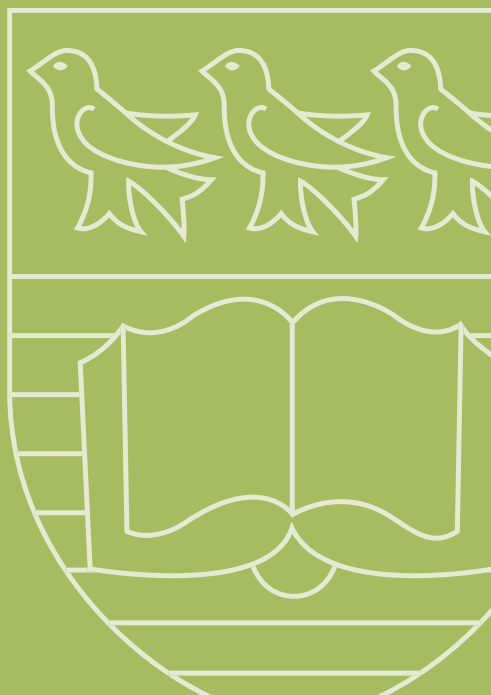
University of Victoria | Law

APPEAL

REVIEW OF CURRENT LAW AND LAW REFORM

ARTICLES



VOLUME 16 ■ 2011

APPEAL

REVIEW OF CURRENT LAW AND LAW REFORM

VOLUME 16 ▪ 2011

ISSN 1205-612X (Print)
ISSN 1925-4938 (Online)

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

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

Telephone: (250) 721-8198
Fax: (250) 721-6390
appeal@uvic.ca

http://appeal.law.uvic.ca

Appeal publishes the work of law students, recent graduates, articling students and students pursuing undergraduate or graduate work in law-related disciplines. *Appeal* endeavours to publish articles that are timely, relevant and which address possibilities for Canadian law reform

SUBMISSIONS

Appeal invites the submission of articles, commentaries, essays and book reviews. *Appeal* does not consider articles that are simultaneously under consideration for publication elsewhere. For complete submission guidelines and information, please visit our website at http://appeal.law.uvic.ca or email the Editorial Board at appeal@uvic.ca.

SUBSCRIPTIONS

Appeal is published once annually. Annual subscriptions to *Appeal* are $20. Student subscriptions are $10. Please direct any subscription inquires to appeal@uvic.ca.

ADVERTISING AND DONATIONS

Appeal is grateful to the Law Society of British Columbia, the University of Victoria Faculty of Law and its patrons and sponsors for their ongoing encouragement, support and assistance. Advertising rates are available upon request. All advertising correspondence should be directed to appeal@uvic.ca. For more information, please visit our website at http://appeal.uvic.ca.

PRODUCTION TEAM

SPECIAL THANKS

GOLD PATRON

Lawson Lundell LLP
Law Foundation of BC

SILVER PATRON

Miller Thomson LLP

BRONZE PATRONS

Continuing Legal Education
Davis LLP
UVIC Law Students Society

SPONSORS

Alexander, Holburn, Beaudin & Lang LLP
Blake, Cassels & Graydon LLP
Bull, Housser & Tupper LLP
Continuing Legal Education BC
Farris, Vaughan, Wills & Murphy LLP
McCarthy Tétrault LLP

ADMINISTRATION

Dean Donna Greschner
Krista Sheppard
Mary McQueen

SPECIAL THANKS TO OUR SUPPORTERS

The 2010/2011 *Appeal* Editorial Board would like to thank Professors Ted McDorman and Neil Campbell for their help and guidance in producing this Volume. The Board would also like to thank Krista Sheppard for her assistance in development and sponsorship. And finally, the Board would like to thank the entire University of Victoria, Faculty of Law community for its ongoing support of *Appeal*.

TABLE OF CONTENTS

Bull, Housser & Tupper gives law students from across Canada the opportunity to excel in an environment combining challenging legal work and Vancouver's unmatched natural splendour.

Learn more at **www.bhtstudent.com**

B H & T

Bull, Housser & Tupper LLP

PREFACE

by Mark Witten and Sarah Runyon

This year's *Appeal* Board came onto the scene bursting with fresh ideas and new visions for *Appeal*. Why do we publish only student work? Why is the journal green? Nothing was sacred; we wanted to change everything. Rebrand the journal, non-student authors, more online content, potential partnerships, the list went on.

Yet as the year progressed a maturation process ensued. We began to ask: is there really a need for another traditional law review? Probably not. Make no mistake, we didn't settle for the status quo. We have strived to improve *Appeal* in an amalgam of ways. The transition to open access online publishing is almost complete, and a modified format remains in the works. However, in the end, we settled upon a more respectful change trajectory. We came to see *Appeal*'s evolution over the last 16 years — from a glossy magazine to a robust academic journal — as an invaluable inheritance shaped by countless contributors. Slowly but surely we returned to our core: edgy, quality, student scholarship.

We also came to appreciate that there are immense advantages to publishing student work. To begin, as the scholarship in this volume attests, there is no shortage of powerful student writing. Without *Appeal*, some of these works would be damned to languish eternally on long forgotten hard-drives. And this actually leads to another advantage. Student authors recognize that opportunities to publish their work are rare, and as a result, they are (for the most part) a joy to work with. Our edits were received with grace and our suggestions with enthusiasm. But perhaps the most important advantage of student scholarship is that student writing epitomizes academic freedom. Several of our authors are well aware that their papers may receive sour receptions in their respective legal communities. Yet unconcerned with politics, research funding, or tenure, they were free to voice their thoughts — unfiltered, uninhibited, uncensored.

And our authors' voices will be heard. Each of these articles will be read, studied, and cited. Every month requests for reproduction drop into our inbox, and a steady stream of royalties trickle in. A quick Google Scholar search reveals that, amazingly, our student authors are cited in academic journals around the world.

But enough about our talented authors lest we begin to swell their heads. Some thank yous are in order. This volume of *Appeal* would not have been possible without the dedicated support of our generous sponsors, faculty supervisors, volunteers, external reviewers, past boards, and the University of Victoria, Faculty of Law. We are very grateful for every contribution we received, whether money, experience, or time.

It has been a great honour and a tremendous experience to edit this year's *Appeal*. Though you now hold in your hands a sleek, polished, finished product, we can assure you that the production process was anything but sleek. Producing a law journal involves a steep learning curve and a surprising amount of work. Thousands of e-mails, countless meetings, and more than a few heated debates shaped the production of this 16th Volume of *Appeal*. We hope you enjoy it.

ARTICLE

FEDERAL POWER AND FEDERAL DUTY: RECONCILING SECTIONS 91(24) AND 35(1) OF THE CANADIAN CONSTITUTION

By Brian Bird*

CITED: (2011) 16 Appeal 3-14

I. INTRODUCTION

From 1867 to 1982, the relationship between the Crown and the Aboriginal peoples of Canada unfolded primarily through section 91(24) of the *Constitution Act, 1867*, which provides Parliament with exclusive legislative authority over "Indians, and lands reserved for the Indians."[1] Indeed, s. 91(24) was the only reference to Aboriginal peoples in the Canadian Constitution until s. 35(1) of the *Constitution Act*, *1982* came into force, recognizing and affirming the aboriginal and treaty rights of Aboriginal peoples in Canada. In the words of Charlotte Bell, s. 35(1) "was profoundly important in strengthening and protecting the rights of Aboriginal peoples in Canada and demanded a new model for the relationship between governments and Aboriginal peoples."[2]

Since 1982, a question has arisen as to whether s. 35(1) superseded s. 91(24) in terms of "mediating the relationship of Aboriginal peoples with the Crown — including rights protection — or whether section 91(24) of the *Constitution Act*, *1867* remains relevant in this relationship."[3] This paper proposes that s. 35(1) has not superseded s. 91(24) in the context of Crown-Aboriginal relations in Canada. In *R. v. Sparrow*, the Supreme Court of Canada held that the two provisions are to be read together; "federal power must be reconciled with federal duty".[4] This statement by the Court reveals that s. 91(24) is by no means irrelevant in the context of Crown-Aboriginal relations after 1982. Indeed, this paper argues that the coexistence of s. 91(24) and s. 35(1) translates into an obligation upon the federal

* The author would like to thank Professor Hamar Foster, Q.C., for his support and encouragement in relation to the first version of this article. The article was originally submitted as a term paper in the "Indigenous Lands, Rights and Governance" course at the University of Victoria Faculty of Law.

1. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, App II, No 5.
2. Charlotte A Bell, "Beyond Space and Time — A Purposive Examination of Section 91(24) of the *Constitution Act, 1867*" in Frederica Wilson & Melanie Mallet, eds, *Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Toronto: Irwin law, 2008) 95 at 96.
3. *Ibid*.
4. *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385, [1990] SCJ No 49 at para 62 (QL) [*Sparrow*].

government to exercise its exclusive legislative jurisdiction over Aboriginal peoples in Canada in order to fulfill the constitutional promise embedded within s. 35(1), namely the affirmation and recognition of aboriginal and treaty rights. This federal obligation comes into clearer focus when one considers the duty of the Crown to act honourably in all its dealings with Aboriginal peoples and the responsibility of the Crown to act as a fiduciary towards Aboriginal peoples in particular circumstances.

Section 91(24) of the *Constitution Act, 1867* provides the Parliament of Canada with "exclusive Legislative Authority" in relation to the classes of subjects "Indians, and Lands reserved for the Indians."[5] There is little evidence to indicate why the Fathers of Confederation opted to assign the federal government exclusive legislative authority in this domain, but the most plausible explanation appears to be the nation-to-nation relationship that characterized dealings between Aboriginals and the Crown in British North America since contact.[6] From the outset of Crown-Aboriginal relations in British North America, the Crown found itself responsible for protecting Aboriginals and their lands from the encroachment of settlers and exploitation by colonial governments. A renowned articulation of this responsibility and relationship is found in the *Royal Proclamation of 1763*, wherein King George III decreed that Aboriginals living under British rule "should not be molested or disturbed" by colonial governments or settlers with respect to lands "reserved to them."[7] The Crown responsibility to ensure the welfare and protection of the Aboriginal peoples under its rule emanated from the perception of Aboriginals as "victims of colonial expansion" and the belief that "a more distant level of government would better protect Indians against the interests of the local settlers."[8] At Confederation, this responsibility of the British Crown succeeded to the Crown in right of Canada by virtue of s. 91(24) of the *Constitution Act*, *1867*.

Until 1982, section 91(24) was the only reference to the Aboriginal peoples of Canada in the Canadian Constitution. The enactment of section 35(1) of the *Constitution Act, 1982* recognized and affirmed the existing aboriginal and treaty rights of the Aboriginal peoples of Canada. The Supreme Court of Canada first addressed the relationship between s. 91(24) and s. 35(1) in the 1990 decision of *R. v. Sparrow*. Acknowledging that the exclusive federal power to legislate in relation to "Indians, and Lands reserved for the Indians" continued after 1982, the Supreme Court of Canada held that this power "must, however, now be read together with s. 35(1)."[9] This requirement led the Court to acknowledge that s. 35(1) mandates that the power of the federal government pursuant to s. 91(24) be reconciled with the federal duty "to act in a fiduciary relationship with respect to aboriginal peoples" that is "trust-like, rather than adversarial".[10]

Since *Sparrow*, an increasingly broad conception of reconciliation emerged as the fundamental objective of s. 35(1). In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, Binnie J. held that "the fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[11] Charlotte Bell argues that "the scope

5. *Supra* note 1.
6. Bell, *supra* note 2 at 100.
7. *Royal Proclamation of 1763*, RSC, 1985, App II, No 1.
8. Douglas E Sanders, "Prior Claims: Aboriginal Peoples in the Constitution of Canada", in SM Beck and I Bernier, eds, *Canada and the New Constitution: The Unfinished Agenda*, vol 1 (Montreal: Institute for Research on Public Policy, 1983) 225 at 238.
9. *Sparrow*, *supra* note 4 at para 62.
10. *Ibid* at para 59.
11. *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388, at para 1 [*Mikisew Cree*].

of section 35 may not be sufficient" to facilitate such an all-embracing form of reconciliation; the ability to do so may require turning to another constitutional source.[12] This paper proposes that the duty of the federal Crown inhered within s. 91(24) of the *Constitution Act, 1867* to provide for the welfare and protection of the Aboriginal peoples of Canada is that source. The broad and historical duty underlying s. 91(24) mandates the federal government to lead the way in pursuing the reconciliation of Crown sovereignty with the prior inhabitation of the Aboriginal peoples of Canada. This historic responsibility of the federal Crown in relation to the Aboriginal peoples of Canada must now assume its modern function in the determination, recognition and respect of the aboriginal and treaty rights protected by s. 35(1) of the Canadian Constitution.

In support of this assertion, this paper first outlines the legal interpretation of s. 91(24) in Part I and of s. 35(1) in Part II. Part III then addresses the reading of the two provisions together as outlined in *Sparrow* and the requirement for s. 91(24) to adapt itself to the broadening reconciliatory objective of s. 35(1) after *Sparrow*. Parts IV and V explore the honour of the Crown and the fiduciary duty of the Crown towards Aboriginal peoples and the support that these principles provide to the notion that s. 91(24) should be read in light of s. 35(1) to obligate the federal government to negotiate reconciliation with Aboriginal peoples. Finally, Part VI calls for recognition of the principle that reconciling federal power and federal duty" translates into an obligation upon the federal government to exercise its legislative jurisdiction over Aboriginal peoples in Canada under s. 91(24) to recognize and affirm the aboriginal and treaty rights protected under the s. 35(1) through honourable processes of negotiation.

II. SECTION 91(24) OF THE *CONSTITUTION ACT, 1867*

Section 91(24) contains two distinct classes of subjects: "Indians *and* Lands reserved for the Indians, not Indians *on* Lands reserved for the Indians."[13] Therefore, s. 91(24) applies to Aboriginals generally, whether on or off reserve, status or non-status. Section 91(24) also incorporates the Inuit[14], but it remains unresolved as to whether the Métis people of Canada fall under the authority of s. 91(24).[15] The Supreme Court of Canada has held that the class of subjects "Lands reserved for the Indians" in s. 91(24) "encompasses not only reserve lands, but lands held pursuant to aboriginal title as well."[16] In keeping with the historical origins of the provision, the Court has also acknowledged that the federal Crown bears unique "responsibilities flowing from s. 91(24) of the *Constitution Act, 1867*."[17] In its broadest terms, the federal Crown alone bears the responsibility "to provide for the welfare and protection of native peoples" in Canada.[18] In *Mitchell v. Peguis Indian Band*, the Supreme Court of Canada acknowledged that

12. Bell, *supra* note 2 at 117.
13. *Four B Manufacturing Ltd v United Garment Workers of America*, [1980] 1 SCR 1031 at 1049-50, 102 DLR (3d) 385, 30 NR 421 [*Four B Manufacturing*].
14. *Reference Re British North America Act, 1867 (UK), s 91*, [1939] SCR 104 at 134-135, [1939] 2 DLR 417, [1939] SCJ No 5 (QL) [*Reference Re British North America Act*].
15. *R v Blais*, 2003 SCC 44, [2003] 2 SCR 236 at para 36 [*Blais*].
16. *R v Delgamuukw*, [1997] 3 SCR 1010, 153 DLR (4th) 193, [1997] SCJ No 108 at para 174 (QL) [*Delgamuukw*].
17. *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, 71 DLR (4th) 193, [1990] SCJ No 63 at para 78 (QL) [*Peguis Indian Band*].
18. *Ibid* at para 121.

> …since 1867, the Crown's role has been played, as a matter of the federal division of powers, by Her Majesty in right of Canada, with the *Indian Act* representing a confirmation of the Crown's historic responsibility for the welfare and interests of these peoples.[19]

In *Ontario v. Bear Island Foundation*, the Ontario Court of Appeal lends additional support to the principle enunciated in *Peguis Indian Band*:

> Ordinarily, the affirmative obligation to provide for the welfare of aboriginal peoples and to implement the terms of treaties belongs to the federal Crown.[20]

These judicial pronouncements acknowledge that the broad federal responsibility embedded within s. 91(24) represents the continuation of the nation-to-nation Crown-Aboriginal relationship that existed prior to Confederation.

The proposition that s. 91(24), read in conjunction with s. 35(1), places a positive duty upon the federal government to seek reconciliation with the Aboriginal peoples of Canada may be perceived as ascribing a quality to s. 91(24) that is conceptually incoherent. Those who support this argument submit that s. 91(24) grants exclusive legislative jurisdiction to the federal government over "Indians, and lands reserved for the Indians." As a mere grant of legislative jurisdiction, the provision does not impute a positive duty on Parliament to exercise its jurisdiction or to exercise it in a particular way.

Writing one year before the decision of the Supreme Court of Canada in *Sparrow*, Bradford Morse addressed the potential impact of s. 35(1) on the traditional conception of s. 91(24) as an exclusive grant of authority to Parliament to legislate in relation to Aboriginal peoples. Morse observed that after 1982, the perception of the federal government towards s. 91(24) had been "extensively revised" due to a number of factors.[21] Among these factors, s. 35(1) appeared to reduce the "room for federal action" in relation to aboriginal and treaty rights now protected under the Constitution.[22] The decision of the Supreme Court of Canada in *R. v. Guerin*[23] also affected the perception of s. 91(24). In *Guerin*, the Court held that where the federal government manages the surrender of reserve land pursuant to its authority under s. 91(24), it owes a fiduciary duty to act in the best interests of the Aboriginal people in question.[24] As will be discussed later, the fiduciary duty of the Crown also serves as a guiding principle in the interpretation of s. 35(1). Morse concludes his assessment of how s. 91(24) is to be perceived in light of s. 35(1) and the decision in *Guerin*:

> It is also possible that the fiduciary relationship in conjunction with s. 35 may have an impact upon s. 91(24). It may create a more proactive obligation on the Government of Canada in which it must seek to "affirm" aboriginal and treaty rights through suitable means. Although legislative action may not be imposed, executive action might take place. For example, a court might declare that it is a violation of s. 91(24) respon-

---

19. *Ibid* at para 35.
20. *Ontario v Bear Island Foundation*, 126 OAC 385, [2000] 2 CNLR 13, [1999] OJ No 4290 at para 35 (CA) (QL) [*Bear Island Foundation*].
21. Bradford Morse, "Government Obligations, Aboriginal Peoples and Section 91(24) of the *Constitution Act, 1867*" in David C Hawkes, ed, *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989) 59 at 75.
22. *Ibid.*
23. *Guerin v The Queen*, [1984] 2 SCR 335, 13 DLR (4th) 321, [1984] SCJ No 45 (QL) [*Guerin* cited to SCR].
24. *Ibid* at 385.

> sibility and a breach of a fiduciary obligation for the Department of Indian Affairs and Northern Development to refuse to negotiate comprehensive land claims with more than six aboriginal groups at a time, thereby causing a backlog for decades. Likewise, it could be a similar violation to fail to resolve expeditiously the presence of hundreds if not thousands of specific claims regarding reserve lands.
>
> …
>
> In other words, even if s. 91(24) provided a discretionary power to legislate prior to 1982, it still possessed within it a restraint not to violate aboriginal interests as part of mandatory fiduciary duties once those duties had become concrete in a given situation. It is conceivable that as a result of the *Constitution Act, 1982*, the former discretionary authority has been slightly transformed so as to be subject to some active duties. The nature of these obligations might be similar to those imposed upon a trustee regarding the necessity to take action to preserve and protect trust assets, as well as to maintain the beneficiary at an appropriate standard of living.[25]

In a more recent article, Morse argues that s. 91(24) has "had a profound impact upon the evolution of the Crown-Aboriginal relationship since 1867."[26] The inclusion of s. 91(24) at Confederation sustained the presumption "that all of the major responsibilities that had been held exclusively by the Colonial office, including obligations under pre-Confederation treaties and the power to negotiate new ones, were simply transferred to the government of Canada."[27] In essence, the inclusion of s. 91(24) embodied the assumption by the federal Crown of the responsibilities formerly held by the British Crown towards Aboriginal peoples, including the provision for their welfare and protection. From 1867 to 1982, the utilization of s. 91(24) ultimately depended on the will of Parliament. With the enactment of the *Constitution Act, 1982*, however, constitutional supremacy supplanted parliamentary supremacy in Canada. The inclusion of s. 35(1) in the *Constitution Act, 1982* means that this paradigm shift also governs the determination of aboriginal and treaty rights in Canada after 1982.

III. SECTION 35(1) OF THE *CONSTITUTION ACT, 1982*

Prior to 1982, the aboriginal and treaty rights of the Aboriginal peoples of Canada were vulnerable to governmental extinguishment by way of clear and plain legislative action. With the enactment of the *Constitution Act*, *1982*, such rights received constitutional protection by virtue of s. 35(1):

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.[28]

---

25. Morse, *supra* note 22 at 87.
26. Bradford W Morse, "Are the Métis in Section 91(24) of the *Constitution Act, 1867*? An Issue Caught in a Time-Warp" in Frederica Wilson & Melanie Mallet, eds, *Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Toronto: Irwin Law, 2008) 121 at 126.
27. *Ibid* at 126-127.
28. *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Immediately following the enactment of s. 35(1) as part of the *Constitution Act, 1982*, the import of the provision was unclear. A series of First Ministers' Conferences during the 1980s failed to clarify the content of the provision. In 1990, the Supreme Court of Canada interpreted s. 35(1) for the first time in *R. v. Sparrow*. Speaking to its content and the scope of its protection for aboriginal and treaty rights, the Court also assessed the effect of s. 35(1) on s. 91(24) of the *Constitution Act, 1867*:

> Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, *federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.*[29]

In the *Sparrow* decision, the Supreme Court of Canada made a point of discussing the impact of s. 35(1) on the exclusive legislative authority of the federal government over "Indians, and Lands reserved for the Indians" in s. 91(24). In *Sparrow*, this meant that the exclusive federal power to legislate in relation to Aboriginals now had to be reconciled with the federal duty to act in a fiduciary relationship with respect to the Aboriginal peoples of Canada. This reconciliation dictates that by virtue of s. 35(1), the meaning of s. 91(24) must transform itself from a constitutional grant of legislative authority permitting Parliament to do as it wishes in regards to Aboriginal peoples and their lands, to the constitutional vehicle for accomplishing reconciliation between Aboriginals and non-Aboriginals. This transformation is conceptually achievable by virtue of the broad duty that underlies s. 91(24) to ensure the welfare and protection of the Aboriginal peoples of Canada. In essence, the *Sparrow* decision dramatically recast the constitutional understanding of "welfare and protection" in relation to the Aboriginal peoples of Canada to mean the determination, recognition and affirmation of their constitutionally protected aboriginal and treaty rights.

IV. FEDERAL POWER AND FEDERAL DUTY

The Court in *Sparrow* held that s. 35(1), at the very least, provides "a solid constitutional base upon which subsequent negotiations can take place" to determine and recognize the still unproven aboriginal rights embedded within the provision.[30] While the Court states that s. 35(1) provides the constitutional base for Crown-Aboriginal negotiation, it does not go so far as to identify s. 35(1) as the constitutional mechanism that triggers Crown-Aboriginal negotiations in relation to aboriginal and treaty rights protected under the provision. Indeed, the Court does not identify a constitutional source of governmental power that occupies this role. However, it is logical to conclude that s. 91(24) is that source. Negotiations consecrated to determine aboriginal and treaty rights fall under the classes of subjects "Indians, and Lands reserved for the Indians", and therefore under the exclusive legislative jurisdiction of the federal government. Furthermore, reading s. 91(24) together with s. 35(1) illustrates that the former provision must also serve as the constitutional vehicle by which Crown-Aboriginal negotiations will transpire. The engagement of s. 91(24) in realizing mutual reconciliation between Aboriginal peoples and the Crown is unavoidable, as treaty ne-

29. *Sparrow*, *supra* note 4 at para 62 [emphasis added].
30. *Ibid* at para 53.

gotiations pertaining to Aboriginal rights will undoubtedly fall under the classes of subjects "Indians, and Lands reserved for the Indians." Simply put, the provinces do not possess the constitutional jurisdiction to finalize treaties; s. 91(24) requires the involvement of the federal government. While the constitutional division of legislative powers in the *Constitution Act, 1867* does not bar the provinces from participating in processes of negotiations, the ratification of any tripartite process between the provinces, federal government and Aboriginals requires the final approval of Parliament under its exclusive legislative authority over "Indians, and Lands reserved for the Indians." One must recall that s. 35(1) delivers the constitutional base for negotiation; it gives Aboriginal peoples a constitutional bargaining chip at the negotiating table, but not the negotiating table itself. As the provider for the welfare and protection of Aboriginal peoples and the level of government with the appropriate legislative jurisdiction, the federal Crown by virtue of s. 91(24) is obligated to fulfill the promise of s. 35(1) through honourable negotiation, so that the aboriginal and treaty rights of the Aboriginal peoples of Canada are "recognized and affirmed" both in letter and reality.

Since the *Sparrow* decision, the Supreme Court of Canada has, from time to time, readdressed the reconciliatory objective of s. 35(1). From its focus in *Sparrow* on the reconciliation of federal power with federal duty, the Court held six years later in *R. v. Van der Peet* that "the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[31] In *Haida Nation v. British Columbia (Minister of Forests)*, the Court held that in this area of the law, reconciliation is "not a final legal remedy in the usual sense"; instead it is "a process flowing from rights guaranteed by s. 35(1)".[32] Finally, the Court in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* held that the fundamental modern objective of s. 35(1) is "the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[33] The development of the reconciliatory objective of s. 35(1) by the Supreme Court of Canada since *Sparrow* has resulted, according to Charlotte Bell, in the gradual imputation of a "much broader objective" to the provision.[34] Bell argues however that the purpose of s. 35(1) is "limited to setting parameters around the Crown's ability to infringe or extinguish Aboriginal rights" and that the scope of the provision "may not be sufficient to permit the courts to accomplish the reconciliation of the claims, interests, and ambitions of the Aboriginal and non-Aboriginal peoples of Canada."[35] Prior to Confederation, the British Crown assumed the responsibility "to define and reconcile the relationship between First Nations and others" by ensuring the welfare and protection of Aboriginal peoples in the face of colonial expansion.[36] This responsibility of the British Crown found its inheritor in the federal Crown at Confederation by virtue of s. 91(24) of the *Constitution Act, 1867*. In order for this broad duty to find relevance today, the understanding of what constitutes the welfare and protection of Aboriginal peoples must adapt itself to the reconciliatory objective of s. 35(1) of the *Constitution Act, 1982*. As s. 91(24) and s. 35(1) must be read together, so must their underlying rationales.

---

31. *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289, [1996] SCJ No 77 at para (QL) [*Van der Peet*].
32. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 32 [*Haida Nation*].
33. *Mikisew Cree*, *supra* note 11 at para 1.
34. Bell, *supra* note 2 at 116.
35. *Ibid* at 117.
36. *Ibid.*

V. THE HONOUR OF THE CROWN

Writing for a unanimous Supreme Court of Canada in *Haida Nation*, McLachlin C.J. held that the Crown — federal or provincial, depending on the circumstances — has a duty to consult and potentially to accommodate the interests of Aboriginals when it "has knowledge, real or constructive, of the potential existence" of an "Aboriginal right or title and contemplates conduct that might adversely affect it".[37] These duties are "grounded in the honour of the Crown", which is "always at stake" when the Crown engages with Aboriginal peoples.[38] The honour of the Crown mandates that "in all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably."[39] The Court in *Haida Nation* acknowledges that "nothing less is required" in order to achieve the reconciliatory objective of s. 35(1) of the *Constitution Act, 1982*.[40] The principle also "infuses the processes of treaty making and treaty interpretation", obligating the Crown to "act with honour and integrity" so as to avoid the appearance of "sharp dealing".[41] The honour of the Crown also — in limited circumstances — gives rise to a fiduciary duty on the part of the Crown to act in the best interests of Aboriginal peoples.[42]

The relationship between the honour of the Crown and s. 91(24) of the *Constitution Act, 1867*, while not explicitly addressed in *Haida Nation*, can be inferred. As the honour of the Crown permeates all aspects of the Crown-Aboriginal relationship, the principle encompasses the federal exercise of its legislative authority under s. 91(24). Whether the federal government has actually upheld the principle in relation to its exercise of s. 91(24) since Confederation is a separate matter. Indeed, Binnie J. begins his judgment in *Mikisew Cree* by acknowledging that the Crown-Aboriginal relationship in Canada features a "long history of grievances and misunderstanding", "indifference of some government officials to aboriginal people's concerns", and a "lack of respect inherent in that indifference".[43]

In *Haida Nation*, the Supreme Court of Canada also discusses the honour of the Crown in relation to s. 35(1) of the *Constitution Act, 1982*. In what Mark Walters considers "one of the most important Canadian judicial statements on aboriginal rights since 1982,"[44] the Court in *Haida Nation* held:

> Where treaties between aboriginal peoples and the Crown remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims…Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*.
>
> ...
>
> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others,

37. *Haida Nation*, *supra* note 32 at para 35.
38. *Ibid* at para 16.
39. *Ibid* at para 17.
40. *Ibid*.
41. *Ibid* at para 19.
42. *Ibid* at para 18.
43. *Mikisew Cree*, *supra* note 11 at para 1.
44. Mark D Walters, "The Morality of Aboriginal Law" (2006) 31 Queen's LJ 470 at 513.

> notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.[45]

The language in *Haida Nation* is momentous; it places upon the Crown an obligation to determine, recognize and respect the still unproven rights of Aboriginal peoples through honourable negotiation. Notably, the Court does not identify s. 35(1) as the constitutional vehicle for determining aboriginal and treaty rights. Instead, the rights of Aboriginal peoples are "protected by s. 35" and, as mentioned previously, the provision delivers the constitutional base wherefrom negotiations can arise.[46] Brian Slattery describes s. 35(1) as a "springboard for negotiations leading to just settlements".[47] *Haida Nation* reveals that after jumping off the springboard, the honour of the Crown requires that Aboriginal rights "be determined, recognized and respected."[48] Section 91(24) obligates the federal government to exercise leadership in this process not only because of its exclusive legislative jurisdiction over the subject matter, but also because the negotiations mandated by *Haida Nation* require a "form of mutual reconciliation" between Aboriginal peoples and the Crown so as to "reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty".[49] This mutual reconciliation of two sovereignties hearkens back to and calls for a renewal of the genuine nation-to-nation relationship between the Crown and Aboriginal peoples in British North America that would find its codification at Confederation in s. 91(24) of the *Constitution Act, 1867*. Though the original nation-to-nation relationship was forged between the British Crown and Aboriginal peoples "during times of war out of the need for protection from a common external enemy"[50] — namely France — the renewed nation-to-nation relationship envisioned in *Haida Nation* seeks to reestablish the "respect of territories and rights" and "the relationship between friends" which "characterized the Crown's inclinations from the first formative days of Crown-First Nations relations in Canada" so as to facilitate meaningful reconciliation between the parties in the present era.[51]

The need for a renewed nation-to-nation relationship between the Crown and Aboriginal peoples is evident in the context of the modern treaty process in British Columbia. Established in 1992 by an agreement between Canada, British Columbia and the First Nations Summit, the process is overseen by the British Columbia Treaty Commission, an "independent and neutral body responsible for facilitating treaty negotiations" between the three parties.[52] Notably, participation in the process is voluntary. Nearly twenty years after its inception, the process has only yielded two final agreements that have been ratified by Canada and British Columbia. Of course, the federal government is not solely to blame for this result. Indeed, the Commission has recently urged all parties to "publicly re-affirm their commitment to completing treaties" within the treaty process and has called for "clear

45. *Haida Nation*, *supra* note 32 at paras 20, 25.
46. *Ibid* at para 25.
47. Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR 435 at 445.
48. *Haida Nation*, *supra* note 32 at para 25.
49. *Ibid* at para 20.
50. Bell, *supra* note 2 at 101.
51. *Ibid* at 106.
52. "About Us", online: British Columbia Treaty Commission <http://www.bctreaty.net/files/about_us.php.>.

statements from the Principals — the prime minister, premier and First Nation Summit leaders — recommitting the parties to the BC Treaty Process, and committing them to renewing mandates, and removing obstacles in the way of completing treaties."[53] The Commission has also observed that because "First Nations continue to launch legal actions to preserve their aboriginal rights when a perceived threat exists", litigation "has informed treaty negotiations and continues to do so."[54] Nevertheless, the Commission advocates for "a government-to-government relationship, with all its complexities" to be negotiated between the parties.[55] The challenges facing the modern treaty making in British Columbia illustrates a need for the federal government to fulfill its historical responsibility under s. 91(24) to provide for the welfare and protection of Aboriginal peoples in Canada by taking up the mantle of leadership in the processes of negotiation to determine, recognize and respect aboriginal and treaty rights which are protected by s. 35(1).

Ultimately, the endorsement in *Haida Nation* of a genuine nation-to-nation Crown-Aboriginal relationship, in conjunction with s. 35(1), requires the federal Crown to reaffirm in the post-1982 era the responsibilities it inherited from its imperial predecessor at Confederation. As the provider of the welfare and protection of Aboriginal peoples, the honour of the Crown informed the Crown responsibility before Confederation to protect Aboriginals and their lands from colonial expansion and settler encroachment. This historical role of the British Crown in relation to Aboriginal peoples preserved in s. 91(24) must become relevant in the context of s. 35(1) of the *Constitution Act, 1982*. This requires federal leadership in seeking mutual reconciliation of pre-existing Aboriginal and asserted Crown sovereignty by way of determination, recognition and respect of unproven Aboriginal rights through honourable negotiation.

VI. THE FIDUCIARY RELATIONSHIP

As held in *Haida Nation*, when dealings occur between the Crown and Aboriginal peoples the honour of the Crown is always at stake. A subset of the honour of the Crown is the fiduciary duty of the Crown towards Aboriginal peoples that arises in limited circumstances, namely where the Crown assumes discretionary control over specific Aboriginal interests such as the surrender or expropriation of reserve land. The fiduciary duty pertains to a relationship in which the fiduciary — the Crown — must act in the best interests of the beneficiary — Aboriginal peoples — in particular situations. The judicial acknowledgement of the fiduciary relationship between the Crown and Aboriginal peoples occurred in the *Guerin* decision. Before *Guerin*, the Crown-Aboriginal relationship was traditionally seen to be a "political trust" or a "trust in the higher sense".[56] In *St. Catherines Milling and Lumber Co. v. The Queen*, Taschereau J. of the Supreme Court of Canada described the Crown's obligation towards Aboriginals as "a sacred political obligation, in the execution of which the state must be free from judicial control."[57] The *Guerin* decision reversed this line of jurisprudence in dramatic fashion. In *Guerin,* a case that involved the

53. British Columbia Treaty Commission, 2009 Annual Report, pg 12, <http://www.bctreaty.net/files/pdf_documents/2009_Annual_Report.pdf.>.
54. British Columbia Treaty Commission, 2010 Annual Report, pg 9 <http://www.bctreaty.net/files/pdf_documents/2010_Annual_Report.pdf>.
55. *Ibid*.
56. *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 at para 73 [*Wewaykum*].
57. *St Catherines Milling and Lumber Co v The Queen* (1887), 13 SCR 577 at 649 [*St Catherines Milling*].

mishandling by the federal Crown of a land surrender agreement by the Musqueam Band in British Columbia, the Court held that:

> Section 18(1) of the *Indian Act* confers upon the Crown a broad discretion in dealing with surrendered land. In the present case, the document of surrender…by which the Musqueam Band surrendered the land at issue, confirms this discretion in the clause conveying the land to the Crown "in trust to lease...upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people". When, as here, an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf.[58]

The majority in *Guerin* held that the fiduciary relationship between Aboriginals and the Crown is *sui generis* — "of its own kind" — and is not akin to a trust or an agency relationship. The Court in *Sparrow* traces the origin of this fiduciary relationship to the "*sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown"; the same powers and responsibility contained within s. 91(24) of the *Constitution Act, 1867*.[59] The Court in *Sparrow* further stated that the fiduciary duty of the Crown serves as a "general guiding principle for s. 35(1)", mandating the Crown "to act in a fiduciary relationship with respect to aboriginal peoples" that is "trust-like, rather than adversarial."[60] The fiduciary duty thus reflects "the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada".[61] The duty of the Crown to act in a fiduciary capacity when it assumes control over specific Aboriginal interests is a particular expression of the historical responsibility of the British Crown to provide for the welfare and protection of Aboriginal peoples in Canada. This responsibility, inherited by the federal Crown through the inclusion of s. 91(24) in the *Constitution Act, 1867*, continues to be relevant to the Crown-Aboriginal relationship after the enactment of s. 35(1). Indeed, as the relationship between Aboriginal peoples and the Crown is "trust-like, rather than adversarial," it is fitting that the "contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship" between Aboriginal peoples and the Crown.[62]

The Court in *Sparrow* declared that s. 91(24) of the *Constitution Act, 1867* must be read together with s. 35(1) of the *Constitution Act, 1982*, that "federal power must be reconciled with federal duty".[63] The federal power under s. 91(24) to legislate exclusively in relation to "Indians, and Lands reserved for the Indians" must be reconciled with the federal duty to maintain a fiduciary relationship with Aboriginal peoples of Canada. More importantly, this reconciliation reveals that the federal government bears the responsibility to lead the way in fulfilling the promise of s. 35(1) to recognize and affirm the aboriginal and treaty rights of the Aboriginal peoples of Canada.

---

58. *Guerin*, *supra* note 23 at 385.
59. *Sparrow*, *supra* note 4 at para 59.
60. *Ibid*.
61. *Ibid* at para 62.
62. *Ibid*.
63. *Ibid*.

VII. RECOGNITION AND RECONCILIATION

Since the *Sparrow* decision, there has been an obvious silence by the Supreme Court of Canada on the relationship between s. 91(24) and s. 35(1) that has inadvertently caused s. 91(24) to appear irrelevant in the post-1982 era of Crown-Aboriginal relations. Perhaps the silence persists because the Supreme Court felt that it sufficiently enunciated the federal power-duty relationship in *Sparrow*, or because the modern role of s. 91(24) as prescribed in this work has been implied by the reasoning of the Court ever since. Either way, the modern function of s. 91(24) must be reasserted and reaffirmed. In *Sparrow*, the Court held that for federal power to be reconciled with federal duty, "the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights."[64] It is possible to recast this statement with the language used in *Haida Nation* fourteen years later, where a unanimous Supreme Court of Canada held that unresolved Aboriginal rights protected by s. 35(1) must cross the divide into legal existence; it is incumbent upon the Crown that these rights be "determined, recognized and respected" through honourable "processes of negotiation."[65] If one reaffirms in *Haida Nation* the principle that federal power under s. 91(24) must be reconciled with the federal duty to act in a fiduciary relationship with respect to the Aboriginal peoples of Canada, the "best way to achieve that reconciliation" is to obligate the federal Crown in its capacity as the provider of the welfare and protection of the Aboriginal peoples of Canada to diligently pursue honourable processes of negotiation to determine these rights. The unequivocal statement by McLachlin C.J. in *Haida Nation* supporting this position is worth repeating:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. *The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation.*[66]

This truth must remain at the forefront in the quest for mutual reconciliation of Crown sovereignty and prior Aboriginal sovereignty in Canada. Otherwise, Canada will not accomplish the recognition and affirmation of aboriginal and treaty rights promised by s. 35(1) of the *Constitution Act, 1982*. The time for indifference and inactivity has passed; the time for recognition and reconciliation has come.

64. *Ibid*.
65. *Haida Nation*, *supra* note 32 at para 25.
66. *Ibid* [emphasis added].

ARTICLE

BEYOND BOUNTIFUL: TOWARD AN INTERSECTIONAL AND POSTCOLONIAL FEMINIST INTERVENTION IN THE BRITISH COLUMBIA POLYGAMY REFERENCE

By Michelle Chan*

CITED: (2011) 16 Appeal 15-30

I. INTRODUCTION

In recent years, the issue of polygamy[1] has garnered much public attention. Among the reasons for this[2] are the polygamous practices of members of the Fundamentalist Church of Jesus Christ of the Latter Day Saints community of Bountiful, British Columbia and more specifically, the polygamy charges laid against two of the community's leaders in January 2009 following several years of investigation.[3] Section 293 of the *Criminal Code*, which

* Michelle Chan is a J.D. Candidate at the University of Victoria Faculty of Law. She wrote this paper as a second year law student and as part of the requirements for Professor Maneesha Deckha's Feminist Legal Theories class. She is tremendously grateful to Professor Deckha for her inspiration, insight and support in the completion of this article as well as to Professor Gillian Calder for her suggestions and encouragement. Thank you also to Baird Makinson and Erin Pritchard for their assistance.

1. While polygamy is a general term that includes both polyandry, the practice of one woman having more than one husband, as well as polygyny, the practice of one man having more than one wife, there is no evidence of polyandrous polygamy in Canada and indeed, the concern around polygamy in Canada is focused on polygamy in its polygynous form. For a more in-depth history of polygamy in Canada, see Amy J. Kaufman, "Polygamous Marriages in Canada" (2004-2005) 21 Can J Fam L 315.
2. See also the events in the US Fundamentalist Church of Jesus Christ of the Latter Day Saints (FLDS) community in Utah where FLDS leader and prophet Warren Jeffs was convicted in 2007 as an accomplice to rape for his part in arranging the 'celestial marriage' of a 14-year old FLDS member to her cousin. John Dougherty & Kirk Johnson, "Sect Leader is Convicted as an Accomplice to Rape" *The New York Times* (26 September, 2007) online: <http://www.nytimes.com/2007/09/26/us/26jeffs.html>. The recent debates on same-sex marriage in Canada have also sparked discussion about polygamy as 'slippery slope' arguments emerged. Some groups were concerned that allowing same-sex marriage would lead to, among other things, polygamy, the legalization of incest and other 'intolerable behaviour.' Claire F.L. Young & Susan B. Boyd, "Losing the Feminist Voice? Debates on the Legal Recognition of Same Sex Partnerships in Canada" (2006) 14(2) Fem Legal Stud 213 at 234-235.
3. Daphne Bramham, "Bountiful leaders charged with polygamy" *The Vancouver Sun* (7 January 2009), online: The Vancouver Sun <http://www.vancouversun.com/news/Bountiful+community+leaders+charged+with+polygamy/1151579/story.html>.

prohibits polygamy (the "Polygamy Provision")[4], has rarely been used since its enactment in 1892,[5] but the charges against Winston Blackmore and James Oler have served to bring it back to the forefront of Canadian law and society. While the charges were eventually dropped in September of the same year for reasons unconnected to the merits of the polygamy case against Blackmore and Oler,[6] British Columbia's Attorney General has decided to proceed by seeking the courts' direction on the constitutionality of the Polygamy Provision through a reference to the British Columbia Supreme Court (the "Polygamy Reference").[7] The Attorney General's office, with the support of mainstream women's organizations, argues that the law prohibiting polygamy exists in order to protect women's equality rights and to prevent the exploitation of women and children from the vulnerability and harm that may arise in polygamous communities.[8] However, there are concerns about whether s. 293 is compliant with the *Canadian Charter of Rights and Freedoms*, specifically the right to freedom of religion protected under s. 2(a) of the *Charter*. Indeed, the first two special prosecutors appointed by the then Attorney General, Wally Oppal, recommended against proceeding with charges due to concerns that the Polygamy Provision may not be constitutionally valid.[9] The British Columbia Supreme Court is scheduled to hear the Polygamy Reference between November 15, 2010 and January 31, 2011 and the case will likely be heard by the Supreme Court of Canada in the following years.

