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REMORALIZING FAMILIES?
FAMILY REGULATION AND STATE FORMATION IN BRITISH COLUMBIA, 1862-1940

by

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Thesis submitted to the
Faculty of Graduate and Postdoctoral Studies
in partial fulfillment of the requirements
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ABSTRACT

REMORALIZING FAMILIES?
FAMILY REGULATION AND STATE FORMATION
IN BRITISH COLUMBIA, 1862-1940

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This thesis contributes to scholarly debates over the enactment and effect of age, gender, and kin-based property rights during the late nineteenth and early twentieth centuries. The thesis focusses on three distinct waves of reform, involving homestead, married women's property, intestacy, and maintenance legislation. Similar 'waves' of legislation have been documented throughout North America.

This thesis brings new evidence to the discussion of legislative intentions and regulatory effects. In doing so, it challenges current conceptualizations of regulatory relationships, an issue of some importance to those interested in matters of governance and legislative efficacy. The evidence collected during this investigation raises several questions respecting current theories of legislative formulation. Current theories hold that family property rights were altered during this period for two reasons: as part of a liberal drive to increase individual rights; and as a result of 'the state's' interest in protecting reproduction from economic volatility. The evidence renders each of these interpretations problematic: first, while women's individual rights were expanded, men faced increasingly overt regulation; and second, with respect to 'the state's' interest in

reproduction, this thesis challenges the reification of a neutral, transhistorical state. The evidence reveals self-interested legislative factions with overlapping and contradictory regulatory agendas. In response, this investigation tests 'state formation' theory as a means of understanding legislative formulation and regulatory relationships, commenting on both the strengths and weaknesses of the approach.

This thesis also brings new evidence to two areas of interest to students of legislative implementation: the nature of judicial construction, and the value of cases for understanding regulatory relationships. Studies of the married women's property acts, both in the United States and Canada, have revealed that the judiciary interpreted the statutes conservatively, inhibiting full realization of the legislation's equal-rights potential. This thesis revisits the issue, scrutinizing legislative intentions and exploring the doctrines of judicial construction, resulting in the reinterpretation of both legislative intent and judicial behaviour.

The second debate surrounding legislative implementation revolves around an emerging sense of the inherent limitations of cases as source material. Both social and legal historians have commented on the narrow scope of case files for the exploration of regulatory relationships. What happens outside the courtroom is of great concern, and case files reveal only a 'slice' of human experience. Moreover, within legal history, several commentators have noted that published cases differ significantly from the vast majority of unpublished cases. This thesis contributes to the understanding of regulation both within and outside the courtroom, employing published and unpublished cases, bureaucratic correspondence and quantitative studies.

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I am indebted to my field supervisors at the University of Ottawa, Chad Gaffield, Don Davis, and Jan Grabowski, for introducing me to ideas, methods, and literature which were fundamental to this project. The members of my defense jury, Tim Stanley, Bettina Bradbury, Constance Backhouse, and Professor Grabowski have each challenged and altered my perspective on this project, and provided valuable suggestions for revision. Chad Gaffield has my particular gratitude for his encouragement, his challenging comments, and his willingness to discuss and explore the project on short notice. Any shortcomings in this thesis are entirely my own responsibility.

This project would not have been realized without the influence of Peter Baskerville and Eric Sager. My first exposure to the topic came as a result of suggestions from Professor Baskerville, suggestions which proved both generous and invaluable. Peter and Eric have both been encouraging to me.

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INTRODUCTION

At their inception, the Colonies of Vancouver Island and British Columbia adopted the law as it existed in England, in 1851 and 1858 respectively. After the Union of the Colonies in 1866, Vancouver Island was absorbed into the mainland colony, and British law as it existed in 1858 applied to the entire colony, except where altered by legislative statute.[1] English common law upheld a patriarchal organization of the family: the law supported the "male headship of family households," bestowing upon married men broad authority and power over wives and children.[2] By the nineteenth century, patriarchal rights had been strengthened considerably by statute. Patriarchal domination of the family was maintained by restricting the access of women and children to subsistence resources[3] and was entrenched in the property rights accorded family members under common and statute law.[4] As Lori Chambers has observed, "property and personal status

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[1] David R. Williams, *"...The Man for a New Country" Sir Matthew Baillie Begbie* (Sidney, British Columbia: Gray's Publishing, 1977), p. 35; Margaret E. McCallum, "Prairie Women and the Struggle for a Dower Law, 1905-1920," *Prairie Forum*, vol. 18, no. 1 (1993), p. 21

[2] Wally Seccombe, "Patriarchy Stabilized: the Construction of the Male Breadwinner Wage Norm in Nineteenth-Century Britain," *Social History*, vol. 11, no. 1 (January 1986), p. 59. Ursel, *Private Lives Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women's Press, 1992), p. 5.

[3] Ursel, "The State and the Maintenance of Patriarchy: A Case study of Family, Labour, and Welfare Legislation in Canada," *Family, Economy and State: The Social Reproduction Process Under Capitalism*, ed. James Dickinson and Bob Russell (London: Croom Helm, 1986), p. 153. Emphasis in original.

[4] For the crucial role the law plays in establishing patriarchy, see Gerda Lerner, *The Creation of Patriarchy* (Oxford: Oxford University Press, 1986), pp. 212, 238-239. Common law originated in medieval England and was administered by Crown appointees. It "evolved as feudal law and local

are intimately linked in Anglo-American culture," and the property rights enshrined in English law were central to establishing and enforcing patriarchal family organization.[5] Yet it is important to remember that these are laws 'on the books.' Historians are beginning to amass substantial evidence that individuals both made use of and circumvented the laws for their own reasons.[6] As Carolyn Strange and Tina Loo have commented, the image of the hammer has been replaced with that of "the net — restrictive, yet full of holes."[7]

In the seventy years following the Pacific colonies' creation, the colonial and provincial assemblies radically altered patriarchal property relations in three distinct waves of reform. The first wave of reform, enacted in the 1860s and early 1870s, involved significant alterations in the property rights of married women and the inheritance rights of children; simultaneously, legislators engaged in an attempt to legislate family-oriented debtor-protection. The second wave of reforms, passed in the from the mid-1880s to the mid-1890s, redressed growing concern over creditors' rights

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customs were moulded by the interpretations of royal judges and local magistrates throughout the country and were amended from time to time by statutory enactments." In essence, common law jurisprudence developed over the centuries on the basis of precedent-setting individual case decisions, judicial doctrines and legislative intervention. By the late eighteenth and early nineteenth centuries, much of the common law was being informally — but influentially — 'codified' in legal treatises written by prominent jurists. Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (Toronto: University of Toronto Press, 1983), p. 9.

[5] Anne Lorene Chambers, *Married Women and the Law of Property in Victorian Ontario* (Toronto: University of Toronto Press, 1997), p. 4.

[6] A salient example may be found in Eileen Spring's discussion of the many means for evading inheritance law, in *Law, Land, & Family: Aristocratic Inheritance in England, 1300-1800* (Chapel Hill: University of North Carolina Press, 1993).

[7] Carolyn Strange and Tina Loo, *Making Good: Law and Moral Regulation in Canada, 1867-1939* (Toronto: University of Toronto Press, 1997), p. 5.

created by the controversial use of earlier debtor-protection measures. Throughout both 'waves' of reform, the legislatures continued to exhibit over-riding concern for the rights of men. Patriarchal prerogative was altered significantly, but not abolished. The patriarch's rights remained paramount. The third wave of reforms effected significant changes in patriarchal rights. Legislation passed from 1900 through to the early 1920s, enacting reform of maintenance, legitimation, and inheritance law, eroded patriarchal property rights and enforced patriarchal obligations.

Very similar 'waves' of legal reform have been observed across the North American continent.[8] This dissertation seeks to contribute to the scholarly understanding of these reforms and their impact: it investigates alterations in the property rights of family members, seeking to establish why these changes occurred, and examines their effects in practice. Attention will be given to legislative intention, adjudication and enforcement, as well as to exploring the aims and intentions of individual subjects as they encountered the law, both invoking and experiencing its effects. In building on my previous work,[9] and the work of other scholars, this dissertation introduces substantial new evidence to the debate, and tests a new theoretical approach. The combination of this new information and new theoretics has resulted in an interpretation which offers an

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[8] Richard H. Chused, "Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures," *The American Journal of Legal History*, vol. 29 (1985), pp. 3-35; Constance B. Backhouse, "Married Women's Property Law in Nineteenth-Century Canada," *Law and History Review*, vol. 6, no. 2 (Fall 1988), pp. 211-257.

[9] See Christopher A. Clarkson, "Liberalism, Nation-Building, and Family Regulation: The State and the Use of Family Property Law on Vancouver Island and in the United Colony/Province of British Columbia, 1862-1873," University of Victoria, M.A. thesis, 1996, and "Property Law and Family Regulation in Pacific British North America, 1862-1873," *Histoire sociale / Social History*, vol. 30, no. 60 (November 1997), pp. 386-416.

intriguing new perspective on the actions and intentions of legislators, the judiciary, and regulated populations.

The initial focus in investigating each wave of legislation is to understand the intentions of legislators. It is a central premise of this dissertation that a detailed understanding of legislative intention is necessary to fully appreciate the nuances of legislative application and administration by the judiciary. Since British Columbia's legislative debates were not officially recorded — there was no Hansard until the early 1970s — the most useful sources for this purpose are reports of the debates in newspapers. From the 1860s onward, Victoria's dailies presented extensive accounts of the legislative debates. These accounts often differ in detail, and every attempt has been made to reconcile factual differences. Nonetheless, the differences are interesting in themselves, and along with editorial comment, have been employed to explore the different perspectives of varying legislative factions.

In examining the administration and effect of the legislation, this dissertation makes use of legal history's 'traditional' source, published case law. Case files, as Karen Dubinsky notes, are fascinatingly rich qualitative sources, providing an opening into the lives of individuals who left no records of their own.[10] For legal historians, they provide an opportunity to explore the interaction of regulated populations with regulatory authorities and official ambitions. Yet recent discussions of case files have cautioned historians to maintain an awareness of their inherent biases and limitations as source

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[10] Karen Dubinsky, "Afterward: Telling Stories about Dead People," *On the Case: Explorations in Social History*, ed. Franca Iacovetta and Wendy Mitchinson (Toronto: University of Toronto Press, 1998), p. 361.

material. In their introduction to *On the Case*, Franca Iacovetta and Wendy Mitchinson identify two predominant concerns with case files: reliability and representivity. The first, reliability, revolves around authorship, perspective, and bias. As Eric Sager notes, case files "describe certain people in words and categories that serve the official purposes of other people."[11] The files are produced by the very agencies which seek to moralize the populace. The human subjects are recorded and filtered through the prejudices, biases, and ideological frameworks of an often hostile intermediary. Dealing with this bias, several of the contributors to *On the Case* suggest, is a task familiar to social historians. It requires an understanding of the provenance of the records, their source and original purposes. For legal historians, the structure of the files, their inclusions and exclusions, are also important. Legal hearings admit of certain evidence and exclude other information: often the subject is not permitted to tell his or her entire story. Maintaining a critical awareness of the limitations and bias of our sources, and reading them 'against the grain' for the voices of subjects, aids the historian in conveying a more nuanced appreciation of the interactions and power relations within those cases.

Yet reading the sources 'against the grain' only takes the historian so far. The reliability of the sources can be further explored by making use of a greater variety of sources, permitting comparison and contextualization. This approach also helps in addressing questions of representivity. Historians dealing with case files face demanding questions of representivity: do the files provide us with evidence of a typical experience?

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[11] Eric W. Sager, "Employment Contracts in Merchant Shipping: An Argument for Social Science History," *On the Case*, p. 49.

Can they be categorized and quantified? Can we generalize from a qualitative example or are the cases singular and unique? In the field of legal history, we have only recently begun to grapple with these questions.

Those who pioneered legal history began in a wilderness: they sought out and discovered major points of reference; understandably, their search began with the most accessible sources: published cases. Yet published cases, it turns out, are unrepresentative by design. Published cases do not simply provide precedents to be adhered to as the standard, although some fulfill this function. Many cases are published, Lori Chambers explains, because of their anomalous nature. They serve to instruct courts facing unfamiliar situations. Chambers examined both published and unpublished cases on the married women's property acts in Ontario, and found the published cases were variations from the norm. Thus she advocates the examination of unpublished cases.[12] Yet, in this respect it may be that legal historians need to reconsider the whole concept of representivity: is there a standard case which characterizes a common regulatory experience?[13] Or rather, should we investigate a broad variety of case dispositions and individual experiences to fully understand the nuances of regulation? This dissertation favours the latter approach, making use of both qualitative and quantitative sources to understand the range of experience of both the regulators and the regulated. Both published and unpublished cases are examined. Characteristic and precedent-setting cases are explored in detail, set in the context of quantitative characterizations of case

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[12] Chambers, *Married Women and the Law of Property*, pp. 5-6.

