. The Brazilian Constitution, praised for its creation of a positive duty to protect the environment, bluntly characterizes the environment as a commodity item to be preserved for the use of future generations. The proposed strengths of this approach may actually prove to be greater weaknesses. For example, a purported familiarity with regional or domestic issues may inhibit or prevent honest dialogue among participants. Rather than engaging in a discussion to clarify and target real concerns, participants in a regional or domestic process may instead proceed on the basis of their perceived understanding, which may not reflect current positions. In addition, regional systems may encourage the creation of environmental standards based on the lowest "common denominator,"[80] since that may be the only basis on which agreement can be reached. Decentralization of environmental issues to regional and national systems also detracts significantly from the ability to secure a consistent and strong commitment to action. In effect, with this second variation, many of the problems associated with the rights-based approach simply reappear on a smaller scale.

The longer the international community waits to act on environmental rights, more variations will develop. An unfortunate side-effect that flows from the

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[76] Taylor, *supra* note 3 at 350.

[77] *Ibid.*

[78] W. Paul Gormley, *Human Rights and Environment: The Need for International Co-operation* (Leyden: A.W. Sijthoff, 1976).

[79] Popovic, "Commentary," *supra* note 1 at 603.

[80] Angela Liberatore, "The European Union: Bridging Domestic and International Environmental Policy-making" in Schreurs & Economy, *supra* note 36, 188 at 206.

creation of "camps" to support these "alternatives" is the development of a false but increasingly powerful sense of distance between people who began with a common interest in the environment. It can be argued that this distance will make it even more difficult to secure a commitment to a common goal of environmental protection. While the majority of rumblings are currently at the grassroots and NGO level, further delay may result in action by broader-based coalitions whose political influence – and often, therefore, whose ideological isolation – is correspondingly increased.

Conclusion

In concluding this discussion, two core concepts are worth brief exploration: anthropocentrism and eco-centrism. These two value sets are at the heart of the debate about whether the human rights framework is an appropriate forum in which to discuss environmental concerns. Despite potential benefits that may accrue from a human rights approach to environmental issues, the concept of *rights* inherently reinforces the idea that the environment is composed purely of natural resources that "exist only for human benefit and have no intrinsic worth."[81] The idea of "greening" the international human rights sphere essentially constructs a relationship of dependency between human rights and the environment, annulling the environment's independent value. This approach also narrows the possible scope of environmental protection to fit within the human rights framework. From this anthropocentric position, it may be impossible to encourage the sacrifice in current lifestyles needed to ensure environmental conservation.

With this in mind, the environment – and, ultimately, humankind as a result – may be much better served by an eco-centric approach that moves beyond utilitarian values. In the last half century, we have seen the proliferation of human rights and other international treaties with ambitions set so high as to basically isolate them from the state behaviour they were designed to influence.[82] If the continued functioning of the environment is really a priority, and it should be, perhaps it is better addressed by a more grassroots approach. At that level, people seem more capable, and perhaps most importantly, more *willing* to think beyond themselves, in order to shift the focus away from humans and toward broader goals. From this perspective, it may prove possible to re-establish belief in the independent value of the environment. If this belief can be nurtured to critical mass, perhaps it can eventually encourage explicit, international commitment to protecting the intrinsic value of the natural environment. An effective and sustainable way of ensuring a healthy environment may surface once attempts to mold environmental priorities so that they fit into other "boxes" – whether those are boxes for human rights or otherwise – are abandoned. Only then can energies be refocused on giving environmental concerns recognition on environmental terms. The global community's understanding of the context in which rights are exercised must be broadened to include the context of the natural environment. Perhaps in this broadened context, human rights can be exercised in a way that affords respect to both human and other living beings in this shared world.

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[81] Taylor, *supra* note 3 at 351.

[82] Henry J. Steiner, "Preface" in *Human Rights at Harvard: Interdisciplinary Faculty Perspectives on the Human Rights Movement - Proceedings of the Second Symposium.* (Cambridge, MA: University Committee on Human Rights Studies, 1999) at 7.