In light of this legal history and the impending court proceedings, this is an especially important moment to engage with the issue of polygamy and to consider the perspectives to which the courts will need to attend in order to decide the Polygamy Reference. In particular, given that the issue of polygamy is connected to broader concerns such as gender equality and that the public discourse in support of the criminal provision has centered on the harm to women that is often said to flow from the practice of polygamy, it is crucial that the courts take feminist perspectives into account when making its decision. Moreover, while the government's concern with polygamy has coalesced around a white, non-immigrant, religious group in British Columbia, the Polygamy Provision has a troubling history of use as a tool to preserve racial boundaries and promote white supremacy even when it is marshaled against those who are perceived to be white and thus members of the dominant racial group. Further, the Polygamy Reference decision will affect other marginalized groups in Canada as well, such as the Muslim community, some of whom may practice polygamy in accordance with their faith. That members of all of these communities include women who have diverse understandings of the relationship between polygamy on the one hand and gender equality and harm on the other should give pause to any simplistic

---

4. *Criminal Code*, RSC 1985, c C-46 s 290 Section 293(1) states,
   Every one who
   (a) practises or enters into or in any manner agrees or consents to practise or enter into
   (i) any form of polygamy;
   (ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage,
   …
   is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
5. These polygamy charges are the first in Canada since the 1800s. See Bramham, *supra* note 3.
6. The charges against Blackmore and Oler were dropped after the British Columbia Supreme Court ruled that the decision of the first special prosecutor, Richard Peck, not to proceed with a prosecution was final and binding on the Attorney General and that the AG did not have the authority to appoint two subsequent special prosecutors in attempt to secure a different prosecutorial recommendation. See *Blackmore v. British Columbia*, 2009 BCSC 1299 [*Blackmore*].
7. British Columbia Ministry of Attorney General, Media Release, 2009AG0012-000518, "Province to Seek Supreme Court Opinion on Polygamy" (22 October 2009) (The "Polygamy Reference").
8. Bramham, *supra* note 3.
9. British Columbia Ministry of Attorney General, *supra* note 7.

analysis. Indeed, it is important for the courts to take a specifically intersectional and postcolonial approach to feminist readings of this legal issue.

As an intervener in the Polygamy Reference who aims to represent the interests of all women, the West Coast Women's Legal Education and Action Fund (LEAF) seems poised to bring a unique feminist perspective to the courts. According to its Application for Intervention, LEAF intends to argue that the Polygamy Provision can be interpreted to be constitutionally valid and should be upheld in order to protect the equality rights of women.[10] However, I argue that while the position advanced by LEAF is attentive to some of the issues engaged by the Polygamy Reference, ultimately, LEAF's position is problematic when assessed through an intersectional and postcolonial feminist perspective. In particular, LEAF's position in support of the criminal prohibition continues to single out and stigmatize a practice associated with religious and cultural minorities.[11] In doing this, LEAF privileges and constructs as normal a certain cultural and racialized distribution of power despite their concern for a nuanced response to polygamy. Ultimately, in supporting the Polygamy Provision, LEAF participates in dynamics of 'Othering;' it positions those who engage in polygamous relationships as a cultural 'Other', reinforcing the dichotomy between a civilized, Western 'us' and a barbaric, non-Western 'Them.' In the process, the concerns of women in polygamous relationships, who may see their relationship with gender equality differently, are further marginalized.

In order to determine the Polygamy Reference in a manner that is responsive to the concerns of marginalized women, I argue that the courts should take a feminist approach that is intersectional,[12] in being attentive to diversely located identities and in moving beyond the "reductive analyses of power based on a single axis of social division,"[13] and postcolonial,[14] in being alive to the way in which the legacies of colonialism continue to affect our understanding of the choices and concerns of women, especially those from minority communities. Specifically, this feminist, intersectional and postcolonial approach would result in the courts striking down the Polygamy Provision. Part II of this article outlines the background to, and provides context for, the Polygamy Reference with special attention to the historical roots of the criminal prohibition of polygamy as a tool of religious oppression. Part III explains the position of West Coast LEAF, a prominent Canadian women's rights organization, on the Polygamy Provision. Part IV takes a critical, intersectional and postcolonial feminist lens to LEAF's position. In this part, I aim to problematize LEAF's ap-

---

10. West Coast LEAF, Intervener Affidavit of Alison Brewin, No. S-097767, Vancouver Registry (25 January 2010).
11. While I recognize that there are important differences between cultures and religions, I group these together for the purposes of this paper because they can both serve as sources of marginalization in the creation of the cultural 'Other' in the context of polygamy. Further, while I am aware of the contentiousness surrounding the term "minority" and "minority culture," I use it for ease of reference to refer to a range of marginalized social groups. For a more in depth discussion of this issue, see, Philip Gleason, "Minorities (Almost) All: The Minority Concept in American Social Thought" (1991) 43(3) American Quarterly.
12. The concept of intersectionality is grounded in an understanding that different axes of identity such as race, class, gender, ability, etc. interact to create complex experiences of marginalization that cannot be understood through a single lens. See, for example, Kimberlé Crenshaw's groundbreaking articulation of intersectional identities in Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 Stan L Rev 1241 at 1252.
13. Sirma Bilge, "Beyond Subordination vs. Resistance: An Intersectional Approach to the Agency of Veiled Muslim Women" (2010) 31(1) Journal of Intercultural Studies 9 at 10.
14. Postcolonialism considers the way in which Western narratives construct non-Western subjects as monolithic, unchanging and without agency in order to create the Western identity based on ideas about progress and modernity. See, for example, Edward Said's groundbreaking work on postcolonialism in Edward Said, *Orientalism* (New York: Vintage Books, 2003). See also Chandra Talpade Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" (1988) 30 Feminist Review, in which Mohanty critiques the project of Western feminism in creating the static category of the Third World Woman.

proach to s. 293 with an eye to delineating a more inclusive legal approach to polygamy. Finally, Part V offers thoughts on how an intersectional and postcolonial feminist approach to polygamy can be articulated through the law.

II. BACKGROUND AND CONTEXT OF THE POLYGAMY REFERENCE

The Polygamy Reference stems from charges against two leaders of the Bountiful Community,[15] a community of about 1,000 people founded in the 1940s by families that broke away from the mainstream Mormon Church after the latter renounced the practice of polygamy.[16] Known as the Fundamentalist Church of Jesus Christ of the Latter Day Saints (FLDS), residents of Bountiful continue to openly practice polygamy as a central tenet of their faith and, until relatively recently, drew little public attention. This began to change in the 1990s amidst allegations of polygamy, which prompted RCMP investigations into the community and increasing public interest. No charges were laid, however, due to concerns regarding the constitutionality of the Polygamy Provision.[17] In 2004, Bountiful once again became the subject of intense investigations after reports of sexual exploitation, child abuse and forced marriages emerged.[18] These investigations culminated in the 2009 arrests of Blackmore and Oler on polygamy charges and the subsequent Polygamy Reference to the British Columbia courts in 2010.

The mainstream discourse that has emerged around polygamy and its practice in Bountiful indicates that the contemporary rationale for its prohibition is grounded in ideas about protecting women from the inherent inequalities and harm that are said to flow from being one of many wives.[19] Former Attorney General Oppal, for example, has commented: "the reason the polygamy law exists is to prevent the exploitation of women"[20] while LEAF executive director Alison Brewin responded to the charges against Blackmore and Oler by noting that they would "allow the courts, the government, the women of Bountiful and all Canadians to determine the boundaries of religious freedom when women's equality is at stake."[21] Internationally, in its General Recommendation on Equality in Marriage and Family Relations, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), of which Canada is a party, notes that "Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited."[22] Indeed, current justifications for the prohibition of polygamy are clearly centered on ideas about the protection of women.

However, the criminal provision also has historical roots in a legacy of colonialism, racism and sexism. According to Susan Drummond, the Polygamy Provision "from its inception through its bizarre history of virtual non-use, has always been shrouded in an aura of xenophobia and racism."[23] The law prohibiting polygamy was originally enacted in 1892 under

---

15. *Blackmore*, *supra* note 6.
16. Mike D'Amour, "Polygamists defend lifestyle" *The Calgary Sun* (2 August 2004).
17. British Columbia Ministry of Attorney General, *supra* note 7.
18. D'Amour, *supra* note 16.
19. Angela Campbell, "Bountiful Voices" (2009) 47 Osgoode Hall LJ 190 [Campbell, "Bountiful Voices"].
20. Bramham, *supra* note 3.
21. *Ibid.*
22. CEDAW at General Recommendation No. 21 (13th session, 1994), online: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.
23. Susan Drummond, "A marriage of fear and xenophobia" *The Globe and Mail* (6 April 2009), A13 [Drummond, "Xenophobia"].

pressure from the United States government, who was attempting to eliminate the practice of polygamy by members of the Mormon Church.[24] The US government was not concerned about gender equality but rather was attempting to control what they viewed as "treacherous Mormon claims to political, economic, and social control of Utah in the late nineteenth century."[25] Equally, scholars have demonstrated that the US government was concerned about the 'race treason' engaged in by this group of white polygamists.[26] Indeed, citing Martha Ertman, Drummond highlights that in the leading anti-polygamy case of the era, *Reynolds v. United States*, the US Supreme Court notes that polygamy was "odious among the northern and Western nations of Europe... almost exclusively a feature of the life of Asiatic and of African people."[27] Under US influence, then, Canada also enacted laws against polygamy and in fact, the original Polygamy Provision had a clause explicitly targeting Mormon polygamy that was not removed until 1954.[28]

The origins of the Polygamy Provision as a mechanism for religious persecution and as a tool for policing racial boundaries and reinforcing white supremacy are not the only troubling aspects. Since its enactment, there has been a single conviction under the law, notably, against an Aboriginal man[29] and the contemporary desire to prosecute using the Polygamy Provision has mostly been directed at religious minorities such as Muslims.[30] As Drummond points out, this disconcerting history "supports the idea that the polygamy provision was crafted as a means of disciplining and colonizing socially and politically marginal groups."[31] In light of this context, and the fact that the Polygamy Reference will affect many other minority communities in Canada beyond Bountiful, a closer analysis of the current rationale for the criminal prohibition and its effect on marginalized communities and members of those communities is necessary.

III. A FEMINIST PERSPECTIVE ON POLYGAMY: WEST COAST LEAF

Many arguments have been advanced both in support of and in opposition to the prohibition on polygamy on the basis of a range of rationales. For example, some have opposed the law on the ground that it is unconstitutionally vague and targets no discernable criminal mischief[32] while others have supported the law on the basis that it is the source from which other alleged harms flow and thus needs to be addressed directly.[33] While these arguments make important contributions to the different ways of thinking about the Polygamy Provision, as stated above, it is also crucial for the courts to consider an intersectional, postcolonial feminist perspective in light of the nature of the issues engaged by the Polygamy Reference and the current justification for the criminal prohibition based on the protection

24. *Ibid.*
25. Susan Drummond, "Polygamy's Inscrutable Criminal Mischief" (2009) 47 Osgoode Hall LJ 317 at 331 [Drummond, "Mischief"].
26. *Ibid.*
27. *Ibid.*
28. *Ibid. See Criminal Code*, SC 1953-54 , c 51, s 243.
29. The only reported conviction under the Polygamy Provision, *Bear's Shin Bone*, involved a First Nations man who was living in a customary polygamous relationship. See Harsha Walia, "West Coast LEAF Women's Equality and Religious Freedom Project: Report Based on Advisory Committee Discussions" *West Coast LEAF Report* (November 2006) 30.
30. Drummond, "Mischief", *supra* note 25 at 329.
31. *Ibid* at 359.
32. See, for example, Drummond, "Mischief", *supra* note 25 at 368 where she notes: "given the range of behaviours and arrangements that the law views as consistent with monogamy, it has become increasingly difficult to decipher the specific harm that the polygamy provision is intended to thwart."
33. Bramham, *supra* note 3.

of women. As a women's organization with extensive experience in the area of women's rights and promoting women's substantive equality through public legal education, law reform and equality rights litigation, LEAF seems perfectly situated to assist the courts in gaining a feminist understanding of polygamy. Indeed, LEAF's stated vision "[is] a society in which women are full participants in the social, economic and political activities of the nation, a society in which it is *a right to have one's differences respected and supported* both by the law, and through social and institutional policies and practice".[34] Additionally, on the issue of polygamy in particular, LEAF has considerable interest and expertise.[35]

Having been granted leave to intervene, LEAF will argue that, "read down to include as a necessary element of the offence one or more of: involvement of a minor, exploitation, coercion, abuse of authority, a gross imbalance of power or undue influence, the Polygamy Provision is consistent with the *Charter*."[36] Thus, LEAF supports the criminal provisions where the offence meets certain other criteria. LEAF expects the evidence at the hearing to show that the practice of polygamy in communities like Bountiful is directly connected with the abuse and exploitation of women and children, in violation of their rights to equality and autonomy and will argue that "there is a sufficient historical connection between the practice of polygamy and these harms to justify the legislative prohibition of polygamy."[37] In general, LEAF's position is that the practice of polygamy can limit women's choices and create serious vulnerability for young women and girls to sexual and other exploitation and that s. 293 can be interpreted to prohibit this harmful conduct. In the alternative, LEAF argues that the law can be justified under s. 1 of the *Charter*: "The Polygamy Provision prevents the practice of polygamy where such practice is exploitative or abusive of the women and children involved. The Polygamy Provision is justifiable to the extent that it prohibits unacceptably harmful conduct."[38] Ultimately, LEAF's position is that s. 293 can be interpreted to be constitutionally valid and should be upheld in order to protect the constitutional rights of women with respect to equality and autonomy.

This position is attentive to some of the nuances engaged by the Polygamy Reference and succeeds, to some extent, in recognizing the overly broad sweep of the Polygamy Provision as well as the way it may affect differently situated individuals. In particular, in recognizing that the law must be 'read down' to be constitutionally valid, LEAF attempts to ensure that only those polygamous relationships that involve certain other harmful characteristics will be subject to the criminal provision; men or women who are in polygamous relationships that do not involve "a minor, exploitation, coercion, abuse of authority, a gross imbalance of power or undue influence"[39] would not be captured by the prohibition. By insisting on such a reading down, LEAF's position aims to prevent harm to women that may flow from a polygamous relationship but recognizes that not all polygamous relationships are problematic *per se*.

However, while LEAF's position addresses one problematic aspect of the provision, it neglects others. LEAF's position in support of the Polygamy Provision focuses on the idea that polygamous relationships are potential sites of gender inequality and that harm to women may result. But, as Lori Beaman has noted, "women have been protected from themselves

34. LEAF website online: http://www.westcoastleaf.org/ [emphasis added].
35. For example, according to their Intervenor Affidavit, their views on the practice of polygamy in Bountiful have been cited in various media outlines 11 times since August 2007. Intervenor Affidavit, *supra* note 10 at 6.
36. Intervenor Affidavit, *supra* note 10 at 7.
37. *Ibid* at 7.
38. *Ibid* at 8.
39. Intervenor Affidavit, *supra* note 10 at 7.

by state institutions from time immemorial, and very often not protected when they have asked for it."[40] Beaman suggests that the use of such rhetoric should cause suspicion and proposes that we ask: "Whose interests are being served by this? What relations of power are being supported by the use of women and children as a shield?"[41] In the next section, I intend to take up Beaman's suggestion in analyzing LEAF's approach. In particular, I hope to engage with LEAF's position to unravel some of the assumptions, norms and values that may underlie this position in an attempt to gain a sense of how it falls short of an intersectional and postcolonial feminist approach.

IV. PROBLEMATIZING WEST COAST LEAF'S POSITION: APPROACHING AN INTERSECTIONAL AND POSTCOLONIAL FEMINIST PERSPECTIVE ON POLYGAMY

LEAF's position fails to take the intersectional and postcolonial feminist approach necessary to be responsive to difference and the needs of differently situated women. More specifically, LEAF's recognition that not all polygamous relationships result in harm to women through advocating for a 'read down' interpretation of the prohibition does not go far enough. As this Part explains, LEAF's position still does not question the special targeting and condemnation of polygamous relationships by the criminal provision, but rather, supports this singling out. In light of the Polygamy Provision's history and the way in which it has been used, this approach ultimately serves to police the boundaries between a civilized, Western 'us' from a barbaric, non-Western 'them' and further ignores the intersectional identities of some marginalized women. Thus, while recognizing the important work that LEAF has done in promoting gender equality as well as the fact that the allegations of some of the practices in Bountiful are troubling, I propose to examine LEAF's position more closely. This will be productive not only for gaining a sense of the weaknesses in LEAF's position but, more importantly, for understanding what a more inclusive feminist position, one that embraces difference and is mindful of colonial projects, may look like and to suggest that this is the perspective that the courts should consider.

A. The Assumed 'Inherent' Harm of Polygamy

LEAF's position in support of the Polygamy Provision begins to be problematic when it accepts, without question, a discourse that assumes polygamous relationships are inherently more exploitative than monogamous relationships, a discourse that perhaps conflates the institution of polygamy with the way that polygamy can sometimes be practiced. Even while advocating for a 'read down' interpretation of the criminal prohibition that would seem to recognize that polygamous relationships are not inherently problematic, LEAF fails to question whether there is, in fact, anything inherently more exploitative about polygamous relationships than monogamous ones such that criminal sanctions are justified *at all*. Indeed, the fact that LEAF supports criminal prohibitions for polygamy alongside the non-prohibition of monogamy, when both have the potential to be sources of gender inequality and harm, reveals the acceptance of a discourse that presumes the unique and inherent harm of polygamy. As Gillian Calder notes, "issues of lack of consent, and abuse of women and children, are properly subjects of the criminal law, but none of these

40. Lori Beaman, "What's Wrong with Polygamy or For the Sake of Women and Children" (Talk at the Faculty of Law, University of Victoria, 1 October 2009) [unpublished] used with permission.
41. *Ibid* at 3.

are inherent to the practice of loving more than one person at the same time."[42] Indeed, polygamy does not appear to be inherently more exploitative than monogamy.

While some have argued that polygynous polygamy is, by nature, unequal by virtue of the fact that wives are forced to share the emotional, sexual, and financial attention of their husband with other wives,[43] such an interpretation is only one way of understanding the many possible manifestations and dimensions of polygamous relationships. For example, some scholars have pointed out that "relationships and alliances forged between and among women could prove to be sites for developing agency and implicit power, bolstering women's autonomy and influence in their families and community."[44] Further, in her interviews with twenty women from Bountiful, Angela Campbell reports that, "participants cast Bountiful as a heterogeneous and dynamic social and political space, where at least some women are able to wield considerable authority in their marriages, families, and community."[45] For example, one participant commented: "I feel sorry for the guys. They're very outnumbered even if they're with two wives. They're very outnumbered."[46] Moreover, this understanding of polygamy as inherently more exploitative assumes that, but for the existence of other wives, a wife would otherwise not have to 'share' her husband's time and resources with other competing interests and that a wife would have more control over her husband's resources simply because he does not have other wives. While this may certainly be true in some circumstances, it must be noted that monogamous relationships are not specially structured to ensure that any of a husband's time and resources are used to the benefit of his wife.

Perhaps even more compellingly, Elizabeth Joseph, a lawyer and outspoken polygamist wife in Utah has described her life as representing "the ultimate feminist lifestyle" with regards to tasks such as childcare. At a National Organization for Women (NOW) conference, she explained: "If I'm dog-tired and stressed out, I can be alone and guilt free... It's a rare day when all eight of my husband's wives are tired and stressed at the same time." According to Joseph, polygamy "offers an independent woman a real chance to have it all."[47] While Joseph's framing of how polygamy provides her with the 'ultimate feminist lifestyle' is not without problems,[48] it is nonetheless significant that there are other ways of understanding the power dynamics at play within a polygamous relationship and that it need not result in inequality.

In failing to make explicit this distinction between whether there is something inherently exploitative about polygamy and whether troubling aspects emerge in the way polygamy

---

42. Gillian Calder, "Penguins and Polyamory: Using Law and Film to Explore the Essence of Marriage in Canadian Family Law" (2009) 21(1) CJWL 55 at 80.
43. Susan Deller Ross cited in Lisa M. Kelly, "Bringing International Human Rights Law home: An Evaluation of Canada's Family Law Treatment of Polygamy" (2007) 65 UT Fac L Rev 1 at 14.
44. Angela Campbell, "Wives' Tales: Reflecting on Research in Bountiful" (2008) 23 CJLS 121 at 126 [Campbell, "Wives' Tales"].
45. Campbell, "Bountiful Voices", *supra* note 19 at 188.
46. *Ibid* at 214.
47. John Tierney, Op-Ed, *The New York Times* (11 March 2006) online: The New York Times: <http://select.nytimes.com/2006/03/11/opinion/11tierney.html>.
48. For example, according to Joseph, one of the ways in which polygamy facilitates the 'ultimate feminist lifestyle' is by providing "round-the-clock day care that enabled her to keep an unpredictable schedule at work and to relax when she came home." *Ibid.* While such an arrangement, involving shared childcare among 'sister-wives,' may certainly assist some women in achieving their career or other goals, it does not address the fact that childcare is still predominantly undertaken by women. Nor does it consider the needs of other sister-wives, some of who may want to pursue goals requiring an "unpredictable schedule" too, and, that in this way, polygamy is not so different from many monogamous nuclear family relationships where some, usually women, must sacrifice other activities in order to undertake care-giving responsibilities.

is sometimes practiced, LEAF's position falls short of ensuring that their position is inclusive and attentive to difference. However, LEAF's position, rather than focusing on this analysis, centres on the way in which polygamy is sometimes practiced. Indeed, LEAF's argument focuses on the connection between the practice of polygamy and harms to women in order to justify the criminal provision. Is this, then, sufficient to justify the provision? In other words, even if there is nothing inherently exploitative about polygamy, is the fact that the practice of polygamy is directly connected with the abuse and exploitation of women and children in communities like Bountiful sufficient to justify the Polygamy Provision? In the next section, I argue that it is not.

B. Creating the Cultural 'Other' and the Project of Empire

LEAF's position is problematic when considered from an intersectional and postcolonial feminist perspective because it supports a law that singles out a practice associated with religious and cultural minorities for special condemnation while leaving the mainstream practice of monogamy criminally un-interrogated. LEAF's position implicitly yet effectively harnesses and reinforces a civilizational discourse that works to racialize and culturalize minority practices as uniquely oppressive to women, and thus indicative of that culture's 'backwardness,' while rendering dominant Western practices invisible as the 'norm.' In doing this, LEAF's position contributes to creating the cultural 'Other' and permits feminist concerns about gender equality to be co-opted by neo-colonial forces.

While the practice of polygamy is certainly not without problems, neither is the practice of monogamy. For example, in highlighting that women are not automatically better off in monogamous, as compared to polygamous, relationships despite the fact that abuse and exploitation are frequently cited factors in support of the Polygamy Provision, Christina Murray points out that "violence is endemic in Western nuclear families. Nuclear families isolate women and disadvantage them economically and when monogamous unions disintegrate, women are usually left to join the poorest class in society, that of single mothers."[49] Indeed, focusing exclusively on polygamy as a problematic family form can obscure the problems within monogamous relationships. As Campbell explains, "flatly casting plural marriage as a misogynist practice serves as a foil to monogamy in a way that clouds the experience of monogamous wives."[50] Monogamy does not afford women unique protection from inequality and harm, and feminists have long critiqued the institution of (heterosexual and monogamous) marriage and the norm of the nuclear family as harmful to women. As Jyl Josephson puts it "the flaws of the institution are deeply embedded in its reinforcing of inequality, gender roles, gender hierarchy, and male power."[51] However, despite the fact that the practice of monogamy sometimes involves the same troubling aspects as the practice of polygamy, only polygamy is subject to special critique. To selectively use the criminal law as a way to address concerns about gender inequality and the exploitation of women within *some* polygamous relationships harnesses racist and culturalist ideas about the sources of

49. Christina Murray, "Is Polygamy Wrong?" (1994) 22 Agenda: Empowering Women for Gender Equality 37 at 39.
50. Campbell, "Bountiful Voices", *supra* note 19 at 190-191.
51. Jyl Josephson, "Citizenship, Same-Sex Marriage, and Feminist Critiques of Marriage" (2005) 3(2) Perspectives on Politics 269 at 270. See also Ruthann Robson, "Resisting the Family, Repositioning Lesbians in Legal Theory" (1994) 19(4) Signs 975.

gender inequality and serves to position racialized and minority communities as a cultural 'Other' with a distinctly subordinate position on the civilizational hierarchy.[52]

In her influential work analyzing issues at the intersection of race, gender and culture, Sherene Razack has examined the culturalizing trend in recent decades as the way in which Western liberal societies have addressed issues of patriarchal violence.[53] More specifically, these societies have increasingly focused on violence experienced by racialized and minority women and pointed to the cultures of these communities as the exclusive source of patriarchal violence. This culturalizing move uses the status of women, and particularly gender equality, as a marker of progressive Western civilization.[54] And, as Sirma Bilge points out, "it is particularly with regards to Muslims... that the gender-equality-and-sexual-freedoms frame has become the normative interpretative schema."[55] However, rather than examining the gender oppressive practices of both Western and non-Western societies, the culturalist narrative highlights the oppressive practices of non-Western societies, attributing these practices to their cultures while rendering invisible the oppressive practices of Western societies. As Leti Volpp explains,

> [p]art of the reason many believe the cultures of the Third World or immigrant communities are so much more sexist than Western ones is that incidents of sexual violence in the West are frequently thought to reflect the behavior of a few deviants –rather than as part of our culture. In contrast, incidents of violence in the Third World or immigrant communities are thought to characterize the cultures of entire nations.[56]

In this vein, Razack explains that "dominant groups are thought to have *values* while subordinate groups have *culture*"[57] and while the minority "culture" is expected to "clean up its gender act,"[58] one that is framed as unchanging, backwards and barbaric, the unmarked gender practices of dominant groups remains invisible and un-interrogated as the norm.[59]

In explaining the violence that such a narrative does to marginalized communities, Volpp states:

> [t]hose with power appear to have no culture; those without power are culturally endowed. Western subjects are defined by their abilities to make choices, in contrast to Third World subjects, who are defined by their group-based determinism. Because of the Western definition of what makes one human depends on the notion of agency and the ability

---

52. Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 96-97. [Razack, "Looking White People in the Eye"]. Sirma Bilge makes a similar observation noting "the problematic persistence of a gender-first approach to discrimination... which pushes feminist agendas within states, human rights establishments and supranational organizations, without critically engaging with specific overt and covert exclusions they may enforce, or social hierarchies they may consolidate." Bilge, *supra* note 13 at 11.
53. See especially Sherene Razack, "Imperiled Muslim Women, Dangerous Muslim Men and Civilised Europeans: Legal and Social Responses to Forced Marriages" (2004) 12 Fem Legal Stud 129 [Razack, "Imperiled Muslim Women"]. Razack uses the term 'culturalization' to describe an exclusive focus on culture, understood as frozen in time and separate from systems of domination. *Ibid* at 131, n. 3.
54. *Ibid* at 131-132.
55. Bilge, *supra* note 13 at 10.
56. Leti Volpp, "Feminism Versus Multiculturalism" (2001) 101 Colum L Rev 1181 at 1187.
57. Sherene Razack, *Casting Out: The Eviction of Muslims From Western Law & Politics* (Toronto: University of Toronto Press, 2008) at 169. [Razack, "Casting Out"] [emphasis added].
58. *Ibid* at 169.
59. *Ibid.*

> to make rational choices, to thrust some communities into a world where their actions are determined only by culture is deeply dehumanizing.[60]

To further highlight and problematize Western societies' attention to the violence experienced by minority women to the exclusion of an analysis of patriarchal violence in the West, Uma Narayan notes that: "burning a woman to death in India is no more exotic than shooting a woman to death in the United States; at the same time, shooting a woman to death would be considered exotic in India, where firearms are not freely available and the prevalence of guns is viewed as an American phenomenon."[61] Such a culturalist framing "prevents the serious exploration of the roots and nature of human suffering"[62] and further, ignores the way in which interlocking systems of oppression function. As Razack cautions: "we should remember that patriarchies themselves are not only cultural practices but systems interlocked with capitalism and white supremacy."[63] Further, such a framing enables feminist concerns about gender equality to be appropriated to serve the colonial projects of the West.[64] As a result, this culturalist gender narrative is deeply problematic. In discussing this turn to culture in the federal government's new guide to citizenship entitled 'Discover Canada: The Rights and Responsibilities of Citizenship,' Radha Jhappan puts it this way:

> [J]ust as Canadians would be horrified if 'Canadian culture' were to be advertised as home to many barbaric practices, including rape, sexual assault, spousal abuse, sex discrimination, and pay inequity, neither should our government substitute 'culturism' as the new screen for good old-fashioned racism.[65]

In its support for the Polygamy Provision, LEAF relies on and buttresses these ideas about the 'backwardness' of the cultural 'Other'. Although the Polygamy Reference emerged from charges against a white religious minority group in British Columbia, the current understanding of polygamy, as presenting a unique and intolerable threat to women's equality, stems from a fear of the cultural, and often Muslim, 'Other'. Indeed, Beaman points out that in the briefing notes of the Federal Minister of Justice who was speaking about polygamy in Bountiful, there is specific mention of Muslims and polygamy. She explains,

> [i]n fact, in the brief there is a rapid transition to Muslims, polygamy in Muslim Communities and reference to section 117(9)(c) of the *Immigration and Refugee Protection Act* which prohibits sponsorship by a spouse who is also the spouse of another person. Why, if the Minister was being asked about polygamy, specifically in relation to the BC government's decisions around Bountiful, was there a need to talk about polygamy among Muslims?[66]

---

60. Volpp, *supra* note 56 at 1192.
61. Uma Narayan, *Dislocating Cultures: Identities, Traditions, and Third-World Feminism* (New York: Routledge, 1997) at 102.
62. Lila Abu-Lughod, "Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others" (2002) 104(3) American Anthropologist 783 at 784.
63. Razack, "Casting Out", *supra* note 57 at 165.
64. *Ibid.*
65. Radha Jhappan, "The new Canadian citizenship test: No 'barbarians' need apply" *FEDCAN Blog* (23 February 2010), online: <http://blog.fedcan.ca/2010/02/23/the-new-canadian-citizenship-test-no-barbarians-need-apply/>.
66. Beaman, *supra* note 40 at 9.

As Natasha Bakht further points out, "the government's concern with polygamy though currently directed at the Mormons of the FLDS in Bountiful, British Columbia will likely open the door to more vociferous investigations of the already besieged and racialized Muslim community in Canada."[67] While the practice of polygamy can certainly be critiqued, the selective condemnation of polygamy as uniquely problematic positions a practice associated with religious and cultural minorities as distinctively oppressive to women and further obscures the fact that polygamy exists within a global context of systemic discrimination. Further, the inequality of women in non-Western cultures is held up in contrast to the supposed equality that women have in Western societies as a way of constructing the superiority of the West and justifying a racialized distribution of power.

The difference in the nature of the mainstream discourse between the practice of polygamy and polyamory is illustrative of this racializing and culturalizing process whereby practices that are imagined and represented as racialized are treated differently than practices associated with white mainstream society. As Harsha Walia explains, "while polyamory is used to define a relationship based on mutual negotiation between 'independent people,' polygamy refers to a 'cultural practice.' Such a dichotomy reinforces assumptions that women in racialized cultures are being more exploited and less independent than 'autonomous women' from dominant white cultures."[68] These assumptions, in turn, justify the different scrutiny applied to polygamy and polyamory. Thus, polyamory, while still a marginal practice, does not come under the same scrutiny as polygamy; it is shielded by its white identity. Tellingly, LEAF has not sought to include polyamory within the purview of polygamy.

Until the state is prepared to criminalize monogamous relationships in and of themselves, as opposed to acts of violence or abuse against women that may occur in these relationships, criminalizing polygamous relationships creates a cultural 'Other' and brings the power of the State to bear on those who are different. The singling out of polygamy for special condemnation will only serve to reinforce a certain cultural and racialized distribution of power and to reify the boundaries between a civilized and Western 'us' as opposed to a barbaric and non-Western 'Other.'

C. The Problem of Agency and the Rhetoric of Salvation

LEAF's position is objectionable in yet another way. It does not consider the intersectional identities of some marginalized women who practice polygamy and who may understand the connection between polygamy and gender equality differently than those who practice monogamy. As a result, LEAF's approach leaves no room for these women and risks stripping them of agency through discourses of salvation. Feminist support for the Polygamy Provision thus further marginalizes women who want to live in polygamous relationships in accordance with their faith, relegating them to the space just outside of criminal sanctions. In supporting the criminal prohibition on polygamy, even a 'read down' interpretation of the prohibition, LEAF's position risks casting women in polygamous relationships as perpetual victims, without agency within patriarchy.[69] Indeed, promoting a law that is

---

67. Natasha Bakht, "Reinvigorating Section 27: An Intersectional Approach" (2009) 6(2) JL & Equality 135 at 156-157.
68. Interview of Harsha Walia by Anna Carastathis (28 December 2007) in "Gender, Race, and Religious Freedom: The Bouchard-Taylor Commission's Hijacking of 'Gender Equality'" *The Dominion* (28 December 2007), online: <http://www.dominionpaper.ca/articles/1595>.
69. Volpp, *supra* note 56 at 1211.

justified on culturalist terms on the basis of protecting women from the inequality and harm of a racialized practice reinforces the idea that these marginalized women need to be 'saved' from their cultures.

In discussing the politics of the veil in the aftermath of 9/11, but which I argue applies equally to thinking critically about polygamy and the agency of women in polygamous relationships, Lila Abu-Lughod notes first, that "veiling itself must not be confused with, or made to stand for, lack of agency... [when it is sometimes a] voluntary act by women who are deeply committed to being moral and have a sense of honor tied to family,"[70] and second, asks us to think about "what freedom means if we accept the fundamental premise that humans are social beings, always raised in certain social and historical contexts and belonging to particular communities that shape their desires and understandings of the world?"[71] Indeed, it is important to remember that "women are agents with multilayered identities."[72] In insisting that we be careful in using the rhetoric of salvation, Abu-Lughod points out,

> when you save someone, you imply that you are saving her from something. You are also saving her to something. What violences are entailed in this transformation, and what presumptions are being made about the superiority of that to which you are saving her? Projects of saving other women depend on and reinforce a sense of superiority by Westerners, a form of arrogance that deserves to be challenged.[73]

Thus, in approaching the issue of polygamy, it is vitally important to consider the context, agency, and motivations of women engaged in polygamous relationships as well as any Western biases at work in our reading of the issue.

In her article, in which she attempts to understand the agency of veiled Muslim women, Sirma Bilge offers similarly valuable insight applicable to thinking about the agency of women in polygamous relationships. Recognizing the prevailing dichotomy where the veil acts either "as a *symbol of submission* of women to men, [or] as a *symbol of resistance* against Western hegemony,"[74] Bilge attempts to move beyond this framework because "both fail to address the reasons most frequently given by veiled women [for veiling]; questions of piety, morality, modesty, virtue and divinity."[75] She notes that in both perspectives, veiling as submission and veiling as resistance, religious reasons for veiling are translated into something else and thus fail to address religious motivations. Bilge suggests that part of taking religious motivations seriously "requires asking how people conceive their own actions, whether they attribute responsibility for events to individuals, to fate, to deities, or to other animate or inanimate forces."[76]

In light of this, how can we be mindful of the fact that the wholesale condemnation of polygamy may not be helpful in addressing issues of gender inequality and harm within polygamous communities? Furthermore, how can we approach the Polygamy Provision in a manner that embraces difference? Abu-Lughod has advocated that we undertake

---

70. Abu-Lughod, *supra* note 62 at 786.
71. *Ibid.*
72. Razack, "Casting Out", *supra* note 57 at 153.
73. Abu-Lughod, *supra* note 62 at 789 [emphasis in the original].
74. Bilge, *supra* note 13 at 14.
75. *Ibid.*
76. *Ibid* at 22.

> the hard work involved in recognizing and respecting differences — precisely as products of different histories, as expressions of different circumstances, and as manifestations of differently structured desires. We may want justice for women, but can we accept that there might be different ideas about justice and that different women might want, or choose, different futures from what we envision as best? We must consider that they might be called to personhood, so to speak, in a different language.[77]

As suggested by this analysis, the courts will need to "pay attention to specific contexts, to listen to those women whose rights we purport to stand for, and to understand that we occupy different relationships of power and privilege."[78]

V. TOWARD AN INTERSECTIONAL AND POSTCOLONIAL FEMINIST PERSPECTIVE TO POLYGAMY IN THE LAW

In order to realize an intersectional and postcolonial feminist approach to polygamy, the courts must begin by striking down the Polygamy Provision. In the event that this happens, legislators must necessarily critically evaluate what, if any, legislation will take its place. However, even if the courts do not strike down the criminal prohibition on polygamy, legislators should still consider a different approach to polygamy. Rather than isolating a practice associated with religious and cultural minorities for special condemnation, legislators could take the following steps in addressing polygamy.

A. Approach Polygamy Through a 'World-Travelling' Methodology

In mapping out how legislators might theorize and implement a more inclusive approach to polygamy, the concept of 'world-travelling,' as popularized by Isabelle Gunning,[79] may provide some guidance. Maneesha Deckha has explained the term as "signifying a certain critical yet respectful stance of listening to 'Others' from cultural contexts not our own."[80] In her work on why feminists should not dismiss the potential of the practice of sexual sadomasochism to be part of a feminist project, Deckha advocates using the world-travelling approach because it

> readily affirms the situatedness and embodiedness of all knowledge-making. Steeped as it is in the nuances and subtleties of the scattered nature of power, it denies the possibility of a pure of innocent "equal" exchange between relatively privileged and marginalized locations, despite the best intentions we may hold as privileged subjects of undoing hegemonies that mediate our interactions with Others.[81]

Indeed, this seems especially important in the context of the Polygamy Reference where the dominant discourse marshaled in support of the Polygamy Provision, by both the British Columbia Attorney General's Office as well as mainstream women's rights organizations

77. Abu-Lughod, *supra* note 62 at 788.
78. Carastathis, *supra* note 68.
79. Isabelle Gunning, "Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries" (1991-1992) 23 Colum HRL Rev 189 at 194.
80. Maneesha Deckha, "Pain as Culture: A Postcolonial Feminist Approach to S/M and Women's Agency" (2010) at 9 [unpublished, on file with author].
81. *Ibid* at 9-10.

such as LEAF, centres on the criminal prohibition's supposed ability to promote gender equality and protect women from harm. While these groups may have the best intentions in supporting the law against polygamy, taking a world-travelling approach would enable the courts to assess the practice of polygamy informed by the perspectives of those who reside in different 'worlds.' Indeed, using a world-travelling methodology does not mean that 'outsiders' to a particular practice should not evaluate that practice, rather, "it is a structured reminder... that the buffer to prevent slippages into an unwitting imperial standpoint is to educate one's affect with these different perspectives before settling on a position."[82] In her work on female genital 'cutting,' Isabelle Gunning further articulates the process for undertaking a world-travelling approach noting that it involves three steps: 1) understand one's own historical context; 2) see oneself as the 'Other' woman might see you; and 3) see the other woman, her world and sense of self through her eyes.[83] She explains that this three-part methodology "is a process to use in perceiving and understanding [unfamiliar] practices within their cultural context and relies upon a multicultural dialogue as a way to encourage the evolution of more shared values."[84]

B. Engage With and Listen to Women Who Reside in Different 'Worlds'

As part of employing a world-travelling approach, legislators should engage with and listen to women who are in polygamous relationships to understand where there may be gaps in the laws that aim to protect their interests. Rather than presuming to know the source of problems in polygamous relationships, legislators should make an effort to connect directly with those whom the law purports to protect before advocating for particular provisions and legislation. As Campbell puts it, "the question of what — if anything — to do about polygamy in Canada is one that embodies the perils of relying exclusively on 'the situated knowledge of the golden few' whom we typically imagine as wielding moral prominence and authority."[85] Good intentions cannot replace empirical research, such as that done by Campbell, and direct engagement with polygamous wives if we are to understand how the law can best be used to promote and protect equality rights; "the perspectives of the women affected by these hardships are necessary to understanding whether these women perceive polygamy, or some other force, as the root source of such adversity."[86] While direct engagement with wives in polygamous relationships may be challenging, not the least because polygamy remains a culturally and legally sensitive issue, it is nevertheless a critical task.