[13] The author would like to thank Chad Gaffield for his helpful suggestions on this subject.

dispositions wherever possible. Case files on their own, however, whether published or unpublished, are reliable indicators only of what happens inside the courtroom. To fully explore the relationship between government and the regulated population beyond the courtroom requires the use of additional sources. To this end, this study employs secondary quantitative studies, bureaucratic reports, internal government correspondence, and letters from members of the public to the Attorney General.

This dissertation also tests a new theoretical approach to legal history. Explaining the rationale behind this decision requires an examination of the extant legal history literature, with attention to where this literature is supported and contradicted by the evidence to date. The literature on family property law reform in North America is generally fragmented, like its subject. There was no discrete body of domestic legislation in the late 19th and early 20th centuries and historical studies reflect this fact. Few authors have attempted to present a synthesis of family property law.[14] Most address a single topic, such as married women's property rights, dower, inheritance, or maintenance. Yet if the literature's overall fragmentation is a weakness, that same fragmentation, in combination with sheer volume, is also a strength. Within each area of interest are volumes of detail and analysis. From this literature, two broad and conflicting interpretive outlines of political and legal reform emerge. The first claims that for political and economic reasons, liberal governments expanded individual rights, and

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[14] Jane Ursel writes that "early laws regulating family relations were dispersed over a wide variety of property laws, estate statutes and illegitimacy and guardianship acts." Jane Ursel, *Private Lives, Public Policy*, p. 101. For syntheses, see Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985); Steven Mintz, "Regulating the American Family," *Journal of Family History*, vol. 14, no. 4 (1989), pp. 387-408.

thereby weakened the patriarchal family. The second claims that patriarchy was not weakened, but transformed and appropriated by a state more interested in preserving the family's function as a nation-building institution than maintaining individual patriarchal power.

The first interpretation is most common and best suited to histories of nineteenth-century intestacy and married women's property statutes. In this scenario, legislators interested in individual rights slowly succeeded in removing the legal constraints placed upon women, granting them property, contractual, and finally political rights. Children's rights were also slowly expanded. American legal historian Martha Minow writes,

> The traditional view of the legal history of family relationships described a movement from an era of patriarchal power reinforced by the state, consigning women and children to a private sphere removed from political and economic power, to an era of individual autonomy where each individual could claim and enforce legal rights before the state.[15]

For most historians, this liberalizing trend was prompted by some combination of changing political ideologies and a 'modernizing' economy. Both Steven Mintz and Michael Grossberg perceive a solid connection between political ideology and family law, identifying shifts in the legal regulation of the family dependent on the form of political rule.[16] Historians have also related changes in intestacy and married women's property statutes to the availability of land and the development of capitalism.[17]

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[15] Martha Minow, "'Forming Underneath Everything That Grows:' Toward a History of Family Law," *Wisconsin Law Review* (1985), p. 833.

[16] Mintz, "Regulating the American Family, pp. 388-389; Grossberg, *Governing the Hearth*, pp. 6-7.

[17] Grossberg, *Governing the Hearth*, p. 244; Carole Shammas, "Re-assessing the Married Women's Property Acts," *Journal of Women's History*, vol. 6, no. 1 (1994), p. 24; examples of this interpretive

The approach is not without its critics. Martha Minow and Mary Lyndon Shanley label certain variants of this perceived progression toward individual rights as Whiggish, because, as Shanley indicates,

> [f]rom the traditional perspective of many legal historians, recognition of individual rights came slowly but inevitably. In this view, the achievement of women's rights has been the result of a gradual but inexorable application of liberal principles of individual freedom and welfare to an ever-broadening spectrum of the population.

Shanley argues that such studies do not take opposition to reform seriously.[18] It should be noted, however, that portraying the legal changes of the nineteenth and early twentieth centuries as a progression towards individual rights need not necessarily be Whiggish. It can and has been portrayed as a struggle, the outcome of which was not inevitable. Many authors have depicted a complex and contradictory reform process, involving competing liberal and conservative agendas.[19] In addition, historians of the married women's property acts have often nuanced their interpretations with evidence that the property statutes were the result of broader drives to consolidate common law and equity, regularize credit relations, and provide debtor-relief for families in volatile economies.

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school may be found in Chused, "Late Nineteenth Century Married Women's Property Law"; Norma Basch, *In the Eyes of the Law: Women, Marriage and Property in Nineteenth-Century New York* (Ithaca: Cornell University Press, 1982); Paulette Yvonne Lynette Falcon, "'if the evil ever occurs' — The 1873 Married Women's Property Act: Law, Property and Gender Relations in 19th Century British Columbia," University of British Columbia, M.A. thesis, 1991; Backhouse, "Married Women's Property Law."

[18] Mary Lyndon Shanley, "Suffrage, Protective Labour Legislation and Married Women's Property Laws in England," *Signs: Journal of Women in Culture and Society*, vol. 12, no. 1 (1986), pp. 63-64.

[19] See Philip Girard and Rebecca Veinott, "Married Women's Property Law in Nova Scotia, 1850-1910," *Separate Spheres: Women's Worlds in the 19th Century Maritimes*, ed. Janet Guildford and Suzanne Morton (Fredricton: Acadiensis, 1994); Clarkson, "Property Law and Family Regulation"; Dorothy E. Chunn, *From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario, 1880-1940* (Toronto: University of Toronto Press, 1992).

Finally, historians of this school have pointed to the administration of the law, arguing that the judiciary effectively stifled the intentions of the legislation, forcing legislators to draft amendments or completely redraw the legislation.[20]

A more fundamental problem with the individual rights interpretation is that, apart from certain nineteenth-century intestacy and married women's property statutes, it lacks explanatory power. Certainly, the interpretation has struck a central theme underlying married women's increased property rights and more egalitarian inheritance statutes. Yet the increasing infringement upon married men's property rights in late-nineteenth and early-twentieth-century maintenance and inheritance statutes is inexplicable within an individual rights framework. Married men's ability to freely dispose of their property, during their lifetime and by will, became more intensely regulated than it had been since the seventeenth century. Nor does the theory adequately characterize the changing legal position of children. While children did gain new individual rights, they were also subject to increasingly overt regulation by government.[21] If the driving force behind law reform was to render individuals more free, how do we explain the increasing tendency of

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[20] Examples of this interpretive process are found in Backhouse, "Married Women's Property Law"; Basch, *In the Eyes of the Law*; Falcon, "'if the evil ever occurs'".

[21] Martha Minow writes, "The story of children's legal status ... contrasts traditional rules imposing dependency on children with modern developments granting children individual legal rights. From the vantage point that treats individual independence as the important normative reference point, children — like women — have had to struggle with a legacy of legally-imposed dependency.... These developments, however, did not simply mark progress on the road toward individual rights; they equally represented the initiation of a direct relationship between children and the state, unfiltered by parental involvement but maintaining children's special status as people deserving protection from others and themselves." Minow, "'Forming Underneath Everything That Grows,'" p. 832.

government to obligate patriarchs? and how can we explain the increased overt government regulation of children?

The second interpretation helps to answer these questions. This interpretation posits that the statutory changes affecting the family in the nineteenth century only altered patriarchy, shifting the locus of patriarchal power to the state. In many histories of family law, including my own previous work, this theory is found alongside the individual rights interpretation, suggesting that reform was a multifaceted and complex process.[22] The most forceful and explicitly theorized version of the state patriarchy interpretation has been outlined by Jane Ursel. Ursel documents a shift in the locus of patriarchal power, from individual family heads to the state, during the transition from decentralized modes of production to a capitalist wage-labour economy. According to Ursel, this economic transition resulted in a growing tension between the needs of production and reproduction (the latter term incorporating procreation, socialization, and daily maintenance). Under family patriarchy, control of resources vested in the patriarch and production was directly related to his family's consumption requirements. Under capitalism, ownership of resources became increasingly centralized and concentrated. The individual patriarch lost control over productive resources.

The patriarch's loss of material control had two effects. First, his authority was undercut, since control over material resources was the basis of that authority. Fathers experienced greater difficulties controlling their children. Capitalists' use of labour was

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[22] Minow, "'Forming Underneath Everything That Grows'"; Grossberg, *Governing the Hearth*; Clarkson, "Property Law and Family Regulation."

indiscriminate. The wage was available to dependents, and material independence opened an avenue to social independence. The spectre of disorder loomed large. The patriarchal family, perceived as the bedrock of social order, was in danger. Secondly, Ursel argues, the wage undercut the incentive to reproduce. Production became oriented toward accumulation and exchange. To facilitate accumulation, capitalists paid wages only for the labour they consumed — that is, wages barely sufficient to maintain the individual worker. No provision was made for the maintenance of dependents or the reproduction of a future labour supply. In this context, the birthrate plummeted.

One of the defining features of family patriarchy, Ursel contends, was its pro-natalist dynamic. Since the patriarch controlled productive resources and the labour of family members, children were an asset. Their father stood to profit from increasing the size of the family. The capitalist wage, alternatively, made no provision for reproduction, and children became a liability. A declining birthrate ensued, which contemporaries decried as race suicide and sought to reverse. In this aspect of her argument, Ursel has greatly oversimplified. The explanation of declining birthrates is a subject of some controversy among historians: many factors were at play. In fact, it may be that the pro-natalist dynamic of patriarchy was a temporary anomaly. Eileen Spring cites voluminous literature holding that high fertility rates occurred only in areas with an abundant supply of agricultural land. In more settled areas, population growth was much lower.[23] For our

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[23] See Eileen Spring, *Law, Land, & Family*, p. 90.

purposes, however, the perception of decline is as important as the fact. Contemporaries believed fertility was declining, and this was a source of some political concern.

Ursel argues that in order to protect society's interest in the material and biological reproduction of the population, the state was forced to mediate between the needs of production and reproduction. The state legislated patriarchy to maintain reproductive relations and sexual/generational interdependence (and therein, social order, albeit a social order of a very particular type). In Ursel's words, "the state stands alone as the only entity that has both an interest in preserving patriarchy and the material resources to do so." She continues:

> As guarantor of the overall integrity of the social system, the state has been forced over time to assume increasing responsibility for the long-term interests of society, that is, the reproduction and maintenance of the population, at the same time that it actively supports the strategies of capital that undermine those interests.

In Ursel's time period legislating patriarchy involved the creation of a support-service family structure — the male-as-breadwinner, female-homemaker form. The support-service patriarchal form, Ursel continues, was constructed through labour legislation which discriminated on the basis of age and gender, newly expanded legal rights for wives and mothers contingent upon adherence to adultery clauses, and welfare legislation providing state funding or institutional care for neglected future producers (children).[24]

Taken alongside liberalization theory, the state patriarchy interpretation greatly enhances our understanding of family law reform in the late nineteenth and early

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[24] Ursel, "The State and the Maintenance of Patriarchy," pp. 150, 157-158, 188; Ursel, *Private Lives, Public Policy*, pp. 5-7, 10, 20-22, 2634, 36, 38, 40-41, 43, 52, 86-87, 122-124.

twentieth centuries. Two powerful and often antithetical movements influenced the course of family property law reform in the nineteenth and early twentieth centuries: liberalism and nation-building. However, the evidence gathered for this dissertation suggests that certain aspects of the state-patriarchy theory warrant reconsideration. First, the evidence indicates that the economy was not the inevitable product of a mechanically advancing social and economic order. The legislation under consideration offers repeated evidence of the purposive legislative construction of economic relationships. Martin Sklar's work offers an explanation for these observations. Sklar argues that the depiction of the economy as a self-regulating entity, evolving according to "indefeasible economic law," was popularized by nineteenth- and twentieth-century pro-capitalist political leaders, who sought to "explain and justify, to themselves and the general public, the rise of corporate capitalism..." Through this argument, legislators "argued that the nation's laws, institutions, thinking, and habits must be reformed to facilitate and regulate the emerging corporate-capitalist order." People had no choice but to "adapt to natural economic evolution." The corporate capitalist economy was inevitable. It was an external force to which people responded.[25] This was a useful argument, drawing on the evolutionary cultural biases of the period, and it served the purposes of its creators. Yet, as has been noted, it is not supported by the historical evidence.

Sklar offers an alternative theorization, much better supported by the evidence. Capitalism, contends Sklar, is cultural. It is a "complex mode of consciousness"

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[25] Martin Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics* (New York: Cambridge University Press, 1988), pp. 5-6.

permeated by values and morals. It involves ideas of normal behaviour, character structure, and social hierarchy. It involves the rational calculation of cost and benefit in relationships with others. Thus, it can be and is altered by human agency. "[C]*hanges in property and market relations*," Sklar writes, are "*something that people are making happen.*" The corporate capitalist order had to be constructed. Corporate capitalism was not an external force, but a social movement, akin to populism, the labour movement, feminism or socialism, and as such, corporatism was promoted through the "organizational forms usually associated with social movements." Trade and civic associations, party politics, and reform associations emerged, with the usual associated publications and gatherings. These groups promoted the values and ideals undergirding corporate capitalist social relations, and lobbied for legislative change.[26] To fully understand the social relations, the economic relations, and in our case, the property laws of a given period, requires an understanding of the economy as a cultural construction. Here we arrive at a central premise of this dissertation: family property laws were not constructed in response to the economy. They were constructed alongside, and were integral to, the construction of the economy.