Mining for Legislative Gold after Bre-X: A General Commentary on the Use of Class Actions for Fraud in the Secondary Market

*by Violetta Kokolus**

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Introduction

Securities are a key component of the modern market economy. Effective functioning of the securities market is based on the establishment of good faith and trust between investors and public companies. Consequently, any distortion of the truth by companies or their agents to the investing public has the potential to undermine the functioning of the securities market. To maintain economic health, countries require effective legal mechanisms to deal with cases of securities fraud; these legal mechanisms aim to minimize the damage incurred by investors, deter future fraud, and maintain the legitimacy of securities as an economic tool.

The collapse of the Canadian mining company Bre-X Minerals Ltd. ("Bre-X") left Canada with the unenviable historical distinction of being one of the nations whose regulatory system failed to prevent the "biggest gold-mining fraud in history."[1] In its aftermath, the Canadian legal system was left to clean up the wreckage caused by a case of securities fraud on an unprecedented scale.

Bre-X, a Calgary-based exploration company, was incorporated in 1988.[2] In January 1996, Bre-X presented the world with information claiming a gold deposit at Busang in East Kalimantan, Indonesia, with an estimated yield of 30 million ounces[3] worth approximately US$11.9 billion.[4] Based on this information and other representations made by the company and its directors, Bre-X was transformed from a penny stock to one of the hottest securities in Canada, rising to more than $200 a share, splitting 10:1, and climbing to an extraordinary market capitalization of US$4.5 billion.[5]

What appeared to be one of the greatest finds in mining history proved to be a fraud in 1997.[6] On March 26, 1997 Freeport McMoran Copper & Gold Inc. ("Freeport") found "insignificant amounts of gold" in seven core samples obtained from areas that Bre-X claimed had high concentrations of gold.[7] An independent audit was later conducted by Strathcona Minerals Services Ltd. ("Strathcona"); this audit provided clear evidence of fraud and specifically indicated that the Bre-X samples contained gold that

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[1] Howard Schneider "A Lode of Lies: How Bre-X Fooled Everyone Amid Tales of Gold, Investors and Regulators in U.S., Canada Didn't Dig Deep Enough" *The Washington Post* (18 May 1997) H1; Peter Waldman & Jay Solomon "Gold Fraud Recipe? Bre-X Workers Saw Mine Samples Mixed" *The Wall Street Journal* (6 May 1997) A1.

[2] Bre-X Minerals Ltd, CANCORP Company Number 0200845. (22 February 2002) (Lexis, CANCORP Plus Database).

[3] *Ibid.*

[4] "The Markets" *The Globe and Mail* (16 January 1996) B1.

[5] "Chronology of Indonesia's huge Busang gold find" *Reuters* (18 February 1997) (Global NewsBank); Solange De Santis & Mark Heinzl "Canada Recommends Tougher Rules for Mining Firms After Bre-X Fiasco" *The Wall Street Journal* (9 June 1998) C22.

[6] Mark Heinzl "Bre-X, Confirming Worst Fears, Says Busang Contains Virtually No Gold" *The Wall Street Journal* (5 May 1997) C19.

[7] *Ibid.*

did not originate from Busang.[8] In other words, someone had "doped" the core samples with gold from another region.

Billions of dollars evaporated as Bre-X stock plummeted in value after Freeport's initial findings and Strathcona's clear evidence of Bre-X's fraud – within a week of Strathcona's report, Bre-X was delisted from the Toronto Stock Exchange.[9]

Dealing with the Bre-X aftermath was a test of the securities laws and regulations within both Canada and the United States, and exposed areas that required reform in the Canadian framework. This paper briefly examines the different approaches taken by the American and Canadian legal systems to deceptive practices in the secondary market. It also raises questions about civil liability for secondary market misrepresentations and the use of class actions in securities suits. The outcome of the findings is that there is need for legislative reform to protect secondary market participants. Legislative reform has commenced in Ontario following the passage of Bill 198.[10] As well, Saskatchewan has included a statutory civil liability provision in its *Securities Act* for verbal misrepresentations.[11]

As a final introductory note, the Canadian courts have certified the class action against Bresea Resources Ltd., and Bre-X and its insiders, but not against the brokerage firms and analysts, or engineering companies.[12] There are no appeals pending; the Supreme Court of Canada refused leave to appeal on October 18, 2001.[13]