C. Address Concerns with Polygamy Through Existing Legislation.

As some have already pointed out, "the specific harms associated with sexual integrity that are now voiced in the concerns about a minimum age for, and consent to, valid marriages are already captured in the prohibitions on sexual exploitation and sexual interference, as well as the post-1983 removal from the *Criminal Code* of marriage as a defence to sexual assault."[87] While the elements of the offence of polygamy may be easier to prove than, for example, sexual exploitation in tightly knit and closed communities such as Bountiful, this

82. *Ibid* at 10.
83. Gunning, *supra* note 79 at 194.
84. *Ibid* at 193.
85. Campbell, "Bountiful Voices", *supra* note 19 at 226.
86. Campbell, "Wives' Tales", *supra* note 44 at 139.
87. Drummond, "Mischief", *supra* note 25 at 366.

should not be a reason for upholding a law that is otherwise deeply problematic. Indeed, "the moral perils inherent in the criminalization of polygamy need to be deeply weighted and re-considered."[88]

VI. CONCLUSION

As a prominent women's organization focused on promoting the equality rights of women, LEAF seems ideally situated to bring a nuanced feminist perspective on polygamy to the courts. However, I have argued that LEAF's position is problematic from an intersectional and postcolonial feminist perspective. In supporting even a 'read down' interpretation of the Polygamy Provision, LEAF accepts a discourse about polygamy that too easily and uncritically creates boundaries between mainstream and marginal practices, labeling the former as acceptable and the latter as criminal, without interrogating the reasons underpinning this understanding of a minority practice. First, LEAF's position is based on the assumption that polygamy is inherently more harmful to women such that it warrants criminal sanctions. This is problematic because it leaves unexamined what exactly is so troubling about a different practice, one that is imagined and represented as racialized, and whether and how our own assumptions and values are at work in understanding polygamy in this way. Second, LEAF's position isolates a practice associated with religious and cultural minorities for special critique while leaving the mainstream practice of monogamy unexamined. As Drummond has highlighted, "the singling out of minority groups for practices that are functionally no different from what the majority population has tolerated and accommodated over the last century leaves the polygamy provision poised to trigger concerns about xenophobia and racism."[89] Finally, LEAF's position fails to consider the concerns of women who participate in polygamous relationships and who do not view their relationships as unequal and oppressive in the way that mainstream society has understood polygamy, thus furthering their marginalization.

In light of this and the Polygamy Provision's troubling history as a tool of oppression and an aid to white supremacy, the courts must be careful in determining the Polygamy Reference to ensure that they take an intersectional and postcolonial feminist approach. While currently focused on the practices of a white, non-immigrant minority religious group, this decision has the potential to affect future decisions involving racialized minorities with similarly 'foreign' practices. As such, the courts must be mindful of their role in creating cultural 'Others' and strike down the Polygamy Provision. In order to create a more inclusive legal approach, legislators should then take a world-travelling approach to polygamy to ensure that those unfamiliar with, and uninformed about, particular practices and 'worlds' do not slide into inaccurate and culturally biased understandings. As part of this world-travelling approach, decision-makers will need to engage with women who are involved in polygamous relationships and learn about their perspectives on their relationships. Finally, actualizing an intersectional and postcolonial feminist perspective to polygamy in the law also includes addressing problems that emerge in polygamous relationships with existing legislation that targets particular harms.

---

88. *Ibid.*
89. Drummond, "Mischief", *supra* note 25 at 368.

ARTICLE

CHINA'S ANTI-MONOPOLY LAW: HISTORY, APPLICATION, AND ENFORCEMENT

By Thomas Brook*

CITED: (2011) 16 Appeal 31-48

I. INTRODUCTION

The growth of a competitive market economy is straining the socialist ideologies upon which the People's Republic of China was founded.[1] Nothing illuminates this tension better than China's recent struggle to implement its Anti-Monopoly Law (AML).[2] This struggle has created a unique Chinese structure behind the AML's pro-competition facade.[3]

The AML promotes a market economy on China's terms. Vague concepts in its articles, such as the protection of "public interest" give government agencies significant deference on when and how to enforce decisions.[4] The text of the AML also indicates that China will continue to promote socialist ideologies while attempting to strengthen its market economy.[5] But perhaps the most striking differences between the AML and competition legislation in other market economies come from outside the text itself. These differences only become apparent once the legal environment surrounding the AML is illuminated. As such, this paper explores the AML through two of these environmental influences: the lack of an independent and experienced judiciary, and the political influence of State Owned Enterprises (SOEs). It is hoped that this exploration will determine whether the AML rep-

* Thomas Brook is a Law Student in the University of Victoria's JD program. He completed an engineering degree with distinction at the University of Victoria and has worked as a professional engineer and business manager for 10 years prior to entering law school. He has summered at Fasken Martineau Dumoulin LLP in Toronto and will be articling with Faskens starting in the summer of 2011.

1. The People's Republic of China is abbreviated as "China" throughout.
2. Anti-Monopoly Law of the People's Republic of China (AML), Presidential order No. 68 (Approved by the Standing Committee of the National People's Congress on Aug. 30, 2007 and effective Aug. 1, 2008), online: Ministry of Commerce of the People's Republic of China <http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf>
3. Bruce Owen, Su Sun, and Wentong Zheng, "China's Competition Policy Reforms: The Anti-monopoly Law and Beyond" (2008-2009) 75 Antitrust LJ 233, at page 237; and Zhenguo Wu, "Perspectives On The Chinese Anti-Monopoly Law" (2008-2009) 75 Antitrust LJ 73, at page 77.
4. See for example: AML, *supra* note 3 at Articles 1, 15, and 28.
5. See: AML, *supra* note 3 at Articles 1 and 4.

resents a sword bravely defending competition or a twig bending at the whim of the Chinese Communist Party (CCP).

This exploration is divided into four sections. Following this introduction, the legislative history, in regards to competition law in China, is discussed to elucidate the origins of the AML. The AML is then summarized and five areas where it has diverged from competition law in Western democracies are explored. This divergence is further investigated through the review of civil cases and government agency decisions. Finally, this exploration is concluded with an assessment of the AML's enforceability.

II. HISTORICAL DEVELOPMENT OF THE AML

To understand the AML and its application it is important to understand the legal environment in which the AML was created. Law in China is often seen as a tool for organizing government activity rather than as a method of balancing the interests of citizens with the interests of the State.[6] A majority of articles within China's Constitution[7], for example, simply describe the structure of state agencies.[8] Traditionally, the protection of private interests, whether personal or business, has not been a priority within Chinese law. This contextual background is important to keep in mind when considering how the AML, which focuses on the protection of private interests, was created. As stated by Salil Mehra and Meng Yanbei, the AML "is a dramatic change for China's legal system [. It has been] undertaken with a view towards the paths taken by other nations [but does not] necessarily [follow] those paths."[9]

China's path originated with Deng Xiaoping's (邓小平) reformation of the country's planned economy soon after his rise to power in 1978. Early reforms included the implementation of a "'responsibility system' [that] allowed farmers to privately retain and sell agricultural products."[10] This limited allowance for competition reignited a long history of Chinese commercialism and quickly lead to the creation, by the mid 1980's, of thousands of local enterprises.[11]

Perhaps more importantly, Deng Xiaoping created a series of special economic zones that allowed foreign companies to form joint ventures with SOEs in designated geographic locations.[12] This, in turn, led to a significant increase in foreign investment and trade.[13]

As investment grew and competition became entrenched within the Chinese economy, concern increased over anticompetitive practices. This concern gave rise to discussion within the CCP, beginning as early as the mid 1980's, of the need for a comprehensive competition law.[14] Although the drafting of the AML began in the mid 1990's it was not until

---

6. Jianfu Chen, *Chinese Law: Context and Transformation* (Leiden, the Netherlands: Brill 2008), at 77.
7. *Constitution of the People's Republic of China* (中华人民共和国宪法)(Adopted December 4, 1982, amended March 14, 2004), online: National People's Congress <http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm>.
8. Chen, *supra* note 7 at 77.
9. Salil Mehra and Meng Yanbei, "Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law", (2008) 49 Virginia Journal of International Law 379, at 390.
10. Mark William, "Foreign Investment in China: Will the Anti-Monopoly Law be a Barrier or a Facilitator" (2010) 45 Texas Int'l L J 127, at 128.
11. *Ibid*.
12. William, *supra* note 11 at 128-130.
13. *Ibid*.
14. H. Stephen Harris, "The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China" (2006) 7 Chi J Int'l L 169, at 174.

2002, with China's accession to the World Trade Organization (WTO), that the impetus would exist for China to commit to enacting the AML.[15]

The legislative history of the AML can be traced back to 1987. In 1987 the State Council set up a legislative committee tasked with implementing anti-trust Legislation.[16] According to Shang Ming, Director General of the Anti-Monopoly Bureau at the Ministry of Commerce, the committee established an early foothold into competition legislation with the *Regulation on the Administration of Advertisement of the People's Republic of China*.[17] This regulation states that "monopolies and unfair competition in advertising activities are prohibited."[18] After the introduction of this regulation, however, efforts to expand the use of competition law slowed. During the late 1980's several government officials, who vehemently opposed economic reform, resisted attempts to introduce new legislation.[19]

Competition law did not take hold in China until 1993 when the *Anti-unfair competition Law* (AUCL) came into force.[20] Although the AUCL prohibited tied selling, price fixing and bid rigging, it failed to address other anticompetitive activity including the formation of monopolies.[21] Some observers have described the AUCL as a combination between a consumer law and intellectual property law rather than true competition legislation.[22]

During the 1990's and into the early 2000's several laws, regulations, and administrative rules touched on some aspect of competition law.[23] This legal apparatus, however, focused on specialized features of individual industries. It did not provide a structure which could form the basis for a comprehensive competition law in China.[24] As Zenguo Wu stated, there are four main issues with China's pre-AML legislation:

> First, there is no unified and complete anti-monopoly law and system. Second, the content of the existing rules is relatively general and impractical. Third, the actual impact of the existing rules is likely to be relatively low, and at this point the rules are not perceived as authoritative. Fourth, there are insufficient penalties and other consequences for violations.[25]

---

15. *Ibid* at pages 176 and 177.
16. Zhengxin Huo, "A Tiger Without Teeth: The Antitrust Law of The People's Republic of China" (2008) 10 Asian-Pacific L & Pol'y J 32, at 35.
17. Shang Ming, "Antitrust in China – a constantly evolving subject" (February 2009) *Competition Law International*, at 4.
18. *Ibid.*
19. Youngjin Jung and Qian Hao, "The New Economic Constitution in China" (2003) 24 NW J Int'l L & bus 107, at 112.
20. *Anti-Unfair Competition Law of the People's Republic of China* (AUCL) (approved by the Standing Committee of the National People's Congress on Sept. 2, 1993 and effective Dec. 1, 1993), online: Supreme Court of the People's Republic of China <http://en.chinacourt.org/public/detail.php?id=3306>.
21. AUCL, *supra* note 21 at Chapter 2- Activities of Unfair Competition.
22. Yvonne Chua and Grace Wong, "New judicial interpretation of PRC Anti-Unfair Competition Law issued" (2007) 2(7) J. Intell Prop Law & Pract 443, at 444.
23. See: Owen *et al*, *supra* note 4 at 233-234.
24. See: *The Law of Commercial Banking of the People's Republic of China* (effective May 10, 1995, and amended on Dec. 27, 2003), online: China Securities Regulatory Commission <http://www.csrc.gov.cn/n575458/n4001948/n4002075/n4002315/4059118.html> ; *The Price Law of the People's Republic of China* (approved by the Standing Committee of the National People's Congress on Dec. 29, 1997 and effective May 1, 1998), online: China Cultural Industries <http://en.cnci.gov.cn/Law/LawDetails.aspx?ID=6024>;
25. Wu, *supra* note 4 at 76.

The first comprehensive attempt to regulate monopolies did not occur until the *Regulations for Merger and Acquisition of Domestic Enterprises by Foreign Investors* (RMADE)[26] was passed on September 8, 2006.[27] RMADE resembles similar laws in the United States and Canada. For example, Article 51 states that if any party has an annual turnover of more than RMB 1.5 billion, and has over 20% of the pre-merger market share or will have more than 25% of the post merger market share then the parties must notify the Ministry of Commerce (MOFCOM) and the State Administration of Industry and Commerce (SAIC).[28] This legislation, as Sun Su suggests, may have been implemented to simply "study" the effects of merger review in China.[29] It contains no provisions detailing how mergers are evaluated or judgments are enforced. The legislation simply states that if MOFCOM and SAIC believe there will be an over-concentration then hearings will be held.[30]

Although the People's Congress included the enactment of a comprehensive competition law in their 1994 five-year legislative plan,[31] it was not until just before the Beijing Olympics on August 1, 2008 that the AML would be enforced.[32] An initial draft of the AML materialized slowly. It was completed only after China became a member of the WTO in 2002.[33] This draft was reviewed by a small number of individuals, heavily revised, and then submitted to the State Council Legislative Affairs Office in March 2004.[34] It was not until 2005 that MOFCOM, the principle drafter of the AML, would distribute the law for wider review and not until 2007 when a final version of the AML would be available.[35]

The drafting process was not public or transparent but it did take into account comments from a small group of international anti-trust experts.[36] These comments, particularly those from US and European anti-trust enforcement agencies, and the American Bar association, are widely considered to have shaped the final form of the AML.[37]

During this period of international consultation, conflicts over the content and scope of the AML raged within the Chinese government.[38] Several factions in the State Council provided significant resistance to the law's implementation.[39] Some of the most powerful of these opponents were the representatives of SOEs. One such person, Yang Jingyu was not only a representative for SOEs but also a member of the National People's Congress and the Chief Secretary of the Law Committee.[40] At one point, while rejecting the need to contain

---

26. *Regulations for Merger and Acquisition of Domestic Enterprises by Foreign Investors* (effective September 8, 2006), online: Foreign Affairs office of the People's Government of Yunnan Office <http://www.yfao.gov.cn/Enshow.aspx?id=172>.
27. Owen *et al*, *supra* note 4 at 235.
28. *Regulations for Merger and Acquisition of Domestic Enterprises by Foreign Investors*, at Article 51. See note 29.
29. Su Sun, "Antitrust Review in China's New Merger Regulation" (2007) Economists Ink, Winter 2007, online: Economists Ink <http://www.ei.com/ink/Winter_2007.pdf>.
30. *Regulations for Merger and Acquisition of Domestic Enterprises by Foreign Investors*, at Article 52. See note 29.
31. Huo, *supra* note 19 at 35 and 36.
32. AML, *supra* note 3 at Article 57.
33. As a member of the WTO, China was not required to create a competition law but they were obligated "to avoid distortions to market competition." See: David J. Gerber, "Economics, Law & Institutions: The Shaping of Chinese Competition Law" (2008) 26 Journal of Law & Policy 271 at page 281.
34. Owen *et al*, *supra* note 4 at 236.
35. *Anti-Monopoly Law of the People's Republic of China:* Draft for Comment (Apr. 8, 2005), online: International Bar Association <http://www.ibanet.org/LPD/Antitrust_Trade_Law_Section/Antitrust/DevCompLaw_PRC.aspx>.
36. Owen *et al*, *supra* note 4 at page 237.
37. Owen *et al*, *supra* note 4 at page 237.
38. Huo, *supra* note 19 at pages 36 and 37.
39. *Ibid*.
40. Huo, *supra* note 17 at 38. Note that the Law Committee was tasked with implementing the AML.

government monopolies, Yang Jingyu boldly stated that "administrative monopolies do not exist in China."[41] Yang Jingyu's appointment and his ability to shape the AML by, for example, minimizing its impact on administrative monopolies exemplifies the political influence wielded by SOEs in China. It is this conflict, between established, and often monopolistic, business entities and China's new found desire for consumer protection that has produced the AML's unique character.

III. SUMMARY OF THE AML

The AML contains eight chapters.[42] In Chapter One, the law's objectives are stated, its scope is explained and various terms are defined. Chapter Two explains the type of monopoly agreements that are prohibited and details exceptions to these prohibitions including agreements that improve dynamic or productive efficiencies. Factors used to determine market dominance of a "business operator" and prohibited abuses of a "dominant market position" are detailed in Chapter Three.[43] Chapter Four contains notification procedures for mergers and acquisitions. Article 31 of this chapter introduces the "national security" test which appears to allow significant discretion for the Chinese government to decide if and when foreign entities can acquire interests within China.[44] One of the most interesting and unique aspects of the AML is its apparent prohibition of administrative monopolies in Chapter Five.[45] This prohibition appears to be a radical departure from Chinese socialist ideology but may prove to be unenforceable, as will be explored below. Approved investigation procedures are included in Chapter Six and Chapter Seven allows for specific penalties. Finally, Chapter Eight excludes the lawful exercise of intellectual property rights and monopolies within the agricultural sector from prosecution under the AML.

The following analysis focuses on the unique aspects of the AML that have differentiated it from similar legislation in Western democracies. A brief discussion of the prohibition of monopoly agreements, merger notification requirements and the national security provision will be followed by a more detailed discussion of the areas that show a significant contrast to Western competition law. This detailed discussion will explore the AML's potential for restricting administrative monopolies and the muted impact of the AML as it is implemented through enforcement agencies and the Chinese judicial system.

A. Prohibition of Monopoly Agreement

The prohibition of monopoly agreements in Chapter Two of the AML is similar to the prohibitions listed in s.45 and 90.1 of Canada's *Competition Act*.[46] A non-exhaustive list of prohibited horizontal monopoly agreements is presented in Article 13.[47] A similar list of prohibited vertical agreements is listed in Article 14.[48] Finally, Article 15 provides defences to prosecution.[49]

---

41. Interview with Yang Jingyu, Xinhua News Net, 30 Sept 2007, online: Xinhua News Net <http://news.xinhuanet.com/legal/2007-09/30/content_6816174.htm>.
42. AML, *supra* note 3.
43. AML, *supra* note 3 at Articles 17, 18 and 19.
44. AML, *supra* note 3 at Article 31.
45. AML, *supra* note 3 at Chapter 25.
46. *Competition Act*, R.S. 1985, c. C-34, at s.45 and s. 90.1.
47. AML, *supra* note 3 at Article 13.
48. AML, *supra* note 3 at Article 14.
49. AML, *supra* note 3 at Article 15.

Two features differentiate this Chapter of the AML from the *Competition Act*. First, the AML does not refer to lessening competition "substantially"[50] but rather applies a lower standard of "restrict[ing] competition".[51] It has been argued that this lower standard will increase the discretionary power of the AML's enforcement agencies and hence increase the potential for misapplication of the law on harmless agreements.[52] Secondly, ss. 4, 5 and 6 of Article 15, unlike the *Competition Act*, allow the creation of a monopoly when it is formed in the "public interest", during times of "economic recession" or for the purpose of "safeguarding the justifiable interests of foreign trade."[53] As with much of the AML, "[i]t falls to the enforcement process to articulate (or dissemble) China's substantive policy" on these provisions.[54] This provides government agencies with a vast amount of discretion when enforcing the AML.

Merger Notification Requirements

Article 20 provides a basic definition of "concentration", stipulating a concentration consists of either:

> (1) Mergers conducted by undertakings; (2) Controlling other undertakings by acquiring their shares or assets or through other means; [or](3) Acquiring control over other undertakings by contract or other means, or by obtaining the ability to exercise decisive influence over other undertakings by contract or other means.[55]

This definition is certain to cover a majority of merger situations but does not follow the expansive definitions provided by legislation in the United States and Canada.[56]

The AML's merger notification procedures are not unique. Articles 23 through 30 present a procedure that is very similar to the one adopted by Part IX of the *Competition Act*.[57] Likewise, the AML's *Regulation on Notification Thresholds for Concentrations of Undertakings* (RNTCU) has similar notification thresholds to the ones detailed in the *Competition Act*.[58]

One criticism that has been raised about the notification requirements, in the RNTCU, is that they "may leave some room for the Chinese authorities to deliberately block a merger that affects only a foreign market when a Chinese firm in the same market would be disadvantaged."[59] Although this is possible it is more likely that differential enforcement will be exercised through reference to the "public interest", as discussed above, or through the "national security" provision.

---

50. *Competition Act*, *supra* note 47 at s. 45 and s. 90.1.
51. AML, *supra* note 3 at Article 13.
52. Huo, *supra* note 17 at 47.
53. AML, *supra* note 3 at s. 4, 5 and 6, Article 13.
54. Nathan Bush, "Constraints on convergence in Chinese antitrust" (2009) 54 The Antitrust Bulletin 87 at 137.
55. AML, *supra* note 3 at Article 20.
56. *Competition Act*, *supra* note 47 at s. 91; and *Clayton* Act, U.S.C. Title 15, Chapter 1, § 12 (1914), at s. 7.
57. AML, *supra* note 3 at Articles 23-30.; and *Competition Act*, *supra* note 47 at Part IX.
58. AML, *supra* note 3 at Article 21; and *Competition Act*, *supra* note 47 at s. 110.
59. Christopher Hamp-Lyons, "The Dragon in the Room: China's Anti-Monopoly Law and International Merger Review" (2009), 62 Vand. L. Rev. 1577 at 1607.

B. The National Security Provision

Article 31 of the AML provides that:

> besides the examination on concentration in accordance with this Law, the examination on national security according to the relevant regulations of the State shall be conducted as well on the acquisition of domestic undertakings by foreign capital.[60]

The concept of "national security" is not defined within the AML and there is no limitation placed on the application of this provision. This again leaves the Chinese enforcement agencies with a significant amount of discretion.

This type of national security review, however, is not uncommon in competition legislation throughout the world. For example, the *Investment Canada Act*[61] has recently undergone a revision where a new ground for review of foreign investment has been added. Part IV.1 of this act prevents foreign investment that would be "injurious to national security."[62] It is interesting to note that, like the AML, the term "national security" is also left undefined in the *Investment Canada Act*.

The concern from the perspective of foreign entities investing in China seems to stem from the uncertainty surrounding the national security review process and the lack of an adequate means of appeal within the Chinese legal system. As Thomas Jones, a partner in Allen & Overy, who has significant experience with foreign acquisitions of Chinese companies, stated:

> the national security review on foreign investments is undoubtedly a sovereign issue. However, foreign investors seek transparency, consistency, and guidance in the law's implementation. In addition, national security review policies must be specific and authorities should establish detailed implementation plans in the near future.[63]

C. Administrative monopolies

i. State Owned Enterprises

Prior to the reforms begun by Deng Xiaoping in the late 1970's nearly all economic activity within China was controlled by SOEs.[64] These SOEs are China's largest administrative monopolies and continue to have a significant effect on its economic and political climate.[65] To understand the potential effect of the AML, it is essential to understand the role played by these state sponsored monopolies.

China currently has the greatest economic separation between rich and poor of any nation.[66] This separation has been fostered by the continued distortion of the labour market

60. AML, *supra* note 3 at Article 31.
61. *Investment Canada Act,* R.S. 1985, c. 28 (1st Supp.).
62. *Investment Canada Act*, *supra* note 62 at Part IV.1.
63. Huo, *supra* note 17 at page 57.
64. Sun Han and Clifton Pannell, "The Geography of Privatization in China, 1978-1996" (1999) 75(3) Economic Geography 272, at pages 276 and 291.
65. Owen, *supra* note 4 at 232-234.
66. Richard Spencer, "China Rich-poor Gap is the World's Worst", February 27, 2008, online: Daily Telgraph <http://www.telegraph.co.uk/education/main.jhtml?xml=/education/2004/03/26/tegAwchina27.xml>.

by SOEs.[67] As stated by the United Nations in its China Human Development Report, this widening wage differential, between rich and poor, has mainly arisen due to the effect of monopolistic industries turning higher profits into higher wages for workers.[68] This issue is a focal point for proponents of the AML who see the law as a method of introducing competition and balancing this wage differential.

SOEs have retained significant if not strengthened control of many industries despite attempts by the Chinese government to introduce competition.[69] On December 18, 2006, the State Assets Supervision and Management Commission announced that the national defence, electrical power infrastructure, petroleum, petrochemicals, telecommunications, coal, civil aviation and waterway transportation industries are to be absolutely controlled by SOEs.[70] Despite this policy competition has been actively introduced into these "strategic industries."[71] For example, there are currently four private airlines that are allowed to operate within the Chinese market.[72] Likewise, SOEs have been broken up to increase competition.[73] These efforts, however, are often thwarted by blatant anticompetitive behaviour.

The best example of this behaviour was seen when China Telecom and China Netcom, both the result of the forced breakup of an SOE in 1999, signed a two year "gentleman's agreement" that stated they would not compete for customers in each other's territory.[74] Likewise, China's petroleum providers have entered into similar written non-competition agreements.[75] Due to their political influence, lack of accountability and ready financing by China's well established banks,[76] SOEs are seen as more likely than private monopolies to aggressively pursue anticompetitive behaviour.[77]

The struggle between reigning in of the anticompetitive behaviour of SOEs and their dominant position in China can be observed in the AML. Article 7 provides that the government will regulate SOEs to "operate lawfully, be honest and faithful, be strictly self disciplined [and] accept social supervision."[78] Yet, as discussed below, the AML explicitly excludes SOEs from penalty or sanction. Although the AML appears to be the perfect mechanism for reducing the economic power of SOEs, and protecting consumers within China, it is reasonably clear that the AML will have little impact on these monopolies.

---

67. Knight, John, and Li Shi, "Wages, Firm Profitability and Labor Market Segmentation in Urban China" (2004) 16(3) China Economic Review 205, at 206.
68. United Nations Development Programme, and China Development research Department "China Human development report 2005", online: United Nations Development Programme <http://www.undp.org.cn/downloads/nhdr2005/NHDR2005_complete.pdf> at 45.
69. For a summary of the efforts taken by the Chinese government to force competition on sectors traditionally dominated by SOE's see: Owen *et al*, *supra* note 4 at 242-244.
70. State Assets Supervision and Management Commission, "Guidance on the Restructuring of State Capital and State Owned Enterprises", December 18, 2006, online: State Assets Supervision and Management Commission <http://www.sasac.gov.cn/n1180/n1566/n258252/n258659/1728074.html> .
71. *Ibid.*
72. Owen *et al*, *supra* note 4 at 245.
73. David Dollar, "Economic Reform and Allocative Efficiency in China's State-Owned Industry" (1990) 39 Economic Development and Cultural Change 89 at 91-95.
74. Jiao Likun, "China Telecom and China Netcom Reaching Agreement Not to Compete for Landline Customers", Beijing Morning Daily, Feb. 27, 2007, online: SINA <http://tech.sina.com.cn/t/2007-02-27/01011391578.shtml>.
75. Master's thesis, Jiamin Liu, Simon Fraser University, Department of Economics, Masters of Arts, "The Introduction of Competition to China's Petroleum Sector: A Policy Analysis", Spring 2008.
76. Robert Cull, Lixin Xu, "Who gets credit? The behavior of bureaucrats and state banks in allocating credit to Chinese state-owned enterprises" (2003) 71 J of Development Economics 533.
77. David E.M. Sappington & J. Gregory Sidak, "Competition Law for State-Owned Enterprises", 71 Antitrust LJ 479 (2003).
78. AML, *supra* note 3 at Article 7.

Exempting SOEs from prosecution under the AML is certain to greatly diminish the effectiveness of this legislation. As Eleanor Fox states, "[t]he exemption of state monopolies in strategic sectors could drive a huge hole in China's efforts to help the market work."[79]

ii. Administrative Monopolies Provision

Although SOEs are the largest and most prominent example of an administrative monopoly, threats to the enforcement of the AML come from all levels of government in China. Administrative monopolies at the local or regional level are particularly difficult to reign in due to the corruption of officials.[80] The use of administrative power at this level of government to favour one business over another creates many opportunities for anticompetitive behaviour to flourish. Despite significant opposition from consumer groups and officials in Beijing, administrative monopolies remain prevalent in China.[81]

A brief history of the Chapter governing "abuse of administrative powers to exclude or restrict competition" is key to understanding its application.[82] Early drafts of the AML contain a chapter that prohibits the restriction of competition by administrative agencies and provides appropriate legal remedies.[83] This chapter was expunged from the AML by December of 2005.[84] The elimination of this Chapter can be directly linked to the political influence of SOEs, who felt threatened by its prohibition of administrative monopolies.[85] This move, by legislators, was swiftly met with significant public opposition.[86] Thus, Chapter Five, which was edited and reintroduced into the AML, became a compromise between consumers' desire to limit administrative monopolies and the SOEs' drive to maintain their monopolistic position.

On its face, Chapter Five appears to outlaw administrative monopolies. Article 33 prohibits anticompetitive behaviour by an entity "empowered by the law"[87] and Article 37 explicitly prevents administrative bodies from using their powers to "eliminate or restrict competition".[88] On closer inspection, however, it is clear that this Chapter is a "tiger without teeth."[89] No penalties are provided in Chapter Five and Article 51, which provides legal remedies for violations of the AML, explicitly excludes administrative monopolies from penalty or sanction.[90]

Article 51 provides, in regards to administrative monopolies, that the "Anti- Monopoly Authority may put forward suggestions … to the relevant superior authorities."[91] Currently these "superior authorities" have shown little interest in restricting administrative monopolies.[92] As Wang Ye comments, restricting administrative monopolies in China is par-

---

79. Eleanor Fox, "Symposium: The Anti-Monopoly Law of The People's Republic of China:An Anti-Monopoly Law for China—Scaling the Walls of Government Restraints" (2008) 75 Antitrust ABA 173 at 178.
80. Mehra and Yanbei, *supra* note 10 at page 400.
81. Yong Guo and Angang Hu, "The Administrative Monopoly in China's Economic Transition" (2004) 37 Communist & Post-Communist Stud. 265 at 279.
82. AML, *supra* note 3 at Chapter 5.
83. Harris, *supra* note 15 at 187-188.
84. Owen *et al*, *supra* note 4 at 254.
85. Harris, *supra* note 15 at 172.
86. *Ibid.*
87. AML, *supra* note 3 at Article 33.
88. AML, *supra* note 3 at Article 37.
89. Huo, *supra* note 17.
90. AML, *supra* note 3 at Article 51.
91. *Ibid*.
92. Wang Ye, "Four bottlenecks facing the implementation of anti-monopoly law", online: Caijing <http://www.caijing.com.cn/2007-12-06/100040501>

ticularly difficult because this requires not only economic but political reform.[93]

It is unclear, given China's current political realities, if Chapter Five will be used to limit administrative monopolies. Any strengthening of Chapter Five will not only depend on the political influence of large SOEs within China but also on China's age old struggle between enforcement agencies, operating out of the central government in Beijing, and local or regional governments.[94]

D. Enforcement

Eleanor Fox has commented that China faces "enormous practical and political limitations on enforcement" of the AML.[95] Enforcement in China is fundamentally different from enforcement in Western democracies. As Nathan Bush points out:

> China lacks a strong tradition of judicial review, and Chinese judges are loath to second-guess agency interpretations of complex laws. In many respects, agency implementation of new antitrust rules will matter more than the legislative process.[96]

Though it was anticipated that a single authority would be responsible for enforcement of the AML it became apparent, in 2005, that this would not occur due to a bitter rivalry between the National Development and Reform Committee (NDRC), MOFCOM and SAIC.[97] This struggle resulted in the formation of an "Anti-Monopoly Commission" (AMC). Currently, Vice Premier Wang Qishan (王岐山), heads the AMC which contains officials from the NDRC, SAIC and MOFCOM.[98] The AMC's authority is described in Article 9 of the AML.[99] This article leaves the commission with an advisory role rather than one focused on enforcement.

Article 10 clarifies that enforcement should be carried out by an "Anti-Monopoly Enforcement Authority" which is appointed by "state council."[100] The enforcement authority is given investigatory power under Article 39 but, interestingly, must get approval from the "person in charge" for each step in the investigation.[101] Moreover, it appears that the state council has continued to divide enforcement authority among multiple agencies.[102] This has created a situation where anticompetitive activity is investigated through multiple agencies that have conflicting agendas and regulations.[103]

Enforcement by NDRC, SAIC and MOFCOM also presents the potential for significant conflicts of interest. These regulators all have ties to SOEs and continue to protect the SOEs'

93. *Ibid.*
94. Owen *et al, supra* note 4 at 257.
95. Eleanor Fox, *supra* note 80 at Abstract.
96. Nathan Bush, "Chinese Competition Policy: It takes more than law" (2005), online: The China Business Review <http://www.chinabusinessreview.com/public/0505/bush.html>
97. See: Sanbuwei Qiang Zhengli Fanlongduanfa [Three Departments are struggling to claim exclusive control over the Antitrust Law], SINA (China), <http://finance.sina.com.cn/roll/20050111/06181283920.shtml>.
98. Joel Mitnick, Yang Chen and Adrian Emch, "The Dragon Rises: China's Merger Control Regime One Year On" 23(3) Antitrust 53 at 53.
99. AML, *supra* note 3 at Article 9.
100. AML, *supra* note 3 at Article 10.
101. AML, *supra* note 3 at Article 39.
102. Fox, *supra* note 80 at 178.
103. *Ibid.*

monopoly position.[104] Whether or not the state council retreats from this position and provides a truly independent enforcement agency remains to be seen.

The most significant challenge to the enforcement of Chinese law is the lack of *stare decisis* or an equivalent system that binds authorities to their prior decisions. Although Article 44 states that decisions will be publicized, it is uncertain whether publication is mandatory or voluntary, or whether courts are required to review prior cases.[105]

From several recent decisions, discussed below, it appears that publication does occur but with minimal information that often does not include the reasons for the judgement. Given the limited information provided by these decisions, it is questionable whether enforcement agencies will develop the transparency necessary to even-handedly apply the AML. This transparency, however, is critical to the AML's success. It is the only way that the power of enforcement agencies can be properly monitored and uncertainty can be removed for individuals pursuing new businesses in China.[106]

In addition, it is almost certain that even handed enforcement of the AML will be hindered by the structure of China's legal system. As Lindsay Wilson wrote, China has:

> (1) [a] lack of a cohesive legal "system;" (2) pervasive vagueness in the language of statutes and administrative rules; and (3) difficulty … enforcing judgments once they are obtained.[107]

Furthermore;

> since the enforcement of antitrust law is a relatively new phenomenon [for China], judges may not have the requisite level of knowledge to produce decisions that conform to international practice and reflect microeconomic analysis, an observation admittedly common to many jurisdictions.[108]

Though China has recently embarked on several initiatives to improve the quality of its judicial system, in regards to civil litigation, it is clear that the AML will pose a significant and unique challenge for judges and lawyers with limited experience in competition law.[109] As Bruce Owen, Su Sun and Wentong Zheng point out, "[i]t would be inappropriate to evaluate the AML as if it were a set of instructions intended for the judiciary to interpret."[110] The absence of this judicial oversight is perhaps the most significant issue facing the AML.

Without the direction provided by previous decisions or the availability of an appeal process within the Chinese legal system, the AML may not be appropriately equipped to defend competition in China.

---

104. Owen *et al, supra* note 4 at 240.
105. See: Owen *et al, supra* note 4 at 263; and Fox, *supra* note 80 at 177.
106. Owen *et al, supra* note 4, at page 264.
107. Lindsay Wilson, "Investors Beware: The WTO Will Not Cure All Ills in China" (2003) Colum. Bus L Rev 1007, at page 1009.
108. Subrata Bhattacharjee, "The Merger Review Process under the New PRC Anti-Monopoly Law: Selected Issues" (2008) A.B.A. Sec. Antitrust 9.
109. Mehra and Yanbei, *supra* note 10 at 410.
110. Owen *et al, supra* note 4 at 264.

IV. APPLICATION OF THE AML

A brief overview of civil cases and agency enforcement decisions in regards to the AML is included below. Analysis of these cases is constrained by the limited reasons for judgment that have been given by Chinese courts and government agencies. As will be explored below, these decisions illustrate that the AML is yet to become a sword protecting consumers in China.

A. Civil Cases

Article 50 of the AML,[111] like s. 36 of the *Competition Act,*[112] allows plaintiffs to obtain judgments against companies that are pursuing anticompetitive practices. This monopolistic conduct, as described in Article 3, includes monopoly agreements, abuse of dominant position and concentrations that may restrict competition.[113] As of June 2010, there were ten reported cases prosecuted under Article 50.[114] Nine have involved allegations of "abuse of market dominance, including three involving discriminatory pricing, four involving restrictions on the freedom to trade, and only one involving a monopoly agreement."[115]

As stated by Yang Xun and Jessica Su, Chinese courts have begun to set civil litigation standards in regards to the AML.[116] This includes the determination of a burden of proof that is to be accepted in courts throughout the country.

For actions that involve abuse of dominant position, it appears the courts have settled on splitting the burden of proof between the plaintiff and defendant.[117] Courts require the plaintiff to define the market under consideration, demonstrate the defendant's market dominance and monopolistic conduct, and prove damages and causation.[118] It is then the responsibility of the defendant to either rebut the presumption of dominant market position, as described in Article 19, or justify the anticompetitive conduct through, for example, the public interest provisions in Article 15, as discussed above.[119]

This continued effort to define civil procedure in regards to the AML demonstrates that the implementation of this law has been taken seriously. The extent of AML's application, however, remains unclear, as is demonstrated by the following five cases.

i. China Mobile Case

This action was filed by Mr. Zhou Ze an activist lawyer who sought to have a discriminatory charge on his mobile phone bill removed. As commented by Kirstie Nicholson,"[i]t is interesting that … the complaint [was] brought directly [to] Court rather than" being addressed by the SAIC.[120] According to Gerry Obrien, taking this action directly to court

111. AML, *supra* note 3 at Article 50.
112. *Competition Act*, *supra* note 47 at s. 36.
113. AML, *supra* note 3 at Article 3.
114. Lester Ross, "Litigation under China's Anti-Monopoly Law" (November 17, 2010) Competition Policy International 1 at 2.
115. *Ibid* at pages 2 and 3.
116. Yang Xun and Jessica Su, "Risks from China anti-monopoly lawsuits increase" (October 2009) China Law & Practice 42, at page 42; Note that the AML prescribes the activities which constitute abuse of dominant market position in Article 17. See AML, *supra* note 3 at Article 17.
117. *Ibid*.
118. *Ibid*.
119. Xun and Su, *supra* note 117 at 42; and AML, *supra* note 3 at Articles 15 and 19.
120. Editorial, "China Mobile sued on anti-monopoly grounds" (April 2009) China Law & Practice 32 at 32.

was not surprising given the SAIC's focus during this period on "drafting implementation rules and … enforcement procedures" which left little capacity at the SAIC to deal with consumer complaints.[121]

Mr. Zhou was the only one being charged this discriminatory "monthly rental charge."[122] As China Mobile is a SOE, this case had the potential to test the administrative monopoly provisions. It was, however, settled out of court and therefore did not provide additional information on how the AML would apply to SOEs.[123]

ii. Shanda Case

After several false starts the Shanda case became the first AML case to have a decision entered within a court. On October 23, 2009, the plaintiff's action was dismissed on the grounds that Beijing Shusheng Electronic Technology (Shusheng) failed to prove that Shanda Interactive Entertainment Limited, a subsidiary of Shusheng, abused its dominant market position. Instead, Shanghai No. 1 Intermediate People's Court found that Shanda was protecting their IP rights when they prevented the plaintiff from publishing a book that mislead the public into believing that this unauthorized sequel was written by the same author as the original.[124]

According to Michael Han, this judgement should be "welcomed as an early indication that courts will be reluctant to uphold AML claims which do not meet the necessary evidential standards."[125] Han has commented that consumers, who have long been unhappy with business conduct of certain SOEs, have used the AML as "a fresh means of taking action" without understanding the requirements for proving monopolistic conduct.[126] According to Han, Chinese courts are clearly willing to accept many marginal cases in order to "develop their expertise and … supplement the work carried out by" the SAIC and MOFCOM but are unwilling to find anticompetitive activity unless a heavy evidentiary burden has been met.[127]

iii. Baidu Case

As with the China Mobile case, the Baidu case was initiated after a complaint was received but ignored by the SAIC.[128] On December 18, 2009, this action against Baidu, China's largest internet search engine was dismissed. The plaintiff, Tangshan Renren Information Services Co. (TRISC), alleged that, after reducing their spending on Baidu advertising, Baidu took active steps to limit access to the plaintiff's website.[129]

The court found that the relevant market under consideration included "search engine services in China" rejecting Baidu's claim that these "free services" did not represent a mar-

---

121. *Ibid*.
122. *Ibid*.
123. *Ibid.*
124. *Ibid.*
125. Editorial, "Shanghai court dismisses Shanda anti-monopoly lawsuit" (November 2009) China Law & Practice 36, at page 36.
126. *Ibid*.
127. *Ibid*.
128. Editorial, "Baidu is latest to be sued under Anti-monopoly Law" (May 2009) China Law & Practice 20, at page 20.
129. Hannah Ha, John Hickin and Gerry O'Brien, "Civil Actions Under China's Anti-Monopoly Law - Five Major Cases, Five Major Lessons (Part I)" (February 8, 2010), online: Mayer Brown JSM < http://www.mayerbrown.com/public_docs/Client%20Update_Civil.pdf>.

ket.[130] The court then went on to find that there was insufficient evidence of Baidu's dominant market position.[131] This is an interesting finding given that when this case was heard Baidu maintained a market share of over 75%.[132] The court stated that market share could not be determined because there was a lack of "scientific and objective analysis" and an underlying methodology was not provided.[133] Lastly, the court found that Baidu was justified in down-ranking the plaintiff's website due to TRISC's "hyperlink cheating."[134]

According to Nathan Bush, rulings, such as those in the Baidu, Shanda and China Mobile cases "may signal the judiciary's wariness … [in] undermining critical industrial policies or economic reforms with a liberal approach to abuse of dominance claims."[135]

iv. Beijing Netcom Case

On December 26, 2009, a similar decision was handed down by Beijing's No.2 Intermediate People's Court. The plaintiff, Mr. Li Fangping, accused Beijing Netcom of discriminatory pricing practices in regards to the mobile phone services of non-Beijing residents. In dismissing the plaintiff's claim for damages, the court found that the Beijing Netcom was involved in legitimate debt collection procedures. Beijing Netcom's policies for non-residents were found to be similar to their policies for residents with a history of overdue payments.[136]

The court, in the Beijing Netcom case, held that the plaintiff bore the burden of defining the market and proving that the defendant held a dominant position.[137] As with several other civil cases, the court considered the plaintiff's evidence insufficient to determine the existence of a dominant market position.[138] The court also accepted China Netcom's defence that discrimination towards non-residents of Beijing was justified to counter a valid "operational risk."[139]

v. Chongqing Insurance Association Case

The Chongqing Insurance Association (CIA) Case was the first case to address price fixing. This case was filed on August 1, 2008, the same day the AML came into effect.[140] CIA is an insurance industry association that was in the practice of setting automotive insurance prices for its members.[141] The Falin Law Firm, in Chongqing, claimed the actions of

130. Nathan Bush, "Section 3: Country Chapters China: Antimonopoly Law" (2010) The Asia-Pacific Antitrust Review, online: Global Competition Review <http://www.globalcompetitionreview.com/reviews/25/sections/90/chapters/942/china-antimonopoly-law/>.
131. *Ibid.*
132. Owen Fletcher, "China Says No to Bing: Baidu Ups Lead Over Google" (August 5, 2009), online: PC World: Business Center <http://www.pcworld.com/businesscenter/article/169717/china_says_no_to_bing_baidu_ups_lead_over_google.html>
133. Bush, *supra* note 131.
134. Hyperlink cheating is a practice whereby website operators embed hidden or irrelevant contents in their pages to manipulate page rankings.
135. *Ibid*.
136. Ha, *supra* note 130.
137. Susan Ning, Angie Ng and Ding Liang, "China: Li Fangping vs China Netcom - Abuse of Dominance Case Dismissed" (20 September 2010), online Mondaq <http://www.mondaq.com/article.asp?articleid=110490>.
138. *Ibid*.
139. *Ibid*.
140. Ross, *supra* note 115 at 3.
141. *Ibid*.

the CIA constituted price fixing as under the AML. They claimed only nominal damages of one RMB but sought an order preventing CIA from continuing the practice.[142]

The CIA discontinued the practice which was the subject of the proceedings causing the plaintiff to withdraw and the court to dismiss this action.[143] Even without a ruling, it appears the availability of civil action under the AML provided a tool to consumer groups who were intent on modifying anticompetitive behaviour.

vi. Conclusion to Civil Cases

It is difficult to pass judgement on the effectiveness of the AML given the limited number of decided cases.[144] These cases, however, do demonstrate the difficulty that individuals or small businesses face when pursuing an action under Article 50.