A second facet of state patriarchy analysis not supported by the evidence is its depiction of the role of 'the state.' In this analysis, the state takes on the role of mediator, implying that the state is a disinterested, neutral entity acting in society's overall interest. Yet the evidence compiled for this dissertation finds individual proponents of legislation,

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[26] Sklar, *Corporate Reconstruction*, pp. 5-10, 12-13, 15. Italics original.

self-interested political agendas, and discontinuities of purpose. In an attempt to better understand this evidence, this dissertation tests state formation theory. Sociologist Philip Abrams argues that the state is not a thing or an entity. It does not exist. It has no interests of its own. Rather, Abrams argues, 'the state' is an idea used to conceal domination by presenting it as being in "the 'illusory common interest' of a society; the crucial term being 'illusory'." The idea of the state is invoked "to elicit support for or tolerance of the insupportable and intolerable by presenting them as something other than themselves, namely, legitimate, disinterested domination." Certain groups or classes present their own interests as the state's. Through the invocation of the state's interests, class-biased social orders are made to appear neutral. Hence Abrams suggests that scholars should abandon the study of the state as a material object. But we should continue to "take the *idea* of the state extremely seriously, turning our attention to means by which the idea of the state is "constituted, communicated and imposed," a project Abrams terms the study of "politically organized subjection."[27]

Building on Abrams' theories, a broad state formation literature has emerged, which provides some helpful insights into the application of Abrams' theory, and also requires some criticism. The state formation proponents argue that the central function of state discourses is, in the words of Bruce Curtis, "the lending of legitimacy to the ultimately illegitimate domination of a class (and, one should add, of a sex and a race as well)." Following on this assertion, historians of state formation examine the cultural

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[27] Philip Abrams, "Notes on the Difficulty of Studying the State," *Journal of Historical Sociology*, vol. 1, no. 1 (March 1988), pp. 63-64, 69, 75-76, 80.

construction of forms of rule and order. Most prominently, these historians have investigated the establishment of bourgeois values and norms during the cultural revolution underlying liberal capitalism. In nineteenth-century Canada, men ranging from respectable artisans to proprietors, professionals, and large capitalists promoted "private property in the means of production; the wage relation; and the individual accumulation of capital, rational religion, and self-help." While not an economically homogeneous bloc, these men were solidly bourgeois in outlook, and they attempted to remake the world in their own image. The crucial word here, however, is *attempted.* While the state formation literature stresses that remoralization involved significant amounts of ideological work, and cross-class appeals to incorporate and appease dissident elements, it generally overestimates the capacity of the middle-class to present bourgeois interests as the interests of society.[28] The evidence does not support a depiction of middle-class men imposing their will and consciousness with great power. Rather, it upholds a sense of reformers struggling to gain some semblance of control over a volatile, chaotic, and unfamiliar society.

Capitalism, as Martin Sklar argued, is not simply an economy. It is, in the words of Corrigan and Sayer, "a regulated set of social forms of life." "'[E]conomies,'" they continue, "exist only as historical forms of civilization, and in the case of the capitalist economy state formation is crucial to their making and sustaining. Capitalism is not, and

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[28] Bruce Curtis, *True Government by Choice Men? Inspection, Education, and State Formation in Canada West* (Toronto: University of Toronto Press, 1992), pp. 5-6, 9-10, 17, 102; Philip Corrigan and Derek Sayer, *The Great Arch: English State Formation as Cultural Revolution* (Oxford: Basil Blackwell, 1985), pp. 194, 199-200.

never has been, 'self-regulating', ideologies to the contrary notwithstanding." In fact, capitalism requires particular conditions for its success. These include a specific legal environment and a state strong enough to enforce the law. The law must be rational, predictable, and stable. Moreover, the law must guarantee the security and transferability of property and the enforcement of contracts, in order to minimize the risk of economic activity and promote accumulation. The market created by these laws is policed by force, but this force is accompanied by an attempt to remoralize the populace, to have the subjects internalize the discipline and moral order required by the market. As Corrigan and Sayer have remarked, "Property and discipline are two sides of ... one coin."[29]

State formation, then, involves a cultural project of moral regulation, of habituating subjects to certain behaviours, normalizing and rendering natural bourgeois social relations. Respect for property, the values of self-improvement — sobriety, punctuality, regularity, orderliness — and routines and rituals of willing deference and obedience to superiors were all impressed upon individuals through education, institutional activity, and different forms of media. Moral regulation is a process of suppressing alternative identifications, misrepresenting us and coercing us to misrepresent ourselves. This remoralization of individuals, it must be stressed, does not replace violence as a means of coercion. Violence remains fundamental to sustaining the moral order: a "dialectic of force and will, coercion and consent ... has to be sustained, reconstructed, extended and

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[29] Corrigan and Sayer, *The Great Arch*, pp. 3, 95-96, 99, 106, 183, 186, 188, 199, 203.

generally kept up to date."[30] Recourse to force through culturally legitimate channels remains an ever-present possibility; moreover, and this is a point often overlooked by state formation theorists, it is recourse to force which most strikingly reveals the failures of remoralization.

The project of forming selves, of presenting a specific cultural order and encouraging its internalization, involves what Corrigan and Sayer refer to as a 'double disruption of identities.' First, state formation represents people as members of an illusory community, the nation. This involves the disruption of other identifications, which may include kin, clan, class, gender, ethnicity, and religion, and refocussing on a common, fictional identification. The nation, Corrigan and Sayer write, is the "master-symbol" of the cultural revolution. Through the nation, new loyalties are created, based on allegiances to a fictive community and a manufactured tradition — a false collective memory. Presenting itself as "the nation made manifest," the state claims to speak from the neutral vantage-point of society. Speaking and acting in the name of the nation allows the governing actor(s) to deny both the self-interest of what is being done and the identity of the initiator(s). 'The state' claims the role of neutral social arbiter.[31]

The second facet of the double disruption of identities is that the state individualizes, categorizes and classifies people in very definite, concrete ways. Social classifications built upon age, gender, and race are enshrined in laws, institutions and administrative

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[30] Curtis, *True Government*, p. 14, and *Building the Educational State: Canada West, 1836-1871* (London, Ontario: Althouse Press, 1988), p. 366; Corrigan and Sayer, *The Great Arch*, pp. 106, 180, 199.

[31] Corrigan and Sayer, *The Great Arch*, p. 6, 27, 29-30, 195.

routines. These descriptions appear natural, obvious and neutral. They are encouraged as self-identifications, and most insidiously, as indicators of self-worth. But they are in fact impositional claims used to restrict legitimacy to those meeting culturally prescribed standards, assign individuals specific legal rights, and organize them into hierarchical relations of power and authority.[32]

The construction of subjectivities involves a continuous process of education, inspection and enforcement. From the mid-nineteenth-century onward, liberal-capitalist states constructed educational facilities to inculcate bourgeois values in the young, the poor, and the 'immoral' of various categories. Schools, asylums, workhouses, reformatories, and penitentiaries, all with explicit behavioural modification premises, emerged to remoralize the public.[33] State inspectors, write Corrigan and Sayer, "spread like a contagion," allowing rulers to gather information about the ruled, a necessity as the social distance between rulers and ruled increased with the development of the impersonal labour market, and their geographical distance increased with the increasing centralization of political and economic power. Inspectors of factories, schools, prisons and mines, as well as police forces, provided rulers with social, political, and economic

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[32] Corrigan and Sayer, *The Great Arch*, pp. 4-5, 7-8.

[33] On schooling see, Curtis, *Building the Educational State*; for asylums, see Daniel C. Francis and C. James Taylor, "Institutions of Confinement: the Origins of Canadian Mental Hospitals and Penitentiaries," *Readings in Canadian History: Pre-Confederation*, 4th ed. (Toronto: Harcourt Brace, 1994), pp. 388-395; for workhouses, see Stormie Stewart, "The Elderly Poor in Rural Ontario: Inmates of the Wellington County House of Industry, 1877-1907," *Journal of the Canadian Historical Association*, 1992-1993, pp. 217-233; for policing see Michael B. Katz, Michael J. Doucet and Mark J. Stern, *The Social Organization of Early Industrial Capitalism* (Cambridge, Massachusetts: Harvard University Press, 1982), esp. ch. 6, "The Criminal Class: Image and Reality."

information about the ruled, as well as about the local fate of central policies.[34] Most inspectors also had local enforcement duties and authority. In British Columbia, however, the growth of an inspectorate and bureaucracy was a slow process, and the power of government sharply constrained. If remoralizing the population was a difficult, arduous and undoubtedly incomplete process in long-settled England, the limited size and extent of government must have rendered it proportionately less efficacious in British Columbia!

From an early date, British Columbia's colonial regime had placed great emphasis on the construction and administration of its legal system. It is through these legal institutions that this dissertation follows the development of official ambition and the outcome of regulatory objectives. Given the limited governmental machinery in the pacific colonies, legislation and the judicial system were central to middle-class reformers' attempts to implement their aims. Statute law — the product of legislatures — functions in conjunction with the common law and equity. But it is legislation which best reflects contemporary concerns and bourgeois interests, since legislators formulated public policies based on their ideals of a proper social order.[35] Drafting new legislation creating or recreating areas of political regulation involved the delineation of categories of persons, the assigning of statuses, and the prescription or proscription of behaviours and relationships. Since legislation did not result in the implementation of policy by fiat,

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[34] Corrigan and Sayer, *The Great Arch*, p. 125; Curtis, *True Government*, pp. 5, 11, 21, 30, 177; Allan Greer, "The Birth of the Police in Canada," *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada* (Toronto: University of Toronto Press, 1992), pp. 17-49.

[35] Falcon, "'if the evil ever occurs,'" p. 14.

it also necessitated the formulation of enforcement mechanisms and procedures, and sometimes the appointment of enforcement personnel.[36]

The Courts are the ultimate agencies of legal coercion. Historically, courts have had recourse to numerous violent sanctions including incarceration, forced labour, the inflicting of physical pain, and capital punishment. But courts are much more than this. Reflecting the desire not only to violently coerce but also to remoralize the population, courts are theatres of education. Through their arcane ritual performances, their obscure language and symbolic representations, the courts lay claim to a legitimacy derived from secret knowledge, grandeur and age. Through their public recitation of law, and attempts at the steady, repetitive enforcement of its provisions, the courts endeavour to make visible and normalize the law's classifications, its boundaries, and its behavioural demands.

Given the implications of the state formation literature, the following guidelines are adopted for the purposes of investigation and analysis. In examining the evidence which follows, this dissertation will investigate who is speaking in the name of the state, and will identify their agendas. Biographical materials and the tools of collective biography will be central to this task. Second, this dissertation argues that legislators and lobbyists were not simply responding to the economy, they were creating a liberal-capitalist nation state. Their concerns with families, and the social roles comprising them, developed within that context. Thirdly, this dissertation will give due attention to the ways in which

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[36] Curtis, *Building the Educational State*, pp. 141, 145-146, and *True Government*, 29.

legislation categorizes and regulates people. The social categories and roles created by legislation were crucial to the project of remoralizing the population; these roles could also be 'turned' so to speak, to serve as means of resistance; or they could be resisted outrightly. Following from these assertions, this dissertation will take seriously the responses of those subject to the legislation. Quite often, such responses appear parochial, ill-advised, and foredoomed to failure. But these appearances are distorted by the prism of the world we live in, a future they resisted.[37]

This dissertation has three parts, each of which is structured in a triadic format: each part outlines the political and economic context of the period, examines legislative intentions, and then delves into the administration of the legislation. Part One looks at the development and implementation of the legislative programme of the 1860s and 1870s. Chapter One examines the demographic and economic situation of the period, and outlines reform legislators' political beliefs. Chapter Two discusses the emergence of family protection and inheritance legislation in the 1860s, relating that legislation back to demographic and political nation-building concerns. Chapter Three continues this investigation, examining the development of the legislative programme in the early Provincial period through legislation granting married women independent property rights, and efforts to provide equivalent rights to the members of unsanctioned families. Chapter Four examines the implementation of the laws, focussing on judicial approaches

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[37] This sense of historical understanding is drawn from Lawrence Goodwyn, *The Populist Movement: A Short History of the Agrarian Revolt in America* (New York: Oxford University Press, 1978).

to the legislation, the individual agency exercised by those who entered the courtroom, and an emerging concern for the rights of creditors.

Part Two investigates a shift in legislative interests during the 1880s and 1890s. Chapter Five discusses the emergence of a governing coalition committed to capital accumulation and hierarchical social relations. Chapter Six chronicles the alteration and amendment of the family protection legislation of the earlier era, highlighting subsequent legislators' satisfaction with unequal class relations, and their desire to protect creditors' rights. Chapter Seven investigates increasing property ownership and entrepreneurship by married women using both case law and quantitative data to help explain these changes.