Background – Securities and Class Actions

The Importance of Securities Regulation and Enforcement

To achieve an efficient capital market and attract investment in the market, a government needs to have a strong regulatory framework in place to protect investors from unfair, improper, and fraudulent practices. The 1997 paper "Legal Determinants of External Finance" concluded that "countries with poorer investor protection, measured by both the character of legal rules and the quality of law enforcement, have smaller and narrower capital markets."[14] Moreover, a 1997 paper entitled "A Survey of Corporate Governance" recognized, *inter alia*, the relevance of the legal protection of investors to corporate governance.[15]

Rationale for the use of Class Actions

Secondary sales of shares in the public market normally involve a number of stakeholders. Class actions can effectively consolidate the common grievances of these stakeholders with two principal procedural benefits: an increase in "judicial economy" and an improvement of "access to justice."[16] Judicial economy is the efficiency that the court system and individuals gain by consolidating a large number of claims into

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[8] Bertrand Marotte "'The biggest mining fraud ever': Bre-X mine contains no gold 'of economic interest,' report says" *The Ottawa Citizen* (5 May 1997) A1.

[9] *Supra* note 5; Mark Heinzl & Larry M. Greenberg "Bre-X Stock Collapses 97% to Pennies As Heavy Trading Swamps Exchange" *The Wall Street Journal* (7 May 1997) A3; Mark Heinzl "Bre-X Shares Are Delisted in Toronto As Police Map Their Probe of Gold Claim" *The Wall Street Journal* (8 May 1997) A4.

[10] Bill 198, *Keeping the Promise for a Strong Economy Act (Budget Measures)*, 2002, 3rd Sess., 37th Parl., Ontario, 2002, s. 185 [Bill 198] (Part XXVI); Government of Ontario, News Release, "Eves government takes action to protect public confidence" (9 December 2002).

[11] *Securities Act*, S.S. 1988, S-42.2, s.138.2.

[12] *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236, 196 D.L.R. (4th) 344 (C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 660 (QL).

[13] *Ibid.*

[14] Rafael LaPorta et al. (1997) Legal Determinants of External Finance. *Journal of Finance*, 52(3), 1131-1150 at 1131.

[15] Andrei Shleifer & Robert W. Vishny. (1997) A Survey of Corporate Governance. *Journal of Finance*, 52(2), 737-783.

[16] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46 at paras. 27-28 [*Western* cited to S.C.R.].

one claim, thereby saving time, effort, and cost for all parties involved. By jointly entering into a class action, plaintiffs also achieve improved access to justice. Multiple economic, social, and/or psychological barriers often deter plaintiffs from contemplating legal action; class actions increase the ability of plaintiffs to apply to the courts by distributing any of these potential barriers across the group of plaintiffs. The third and final benefit of class actions is that they can constitute a powerful force in deterring wrongdoing.[17]

It can be argued that the only feasible method for individual investors to obtain a remedy for misrepresentations in the secondary market sale of shares is by class actions. Vern Krishna, referring to Bre-X, states:

> [I]n theory, investors can bring individual legal actions against the broker-dealers on the basis that they were deliberately or negligently misled by the dealers and suffered substantial financial losses. Any such lawsuit would require substantial financing and would likely drag on for years. Given the ultimate uncertainty of litigation, the protracted timetable, and substantial costs, which would include a demand by the broker-dealers for security for costs, stand-alone lawsuits are a theoretical and hollow remedy for anyone other than large institutions ....The decision of the Superior Court of Justice not to certify the class effectively immunizes the broker-dealers from their participation in the largest ever securities fraud in Canada.[18]

The Canadian Legal Framework

In Canada, class actions can be brought either as representative actions or pursuant to provincial class proceedings acts. The Bre-X class action was certified under Ontario's *Class Proceedings Act* ("*CPA*").[19] The section of significance to class action certification in Ontario is s. 5(1), which states:

> 5. (1) The court shall certify a class proceeding on a motion under section 2, 3, or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the

[17] *Western, ibid.* at para. 29.