The courts look to the plaintiffs alone to satisfy a significant evidentiary burden. No assistance in meeting this burden is given by the government agencies responsible for AML's enforcement, regardless of the validity of the claim. That being said, there is some indication, even with consumers' limited ability to successfully sue under the AML, that businesses are "compelled [, at least to some degree,] to adjust their practices [and] conform to competition requirements."[145]

B. Government Agency Decisions

i. Dismantling Cartels

The NDRC and the SAIC have recently been active in the enforcement of the AML against several cartels. These cartels have demonstrated significant economic strength within small geographic regions.[146]

The most aggressive enforcement action taken thus far has been against several manufacturers of rice noodles in Guangxi.[147] On March 30, 2010, the NDRC published its first administrative enforcement action against this group of rice noodle manufacturers.[148]

A group as large as 33 producers had agreed on a price increase just before Chinese New Year. This price increase prompted significant protest from the public and the municipal governments of Nanning and Liuzhou.[149] In response to the consumers' concerns, the NDRC launched an investigation which concluded with an order to "stop illegal activities, correct their faults, and formulate [an] emergency proposal for stabilising … prices and … supply."[150] While some participants were given fines up to RMB 100,000 and were subject to criminal prosecution, others, who had cooperated with the NDRC, took advantage of the leniency provided by Article 46 of the AML and were given a simple warning.[151]

---

143. *Ibid*.
144. Some commentators have passed judgment on the effectiveness of civil actions under the AML. See for example: Ha, *supra* note 130.
145. Ross, *supra* note 115 at 6.
146. Sébastien Evrard, *et. al*., "China Takes First Action Against Price Cartel Under New Anti-Monopoly Law" (April 19, 2010) Jones Day, online: Martindale < http://www.martindale.com/government/article_Jones-Day_983798.htm>.
147. *Ibid*.
148. *Ibid*.
149. Bush, *supra* note 131.
150. *Ibid.*
151. Bush, *supra* note 131; and Evrard *et. al, supra* note 147.

Interestingly, the actions taken by the NDRC do not appear to have been directed towards restoring competition. Rather, the focus of the NDRC's action appears to center upon the immediate correction of the price imbalance and the proffering of these producers as an example of the NDRC's power to dismantle other cartels.

ii. Merger Review

MOFCOM has taken the lead in regulating mergers under the AML with their recent establishment of a Chinese Anti-Monopoly Bureau.[152] The Bureau has provided a consistent system for notification and review.[153] The Bureau, however, still lacks the authority to apply remedies without approval from the state council.[154]

Article 27 of the AML establishes the factors which the Bureau must use to assess a merger application.[155] The Bureau can also take into consideration, as part of these factors, an applicant's efficiency defence.[156] This defence mimics the defence available in s. 96 of Canada's *Competition Act*[157] but provides far less detail. The Bureau is then tasked with determining whether, given these factors, competition will be "restricted."[158] As mentioned previously this standard departs from the more onerous standard of "substantially" restricting competition that has been adopted in Canada.[159]

If the Bureau finds that a restriction is likely they can prohibit the merger, through Article 28, or provide "restrictive conditions" through Article 29.[160] To illustrate how these Articles have been applied, MOFCOM's decisions in the proposed mergers of Coca-Cola - Huiyuan and Mitsubishi Rayon - Lucite International are reviewed.

a. Coca-Cola Huiyuan

On March 18, 2009 MOFCOM published its decision rejecting Coca-Cola's acquisition of the Chinese juice producer Huiyuan.[161] This was the first time an acquisition was prohibited under the AML.[162] This prohibition is described in a brief two page decision that has been published by MOFCOM.[163] Its brevity demonstrates that the requirement to publish decisions under Article 26 and 44 has been applied in a limited fashion.[164]

Within this decision there is an indication of which AML provisions were utilized, but no reasons for the decision are given. It suggests that MOFCOM found anticompetitive harm based on reasoned principles but does not mention the principles which may have been

152. Mitnick *et al, supra* note 99 at 53.
153. Stephen Harris and Keith Shugarman, "Interview with Shang Ming, Director General of the Anti-Monopoly Bureau Under the Ministry of Commerce of the People's Republic of China" (February 2005), online: The Anti-Trust Source < http://www.abanet.org/antitrust/at-source/09/02/Feb09-ShangIntrvw2-26f.pdf >.
154. *Ibid.*
155. AML, *supra* note 3 at Article 27.
156. AML, *supra* note 3 at Article 27(3).
157. *Competition Act*, *supra* note 47 at s. 96.
158. AML, *supra* note 3 at Article 28.
159. *Competition Act, supra* note 47 at s. 92.
160. AML, *supra* note 3 at Articles 28 and 29.
161. *The People's Republic of China Ministry of Commerce Announcement No. 22* [2009], "Ministry of Commerce decision notice on the Prohibition of Coca-Cola's acquisition of China Huiyuan", online: MOFCOM <http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html>
162. Mitnick *et al, supra* note 99 at 53.
163. *The People's Republic of China Ministry of Commerce Announcement No. 22*. See note 169.
164. AML, *supra* note 3 at Articles 44 and 26.

used.[165] Regardless, the Coca-Cola decision demonstrates that the AML is having, a significant impact on companies operating within the Chinese market.

Three anticompetitive issues were identified in this case. First, MOFCOM determined that Coca-Cola had the potential to participate in tied selling or bundling of products resulting in restricted competition.[166] Second, increasing the Coca-Cola portfolio of products, which presently included the "Minute Maid" juice brand, would, according to MOFCOM, significantly increase the barriers to entry in a market which is highly reliant on product branding.[167] Third, MOFCOM determined that the merger would adversely affect the ability of small and medium sized firms in this market to innovate effectively.[168]

It is impossible to tell within the limited text of MOFCOM's decision which of the three issues led to the rejection of this merger. It is interesting to note, however, that the proposed acquisition was by all accounts a conglomerate merger,[169] rather than a horizontal merger, and one that may not have been subject to this level of scrutiny in Canada. There is, unfortunately, no mention of an analysis of market size, market concentration or relative market power of the competitors within the domestic juice market.[170] Likewise, there are no reasons given for the rejection of Coca-Cola's efficiency defence.[171] This leaves open the question of whether the bundling, provided by the merger, might have had a positive effect on competition.[172]

It is unclear whether the foreign ownership of Coca-Cola had any effect on the Bureau's decision. There are, however, commentators that believe there is, within China, a new wave of "economic patriotism" that has created negative views of foreign entities acquiring businesses in China.[173]

b. Mitsubishi Rayon - Lucite International

MOFCOM released their two page decision on the merger of Mitsubishi Rayon and Lucite International on April 24, 2009.[174] According to MOFCOM's decision, Mitsubishi Rayon is predicted to control 64 percent of the methyl methacrylate (MMA) market in China after its acquisition of Lucite.[175] This mainly horizontal merger is set to create a market share that is significantly greater than that of the second and third place competitors. From the vertical perspective, the merged entity will have the ability to block competition in upstream markets where MMA is distributed and utilized. It was held, by MOFCOM, that this merger had the potential for significant anticompetitive impacts both horizontally and vertically.[176]

---

165. *Supra* note 162.
166. *Ibid.*
167. *Ibid.*
168. *Ibid.*
169. Freshfields Bruckhaus Deringer ,"China's MOFCOM prohibits Coca-Cola's acquisition of Huiyuan" (March 2009), online: Freshfields Bruckhaus Deringer, <http://www.freshfields.com/publications/pdfs/2009/mar09/25486.pdf >.
170. *Supra* note 162.
171. *Ibid.*
172. Mitnick *et al, supra* note 99 at 58.
173. Kim, Joongi, "Fears of Foreign Ownership: The Old Face of Economic Nationalism" (2007) 27 SAIS Review 167, at 167.
174. *The People's Republic of China Ministry of Commerce Notice No. 28* [2009], "Ministry of Commerce decision notice on Japan's Mitsubishi Rayon Corporation proposed acquisition of Lucite International, Inc." , online: MOFCOM <http://fldj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html>.
175. *Ibid.*
176. *Ibid.*

Instead of blocking the merger, however, a negotiated settlement was reached that allowed the merger to proceed with restrictive conditions. First, Lucite China is required to sell 50% of its annual production, at cost, to unaffiliated purchasers for a period of not less than five years.[177] Second, Lucite China and Misubishi Rayon were required to operate separately. Each would retain their own officers and directors for six months. During this time no sharing of information was permitted.[178] Lastly, the merged entity is prohibited from acquiring any domestic MMA product manufacturer or building a new plant for manufacturing MMA products in China for a period of not less than five years.[179]

iii. Conclusion to Agency Decisions

Some argue that the interpretation of the AML by MOFCOM, NDRC and SAIC is out of step with competition law in other jurisdictions.[180] A bigger concern, however, which is echoed by several observers, is that these decisions are effectively opaque.[181] Without greater access into the reasoning of these agencies, significant uncertainty will remain for businesses operating in China.

Addressing this type of uncertainty, however, is not a new concept for businesses in China. The AML, at a minimum, has provided a regulatory structure with published rules and a consistent process for merger review. As these decisions show, the AML is having a significant effect on transactions and will alter how business opportunities in China are approached.

V. CONCLUSION

Given the immaturity of competition legislation in China, it is uncertain whether the AML will provide an effective barrier to anticompetitive activity. Substantial obstacles to effective enforcement remain prevalent. These obstacles include inadequate judicial review, a lack of transparency in the decision making process and the exemption of administrative monopolies from prosecution under the AML. As one observer has stated, the implementation of the AML is "doomed to be difficult."[182]

The development of the AML cannot, however, be considered in the same terms as the development of the laws or the economies of Western democracies. China is moving quickly. Over 300 million people have escaped poverty in less than a generation. Capitalism has found a new home and people now "talk openly about wanting to get rich, a desire once verboten."[183] Though many government officials continue to support the development of the AML, calling it China's "economic constitution,"[184] it is the rapidly expanding power of consumers in China that is poised to drive the future development of the AML. With improved access to the judicial system and increased transparency the twig now in the hands of the CCP might soon be fashioned into a protective sword in the hands of the Chinese consumer.

---

177. *Ibid.*
178. *Ibid.*
179. *Ibid.*
180. Mitnick *et al, supra* note 99 at 58.
181. See for example: Mitnick *et al, supra* note 99; and Freshfields, *supra* note 170.
182. Wang Xiaoye, "The Implementation of the Antitrust Law Is Doomed to Be Difficult" (2008) 110 Caijing Zazhi Niankan [Yearbook of Journal of Finance and Economy], online: Caijing <http://www.caijing.com.cn/2007-12-06/100040501.html>.
183. Felicia Lee, "Ted Koppel Tours a China Brimming With Dreams and Consumerism" (July 8, 2008) New York Times, online: New York Times. <http://www.nytimes.com/2008/07/08/arts/television/08kopp.html?pagewanted=print>.
184. Huo, *supra* note 17 at 43.

ARTICLE

THE CRIMINALIZATION OF POVERTY: MONTRÉAL'S POLICY OF TICKETING HOMELESS YOUTH FOR MUNICIPAL AND TRANSPORTATION BY-LAW INFRACTIONS

By Justin Douglas*

CITED: (2011) 16 Appeal 49-64

> "If, in the case of racial profiling, skin colour is the element that triggers police intervention, in the case of social profiling, the trigger is the visible signs of poverty or marginality. The stigmatization of the homeless in the Police Service of Montréal [Service de police de la Ville de Montréal (SPVM)] standards and policies as well as the ensuing police profiling, undermines the rights of the individuals concerned to the safeguard of their dignity without discrimination based on social status."[1]

I. INTRODUCTION

As a student in the Faculty of Law at McGill during the summer of 2009, I was fortunate enough to do a 200-hour legal information placement with *Dans la rue* (DLR). *Dans la rue* was started in 1988 by Father Emmett Johns, who held a strong conviction that young people in unfortunate life circumstances were deserving of help, respect and compassion. With the support of countless others who have shared his philosophy and philanthropy, *Dans la rue* has become Canada's second largest provider of services to street and at-risk youth.

Legal information forms only a small segment of the services offered at DLR, and my role in providing legal information to their clientele was not limited to looking up legal facts. The hands-on experience of working with these youth and learning their life stories changed the way I now perceive homelessness and the people who are affected by poverty in Canada,

---

* Justin Douglas in a 4th year student in the faculty of law at McGill University. He completed his undergraduate degree in political science at the University of Victoria in 2005. This piece would not have been possible without the support of Dans la rue, Professors Angela Campbell and Kirsten Anker, Eva Warden as well as my mother, Tara. Thanks to all of you!

1. Commission des droits de la personne et des droits de la jeunesse (Québec Human Rights Commission), News Release, "The Commission des droits de la personne et des droits de la jeunesse Speaks Out Against the Social Profiling of the Homeless in Montreal" (10 November 2009), online: intraspec.ca <http://intraspec.ca>.

and in Montréal in particular. Despite the plethora of issues I encountered during my time at DLR, the reoccurring theme that emerged from almost all of my interactions with these young people is how the current legal system is overburdening the homeless poor and is placing already vulnerable members of our society into further turmoil.

While there are many examples of how the system works to keep the disadvantaged oppressed, the most frequent example I found during my placement was the ticketing of street youth for statutory and by-law offences, such as panhandling, jaywalking, squeegeeing, sleeping in a park, or creating public disturbances. As the legal information intern, I would spend a lot of my time verifying outstanding fines and contestations, annulling writ of seizures and working with DLR, the City of Montréal and the YM-YWCA's Compensatory Work Program to create payment work plans. Navigating the bureaucratic framework to find the appropriate legal information was easy enough, but I found that simply dealing with the monetary amounts owed to the City of Montréal did nothing to explain why street youth were consistently receiving tickets for violating Montréal by-laws, nor did it address the repercussions of those tickets.

Although there are countless reasons why young people might end up homeless, more often than not they have left situations of abuse or neglect with very limited resources, only to find themselves confronting substance abuse, depression, mental disturbances and basic survival issues on the street. But, as I soon discovered, as well as facing social marginalization and prejudice, and equipped with poor life and advocacy skills, their difficulty is compounded by the fact that they are often targeted and ticketed by law enforcement officials precisely for being poor and problematic. I found that it is not uncommon for homeless young people to have $7,000 to $20,000 worth of tickets.

In this article, I argue that Montréal's current statutory laws and general attitude of law enforcement towards street youth create what I refer to as the "criminalization of poverty." This targeting of homeless youth, which victimizes and marginalizes an already disadvantaged segment of the population, places financial burdens upon them that negatively impacts life opportunities, including credit, work and educational options, and adds unnecessary stress to an already stressful situation. It is a given that it is the function of the law to regulate society, but I would also suggest that the legal system has a responsibility to protect those who are vulnerable in our society. In this case, it seems that the laws and their methods of enforcement exist to serve the interests of the financial elite and not the general public good. Both the law and societal attitudes need to be changed in order to more adequately address the causes and solutions to homeless youth ticketing. These homeless youth need more compassionate and alternative social, financial and compensational options.

In addressing these issues, I look at the problem of homelessness in Montréal, and in Canada generally. I identify the influences that have determined the policies which have shaped Montréal's by-laws and attitudes towards homeless youth, including the zero-tolerance approach adopted by the City. I contrast this approach with Canada's and Québec's stated *Rights and Freedoms*; demonstrate how youth are targeted and discriminated against through the current laws and the methods of enforcement; and explore how the Courts deal with issues of fines and imprisonment. I conclude by critiquing the current system and suggesting both social and legal alternatives, drawing on examples from both B.C. and Ontario.

II. YOUTH AND HOMELESSNESS

A. The National Problem of Homelessness

The Canadian government's Department of Human Resources and Skills Development estimates that between 150,000 to 300,000 people are homeless in Canada.[2] Canada's adult homeless population costs taxpayers between $4.5 and $6 billion annually.[3] These people live in shelters or on the streets, and approximately 40,000 stay in homeless shelters nightly. Single men are the largest segment of homeless people in most Canadian cities, but homelessness is rising among both single women and single-parent families headed by women. Others who are disproportionately reflected in the homeless population include street youth, Aboriginal people, persons with mental illness, the working poor, and new immigrants. The causes of homelessness are cited as insufficient affordable housing and housing supply; low income; the gap between income and affordability; mental health and/or substance abuse issues; family conflict and violence; job loss; and inadequate discharge planning for ex-offenders, mentally ill persons, and persons leaving the care of the child welfare system.[4]

B. Youth Homelessness

Raising the Roof, a non-profit organization dedicated to eradicating homelessness in Canada, calls youth homelessness an unacknowledged national crisis.[5] According to this organization, "youth" are considered to range from 12 to 29-years old.[6] Youth homelessness generally refers to youth who are homeless, in a cycle of homelessness (temporarily) sheltered or living in crowded or unsafe conditions) or at-risk of becoming homeless. These youth do not live with a family in a home, nor are they under the care of child protection agencies. They include many homeless youth who do not live on the street and who, therefore, are considered the hidden homeless.[7]

Based on three years (2006-2009) of research and consultations with 700 youth across Canada, Raising the Roof issued a report, *Youth Homelessness in Canada: The Road to Solutions*, that identifies characteristics and circumstances common to homeless youth.[8] According to their research, the main commonalities among these youth include possessing inadequate stability, opportunity and support, but most relevant to this article is that 71%, or the great majority of homeless youth in Canada, have had some form of interaction with the criminal justice system.[9] This statistic does not identify the causes and types of legal involvement. Nevertheless, the fact that almost three quarters of homeless youth are involved with the criminal justice system is significant, and reveals how impactful the system is on the young and poor.

---

2. Human Resources and Skills Development Canada, "Homelessness Partnering Strategy 2007 to 2011", online: HRSDC <http://www.hrsdc.gc.ca>.
3. See *Youth Homelessness in Canada: The Road to Solutions* (Raising the Roof, 2009) at 15, online: Raising the Roof: <http://www.raisingtheroof.org> [*Youth Homelessness in Canada*].
4. HRSDC, *supra* note 2.
5. *Youth Homelessness in Canada*, *supra* note 3 at 7.
6. *Ibid* at 12.
7. *Ibid*. See also Susan Wingert, Nancy Higget & Janice Ristock, "Voices from the Margins: Understanding Street Youth in Winnipeg" (2005) 14:1 *Canadian Journal of Urban Research* 54.
8. *Youth Homelessness in Canada*, *supra* note 3 at 12.
9. *Ibid* at 13.

III. THE CONNECTION BETWEEN HOMELESSNESS AND TICKETING IN MONTRÉAL: HOW, WHAT AND WHO

Tickets in Montréal can be issued for violations of either City of Montréal by-laws (averaging 58%) or public transportation rules [Société de transport de Montréal (STM)] (approximately 41%), while one percent of the violations come from other sources, such as the ban on smoking in public places.[10] The most common by-laws for which youth are ticketed fall under Regulations Regarding Occupying the Public Domain; Regulations on Peace and Public Order; and Regulations Regarding Parks.[11]

Some examples of the most frequent violations include:

- Sleeping in the metro (20% of the tickets)
- Public Loitering (9.8%)
- Free-riding public transport (8.1%)
- Hindering public transportation (8%)
- Smoking in/on public transportation areas (7.1 %)
- Drinking in public (6.5%)
- Public disturbances (5.4%)
- Loitering in a public park after hours (2.1%)[12]

According to *The Judicialization of the Homeless in Montréal: A Case of Social Profiling*, a 2009 report issued by the Québec Human Rights Commission (addressed in greater detail later in this article), the practice of ticketing has increased dramatically over the past decade and a half.[13] According to this report, in 1994 the City of Montréal issued 575 tickets and the STM issued 494. In 2004, the City issued 3,281 tickets and STM issued 3,942. This represents a quadrupling of tickets over a ten-year period. Between 2003 and 2005 more than $3.3 million remained owing to the City in unpaid tickets.[14]

---

10. This by-law information was provided by Gilles Lafontaine, Technicien en gestion de documents et archives, Section des archives, Ville de Montréal (July 2010), contact: glafontaine1@ville.montreal.qc.ca.
11. *Ibid*. The following is a sample of a section of one by-law and the financial repercussions of multiple infractions (City of Montreal, revised by-law c P-I, *Règlement concernant la paix et l'ordre sur le domaine public* (*Rules Concerning Peace and Order in the Public Domain*)):
    3. Il est défendu de consommer des boissons alcooliques sur le domaine public. (It is illegal to drink alcoholic beverages in public.)
    …
    5. La personne qui, ayant reçu d'un agent de la paix l'ordre de cesser un acte en violation d'un règlement ou d'une loi, sur la voie publique, le domaine public ou dans un endroit où le public a accès, le continue ou le répète, est coupable d'une infraction qui constitue une nuisance, et trouble la paix et la sécurité publiques. (A person who receives an order from a law enforecemnt officer to cease violating a legal regulation concerning the use of the public domain or public access is guilty of a nuisance, disturbing the peace, or a security infraction.)
    …
    13. Quiconque contrevient à l'article 3 commet une infraction et est passible: (Contravening Article 3 (drinking alcohol in public) is an infraction and is fined at the following rate:)
    1°pour une première infraction, d'une amende de 100 $ à 150 $; (for a first infraction, the fine is $100-150;)
    2°pour une première récidive, d'une amende de 150 $ à 300 $; (for a first repeat infraction, $150-300;)
    3°pour toute récidive additionnelle, d'une amende de 300 $ à 1 000 $. (additional infractions, $300-1,000.)
12. From Gilles LaFontaine, *supra* note 11.
13. *The Judiciarization of the Homeless in Montréal: A Case of Social Profiling*, Executive Summary of the Findings of the Commission, (Commission des droits de la personne et des droits de la jeunesse, 2009), online: CDPDJ <http://www2.cdpdj.qc.ca> [*The Judiciarization of the Homeless*].
14. *Ibid*, Executive Summary of the Findings of the Commission at 2.

The table below summarizes these changes in the ticketing of the homeless:

NUMBER OF TICKETS ISSUED EACH YEAR TO THE HOMELESS UNDER MUNICIPAL BY-LAWS BETWEEN 1994 AND 2005

	Municipal By-Laws	*Urban Transit By-Laws*	*Total*
1994	575	494	1,069
1995	782	640	1,422
1996	805	799	1,604
1997	645	601	1,246
1998	1,275	389	1,664
1999	1,776	373	2,149
2000	1,080	950	2,030
2001	1,602	980	2,582
2002	1,785	1,449	3,234
2003	2,438	1,750	4,188
2004	3,281	3,934	7,215
2005	2,455	3,942	6,397
Total	18,499	16,301	34,800[15]

In addition to the huge increase in the number of tickets issued, tickets are frequently given to repeat offenders. Between April 2003 and March 2004, 22,685 tickets were issued to 4,036 people in the City of Montréal. Between January 2005 and March 2006, 15,090 tickets were issued to only 2,704 people. Ninety-two percent of infractions were issued to men and eight percent to women. While these statistics speak for themselves, it is also important to examine why this dramatic increase in targeting the homeless has been taking place.[16]

IV. THE THEORY BEHIND THE LAW: THE ZERO-TOLERANCE APPROACH

In 1997, Montréal adopted a new "neighbourhood policing" model based on a similar "community policing" model in New York City. The idea behind this policy was to take a proactive or problem-oriented approach to crime by increasing contact with citizens through zone policing, neighbourhood foot patrols and mini-police stations. The neighbourhood police model adopted by Montréal aimed to bring the Service de police de la Ville de Montréal (SPVM) closer to the citizens.[17] However, the new policy's rhetoric seems to be at odds with the realities on the ground.

This community approach is strongly connected to the "zero-tolerance" policy, popularized in the 1980s by two conservative Americans, sociologist James Q. Wilson and criminologist George Kelly. In their 1982 article published in the *Atlantic Monthly*, Wilson and Kelly postulated the "broken-window" theory, which argued that policing in neighbourhoods should be based on a clear understanding of the connection between order-maintenance and crime prevention.[18]

---

15. *Ibid*, Fact Sheet 4 (Overview of the over-judiciarization of the homeless in Montréal — Statistics) at 1.
16. *Ibid* at 2.
17. Service de police de la Ville de Montréal (SPVM), "About the SPVM" online: SPVM <http://www.spvm.qc.ca>.
18. James Q Wilson & George L Kelling, "Broken Windows: The Police and Neighborhood Safety" (1982) 249:3 *Atlantic Monthly* 29.

According to Wilson and Kelly, the best way to fight crime is to fight the disorder that precedes it. The premise is that if a window is left unrepaired, the appearance of neglect and lack of concern will result in other broken windows, so it follows that it is necessary to enforce the minor offences though the creation of an atmosphere of regulation that will then prevent escalation to major crimes, such as rape and murder. Wilson and Kelly, therefore, argued for "zero-tolerance" of minor public disorders and the decentralization of authority to empower individual police officers. In their own words:

> Many citizens, of course, are primarily frightened by crime, especially crime involving a sudden, violent attack by a stranger. This risk is very real, in Newark as in many large cities. But we tend to overlook another source of fear –the fear of being bothered by disorderly people. Not violent people, nor, necessarily, criminals, but disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed.[19]

In his article "Urban Revitalization, Security, and Knowledge Transfer: The Case of Broken Windows and Kiddie Bars", Randy Lippert refers to the "broken window theory" as "a simplistic 'clean and safe' mantra."[20] Other critics of this theory and the policies that have resulted from it argue that the emphasis on the value of safety and security and the resultant zero-tolerance of minor infractions threatens the general societal tolerance of cultural pluralism and helps to legitimize extreme measures in keeping and/or restoring order to communities. Despite the theory's detractors, urban centers such as New York City, Windsor and Montréal have based their security policies on the "broken window theory" and zero-tolerance policing.[21] This approach has resulted in the deliberate targeting of street and homeless youth for minor infractions, since they often comprise "the disreputable or obstreperous or unpredictable people" that Wilson and Kelling identified as needing to be controlled and quelled in order for the general citizenry to "feel" safe. However, Wilson and Kelling readily admit in their article that attempting to create the perception of safety for the public by targeting the homeless bears little connection to actual crime rates.[22]

V. HOW THE ZERO-TOLERANCE APPROACH IS IN CONFLICT WITH CHARTER PRINCIPLES AND CANADIAN VALUES

A. The Canadian and Québec Charters

Throughout my time at Dans la rue I witnessed many examples of discrimination that were worthy of challenges under both the Canadian and Québec Charters, but for a variety of reasons — including lack of resources, lack of education, vocational instability and psychological stress — those who could legitimately pursue a case against Montréal statutory by-laws have been prevented, to date, from doing so. Despite the fact that a case has not yet been brought forth, the Canadian Charter enshrines the protection of the vulnerable in our society. Should a challenge come before the courts, the initiator would most likely claim a breach of Section 15(1) of the Charter, which states:

---

19. *Ibid* at 29.
20. Randy Lippert, "Urban Revitalization, Security, and Knowledge Transfer: The Case of Broken Windows and Kiddie Bars" (2007) 22:2 CJLS 29 at 30.
21. *Ibid* at 30-31.
22. *Ibid* at 31.

> 15(1) *Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*[23]

As Graham Garton asserts, the purpose of s. 15(1) is to "prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration."[24] Therefore, s. 15(1) stands in direct contradiction to the social marginalization and systemic discrimination that street youth encounter by police and community services.

Because Montréal street youth are also subject to the *Québec Charter of Human Rights and Freedom*s, should a Montréal youth initiate a case of systemic discrimination against the City of Montréal, he or she would be further supported by the *Québec Charter*'s specific inclusion of social condition as a legally enshrined principle.

As s. 10 states:

> Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, *social condition,* a handicap or the use of any means to palliate a handicap.[25]

Further, s. 10(1) states:

> No one may harass a person on the basis of any ground mentioned in Section 10.[26]

Although it appears that there is a strong case to be made for a legal challenge against statutory by-laws and City/police policies that have a disproportional effect on socially marginalized populations, there are a number of other options to promote policy change without legal imposition and the courtroom process.

Montréal is the only city in Canada to have adopted a *Charter of Rights and Responsibilities,* which came into effect on 1 January 2006.[27] Although it is not legally enforceable, the *Charter* establishes principles of rights and responsibilities to guide the collective efforts of citizens in the City with respect to those rights. When a dispute arises, Montréal's Ombudsperson has been given the authority to promote solutions based on the *Charter's* content. Article 2 of the *Charter* is relevant to Montréal's youth, and states:

> Human dignity can only be preserved as part of a sustained struggle *against poverty* and *all forms of discrimination*, and in particular, those

---

23. *Canadian Charter of Rights and Freedoms* , Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15(1) [*The Charter*].
24. Graham Garton, "Commentaries on Section 15.1" in *Canadian Charter of Rights Decision Digest* (Ottawa: Department of Justice Canada, 2005).
25. *Charter of Human Rights and Freedoms*, RSQ c C-12, s 10 [Québec *Charter*] [emphasis added].
26. *Ibid* at s. 10(1).
27. City of Montreal, *Montréal Charter of Rights and Responsibilities* (adopted 20 June 2005), online: Ville de Montréal <http://ville.montreal.qc.ca>.

> based on ethnic or national origin, race, *age, social status*, marital status, language, religion, *gender*, sexual orientation or disability.[28]

In addition, Article 16 Section i states that the purpose of the *Charter* is to aid in:

> Combating discrimination, xenophobia, racism, sexism and homophobia, *poverty* and *social exclusion*, all of which serve to erode the foundations of a free and democratic society.[29]

To my knowledge, the Ombudsperson of Montréal has not faced a complaint specific to street youth, or at least not where a public decision has been released. However, the use of the Ombudsperson as a mediator between the City police and street youth would seem like a proactive step in helping to dissuade discrimination and create community solutions.

B. Other Legislation

Youth are also protected by the *Youth Protection Act*, which applies to youth from birth to 18 years of age, and the *Youth Criminal Justice Act,* which applies to young people aged 12 to 17 who commit an offence under the *Criminal Code* or another federal law, such as theft, vandalism, breaking and entering, or the possession of drugs.[30] The objective of the *Youth Protection Act* is to safeguard the intrinsic rights and freedoms identified by the *Charter*s and to ensure the protection and development of all children. However, these stated ideals and values are threatened by the discrimination, harassment, exploitation and exclusion that homeless youth so frequently experience. As previously noted, street youth have yet to be in a position to challenge these offences in Canadian courts, but it is my view that these youth should not be forced into the position of having to wait for a legal challenge before Montréal society recognizes that the current laws and their enforcement need to be changed.

Similar opinions have also been expressed in a report prepared for *Justice for Children and Youth* headed by Professors Stephen Gaetz of York University and Bill O'Grady of the University of Guelph.[31] In researching their 2009 report, 244 homeless youth in Toronto were interviewed about life on the streets, including their experiences of criminal victimization. The authors claim that while street youth are often portrayed as threatening and delinquent, their own research highlights the degree to which street youth are frequently victimized by the vulnerabilities that homelessness produces. Their findings indicate that the criminal justice and shelter systems are not effectively addressing this victimization. Gaetz and O'Grady note that if the levels of violence and other forms of crime found in this study were experienced by any other group of youth in Canada, there would be immediate public outrage and considerable pressure for action by the government. Gaetz and O'Grady argue that street youth deserve the same level of attention in responding to their needs as any other group of Canadian citizens.

---

28. *Ibid* at Article 2 [emphasis added].
29. *Ibid* at Article 16 [emphasis added].
30. *Youth Protection Act*, RSQ, c P-34.1; *Youth Criminal Justice Act*, RSC 2002, c 1.
31. Stephen Gaetz, Bill O'Grady & Kristy Buccieri, *Surviving Crime and Violence: Street Youth and Victimization in Toronto* (Toronto: JFCY and Homeless Hub Press, 2010).

VI. HOW THE PRACTICE OF TICKETING AFFECTS YOUTH ON THE GROUND

My experience of the excess targeting of street youth by Montréal law enforcement officials is supported by research conducted on this issue. During the summer of 2004, several Montréal groups asked the *Commission des droits de la personne et des droits de la jeunesse* (Human Rights and Youth Rights Commission) to launch an investigation into allegations of systemic discrimination against the homeless in Montréal.[32] A three-party taskforce made up of the Commission, Montréal's Homeless Support Network [Réseau d'aide aux personnes seules et itinérantes de Montréal (RAPSIM)], and the City of Montréal was created in 2005. The taskforce also brought together elected members of the City of Montréal's executive committee, the mayor of the Ville–Marie borough, public security and social development officials and advisors, representatives from Service de police de la Ville de Montréal (SPVM) and the Société de transport de Montréal (STM).[33]

Members of the taskforce unanimously found that the issuing of large numbers of tickets for minor offences affect the homeless in particular, and in a high percentage of cases lead to a prison term for non-payment of tickets. They all agreed that imprisonment is not a solution to the problem of homelessness. The taskforce also determined that the main reason the courts convict the homeless is to enforce regulatory and legislative provisions concerning public spaces, and this is determined by the ways in which the police apply these legal instruments. However, despite their consensus, the taskforce produced no concrete policy recommendations.[34]

The Commission then decided to focus its attention on the extent to which the municipal by-laws and their enforcement are consistent with the *Charter of Human Rights and Freedoms*. The Commission issued an executive summary of its investigations in the previously mentioned report "The Judiciarization of the Homeless in Montréal: a Case of Social Profiling."[35] In regards to the *Charter of Human Rights and Freedoms*, the Commission identified four main issues of concern: the repression of the homeless; the discriminatory impact of police standards, municipal by-laws and legislation; social profiling; and imprisonment.[36] Again, the courts have not been faced by a legal challenge on these subjects to date. Nevertheless, concerning the *Charter*, the Commission asserts that the intensive enforcement of municipal by-laws by the SPVM has led to a disproportionate number of tickets being issued to the homeless.[37] This is demonstrated by the fact that while the homeless make up less than one percent of Montréal's population, they received 31.6 percent of the tickets issued by the police under municipal by-laws in 2004, and 20.3percent in 2005.[38]

The Commission considers this discrimination to be systemic because it does not result from an isolated standard or practice, but from the combined effects of standards, policies and police methods, and also from certain by-laws and legislative provisions. During their investigation, the Commission focused on the institutional standards and policies of the SPVM, the way in which police officers apply these standards and policies, the by-laws

32. See *The Judiciarization of the Homeless*, *supra* note 13, Executive Summary of the Findings of the Commission.
33. *Ibid* at 1.
34. *Ibid*.
35. *Ibid*.
36. *Ibid* at 2-4.
37. *Ibid* at 4.
38. *Ibid* at 1.

concerning the use of public spaces, and the legislation that imposes prison sentences for unpaid fines. The Commission found that policy objectices have made the fight against uncivil behaviour and "public disorder" a priority for the police, who tend to assign responsibility for disorder to certain groups, predominately the homeless, panhandlers, squeegeers and prostitutes.[39]

The Commission also demonstrated that social profiling occurs when individuals are (or appear to be) homeless. These people are ticketed for minor offences that are rarely enforced by the police when committed by other citizens. These offences include, for example, loitering, spitting, dropping cigarette ends, lying on a public bench, being drunk in public, and jaywalking. However, the homeless population, by definition, has no other option but to use public spaces to carry out private functions. It seems that even the municipal courts have occasional difficulty enforcing these by-law infractions. For instance, the report cites the case of a municipal court judge who was surprised to find that lying down on a public bench could result in being charged by the police under a municipal by-law prohibiting the use of street furniture for a purpose other than the one for which it is intended. The judge was even more uncomfortable with the fact that, for this offence, the minimum fine was $500, which he found to be completely out of proportion to the seriousness of the offence committed.[40]

The Commission also found that vaguely worded by-laws frequently open the door for the targeting of the types of behaviour associated with homelessness. If a provision does not identify the nuisance, it is up to the police to decide what behaviours justify punishment. For example, one STM by-law states that a person loitering in the metro system, even without disturbing or obstructing other people, is guilty of an offence.[41] Another by-law, enacted by the Ville-Marie borough, closed 15 parks and squares at night, several of which were used by the homeless to sleep in.[42] This by-law has resulted in homeless persons being placed in an illegal situation when trying to sleep. In the Commission's view, these by-laws and their discriminate enforcement undermine the *Charter*-protected rights of the homeless population to personal security, inviolability and freedom without discrimination, and also their right to have their dignity safeguarded.

Another important issue addressed by the Commission concerns the consequences for the homeless of imprisonment for unpaid fines. In light of the rights recognized by the *Charter*, it was determined that this practice is extremely harmful for people with very low or no income. The Commission argues that the provisions of the *Code of Penal Procedure* that impose a prison sentence for unpaid fines have a discriminatory effect on the homeless, noting that nothing in the *Code* justifies this discrimination on the basis of social condition.[43] As Supreme Court of Nova Scotia Justice B. Kelly has stated: "Our Constitution enshrines a system of justice based upon a belief in the inherent dignity and worth of every

---

39. *Ibid* at 3.
40. *Ibid.*
41. *Ibid* at 4.
42. City of Montreal, revised by-law, c P-3 *Règlement sur les parcs* (*Park Regulations*), articles 3, 20. Ordonnance sur les heures de fermeture des parcs (Ordinances on the hours of park closures)
    In the City of Montréal's July 1999 session, the executive committee decreed:
    1. Parks, public places and squares will be closed from 00:00hr to 06:00hr except:
       1) parks, public places and squares ennumerated in annexe 1;
       2) areas designated for automobile traffic in parks, public places and squares;
       3) areas designated for parking in parks, public places and squares;
       4) City events in parks, public places and squares.
43. *Code of Penal Procedure*, RSQ c C-25.1.

individual. That a person should be imprisoned only because of his or her inability to pay a fine is inconsistent with such a system."[44]

VII. HOW THE COURTS ARE ADDRESSING THE IMPRISONMENT OF THE HOMELESS POPULATION AND THE INABILITY OF THE HOMELESS POPULATION TO PAY FINES

In the 2003 Supreme Court case *R v. Wu*, Chief Justice McLachlin stated that "the purpose of imposing imprisonment in default of payment is to give serious encouragement to offenders with the means to pay a fine to make payment. Genuine inability to pay a fine is not a proper basis for imprisonment."[45] Yet according to a report from Statistics Canada, 17 percent of all people in custody in provincial or territorial institutions in 2000-2001 were jailed for default on unpaid fines, where "at least one of the causes for their committal arose from a fine default."[46] A 1994 Québec survey found that 35 percent of imprisoned fine defaulters had been fined for offences under the *Criminal Code* or other federal criminal laws with an average fine of $262, or, in the case of default, incarcerated for an average of 26 days. Ten percent were in prison for both federal and provincial offences with an average fine of $1,366 or a 50-day sentence, and 55 percent were imprisoned for violations of provincial laws or *municipal by-laws*. The latter penalties averaged $116 or eight days of prison.[47] Within municipal law, the homeless are continually and repeatedly fined, and frequently find themselves in prison as a result.