Part Three moves into the twentieth century. Chapter Eight sets the political and economic context and investigates the character of emerging social reform movements in British Columbia. Chapter Nine discusses reformers' successes and setbacks to 1915. The chapter begins with the passage of deserted wives' and illegitimate children's maintenance statutes, situating these statutes within the context of reformers' nation-building concerns, and continuing into an investigation of the legislation's practical failures. The Chapter then delves into feminist reformers' relationship with the Conservative government, and the divisive impact of reform and the women's suffrage movement upon the Conservative coalition. Chapter Ten examines the much closer relationship between feminist reformers and government after the Liberal election in 1916 through the prism of Equal Guardianship Legislation. The chapter then follows attempts to strengthen the deserted wives' and illegitimate children's maintenance legislation in the late 1910s and into the 1920s, explaining these reforms with reference

to the mothers' pension movement. The discussion concludes with an exploration of the limits of Liberal receptivity to women's aims. This topic is exmained through the prism of women's campaign for joint rights in family property, a quest which culminated in the attainment of testator's family maintenance legislation. Chapter Eleven examines the reception of progressive maintenance legislation by the police courts, using both qualitative and quantitative techniques. The use of bureaucratic reports and correspondence permits an intriguing investigation of behaviour outside the courts, permitting an assessment of the *disuse* of some of the statutes, as well as problems with enforcement. Chapter Twelve looks at the administration of the Testator's Family Maintenance Act, concluding with a discussion of judicial implementation and legislative intent. Finally, the conclusion offers an assessment of the strengths and weakness of state formation theory for legal history.

PART ONE:

THE YEOMAN DREAM

CHAPTER ONE:

THE POLITICAL AND ECONOMIC CONTEXT OF THE 1860S AND 1870S

Family property law reform in the 1860s and 1870s was largely the product of a small group of reform legislators. This chapter outlines the influence of liberal and republican beliefs on these legislators' vision of the nation, a vision which informed the changes in family property laws which followed. The leading and best-studied reform politicians in the Pacific colonies during the 1860s and 1870s, Amor De Cosmos and John Robson, were committed to the liberal ideals of individualism, equality, and progressive social and economic expansion of the colony and province. Robert McDonald and Keith Ralston write that De Cosmos "hated social, economic, and political privilege, distrusted 'monopolies' and 'incorporated companies,' and saw in ordinary people an intelligence and dignity that deserved respect." Yet, despite his criticism of the direction social and economic change was taking, De Cosmos was committed to social and economic expansion and development. He "celebrated ... 'men of action,' moral and material progress, growing population, and expanding trade.[1] He was Robert Kelley's 'typical'

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[1] Robert A. J. McDonald and H. Keith Ralston, "Amor De Cosmos," *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1990), vol. 12, p. 238-239; Margaret Ross, "Amor De Cosmos, a British Columbia Reformer," University of British Columbia, M.A. thesis, 1931, p. 52.

Victorian, taking "a simple delight in bigness and quantity — more people, longer railroads, more coal."[2]

John Robson, though rarely united with De Cosmos politically, held similar views. Robson consistently advocated responsible government, liberal institutions and the "moral and intellectual improvement of the people." For Robson, public education was central to progress. He wrote that education provided "the best safeguard against crime, indolence, poverty [and] intemperance" and believed it incumbent upon "every man, whether he has children of his own to educate or not, to aid in placing within the reach of every child in the community a liberal and wholesome education." Economically, Robson advocated rapid growth and development, agitating for the promotion of immigration, land on easy terms for settlers, and improved transportation and communication infrastructure.[3] On the issue of trade policy the two men disagreed, but this was the exception that proved the rule. De Cosmos was decidedly protectionist, promoting both tariffs and subsidies to nurse the young industries of the region. Robson favoured a liberal free trade tariff policy. Yet, while favouring different means, both men believed that their chosen policy would lead to economic growth. They shared the liberal assumption that material progress — an ever-expanding production and consumption of

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[2] Robert Kelley, *The Transatlantic Persuasion: The Liberal-Democratic Mind in the Age of Gladstone* (New York: Alfred A. Knopf, 1969), p. 9.

[3] Patricia E. Roy, "John Robson," *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1990), vol. 12, pp. 914, 917; Ivan Earl Matthew Antak, "John Robson: British Columbian," University of Victoria, M.A. thesis, 1972, pp. iii, 86.

material goods — was inextricably linked to demographic, social, moral and political progress.

Eric Hobsbawm writes that for nineteenth-century liberals, the apogee of all forms of progress was the nation-state: "the development of nations was unquestionably a phase in human evolution or progress from the small group to the larger, from family to tribe to region, to nation and, in the last instance, to the unified world of the future."[4] The progressive, evolutionary, and competitive mentalité of the nineteenth-century, a mindset pre-dating and influencing Darwin,[5] fueled nation-builders like Robson and De Cosmos. If social, economic, and political progress demanded and produced increasingly large societies, then small, uncompetitive societies and nations could not be sustained. As sometime reform politician, judge, and political analyst Robert Sullivan warned Canadians in 1848, "no country, no community, can with safety be stationary." He continued ominously, "To improve with the improving, to advance with the advancing, to keep pace with the foremost, or to sink into contempt and poverty, or what is worse, into slavery and dependence, seems to be the fate of nations."[6] The society which failed to

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[4] Eric J. Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality*, 2nd ed. (New York: Cambridge University Press, 1992), p. 38. For a detailed description of nationalism during this period, see pp. 14-45 *passim*, esp. pp. 38-41.

[5] In this context, the reader would be well-advised not to assume that nationalist aspersions were motivated by Darwinism. Steven Shapin and Barry Barnes suggest in "Darwin and Social Darwinism: Purity and History," *Natural Order: Historical Studies of Scientific Culture*, ed. Barry Barnes and Steven Shapin (London, 1979), that Darwin's theories were a manifestation of a wider cultural phenomenon which sought to account for natural phenomena of sociological, historical, and scientific interest "in nonanthropomorphic, secular, uniform, nonteleological, and materialist terms."

[6] Laurence S. Fallis, Jr., "The Idea of Progress in the Province of Canada: A Study in the History of Ideas," *The Shield of Achilles: Aspects of Canada in the Victorian Age*, ed. W. L. Morton (Toronto: McClelland and Stewart, 1968), p. 171. For background on Sullivan see Victor Loring Russell, Robert Lochiel Fraser, and Michael S. Cross, "Robert Sullivan," *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1985), vol. 8, pp. 845-50.

advance to nationhood was doomed either to subjugation by or assimilation into stronger, more vibrant, progressive societies.[7] For the British Colonies in the Pacific Northwest, stagnancy would likely lead to incorporation into the United States. To remain 'independent' adjuncts of the British Empire, the colonies had to be enlarged. They had to attract population, build infrastructure, and promote trade.

Robson, De Cosmos, and a host of their fellow colonists believed that the wealth, growth, and development of the British colonies would best be achieved in a free-market economy. Influenced by the rhetoric of classical, or laissez-faire liberalism, they believed that each person's actions are motivated by rational self-interest and directed toward the pursuit of personal gain. Based on these assumptions, liberal colonists argued that if individuals were allowed to realize their self-interest, the colony's total economic production would increase. In *Making Law, Order, and Authority in British Columbia, 1821-1871*, Tina Loo writes

> European British Columbians were concerned first and foremost with their economic futures — that, after all was their raison d'etre, as well as the colony's — and with the colony's economic development, and they saw the law as a means to secure both. Their notions of the law's role in doing so and, by extension, the role of government ... were shaped by the discourse of laissez-faire, which was ascendant in Britain at the colony's creation in 1858.

Laissez-faire did not mean an absence of governance. In the liberal order, the role of law was to create a secure, predictable, rule-bound arena, within which economic transactions could be conducted, and when necessary, enforced.[8] This was especially

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[7] See Hobsbawm, *Nations and Nationalism*, p. 39.

[8] Tina Loo writes, "even at the height of laissez-faire in the mid-nineteenth century, the 'free market' was the product of self-conscious construction and regulation on the part of the state rather than a natural

important in a growing colony, where the influx of new immigrants meant that society was loose, transient, and impersonal: few individuals knew one another; even fewer knew whether they could trust one another. Law had to fill the gap. Individual colonists engaged in the quest for spoils, reform-oriented politicians, and metropolitan journalists pushed the colonial government and judiciary to create conditions favourable to impersonal individual economic enterprise. By making the rules of exchange clear, predictable, rational, and impartial, by ensuring the security of property, and by enforcing contracts, these liberal legal reformers believed they could minimize risk to the individuals involved and promote economic activity.[9]

If individualistic economic expansion was what British Columbian reformers wanted when they demanded a liberal legal system, it was also what they got, although for reasons perhaps more geographical than legal. Almost from the outset of the goldrush, rapid industrial growth and capitalist productive relations prevailed in British Columbia and Vancouver Island. The course of development had been different in the eastern colonies. There, following the fur trade, colonial economies went through distinct phases of economic development: agriculture, small-scale artisanal production, water-powered mills, and beginning in the 1850s and 1860s, factory production. "British Columbia," writes John Lutz,

> skipped these stages and large-scale factory production arrived with settlement. From the start, the manufacturing industry developed as a composite of small-scale,

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phenomenon." See *Making Law, Order and Authority in British Columbia, 1821-1871* (Toronto: University of Toronto Press, 1994), p. 64.

[9] Loo, *Making Law, Order and Authority*, pp. 3-4, 9-10, 57, 101.

> traditional workshops and large modern factories representing the newest forms of industrial organization.[10]

The early economic history of the Pacific colonies is usually assumed to have involved only staples extraction. But manufacturing and staples extraction developed side by side. Since the Pacific colonies lacked efficient and inexpensive transport to manufacturing centres in the United States, central Canada, or Europe, they were forced to develop a complex, mature economy in a short period of time.[11]

Gold was the colonies' major staple export from 1858 until the 1880s. A succession of overlapping staple export booms followed from the mid-1860s onward, including canned salmon, lumber, seal pelts, and coal. At first, supplies for goldminers were imported from San Francisco. But with little return freight — gold, the major export, was low-bulk — most shipments of supplies had to bear the costs of an empty return trip; so transport costs were high. High enough, in fact, to provide natural protection from outside competitors to local manufacturers producing consumer goods and industrial supplies. Sawmills, gristmills, breweries, bakeries, blacksmiths, clothiers, and other primary and secondary manufacturing industries developed quickly. By 1860, Victoria had developed a broad array of industry; on a per capita basis, the city was as industrialized as Hamilton, Canada West. New Westminster's manufacturing sector saw steady growth after 1870. As new resource extraction industries developed, local manufacturing developed to serve

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[10] John Sutton Lutz, "Losing Steam: Structural Change in the Manufacturing Economy of British Columbia, 1860-1915," University of Victoria, M.A. thesis, 1988, pp. 67-68.

[11] Ibid., pp. 57, 70.

them too, through backward, forward, and final demand linkages: local manufacturers equipped resource extraction industries, produced finished goods from their products, and satisfied workers' consumer demands.[12]

The manufacturing concerns that developed were large and highly capitalized. "Since 1860," writes John Lutz, "manufacturing has been 'big business' in British Columbia."[13] In relation to secondary industry elsewhere in Canada, factories and craftshops in British Columbia's manufacturing sector were larger on average in terms of capital investment and number of employees, and on par in terms of output.[14] With a large manufacturing sector, the prominence of resource extractive industries, and the relative absence of agriculture, British Columbians were much more likely to be involved in wage- or piece-work than their counterparts in the eastern colonies.[15] By the mid-1860s, as placer deposits became rare, even gold mining required large capital outlays. The easy gold was gone, and along with it went the age of the independent free miner. Deeper subsurface deposits required shafts and cribbing, and access to river-bottom placer gold meant

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[12] Ibid., pp. 45, 47-48, 50-53, 57-59, 60, 67. The first available statistics, from 1880-1881, confirm this picture. British Columbians were engaged in manufacturing at a rate nearly equal to Ontario and Quebec. By 1890-1891, 11.75 per cent of British Columbia's population was employed in manufacturing, compared to under 8 percent in Ontario and Quebec. These statistics include the fifty percent of the population that was native, who may have had different participation rate in manufacturing labour. Ibid., pp. 73-74 (Table 8).

[13] Ibid., p. 154.

[14] Ibid., pp. 69, 72, 73 (Tables 4, 6, and 7).

[15] Ibid., p. 76.

constructing wing-dams. Most could not afford the cost, and ended up labouring for the few who could.[16]

Cole Harris writes that the social effects of capitalism and British Columbia's alien environment on immigrants were extensive, paring back immigrant cultures from their original complexity, and creating a simplified, polarized colonial society. Harris builds from the work of Frederick Jackson Turner, Edward Gibbon Wakefield, and Louis Hartz,[17] arguing that two factors led to a critical simplification of immigrant culture in British Columbia. First, the environment "shaped ... society's terms of access to land — its relationship with property." The main effect was on the class structure. Where land was abundant and inexpensive, a niche was opened for family farms and a broad property-owning class. Where resources were plentiful, and within reach of markets, capital and labour made their appearance. Second, Harris argues that in the new environment, many ideas, life- and work-ways were decontextualized and irrelevant. People had left complex social environments, arriving in small societies dedicated solely to the extraction, processing, and transportation of resources. In this new environment,

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[16] Margaret A. Ormsby, *British Columbia: A History* (Toronto: Macmillan, 1958), pp. 183, 212; Roy, *A White Man's Province: British Columbia Politicians and Chinese and Japanese Immigration, 1858-1914* (Vancouver: University of British Columbia Press, 1989), p. 8.