[18] Vern Krishna, "Insider Trading" (1998-99) 9 Can. Curr. Tax 106 at 106-107. Costs are a true risk and were seriously considered by the Canadian Bre-X plaintiffs in their decision to dismiss Nesbitt Burns Inc. and Egizio Bianchini from the proposed class action. Sandra Rubin of *The National Post* writes: "Harvey Strosberg, leading the Canadian class action, said the arrangement means his lead plaintiffs no longer have to worry about being hit with a huge bill for costs should their case against Nesbitt fail. 'The decision was a difficult one, but it removes the risks of litigation... and will allow the remaining action to be more aggressively pursued.'" Sandra Rubin, "Nesbitt off the hook in Bre-X class action: To pay costs" *The National Post* (13 November 1999) D3.

[19] S.O. 1992, c.6.

> common issues for the class, an interest in conflict with the interests of the other class members.[20]

The above criteria must be met for a class action to be certified. It should be noted that the *CPA* does not create any new causes of action. The cause of action must be found in the common law or under statute but, as will be discussed, some causes of action function better as class actions than others. Generally, to be certified as a class action, a cause of action with more common issues and fewer issues to be considered individually is preferable.

Provinces regulate securities by their respective securities commissions and statutes.[21] In terms of civil remedies, provincial securities statutes and some federal statutes, such as the *Canada Business Corporations Act*[22] provide statutory causes of action to individuals in particular circumstances. For instance, under Ontario's *Securities Act*, misrepresentations made in a prospectus (the primary market) will trigger civil liability under the following provision:

> 130. (1) Where a prospectus together with any amendment to the prospectus contains a misrepresentation, a purchaser who purchases a security offered thereby during the period of distribution or distribution to the public shall be deemed to have relied on such misrepresentation if it was a misrepresentation at the time of purchase and has a right of action for damages against,
>
> (a) the issuer or a selling security holder on whose behalf the distribution is made....[23]

To date, except in Saskatchewan, there is no similar statutory civil remedy in force for misrepresentations made in the secondary market.[24] However, it is expected that Ontario will amend its *Securities Act*[25] to add a statutory civil liability remedy for misrepresentations made in the secondary market.[26] This amendment, introduced under Bill 198, received Royal Assent on December 9, 2002, and it will come into force on a day to be named by proclamation of the Lieutenant Governor.[27]

Other statutes, such as the federal *Competition Act*, can also give rise to a cause of action for shareholders.[28] The relevant parts of the *Competition Act* are s. 52(1) (offences in relation to competition: false or misleading representations) and s. 36(1) (recovery of damages for the breach of any provision in Part VI including s. 52(1)) state:

> 36. (1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI,...
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of

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[20] *Ibid.*
[21] See e.g. *Securities Act*, R.S.A 2000, c. S-4; *Securities Act*, R.S.B.C. 1996, c.418; *Securities Act*, R.S.O. 1990 c.S.5 [*Ontario Securities Act*].
[22] R.S.C. 1985, c.C-44.
[23] *Ontario Securities Act, supra* note 21.
[24] *Supra* note 11.
[25] *Ontario Securities Act, supra* note 21.
[26] *Supra* note 10.
[27] *Ibid.*
[28] R.S.C. 1985, c.C-34.

proceedings under this section....

> 52. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect....[29]

Another option for shareholders is to rely on the common law to provide a basis for liability through the use of the tort of conspiracy, negligent misrepresentation, and/or fraudulent misrepresentation. However, there are significant individual issues, such as proving reliance in a misrepresentation, which may bar an action from being certified. In *Arsene v. Jacobs*, Riley J. quotes Lord Chelmsford's decision in *Hallows v. Fernie* (1868), L.R. 3 Ch. 467 where the court decided to bar a class action based on fraud:

> It was held, *inter alia*, that such a suit could not be maintained by the plaintiff on behalf of all the other shareholders.... On this point Lord Chelmsford, L.C., states at p. 471:
>
> > The Plaintiff's case being founded on alleged misrepresentations he could not properly make himself the representative of the other shareholders and file this bill on their behalf, as well as his own. For the case of each person who has been deceived by a misrepresentation is peculiar to himself, and must depend upon its own circumstances....[30]

The American Legal Framework

In the U.S., Rule 23 of the *Federal Rules of Civil Procedure* sets out the requirements for a class action; the general criteria (i.e., numerosity, commonality, typicality, and adequacy) for a class action are set out in Rule 23(a) and (b):

> Rule 23. Class Actions
>
> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (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,

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[29] *Ibid.*

[30] *Arsene v. Jacobs* (1963), 37 D.L.R. (2d) 254 at 256 (Alta. S.C.), aff'd (1964), 44 D.L.R. (2d) 487 (Alta. S.C. (A.D.)).