The Federal and Provincial Supreme Courts have recently favoured adaptable penalties based on ability and means to pay. As was held in the 1973 case *R. v. Grady*, the primary purpose of sentencing is to protect the public.[48] Justice Kelly then stated inthe 1989 case *R. v. Hebb* that:

> This purpose can be established either by rehabilitation or deterrence or combination of the two. A court, before determining the amount of the fine, should take into consideration the ability of the offender to pay the fine. Thus, a fine of some substance is only appropriate when a court concludes that deterrence is an appropriate method of protecting the public under the circumstances of the offence and the individual and secondly, when the offender is capable of paying the fine.[49]

The Criminal Code also states that if an offender does not have the means to pay a fine immediately, he or she should be given a reasonable time to pay.[50] The offender may also be eligible for a provincial fine option program in which the fine may be discharged "in whole or in part by earning credits for work performed during a period not greater than two years."[51] In the event of a default, the Crown can resort to a number of civil remedies such

---

44. *R v Hebb* (1989), 69 CR (3d) 1 at Conclusion [*R v Hebb*].
45. *R v Wu*, 2003 SCC 73, [2003] 3 SCR 530 at para 3 [*R v Wu*].
46. Canadian Centre for Justice Statistics, *Adult Correctional Services in Canada, 2000-2001* (2002), at Table 7, cited in *R v Wu*, *supra* note 45 at para 34.
47. *Justice and the Poor*, National Council of Welfare Report (2000) at 76-77, cited in *R v Wu*, *supra* note 45 at para 35 [emphasis added].
48. *R v Grady* (1973), 5 NSR (2d) 264 (SC (AD)).
49. *R v Hebb*, *supra* note 44. The essential issue for the court in this case was to determine whether a person sentenced to a fine and a period of time in jail in default of payment of that fine should be incarcerated if they do not pay that fine by reason of being poor and unable to pay the fine.
50. *Criminal Code* RSC 1985, c C-46, s 736(1).
51. *Ibid*.

as suspending licenses or other instruments until the fine is paid in full or by registering the fine owing with the civil courts. The option of jail for a default is limited by important restrictions. A fine default is not punishable by committal unless the other statutory remedies, including license suspensions and civil proceedings, are not appropriate in the circumstances[52] or the offender has, without reasonable excuse, refused to pay the fine or discharge it under s. 736.[53]

A recent study by Stephen Gaetz and Bill O'Grady, conducted on behalf of the *John Howard Society of Ontario,* interviewed prison discharge planners, inmates and those recently released from prison. The results indicated that the relationship between homelessness and incarceration is in fact bi-directional; in other words, people who are homeless are at risk for incarceration, and the prison experience itself places many former prisoners in danger of becoming homeless. In addition, because homeless youth often find themselves living in neighborhoods that are subject to elevated levels of police surveillance, as a group they are over-represented in the court and correctional systems.[54]

VIII. FINANCIAL AND SOCIAL COSTS OF THE CURRENT SYSTEM

In addition to the ramifications for homeless youth, the current laws and their methods of enforcement are producing other financial and social costs, including costs to the judicial and law enforcement system, the municipality, and ultimately to the taxpayers and society in general. Youth homelessness itself has numerous social and practical ramifications, but from a strictly fiscal perspective, it costs an estimated $30,000–$40,000 per year to keep one youth in the shelter system.[55] This amount seems minimal compared to the cost of keeping one youth in detention for unpaid fines, which is estimated at over $250 a day or $100,000 a year.[56] When the costs of administration, policing, the court system, work and payment programs, collection agencies, bailiffs and everything else associated with the current system are added to the cost of youth incarceration, the enormity of these fiscal burdens becomes apparent. In my view, the burden on the taxpayer would be better served by redirecting this money into more efficient and effective legal/social policies and programs. I will discuss some possible alternatives later in this paper.

In terms of costs to the judicial system, having a high number of homeless or street youth pass through the courts burdens the system with an unnecessary case load, and adds to the wait time before cases are dealt with. It has been my experience that youth frequently wait for months and even years before receiving appropriate notifications or having their cases dealt with in the court system, which compounds the stress of their already difficult situations.

The current system has also increased the financial and administrative burdens of law enforcement, without, I would argue, any apparent benefit. In 2004, the City of Montréal's police force received a budgetary increase of $28 million to reorganize the force, hire new

---

52. *Ibid*, s 734.7(1)(*b*)(i).
53. *Ibid*, s 734.7(1)(*b*)(ii).
54. Stephen Gaetz & Bill O'Grady, "Homelessness, Incarceration, and the Challenge of Effective Discharge Planning: A Canadian Case" in J David Hulchanski *et al*, eds, *Finding Home: Policy Options for Addressing Homelessness in Canada* (Toronto: Cities Press, University of Toronto, 2009) Chapter 7.3 (e-book), online: The Homeless Hub <http://www.homelesshub.ca>.
55. Gordon Laird, "Shelter, Homelessness in a Growth Economy, Canada's 21st Century Paradox", Report for the *Sheldon Chumir Foundation for Ethics in Leadership* (2007), cited in Raising the Roof, Youthworks, "Costs to Society", online: Raising the Roof <http://www.raisingtheroof.org>.
56. *Ibid*.

officers and implement "optimization mode."[57] This new mode sought to make the reduction of anti-social behaviour a priority by using 26 new call codes to classify "incivilities" including prostitution, the "bothersome presence of homeless people and beggars, the menacing activity of squeegees, and the gathering of youth in public areas."[58] Yet despite this influx of money and a shift in priorities to deal with the "uncivil," the crime rates did not drop, as one might expect. Instead, this community strategy produced both an increase in the number of tickets issued — 10,000 — and the number of complaints against police officers.[59]

In 2003-2004, the Commissioner of Police Ethics received 1,290 complaints of inappropriate behaviour by law enforcement officers, SPVM officers, and municipal bylaw officers; by 2007-2008 the number went up to 1,459 complaints.[60] In addition to the inefficient use of resources, these policing policies have negatively impacted street youth-police relations and have added to the unnecessary targeting and punishment of the youth for being visibly poor, "disruptive" and "uncivil."

IX. WHAT ARE THE ALTERNATIVES?

A. Building Better Relationships between Police and Youth: The Kelowna R.E.S.P.E.C.T. Program

Many groups believe that the negative relationship that exists between youth and police services can be positively transformed through alternative means. One example can be illustrated by the R.E.S.P.E.C.T. (Recognizing Every Strategy Promoting Excellent Community Trust) program, which is in the process of being instituted in the Okanagan region of B.C.[61] As its name implies, the purpose of the program is to promote positive community relations and trust. This is being brought about by a partnership between the Regional District of Central Okanagan (Parks & Recreation and Crime Prevention), the RCMP and the Westside Youth Centre, with the intent to create a more positive experience for youth-community relations in Westside.[62]

One of the foundational components of the program rests on the relationship between youth and the RCMP. A main objective is to strengthen the relationship between youth and the police through the use of "positive tickets." The RCMP will hand out "positive tickets" to any youth they see who are *not* engaged in any *negative* or *destructive* behaviour. Positive tickets include coupons for a free slushie, free coffee, free pizza, swim vouchers, movie passes, skating tickets, ski passes, etc. The theory behind this approach is based on the ability to change behavior through positive, rather than negative reinforcement, and the need to build community relations through the recognition of the positive potential and actual contributions of youth.[63]

---

57. Martin Lukacs (*The McGill Daily*), "The New Blue Line", *Streetviews* (Spring 2006) online: Wyoming Coalition for the Homeless <http://www.wch.vcn.com>.
58. *Ibid*.
59. *Ibid*.
60. *Ibid*.
61. "Recognizing Every Strategy Promoting Excellent Community Trust" (RESPECT), online: City of Kelowna <http://www.kelowna.ca>.
62. *Ibid.*
63. *Ibid*.

According to the program, an important component of community building is the elimination of fear and negative stereotyping on the part of both the police and youth in relation to each other, in order to foster greater mutual respect and understanding. R.E.S.P.E.C.T. holds that this can best be accomplished by an integrative approach that connects youth with their communities. In this case, the three partner groups have also been approaching local businesses to solicit support for their program in the form of donations, free coupons and vouchers for products, with the sponsoring/donating businesses recognized on the tickets that are handed out by the RCMP, to encourage community cooperation.[64]

Whether or not Montréal chooses to follow this program, it is important that police officers in the district change their attitude towards the homeless. At the very least, they should be mandated to participate in sensitivity training so that they can deal with marginalized, at-risk and mentally challenged street youth with greater awareness and understanding.

B. Litigation Alternatives: The Restorative Justice Movement

Restorative justice is also a growing movement in communities throughout Canada. Restorative justice is an alternative to court where wrongdoers must make reparations to victims, themselves and the community. This differs from the traditional adversarial legal process by expanding the issues beyond those that are legally relevant to include underlying relationships and community healing. Through the guidance of trained volunteers, guardians, victims and other interested supporters, the offenders participate in a process where they acknowledge responsibility for their behaviour, learn how others are affected, and take steps to repair the harm done. Strong restorative justice programs have well-trained facilitators who are sensitive to the needs of victims and offenders, who know the community in which the crime took place and who understand the dynamics of the criminal justice system.[65]

Restorative justice can help keep youth out of the criminal court system by providing another way to hold them accountable. Police services may refer youth who commit minor crimes to the program. Trained facilitators then hold face-to-face meetings with the offender, who admits responsibility and describes what was done, and the victims, parents, police and others involved in the incident all explain how they have been affected. The group then develops a written contract of action for the offender so that he or she can repair harm caused and prevent a similar situation from reoccurring. The value of this approach in dealing with minor infractions generated by street youth is easily apparent.[66]

C. Addressing the Roots of By-law Infractions: The Need for Social Housing

While currently there is no general integrated strategic response to youth homelessness on the federal, provincial and municipal levels of government, this is certainly something that merits effort. In the meantime, Montréal can benefit from the approaches taken by Canada's other large urban centers, such as Toronto. Until recently, the City of Toronto's policies and practices regarding the issue of youth homelessness have been directed towards encouraging youth to access the network of existing street youth services and dis-

64. *Ibid*.
65. Department of Justice, Policy Centre for Victim Issues, Fact Sheet, "Restorative Justice", online: Department of Justice Canada <http://www.justice.gc.ca>.
66. *Ibid*.

courage them from living outside of the shelter system in parks, under bridges and in abandoned buildings.[67] In 2007, the City expanded its outreach efforts to engage street youth in its successful "Streets to Homes" program, which uses a 'housing first' approach to move young people from the streets directly into housing.[68]

While these may be positive changes in Toronto, much more is needed to create a truly effective response to youth homelessness and its consequences across Canada. An integrated preventive approach would include the creation of affordable housing for youth, as well as joint efforts by the health/mental health sectors, the education system, corrections and child welfare services to assist the prevention of homelessness. Preventive strategies should also include crisis intervention and family mediation approaches that help young people stay housed. Transitional approaches, including Toronto's "Street to Homes" program are most effective when there is an adequate housing supply, as well as appropriate levels of income, social and health care supports.

The issue of social housing has recently created controversy in Victoria, B.C., where it is now legal for homeless people to put up temporary shelters in public parks if the municipality is not able provide adequate social housing.[69] In *Victoria (City) v. Adams*, the B.C. Court of Appeal upheld the ruling of Madame Justice Carol Ross.[70] Justice Ross held that in the absence of adequate homeless shelter spaces, the City of Victoria's ban on camping in parks violated section seven of the *Canadian Charter of Rights and Freedoms*, which guarantees "the right to life, liberty and security of the person." The Court of Appeal further added that the City could simply resolve the issue by making more shelter space available.[71]

Following Justice Ross's ruling, the City of Victoria changed its by-laws to allow camping in parks between 7 p.m. and 7 a.m.[72] The ruling in Victoria may have set a precedent for the use of public space in municipalities across Canada because it legally affirmed that people have the right to live in public spaces without paying. This is one concrete example of how marginalized populations have to fight against elected officials in order to protect their rights. On the one hand it is unfortunate that the fight for social housing requires legal action, but this case is also an indication of the direction in which Canadian courts are moving in addressing issues of concern to the poor and homeless.

X. CONCLUSION

In my opinion, the criminalization of poverty stems from a misunderstanding and abrogation of social responsibility and community cohesion. Rather than dealing solely with tickets after-the-fact, more emphasis must be placed on changing the ticketing practices of the City of Montréal. This requires more than legal reforms and the changing of by-laws; it also requires balancing legal reforms with social awareness, concern and action. This can be accomplished by working with police, the City, courts, intervention workers, and other community member and organizations to find a balance between public order, law enforcement

67. Gaetz & O'Grady, *supra* note 54.
68. *Ibid.*
69. Laurin Liu, "Policing Poverty: Filmmaker and ex-squeegee kid portrays the criminalization of Montreal's homeless", *The McGill Daily* (18 February 2010), online: The McGill Daily <http://www.mcgilldaily.com>.
70. *Victoria (City of) v Adams*, 2008 BCSC 1209.
71. *Ibid.*
72. "BC Homeless Win Right to Camp in Parks", *CBC News* (9 December 2009), online: CBC News <http://www.cbc.ca>.

and social concern. But in order for meaningful change to be accomplished the old attitudes of zero-tolerance need to be transformed into a more humane, care-based approach, where socially marginalized populations are treated with respect, dignity and compassion.

By changing or repealing discriminatory statute by-laws, redirecting funds to social services, building better community and police relationships, and offering proper support services, the City of Montréal could become a leader in community development instead of remaining mired in its current reputation as one of the most discriminatory regions in Canada in regards to its attitudes and actions towards street youth. However, it is easier for the City to use coercive measures for short-term gains and immediately visible results than to directly confront and remedy the issues it faces. Therefore, it will likely take a long and expensive court battle before the City is finally ready to address its problem of criminalizing poverty through its practice of ticketing street youth for being poor, homeless and problematic.

ARTICLE

IMPAIRED EXCLUSION: EXPLORING THE POSSIBILITY OF A NEW BRIGHT LINE RULE OF GOOD FAITH IN IMPAIRED DRIVING OFFENCES

By Brian Eberdt*

CITED: (2011) 16 Appeal 65-83

I. INTRODUCTION

The success of a defendant's application to have inculpatory evidence excluded under s. 24(2) of the *Canadian Charter of Rights and Freedoms ("Charter")*[1] can easily be characterized as one of the most determinative events in the outcome of a criminal trial. In light of the fact that most successful applications eliminate the Crown's ability to sustain a prosecution, the exclusion of evidence may be the most formidable means of upholding *Charter* rights within the criminal justice system. In the absence of a meaningful test with which to exclude evidence, the breach of a defendant's *Charter* rights becomes a breach without any other means of recourse. At the same time, imposing a test that weighs too heavily in favour of exclusion can give rise to negative perceptions of the administration of justice. It is for these reasons that s. 24(2) balances the importance of *Charter* rights against the repute of the administration of justice.

On July 17, 2009, the Supreme Court of Canada released the decisions of *R. v. Grant*,[2] *R. v. Harrison*,[3] and *R. v. Suberu*.[4] Together, these three decisions establish a new approach to the exclusion of evidence. The event has had a significant impact throughout the world of

* Brian Eberdt completed his J.D. at the University of Victoria Faculty of Law in the fall of 2010. He has Bachelor of Arts degree in Psychology from York University (Glendon College) and McGill University. While completing his J.D., Brian completed co-op work terms at the criminal law firms of Claus and Company in Victoria and Lockyer Campbell Posner in Toronto. He will be returning to the latter for his articles in May 2011. He would like to thank his major paper supervisor, Professor Lee Seshagiri, for his insight and enthusiasm throughout the research and editing process. He would also like to thank Appeal staff editor Meaghan McWhinnie for her careful and patient eye. Finally, Brian would like to thank his wife, Sarah Facini, for her unwavering support.

1. *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK) (1982), c 11 at s 15 [*Charter*].
2. *R v Grant*, 2009 SCC 32, [2009] SCJ No 32 [*Grant*].
3. *R v Harrison*, 2009 SCC 34, [2009] SCJ No 34 [*Harrison*].
4. *R v Suberu*, 2009 SCC 33, [2009] SCJ No 33.

criminal law because these are the first decisions to fundamentally change the framework created by *R. v. Collins*[5] over 20 years earlier. The initial reaction to the decisions has been positive. This is perhaps unsurprising given the accumulation of legal commentary denouncing the uncertainty of the pre-existing framework created by *Collins* and further exacerbated by *R. v. Stillman*[6] in 1997.

At the time of publication, there were approximately 700 reported decisions referencing the new framework. In light of the fact that the majority of these decisions have dealt with impaired driving offences, the trends that have emerged in the post-*Grant* case law are most apparent within that context. This article surveys the post-*Grant* jurisprudence in the area of impaired driving to illustrate that the consideration of "good faith" now threatens to singularly determine the analysis in a manner that resembles the conscription bright line rule articulated in *Stillman*.

Part one provides a review of the historical context that gave rise to *Grant* and its companion decisions. Commencing with the pre-*Charter* position to exclusion of evidence established in *R. v. Begin*[7] and *R. v. Wray*[8], the section describes the struggle involved in giving effect to the words that appear at s. 24 of the *Charter*. This is followed by an outline of the post-*Charter* interpretations of s. 24(2), including the confusion and inconsistency that arose out of the decision of *R. v. Stillman*.

Part two provides a brief explanation of the *Grant* decision, highlighting the elements of the framework to which the Supreme Court sought to bring new certainty. It devotes particular focus to the discussion of bodily evidence in *Grant* and its direct treatment of breath samples. It also notes the ambiguous nature with which the majority has dealt with the consideration of the seriousness of the offence. This is supported by a discussion of Justice Deschamps' separate reasons as she addresses her disagreement with the majority's focus on the factor of good faith.

Part three provides a discussion of the post-*Grant* jurisprudence, focussing on the distinct effect that the decision has had within the area of impaired driving offences. The section includes the argument that the removal of the automatic exclusion of conscriptive evidence, established in *Stillman*, has reintroduced significant legal barriers for defendants seeking to exclude breath sample evidence. This is followed by an illustration of how the treatment of this type of evidence as articulated by the majority in *Grant* creates the risk that the second and third branches of the framework will be pre-determined. The section proceeds to show how the manner in which trial judges have interpreted the seriousness of the offence further contributes to the likelihood that the exclusion of breath sample evidence is most likely to occur under the first branch of the framework.

II. PART ONE: DEVELOPING CANADA'S EXCLUSION OF EVIDENCE REGIME

Due to the fact that the exclusion of evidence is one of the most regularly adjudicated issues in a criminal trial, the history of this area of the law is especially dense. The brief overview that follows devotes particular attention to how the evolving exclusion of evi-

5. *R v Collins*, 1987 SCC 11, [1987] 1 SCR 265 [*Collins*].
6. *R v Stillman*, [1997] 1 SCR 607, [1997] SCJ No 34 [*Stillman*].
7. *Québec (AG) v Begin*, [1955] SCR 593 [*Begin*].
8. *R v Wray*, (1970), 11 DLR (3d) 673 (SCC), [1970] 4 CCC 1 [*Wray*].

dence regime has affected the prosecution of impaired driving offences in order to provide a better illustration of the current legal context.

A. Pre-Charter Exclusion of Evidence

The pre-*Charter* jurisprudence regarding exclusion of evidence had established that there was little remedy for excluding evidence beyond appealing one's conviction or pursuing civil action against the impugned officers.[9] Once it became clear that there was unlikely to be any broadening of the trial judge's discretion by the courts, the Trudeau government decided to include s. 24(2) when it enacted the *Charter* in 1982.[10] Section 24(2) reads as follows:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.[11]

The initial cases that applied s. 24(2) did so in a limited fashion, reluctant to move beyond the long-held resistance to exclusion. When the new provision was applied, it was in an inconsistent fashion. This was largely because the words contained in s. 24(2) provide little in the way of prescribed criteria to consider.[12] It was not until 1987 that the Supreme Court released *Collins*, which sought to create a uniform approach to exclusion with the establishment of a three-part test for determining admissibility. An outline of the test is provided here, as a significant portion of it has been retained in *Grant*.

The first factor in *Collins* required the trial judge to consider the nature of the evidence and the effect that its admission would have on the fairness of the trial. There were three elements to consider under this heading: the reliability of the evidence, whether the evidence was obtained independently of the *Charter* violation, and whether the evidence was discoverable.[13] The second factor required the judge to consider the seriousness of the violation. Under this heading, Lamer J., (as he then was), instructed trial judges to consider: whether the determination was serious or merely technical; whether it was wilful and deliberate or inadvertent and made in good faith; and whether there were other, less infringing, investigatory techniques available.[14] The third factor required the trial judge to consider what the effect of excluding the evidence would be. This included a consideration of the likelihood of sustaining a prosecution without the evidence and the serious-

---

9. See *Begin*, *supra* note 7 and *Wray*, *supra* note 8.
10. Although the provision merely provided Canadians with a protection that was already afforded by citizens of most commonwealth countries at the time, the inclusion was the subject of intense debate amongst those who drafted the *Charter*. While the United States had adopted the most expansive regime at the time, it was more frequently referenced by opponents to the introduction of section 24(2). Both within and outside of the American judiciary, there had been significant criticism of this "absolute exclusion" model, alleging that it resulted in too many exclusions of evidence, with insufficient consideration of the results. See *Stone v. Powell*, 428 US 465 (1976) for strongly worded judicial activism to this effect. For extensive coverage on the drafting of s. 24(2) and its initial reaction in the Courts of Appeal, see Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed (Toronto: Thomson Carswell, 2005) at 531-537 [Stuart].
11. *Supra* note 1 at s 24(2).
12. See Stuart, *supra* note 10 at 476-480 for discussion of the initial judicial application of section 24(2).
13. *Collins*, *supra* note 5 at paras 36-37.
14. *Ibid* at para 38.

ness of the offence.[15] These three factors were to be considered in a manner that upheld the aim of s. 24(2): the maintenance of repute of the administration of justice.

The three branches of Justice Lamer's framework remained in place for nearly 12 years until the introduction of the conscription bright line rule in *Stillman.* There, Cory J. modified the structure of the test, creating a virtually automatic exclusion for evidence that was deemed to be conscriptive. In defining what would constitute conscriptive evidence he gave the following broad instructions, "Evidence will be conscriptive when an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples."[16] The breadth of this definition was the catalyst for a snowball effect of confusion and uncertainty with respect to the proper application of the exclusion of evidence framework.

While this modification of the framework helped to ensure the exclusion of conscriptive evidence, it diminished the opportunity for judicial consideration of the circumstances involved in the obtainment of the evidence. This resulted in trial judges being forced to distort their analysis in order to ensure that certain evidence was admitted.[17] It is this confusion that led to the Supreme Court's decision to revisit the s. 24(2) framework in *Grant*.

B. An Approach Without Confidence

While the majority's aim in *Stillman* was to bring some order to the exclusion of evidence framework, it has become the primary target of the criticisms directed at the *Collins*/*Stillman* exclusion of evidence regime.[18] The overarching criticism of this aspect of the framework is encapsulated by McLachlin C.J. and Charron J. in *Grant*:

> Despite reminders that "all the circumstances" must always be considered under s. 24(2) … *Stillman* has generally been read as creating an all-but-automatic exclusionary rule for non-discoverable conscriptive evidence, broadening the category of conscriptive evidence and increasing its importance to the ultimate decision on admissibility.[19]

In other words, *Stillman* reduced the trial judge's ability to consider the full set of circumstances associated with the obtainment of the impugned evidence. The inquiry was driven almost exclusively by a determination of whether or not a *Charter* breach had occurred. The rigidity of the conscription bright line rule introduced the risk that trial judges might arrive at questionable characterizations of those circumstances in order to avoid categorizing evidence as conscriptive and non-discoverable.[20]

In the absence of an all-encompassing framework, courts were forced to make highly fact-specific determinations that were difficult to reconcile with one another as opposed to carefully balancing interests as prescribed by the *Charter*. Constitutional expert, Professor Peter

15. *Ibid* at para 39.
16. *Stillman, supra* note 6 at para 80.
17. Stuart, *supra* note 10 at 578-582.
18. For examples of common critiques of the *Collins/Stillman* approach see Steven Penney, "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the Charter" (2004) 49 McGill LJ 105 – 144 [Penney]; and Stuart, *supra* note 11 at 516-520 (Professor Stuart entitles this section "Stillman Approach Should Be Reconsidered").
19. *Grant*, *supra* note 2 at para 64.
20. See Penney, *supra* note 18 at paras 38-43.

Hogg, felt it necessary to depart from his characteristically reserved tone in describing the framework:

> It is worth commenting that the Court's balancing approach provides little certainty, and … those rules that the Court has developed to constrain its discretion are highly complicated. These are serious infirmities in a body of doctrine that should have the effect of deterring unconstitutional behaviour by police. The Court has lost sight of the commonsense proposition that "the more complex and uncertain the rules the less likely it is that the police will obey them.[21]

The approach was described as being "a highly rigid and technical grid, divorced from the social realities of what would actually bring the administration of justice [into] disrepute".[22] In order to conduct exclusions of evidence in line with its legislated purpose, a broad consideration of all the circumstances relating to the offence and the obtainment of evidence was necessary.

III. PART TWO: A NEW REGIME

The release of the *Grant*-trilogy had been long anticipated by both academics and practitioners.[23] While the focus of this article is to argue that the first branch of the *Grant* framework has adopted a determinative role in the exclusion of evidence in impaired driving offences, a brief summary of the framework is required in order to better understand their subsequent application.

A. An Overview of *R. v. Grant*

In the *Grant* decision, McLachlin C.J. and Charron J. set out a three-part test to guide trial judges in responding to the inquiry posed by s. 24(2) of the *Charter*: whether the admission of the impugned evidence could[24] bring the admission of justice into disrepute. Firstly, they must consider the seriousness of the *Charter* violation. Secondly, they must consider the impact of the violation on the *Charter* rights of the accused. Thirdly and finally, they must consider society's interest in adjudication on the merits.

When comparing the new and old frameworks, one could make the argument that the factors have merely been rearranged, and not rewritten. Even McLachlin C.J. and Charron J. concede the similarities when introducing the three branches of their framework:

---

21. Peter Hogg, *Constitutional Law of Canada,* 2007 Student Edition (Toronto: Thomson Carswell, 2007) at 908.
22. David Milward, "Why we can't Take Exclusions of Evidence for Grant-Ed" *Lawyers Weekly* (23 October 2009) 11.
23. While the decisions of *Harrison* and *Suberu* provide useful applications of the new framework, *Grant* is the decision that establishes the new framework for the exclusion of evidence. Although these topics lie beyond the scope of this article, the *Grant*-trilogy also provides significant contributions to the jurisprudence under sections 8, 9, and 10(b) of the *Charter*. For an excellent discussion on the impact of the *Grant*-trilogy on sections 9 and 10(b), see Steve Coughlan, "Great Strides in Section 9 Jurisprudence" (August 2009), 66 Criminal Reports (6th) 75.
24. While the English words of the *Charter* ask whether the admission of the evidence "would" bring the administration of justice into disrepute, the French equivalent of the section asks whether it "could" (est susceptible de) bring the administration of justice into disrepute. *Collins* adopts the French interpretation of the provision, which is upheld in *Grant*. See *Collins*, *supra* note 5 at para 43.

> These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.[25]

Ostensibly, their efforts to refine the approach leave us with a framework that seems capable of better realizing the aim of s. 24(2). The following paragraphs outline the three new branches of the exclusion of evidence framework, drawing attention to the manner in which they modify the approach in *Collins*/*Stillman*.

i. Branch One: The Seriousness of the *Charter* Violation

The first branch of the *Grant* framework asks the trial judge to consider the circumstances that surround the obtainment of the impugned evidence. In determining whether or not the evidence was obtained in a manner that would "preserve public confidence in the rule of law and its processes",[26] the court must consider whether or not the officer was acting in good faith. To help instruct judges in making this determination, the majority articulates a wide spectrum of circumstances in which a *Charter* violation may occur, from an error made in good faith to a wilful disregard of applicable law.[27]

The content of the first branch of the *Grant* framework does not differ significantly from the second factor in the *Collins* test. However, what is significant about this branch in *Grant* is that it will still be considered where it seems clear that a *Charter* violation has occurred. This represents the most significant innovation of the *Grant* framework. The *Stillman* conscription bright line rule effectively precluded trial judges from considering all the circumstances of the obtainment of the evidence; it follows that the removal of this bright line has reinvigorated the trial judge's ability to broadly consider the circumstances as required by s. 24(2). As discussed in Part three, however, the manner in which *Grant* has been interpreted suggests that the trial judge's discretion may not be as broad as the majority suggests.

ii. Branch Two: The Impact of the Infringement on the Rights of the Accused

The second branch requires the trial judge to consider that not all *Charter* violations will impact the accused equally. For example, a roadside stop of a motorist will have a much smaller impact than a search of an individual's home. While the constituent parts of the second branch of the *Grant* framework were largely present within the *Collins* framework, their consideration as a discrete factor is new. Under the *Collins* test, this was an inquiry that was conducted under the first factor: the effect of admission on the fairness of the trial. As noted before, however, the consideration of this factor would be precluded by a positive finding that the evidence was conscriptive and non-discoverable. While the first factor of the *Collins* framework was more directly concerned with interests of the accused at trial, the second branch in *Grant* shifts the focus to the interests of the accused at the time the time of the infringement. The prior absence of a direct consideration of the rights of the accused at the time when their rights were infringed had put trial judges in the awkward position of being forced to distort the earlier framework in order to account for this fac-

25. See *Grant*, *supra* note 2 at para 71.
26. *Ibid* at para 72.
27. *Ibid* at para 74.

tor.[28] The reduction of the number of areas in which a judge is required to distort the analysis increases both its transparency and legal certainty.

iii. Branch Three: Society's Interest in an Adjudication on the Merits

The third branch of the framework requires the trial judge to consider society's interest in an adjudication on the merits. The majority effectively summarizes the purpose of this inquiry as "[asking] whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion".[29] Under this heading, the reliability of the evidence and the importance of that evidence to the prosecution's case are the predominant considerations. As with the other branches, the majority has not embarked on a complete departure from the *Collins* approach. What is unclear is whether or not the trial judge is permitted to consider the seriousness of the offence under this heading. The rationale underlying this consideration is that society will be more concerned in admitting evidence in trials for more serious offences than they would for less serious offences. While this was a permissible inquiry under the *Collins*/*Stillman* framework, the majority in *Grant* cautions the use of this consideration, yet stops short of expressly prohibiting it.[30] Part three of this article includes an examination of the troubling effect that this ambiguous instruction has in the area of impaired driving.

B. The Unique Effect on Bodily Evidence and Impaired Driving

The primary impact of *Grant* on the exclusion of evidence in impaired driving offences is the elimination of the conscription bright line rule created in *Stillman*. However, this has less to do with *Grant* than it does with the manner in which these offences are prosecuted. In nearly all impaired driving cases it is necessary for the officer to have obtained a sample from the accused, demonstrating that the concentration of alcohol in their blood is in excess of 80 milligrams per one hundred millilitres of blood.[31] In most cases of impaired driving, this involves the obtainment of a breath sample into an approved breath analysis instrument. There are many elements of this transaction that carry a strong potential for the arresting officer to violate the motorist's *Charter* rights. In order to avoid a violation, a long history of jurisprudence imposes exacting requirements on the officer to obtain the required evidence in a lawful manner.[32] While there are many requirements, examples of those which are frequently adjudicated include: the requirement that the detention of the motorist is not arbitrary; the requirement that a police officer have reasonable and probable grounds to make a breath demand; informing the motorist of his or her rights to coun-

---

28. Under the earlier *Collins*/*Stillman* framework, it would be unlikely that a trial judge would have the opportunity to directly address the impact on the rights of the accused. Instead, the relevant factors that arise under this branch of the *Grant* framework would be folded into the judge's analysis of whether or not the evidence was conscripted. This created the undesirable affect of judge's distorting the analysis in order to ensure that all the necessary factors could be considered within the rigid confines of the *Stillman* conscription bright line rule. See Hamish Stewart, "The *Grant* Trilogy and the Right Against Self-Incrimination" (2009) 66 CR (6th) 97 at 100 for further explanation on why the *Collins*/*Stillman* approach was deemed "controversial".
29. *Grant*, *supra* note 2 at para 79.
30. *Ibid* at para 84.
31. *Criminal Code*, RSC 1985, c C-46 at s 253(1)(b).
32. Due to the relatively strong accuracy and reliability of breath sample evidence, there has been little success in defending an impaired driving show unless it could be shown that the arresting officer either violated the statutory requirements or infringed the individual's *Charter* rights in a manner that requires exclusion of the evidence. This resulted in a line of jurisprudence that was centered around s 24(2). As will be discussed later in the paper, the first category of defences has now been merged into the second.

sel once a breath demand has been made; making counsel available to the motorist upon request; and obtaining a breath sample from the motorist "as soon as practicable".[33]

Under *Stillman*, if an impaired driver were successful in showing that a police officer's obtainment of a breath sample resulted in an infringement of their *Charter* rights, then the evidence would likely be excluded. While *Stillman* allowed for an exception to the rule of automatic exclusion where the evidence would have been otherwise discoverable, this exception rarely arose in impaired driving.[34] As discussed in part one, the primary disadvantage to this approach is that it significantly reduced the ability of trial judges to consider "all the circumstances" in deciding whether the admission of the evidence would bring the administration of justice into disrepute. In recognizing that a significant increase in the exclusion of breath sample evidence would likely bring the administration of justice into disrepute, trial judges were then forced to distort their analyses in order to circumvent the automatic exclusion required by *Stillman*.[35] Thus, the elimination of the bright line rule in *Grant* brings the prospect of restoring certainty and transparency to the framework. Moreover, it provides for the rare circumstances in which conscriptive, non-discoverable evidence should be admitted.

While the changes outlined above would, on their own, have a substantial impact on the application of the framework in the area of impaired driving offences, McLachlin C.J. and Charron J. went further by discussing bodily evidence and *Charter* violations in the impaired driving context directly.[36] They point out that the conscription rule from *Stillman* was particularly ill-suited to bodily evidence, noting that the expansive definition that *Stillman* established for conscriptive evidence resulted in a "near-automatic exclusionary rule for bodily evidence obtained contrary to the *Charter*".[37] They also provide clear instructions on how the obtainment of breath samples should be characterized in reference to the impact on the rights of the accused:

> Where the violation is less egregious and the intrusion is less severe in terms of privacy, bodily integrity and dignity, reliable evidence obtained from the accused's body may be admitted. For example, this will often be the case with breath sample evidence, whose method of collection is relatively non-intrusive.[38]

This makes it clear that the majority sees the obtainment of a breath sample to have a minimal impact on the *Charter* rights of the accused. It is also supported by the majority's affirmation in *Harrison* that a motorist will have a relatively low expectation of privacy while

---

33. *Supra* note 31 at s 254(3)(a).
34. *R. v Farrell*, 2009 NSCA 3, [2009] NSJ No 15, is an example of one of the few cases in which conscriptive evidence was admitted on the grounds that it would have been discoverable. The officer obtained a blood sample from the accused after they had been involved in an accident, thinking it would have been impracticable to obtain a breath sample at the hospital. At trial, the sample was excluded upon a finding that the officer lacked reasonable grounds for the belief that he could not obtain a breath sample. At the Court of Appeal, it was held that a breath sample could have been obtained (i.e. the necessary evidence was discoverable), allowing the evidence to be admitted.
35. *R. v Farrell, Ibid* also provides an illustration of the manner in which the *Collins/Stillman* approach required judges to distort the analysis in order to ensure that they maintained public confidence in the justice system. The Court of Appeal repeatedly refers to the hypothetical breath sample as "probably" being discoverable. The ambivalence of this assertion coupled with the weighty consequence of a finding that the evidence was discoverable creates some concern.
36. See *Grant*, *supra* note 2 at paras. 99-111.
37. *Ibid* at para 100.
38. *Ibid* at para 111.

in their cars.[39] In reference to society's interest in adjudication on the merits, the majority clarifies that the reliability of bodily evidence in addition to the "error inherent in depriving the trier of fact of evidence" will generally result in the third branch favouring admission of the evidence.[40] These dicta have the effect of creating a presumption that the second and third branches will favour the admission of breath sample evidence.

C. The Emerging Significance of Good Faith

Although there has been some dispute with respect to role it plays within the framework,[41] the consideration of whether or not the police have acted with good faith has factored into judicial analysis of whether or not to exclude evidence since the enactment of s. 24(2) of the *Charter*. This factor has existed within the framework ever since *R. v. Therens*,[42] the first case in which the Supreme Court applied s. 24(2). It has been noted that, since that initial decision, the consideration has been accompanied by a presumption that that the police did act in good faith, despite substantial empirical evidence to suggest that they often do not.[43] Irrespective of the extent to which such a presumption exists within the application of the s. 24(2) framework, the good faith consideration is well-entrenched within the exclusion of evidence jurisprudence. While there has also been a continued debate regarding the proper relationship between the judiciary and the law enforcement branch of the state,[44] the good faith consideration is a vital component to determining whether or not admission of evidence would bring the administration of justice into disrepute. It requires the trial judge to consider whether a police officer was acting within the confines of their legal duty in a given situation. It would be difficult to conceive of another element of the framework that touches more closely upon the purpose of s. 24(2).

Under the *Grant* framework, the good faith consideration falls under the third branch, the seriousness of the violation. Although the majority does not discuss this branch specifically within the context of impaired driving offences, the treatment of this factor across the *Grant* trilogy is instructive. In particular, a comparison of the *Grant* and *Harrison* decisions reveals the substantial weight that can be accorded to the determination of whether the impugned state officials were acting in good faith. In both cases, this determination appears to play a central role. In *Grant*, the majority devotes significant attention to the factors that suggested the police officers' conduct was in good faith. These include the lack of evidence of racial profiling and their finding that the breach was neither egregious nor deliberate.[45] What is interesting about their consideration of the first branch is the majority's significant reliance on the uncertainty in the law of detention that existed at the time. While this factor certainly provides an explanation for the conduct of the police, the fact that it is treated as a justification for the conduct is difficult to reconcile with the explana-

39. *Harrison*, *supra* note 3 at para 30.
40. *Grant*, *supra* note 2 at para 110.
41. See Jordan Hauschildt. "Blind Faith: The Supreme Court of Canada, s. 24(2) and the Presumption of Good Faith Police Conduct" (2010) 56 Criminal Law Quarterly 469 [Hauschildt].
42. *R. v Therens*, [1985] 1 SCR 613, 18 CCC (3d) 481.
43. See Hauschildt, *supra* note 41 at 473.
44. This has also been an issue upon which the Supreme Court has provided inconsistent guidance. This has ranged from a view that s. 24(2) should be viewed as remedying police misconduct in *R. v. Collins*, to the more detached position espoused by Iacobucci J. in *R. v Burlingham*, [1995] 2 SCR 206 at 283, wherein s. 24(2) should be seen to "oblige law enforcement authorities to respect the exigencies of the *Charter*". Wisely, the majority in *Grant* adopts a compromise between these two extremes, characterizing the purpose of s 24(2) as being one of "dissociation" from unlawful conduct. See *supra* note 2 at para 72.
45. *Grant*, *supra* note 2 at para 133.

tion of the analysis that appears earlier in the decision.[46] This approach seems to create unwanted flexibility and uncertainty in how to correctly assess good faith. Trial judges are left with difficult questions regarding the degree and types of uncertainty that can support a positive showing of good faith on behalf of police officers. Given the seriousness of the *Charter* breach in *Grant*,[47] the fact that this relatively precarious finding of good faith resulted in admission speaks to the strong role that it plays within the framework.[48]

Harrison is useful as a companion case to *Grant* as it provides an example of the inverse scenario: while the second factor was neutral and the third factor favoured the admission of the evidence, the Court found that the lack of good faith on behalf of the police officers was sufficient to necessitate exclusion of the evidence. In accordance with their judicial role, the majority shows significant deference to the trial judge who characterized the conduct as "brazen", "flagrant", and "very serious".[49] While these characterizations might have been sufficient to require that the evidence be excluded, McLachlin C.J. proceeds further with the analysis, finding the police officer's in-court testimony to be misleading. In recognizing that this consideration goes beyond the breach itself, she holds it to be a factor that reinforces the finding of bad faith on behalf of the police even further.[50]

The fact that these findings led to the exclusion of highly reliable evidence (32kg of cocaine) obtained in a situation where the individual had a low expectation of privacy (driving a rental car on the highway), helps to illustrate the weight that was accorded to the first branch of the framework. When contrasted with the treatment of this factor in *Grant*, its pivotal role within the framework becomes clear. The broadened consideration of police conduct in *Harrison* increases the potential that the first factor of the *Grant* framework might determine the result.

D. The Seriousness of the Offence

The summary of the new exclusion of evidence framework above notes how the majority discussed the appropriate consideration of the seriousness of the offence with relative ambiguity. While this factor was validly considered under the framework created in *Collins*,[51] the majority in *Grant* seems to dissuade trial judges from adopting it as a consideration. The lack of clarity in this section of the judgment has particular relevance to the argument that good faith is emerging as the determinative factor, particularly in the area of impaired driving offences. As discussed earlier, there is substantial direction within the *Grant* decision regarding the appropriate treatment of breath samples in reference to the second and third branches of the framework. The decision makes clear that these branches will regularly militate in favour of admission. With this established, it is unnecessary to rely on the factor of the seriousness of the offence in impaired driving offences, irrespective of whether it is legitimate to do so. As discussed in part three, many post-*Grant* impaired driving cases

46. Admittedly, *R. v Kokesch*, [1990] 3 SCR 3 at 32-33 stands for the proposition that, once a particular area of law has been settled by the courts, police officers are expected to act in conformity with that resolution. It is the majority's reliance on the inverse proposition that highlights the extent to which they sought to demonstrate the good faith of the officers in *Grant*.
47. The police officers violated the accused's ss. 9 and 10(b) rights. The evidence that was obtained was deemed to be non-discoverable leading the majority to conclude that the impact of the infringement was "significant". See *Grant, supra* note 2 at paras 136-138.
48. The third *Grant* factor was held to have a neutral effect in the analysis. See *supra* note 2 at para 139.
49. *Harrison*, *supra* note 3 at para. 23.
50. *Ibid* at para 26.
51. See *Collins, supra* note 5 at paras 35, 39, and 45.

do consider this factor. In most of these cases, it is deemed to favour the admission of the evidence. This interpretation by the courts further reinforces the presumption that breath samples will be admitted. This has the effect of reducing the likelihood of successful arguments for exclusion under the first branch of the framework, the branch under which the decision of admission or exclusion is most likely to occur.

Prior to evaluating the interpretation of this consideration in the post-*Grant* jurisprudence, it is necessary to determine the correct interpretation of the factor as established by the *Grant* trilogy. In *Grant*, McLachlin C.J. and Charron J. do not encourage reliance on the seriousness of the offence, yet they do not expressly prohibit trial judges from considering it either. Instead, we are left with the following vague statement: "In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways".[52] The Justices explain this by highlighting how the public will have a great interest in seeing that evidence is admitted in the case of a serious offence however it is necessary to balance this interest against the long-term repute of the administration of justice. While acknowledging Deschamps J.'s disagreement on this point (she believes that the seriousness of the offence is a valid consideration), they canvas the authorities that suggest that the reliance on this factor runs contrary to the principles of s. 24(2). McLachlin C.J. and Charron J. then highlight the most frequently repeated principle of the judgment: that s. 24(2) is concerned with the *long-term* repute of the justice system. They then apply this principal in context: "The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice".[53] Thus, it appears from *Grant* that if any permissible reliance on the seriousness of the offence exists, it will be slight. Unfortunately, the interpretation of this aspect of the decision has not been consistent.