[17] For Turner and Wakefield, the decisive factor in changing migrant societies was an abundance of cheap land and the great 'levelling' of society it produced; for Hartz, the transfer of ideologies was crucial. Hartz believed that only fragments of societies and cultures migrated to new lands, and the ethos of the fragment became the overall ethos of the new society. Cole Harris, *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change* (Vancouver: UBC Press, 1997), pp. 254-256.

many elements of old world cultures fell out of use: European and Asian cultures, while not lost entirely, were greatly simplified.[18]

Harris's observations, with some modification, provide useful insight into the society emerging in the Pacific colonies. Agriculture throughout the nineteenth century was a small, albeit significant, sector of the economy. While in other parts of Canada forty-five to sixty-four percent of the male workforce was engaged in agriculture, the proportion in British Columbia was thirteen percent. In a few areas farms prospered. Generally, they were marginal, small-scale, and relatively unspecialized family-based enterprises. More than eighty percent of all farms in British Columbia were owner-occupied. Specialized commercial agriculture was slow in arriving. Clearing land in forested areas was expensive, and localized agricultural knowledge was poor. Farmers were uncertain about which crops were suited to the environment. Moreover, markets were uncertain.[19]

Conversely, capital poured into resource exploitation, opening corridors of transportation and communication into remote areas. Here was the engine of settlement. In the work camps of British Columbia, the range of employment was limited. The skills required were of a select range. Large facets of previous workplace and domestic culture became irrelevant or simply ceased to exist. As Harris explains, "To be a placer miner in a remote camp suddenly assembled in what miners took to be wilderness was to acquire a few new ways, and leave an enormous amount behind. So it was in hard-rock mining and

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[18] Harris, *The Resettlement of British Columbia*, pp. 254-256.

[19] Jean Barman, *The West Beyond the West: A History of British Columbia* (Toronto: University of Toronto Press, 1991), pp. 114-115; Harris, *The Resettlement of British Columbia*, pp. 86, 220, 222, 244-245.

logging." In the process of reskilling, male workers with vastly different ethnic and cultural backgrounds tended to identify with and be identified by their novel new occupations. Former ways of life — rich cultures — were often transformed into overt, sparse, symbolic ethnicities. If the process was one of simplification, it was also one of polarization. "[O]verall," he writes, "there was a tendency for the workplaces of the province to emphasize the values of the bourgeoisie and the working class. The cleavage between capital and labour became a dominant axis of the social structure of the immigrant society..." Work camps were the most polarized. In the small resource towns, a middling element of shopkeepers, hoteliers, and the like sprang up to attend to the needs and wants of industry and industrial workers; yet this minority fragment lacked the power to assert its own interests, and tended to side with one faction or the other. Only in the cities, where the occupational and social structures were much more diverse, were conscious class antagonisms less pronounced.[20]

Such were the economy and society produced by laissez-faire liberalism. Yet they failed to satisfy reformers' aims. While liberalism's theoretical economic equality of opportunity appealed to most Pacific northwestern reformers, the social effects of capitalism and acquisitive individualism did not. They, like republicans, clear grits, and British radical Liberals, idealized property-based democracy and economic equality for yeomen smallholders, artisans, tradesmen, merchants, and entrepreneurial

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[20] Harris, *The Resettlement of British Columbia*, p. 257-261, 265-266.

businessmen.[21] The prospect of industrial monopolies, widespread wage labour, and a large landless proletariat was abhorrent to them. Capitalist productive relations divided tasks, stripping workers of their individual competency, and capitalist ownership of the means of production divested them of their economic independence: "the general uneasiness about the new economic order" among liberals and republicans, writes Christopher Lasch, "found its most striking expression in the nearly universal condemnation of wage labor."[22]

Liberal and republican theorists and political leaders from Thomas Jefferson to John Bright advocated the use of legislation to stimulate the growth of a hardy and independent class of artisans and yeomen.[23] The independent producer was their idealized masculine form. Independent producers were believed to possess a social and intellectual autonomy absent in the wage-earning proletariat, and essential to establishing an equalitarian, democratic society. According to Paul Goodman, yeomen and master mechanics were idealized as the social base of the republican political order in the United States. Christopher Lasch writes that "Americans took it as axiomatic, a cherished

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[21] This ideal was likely self-reflective. In his landmark study *Pollbooks: How Victorians Voted*, John Vincent suggested that Liberal voters in England were small producers and small property-holders: craftsmen, individual farmers, retailers and the like. Robert Kelley perceptively notes that this was a similar profile to the Jacksonian Democrats in America. See *The Transatlantic Persuasion*, p. 46.

[22] Christopher Lasch, *The True and Only Heaven: Progress and its Critics* (New York: W. W. Norton, 1991), p. 203.

[23] Thomas Jefferson believed that the "true pursuit of the nation lay in agriculture, as much for its moral as for its economic results." Adam Smith likewise maintained that a healthy nation required a substantial agrarian population. Kelley, *The Transatlantic Persuasion*, pp. 68, 128; John Vincent, *The Formation of the British Liberal Party, 1857-1868* (London: Constable, 1966), pp. 176-177; Eugenio F. Biagini, *Liberty, Retrenchment and Reform: Popular Liberalism in the Age of Gladstone, 1860-1880* (Cambridge: Cambridge University Press, 1992), pp. 87-88.

article of political faith, that freedom had to rest on the broad distribution of property ownership."[24] Many English liberals, influenced by republican traditions, shared this belief: in England, it was widely held that the United States and Switzerland were structurally democratic because of their widespread property ownership.[25]

The idealization of the independent producing property-owner went deeper than a concern for material independence. It was rooted in an appraisal of character. Eugenio F. Biagini writes that John Stuart Mill "was committed to peasant proprietorship on moral and political grounds." Mill

> praised the homestead farmer as the model citizen.... While the factory proletarian was trained to work as part of a machine, the farmer was employed from childhood in an activity fostering independent thinking and creativity, and was free from the anguish and crushing misery that affected the factory worker. [26]

The history of generalized opposition to the division or specialization of labour, based on its detrimental effect on individual character formation, pre-dates the industrial revolution among republicans. Republicans despised professional armies and politicians, which they believed "undermined self-sufficiency and made men passive and dependent."[27] Specialization, republicans believed, "would undermine the social

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[24] Paul Goodman, "The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880," *Journal of American History*, vol. 80, no. 2 (September 1993), pp. 473-474; Lasch, *The True and Only Heaven*, p. 204.

[25] Biagini, *Liberty, Retrenchment and Reform*, p. 88. See also Ibid., pp. 81-83, where Biagini documents the influence of republicanism on popular British Liberalism. In British Columbia, where a substantial proportion of the population was American or familiar with American political traditions, knowledge of republicanism, or at least the quest for broad democratic institutions, was widespread.

[26] Ibid., p. 86.

[27] Lasch, *The True and Only Heaven*, p. 177.

foundations of moral independence."[28] The complete, competent citizen was the well-rounded citizen, and society should be organized to promote overall individual competency. For liberals and republicans, only when the mass of men were economically, socially, and intellectually independent, could a government supported by and responsible to the populace, regulating all equally rather than favouring the privileged few, be instituted. For the people to bear the burden of self-government meant being able to support themselves and defend their interests.

In the face of emerging capitalist productive relations, British Columbian liberals moved to establish the preconditions necessary to develop an independent producer economy and electorate. Economically, they turned to the idealized agrarian past. Both Robson and De Cosmos were convinced that the foundation of colonial prosperity and democracy lay with settlement of the land and a stable agrarian economic sector. For Robson this meant discouraging speculation, and reserving arable land to the government to provide "a free homestead to every bona fide settler." De Cosmos, foreseeing "that British Columbia[n] settlement must build on a more diverse base," also advocated an economy of small-scale industrial enterprise. He was adamantly opposed to the wage relation, opining that "the wealth of the rich manufacturer is simply nothing more nor less than the profit that he has made from the labor of the artisans employed by him." To forestall this parasitism, and impede the process of proletarianization, De Cosmos

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[28] Ibid., p. 195.

suggested that statesmen were duty-bound to encourage the development of artisans' cooperatives.[29]

Politically, both reform leaders lobbied intensively for the implementation of responsible government. Given their preference for an independent commodity producing electorate, neither seems to have advanced the cause of universal suffrage early in their careers. In the 1860s, De Cosmos promoted a small property qualification to restrict the vote to industrious, socially stable individuals with a stake in the community's future. Nonetheless, white men were to have a chance to improve themselves morally and economically, and to rise in the social scale. Liberals envisioned a meritocratic colony, and subscribed to Samuel Smiles' self-help doctrine, contending that "it was possible for all [white] men to improve their condition, through their own efforts and personal conduct."[30]

Encouraging the patriarchal family as a stable social institution had a threefold significance in the liberal nation-building agenda, reflecting desires for progress, order, and individual equality, all of which were threatened by the social relations of laissez-faire capitalism. First, demographically, nation builders needed families to establish a permanent and expanding population base; second, families were associated with civilization and an orderly, stable society; and third, liberals saw family protection and regulation as means to reconcile the emerging liberal laissez-faire economy with the

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[29] Roy, "John Robson," pp. 914-915; McDonald and Ralston, "Amor De Cosmos," p. 238. For the editorial on cooperatives see *Daily Standard*, 1 November 1871.

[30] T. A. Jenkins, *The Liberal Ascendancy, 1830-1866* (London: Macmillan, 1994), p. 119; Antak, "John Robson: British Columbian," p. 211; McDonald and Ralston, "Amor De Cosmos," p. 238.

envisioned property-based independent producer society. To deal with the first, nation builders encouraged family life to promote population growth. Bachelors and married men who separated from their homes and families to earn a living in the colonies did not make for a stable, enduring population. Single men often left the Pacific colonies after a few years' sojourn. Even when they stayed, men alone did not make for a reproducing populace. Indeed, many were alone. Throughout the nineteenth century the non-aboriginal male to female ratio was 3:1. In some areas of the interior it was 10:1.[31] The Anglican Church promoted the immigration of two shiploads of female immigrants in 1862-63, but to little practical effect. By the late 1860s, the sex imbalance still concerned Lieutenant-Governor Frederick Seymour, who appointed John Robson to head a committee to devise "a system of female immigration."[32]

Such efforts were commonplace in colonial settings and had a specific agenda: Micheline Dumont writes that in colonial New France, the immigration of the filles du roi was encouraged because

> Women were a stabilizing element in a social unit made up primarily of bachelors. Where there were women there would eventually be houses and children — in other words, a future; a reason for building towns and schools and writing laws; a motivation for clearing land, for growing crops and for establishing farms.[33]

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[31] Barman, *The West Beyond the West*, p. 100; Adele Perry, "'Oh I'm Just Sick of the Faces of Men': Gender Imbalance, Race, Sexuality, and Sociability in Nineteenth-Century British Columbia," *BC Studies*, nos. 105-106 (Spring / Summer 1995), pp. 36-37.

[32] Barman, *The West Beyond the West*, p. 90; Antak, "John Robson: British Columbian," p. 69.

[33] Micheline Dumont et al. [The Clio Collective], *Quebec Women: A History*, trans. Roger Gannon and Rosalind Gill (Toronto: Women's Press, 1987), p. 41.

The importation of 'white' Anglo-Saxon women is indicative of the close connection in the nineteenth-century psyche between race and nation. Eric Hobsbawm writes that nineteenth century nationalists used race and nation "as virtual synonyms, generalizing equally wildly about 'racial'/'national' character, as was then the fashion."[34] In British Columbia, Adele Perry contends that white women were considered crucial to nation-building because "they would raise the moral tone of the white, male-dominated society, quell the rapid development of a mixed-blood community, and ensure that British law, mores, and economic development flourished."[35] Reproducing European families and a permanent and progressing nation were generally seen as interdependent. Thus, promoters of the family on Vancouver Island and in British Columbia attempted to persuade those who made fortunes in the colony to stay and marry; and to attract single women and entire families to immigrate. While these goals appealed to specific aspects of the nationalist liberal agenda, most notably the ideology of progress — families meant population growth and the retention of capital within the colony, to be reinvested in the economy as patriarchs tried to secure a future for their progeny — they were not unique to liberals.

Neither was the idea of using women to stabilize social mores. Edward Gibbon Wakefield, designer of the conservative, paternalistic and hierarchical system of

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[34] Hobsbawm, *Nations and Nationalism*, p. 108.