> 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....[31]

These criteria, although similar to the Canadian ones, are generally more restrictive.

The U.S. has an approach to civil remedies in the securities arena that is distinct from Canada's approach. Securities are regulated at the federal and state level. The statute centrally important to this paper is the *Securities Exchange Act of 1934* (*"1934 Act"*).[32] In addition to the federal law, there are the common law claims of negligent and fraudulent misrepresentation that are applied using the applicable state law. The individual states also have securities regulations (also referred to as "Blue Sky Laws").

The *1934 Act* regulates trades of securities subsequent to their initial distribution "to insure the maintenance of fair and honest markets."[33] The *1934 Act* enables the Securities and Exchange Commission ("SEC") to create "such rules and regulations as the Commission [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors...."[34] The SEC promulgated Rule 10b-5 under s. 10(b) of the *1934 Act*; Rule 10b-5 states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[35]

These provisions effectively create a federal civil statutory cause of action for wrongdoing in relation to secondary market misconduct, something that is not present in Canada.

Furthermore, reliance can be presumed in Rule 10b-5 cases. This permits the representative plaintiffs to overcome the often difficult and individual element of reliance in a class action. The presumption arises from the "fraud on the market" theory.

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[31] FED. R. CIV. P. 23. (U.S.).
[32] 15 U.S.C. § 78a (2002).
[33] *Ibid.* at § 78b.
[34] *Ibid.* at § 78j(b).
[35] 17 C.F.R. § 240.10b-5 (2002).

The theory was explained by the Supreme Court in *Basic Inc. v. Levinson*:

> We turn to the question of reliance and the fraud-on-the-market theory. Succinctly put:
>
> "The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business.... Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.... The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations." Peil v. Speiser, 806 F.2d 1154, 1160-1161 (CA3 1986).
>
> ... Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.[36]

Therefore, based on "fraud on the market," security prices reflect the market's collective interpretation of the public information. Hence, a single investor's security portfolio will be affected by misrepresentations even if that individual investor does not access or comprehend the information because an efficient market as a whole will access, comprehend, and act on the information. To apply this theory, as stated in *Newberg on Class Actions*, five required elements must be present:

> (1) that the defendants made public misrepresentations, (2) that the misrepresentations were material, (3) that the stock was traded on an efficient market, (4) that the misrepresentations would induce a reasonable, relying investor to misjudge the value of the stock, and (5) that the plaintiff traded in the stock between the time the misrepresentations were made and the time the truth was revealed.[37]

The combination of the "fraud on the market" theory and the statutory cause of action under Rule 10b-5 has created an effective system for bringing securities class actions forward. In fact, some say it is too effective.[38] The "fraud on the market" theory removes one key individual issue – reliance. Without the theory, each individual would likely have to establish that she relied on the specific piece of information. With the "fraud on the market theory," this is unnecessary, and the case focuses on the common issues surrounding the conduct of the issuer.

From Bre-X to Bill 198

When the Bre-X scandal broke, the case law and statutory instruments made it clear that it would be difficult for investors who purchased shares in the secondary market to receive any material remedy. In the Bre-X class action, the only action certified was the claim against Bresea Resources Ltd., and Bre-X and its insiders.[39] Despite this

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[36] 99 L. Ed. 2d at 215-218 (S.C. 1988).

[37] Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, 7 Newberg on Class Actions § 22:61 (4th ed.) (January 2003) (WL).

[38] Janet C. Alexander, "Do the Merits Matter? A Study of Settlements in Securities Class Actions" (1991) 43 Stan. L. Rev. 497; James Bohn & Stephen Choi, "Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions" (1996) 144 U. Pa. L. Rev. 903; Elliot J. Weiss & John S. Beckerman, "Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions" (1995) 104 Yale L.J. 2053.