The companion decision of *Harrison* provides some additional guidance. There, McLachlin C.J. explicitly overrules the dictum of the Ontario Court of Appeal on this issue in which the seriousness of the offence had been considered in the analysis. She holds that the majority had incorrectly compared the seriousness of the *Charter* violation with the seriousness of the criminality involved.[54] In her words, "The fact that a Charter breach is less heinous than the offence charged does not advance the inquiry mandated by s. 24(2)".[55] McLachlin C.J. seems to endorse the view of Cronk J.A. who, in dissent at the Court of Appeal, warned against the risks of over-reliance on the seriousness of the offence.[56] Thus, it would seem that, while the seriousness of the offence may continue to be a relevant consideration, it should not weigh heavily in the analysis.[57]

While the Supreme Court has created a warning against over-reliance on the seriousness of the offence in *Grant* and *Harrison*, trial judges are left with little instruction as to what degree of reliance is permissible.[58] This lacuna stands in the face of intense pressure for

---

52. *Grant, supra* note 2 at para 84.
53. *Ibid.*
54. *Harrison, supra* note 3 at para 41.
55. *Ibid.*
56. *R v Harrison*, 2008 ONCA 85, [2008] OJ No 427 (QL) at para 83.
57. Several commentators believe that any reliance on the seriousness of the offence should be prohibited for the fear that it might create a two-tiered justice system in which those charged of less serious offences might be subjected to a less stringent exclusion of evidence regime. See Don Stuart, "Welcome Flexibility and Better Criteria for Section 24 (2)" (2009), 66 CR (6th) 82 at 84.
58. For further interpretation of the majority's discussion of this factor in *Grant*, see Tim Quigley, "Was it Worth the Wait?: the Supreme Court's New Approaches to Detention and Exclusion of Evidence" (2009) 66 CR (6th) 88 at 93.

trial judges to bow to the "public clamour" to ensure that the truth-finding function of the courts is not obstructed. When one considers that in 2005, 33% of the motor-vehicle accident fatalities in Canada involved intoxicated drivers,[59] it is understandable that trial judges might feel pressured to admit evidence in these offences in order to maintain the repute of the justice system. While it is impossible to reveal the precise weighing of the factors in each decision, the post-*Grant* jurisprudence suggests that many trial judges continue to accede to the short-term interests of the public in ensuring convictions by according significant weight to this factor. This is of particular concern in the area of impaired driving because the factor is repeatedly interpreted in favour of admitting evidence against the accused. This further increases the likelihood that good faith becomes the only section of the framework under which breath samples may be excluded.

E. Justice Deschamps' Reasons

Justice Deschamps' partially concurring reasons in *Grant* help to add further depth to both the determinative role of good faith and the proper consideration of the seriousness of the offence. Her primary disagreement with the majority's new framework is best described by her proposed alternative. She argues that the three branches proposed by McLachlin C.J. and Charron J. stray too far from the purpose of s. 24(2): to balance the societal interest in protecting constitutional rights against the societal interest in an adjudication of the case on the merits. In her view, by positioning the inquiry into state conduct as the first branch of the framework, the majority is giving it a particular significance that is not shared by the second and third branches.[60] Deschamps J. argues that this gives the appearance that the primary concern of the majority is to deter police misconduct. In her words, "The need for the courts to dissociate themselves from state conduct is at most one factor to be considered in relation to the overall purpose."[61] With respect to this element of the framework, she argues that the preceding *Collins*/*Stillman* framework more faithfully embraced the true purpose of s. 24(2), wherein both the state conduct and the seriousness of the infringement were considered under the review of the seriousness of the violation. Whether or not its position within the framework is the cause for this added significance, Deschamps J.'s contention that the first branch has taken on a disproportionate role within the framework supports the contention that the new exclusion of evidence framework faces the risk of being pre-determined by the determination of good faith.

While the target of Justice Deschamps' concern regarding the role of good faith may be the sequence of the framework, her disagreement with the correct treatment of the seriousness of the offence is entirely in regard to its substance. She devotes significant attention to this consideration in her partially concurring reasons, arguing that society will have a greater interest in adjudication on the merits when it involves a serious crime.[62] Where the majority seems to be striking a balance between the public concern for sustaining prosecutions and the principle that all stand equal before the law,[63] Deschamps J. argues that the former un-

---

59. P. Gutoskie, Road Safety Vision 2010: 2006 Update (Ottawa: Canadian Council of Motor Transport Administrators, 2008) at 13 as cited in R Solomon et al "Alcohol, Trauma, and Impaired Driving" 4th ed (2009) Madd Canada, CAMH, CCSA, online: <http://www.madd.ca/english/research/real_facts.pdf> at 87.
60. *Ibid* at para 195. This is a view that is shared strongly by Benjy Radcliffe, see "R. v. Grant: A Work in Progress" (16 December 2009), online: The Court <http://www.thecourt.ca/2009/12/16/r-v-grant-a-work-in-progress/>.
61. *Grant*, *supra* note 2 at para 214.
62. *Ibid* at paras 217-222.
63. See *R v Johnson* (1971), 5 CCC (2d) 541 (NSCA) at 543, aff'd in *R v Craig*, 2009 SCC 23, [2009] SCJ No 23.

questionably outweighs the latter. She supports this contention by noting that the rights of the accused have already been considered under the first and second branches of the framework; to import this concern into the third branch of the framework would be illogical as it is concerned with *society's* interest in adjudication on the merits. Her view on this topic is expressed more emphatically in her decision in *Harrison* where she argues that the evidence would have been admitted, had the proper weight been accorded to the seriousness of the offence.[64] Justice Deschamps' dissent on this issue provides some explanation for the manner in which this factor has been applied in the post-*Grant* jurisprudence.

IV. PART THREE: IMPAIRED EXCLUSION

It will not be possible to comprehensively assess the impact of the Supreme Court's reformulation of the approach to the exclusion of illegally obtained evidence without several more years of judicial interpretation. However, in the nine months between the release of *Grant* and the publication of this article, there have been nearly 700 reported cases that have referenced the new framework. A quick survey reveals that impaired driving offences comprise the subject matter of more of these decisions than any other type of offence in the *Criminal Code*. Due to the unique difficulties of obtaining this evidence in a manner that conforms with the *Charter*, there is a large body of law concerning *Charter* breaches that arise from this setting. Because there is such a large proportion of exclusion of evidence cases in impaired driving that precede and follow *Grant*, this context provides a useful lens through which to assess the impact of the new framework. This section will draw upon post-*Grant* jurisprudence to illustrate how both the direct treatment of bodily evidence in *Grant* and the ambiguous treatment of the seriousness of the offence have caused the second and third branches of the *Grant* framework to favour the admission of breath samples. This is followed by an illustration of how these trends have caused good faith to emerge as the determining factor in the framework.

A. Applying the New Approach to Breath Samples

As outlined in part two, the removal of the bright line conscription rule has a particularly significant impact on the exclusion of evidence in impaired driving cases. Nevertheless, the majority in *Grant* go further by dealing with bodily evidence, breath samples in particular, directly.[65] In the same way that the automatic exclusion of conscriptive evidence was quickly adopted by defence counsel seeking to ensure that more breath samples would be excluded, the developments in *Grant* have been quickly adopted by the Crown to demonstrate why they should be admitted. This has resulted in a relatively predictable assessment of the second and third branches of the framework. The cases discussed below highlight both the consistency and willingness of trial judges to apply the instructions articulated in *Grant*.

In many senses, *R. v. Skuce*[66] provides a prototypical example of the manner in which the trial judge's application of the facts occurs primarily under the first branch of the framework, while the second and third branches are predominated by an importation of the

64. *Harrison*, *supra* note 3 at para 44.
65. Note that *R v Shepherd*, 2009 SCC 35, [2009] SCJ No 35, a case that deals with the exclusion of breath samples, was one of the companion judgments to *Grant*. While the application of section 24(2) was argued at trial and the appeal, the Supreme Court ultimately found that no *Charter* violation occurred. It is for this reason that their discussion of this type of evidence appears in *Grant* and not *Shepherd*.
66. *R v Skuce*, 2009 BCPC 333, [2009] BCJ No 2289.

principles articulated in *Grant*. The case involves breath samples that were obtained in violation of the accused's rights under ss. 8 and 9. With regard to the arbitrary detention, the officer had little other reason to detain the accused than her observation that the driver making an illegal "u-turn" on an overpass.[67] It was determined that the officer's opinion to detain and obtain breath samples was based on the officer's professional experience in observing the behaviour of impaired drivers.

In applying the *Grant* framework, Skilnick J., of the British Columbia Provincial Court, devotes significant attention to the interpretation and application of the first branch of the framework. In doing so, he highlights that the officer was merely exercising her judgement in detaining and searching the accused. Moreover, he finds that the search was conducted both professionally and courteously. Accordingly, he arrived at the conclusion that the seriousness of the breach was minimal.[68] Skilnick J.'s analysis of the second branch is highly similar to the analysis conducted by trial judges in most impaired driving cases. The facts considered here are common: his liberty was restricted when he had to wait for a test with an approved screening device and he was deprived of the privilege to drive during the period after the offence.[69] Skilnick J. proceeded to apply the dicta from *Grant* in concluding that these infringements represented a small impact on his rights.[70] Finally, he dealt with the third branch in a summary fashion, finding the reliability of the samples to be the "strongest argument in favour of the inclusion of the evidence in cases of this nature".[71] In balancing the three branches, Skilnick J. concluded that the breath samples should be admitted. *Skuce* provides a strong illustration of the manner in which most impaired driving cases will not require a judge to devote significant consideration to the second and third branches of the framework.

R. v. Haut[72] is a member of the minority of cases for which the exclusion of evidence analysis differs significantly from the template demonstrated in *Skuce*. While it does not detract from the argument that the seriousness of the violation is the probable branch of the framework under which most breath samples will be excluded, it demonstrates the manner in which this branch will usually affect the trial judge's determination of the second branch. *Haut* involves a detention and request for breath samples that were made in the absence of good faith. Allen J., of the Alberta Provincial Court, found that the officers involved used excessive force in arresting the accused, the passenger of vehicle was unnecessarily arrested, and there was a lack of reasonable grounds for requesting a breath sample.[73] In light of the finding that the breaches under ss. 8 and 9 were made in the absence of good faith, it seemed nearly inevitable that the impact on the rights of the accused would be viewed in a manner that favoured exclusion. Allen J. recognizes the holding in *Grant* that the collection of breath samples will generally be deemed an unobtrusive procedure, yet he stresses that "all the circumstances must be considered, including the circumstances leading to the breach, and any detention necessary to obtain the breach samples".[74] In this case, the facts considered under the first branch of the framework reveal that such circumstances are sig-

67. *Ibid* at para 7; The video of the accused, as captured by the camera mounted in the officer's cruiser, at the subsequent roadside sobriety test did not indicate anything irregular in the accused's behaviour.
68. *Ibid* at para 35.
69. *Ibid* at para 40.
70. *Ibid* at para 41.
71. *Ibid* at para 42.
72. *R v Haut*, 2010 ABPC 2, [2010] AJ No 113 [*Haut*].
73. *Ibid* at paras 36-53.
74. *Ibid* at para 65.

nificant and favour exclusion. Although the third branch was found to favour inclusion,[75] as is generally the case with breath samples, Allen J. held that the exclusion of the evidence, in light of all three branches, was necessary in order to maintain the long-term repute of the administration of justice.[76] Although *Haut* demonstrates that a finding of the absence of good faith will often be accompanied by a finding that the impact on the rights of the accused was significant, this does not detract from the argument that the origin of most successful arguments for the exclusion of evidence will fall under the first branch of the framework. The interconnectedness of the two branches is also supported by Justice Deschamps' dissenting proposal in *Grant* for a two-branch framework under which the first two branches of the majority's framework would effectively be combined.

In *R. v. Usher*,[77] a recent decision from the British Columbia Supreme Court, defence counsel sought to question the direct treatment of breath samples by the majority in *Grant*. Acting for the appellant, H. Rubin Q.C. argued that the consideration of the second branch of the framework extends beyond the application of the majority's ruling that the obtainment of breath samples does not result in a serious violation of an individual's privacy, bodily integrity, or dignity. He argued that the related liberty-interests of the individual are engaged: taking the individual to a police detachment, detaining them, and towing their car.[78] Barrow J. rejected this argument and found that the post-*Grant* law has correctly applied the approach to the second branch as instructed by *Grant*.[79] *Usher* acts as a counterpoint to *Haut* in that it suggests that findings in favour of exclusion under the second branch of the framework are best restricted to consideration under the first branch. Thus, where *Haut* appears to provide discretion to the trial judge in their consideration of the second branch, *Usher* suggests that it is better exercised under the first.

While most of the post-*Grant* impaired driving jurisprudence emanates from lower courts, *Forsythe*[80] and *McCorriston*[81] are two instructive decisions from the Manitoba Court of Appeal. These cases help to provide definition regarding the proper application of the *Grant* principles in relation to the second and third branches of the framework. Both cases deal with the issue of whether or not it is necessary to resort to a s. 24(2) analysis where it has been shown that a police officer has failed to adhere to the statutory requirements of s. 254(3). The defence had attempted to advance the argument that the failure of the police to demand the sample "as soon as practicable" resulted in an automatic exclusion, irrespective of a s. 24(2) analysis, on the grounds that there had been a failure by the officer to abide by the statutory requirements. The appeal judges followed the earlier line of jurisprudence, established in *Rilling*[82] and *Bernshaw*,[83] to support the contention that an automatic exclusion will not occur. While a failure to abide by the statutory requirements for obtaining samples from a motorist will inevitably influence a judge's s. 24(2) analysis in favour of the accused, *Forsythe* and *McCorriston* both articulate the proposition that it will generally be necessary for the trial judge to consider whether or not a s. 8 violation has occurred. Whether or not they proceed with a s. 24(2) analysis would depend on that result. Since the result of the second and third branches of the framework will likely be presumed,

75. *Ibid* at para 72.
76. *Ibid* at para 81.
77. *R v Usher*, 2010 BCSC 1745, [2010] BCJ No 2432.
78. *Ibid* at para 39.
79. *Ibid* at para 43.
80. *R v Forsythe*, 2009 MBCA 123, [2009] MJ No 438.
81. *R v McCorriston*, 2010 MBCA 3, [2010] MJ No 2.
82. *Rilling v The Queen*, [1976] 2 SCR 183.
83. *R v Bernshaw*, [1995] 1 SCR 254, [1994] SCJ No 87.

these cases support the argument that cases such as these that involve a police officer's failure to uphold the relevant statutory requirements will also turn on the trial judge's determination of good faith.

B. Questionable Reliance on the Seriousness of the Offence

An additional factor of the framework that has tended towards admission in impaired driving offences is the seriousness of the offence. As established in part two, the majority in *Grant* cautioned against relying upon this factor in considering society's interest in adjudication on the merits, although they have not expressly prohibited it from the framework. The interpretations of this element in impaired driving jurisprudence have been markedly inconsistent. At one end of the spectrum, trial judges have interpreted *Grant* to have held that the seriousness of the offence "is not to be considered because s. 24(2) is concerned with the long-term repute of the administration of justice".[84] At the other end, trial judges have devoted considerable attention to the seriousness of impaired driving, referring to it as "a scourge of modern society".[85]

This uncertainty in the law is relevant to this article because most of these decisions have interpreted the seriousness of the offence in a manner that favours admission of the evidence. With the majority's discussion of how breath samples should be considered under the third branch of the framework, there is already a *de facto* presumption against the exclusion of breath sample evidence. It is unnecessary to resort to a consideration of the seriousness of the offence to further support findings of exclusion, particularly when impaired driving cannot accurately be characterized as a serious criminal offence. In light of the limited field in which to argue for the exclusion of breath samples under the second and third branches of the framework, the consideration of the seriousness of the offence further constrains the debate over exclusion to the first branch, and the determination of good faith in particular.

R. v. Srokosz,[86] an impaired driving case from the Ontario Provincial Court, provides an example of the reliance on the seriousness of the offence in a manner that favours admission. Although Judge O'Dea recognizes that impaired driving is not generally considered a serious offence, he proceeds by noting the potential for harm that these offences create in order to show why society would wish to have the impugned breath samples admitted.[87] While the harm that may be inflicted on innocent individuals is an important consideration, it does not seem to be provided for by the majority in *Grant*. The reliance on the seriousness of the offence was significant in this case because the determination of good faith fell somewhere within the middle of the spectrum considered by the majority in *Grant*.[88] Without a clear finding in either direction on the first branch of the framework, the additional weight placed on the seriousness of the offence appears to have swayed the framework towards admitting the evidence.

---

84. *Haut*, *supra* note 72 at para 69.
85. *R v Pinchak*, 2010 ABPC 44, [2010] AJ No 156 at para 61.
86. *R v Srokosz*, 2009 ONCJ 559, [2009] OJ No 4953 (QL) at para 88.
87. *Ibid*; See *R v Mudryk*, 2009 ABPC 253, [2009] AJ No 1072 at para 33 for similar reasoning.
88. The officer had failed to communicate the accused's right to counsel per s. 10(b) because of background noise coming from both the car radio and police communications radio in the police cruiser. Justice O'Dea found that this error demonstrated "a lack of consideration for the importance of the duty being undertaken and the importance to the person in his custody to hear what he had to say". *Ibid* at para 68.

R. v. Winter[89] illustrates another manner in which trial judges have considered the seriousness of the offence in a way that causes the third branch of the framework to lean further in favour of admission. In considering the factor, Justice Brown characterizes the offence of impaired driving as a serious one. However, he then quotes the section from *Grant* that deals with this factor so as to indicate that it must not heavily influence the analysis, if at all.[90] He then proceeds to consider the circumstances of the particular offence, drawing attention to the high blood alcohol content of the accused. In doing so, he finds that these circumstances favour inclusion.[91] This reasoning demonstrates the breadth with which the factor is considered.[92] Moreover, it shows the manner in which trial judges seem to be broadening the purpose of the third branch of the inquiry. While *Grant* is clear that this branch should consider society's interest in adjudication on the merits, these decisions appear to import into the framework the broader societal concern that crimes that are easily preventable and often involve innocent victims should be punished in order for the repute of the justice system to be maintained.

What is concerning about the reliance on this factor in the impaired driving context is the fact that, in most cases, it is an unnecessary consideration. The majority in *Grant* made clear the fact that breath sample evidence is highly reliable and, in most cases, it will be virtually impossible for the Crown to successfully prosecute the offence without it. The certainty and strength of these two factors make it unnecessary to consider the seriousness of the offence. Even if the relative non-seriousness of impaired driving is addressed, *Grant* makes sufficiently clear that the third branch will tend towards the admission of breath samples.[93] Regardless of the legitimacy of the current trend of trial judges to interpret the seriousness of the offence in favour of admission, it reinforces the fact that the majority of the analysis, that is not predetermined by *Grant*, will occur under the first branch of the framework.

C. The Narrowing Effect of Good Faith

The developments considered above make it clear that the new *Grant* framework and its subsequent interpretation establish large obstacles in seeking the exclusion of breath samples. However, this is unlikely to have an effect on the number of defendants who seek a remedy under s. 24(2). Thus, it is essential to develop a clear understanding of what scope of argument remains in this arena. Thus far, the discussion of the post-*Grant* jurisprudence has pertained to the second and third branches of the framework. It seems clear that there is a small likelihood of a trial judge basing a decision for exclusion under either of these branches. While the purpose of the *Grant* framework is to ensure that a trial judge consider all of the relevant circumstances in order to arrive at a conclusion regarding the exclusion of the evidence, the treatment of breath sample evidence in *Grant* and the subsequent interpretation of the seriousness of the offence suggest that both the second and third branches will generally favour admission of breath samples. Thus, it becomes apparent that in most cases the scope of argument for defence counsel will be limited to a consideration

89. *R v Winter*, 2010 ONCJ 147, [2010] OJ No 1733.
90. *Ibid* at para 61.
91. *Ibid* at para 64.
92. *R v Leonardo*, 2009 ONCJ 507, [2009] OJ No 5082 at para 35 provides an example of where a low blood alcohol content was considered under the factor of the seriousness of the offence. The case is part of a small minority of cases where this factor has influenced the analysis towards excluding the evidence. Notably, the first two branches of the framework were also considered to favour exclusion.
93. *Grant, supra* note 2 at paras 110-111.

of the seriousness of the *Charter*-infringing state conduct, under the first branch of the framework.

As discussed in part two, Justice Deschamps' primary disagreement with the majority in *Grant* is their excessive consideration that the framework places on state conduct. The question of whether or not trial judges are, in fact, basing their decisions on a finding of good faith is difficult to answer from the jurisprudence interpreting *Grant*. Even in the most comprehensive decisions, it is difficult to assess the weight placed on each branch of the framework. As stated by the majority, "The balancing mandated by s. 24(2) is qualitative in nature and therefore not capable of mathematical precision."[94] As established above, however, it seems that most decisions involving impaired driving offences turn on the absence or presence of good faith displayed by the police officer because of the challenge in overcoming the presumed results of the second and third branches of the framework. Thus, while *Grant* may have improved the framework by restoring trial judges' ability to consider all the circumstances by removing the automatic exclusion of conscriptive evidence, the manner in which the framework applies in impaired driving offences suggests that a judge's discretion might not have been expanded by *Grant*, but merely diverted to the consideration of good faith.

In *R. v. Booth*,[95] a recent decision from the Alberta Court of Queen's Bench, Clackson J. provides a unique stance on the concept of good faith. He proposes that the majority in *Grant* might not have adopted the best-suited language with good and bad faith. He suggests the concept of good faith is insufficiently concrete to attach or exclude itself from "inadvertence, minor violations, or an honest but mistaken belief".[96] A survey of the applications of the s. 24(2) framework that have been made since *Grant* confirms this ambiguity. Clackson J. suggests that, with respect to the mental intent of police officer in question, the egregiousness of the state conduct should be considered objectively:

> The analysis is not defined by faith, or intent, but by the egregiousness of the state conduct. There is no added requirement to consider the mental processes of the authorities engaged in the breach, rather, intention is a part of the process of determining how egregious the conduct was. It is a factor, not the answer.[97]

While the process of extricating good faith from this branch of the framework may pose a practical challenge to trial judges, this suggestion might assist in controlling good faith such that it does not override the s. 24(2) analysis.

While Clackson J. advocates for a form of control with regard to the correct analysis of the first branch of the *Grant* framework, *R. v. Synkiw*,[98] a decision of the Saskatchewan Provincial Court, represents an example of the influence that *Harrison* has had on the subsequent application of the first branch of the framework. In *Harrison*, Charron J. made particular note of the trial judge's assessment of the arresting officer's in-court testimony in considering the first branch of the s. 24(2) framework. In *Synkiw*, Labach J.'s analysis under the first branch seems to be guided by his assessment of the arresting officer's testimony. It begins with the words, "I did not believe Constable Comley's testimony that he stopped the

94. *Grant*, *supra* note 2 at para 140.
95. *R v Booth*, 2010 ABQB 797, [2010] AJ No 1476.
96. *Ibid* at para 11.
97. *Ibid.*
98. *R v Synkiw*, 2010 SKPC 152, [2010] SJ No 730.

accused for a Traffic Safety Act infraction."[99] While it is not explicitly stated in his judgment, it appears as if the officer's dishonesty in court acts as a further aggravating factor under the first branch; as if the officer's failure to tell the truth, as perceived by the trial judge, is a perpetuation of the misconduct that was exhibited during the incident in question. In this manner *Synkiw* provides an important illustration of the breadth and shape of judicial discretion with respect to the first branch of the framework.[100]

V. CONCLUSION

Clearly, the intent of the majority in *Grant* in their direct treatment of bodily evidence was to restore certainty to how this category of evidence was considered. Unfortunately, due to the relatively uniform nature in which this treatment has been applied, there is a risk that trial judges will fail to genuinely engage in each of the three branches of the framework as prescribed by *Grant*. This is exacerbated by the prevailing interpretation of the seriousness of the offence, which acts to further pre-determine the third branch of the analysis. While the proportion of cases in which breath samples should be excluded solely on the second and third branches of the analysis may be small, if the seriousness of the state conduct continues to be the only inquiry that can lead to exclusion, there is a risk that trial judges will be less willing to look elsewhere.

The concern with over-reliance on the first branch of the *Grant* framework is not without remedy. The critiques that have been expressed in this article pertain primarily to its application, not its composition. In the months and years that follow, courts will likely be confronted with breath samples that are unreliable or obtained in a manner that significantly infringes the rights of the accused, in the absence of any state misconduct. Similarly, the inconsistent interpretations of the seriousness of the offence by trial judges can easily be brought into line by a clearer treatment of this issue by the Supreme Court. In light of the emphasis with which this factor is considered by trial judges, it is essential that they receive further guidance on how to properly integrate this consideration into the framework.

99. *Ibid* at para 83.
100. For further assessment of the broadened scope of trial judges in conducting the s 24(2) in the post-*Grant* era see Kent Roach "The Future of Exclusion of Evidence after Grant and Bjelland" (2009) 55 Criminal Law Quarterly 285 at 286.

ARTICLE

A CRITIQUE OF THE BRITISH COLUMBIA RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY'S USE OF DUAL AGENCY

By Michael Drouillard*

CITED: (2011) 16 Appeal 84-100

I. INTRODUCTION

Many of us purchase homes and deal with real estate agents in the process. Furthermore, the purchase of a home is often one of the most substantial investments a person makes. In light of this, real estate agency ought to be of tremendous concern to anyone interested in consumer protection law and reform. Surprisingly, reform in this area appears to have been left largely up to regulators and real estate industry representatives who engage in a private dialogue that tends to be inaccessible to the public. The intention of this article is to expose the public to this dialogue and spur further academic discussion into the workings of this industry.

This article critiques the current practice of dual agency in British Columbia. Dual agency is a subject of considerable controversy in the residential real estate brokerage industry. It is commonly criticized for the inherent conflict of interest it creates when an agent concurrently represents a vendor and purchaser, parties who hold adversarial-like aims in a transaction.

However, this article contends that there are three additional issues with dual agency that tend to be neglected by commentators and that are perhaps of even greater concern. First, in the typical residential real estate transaction, consent to dual agency is, arguably, neither informed nor truly obtained; rather, consent tends to be compulsory due to the workings of the residential real estate brokerage industry whose members routinely enter dual agency relationships with their clients through the use of standardized forms. Second, dual agency suffers from increased risk of a particular form of conflict of interest known as "principal-agent incentive misalignment"[1] where the real estate agent furthers his or her financial interest at the expense of one or both clients. Finally, real estate agents tend to lack the training required to undertake a dual agency role in a competent manner.

---

* Michael Drouillard is a third year law student at the University of Victoria, the author of *Landlording in Canada* (International Self-Counsel Press, 2008), and a professional member of the Real Estate Institute of British Columbia. Before entering law school, Michael worked for nearly seven years as a real estate agent and this article is informed by that experience. Michael would like to thank supervising instructor Deborah Curran and *Appeal* editor Cody Olson for their invaluable input.

1. The use of this term is adopted from Vrinda Kadiyali, Jeffrey Prince & Daniel Simon, "Is Dual Agency in Real Estate Transactions a Cause for Concern?" (2008) Johnson School Research Paper Series No 08-07.

This article begins with a brief overview of a typical real estate transaction. It next reviews the law of real estate agency as it applies to the creation of a dual agency relationship and potential corresponding fiduciary duties, so that the problems with dual agency may be better understood in their legal context. Some of the many problems associated with dual agency are then identified. The article concludes with a critical evaluation of the real estate industry's proposed solutions to the problems of dual agency. The article also suggests possible additional solutions that directly address the issues of informed consent and principal-agent incentive misalignment.

II. ANATOMY OF A TYPICAL RESIDENTIAL REAL ESTATE TRANSACTION

An individual wishing to sell his or her home with the assistance of a real estate agent[2] typically enters into a Multiple Listing Service ("MLS") listing agreement. This agreement is a contract between the homeowner (also known as the "vendor") and the real estate agent's brokerage. Among other things, it gives the brokerage the exclusive right to market the property during a defined period, the right to receive a commission upon a successful sale, and the right to advertise the property through the MLS. A separate agreement between the real estate agent and his or her brokerage typically delegates the task of selling the listed property to the real estate agent and gives him or her the right to receive the commission that the vendor pays to the brokerage. Once an MLS contract is signed, the real estate agent responsible for the listing of the property is commonly known as a "listing agent."

The MLS is both a database of information about homes listed for sale by real estate agents and a system of cooperation which allows real estate agents to share information about listings and to assist each other with connecting buyers and vendors. Only real estate agents have direct access to the MLS,[3] which is a form of intellectual property. The Canadian Real Estate Association ("CREA"), a membership-based group that represents real estate agents across Canada, holds the MLS trademark, and grants rights of use to provincial real estate associations, real estate boards, and individual real estate agents across Canada.[4]

Pursuant to the MLS system, listing agents may share information about homes they are listing for sale. Real estate agents who represent buyers, known as "buyers' agents" or "cooperating agents," may show their clients properties listed by other real estate agents and may assist clients with preparing offers to purchase. Cooperating agents may have a written agreement with their buyer clients to provide real estate services, but it is still common for no written agreement to exist. In the latter case, an "implied agency" agreement exists between the cooperating agent and his or her client.[5]

Upon a successful sale, the listing agent is required to share a portion of his or her commission with the cooperating agent. The requirement to share a commission is imposed by

---

2. It is important to note that use of the term "real estate agent" is not universal. For example, pursuant to British Columbia legislation, "real estate agents" may be known as "representatives," "associate brokers" or "managing brokers." The term "real estate agent" is used throughout this paper as a widely understood generic term.
3. See Part IV-B, below, for more on this topic.
4. See The Canadian Real Estate Association, *Who We Are*, online: The Canadian Real Estate Association <http://www.crea.ca/public/crea/who_we_are.htm>. In addition to the term "MLS", the CREA also has trademarked the term "Realtor".
5. For information about how implied agency relationships are created, see generally William F Foster, *Real Estate Agency Law in Canada*, 2nd ed (Scarborough: Carswell Thomson Professional Publishing, 1994) [Foster, *Real Estate Agency Law*] at 83-85. See also Part IV-C, below, for more on this topic.

the listing agent's real estate board rules of cooperation.[6] The amount the listing agent must share is specified in the MLS contract.

Dual agency may arise in a variety of situations in the residential real estate industry.[7] However, the most controversial and common form of dual agency (and the only form discussed in this article) arises where a buyer approaches a listing agent directly without representation by a cooperating agent. In that circumstance, the buyer may proceed without any representation. Alternatively, with the agreement of the agent and both "principals" to the transaction (i.e., the buyer and vendor), the listing agent may represent both the buyer and vendor as a dual agent.[8] The industry refers to the sale of a property with the involvement of only one real estate agent as "double ending."

The relationship between a real estate agent and his or her client typically gives rise to fiduciary duties on the part of the real estate agent. The following explains how the fiduciary relationship is created and how fiduciary duties may be modified when the real estate agent is acting as a dual agent.

III. FIDUCIARY RELATIONSHIPS AND DUAL AGENCY

A. Real Estate Agency Relationships — Ad Hoc or Per Se Fiduciary?

Canadian common law recognizes two different categories of fiduciary relationships. *Per se* fiduciary relationships consist of certain categories of relationships that have been well-established in case law as fiduciary in nature. Such relationships "have as their essence discretion, influence over interests, and an inherent vulnerability."[9] A fiduciary relationship is presumed in such cases, although the presumption is rebuttable.[10] An agent-principal relationship falls within this category.[11] On the other hand, *ad hoc* fiduciary relationships arise on the specific facts of a situation. A discussion of the elements necessary to establish an *ad hoc* fiduciary relationship is provided below. First, however, it is important to consider the question of whether real estate agency relationships are *per se* or *ad hoc* fiduciary in nature.

Unfortunately, the answer to this question is somewhat elusive, as Canadian case law has been highly inconsistent in this regard. In some cases courts have held that real estate agency relationships are *per se* fiduciary on the basis that they are agent-principal in na-

---

6. Rules of cooperation are not readily available to the public. However, such rules can be inferred by reference to CREA's "Principles of Competition", by which all CREA members must abide. See The Canadian Real Estate Association, *Code of Ethics*, online: The Canadian Real Estate Association <http://www.crea.ca/public/realtor_codes/code_of_ethics.htm>. Principle 8 states that a real estate board or association may not create a rule prohibiting or discouraging cooperation.
7. For information about other circumstances in which dual agency may arise, see generally Foster, *Real Estate Agency Law*, *supra* note 5 at 53-55.
8. For an explanation of agency intended for laypersons, see generally The British Columbia Real Estate Association, *Working with a Realtor®*, online: The British Columbia Real Estate Association <http://www.bcrea.bc.ca/buyers/WWAR.pdf> ["WWAR Brochure"].
9. See e.g. *Hodgkinson v Simms*, [1994] 3 SCR 377, 117 DLR (4th) 161, [1994] SCJ No 84 (QL) [*Hodgkinson* cited to QL] at para 31.
10. *Ibid.*
11. *Ibid.*

ture.[12] In other cases the courts did not reach this conclusion.[13] In no case examined did the courts expressly consider at length whether the real estate agency relationship is *per se* or *ad hoc* fiduciary. Instead the courts simply chose one or the other with little or no explanation, before proceeding with their analysis on that basis.

Arguably, relationships between real estate agents and their clients are not *per se* fiduciary because they are not primarily principal-agent relationships. In a principal-agent relationship, the agent typically has authority, express or implied, to bind the principal. In real estate agency relationships, real estate agents have authority to perform tasks related to the home selling process such as placing the home on the MLS and showing the home to prospective buyers. However, real estate agents generally have no authority, express or implied, to enter into a contract to purchase or sell real estate on behalf of their clients.[14] The ultimate sale of real estate, naturally, is the primary purpose of retaining a real estate agent. This is reflected by the fact that real estate agents generally are not paid for their services unless a successful sale occurs.

It is possible that courts sometimes find real estate agency relationships to be *per se* fiduciary due to a misunderstanding of the term "real estate agent." Real estate agents may be known by the public as real estate agents, and the relationships between real estate agents and their clients may be called "agency relationships," but they are not primarily "agents" of their clients in the traditionally understood legal sense.

A real estate agency relationship is more accurately described as a broker and client relationship than one of principal and agent. Real estate agents are retained primarily to advise their clients about how to sell or purchase property. This entails, for instance, providing advice on what price to list a home for, what price to offer in a contract of purchase and sale, what terms the contract of purchase and sale should contain, how to list a home on the MLS, and so on. According to the Supreme Court of Canada in *Hodgkinson v. Simms* ("*Hodgkinson*"), broker and client relationships are not *per se* fiduciary and one must examine the circumstances to see if the relationship gives rise to such duties.[15]

B. Finding an Ad Hoc Fiduciary Relationship (or Rebutting the Presumption of a Per Se Fiduciary Relationship)

In *International Corona Resources Ltd. v. Lac Minerals Ltd.* ("*Lac Minerals*"),[16] the Supreme Court of Canada referred to its earlier decision in *Guerin v. Canada* ("*Guerin*")[17] and reaffirmed that it is the nature of the relationship, not the special category of the actors involved, which gives rise to a finding of a fiduciary.[18] Also, the court in *Lac Minerals* agreed

12. See e.g. *Alwest Properties Ltd v Roppelt*, 1998 ABQB 1027, 236 AR 201, [1998] AJ No 1401 (QL); *Lee Estate v Royal Pacific Realty Corp,* 2003 BCSC 911, 123 ACWS (3d) 7, [2003] BCJ No 1393 (QL); *DeJesus v Sharif*, 2010 BCCA 121, 284 BCAC 243, [2010] BCJ No 394 (QL) [*DeJesus* cited to QL].
13. See e.g. *RK Holdings Corp v Koyl Commercial Real Estate Services Ltd*, 2000 SKQB 77, 190 Sask R 210, [2000] SJ No 109 (QL); *MacAuley v LeClair*, 61 OTC 344, 79 ACWS (3d) 442, [1998] OJ No 1918 (QL) (Ct J (Gen Div)); *Knoch Estate v Jon Picken Ltd*, 4 OR (3d) 385, 83 DLR (4th) 447, [1991] OJ No 1394 (QL) (CA).
14. For more information on the authority of real estate agents, see generally Foster, *Real Estate Agency Law*, *supra* note 5 at 95-115.
15. *Hodgkinson, supra* note 9 at para 44.
16. *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14, [1989] SCJ No 83 (QL) [*Lac Minerals* cited to QL].
17. *Guerin v Canada*, [1984] 2 SCR 335, 13 DLR (4th) 321, 1984 CarswellNat 813 (WL Can) [*Guerin* cited to WL Can] at para 99.
18. *Lac Minerals*, *supra* note 16 at para 30.

with the observation of Wilson J. in *Frame v. Smith* ("*Frame*")[19] that the following three general characteristics usually, but not always, exist in a fiduciary relationship:[20]

1.) The fiduciary has scope for the exercise of some discretion or power.

2.) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

3.) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[21]

The Court emphasized that most weight is given to the third factor, describing it as "indispensable to the existence of the (fiduciary) relationship".[22]

In *Hodgkinson,* the Supreme Court of Canada affirmed that the existence of a fiduciary duty also depends on the reasonable expectations of the parties which in turn "depend on factors such as trust, confidence, complexity of subject matter, and community or industry standards."[23] Similarly, the Supreme Court of Canada in *Galambos v. Perez* ("*Galambos*") recently affirmed that an undertaking, either express or implied, that the fiduciary will act in the best interests of the other party is also fundamental to the existence of an *ad hoc* fiduciary relationship.[24] Also, whether the relationship is *ad hoc* or *per se*, it is fundamental that the fiduciary have "a discretionary power to affect the other party's legal or practical interests."[25]

It is the author's opinion that real estate agency relationships between sellers and listing agents in residential real estate transactions usually are fiduciary in nature whether a court considers them to be *ad hoc* or *per se* fiduciary. This largely stems from the tremendous power imbalance that exists in the typical relationship between a residential real estate agent and his or her client. The real estate agent typically possesses far more knowledge than the client about real estate transactions and is the only one who can directly access the MLS to obtain residential sales information. The client relies upon his or her real estate agent for professional advice, and because the client cannot personally access the MLS, the client has no real choice but to trust the real estate agent. Further, the standards of ethical behaviour imposed by regulatory requirements and by various real estate boards, of which real estate agents are usually members, are fiduciary-like and arguably create a reasonable expectation of a fiduciary relationship.[26] Thus, an undertaking to act as a fiduciary may be implied from the real estate agent's provision of real estate services within the confines of this regulatory/ethical framework.

---

19. *Frame v Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81, [1987] SCJ No 49 (QL) [*Frame* cited to QL].
20. *Lac Minerals*, *supra* note 16 at para 33.
21. *Frame*, *supra* note 19 at para 60.
22. *Lac Minerals*, *supra* note 16 at para 34.
23. *Hodgkinson, supra* note 9 at para 35.
24. *Galambos v Perez*, 2009 SCC 48 at para 66, [2009] 3 SCR 247, [2009] SCJ No 48 (QL) [*Galambos* cited to QL].
25. *Ibid* at para 83.
26. See *supra* note 6. Some ethical rules imposed upon members of CREA are fiduciary-like. For example, Article 3 states that a realtor's primary duty is to his or her client, which is similar to the fiduciary duty of loyalty. Ethical rules by which a professional is expected to abide may form evidence as to reasonable standards expected of members of that profession by the community. See e.g. *Norberg v Wynrib*, [1992] 2 SCR 226, [1992] ACS No 60, [1992] SCJ No 60 (QL).

C. Dual Agency and its Effect on Fiduciary Duties that Arise from a Fiduciary Relationship

When a fiduciary relationship is established between a real estate agent and his or her client, a number of fiduciary duties arise. The real estate agent is held to a high standard which requires the real estate agent to subordinate his or her own interests to those of the client because, among other duties, a duty of loyalty is owed to the client.[27]

However, as explained by Foster, an obvious problem with dual agency is that the dual agent is expected to be loyal to two clients who have conflicting aims — the vendor to maximize the purchase price, and the purchaser to minimize it.[28] This seemingly makes it impossible for a real estate agent to comply with his or her fiduciary duties.

In an attempt to reconcile this apparent conflict, real estate agents in British Columbia seek consent to a so-called "limited dual agency" relationship. The dual agency is described as limited because it expressly limits the real estate agent's duty to disclose everything known about the transaction to the clients so that the real estate agent may represent both parties in the transaction without harming their negotiating positions and without breaching fiduciary duties. Specifically, the agreement requires the real estate agent to act impartially between the vendor and purchaser, not to disclose whether the buyer or seller is willing to pay or sell for a price or agree to terms different than contained in an offer, not to disclose the motivations of either party to the transaction unless authorized in writing, and not to disclose personal information of one party to the other unless authorized in writing.[29] Clearly, a limited dual agency agreement substantially changes the nature of the listing agent's relationship with his or her client.

However, as recently explained in *DeJesus v. Sharif ("DeJesus"),* this agreement does not function if the real estate agent acts in a way inconsistent or incompatible with the terms of the agreement.[30] In such circumstances, the limitations in the dual agency agreement are inapplicable and are not given effect.[31]

To summarize, real estate agents will typically find themselves in fiduciary relationships with their clients. Representing another client in a transaction will normally result in a breach of fiduciary duty; however, this is not the case if the agent obtains consent to a limited dual agency agreement because this agreement eliminates some fiduciary duties such as the duty not to act for both parties to a transaction, and narrows the scope of other duties, such as the duty of loyalty.