[35] However, antipathy towards mixed-blood marriages was not uniform. Discussion of the Legitimacy Act (below, Chapter 4) seems to indicate that opinion regarding inter-racial marriages was mixed, and dependent on historically specific contexts. Perry, "Sick of the Faces of Men," p. 34.

colonization implemented on Vancouver Island under Hudson's Bay Company rule,[36] wrote that women were "moral" agents in a new society, citing "[a]ll the evils which in colonization have so often sprung from a disproportion of the sexes."[37] Yet the stabilization of society assumed a new urgency in the age of liberal capitalism, because acquisitive individualism seemed to pose novel dangers to the social structure. Many liberals believed that laissez-faire individualism threatened the existence of social and familial ties. If everyone was pursuing his (or her) own rational self-interest, what would prevent competition from escalating to the point where self-gratifying desire and instinctual self-preservation over-ruled altruism, morality, and social cooperation? There were few answers. Certainly, separate spheres ideology and the liberal preoccupation with public education presented means of protecting and influencing the character of future generations in their formative years, and instilling the proper virtues in them. But what of the multitudes of single men in the colony, immersed in the 'public' world of competitive business and rough culture? Liberals hoped that by encouraging family life they could tame otherwise unregulated desire. The "obligation to support a wife and children," writes Christopher Lasch, "would discipline possessive individualism and transform the potential gambler, speculator, dandy, or confidence man into a

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[36] On Wakefieldian colonization on Vancouver Island see Richard Mackie, "The Colonization of Vancouver Island, 1849-1858," *BC Studies*, no. 96 (Winter 1992-93), pp. 3-40.

[37] Perry, "'Sick of the Faces of Men,'" p. 32.

conscientious provider."[38] Acquisitive individualism would be turned toward social reproduction, and in the process, eradicate the evils of the bachelor populace.

The family reformers envisioned was manifestly inspired by the producer ideology: it was to be economically and politically independent. To prevent capitalism's volatile and impersonal productive relations from undermining reproductive priorities, and to inhibit the process of proletarianization, legislators attempted to provide families with a stable property base. They introduced legislation providing means to exempt a portion of the independent producer's real and personal property from debt liability to protect him and his family from the ravages of debt and destitution. Exemption legislation, however, was not solely a reaction against the free market economy. It was also intended to promote economic activity by encouraging individual patriarchs to participate in the economy by reducing the personal and familial risks involved. Moreover, liberal legislators also attempted to encourage the growth of the independent producing class over the long term. They altered the laws of succession to encourage social equality by eliminating the tendency of inheritance laws to reproduce class privilege across generations. By abolishing primogeniture, and by allowing illegitimate children to inherit, liberals hoped to put more of the population on an equal footing with regard to property. As will become evident, liberal legislation was inspired, sometimes quite overtly, by the more egalitarian and individualistic aspects of liberal social ideology.

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[38] Lasch, *The True and Only Heaven*, p. 59.

The new social role of the family effected significant changes in its internal organization and power structures. The ideological segregation of the domestic and market spheres, and the increased emphasis placed upon the family's function of morally and demographically reproducing the population, led to increased social responsibilities for married women. Recognition of these new responsibilities resulted in new legal rights, and a corresponding weakening of patriarchy. At the same time, patriarchy was being attacked on a second front. The primary premises of liberalism — individualism and equality — were ideals intellectually compatible with the emerging and anti-patriarchal Woman's Rights movement. As Lee Holcombe has written, in demanding reform of their legal position, "feminists of the nineteenth century were fortunately not battling adverse elements. Rather, they were identifying themselves with some of the most important intellectual themes of the period." Liberals identified with the Woman's Rights movement because both movements assigned supremacy to "life, liberty, and property — and they condemned all social institutions that infringed upon those [individual] rights."[39] Thus, some liberals began to question the legitimacy of traditional family structures. Others, however, steadfastly maintained that the domestic and public spheres were suited to different varieties of social organization, and based this position on an assumption of masculine supremacy: for these liberals, the public sphere was fraternal; the private sphere was undoubtedly patriarchal. Their differing conceptions of the scope and applicability of egalitarian individualism caused deep ideological rifts

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[39] Holcombe, *Wives and Property*, p. 5.

among liberals; and the conflicting interplay of the ideologies informing public and private spheres, pitting patriarchal domination against egalitarian individualism, are apparent in the ensuing legislation. Women's political and property rights were at once expanded, and yet the resistance of social conservatives meant that these new rights remained constrained by women's social role, as defined by their marital status. In the process, the family was reinforced *and* began to feel the initial effects of the liberal individualism which would ultimately render it a much looser form of social organization.

CHAPTER TWO:

FAMILY PROTECTION IN THE 1860S

Vancouver Island experienced great economic volatility during the first half of the 1860s. During this period, legislators enacted several pieces of legislation designed to protect families from destitution and retain them within the colonies. Yet the debates surrounding this family protection legislation point to additional intentions. Agitation for several inter-related pieces of legislation in the mid-1860s indicates a desire to promote widespread male property ownership. This chapter follows the development of family-oriented debtor protection and inheritance measures, through newspaper accounts of the debates and reformers' editorial commentary, tracing the influence of reformers' national vision of a propertied male electorate upon the formulation of family property rights.

In 1862, the Pacific colonies' economies were generally perceived as good but volatile. Merchants' and manufacturers' fortunes fluctuated with the mining economy in the mainland colony as they became caught up in the web of commercial credit necessary to get supplies quickly into the interior. When the diggings failed, or supplies were lost or damaged in transport, businessmen and their creditors suffered serious repercussions, as did miners. The nature of the early mining industry meant that the population was highly transient. Those who came to reap the harvests of the Fraser and Cariboo gold rushes moved on just as quickly when the prospects faltered, as they often did. The capital-

intensive requirements of the deep deposits in the Cariboo frustrated the ambitions of many individual miners who lacked sufficient resources. Miners who failed to earn a decent living, much less a fortune, moved to new areas or left the colonies. Those in debt, both merchants and miners, "skedaddled" across the Puget Sound to avoid imprisonment. In the wake of this economic instability, writes Constance Backhouse, Vancouver Island was undoubtedly left "with a large number of abandoned wives and children."[1]

The common law granted a husband complete control of his wife's property and earnings upon marriage. Her property rights could only be restored by the termination of the marriage — and access to divorce was severely restricted.[2] This lack of property rights posed great difficulties for a woman abandoned by her husband. While the common law granted her the right to pledge her husband's credit for necessaries, this right was ineffective: few merchants were willing to extend credit which was unlikely to be recovered.[3] Moreover, an abandoned wife could not legally contract or obtain credit on her own account, serious impediments to securing a livelihood; and should she experience a modicum of success, her husband could return at any time and seize her property.

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[1] Backhouse, "Married Women's Property Law," pp. 218-219. Credit extension is documented in Loo, *Making Law, Order, and Authority*, p. 60. Jean Barman overviews the goldrush economy in *The West Beyond the West*, pp. 72-98 *passim*, esp. 72-73.

[2] Backhouse, in *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women's Press, 1991), p. 189, writes that British Columbian courts did not claim the right to grant divorces under the British Matrimonial Causes Act until 1877. Prior to this, then, divorce would only have been available through an act of the British, and later Canadian, Parliament.

[3] Backhouse, "Married Women's Property Law," p. 214.

To remedy these conditions, David Babington Ring introduced "An Act to protect the Property of a Wife deserted by her Husband" to the Vancouver Island House of Assembly in early 1862. Ring described desertion as a masculine moral failure, announcing that he was motivated "by a desire to protect wives who were so unfortunate as to have drunken, vagrant husbands ... and it was with a desire to secure to the wives their hard earned property that the bill was introduced."[4] A letter to the Victoria *British Colonist* from one of Ring's constituents in Nanaimo questioned the need for the act "in [a] country where women are so scarce," indicating the belief that the scarcity of women in the colony would result in better treatment by their husbands.[5] Ring, however, noted that "Two or three instances of the kind had recently come to his notice".[6] Indeed, the first case heard under the act involved residents of Nanaimo.[7] Moreover, a cursory examination of the *British Colonist* in 1862 and 1863 reveals at least seven brutal spousal assault cases, some of them repeated.[8] The assumption that a scarcity of women would result in their better treatment was sadly mistaken.[9]

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[4] *British Colonist*, 10 May 1862.

[5] *British Colonist*, 27 May 1862.

[6] *British Colonist*, 10 May 1862.

[7] British Columbia, Supreme Court, Register of Orders Protecting the property of a Wife deserted by her husband, British Columbia Archives and Records Services [hereafter BCARS], C/AB/30.3D, p. 4.

[8] *British Colonist*, 18 April 1862; 9, 12 May 1862; 4 Nov 1862; 1, 2 January 1863; 3 Mar 1863.

[9] In most of the cases, the husband was characterized as 'drunken.' Alcoholism and abuse seem to have been connected and relatively frequent occurrences. However, it is unlikely Ring's bill would have provided any remedy to the victims of such assaults unless their husbands actually deserted them. In two of the cases, the wives later petitioned the Magistrate to release their husbands. It is possible that economic need on the part of the wives played a role in these cases. Having their husbands in jail would have reduced their household income. In one case, however, the husband and wife agreed to separate, and here the act may have applied.

Ring's bill derived from a section of England's 1857 Matrimonial Causes Act.[10] As introduced on Vancouver Island, the bill permitted a deserted wife to apply to the Chief Justice or a Police Magistrate for an order of protection. The protection order had two effects: it defined the wife as a *feme sole*, allowing her to hold property, contract, sue and be sued, as if she were a single woman; and it protected her property from seizure by her husband or his creditors. During the continuance of the order, a husband was relieved of all liability for his wife's actions.[11] Constance Backhouse asserts that the bill was part of a wave of protective legislation designed "to provide temporary relief for families in crisis." Women's autonomy was not at issue.[12] The act's provisions permitted certain women, thrust outside the boundaries of 'normal' family relations, to assume provisional head of household status in order to support their families. If their husbands failed to fulfill their proper masculine role, abandoned wives were permitted at the court's discretion to have independence in financial relations. Of course, this was in the government's interest: self-supporting abandoned women did not require public funds. In 1862, the strain on government finances was severe: Victoria's municipal council was having difficulty meeting the relief needs of unemployed miners returning from the Cariboo.[13]

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[10] Backhouse, "Married Women's Property Law," p. 218; Holcombe, *Wives and* Property, p. 103.

[11] British Columbia, *The Laws of British Columbia, Consisting of the Acts, Ordinances, & Proclamations of the Formerly Separate Colonies of Vancouver Island and British Columbia, and of the United Colony of British Columbia.* By Authority Compiled and Published by the Commissioners Appointed under 'The Revised Statutes Act, 1871' (Victoria: Government Printer, 1871), pp. 54-55.

[12] Backhouse, "Married Women's Property Law," p. 221.

[13] Falcon, "'if the evil ever occurs,'" p. 27-28.

Concern over the morality of abandoned wives was evident in the instructions provided to the judiciary. In order to receive a protection order, a wife had to satisfy the court that she had been deserted "without reasonable cause." What constituted reasonable cause was not defined specifically, and one can only surmise that the intended subtext was that women of unchaste or immoral character were not entitled to the law's protection; nor were children in their custody.[14] Concern over the morality of destitute women was also evident in a provision of the act stipulating that only property gained by a woman's "own lawful industry" would be safeguarded. Paulette Falcon theorizes that the intention of this provision was to encourage women to "earn a 'respectable' living" rather than take up an illegal occupation or become entirely dependent on public charity.[15] Ring, it would appear, was only interested in protecting virtuous and industrious women when husbands abandoned their patriarchal obligations. He was careful in ensuring his measure did not aid those he perceived of as immoral. Nonetheless, if the situation warranted it, he favoured the termination of marital relationships, and was willing to give wives the power to petition for divorce. Along with the Deserted Wives Act, Ring had introduced a divorce bill.[16] Presumably, the divorce

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[14] The text following "without reasonable cause," states "and that the Wife is maintaining herself by her own industry or property" and would prevent the wife from gaining a protection order if she was being supported by another man. As such, it seems to support this interpretation. See British Columbia, *Laws of British Columbia*, pp. 54-55.

[15] Falcon, "'if the evil ever occurs,'" pp. 25, 28-29.

[16] James E. Hendrickson, ed., *Journals of the Colonial Legislatures of the Colonies of Vancouver Island and British Columbia, 1851-1871*, 5 vols. (Victoria: Provincial Archives of British Columbia, 1980), vol. 2, p. 459; Victoria *British Colonist*, 4 August 1862.

measure, like his deserted wives legislation, was based upon Britain's 1857 Matrimonial Causes Act, and restricted the right of divorce to petitioners able to show cause: those whose spouses had committed some moral breach. Given the controversy which emerged over the Deserted Wives Act, Ring did not press the passage of his divorce bill.

The penalty for interfering in the court-ordered property rights of deserted wives indicates the firmness of the Legislature's resolve in providing them the economic independence necessary to raise their families: a delinquent husband or his creditors wrongfully seizing a wife's protected property could be sued for the restoration of that property plus a sum equal to twice its value.[17] Moreover, on Vancouver Island, legislators recognized the need for a quick response: under British law, a protection-order could not be issued within two years of a desertion; Vancouver Island required no waiting period, and a deserted wife could quickly gain financial independence.[18] Still, while allowing deserted wives to assume provisional headship status, the legislation also valued the patriarch's role in the family highly, and allowed the husband to apply independently to have the protection-order rescinded. Hence, a married woman's financial (and thus in a large measure, personal) independence was out of her hands, subordinated to the state's reproductive interest in the family.