[39] *Supra* note 12.

result, Winkler J. was correct in not applying the "fraud on the market" theory in the Bre-X case.[40] This may have supported certification of the class action against the brokers but simply adopting the theory could be the legal equivalent of opening Pandora's Box (as the proper framework and background necessary for its application are absent in Canada). The inability of the judiciary to provide relief made it apparent that there was a legislative gap that deprives protection to investors in the secondary market for securities.

In light of the Bre-X decision it is clear that Bill 198, the proposed amendment to Ontario's *Securities Act*, is a welcome addition to Ontario's legislation.[41] Under Bill 198, Ontario's *Securities Act* will have a statutory civil liability remedy for misrepresentations in the secondary market, further protecting the interests of investors and enhancing their confidence in the fairness of the system – two ingredients that are essential to any successful economy.[42]

Prior to the introduction of Bill 198, reports by the Canadian Securities Administrators ("CSA Report") and the Toronto Stock Exchange ("TSE Report") also recommended amendments to securities legislation that would add a statutory civil liability remedy for misrepresentations in the secondary market.[43] The proposed amendment in Bill 198 generally follows the recommendations of the CSA Report. The key features of the proposed amendments, as listed in the executive summary of the CSA Report, are summarized as follows:

a) Scope of remedy – Secondary market investors will have a limited right of action to sue;
b) Reliance – Investors will not have to prove their reliance on the misrepresentation;
c) Standard of proof and potential defences –Various defences will be made available to defendants based on their responsibility for disclosure;
d) Liability cap – The liability cap will vary depending on the category of the defendant;
e) National application of liability cap;
f) Screening mechanism – The plaintiffs must obtain leave of the court to commence an action. The court will consider whether the claim was brought in good faith, and has a reasonable possibility of success;
g) Court approval of settlement agreements;
h) Proportionate liability – An exception is made for misrepresentations made knowingly or failure to make timely disclosure, in such situations the liability will be joint and several.[44]

The CSA Report also discussed the issues regarding the belief that a statutory civil remedy would encourage "strike suits."[45] The CSA Report referred to the CSA Civil Remedies Committee who "in 1998 had been largely persuaded by the Allen Report's [TSE Report's] conclusion that the litigation environment in Canada differs sufficiently from that in the United States that strike suits are not likely to be a problem in Canada."[46]

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[40] *Carom v. Bre-X Minerals Ltd.* (1998), 41 O.R. (3d) 780, 41 B.L.R. (2d) 246 (Gen. Div.).
[41] *Ontario Securities Act*, *supra* note 21; Bill 198, *supra* note 10.
[42] *Ibid.*
[43] Canadian Securities Administrators, "Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of 'Material Fact' and 'Material Change'" (2000) 23 O.S.C. Bull. 7383 [CSA]; Committee on Corporate Disclosure (Toronto Stock Exchange), *Responsible Corporate Disclosure: A Search for Balance: Final Report* (Toronto: Toronto Stock Exchange, 1997) [TSE].
[44] CSA, *ibid.* at 7383-7384.
[45] See also *Epstein v. First Marathon Inc.* (2000), 2 B.L.R. (3d) 30, 41 C.P.C. (4th) 159 (Ont. Sup. Ct.).
[46] CSA, *supra* note 43 at 7389.

The TSE Report stated that, "the combination of statutory civil liability, as proposed, with class actions and Canadian procedural rules would not result in a flood of lawsuits such as experienced in the U.S."[47] The TSE Report highlighted differences regarding the use of jury trials, cost rules, and Rule 10b-5 generally in comparison to the rules as set out in the proposed statutory provision.[48] As discussed, the CSA Report also recommends court approval of settlement agreements and a screening provision in order to discourage the filing of frivolous actions. Through the use of reasonable safeguards, these proposed amendments strike the right balance between protecting investors and businesses.

Conclusion

We have seen firsthand that neither the common law nor legislation sufficiently protects the rights of secondary investors. Legislative change, as proposed by the CSA Report and embodied in Bill 198, will act to correct this flaw.[49] Without this change, there will be few remedies for investors wronged in the secondary market, the deterrence of wrongdoing will not be significant, and confidence in the securities markets in Canada will suffer, harming our ability to sustain a healthy economy and to compete internationally.