IV. THE PROBLEM WITH DUAL AGENCY

Dual agency has been widely criticized by academic commentators across Canada and the United States for the increased liability it imposes upon agents and the inherent conflict of interest it creates. There are a number of other criticisms relating to informed consent and principal-agent incentive misalignment which are categorized below. One must keep in

27. See generally Foster, *Real Estate Agency Law*, *supra* note 5 at 233-44.
28. William F Foster, "Dual Agency: Its Implications for the Real Estate Brokerage Industry" (1989) Meredith Mem Lect 73 [Foster, "Dual Agency: Its Implications"] at 78.
29. See generally *Summit Staging Ltd v 596373 BC Ltd (cob Re/Max Westcoast)*, 2008 BCSC 198 at para 62, 68 RPR (4th) 280, [2008] BCJ No 262 (QL) [*Summit Staging* cited to QL]. See also *DeJesus*, *supra* note 12 at para 64-65.
30. *Ibid* at para 70-73.
31. *Ibid.*

mind however, that while these problems are categorized for ease of reading, they are interconnected, and it is the aggregate effect which is most harmful to consumers.

A. Lack of Informed Consent

Dual agency substantially alters the nature of the agency relationship. It releases a real estate agent from some of his or her fiduciary duties and it narrows the scope of others. It is not difficult to see why the informed consent of both parties must be obtained beforehand. However, the following suggests that consumers in British Columbia may not be receiving sufficient information about the nature of a dual agency relationship to make an informed decision.

The Real Estate Council of British Columbia's[32] *Professional Standards Manual* ("*Professional Standards Manual*")[33] states that informed consent is obtained when the proposed agency relationship is accepted after timely disclosure of the following to both parties:

- The nature of the conflict of interest that would arise if the licensee were to represent both parties.
- What is being proposed by the licensee and the implications of [the parties] giving their consent.[34]

This disclosure must be made before the agent begins to act for both parties and before any potential conflict of interest has arisen.[35]

The requirement of disclosure is codified in s. 5-10 of the British Columbia *Real Estate Services Act Rules*.[36] However, s. 5-10 does not specify how or when disclosure should be made, other than stating that disclosure must be made before real estate services are offered. Thus, despite the significant potential for liability and the need to protect the public interest, the Real Estate Council of British Columbia has afforded the industry significant discretion in developing a means of disclosure. To that end, the British Columbia Real Estate Association[37] created a "Working with a Realtor®" brochure that provides information about various types of agency relationships consumers may enter into with real estate agents.[38] The Real Estate Council has accepted the use of this form. According to the *Professional Standards Manual*, providing the brochure to a purchaser or vendor at "first substantial contact" satisfies the s. 5-10 requirement of disclosure and provides the information needed for informed consent.[39]

The "Working with a Realtor®" brochure does provide important information about how fiduciary duties are limited under a dual agency relationship. However, this information arguably is incomplete. In particular, Foster notes the following omissions:

---

32. The Real Estate Council of British Columbia is a government agency that regulates real estate licensing and licensee conduct in British Columbia. Membership in a real estate association or board is optional for a real estate agent, but the receipt of a license to engage in real estate sales from this agency is required by statute.
33. *Real Estate Council of British Columbia Professional Standards Manual*, (Vancouver: Real Estate Council of British Columbia, 2010) available online: Real Estate Council of British Columbia <http://www.recbc.ca/licensee/PSM/PSM.htm> [*Professional Standards Manual*].
34. *Ibid* at Chapter 2-1.
35. *Ibid*.
36. British Columbia, Real Estate Council of British Columbia, *Real Estate Services Act Rules* [*RESA Rules*] at s 5-10.
37. The British Columbia Real Estate Association is a membership-based organization that represents real estate agents in British Columbia.
38. WWAR Brochure, *supra* note 8.
39. *Professional Standards Manual*, *supra* note 33 at Chapter 2-1.

> The advantages and disadvantages of the various [agency] relationships are not clearly indicated, it being left to the parties (who, more often than not, are ignorant of the law of agency, the duties of licensees and the legal and practical ramifications of the various representation relationships) to make the determination themselves on a reading of the forms and the brochures.[40]

Also, important information about remuneration is missing:

> Importantly, in this regard, the forms and brochures omit one crucial piece of information — nowhere are the parties advised that a dual agency relationship will result in individual licensees (and/or their brokerages) "double ending;" nowhere is it stated that dual agency is financially beneficial to licensees (and/or their brokerages). The dual agency forms merely provide that any previous agreements that may exist between buyers and seller [*sic*] are modified to the extent provided in the dual agency form, again leaving it to buyers and sellers to work out the full implications of the new arrangement for their existing relationship.[41]

The lack of information about vicarious liability is significant as well. Clients can be vicariously liable for the conduct of the real estate agents they employ.[42] However, no mention of this risk is made in the brochure or in any other standard form document.

Also, the courts have criticized the brochure for containing conflicting information. In *Summit Staging Ltd. v. 596373 B.C. Ltd. (c.o.b. Re/Max Westcoast)* ("*Summit Staging*"), the Court noted that certain obligations of the real estate agent, as suggested by the brochure, (namely, to "obey all lawful instructions of the principal, keep the confidences of the principal, and exercise reasonable skill and care in performing all assigned duties") are in conflict with the terms of the limited dual agency agreement.[43]

Furthermore, none of the standard forms used in British Columbia explain that the vendor or purchaser has the option of declining dual agency. In fact, the "Working with a Realtor®" brochure may be misleading in this regard. The brochure states: "If you find yourself involved in a dual agency relationship, before making or receiving an offer, both you and the other party will be asked to consent…"[44] This implies that a dual agency relationship may validly arise before consent is obtained. Arguably, this gives the impression that a vendor or purchaser has little choice but to consent to dual agency. It suggests that the consent form is a mere formality because, after all, a dual agency relationship already exists.

If the method of disclosure used by the industry is inadequate, as is suggested above, the consequences could be tremendous. The Minnesota case of *Dismuke v. Edina Realty Inc.* ("*Edina Realty*")[45] is illustrative. *Edina Realty* involved a class action by sellers of homes who claimed that the brokerage breached its fiduciary duty to disclose its dual agency status. While the brokerage made disclosure in a way that satisfied statutory requirements, the

---

40. William F Foster, "Review of Industry Standard Form Representation Agreements" (Paper presented to the Canadian Regulators Group for its "Report of the Agency Task Force," May 2003) [unpublished, available online: Saskatchewan Real Estate Commission <http://www.srec.ca/pdf/FosterPaperMay2003.pdf>] [Foster, "Standard Form Representation Agreements"] at 27.
41. *Ibid*.
42. See e.g. *Betker v Williams*, 86 DLR (4th) 395, 63 BCLR (2d) 14, [1991] BCJ No 3724 (QL) (CA).
43. *Summit Staging, supra* note 29 at para 63.
44. WWAR Brochure, *supra* note 8.
45. *Dismuke v Edina Realty Inc*, 1993 WL 327771 (WL) (Minn Dist Ct) [*Edina Realty* cited to WL].

Court held that this disclosure was inadequate under the common law and that the brokerage breached its fiduciary duty to the sellers.[46] This left the brokerage vulnerable to a claim for hundreds of millions of dollars in commissions.

Edina Realty is highly relevant because Canadian courts have also recognized that a common law standard of disclosure may differ from statutory requirements in the real estate agency context. For example, in *Stacey v. Sigmund* the Court accepted the defendant agent's means of disclosing his licensed status even though it breached statutory requirements at the time.[47] Perhaps *Edina Realty* could occur in British Columbia as well.

B. Underrepresentation and Lack of True Consent Due to the Industry's Practice of Using Dual Agency, its Monopoly over the MLS, and its Use of Standard Forms

In theory, vendors and purchasers may choose not to enter a dual agency relationship with an agent. However, according to American author J. Clark Pendergrass, the claim that vendors and purchasers have a choice "ignores the realities of the residential real estate brokerage industry."[48] Pendergrass argues that dual agency causes vendors and purchasers to be underrepresented in a transaction.

Pendergrass claims that consumers do not bargain at arm's length with real estate agents in entering agency agreements.[49] This is because several factors create a power imbalance in favour of agents over their clients:

1.) Consumers are dependent upon agents for their expertise. This places real estate agents in a commanding position with respect their clients akin to a solicitor-client relationship.[50]

2.) Consumers are further dependent on real estate agents because they have exclusive access to the MLS. In many communities, MLS access plays a key role in ensuring a home is sold for the highest possible price and in the shortest possible time.[51]

3.) The largest real estate brokerages in the United States, which hold the largest share of the market and the most listings, practice dual agency. Consumers who deal with these firms who decline dual representation are put at a disadvantage — purchasers will have fewer homes to choose from since they cannot view homes listed by the brokerage representing them, and sellers will have limited market exposure because their home cannot be shown to buyers represented by the brokerage. The result is that the purchaser and vendor must settle for divided loyalty and non-exclusive representation.[52]

The second point deserves further comment because it also supports a claim that the monopolistic power of the real estate industry in British Columbia through the MLS and the

46. *Ibid*.
47. *Stacey v Sigmund*, 5 BCLR (3d) 354, 46 RPR (2d) 278, [1995] BCJ No 721 (QL) (SC) [*Stacey* cited to QL] at para 10-12.
48. J Clark Pendergrass, "The Real Estate Consumer's Agency and Disclosure Act: The Case against Dual Agency" (1996) 48 Ala L Rev 277 at 293.
49. *Ibid.*
50. *Ibid* at 294.
51. *Ibid* at 294-95.
52. *Ibid* at 295.

industry's use of standard forms pursuant to the MLS system imposes dual agency upon vendors and purchasers.

In many regions across Canada, most residential properties sell through the MLS. From 2006 to 2008, for instance, approximately 480,000 homes across Canada sold through the MLS.[53] In fact, the MLS is estimated to be involved in nearly ninety percent of residential home sales in Canada.[54] Given this and the fact that a substantial number of MLS properties sell through the use of cooperating agents, it is quite reasonable to conclude that the MLS is an essential marketing tool for most residential homeowners. Considering that only real estate agents have direct access to the MLS in Canada,[55] it follows that an agent must likely be retained if a vendor is to maximize the selling price of his or her home and sell within the shortest possible time period.

Furthermore, Foster notes that the standard form agreements prepared by the industry are contracts of adhesion. He suggests that the average buyer or seller may believe they have little option but to sign them without amendment if they wish to be represented by an agent.[56]

The above leaves consumers particularly vulnerable to principal-agent incentive misalignment which reveals itself in various ways. For example, if a vendor is asked to enter a dual agency agreement, the vendor has either the option of consenting to dual agency, or the option of demanding exclusive representation by the listing agent. However, given the previous discussion about the inadequacy of disclosure provided by the standard forms used by agents, it is unlikely that a vendor will even be aware of the latter option in most cases.

If the vendor nonetheless chooses the latter option, the likely result will be that the eventual purchaser will have to proceed without representation. Once an unrepresented purchaser has viewed a property listed on the MLS and has shown interest in presenting an offer, it is unlikely that any other agent would agree to represent the purchaser due to concern about a potential commission dispute. Pursuant to the MLS system, the other agent would have to be remunerated by receiving a share of the listing agent's commission. However, the listing agent likely would not agree to the other agent receiving remuneration at this point on the basis that it was the listing agent, and not the other agent, who introduced the purchaser to the property and who "deserves" the entire commission. The listing agent could possibly even file for arbitration through his or her real estate board in that regard.[57]

In fact, in some jurisdictions it is becoming an increasingly common practice for multiple listings to offer tiered commissions based on the cooperating agent's involvement in the transaction. For example, the listing may state that cooperating agents who do not physically introduce the buyer initially receive a significantly reduced share of the commission. If done without the vendor's informed consent, this practice likely breaches an agent's fi-

---

53. See Altus Group Economic Consulting, "Economic Impacts of MLS® Home Sales and Purchases in Canada and the Provinces 2006-2008" (Report presented to the Canadian Real Estate Association, 24 April 2009) [unpublished, available online: Canadian Real Estate Association <http://www.crea.ca/public/news_stats/pdfs/clayton2009.pdf>].
54. See Gary Marr, "Competition watchdog says realtor rules limit choice" *Financial Post* (8 February 2010), online: Financial Post <http://www.financialpost.com/story.html?id=2536948>.
55. See Canadian Real Estate Association, *Realtor® Services*, online: The Canadian Real Estate Association <http://www.crea.ca/public/use_a_realtor/use_a_realtor.htm>. It is worth noting that the "public MLS" available through http://www.mls.ca is far less detailed than the database that real estate agents use.
56. Foster, "Standard Form Representation Agreements", *supra* note 40 at 30.
57. See e.g. CREA's ethical rules found *supra* note 6. The basis of such a claim presumably would be that the other agent caused or induced breach of an existing agency relationship, an act that is prohibited by Article 20. Article 23 requires commission disputes to be resolved by arbitration. Whether such a claim would succeed is uncertain. Real estate boards do not publicly release the results of arbitration hearings.

duciary duty of loyalty to his or her client because it reduces the number of prospective buyers who may view the property for the sole purpose of protecting an agent's commission. Essentially, it puts the interest of the listing agent above that of the client. However, it is a common practice nonetheless.[58] Whether this is being done with the informed consent of vendors is unclear, but in the author's opinion, this is unlikely. After all, why would a vendor agree to something which only functions to protect a real estate agent's commission and to reduce the number of prospective buyers who may view the property?

C. Principal-Agent Incentive Misalignment Due to the Process by which Agents Obtain New Clients

According to Foster, agents may face considerable difficulty in ascertaining who their client is (or clients are) in a transaction. This is because agency relationships may arise in ways other than by express agreement. In particular, Foster refers to the circumstance where an agent has entered into an agency agreement with a seller by express agreement and when an unrepresented buyer shows interest in the property: "It must be accepted that when dealing with purchasers, many if not most real estate agents, including listing agents, create the impression by word and deed, that they are representing the purchasers' interests — that is, perhaps unbeknown by agents, they enter into an implied agency relationship with purchasers."[59]

By way of example, Foster suggests that an unrepresented purchaser will "seek the [listing] agent's expert advice as to the value of properties, their physical condition, zoning issues, matters of financing, the neighbourhood, and the like."[60] The purchaser will "discuss with the [listing] agent his needs and preferences, his likes and dislikes, his interests, the state of his finances, and a host of other personal matters which one normally would disclose only to a trusted advisor."[61] The listing agent will permit the purchaser to disclose confidential information to him because, as Foster puts it, "If the purchaser does not trust the agent, how can the agent hope to sell the purchaser a property?"[62]

Unfortunately, this sets the stage for vulnerability and reliance by the purchaser on the listing agent and could create an agency relationship by implication with corresponding fiduciary duties. This results in a dual agency relationship that was, of course, created without the informed consent of both parties to the transaction.

One possible cause of the issue identified by Foster is the process by which agents obtain new clients. Listings can be a source of new clients. A prospective purchaser may not be interested in the property listed by the listing agent, but he or she may be interested in a similar property. It may be financially beneficial for the agent to gain the prospective purchaser's trust so that he or she can retain the purchaser as a client. Obtaining new clients this way risks placing the agent in a conflict of interest if the listing agent, intentionally or not, dissuades the buyer from purchasing the listed property for the purpose of gaining a new client. This would clearly not be acting in the best interests of the vendor who expects the listing agent to use all efforts to sell his or her listed property. As a result, this would breach the listing agent's fiduciary duty of loyalty.

---

58. See e.g. article by 2007-2008 BCREA President describing and supporting the practice, Andrew Peck, "Can a seller refuse to pay the buyer's bona fide agent?", (3 March 2009) online: Andrew R. Peck Blog <http://www.andrewrpeck.com/Blog.php/23/>.
59. Foster, "Dual Agency: Its Implications", *supra* note 28 at 84.
60. *Ibid* at 85.
61. *Ibid* at 84.
62. *Ibid.*

D. Principal-Agent Incentive Misalignment Created by the MLS Contract's Terms of Remuneration

Another conflict of interest is created by the typical terms of remuneration found in an MLS contract. The contract will stipulate that the listing agent is required to share his or her commission if a cooperating agent is involved. If there is no cooperating agent involved, the listing agent earns both the listing and cooperating agent portions of the commission.[63]

The allure of "double ending" a commission could also cause agents to breach their fiduciary duties by, for instance, disclosing confidential information about the seller to the buyer in hopes of encouraging an offer, or as Foster notes, by failing to disclose an agent's dual role in the transaction to avoid raising suspicion by the parties.[64] In both examples, a dual agency relationship is created without informed consent.

E. Inadequate Training of Agents in Real Estate Agency Law

Real estate agents receive little formal training in real estate agency law. For example, to become licensed as a real estate salesperson, the Real Estate Council of British Columbia requires completion of a pre-licensing course administered through the University of British Columbia and an applied post-licensing course administered through the British Columbia Real Estate Association.[65] Only one of twenty-six chapters of the pre-licensing course manual is dedicated towards real estate agency.[66] One of the ten units comprising the post-licensing course is dedicated to real estate agency law, but the post-licensing course is only a week long, with evaluation based solely on participation and attendance.[67]

It could be argued that real estate agents generally do not understand real estate agency law at a level of competence one would reasonably expect. Two examples involving dual agency support this claim.

First, real estate agents lack practical information about when informed consent to a dual agency relationship must be obtained. For example, the *Professional Standards Manual* states that informed consent must be obtained before the licensee begins to act for both parties and before any potential conflict of interest has arisen.[68] However, when does a licensee begin acting for both parties? Does it begin, for instance, at an open house where a prospective buyer may casually reveal confidential information about his or her motives to purchase, or does it begin only when the prospective purchaser indicates a desire to offer on the property? The *Professional Standards Manual* fails to answer this question.

The *Professional Standards Manual* also states that potential sellers and buyers should be provided with information about a potential agency relationship at "the first reasonable opportunity". In the following sentence, it states that the "Working with a Realtor®" brochure should be provided at "first substantial contact" to discharge the disclosure obli-

63. See generally Foster, "Standard Form Representation Agreements", *supra* note 40 at 27.
64. Foster, "Dual Agency: Its Implications", *supra* note 28 at 88.
65. Real Estate Council of British Columbia, *Real Estate Education Guidelines*, online: Real Estate Council of British Columbia <http://www.recbc.ca/licensee/educationguide.htm>.
66. UBC Real Estate Division, *Real Estate Trading Services Licensing Course Manual* (Vancouver: UBC Real Estate Division, 2009).
67. British Columbia Real Estate Association, *Real Estate Trading Services Applied Practice Course*, online: British Columbia Real Estate Association <http://www.bcrea.bc.ca/potential/rescourse.htm>.
68. *Professional Standards Manual*, *supra* note 33 at Chapter 2-1.

gation.[69] These instructions are ambiguous because the first reasonable opportunity can differ from first substantial contact. Furthermore, "first substantial contact" and "first reasonable opportunity" are undefined terms.

This uncertainty is troublesome given how agency relationships can arise through implication. Arguably, because real estate agents lack practical information about when to seek informed consent to dual agency, they risk obtaining it at inappropriate times, such as when an offer to purchase has already been drafted. By that point, an unauthorized dual agency relationship likely has already been created by implication.

Second, real estate agents also appear to lack clear understanding of when it is appropriate to enter a dual agency relationship. In British Columbia, this is evidenced by reviewing disciplinary decisions rendered by the Real Estate Council of British Columbia. A search using CanLII reveals 51 reported Council decisions that involved a finding of wrongdoing related to a dual agency relationship from 2005 to April 1, 2010. Of those 51 decisions, 26 involve an agent entering a limited dual agency agreement when the agent was either a principal to the transaction or closely related to one of the principals (for example, the vendor or purchaser may have been a family member or a corporation of which the agent owned some or all of the shares).[70]

The Real Estate Council of British Columbia considers entering a limited dual agency agreement in such circumstances to be a breach of s. 3-3(1)(i) (this section requires an agent to take reasonable steps to avoid a conflict of interest) of the *Real Estate Services Act Rules*[71] because it is believed that agents in such circumstances cannot remain impartial to the interests of both parties.[72] Notably, agents are warned against such conduct in the *Professional Standards Manual*.[73]

The fact that a significant number of agents appear to enter such agreements anyway is puzzling. This trend is arguably at least partly due to inadequate training. It is possibly also due to the mistaken belief that a real estate agent must enter a limited dual agency agreement to "double end" a listing. While the *Professional Standards Manual* explains that dual agency is unnecessary to "double end" a listing,[74] this appears to be an ongoing issue nonetheless, as evidenced by recent articles in industry newsletters.[75] This is a serious problem because this mistaken belief could result in agents pressuring their unsophisticated clients into dual agency agreements out of fear that a commission could be lost if consent is not obtained.

---

69. *Ibid* at Chapter 2-1.
70. The following search criteria were used to obtain these numbers: First, a search was conducted in CanLII using the EXACT(BC R.E.C.) parameter ("BC R.E.C." is part of the citation used by CanLII for Real Estate Council of British Columbia disciplinary decisions). Next, a search for the term "dual agency" was made within those results. This revealed 75 decisions. Each of the 75 decisions was examined to determine whether or not the decision regarded a finding of wrongdoing related to the dual agency relationship.
71. *RESA Rules*, *supra* note 36 at 3-3(1)(i).
72. See e.g. *Re Robin Julieana Smith*, 2008 CanLII 75198 (CanLII) (BC REC).
73. *Professional Standards Manual*, *supra* note 33 at Chapter 2-1.
74. *Ibid* at Chapter 2-1.
75. Real Estate Council of British Columbia, "Acting as a Limited Dual Agent" *Report from Council* 40:4 (February 2005) 1 online: Real Estate Council of British Columbia <http://www.recbc.ca/pdf/RFC/2005/RFCFebruary2005.pdf>; See also Brian Taylor, "Limited Dual Agency or No Agency?" *Legally Speaking* No. 419 (May 2008) 1 online: British Columbia Real Estate Association <http://www.bcrea.bc.ca/publications/legally_speaking419.htm>.

V. SOME POTENTIAL SOLUTIONS TO DUAL AGENCY'S MANY PROBLEMS

A. Industry Proposed Solutions

In June 2004 the Canadian Regulators Group, an association of senior staff members representing various real estate regulatory bodies across Canada and industry groups such as the Canadian Real Estate Association and the Real Estate Institute of Canada, released the "Report of the Agency Task Force" (the "ATF Report").[76] The ATF Report was intended to address some of the problems associated with agency and dual agency and made a series of recommendations. The following describes three of the most relevant recommendations and provides additional comments about their potential merit. Notably, one province so far has adopted the ATF Report's recommendations: Alberta substantially adopted the recommendations pursuant to the ATF Report effective March 1, 2008.[77]

First, the ATF Report recommended that some of the uncertainty associated with disclosure obligations be remedied through statutory reform. Broadly speaking, the ATF Report suggested that statute should require agents to disclose information about a potential agency relationship before eliciting or as soon as practicable upon receiving confidential information or before entering into a service agreement. Further disclosure would also be required if, subsequent to the initial disclosure, there was any material change to the facts disclosed.[78]

The Report also laid out a series of exceptions to the disclosure requirement. The duty to disclose would not be triggered by a "bona fide 'open house' showing", by "preliminary conversations or 'small talk' concerning price range, location and property styles", or by "responding to general factual questions from a potential buyer or seller."[79]

This recommendation appears to address the aforementioned problem of agents lacking practical information about when informed consent to a dual agency relationship must be obtained. It also appears to conform to common law requirements. As noted earlier, reliance that results in a fiduciary relationship depends on the reasonable expectations of the parties. It is difficult to imagine that "small talk", "preliminary discussions" and conversations at open houses would create reasonable reliance and a vulnerability resulting in a fiduciary relationship.

However, the issue of when to obtain consent remains uncertain. Should consent to an agency relationship be requested at the time of disclosure of the possible agency relationship? Or is it acceptable to obtain consent later in the transaction, and if so, how much later?

Second, the ATF Report recommended that a standard course for use across Canada be developed on agency as it applies in the real estate industry.[80] Given the limited training agents presently receive, an additional course focused on real estate agency law could be invaluable if updated regularly and with mandatory attendance requirements. Presumably, this course could address the problem of agents entering agency relationships with consumers when it is inappropriate or needless to do so in the circumstances. However, it

---

76. "Report of the Agency Task Force" (Paper presented to the Canadian Regulators Group, June 2004) [unpublished, available online: Saskatchewan Real Estate Commission <http://www.srec.ca/pdf/ATFReport.pdf>] ["ATF Report"].
77. Alberta, Real Estate Council of Alberta, *Real Estate Act Rules*, at ss 55, 58.1, 59-59.1.
78. ATF Report, *supra* note 76 at 21.
79. *Ibid* at 21.
80. *Ibid* at 37.

would be ideal if courses in agency law were offered on a regular basis with strict annual attendance requirements.

The ATF Report's third recommendation was to adopt transaction brokerage as a standard practice in Canada and to replace dual agency.[81] Transaction brokerage is used in situations where one real estate agent represents both the vendor and purchaser in the same transaction.

> This agreement would essentially set out the ideal practices associated with what is currently called dual agency, but the use of another title would assist consumers and industry members in recognizing that the industry member will not be serving as an advocate for either party.[82]

The ATF Report includes a sample "Transaction Brokerage Agreement."[83] As the ATF Report suggests, the effect of the agreement is similar to the limited dual agency agreement used at present, except that it expands greatly upon the meaning of impartiality by reference to specific acts the real estate agent, now known as a "Transaction Facilitator," will or will not undertake. This includes a statement that the transaction facilitator will not do anything requiring the exercise of discretion or judgment, the giving of confidential information, or advocate on behalf of the vendor or purchaser.

This form could offer risk reduction for individual agents, as it clarifies what a transaction facilitator can or cannot do in the transaction. This clarification could also serve to better inform vendors and purchasers about the potential new agency relationship as well. However, it is worth reminding the reader at this point that real estate agents who act inconsistently with written service agreements containing limitations on fiduciary duties may find the agreements to be of no effect.[84] It follows that, given the present inadequate training real estate agents receive in agency law, the transaction brokerage agreement alone will do little to assist real estate agents in reducing their liability unless this problem is also rectified.

B. Other Possible Solutions

While the recommendations of the "Report of the Agency Task Force" center upon reducing the liability of agents who find themselves in dual agency situations, the ATF Report fails to address issues surrounding informed consent and principal-agent incentive misalignment. Without addressing these issues as well, dual agency likely will remain controversial and problematic.

It is in the best interests of the real estate industry to ensure that consumers make informed decisions about entering into agency relationships if only to avoid a class action lawsuit resembling *Edina Realty*. Real estate agents presently do not provide consumers with enough information to make an informed decision. For example, information about the advantages and disadvantages of various agency relationships, remuneration and vicarious liability is either inadequate or entirely absent from the British Columbian "Working with a Realtor®" brochure. The fact the brochure is described as a "brochure" downplays the importance of the disclosure. Real estate agents should be required to provide much more detailed information that addresses all of these issues.

---

81. *Ibid* at 31.
82. *Ibid* at 34.
83. *Ibid* at Appendix H.
84. See Part III-C, above, for more on this topic.

Also, it should be made clear to consumers through the information disclosure that they should seek independent advice if they remain uncertain about their options. In fact, given the significant amount of money involved in the typical home sale and the fact that consumers tend to be unknowledgeable about real estate transactions, it is reasonable to require consumers to either seek independent legal advice or to sign a separate form waiving their right to seek independent legal advice before entering an agency relationship.

All efforts should be made by the real estate industry to prevent consumers from being drawn into commission disputes between agents. For example, the practice of offering tiered commissions to cooperating agents based on whether or not they physically introduced the buyer should be prohibited. Subject to any agency agreement entered into by a vendor or purchaser that has a fixed term, a purchaser or vendor should feel free to retain their own exclusive representation at any time in a transaction and to replace their existing representation without fear that they will be unable to do so because of a potential commission dispute.

Also, the MLS contract needs to expand upon how remuneration is paid. Not only should the contract address the total commission paid and the portion that is paid to cooperating agents, but it should also explicitly address what the total commission is when the listing agent "double ends." By having this fee confirmed through the listing contract, the vendor is free to negotiate a "double end" commission without the added pressure of dealing with an impending offer. Presumably, vendors in most cases will negotiate payment of a commission that is less than what is paid if two agents are involved, but also allow the listing agent to receive more than if the commission had to be shared with a cooperating agent.

The above could be mutually beneficial for real estate agents and vendors. While the total amount is reduced if the listing agent double ends, the listing agent still receives a larger commission than if a cooperating agent was involved. The vendor retains the option of declining to enter a dual agency agreement. In return, the vendor pays more since the buyer may retain a buyer's agent, but it is the vendor's choice to let that occur.

Simply put, the net result of the above is a substantial improvement in obtaining informed consent with a reduction in the effect of principal-agent incentive misalignment.

VI. CONCLUSION

Even if all of the aforementioned recommendations were implemented, problems with dual agency would linger. For example, the fact that listings are a source of new clients for agents and that implied agency relationships may inadvertently develop through an agent's attempt to recruit a client through an existing listing remains an issue. Also, there exists the question of whether agents are capable of the impartiality required in a dual agency or transaction brokerage relationship when the agent is remunerated only upon the successful sale of the property. Arguably, impartiality cannot be achieved in such circumstances.

Rooted in these issues is the pervasive problem of principal-agent incentive misalignment which appears particularly difficult to solve. This may be due to the fact that agents are primarily remunerated by commission, and that, without successful sales, agents receive nothing for their efforts. Considering how entrenched commission-based remuneration is in the industry, this is unlikely to change in the short-term.

Given the wide range of problems and the difficulties involved in devising solutions, it is not surprising to see some commentators call for a complete prohibition of dual agency as

it applies to the practice of a single brokerage representing a vendor and purchaser in the same transaction.[85] However, dual agency may not be intrinsically harmful. The idea that an agent may act for parties with competing interests in a real estate transaction with their informed consent is reasonable in theory. It upholds the principle of party autonomy and protects the freedom that competent individuals should have to fashion a bargain as they please. Ideally, it could reduce transaction costs as well by precluding the need of bringing another agent (who would require remuneration) into a transaction when their presence may be needless in the circumstances.

In that regard, dual agency's problems are possibly best resolved issue-by-issue. Issues surrounding conflict of interest and increased agent liability must be addressed, but in order to achieve lasting success, a multi-pronged approach that also resolves issues surrounding informed consent, principal-agent incentive misalignment, and real estate agent training must be adopted as well.

85. See e.g. Pendergrass, *supra* note 48 at 299.

ARTICLE

CORPORATE SOCIAL RESPONSIBILITY, SOCIAL JUSTICE, AND THE POLITICS OF DIFFERENCE: TOWARDS A PARTICIPATORY MODEL OF THE CORPORATION

By Dustin Gumpinger*

CITED: (2011) 16 Appeal 101-120

I. INTRODUCTION

The corporation is the most dominant economic institution in the world;[1] it governs society in much the same way as governments do. As Joel Bakan observes, corporations "determine what we eat, what we watch, what we wear, where we work, and what we do. We are inescapably surrounded by their culture, iconography, and ideology".[2] In fact, as a result of phenomena such as privatization and commercialization, corporations may now govern our lives even more than governments themselves.[3] Indeed, the world's ten biggest corporations have posted revenues exceeding the Gross National Income of 168 countries in the world.[4] While much good has emerged from these developments, so too has much harm: Bhopal, Exxon Valdez, Enron and Worldcom are but a few examples of the costs of living in a corporate dominated world. Such illustrious abuses have given rise to public distrust, fear and anxiety. In this context, people are increasingly demanding that corporations be held responsible for their actions.[5] To that end, corporate social responsibility

* Dustin has a Juris Doctor from Osgoode Hall Law School, York University, and a Bachelor of Arts (Honours) from the University of Alberta. This article was written during his third year as a law student at Osgoode Hall. He would like thank all those who reviewed drafts of this paper or discussed the ideas presented in it with him. Dustin is currently articling in Toronto, Ontario, where he expects to be called to the bar in June of 2011. The views expressed in this paper are his own.

1. Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Penguin Canada, 2004), at 5.
2. *Ibid* at 6.
3. *Ibid* at 25; Young, *infra* note 12 at 67.
4. Subhabrata Bobby Banerjee, *Corporate Social Responsibility: The Good, The Bad and the Ugly* (Cheltenham, UK: Edward Elgar, 2007), at 173.
5. *Ibid* at 25.

has been advanced as a solution to such concerns.[6] Companies, it is argued, are accountable to society at large, in addition to their shareholders. Yet, despite these concerns, the corporation remains a perilous combination of power and unaccountability.[7]

The problem is that the notion of corporate social responsibility, under the current corporate law framework, is an oxymoron.[8] The corporation's legal mandate is to pursue its own best interests and thus to maximize the wealth of its shareholders.[9] Hence, corporate social responsibility is illegal and impossible to the extent that it undermines a company's bottom line. Acting out of social concern can only be justified insofar as it tends to bolster the corporation's interests.[10] It is not surprising then that critics have characterized corporate social responsibility as an "ideological movement" designed to legitimize the power of transnational corporations.[11]

In order to foster a world in which corporate decision-makers act genuinely in the interest of individuals and groups other than shareholders, the institutional nature of the corporate form must be reconceptualised. But if corporate social responsibility is an ineffective tool for evaluating corporate decisions, actions and outcomes, where should we turn? I shall argue that, as a dominant social institution, the corporation ought to be held to the same theoretical standard as other social institutions: namely, to the standard of social justice.

To evaluate the corporation in this light, I will draw on Iris Marion Young's seminal reflective discourse on social justice, *Justice and the Politics of Difference*.[12] Young's work provides a useful basis for challenging and changing the theoretical underpinnings of corporate law. Specifically, this paper assesses the corporation through the lens of Young's definition of injustice as domination and oppression. As I will demonstrate, the current corporate structure in North America functions in an ideological manner, which serves to generate and reinforce oppression and domination in the world. In order to surmount corporate injustice, I propose a new model of the corporation. Ultimately, my thesis is that corporate law should provide the means through which the distinct voices and perspectives of those oppressed or disadvantaged by the corporation may be recognized and represented. While my project is first and foremost a theoretical undertaking, I will offer some modest suggestions for bringing my plan to fruition.

---

6. *Ibid* at 27; William W Bratton, "Never Trust a Corporation" (2002) 70 Geo Wash L Rev 867, at 868 ("the main issues in the current debate were identified no later than 1932 when the *Harvard Law Review* published the famous Berle-Dodd debate"); Erwin Merrick Dodd Jr's "For Whom Are Corporate Managers Trustees?" (1932) 45 Harv L Rev 1145; Adolf A Berle Jr, "For Whom Corporate Managers Are Trustees: A Note" (1932) 45 Harv L Rev 1365.
7. Bakan, *supra* note 1 at 28.
8. *Ibid* at 109; William T Allen, "Our Schizophrenic Conception of the Business Corporation" (1992) 14 Cardozo L Rev 261.
9. *Dodge v. Ford Motor Co*, 170 N.W. 668 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes"); *Canada Business Corporations Act*, *infra* note 24, s. 122(1)(a) ("Every director and officer of a corporation in exercising their powers and discharging their duties shall (a) act honestly and in good faith with a view to the best interests of the corporation").
10. Bakan, *supra* note 1 at 33-59; Milton Friedman, "The Social Responsibility of Business is to Increase its Profits", *The New York Times Magazine* (September 13, 1970).
11. Banerjee, *supra* note 3 at 147.
12. Iris Marion Young, *Justice and the Politics of Difference* (Princeton, Princeton University Press, 1990).

II. WHY SOCIAL JUSTICE?

Social justice is the primary focus of political philosophy,[13] not of corporate law theory. Yet, the goal of social justice is to arrange society and its institutions in a way that facilitates, sustains and strengthens the values implicit in the good life.[14] Thus, any social institution can and should be subjected to the standard of social justice.

One might object that the corporation is not a social institution; rather, it is a private institution. For instance, Milton Friedman argues that the corporation is the private property of its owners, the shareholders. As such, the business of the corporation can only legally and ethically be conducted in accordance with the interests of those owners. The best interests of the shareholders, moreover, are generally equated with making as much money as is legally possible.[15] However, this narrow conception of the corporation neglects the institution's historical roots.

Historically, corporations were conceived of as public institutions with public purposes. Corporate activity in Canada was insignificant prior to the mid-1700s. During the last half of the eighteenth century, the government viewed incorporation as a political device. By 1800, however, company law started to facilitate incorporation.[16] By 1850, uniform patterns of incorporation had developed. As F.E. Labrie and E.E. Palmer explain, "[t]he incorporation of companies during this period was carried on in three ways: by the creation of individual companies, by special Acts of the English Parliament or the Canadian government, or under a general incorporation act passed to facilitate the incorporation of companies in certain industries".[17] In all cases, determinations as to the specific powers of companies were left to Canadian legislation.[18]

These companies were largely seen to be instruments of government policy. As Labrie and Palmer state:

> Most of these early Canadian corporations were established for quasi-public purposes, such as canals, banks, harbour companies and railroads. These often required the power to expropriate land and, therefore, lengthy provisions were necessary to protect the public interest. In addition, the average statute would contain sections regulating the rights of the corporation to expropriate property, permitting eventual transfer of the business of the company to the government, and set out the method of managing the concerns.[19]

The authors continue, explaining that, "the acts would usually require the making of annual statements to the legislature, their contents being set out in detail".[20] The rationale underlying these onerous restrictions is clear: since corporations were established and supported by government, the public, not the shareholders, were supreme.

---

13. *Ibid* at 3.
14. *Ibid* at 37.
15. Friedman, *supra* note 10.
16. FE LaBrie and EE Palmer, "The Pre-Confederation History of Corporations in Canada", in Jacob S Ziegel ed, *Studies in Canadian Company Law* (Toronto: Butterworths, 1967) at 36-42.
17. *Ibid* at 42.
18. *Ibid* at 43.
19. *Ibid* at 44.
20. *Ibid* at 48.

Similar views were prevalent in the United States when the corporation was a fledgling institution. Morton Horowitz tracks the development of the early corporation.[21] Underlying the legal treatment of the corporation was the "grant" or "concession" theory, which saw the corporation as an artificial entity constituted by government and restricted by its charter of incorporation. Incorporation was a special privilege granted by the state in the pursuit of public purposes. The state was thus justified in limiting and confining the powers of corporations.[22] These constraints were achieved through the use of special charters of incorporation, passed by state legislatures. However, between 1850 and 1870, the grant theory was undermined by the gradual introduction of universally available incorporation.

This development created a void that prompted legal theorists in the late nineteenth century to reconceptualise the corporate form. By 1900, the natural entity theory, which assumes that the corporation is a natural being with characteristics distinct from its owners, was dominant. This shift made the radical expansion of corporate power possible. Government was no longer able to justify extraordinary regulation because corporations, as natural entities, were entitled to the same privileges as other individuals and groups. [23] Notwithstanding this shift, the corporation remains dependent on government to create and enable it.

The corporation is a legal institution. The existence and capacity of corporations ultimately depend on law. For example, in the federal jurisdiction in Canada, the governing law is the *Canada Business Corporations Act*.[24] The very existence of the corporation is made possible by section 5(1), which permits an individual who is at least eighteen years of age, of sound mind and not of bankrupt status to incorporate by signing the articles of incorporation and complying with section 7 of the Act.[25] On receipt of the articles, the director must generally issue a certificate of incorporation.[26] The effect of this certificate is that a corporation comes into existence on the date indicated in the articles of incorporation.[27] Once established, a firm receives its very capacities from the Act. The corporation generally enjoys the rights, powers and privileges of a natural person.[28] These capacities can in general be exercised throughout and outside Canada.[29] As mentioned in the introduction, the corporation has come to use these capacities to govern our very lives, making it a social institution, in addition to a legal institution.

It is the social aspect of the corporation that arguably offers the most compelling case for the application of social justice to an analysis of the firm. According to Young, "[r]ational reflection on justice begins in a *hearing*, in heeding a call, rather than in asserting and mastering a state of affairs, however ideal. The call to "be just" is always situated in concrete social and political practices that precede and exceed the philosopher".[30] The mid-1990s saw the rise of anti-corporate activism in North America and Europe. Such activism is epitomized by the so-called "Battle in Seattle", the massive street protests surrounding the World

21. Morton J Horowitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992); see also Charles Perrow, *Organizing America: Wealth, Power and the Origins of Corporate Capitalism* (Princeton: Princeton University Press, 2002).
22. *Ibid* at 72.
23. *Ibid* at 73-74.
24. RSC 1985, c. C-44.
25. *Ibid* s. 5(1).
26. *Ibid* s. 8(1).
27. *Ibid* s. 9.
28. *Ibid* s. 15(1).
29. *Ibid* ss. 15(2) & (3).
30. Young, *supra* note 12 at 5.

Trade Organization's 1999 Ministerial Conference. Rather than a single movement, this activism consists of thousands of movements that lack ideological coherence.[31] But there is a commonality among these and other disparate movements that stand in opposition to the corporation: all of these factions call for change.

As Young observes, "[w]hen people say a rule or practice or cultural meaning is wrong and should be changed, they are usually making a claim about social justice".[32] The calls for corporations to stop, for example, supporting oppressive regimes, using child labour, or polluting, though different, are all fundamentally calls for justice. Moreover, these appeals are rooted in the view that the fundamental nature of global capitalism, in general, and corporate law, in particular, is inherently unjust. It is thus imperative that the corporation be placed under the lens of social justice. I will now examine Young's reflective account of social justice.

III. INJUSTICE AS DOMINATION AND OPPRESSION

Rather than develop a totalizing theory, Young offers a reflective account of social justice, starting from the claims of injustice made by excluded groups. She critiques the "distributive paradigm", typified by the work of John Rawls, which "defines social justice as the morally proper distribution of social benefits and burdens among society's members".[33] A distributive focus emphasizes the equality or inequality of wealth and income, at the expense of other important aspects of social justice, including decision-making procedures, the social division of labour, and culture.[34] As Young explains,

> The distributive paradigm implicitly assumes that social judgements are about what individual persons have, how much they have, and how that amount compares with what other persons have. This focus on possession tends to preclude thinking about what people are doing, according to what institutionalized rules, how their doings and havings are structured by institutionalized relations that constitute their positions, and how the combined effect of their doings has recursive effects on their lives.[35]

In other words, the distributive paradigm veils the relational and structural nature of power. It mischaracterizes power as an instrument to be held and used by a small number of powerful people and institutions because it focuses only on the limited circumstances in which power depends on the possession of certain resources. The scope of justice thus needs to be broadened beyond the realm of the distributive.[36]

Notwithstanding the pitfalls of the distributive paradigm, the corporate social responsibility debate has been largely framed in distributive terms. This distributive focus is unsurprising given the fact that the corporation is a vehicle for combining and accumulating capital. The shareholder wealth maximization norm is the most blatant example of this concentration. Friedman puts it nicely when he says that the only "social responsibility of

31. Naomi Klein, "Farewell to 'The End of History': Organization and Vision in Anti-Corporate Movements" in *A World of Contradictions: Socialist Register* (Winnipeg: Fernwood Publishing, 2002) at 12-25.
32. Young, *supra* note 12 at 3.
33. *Ibid* at 16.
34. *Ibid* at 21-23.
35. *Ibid* at 25.
36. *Ibid* at 31-33.

business" is "to use its resources and engage in activities designed to increase its profits".[37] From this perspective, a corporation that maximizes shareholder value is acting in the best interests of society.[38] In addition to being rationally and empirically unsubstantiated,[39] this assumption conflates the idea of the "good" with wealth maximization. Many critics of this model of corporate governance have also succumbed to the distributive paradigm.