Debate over the bill centered on the issue of fraud. As initially drafted, Ring's bill followed English precedent, creating retroactive protection orders which extended

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[17] British Columbia, *Laws of British Columbia*, p. 55; This clause appears also in the English 1857 Matrimonial Causes Act. See Holcombe, *Wives and Property*, p. 239.

[18] Holcombe, *Wives and Property*, p. 172; British Columbia, *Laws of British Columbia*, p. 55.

protection to all property and earnings acquired by a wife following desertion. A wife could apply several weeks, months or years after a desertion to protect property she had acquired in the interim. In the House of Assembly, George Hunter Cary objected to this provision, arguing "that there might easily be a collusion between a husband and a wife in such a matter." This was a legitimate fear given that Ring had omitted the two-year waiting period for an order. Apparently, Cary feared that husbands delinquent in their accounts would have their wives petition for a backdated protection order in order to shield property from the husband's creditors. If the protection applied only to property acquired after the issuance of a protection order, he believed it would be more difficult to use for fraudulent purposes. The House of Assembly agreed and amended the bill, making orders effective from the date of issuance.[19] Thus, the ability to gain a protection order immediately following desertion came at a cost: the order was not retroactive. Other clauses also appear to have been included to prevent fraud: one stipulated that the court had to be "satisfied of the fact of such desertion" before issuing an order, indicating that the circumstances should be investigated thoroughly; another allowed the husband's creditors to apply to have a protection order rescinded.[20]

How necessary were these protections for and from creditors? While historians and contemporaries have stressed that credit was essential to conducting business in the 1860s Pacific colonies, less has been said about the relationship of credit to daily survival. General indebtedness has not been studied. If credit was necessary to everyday

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[19] *British Colonist*, 10 May 1862.

[20] British Columbia, *Laws of British Columbia*, p. 54-55.

survival and widely extended, arguments stressing the necessity of creditors' protection would bear much greater weight. Two registers of intestate estate files provide tantalizing suggestions of the prevalence of credit in nineteenth century British Columbia, and a window upon the economic status of debtors. The files were compiled at the request of the legislature in the 1880s, for the purpose of examining the disposition of intestate estates. Of the 986 files covering the period from 1862 to 1888, 555 are complete, containing a general accounting of the disposition of the estates. The estates held a gross value of $559,223.85, with a total indebtedness of $193,942.67. Expressed more pointedly, debt represented 35 percent of all estate value. British Columbians, then, appear to have been deeply involved in credit relations. Interestingly, although debt was distributed throughout all wealth brackets, it was not distributed evenly. While the wealthy held the greatest debt in absolute dollar values, the poor were more indebted in relative terms: in proportion to their assets, the poor held larger debts. For the wealthiest ten percent of the estates, total debt represented 29 percent of gross estate value. For the poorest fifty percent of estates, debt represented 51 percent of gross estate value. The intestate estate returns, then, reveal that obtaining credit was prevalent among poorer individuals and families.[21] It seems reasonable to assume that much of this credit was secured for necessities, and owed to merchants.

With the suggested amendment, Ring's act passed; yet it garnered insightful criticism. The Colonial Secretary, the Duke of Newcastle, faulted the bill for requiring a protection

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[21] British Columbia, *Sessional Papers*, 1885, pp. 475-528; Ibid, 1889, pp. 447-479.

order. If the protection was automatic, all deserted wives would be covered. The protection order requirement, wrote the Colonial Secretary, meant that "a poor woman, deserted by her husband ... will not be able ... without troubling herself about questions of law, to obtain any protection..."[22] Some would not be aware of the law. Others would not be able to afford to undertake the necessary proceedings. Still others might not reside close enough to a court to take immediate advantage of the law. *Colonist* editor Amor De Cosmos was also uncomfortable with the bill, which, he informed readers, "promises to bring about a *quasi* dissolution of matrimonial unions." The bill made no attempt, De Cosmos pointed out, to reinforce marriage in the colony. There was, for example, no reward offered "for the apprehension of any heathen husband who may cruelly desert his better half." Rather, he wrote, the bill "tacitly recognizes the right of a husband to 'emigrate.'" Moreover, the bill supported a double-standard: while permitting husbands to leave their wives, it did not allow wives the right to turn out non-supporting husbands. In the final analysis, De Cosmos deemed the bill "a kind of Women's Rights affair, to enable deserted wives to work and enjoy their earnings without the let or hindrance of runaway husbands." He concluded with a humorous portrait of a groveling, emasculated deserter returning to his wife.[23] But his discomfort with the bill, and its implicit approval

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[22] Falcon, "'if the evil ever occurs,'" p. 26. With respect to analogous 1866 legislation in Nova Scotia, historians Philip Girard and Rebecca Veinott note, "The fact that the 1866 legislation obliged a deserted woman to obtain a court order meant that it would probably affect only a small number of women." Girard and Veinott, "Married Women's Property Law", p. 75.

[23] Such a man, De Cosmos noted, would be prevented "from using or selling any property acquired by [his wife] subsequent to the date on which she registers the runaway. She can have her end of the table groaning under the good things of this world, whilst the man whom she has agreed to cherish and obey, cannot get a mouthful without her consent. If she owns the blankets, the runaway will have to sleep upon the floor, except he has talent enough to re-construct the union." See the *British Colonist*, 27 May 1862.

of marital dissolution, remained evident. Within three years, De Cosmos would take action on these concerns, promoting legislation to reinforce family life on Vancouver Island.

By early 1865, the boom on Vancouver Island was over. The Pacific colonies' resource-driven economy slowed dramatically. The first signs of an impending recession came in November 1864, when Macdonald's bank failed, leaving $60,000 worth of unredeemable notes in circulation. The bank did much of its business in the Cariboo, where credit was essential to the gold-rush economy; and the rush, for all purposes, was over. In the spring of 1865, few miners arrived in the seasonal migration from California. Others were leaving. The manufacturing industries, linked to gold production, exhibited a similar decline. Overstocked merchants and overproducing manufacturers failed regularly, and skedaddling hit new heights. The total value of Victoria's industrial output dropped almost thirty percent from its previous high, from $591,716 in 1860 to $428,170 in 1865. Over the same period, the number of industrial firms in Victoria declined from 158 to 128. By the end of 1866, the two colonies, which had piled up enormous debts financing road construction and creating the machinery of government, were united in an attempt to reduce expenses.[24] Yet government debt was only half the equation. The other half was the absence of a permanent and expanding population to utilize and finance infrastructural development. As Jean Barman notes,

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[24] Ormsby, *British Columbia*, pp. 212-213; Barman, *The West Beyond the West*, pp. 81-82, 90-91; Lutz, "Losing Steam," p. 62.

> the creation of the united colony tacitly acknowledged another reality: the slowness with which a settler society was emerging. Gold alone was insufficient to ensure [colonial] survival over the long term. The overwhelming majority of miners moved in and out of the Pacific Northwest with great rapidity.[25]

The individualism and volatility of the Pacific colonies' resource-based economy was not conducive to the creation of permanent settler community.

As the recession deepened in the mid-1860s, the emerging group of reform legislators began to promote legislation to protect intact families, prevent family breakdown and promote reproduction. They also sought to attract immigrants and retain them within the colony. For these purposes, they turned to homestead exemption legislation. Homestead exemption, as it had developed in American jurisdictions, exempted the family home, a limited amount of adjoining land, and specified items or amounts of personal property from seizure by creditors. It also offered protection to wives by limiting the husband's ability to dispose of family property without spousal consent, and evolved to regulate the disposal of the property after the husband's death for the family's benefit.[26]

The chief proponents of this legislation are those reformers most closely associated with nation-building in the established historiography, Amor De Cosmos and John Robson. De Cosmos introduced homestead exemption legislation in the 1864-65 and 1865-66 sessions, referring to American competition for immigrants and noting the generous exemption laws in American jurisdictions. If Vancouver Island desired to attract and retain immigrant families, he asserted, it would have to "offer similar

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[25] Barman, *The West Beyond the West*, p. 82.

[26] Goodman, "Emergence of Homestead Exemption," p. 471.

advantages" or "people would leave it for these growing States, where they could safely invest their means for their wives and families, and provide for them against misfortune or want." Homestead exemption, De Cosmos declared, would protect a certain class "of honest, industrious, and in many cases moral households from having their households ruthlessly taken from over their heads, and thus turned in perhaps a penniless condition into the streets." There was an unspoken sub-text here as well. De Cosmos was committed to the reduction of public expenditure; greater self-support would mean a corresponding reduction in relief payments from the provincial treasury. To meet these ends, De Cosmos proposed a measure which would protect $5000 in real property (including both rural landholdings and town lots), and a comprehensive array of personal property, including books, household furnishings, and the tools, implements, and instruments of various professionals, tradesmen, miners, farmers, and carters, from seizure by creditors. In addition, reflecting a new emphasis on the central role of the wife/mother in the home, he included language providing that the homestead could not be abandoned, conveyed or mortgaged by a married man without consent of his wife.[27]

De Cosmos' legislation faced heavy criticism. Opponents in the Assembly and Legislative Council alleged that the value of the exemption was too large, and that exemption opened the door to fraud and social decay by freeing debtors of their obligations. For conservatives, stable, functional societies rested upon hierarchical webs

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[27] In the interest of clarity, I have collapsed two years' debates into a single discussion. De Cosmos' statements are taken from the 25 April 1865 and 2 December 1865 editions of the *British Colonist*. The full details of the 1864-65 bill are not available. Analysis is based on the *British Colonist's* account of legislative proceedings on 25 April 1865, and a version of the 1865-66 bill printed in the Victoria *Chronicle*, 13 December 1865.

of authority, deference and mutual obligation. Protecting families and businessmen from their creditors allowed debtors to escape their social obligations, destabilizing the hierarchical foundations of a functional society. Chief Justice Joseph Needham argued in the Legislative Council that by eradicating obligation, the bill would demoralize the colonists, attract immoral immigrants, and lead to deterioration of "the social condition of the country, destroying the vitality of society."[28] Debtor protection caused concern for liberals as well. The editor of the Victoria *Chronicle* warned his readers to carefully examine the possible "consequences flowing from weakening the security of property in this Colony" through the homestead bill. For liberals, the security of property was prerequisite to high rates of economic exchange and development. In the House of Assembly, Dr. Dickson complained that under the bill, "a person could run into debt and repudiate his liabilities." Allowing debtors to take the property of creditors without compensation would undermine exchange and accumulation. Assemblyman Selim Franklin argued that if merchants and tradesmen could not extend credit to their customers without some means of forcibly retrieving payment, they would simply cease to extend credit, and economic and social growth would be curtailed.[29] Such sentiments were echoed and expanded upon in the Legislative Council, where Treasurer Alexander Watson warned: "The commercial capital in this colony was foreign and was in the hands

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[28] *British Colonist*, 6 Feb 1866.

[29] *British Colonist*, 25 April 1865.

of some dozen merchants, who kept all the retail traders going, and if this bill passed they would withdraw their capital and put a stop to business."[30]

De Cosmos' legislation was also criticized for its potential effects on family formation in the colony. In the Legislative Council, Chief Justice Joseph Needham announced that the bill would destroy the family: allowing the wife limited control over the disposition of family property would diminish familial interdependence, enabling "the wife and children ... to feel independent of the husband and father."[31] Other legislators argued that the bill defeated its purpose by allowing bachelors and spinsters to register under its provisions. In the House of Assembly, Dr. James Dickson became agitated when he realized that the exemption might be utilized by people without families. The Victoria *Chronicle* reported that Dickson had believed the exemption "was intended only to apply to married men, and was struck with it being a good movement, but now he found it was for young men too. Now if this was to be the way, why they might find every one taking advantage of the law."[32]

The editor of the Victoria *Chronicle* agreed with Dickson's sentiment and expanded upon it. The homestead exemption bill was flawed, he argued, because

> it extends ... [its] provisions to men who are not heads of families. We believe that whatever claims the heads of families, as husbands, fathers, brothers, or sons, with those dependent on them residing in Vancouver Island, may have on the extra

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[30] *British Colonist*, 6 Feb 1866. The concerns of the opponents of Homestead legislation on Vancouver Island were apparently quite typical. Paul Goodman writes that "The opponents of homestead exemption usually argued that it would encourage debtors to defraud creditors, weaken respect for property rights, discourage investment, and cripple people's ability to borrow using their homes as security." See "Emergence of Homestead Exemption," p. 489.

[31] *British Colonist*, 6 Feb 1866.

[32] *Chronicle*, 25 April 1865.