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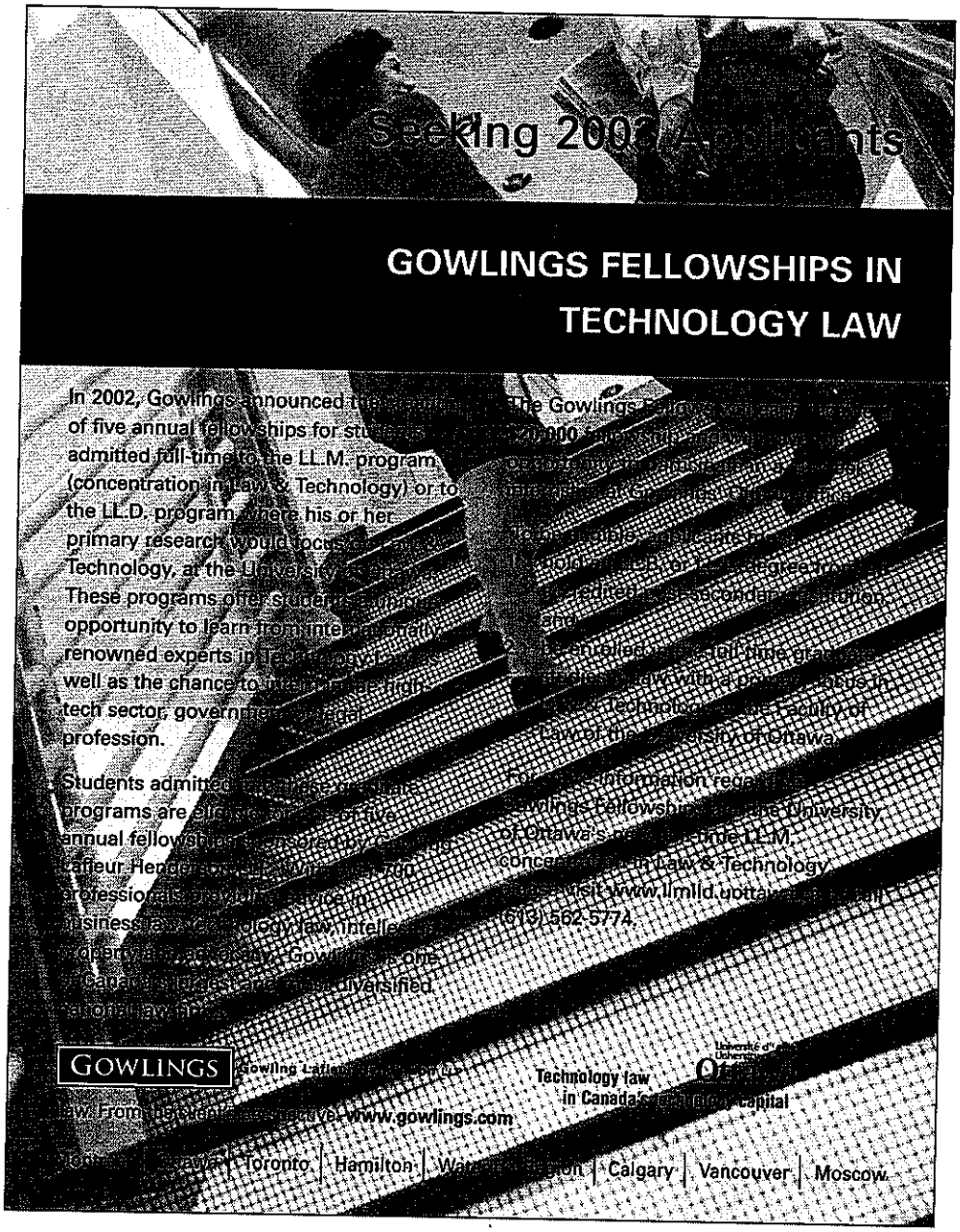
[47] TSE, *supra* note 43 at 26.
[48] TSE, *supra* note 43 at 27.
[49] CSA, *supra* note 43; Bill 198, *supra* note 10.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