For instance, the goal of Margret Blair and Lynn Stout's "team production" model is to maximize the welfare of all corporate stakeholders, rather than the wealth of shareholders.[40] However, the pair defines "stakeholder" in limited, distributive terms, as those who contribute resources to corporate production.[41] Kent Greenfield argues for a much broader corporate purpose than Blair and Stout, proposing that the corporation ought to serve the interests of society at large.[42] Yet, he too maintains a distributive outlook. Greenfield argues that the best way to serve society's broad interests is to create wealth to be distributed among those who contributed to its creation.[43]

The problem with delineating the debate in these terms is that injustices inherent in the corporate structure are obscured and justified. The three theories discussed above all invariably rely on a cost benefit analysis that implicitly considers a corporation to be just if the benefits it creates outweigh the costs, no matter the costs. The only difference between these models is the way in which costs and benefits are measured.

What commentators have largely failed to recognize is that, as doers and actors, people seek to promote values beyond fairness in the distribution of goods. These values can be summarized by two general goals: "(1) developing and exercising one's capacities and expressing one's experience … and (2) participating in determining one's action and the conditions of one's action".[44] Social justice, Young explains, relates to the extent to which "society contains and supports the institutional conditions necessary for the realization of these values".[45] Correspondingly, there are two social conditions that characterize injustice: domination and oppression. These constraints account for matters that fall beyond the logic of distribution: decision-making procedures, division of labour and culture.[46]

Oppression is characterized by the institutional constraints on self-development and self-expression. Domination consists of institutional constraints on self-determination. These conditions are not mutually exclusive; though, while oppression usually entails domination, domination does not necessarily entail oppression. The reason for this asymmetrical relationship is that the hierarchical decision-making structures in society mean that most people, even relatively privileged people, are subject to domination.[47] To best understand the way in which domination and oppression function within the corporate context, I will explore Young's account of these institutional constraints, and demonstrate how it helps to elucidate the injustices inherent in the corporate form.

---

37. Friedman, *supra* note 10.
38. Henry Haanman and Reiner Kraakman, "The End of History for Corporate Law" (2001) 89 Geo LJ 439, at 441.
39. Greenfield, *infra* note 42 at 88.
40. Margaret M Blair & Lynn A Stout, "A Team Production Theory of Corporate Law" (1999) 85 Va L Rev 247.
41. *Ibid* at 295.
42. Kent Greenfield, "New Principles for Corporate Law" (2005) 1 Hastings Business Law Journal 87.
43. *Ibid* at 106-112.
44. Young, *supra* note 12 at 37.
45. *Ibid*.
46. *Ibid* at 37-39.
47. *Ibid*.

IV. SOCIAL GROUPS

Young's account of oppression is rooted in her understanding of social groups. Although not all groups are oppressed, oppression happens to groups. Yet, oppression is much broader than the exercise of tyranny by a ruling group over other groups; it encompasses the systemic restraints on certain groups inherent in our economy, polity and culture. Hence, oppression does not necessarily involve the intentional exercise of power by one group over another.[48]

Nevertheless, oppression is relational: "for every oppressed group there is a group that is *privileged* in relation to that group".[49] Likewise, groups are defined relationally. According to Young "[a] social group is a collective of persons differentiated from at least one other group by cultural forms, practices, or way of life".[50] Groups are not constituted by shared attributes or a common nature or essence, but by similar experiences or ways of life. Through "the process of encounter", both among and within groups, group members develop an awareness of difference and a sense of group identity.[51] Group identities in turn, constitute individuals: "[a] person's particular sense of history, affinity, and separateness, even the person's mode of reasoning, evaluating, and expressing feeling, are constituted partly by her or his group affinities".[52] Even so, individuals can reject or transcend group identities.

Group identities are fluid and shifting, not static and monolithic. As Young explains, groups "come into being and fade away".[53] For example, although homosexual practices have existed across societies and historical periods, the social groups of gays and lesbians are products of the twentieth-century.[54] Additionally, group identities are multiple and cross-cutting, not unified. Blacks, for example, are not a unified group: "[l]ike other racial and ethic groups, they are differentiated by age, gender, class, sexuality, region, and nationality, any of which in a given context may become a salient group identity".[55] Because group differences can cut across individual lives in a plethora of ways, a person can experience both privilege and oppression. Furthermore, different groups experience oppression in different ways.[56]

V. THE FIVE FACES OF OPPRESSION

In order to capture the intrinsic nuances of group relations, Young develops a pluralistic account of oppression. Specifically, she identifies the five "faces" of oppression: exploitation, marginalization, powerlessness, cultural imperialism, and systematic violence.[57] Whether a group is oppressed depends on whether it is the target of one of these five conditions.[58] The first three categories are a function of the social division of labour, while the last two are a function of cultural meanings and relations.[59] While the economic factors are more

48. *Ibid* at 40-2.
49. *Ibid* at 42.
50. *Ibid* at 43.
51. *Ibid*.
52. *Ibid* at 45.
53. *Ibid* at 47.
54. *Ibid* at 48.
55. *Ibid*.
56. *Ibid* at 42.
57. *Ibid*.
58. *Ibid* at 47 & 64.
59. *Ibid* at 58-63.

obviously applicable to corporate law, all five "faces" offer useful insights about the nature of the corporation. I will deal with each "face" in turn, making specific reference to how each functions in the institutional context of the corporation.

A. Exploitation

The first type of oppression is exploitation, which "consists in social processes that bring about a transfer of energies from one group to another to produce unequal distributions, and in the way in which social institutions enable a few to accumulate while they constrain more".[60] In a general sense, exploitation is a function of capitalist society, which occurs through transfer of the results of the labour of workers for the benefit of the capitalist class.[61] Thus, any employer-employee relationship is necessarily exploitative. Yet, the corporation has proven particularly adept at exploiting workers.

As Joel Bakan explains, the corporation "is programmed to exploit others for profit".[62] The effectiveness of the corporate form in this regard is highlighted by the garment industry's use of sweatshops in underdeveloped countries. As Bakan demonstrates, production calculations from the Dominican Republic emphasize the exploitative nature of sweatshops. He describes these calculations as follows:

> Their purpose was to maximize the amount of profit that could be wrung out of the girls and young women who sew garments for Nike in developing-world sweatshops. Production of a shirt, to take one example, was broken down into twenty-two separate operation: five steps to cut the material, eleven steps to sew the garment, six steps to attach labels, hang tags, and put the shirt in a plastic bag, ready to be shipped. A time was allocated for each task, with units of ten thousandths of a second used for the breakdown. With all the units added together, the calculations demanded that each shirt take a maximum of 6.6 minutes to make — which translates into 8 cents' worth of labour for a shirt Nike sells in the United States for $22.99.[63]

The working conditions in these factories are equally revealing. "The typical factory", Bakan continues,

> is surrounded by barbed wire. Behind its locked doors, mainly young women workers are supervised by guards who beat and humiliate them on the slightest pretext and who fire them if a forced pregnancy test comes back positive. Each worker repeats the same action — sewing on a belt loop, stitching a sleeve — maybe two thousand times a day. They work under painfully bright lights, for twelve to fourteen hour shifts, in overheated factories, with too few bathroom breaks and restricted access to water (to refuse the need for more bathroom breaks), which is often foul and unfit for human consumption in any event… The young women 'work to about twenty-five, at which point they're fired because

60. *Ibid* at 53.
61. *Ibid* at 49.
62. Bakan, *supra* note 1 at 69.
63. *Ibid* at 66.

> they're used up. They're worn out. Their lives are already over. And the company has replaced them with another crop of young girls.'[64]

The vulnerability of these workers is heightened by their age. Children as young as 10 have been found making products in these factories.[65]

B. Marginalization

The second category of oppression is marginalization, where "[a] whole category of people is expelled from useful participation in social life and thus potentially subjected to severe material deprivation and even extermination".[66] The marginal are those whom the labour system "cannot or will not use".[67] A good example of particularly vulnerable workers in Canada is that of seasonal agricultural workers. Commonly, when these workers try to voice an opinion, farm employers either don't call them back for the next season's work or immediately send them back to their home countries. For example, 14 migrant workers at a greenhouse business in British Columbia were repatriated to Mexico after they applied to join a union.[68] Migrant workers such as these have to live with the reality that they could become one of the growing numbers of marginals in the world at the hands of corporate decision-making.

Another example arises out of the experience of three Canadian companies that, in partnership with a Chinese State enterprise, are building a railway that will connect China to Tibet. It is believed that the resulting Chinese migration to Tibet will be the final step in the cultural genocide of the Tibetan people, who are already a minority in their homeland.[69] A potential consequence of this venture, then, is the most severe form of marginalization: extermination.

C. Powerlessness

The third form of oppression, powerlessness, is particular to non-professionals. As Young states, the powerless are "those over whom power is exercised without exercising it; the powerless are situated so that they take orders and rarely have the right to give them".[70] People in this position have "little opportunity to develop and exercise skill".[71] What is more, "[t]he powerless have little or no work autonomy, exercise little creativity or judgement in their work, have no technical expertise or authority, express themselves awkwardly, especially in public or bureaucratic settings, and do not command respect".[72] An excellent example of the way in which powerlessness operates in the corporate context is that of the sweatshops discussed above.

Another scenario involves a policy of locking night workers into box stores in the United States in order to prevent robberies and employee theft. Sometimes, employees are even locked into stores without managers who have keys. One employee who had his ankle

---

64. *Ibid* at 66-67.
65. Steve Boggan, "Nike Admits to Mistakes Over Child Labour" *The Independent* (October 20, 2001).
66. Young, *supra* note 12 at 53.
67. *Ibid*.
68. Vancouver Sun, "Employees want to curtail migrant workers' right, union says" *Vancouver Sun* (October 9, 2008).
69. Tenzin Daryal, "Bombardier and Tibetan Cultural Genocide", *The Montreal Gazette* (May 20, 2006).
70. Young, *supra* note 12 at 56.
71. *Ibid*.
72. *Ibid* at 56-57.

crushed by some heavy machinery at 3 a.m., had to wait an hour for someone to unlock the door. The employee refused to use the fire exit as employees had been told that they would lose their jobs for using the fire exit for anything but a fire. In addition to the injured, employees who finish their shifts mid way through the night are sometimes forced to wait for hours for a manager with a key to let them out.[73]

D. Cultural Imperialism

The fourth "face" of oppression, cultural imperialism, "means to experience how the dominant meanings of a society render the particular perspective of one's own group invisible at the same time as they stereotype one's group and mark it out as the Other".[74] Consequently, the culturally imperialized develop a "double consciousness". On the one hand, the dominant group's experience and culture is portrayed as normal or universal. As a result, the dominant perspective is the lens through which other cultures and experiences are interpreted. By virtue of their difference, the culturally dominated are branded with an essence or nature and are represented as inferior or deviant.[75] On the other hand, by virtue of their status as "Others", the culturally imperialized, recognize and develop their shared experiences and culture.[76]

The most obvious way in which corporate culture contributes to the phenomenon of cultural imperialism is through visual media. The television industry is accused of depicting Blacks and Arabs in unjust ways. As indicated by Young, "[m]ore often than not, Blacks are represented as criminals, hookers, maids, scheming dealers, or jiving connivers. Blacks rarely appear in roles of authority, glamour or virtue".[77] Thus, corporate media portrayals of social groups can result in injustice.

E. Violence

The fifth and final "face" of oppression is systemic violence, which involves physical attacks, as well as "harassment, intimidation, or ridicule simply for the purpose of degrading, humiliating, or stigmatizing other group members".[78] It is when violence is "directed at members of a group simply because they are members of that group" that it becomes systemic.[79] Corporate complicity in the use of state violence is germane to the discussion.

Under the leadership of Ken Saro-Wiwa, Nigeria's Ogoni people began non-violent agitation against a large oil compay in the early 1990s. The leaders were protesting, in particular, the ecological devastation that the oil extraction process was wreaking on their homeland. In the face of a lawsuit under the United States' *Alien Tort Claims Act*, the company agreed to pay $15.5M in settlement for its involvement.[80] Another company has likewise been accused for complicity in the murder of union members by paramilitaries at one of its plants in Colombia.[81]

---

73. Steven Greenhouse, "Workers Assail Night Lock-Ins by Wal-Mart" *The New York Times* (January 18, 2004).
74. Young, *supra* note 12 at 58-59.
75. *Ibid* at 59.
76. *Ibid* at 60.
77. *Ibid* at 20.
78. *Ibid* at 61.
79. *Ibid* at 62.
80. Ed Pilkington, "Shell pays out $15.5M over Saro-Wiwa Killing" *The Guardian* (June 9, 2009); Oliver Balch, "Shell Shocked in the Dock" *Ethical Corporation* (June 2009).
81. Michael Blanding, "Coke: The New Nike" *The Nation* (March 24, 2005).

Corporate violence towards unions is no stranger in North America. In *U.S.W.A. v. Baron Metal Industries Inc.*,[82] the defendant corporation was found to have knowingly hired two gang members of Sri Lankan origins to intimidate Sri Lankan employees who supported the union in the days leading up to a certification vote. Acting on authority from management, the men threatened to kill supporters if the union won the vote.[83] The functioning of systemic violence extends beyond these forms of direct threats.

As per Young, "[t]he oppression of violence consists not only in direct victimization, but in the daily knowledge shared by all members of oppressed groups that they are liable to violation, solely on account of their group identity".[84] Systemic violence also extends beyond direct perpetration as it can entail the encouragement, toleration and facilitation of violence against members of specific groups.[85] The way indirect forms of violence can manifest themselves in the corporate context is demonstrated by the debate surrounding recent amendments to the defence appropriations bill in the United States Senate.

In 2005, a woman working for the subsidiary of an American company in Iraq was allegedly drugged, raped, and locked in a storage container by seven American contractors. Upon her return to the United States, she was prevented from taking legal action by a clause in her employment contract which blocked legal action and required arbitration in the event of disputes. The woman's lawyer maintains that this policy has encouraged a climate in which would-be attackers believe they can get away with sexual assault. In fact, as the lawyer explained, "one of the men who raped [the woman] was so confident that nothing would happen that he was lying in bed next to her the morning after".[86] Clearly, corporate culture can contribute to the final "face" of oppression.

VI. DOMINATION

As mentioned, domination is the result of systemic constraints on the ability of people to influence their own actions or the conditions of their actions.[87] A consequence of the hierarchical nature of decision-making in our society is that most people experience domination. Corporate workplaces themselves "are hierarchically structured, in that most workers in them are subordinate to the authority of others. If people have decision-making power, it is generally over others' actions rather than their own".[88] Yet, the reach of corporate domination does not end with this hierarchical structure.

By definition, domination is the opposite of social and political democracy. Bakan argues that, "[c]orporations have no capacity to value political systems, fascist or democratic, for reasons of principle or ideology. The only legitimate question for a corporation is whether a political system serves or impedes its self-interested purposes".[89] Accordingly, corporations regularly do business with undemocratic governments. In fact, Human Rights Watch has demonstrated how China's "Great Firewall", the most sophisticated internet surveillance and censorship system in the world, is made possible only by extensive corporate

82. [2001] OLRB Rep. 553, [2002] CLLC paras 220-010.
83. *Ibid* at paras 109-120.
84. Young, *supra* note 12 at 62.
85. *Ibid* at 63.
86. Chris McGreal, "Rape case to force US defence firms into the open" *The Guardian* (October 15, 2009).
87. Young, *supra* note 12 at 78.
88. *Ibid*.
89. Bakan, *supra* note 1 at 88.

participation. The companies involved actually block terms that they anticipate the Chinese government would want censored. One company has released the identity of private users to the Chinese government.[90]

Additionally, corporations make great efforts to influence the democratic process. In fact, the corporate strategy of political lobbying has been in use for more than 200 years.[91] Today, all major corporations and many industry groups, think tanks and lobby organizations have offices in Washington, DC.[92] The goal of corporate lobbying, according to Bakan, is to pressure government "to avoid regulation" or "to repeal, weaken, or narrow the scope of existing regulations".[93] The corporate financing of elections in the United States serves the same function. For example, in 1999, the chairman of the Republican Party, asked one CEO for a $250,000 donation, explaining that, "we must keep the lines of communication open if we want to keep passing legislation that will benefit your industry".[94] In addition to political activity, corporate economic activity is itself is a source of domination.

As Bakan explains, because the corporation is designed to pursue its own self-interest, regardless of the consequences, "it is compelled to cause harm when the benefits of doing so outweigh the costs".[95] This incentive to externalize costs — that is, to shift the costs of corporate activity onto outside parties — means that people who are not engaged in corporate activity are subject to the consequences of corporate decision-making. The people of Bhopal, India became deeply aware of the way in which people experience this form of corporate domination.

On the night December 2, 1984, a catastrophic gas leak occurred at the Union Carbide Corporation (UCC) pesticide plant in Bhopal. Approximately 7,000 to 10,000 people died in the first few days.[96] Roughly 15,000 died between 1985 and 2003. At least 120,000 people are suffering chronic and debilitating illness today.[97] The contamination site has never been cleaned up; it continues to pollute the groundwater used by those who live around the plant.[98] In addition to the health consequences, the leak has "radically altered the social fabric and economics of everyday life, and entrenched existing poverty and social disempowerment".[99] Amnesty International has discussed UCC's actions in the gas leak.

According to Amnesty International, the company chose to bulk store methyl isocyanate (MIC), even though the plant did not have the safety mechanisms to deal with accidents. Management was aware of safety problems at Bhopal prior to the chemical leak. Moreover, beginning in 1983, the company introduced a series of cost-cutting measures that further undermined the plant's safety.[100]

Corporate domination also operates in more covert ways. Young makes clear that people can experience domination "as clients and consumers subject to rules they have had no part in making, which are designed largely to convenience the provider or agency rather

90. Human Rights Watch, "China: Internet Companies Aid Censorship" (August, 10, 2006).
91. Banerjee, *supra* note 2 at 13.
92. Bakan, *supra* note 1 at 103.
93. *Ibid* at 102.
94. Jim Nicholson (quoted in Bakan, *supra* note 1 at 105).
95. Bakan, *supra* note 1 at 61.
96. Amnesty International, "Clouds of Injustice: Bhopal Disaster 20 Years On" (2004) at 10.
97. *Ibid* at 12.
98. *Ibid* at 22.
99. *Ibid* at 18.
100. *Ibid* at 41-45.

than the consumer".[101] Domination in this context can take the guise of commercialization.

According to Bakan, commercialization "involves corporations infiltrating areas of society from which, until recently, they were excluded".[102] A particularly stealthy technique is the so-called "Nag Factor", which involves targeting advertisements at children in ways that "[get] them to nag their parents to buy things".[103] This advertising model "allows advertisers to bypass media savvy parents and engage the considerable persuasive power children wield over their parents".[104] In employing such techniques, corporations are undermining people's ability to freely choose what goods and services they buy. In so doing, corporations are subjecting people to yet another, albeit concealed, form of domination.

VII. DEMOCRACY AS A CONDITION OF SOCIAL JUSTICE

Implicit in the call to eliminate domination and oppression is the need for democracy. Young thus maintains that, "[d]emocracy is both an element and a condition of social justice".[105] Democratic decision-making is the most effective way in which to undermine domination in that it allows people to voice their own interests and experiences.[106] Allowing people to participate in democratic processes in turn promotes justice "because it is most likely to introduce standards of justice into decision making processes and because it maximizes social knowledge and perspectives that contribute to reasoning about policy", as Young explains.[107]

VIII. THE LOGIC OF IDENTITY

Democracy cannot, however, be based on notions such as the ideal of impartiality, the general interest, the civic public, the common good or the community. These concepts express "a logic of identity that seeks to reduce difference to unity".[108] In effect, this thought pattern "denies or represses difference".[109] Indeed, "the logic of identity shoves difference into dichotomous hierarchical oppositions: essence/accident, good/bad, normal/deviant".[110] In this way, unity is achieved only "at the expense of an expelled".[111] As Young states, "a desire for political unity will suppress difference, and tend to exclude some voices and perspectives from the public, because their greater privilege and dominant positions allows some groups to articulate the 'common good' in terms influenced by their particular perspective and interests".[112] Corporate law theory has not been immune to this exclusionary logic.

Indeed, the shareholder primacy model of the corporation explicitly excludes every point of view, save that of the shareholders. Milton Friedman puts it best:

---

101. Young, *supra* note 12 at 78.
102. Bakan, *supra* note 1 at 118.
103. *Ibid* at 119.
104. *Ibid* at 122.
105. Young, *supra* note 12 at 91.
106. *Ibid* at 92.
107. *Ibid* at 93.
108. *Ibid* at 97.
109. *Ibid* at 98.
110. *Ibid* at 99.
111. *Ibid*.
112. *Ibid* at 115.

> In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society.[113]

Further, Friedman casts the corporation as a value neutral institution. "Only people can have responsibilities", he remarks.[114] Variations of this discourse, which justify shareholder primacy in terms of social good, rather than impartiality, prove equally problematic.

Henry Hansmann and Reinier Kraakman assume that serving the interests of shareholders serves the interests of society as a whole.[115] As we have seen, notions of the general interest espouse the logic of identity. But the logic underlying Hansmann and Kraakman's shareholder-oriented model is more subtle. As indicated by Young, "[i]deas function ideologically… when they represent the institutional context in which they arise as natural or necessary".[116] From this perspective, Hansmann and Kraakman's work functions ideologically. The authors speak of the "broad normative consensus", the "triumph of the shareholder-oriented model" and the resulting "end of history for corporate law".[117] The problem with such assertions, per Young, is that "they… forestall criticism of relations of domination and oppression and obscure possible more emancipatory and social arrangements".[118] In so doing, the authors reinforce the exclusionary tendencies of the logic inherent in the shareholder maximization norm.

Similarly, stakeholder models of the firm, which broaden the focus of corporate law theory to include corporate actors other than shareholders, replicate this logic. Margaret Blair and Lynn Stout argue that the directors of publicly traded companies should maximize the joint interests of those stakeholders who contribute to the corporation's production.[119] Edward Freeman presents a broader notion of stakeholders, which includes all those affected by corporate action.[120] Unlike Young, who seeks to represent the interests of social groups, stakeholder theorists try to promote the perspective of interest groups. Young defines interest groups as "any aggregate or association of persons who seek a particular goal, or desire the same policy, or are similarly situated with respect to some social effect".[121] Corporate stakeholder groups are interest groups insofar as they are constituted vis-à-vis the corporation. Accordingly, even socially conscious shareholders, who some view as potential ve-

---

113. Friedman, *supra* note 10; while other scholars formulate the shareholder primacy model in terms of a nexus of contracts, rather than in terms of the property of shareholders, the model continues to place a duty on corporate managers to act in the best interests of shareholders: see Steven M Bainsbridge, "In Defence of the Shareholder Wealth Maximization Norm" (1993) 50 Wash & Lee L Rev 1423 (arguing that the justification for the shareholder wealth maximization norm ought to come from a contractarian approach to corporate governance); approaches which try to use existing corporate law mechanisms as tools for change prove equally problematic: Cynthia A Williams, "The Securities and Exchange Commission and Corporate Social Transparency" (1999) 12 Harv L Rev 1199 (arguing that the SEC ought to expand social disclosure of public companies); Kelley Y Testy, "Linking Progressive Corporate Law with Progressive Social Movements" (2002) 76 Tul L Rev 1227 at 1236 (arguing that corporate accountability models, such as that of Williams, ultimately maintain a shareholder focus).
114. *Ibid*.
115. Haansman and Kraakman, *supra* note 38 at 441.
116. Young, *supra* note 12 at 74.
117. Haansman and Kraakman, *supra* note 38.
118. Young, *supra* note 12 at 74; Banjeree, *supra* note 4 at 9 ("God did not come down to earth to tell us that corporations should maximize shareholder value").
119. Blair & Stout, *supra* note 40.
120. Edward Freeman, *Strategic Management: A Stakeholder Approach* (Boston: Pitman, 1984).
121. Young, *supra* note 12 at 186.

hicles for facilitating the debate on human rights issues in the corporate context,[122] represent a corporate interest group. The problem is that interest group bargaining forces factions to compete with each other for power and resources in order to maximize their own interests. Groups do not need to listen to the interests of others. Consequently, the process of interest group bargaining invariably excludes the claims of the needy or oppressed.[123]

Yet moving to a unified public realm does little in terms of evading the logic of identity. Kent Greenfield presents an approach that sees the corporation servicing the interests of society as a whole.[124] In using "society's" interests as his foundational principle, Greenfield presupposes the existence of a mythical "common good". Again, this desire for unity represents the voices and perspectives of the privileged and dominant at the expense of the oppressed.

IX. THE HETEROGENEOUS PUBLIC AND DEMOCRATIC PARTICIPATION

The only way to truly overcome the exclusionary bias of corporate law theory is to introduce decision-making structures that recognize and affirm difference. What those, like Greenfield, who assume the existence of a common good fail to recognize is that, "[i]n a society differentiated by social groups, occupations, political positions, differences of privilege and oppression, regions, and so on, the perception of anything like a common good can only be an outcome of public interaction that expresses rather than submerges particularities".[125] Rather than conceive of the public in universal terms, we need to conceptualize the public in heterogeneous ways. Per Young, the notion of the heterogeneous public entails two principles: "(a) no persons, actions, or aspects of a person's life should be forced into privacy; and (b) no social institutions or practices should be excluded a priori from being a proper subject for public discussion and expression".[126] These principles point to the need to introduce elements of participatory democracy into corporate decision-making.

Democratic participation involves recognizing and representing the experiences, perspectives and interests of oppressed or disadvantaged social groups. According to Young,

> Such group representation implies institutional mechanisms and public resources supporting (1) self-organization of group members so that they achieve collective empowerment and a reflective understanding of their collective experience and interests in the context of society; (2) group analysis and group generation of policy proposals in institutionalized contexts where decision-makers are obliged to show that their deliberations have taken group perspectives into consideration; and (3) group veto power regarding specific policies that affect a group directly.[127]

---

122. See e.g. Aaron A Dhir, "Realinging the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability" (2006) 43 Am Bus LJ 365; and Aaron A Dhir, "The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice and Human Rights" (2009) 47 Osgoode Hall LJ 47.
123. Young, *supra* note 12, at 119; Banerjee, *supra* note 4 at 31 ("corporations tend to focus on stakeholders with higher levels of power, legitimacy and urgency"); Haansman and Kraakman, *supra* note 38 at 448 ("managers' own interests will come to have disproportionate prominence in their decisionmaking, with costs to some interest groups").
124. Greenfield, *supra* note 42; see also Abigail McWilliams and Donald S Siegel, "Corporate Social Responsibility: A Theory of the Firm" (2001) *Academy of Management Review*, 117 (similarly characterizing corporate social responsibility in terms of "social good").
125. Young, *supra* note 12 at 119.
126. *Ibid* at 120.
127. *Ibid* at 184.

These mechanisms are designed to help root out oppression and enhance accountability.[128] While the goal of this paper is to shift the theoretical perspective from which we view the corporate form, it may be useful if I provide some practical suggestions for implementing this framework.

Oppressed and disadvantaged social groups need space in which they may organize and express themselves. If we are to satisfy this need, government must, first of all, formally recognize such groups. In my view, in order for a group to establish that it is in fact a disadvantaged social group, it should be required to show that it suffers from one of the five "faces" of oppression. Alternatively, where a social group is pointing to a new form of oppression, it must demonstrate that the self-development of group members is constrained in a systematic way. In addition to distinguishing among groups, government needs to facilitate the creation of independent organizations that speak on behalf of such groups. A system of government funded, though politically independent, formal caucuses could serve this function.[129] Formal caucuses should be responsible for developing group analysis and policy proposals.

In order to ensure that these caucuses are heard, corporate law should require that corporate decision-makers consider caucus analysis and policy proposals. The law should also mandate that corporations demonstrate that their deliberations have considered group perspectives. To that end, "the best interests of the corporation" principle needs to be modified and the "business judgement" rule needs to be scrapped.

The Supreme Court of Canada's *BCE Inc. v. 1976 Debentureholders*[130] decision illuminates this point. In assessing a claim for relief under the *Canada Business Corporations Act* oppression remedy,[131] the court stated: "[i]n considering what is in the best interests of the corporation, directors *may* look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions."[132] According to the court, "[t]his is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen".[133] Using these comments as a spring board, the "best interests of the corporation" principle should be modified further.

In acting in the best interests of the corporation, directors *must* be obliged to consider the perspective of government-recognized oppressed and disadvantaged social groups who are potentially impacted by corporate decision-making. Furthermore, directors *must* illustrate that these perspectives have been considered in reaching impugned business decisions. Additionally, to give this modified fiduciary duty force, the "business judgment" rule should be eliminated.

The court in *BCE* affirmed that "[c]ourts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule".[134] However, in introducing the analysis and policy suggestions of

128. *Ibid* at 185.
129. *Ibid* at 188 (Young discusses the role that group caucuses have played in decision-making bodies).
130. [2008] 3 S.C.R. 560, 2008 SCC 69 [*BCE*]; Robert E Milnes, "Acting in the Best Interests of the Corporation: To Whom is This Duty Owed by Canadian Directors? The Supreme Court of Canada in the BCE Case Clarifies the Duty" (2009) 24 BFLR 601.
131. *Supra* note 24, s. 241.
132. *BCE*, *supra* note 13 at para. 40 [emphasis added].
133. *Ibid* at para 66.
134. *Ibid* at para 40.

oppressed groups, the rationale for such deference, that directors are better suited to weigh competing information, weakens. Moreover, as we have seen, such deference to corporate decision-making contributes to the phenomena of oppression and domination. Even further, as part of government's obligation to facilitate group organizations, it must ensure that such organizations have the funding to litigate these decision-making matters.

Even if proposals for greater diversity on corporate boards of directors[135] were implemented, social justice would still require these radical changes to the way in which corporate decisions are made. As Lisa Fairfax demonstrates, the argument that director's belonging to socially oppressed and dominated groups are better situated to identify and understand the needs of these groups is misguided because there are often significant class differences at play.[136] In other words, directors, regardless of their backgrounds, invariably occupy a privileged social position that, at least to some extent, disassociates them from such groups. Further, a limited number of diverse directors could not possibly account for the multiplicity of perspectives encompassed by Young's model. These shortcomings highlight the importance of constraining corporate decision-making in fundamental ways.

Notwithstanding the introduction of a modified "best interests of the corporation" principle and the abolition of the "business judgement" rule, directors and officers would still be able to make decisions that adversely affect oppressed groups. Thus, it is imperative that the final mechanism, a group veto power vis-à-vis corporate decisions that affect a group directly, be implemented. Accordingly, a government system of monitoring and enforcing the group veto power is necessary. Where a corporation disregards a group veto, government needs to intervene and forbid the corporation from continuing with its actions. Where a corporation pays no heed to the government order, severe repercussions must ensue. Given that the ultimate goal of the veto is to eliminate corporate injustices, corporations that ignore the veto must be subjected to the harshest of penalties, such as charter revocation, for reasons of both denunciation and deterrence.[137]

Looking beyond corporate decision-making, existing corporate law mechanisms that have been touted as tools for change do not adequately address the standard of social justice. Specifically, the shareholder proposal[138] and mandatory social disclosure[139] instruments have been presented as tools for raising awareness of human rights issues vis-à-vis corporations. However, these instruments are investor-centric: they are designed to give a voice to shareholders in particular. While both tools offer methods for raising human rights issues in the corporate context,[140] they do not necessarily advance the perspective of those oppressed and dominated by corporate decision-making.

Consider, for example, Goldcorp Inc.'s dealings in Guatemala. In the face of criticism over the environmental and human rights impacts of the company's mining operations, share-

---

135. See e.g. Bill S-206. *An Act to Establish Gender Parity on the Board of Directors of Certain Corporations, Financial Institutions and Parent Crown Corporations*, 3rd Sess, 40th Parl, 2010; formerly Bill S-238, 1st Sess, 40th Parl, 2009.
136. Lisa M Fairfax, "The Bottom Line on Board Diversity: A Cost Benefit Analysis of the Business Rationales for Diversity on Corporate Boards" (2003) Wis L Rev 795 at 842.
137. For a proposal for bringing corporate charter revocations back into corporate law, see Gil Yaron, *Awakening Sleeping Beauty: Reviving Lost Memories and Discourses to Revoke Corporate Charters* (LLM Thesis, University of British Columbia Faculty of Law, 2000) [unpublished].
138. See Dhir, "Realinging the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability", *supra* note 122.
139. See Dhir, "The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice and Human Rights", *supra* note 122.
140. *Ibid*.

holders brought forward a proposal asking the company to produce an independent human rights assessment of its activities in Guatemala.[141] In response, the company agreed to a peer reviewed assessment of its mining operations in the country.[142] While this move was unprecedented in Canadian history,[143] it still proved inadequate from the perspective of the indigenous farmers who were being impacted by the environmental and human rights consequences of the mining activities. The focus in conducting the assessment was on the perspective of the shareholders themselves, to the exclusion of the standpoint of the farmers. Indeed, the indigenous farmers were not asking for a human rights impact assessment. Rather, the farmers opposed the mine altogether.[144] Hence, by failing to directly give a voice to groups oppressed and dominated by corporations, shareholder-centric mechanisms can actually serve to mask the perspectives of those groups. To avoid these pitfalls, it is imperative to directly involve these groups in corporate decision-making, and empower them to resist such decision-making, to adequately address concrete calls for social justice.

X. OBJECTIONS CONSIDERED

A. An Incomplete Conception of Oppression

An objection to my argument is that Young's account of oppression is incomplete. A number of philosophers have criticized Young for failing to adequately account for the psychological or psychic nature of oppression. Her notion of cultural imperialism, they argue, fails to account for the fact that the oppressed often internalize negative cultural images.[145] However, Young notes that the five "faces" of oppression, "function as criteria for determining whether individuals and groups are oppressed, rather than as a full theory of oppression".[146] Thus, whether or not Young's articulation of oppression is complete, her work remains useful. For my purposes, the "faces" are best thought of as starting points for a group-based conception of the corporation.

In Young's words, the five categories offer "a means of evaluating claims that a group is oppressed, or adjudicating disputes about whether and how a group is oppressed".[147] I would add that the criteria provide a basis for identifying new conceptions of oppression, as evidenced by the philosophers who have pointed to the omission of psychic oppression in Young's work. Moreover, it must be remembered that the starting point of Young's account is the call of the oppressed themselves. The democratic mechanisms discussed above will enable oppressed groups to articulate new forms of oppression.

---

141. "Produce a human rights impact assessment" in Shareholder Association for Research and Education (SHARE), "Shareholder Resolution Database", online: <http://www.share.ca/en/node/1461> [SHARE, Goldcorp proposal].
142. Goldcorp, "Marlin Human Rights Impact Assessment of Marlin Mine", online: <http://www.goldcorp.com/operations/marlin/hria/>.
143. Dhir, "The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice and Human Rights", *supra* note 122 at 73.
144. Ecojustice, "Goldcorp's Guatemala Shenanigans" (2 February 2007), online: <http://www.ecojustice.ca/media-centre/press-clips/goldcorps-guatemala-shenanigans>.
145. Amy Allen, "Power and the Politics of Difference: Oppression, Empowerment, and Transnational Justice", (2008) 23 *Hypatia* 156, at 162; TL Zutlevics, "Towards a Theory of Oppression", (2002) 15 *Ratio* 80, at 82; and Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (New York: Routledge, 1997).
146. Young, *supra* note 12 at 64.
147. *Ibid*.

B. Difficulties with Moving to Transnational Justice

In the epilogue to *Justice and the Politics of Difference*, Young acknowledges that, "[t]he five criteria of oppression that I have developed may be useful starting points for asking what oppression means in Asian, Latin America, or Africa, but serious revision of some of these criteria, or even their wholesale replacement, may be required".[148] Indeed, Amy Allen argues that the dyadic model of oppressor/oppressed that Young rejects for societies such as the United States may be appropriate for countries such as Afghanistan under Taliban rule where there is an, "identifiable oppressor group capable of imposing its will on an oppressed group".[149] What is more, Allen maintains that Young, "did not herself work out an account of the complex relationship between state domination and the other forms of domination and oppression with which the former are intertwined".[150] Nevertheless, she agrees that Young's work provides a helpful starting point for describing oppression and domination in the international context. Again, for my purposes, Young's work is satisfactory because, in the context of the democratic framework argued for, it offers a springboard for identifying and recognizing oppressed groups and developing group-based analysis and policy.[151]

C. Violating the Principle of Corporate Neutrality

Since my model of the corporation clearly makes moral and political claims, it will undoubtedly be accused of violating the principle of corporate neutrality presupposed by the shareholder-oriented model. Such an objection is dubious. The corporate form is partial because value-neutrality is impossible. All substantive positions are historically and socially situated.[152] The shareholder primacy model is no different than any other theoretical model in this regard. As we have seen, the model elevates the perspective of the shareholders at the expense of all others. Moreover, the model valorises material wealth above everything. Propounding the virtues of maximizing shareholder wealth hardly seems value-neutral. Thus, in presenting this perspective as impartial, its proponents justify the suppression of other perspectives. To avoid this pitfall, a theory of the corporation ought to overtly engage with moral and political issues.

D. Inefficiencies, Costs and Impracticalities

The last objection is as follows: making corporate decision-makers beholden to the interests of oppressed and disadvantaged groups will make corporations inefficient, costly and, ultimately, unworkable. Managers do not have the time or resources to consider the claims and interests of all groups impacted by their decisions. Moreover, offering these groups a veto power over corporate decisions will result in the loss of profit-generating opportunities for companies. Accordingly, the wealth generating ability of companies will be compromised. The harm created by these developments will result in net damage to society.

---

148. *Ibid* at 258.
149. Amy Allen, *supra* note 145 at 168.
150. *Ibid* at 170.
151. While beyond the scope of this paper, I would like to note that beyond the conceptual difficulties discussed here, a practical difficulty for any alternative vision of the corporation is the issue of how to mandate such a vision on an international level. For a solution, see, for example, Steven R Ratner, "Corporations and Human Rights: A Theory of Responsibility" (2001) 111 Yale LJ 443 (arguing that international legal duties should be imposed directly on corporations).
152. Young, *supra* note 12 at 102-104; Sandra Harding, "Rethinking Standpoint Epistemology: What is Strong Objectivity" in K Brad Wray ed., *Knowledge & Inquiry: Readings in Epistemology* (Toronto: Broadview Press, 2002).

I see two issues with this objection. First, added decision-making costs and lost opportunities do not necessarily render a corporation unprofitable. The corporation, throughout its short-lived history, has proven to be a tremendous vehicle for pooling and accumulating resources. Corporations have also proven extremely adaptive, as exhibited by the historical evolution of the firm discussed briefly above. While I agree that my model may temper corporate profits, I am unconvinced that it will preclude them.

Second, assuming that my approach would destroy the corporation, the shareholder primacy model should still not be maintained. Shareholder oriented models conflate justice and the good life with material wealth. As I have demonstrated, such an outlook tends to obscure the structural injustices inherent in the current corporate form. Corporations have proven to be an effective tool for generating wealth for society. However, if corporations are unable to generate wealth for society in socially just ways, then maybe we should imagine an institution that can.

XI. CONCLUSION

This paper has critiqued and reconceptualised the corporation in light of Iris Marion Young's reflective discourse on social justice. The corporation ought to be held to the standard of social justice for a number of reasons. Historically, corporations were public purpose institutions; today, they remain legal institutions in that they rely on legislation to create and enable them. Under this legal framework, corporations have come to govern virtually every aspect of our daily lives, despite the fact that they lack the democratic accountability of governments. This fusion of power and unaccountability has given rise to claims that the corporate form is inherently unjust and should be changed.

However, to date, a thorough account of corporate injustice has not been offered, largely because of the distributive focus of the corporate social responsibility debate. This emphasis has obscured and justified the two relational and structural social conditions that characterize injustice: oppression and domination. To correct this omission, I have, following Young, developed a conception of the corporation rooted in the institution's inbuilt tendency to create and strengthen injustices. In the relentless pursuit of profit, the corporation often gives rise to and facilitates the five "faces" of oppression: exploitation, marginalization, powerlessness, cultural imperialism and systemic violence. Corporations are, likewise, a source of domination.

The corporation's propensity to cause and reinforce domination and oppression highlight the need to build democratic decision-making structures into the corporate form. To achieve this goal, corporate law theory needs to abandon its desire for political unity, which tends to exclude the perspectives of the oppressed and disadvantaged. Rather, a theory of the firm ought to be based on a heterogeneous notion of the public which gives voice to those who are systematically excluded from corporate decision-making. Hence, corporate law ought to provide the means through which the distinct voices and perspectives of those who are oppressed and disadvantaged by the corporation may be recognized and represented. If the corporation proves unable to serve this goal in addition to its primary goal of accumulating and generating wealth then it may be time to conceptualize an institution that can.

mccarthy tétrault

Excellence. Creativity. Initiative.

At McCarthy Tétrault, we attract the best and brightest talent to our ranks. We foster an exciting professional environment that promotes and rewards excellence, creativity and initiative, offers many opportunities for success and helps develop the leaders of the future. Do you have what it takes to lead?

mccarthy.ca/students
McCarthy Tétrault LLP

APPEAL ■ VOLUME 16 ■ 2011