> protection of special laws, the sportive bachelors may be left to the general protection of ordinary laws. Surely they are as capable of taking care of their means as a similar number of spinsters.[33]

Those who contributed to social growth by raising families should have the benefit of special protection; those shirking this important social obligation, the sportive bachelor and his spinster counterpart, were not entitled to the same benefits. In fact, bachelors were suspect on several levels. The editor argued, in a barb directed at the many bachelors in the House of Assembly, that family protection ought not be entrusted to bachelors. "[T]he Upper House," he advised, "will do well to confine the bill to heads of families." Nor should family protection be entrusted to wives. He wrote, "this bill really defeats its own purpose by allowing a homestead to be alienated unreservedly on the consent of the wife of the owner." A wife, the editor believed, could generally be persuaded to join her husband in an investment no matter how hazardous: "She has either to consent to his proposal or submit to his ill-will; and naturally the chances are largely in favor of her consent." He concluded that no homestead should be permitted to be mortgaged, sold, or otherwise alienated unless another was selected and registered to replace it, or the parties filed a binding declaration of their intention to leave the colony.[34]

In response to these objections, De Cosmos stressed the bill's value in protecting wives and children from destitution, and noted that an equivalent of homestead exemption already existed under British equity practices. "As it now is," he asserted,

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[33] *Chronicle*, 13 December 1865.

[34] *Chronicle*, 13 December 1865.

"according to British Law, a man in business with $20,000 could buy a post-nuptial contract[,] give his wife $10,000 out of his capital, and the creditors could not touch it." Furthermore, he argued that the value of the exemption should not be reduced. Exemption was not intended solely, or even primarily, to protect impoverished wage-earners, but rather to promote economic activity by attracting the propertied and industrious immigrant. He informed the House,

> The bill was not so much for laborers as for men of capital, men who were carrying on the country. Suppose a young man made $10,000 in the Cariboo and wanted to get married here, he knew that if he left his wife and home behind him in this Colony, when he returned from being unfortunate in the Cariboo or elsewhere that he might lose all his property, while if he settled across the [Puget] Sound he would be protected. If they want the country to secure settlers and capital they would pass the bill.

Interestingly, De Cosmos appears to have offered no response to legislators' fears that the legislation would undermine existing patriarchal family relationships. For De Cosmos, a free-thinker and bachelor, concerns over the shape of the family held little weight. This does not mean that De Cosmos regarded the functions of families and the roles comprising them as unimportant. Rather, his understanding of the adaptability of families differed from that of many of his contemporaries. To borrow a phrase from Bettina Bradbury, De Cosmos understood "the variety of different forms families can take without society collapsing..."[35] He believed that familial roles and social identities could be altered to a certain extent without detrimental effect, and indeed, with certain positive socioeconomic benefits. The elected Assembly agreed, but the appointed Legislative

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[35] Bettina Bradbury, Introduction to *Canadian Family History: Selected Readings* (Toronto: Copp Clark Pitman), p. 2.

Council allowed the bill to lapse in 1864-65, for the most part due to a fear of the bill's effect on debtor-creditor relations.[36]

By the following year, however, De Cosmos had gained the support of the business community and Attorney-General Thomas Lett Wood. Wood noted surprise when the councilors again objected to the measure. He "thought the principle of the bill was admitted, that the wife and family should be protected in the general crash." Wood objected to the characterization of a man "as a rogue because he was in debt." He believed that economic failure in the colonies was not due to moral failure, but rather to misfortune. Business in the colony, he believed, was extremely risky: "many a man was ruined without it being his own fault but through the default of others." Too much depended upon the success of gold-mining ventures and other "doubtful results." The protection offered by the homestead act was not immoral. Neither was it fraudulent. Rather, Wood believed that if a man and his family had to exist under the volatile conditions of capitalism, they should be able to use its protections. He informed the Council "that when a man gave reasonable public notice that he reserved certain property from all liability his creditors could have no reasonable cause of complaint." To justify this claim he appealed to equitable precedents and business practice: "In England the law was virtually in existence as far as married men were concerned[. Husbands] could either by ante[-]nuptial or pre-nuptial contracts settle property upon their wives, and the courts would always protect them as much as possible." Moreover, he could not see "why a man

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[36] De Cosmos quoted in Victoria *Chronicle*, 25 April 1865; Legislative Council decision reported in Ibid., 30 May 1865.

should not limit his liability as joint stock companies did, and the public be told beforehand that [he] reserved £500 out of his property." Such protections were essential, Wood added tellingly, so that a man "should not be humiliated by being reduced to working as a laborer for hire."[37]

Wood was joined in promoting the measure by the business community. The Victoria Chamber of Commerce petitioned the Legislative Council, requesting homestead protection to the value of $2500. Such a measure, the Chamber of Commerce alleged, "would be beneficial to the colony, tending ... to attract population to the country and retain it while here." However, the business community was also concerned with the possibility of fraud, and asked that the law be "so framed that whilst protecting the interests of families, for which it is intended, it would at the same time guard the public against fraud." Why would the business community, so deeply involved in the provision of credit to customers, be willing to take the risks involved in debtor protection legislation? The answer may lie in the fact that many businessmen were debtors as well as creditors, and had families of their own. De Cosmos' bill would allow them to enter business ventures with less risk to their dependents. Moreover, since the bill required the registration of homestead exemptions, businessmen likely believed they would have little difficulty identifying which properties were liable to seizure, and thus available to secure credit.

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[37] *British Colonist*, 19 January, 6 February, 19 May 1866.

The addition of these new allies seems to have tipped the balance. De Cosmos' bill passed through the Legislative Council, with amendments limiting the value of real property exempted to $2500 and personal property to $150. To protect the interests of creditors against fraud, debts acquired prior to the exemption were not protected. After an exemption was registered, legislators assumed creditors would not lend on the security of property which they could not seize.[38] In addition, homestead protection for real property was not automatic; it had to be applied for by the owner of the property, in most cases the husband. Thus patriarchal prerogatives were not injured. A husband who wished to use his house and property for collateral in business could do so, if he did not register.[39] His wife had no control in the matter.

In 1867, John Robson introduced homestead exemption to the newly created United Colony of British Columbia.[40] The rationale behind the measure remained unchanged, although Robson and Thomas Lett Wood added a new twist: they claimed the measure would "raise the moral standard of debtors" and prove "a real advantage to creditors, in leaving a man the means of retrieving his position and paying his creditors at a later

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[38] *British Colonist*, 15 Dec 1865. With regard to American homestead laws, William Dickson Macdonald writes that "homestead legislation shows community solicitude for the family; continuance of the home is viewed as a more basic need than enforcement of creditors' claims." In British Columbia, however, it seems that legislators believed both interests could be accomodated simultaneously. Certainly, De Cosmos did not intend to retard economic development. See Macdonald, *Fraud on the Widow's Share* (Ann Arbor: University of Michgan Law School, 1960), p. 30.

[39] For the details of the bill as passed, see Vancouver Island, Laws, Statutes, etc., 1866, 30 Vict., no. 6. Toronto: Micromedia, 1977.

[40] Under the terms of union, the Vancouver Island Homestead Act applied to the Island, but not to the Mainland. An unsuccessful attempt had been made to pass a homestead bill in 1866 in the mainland colony. See *British Columbian*, 16 March 1867; Hendrickson, ed., *Journals of the Colonial Legislatures*, vol. 4, p. 426.

period."[41] Robson also added a new clause allowing a widow to hold the homestead following the death of her husband, for the duration of her children's minority, or as long as she remained unmarried. This alteration made the measure the first example of homestead dower passed in Canada; yet it was no victory. Women's inheritance under the homestead act was not an absolute right. In fact, it was a way of accommodating social needs without a return to stronger inheritance rights — such as dower — for women.[42] The act served patriarchal and governmental interests, since it restricted the wife's interest in the homestead to the period in which she was raising her children.[43] Robson's act also reflected his patriarchal bias in another way, omitting a clause in the previous act making its terms gender neutral, and likely preventing independent women from registering homesteads. Since homestead exemption was explicitly offered as family protection, restricting registration to males encouraged retention of the patriarchal family as the norm. During earlier debates others had suggested restricting the measure to heads of households, but included women within that category. For Robson, the only legitimate head of household was male.

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[41] *British Colonist*, 19 March 1867.

[42] In fact, Shammas, Salmon and Dahlin note that "Homestead exemptions were one way states found to do away with dower..." Carole Shammas et al., *Inheritance in America from Colonial Times to the Present* (New Brunswick, New Jersey: Rutgers University Press, 1987), p. 167.

[43] British Columbia, *Laws of British Columbia*, pp. 226-231. Although the wording in the clause regulating homestead dower was somewhat confusing, Walter Scott in his 1917 treatise on homestead acts interpreted it as meaning the following: "the more lucid provisions of the B.C. Homestead Act, s. 7 (*infra*), which aims at making provision for both widow and children . . . leaves the latter very much at the mercy of their mother, as it does not appear to constitute a trust in their favour, though measuring the interest of their mother by their minority." Walter S. Scott, *Homesteads and their Exemptions in Western Canada* (Edmonton: Books, Publishers of 'Law Booklets,' 1917), p. 49.

Colonial expansionists of every political stripe understood the functions of families and the importance of familial roles and relationships in materially reproducing the population. But capitalism threatened the patriarchal family's existence. According to American historian Paul Goodman, "The market revolution placed women and families at high risk. In a boom and bust economy husbands often failed, sometimes through no fault of their own, and thereby plunged their families into destitution." Both the homestead and deserted wives acts were intended to insulate women and children from the volatility of the economy, and as in the United States, they were passed in times of great economic uncertainty.[44]

In the process of doing so, these acts enshrined several new categories of persons in the law and altered existing ones, assigning them rights dependent upon their status. Implicitly, the Deserted Wives Act referred to the ideal husband, who provided for his wife and children and escaped regulation under the bill. Central to the masculine identity was the idea of breadwinning. 'Good' men supported their families, and in so doing, maintained all property rights over their wives and children, unless they voluntarily relinquished them. Explicitly, the act referred to the deserting husband, and stripped him of rights to his wife's property, although allowing him an address of appeal. He could petition to have his rights restored. The Act also created several categories of married women, and ascribed very different rights to them. The supported wife was envisioned as a dependent: she required no property rights and was given none. The virtuous deserted

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[44] Goodman, "Emergence of Homestead Exemption," pp. 470-471, 476, 487

wife was entitled to the law's protection, should she request it. She was also entitled to provisional property rights to support herself and her children. The adulterous deserted wife apparently deserved whatever fate awaited her. So did her children. The law would not protect her property against the whims of her husband. Founded upon insecurities over paternity and the belief that a husband was justified in leaving an adulterous wife, the law had much broader effects: it contracted a deserted wife's sexuality to her husband, regardless of his behaviour. Once deserted, she was forced to remain chaste.[45]

The homestead exemption act attempted to reinforce male abilities to provide, by reserving a portion of the family's property beyond the reach of creditors. The act secured to the family a subsistence base to be utilized during recessions, depressions, and personal economic crises. Interestingly, both acts indicate an increasing identification of the family's interests with those of the wife. The Deserted Wives Act acknowledged that women in broken families were often maintaining themselves and their children by their own efforts; the homestead exemption act, reflecting the influence of separate spheres ideology, implied that wives could be entrusted with the responsibility of defending domestic interests: a 'good' wife would ensure that the home was not unnecessarily risked as credit security against familial needs. Moreover, if a husband predeceased his wife, she could retain the homestead under the terms of the act to look after the children. Rather than overestimating the scope of these new familial responsibilities for women, however, it would be wise to again stress their limitations. All familial authority

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[45] Ursel, *Private Lives, Public Policy*, p. 102.

ultimately vested in the husband, since he had to invoke homestead protection; and, in the case of the protection-order for deserted wives, the husband could apply to have his wife's independent financial status removed. The wife remained subject to the priorities of her husband and the middle-class men formulating government policy.

Reformers' ideological vision of the nation involved a specific idealized conception of manhood: the independent yeoman. Here was a man who possessed a modest amount of property, supported and headed his family, and held a voice in the political arena. It was a vision of large-scale, property-based, male democracy. This was, however, an ideal difficult to achieve in a rapidly polarizing, volatile, and largely wage-based economy. The homestead exemption bills were one piece of a legislative package designed to protect the independent producer and his family in this volatile economy. Legislators introduced bills to provide homestead exemption, abolish imprisonment for debt, and establish mechanics' lien laws together.[46] Using legislation to achieve a form of social

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[46] Contemporary newspaper writers also viewed the bills as a package. See the editorial and report entitled "Legislative Questions by John Bissell" in the *British Colonist*, 3 November 1865. The mechanics' lien law entitled artisans to register a legal claim against property when not duly compensated for its construction or repair. After a preset period, the property could be auctioned to recover unpaid expenses and profit. In 1864-65 De Cosmos introduced the homestead exemption bill and the mechanics' lien law. George Dennes introduced the bill to abolish imprisonment for debt (interestingly, Dennes may have been in financial difficulty himself. In 1866, he went bankrupt). All three measures were defeated and were reintroduced in the following session by the same two members. This time imprisonment for debt was abolished and the homestead exemption established. In 1867, when John Robson introduced homestead exemption into the laws of the United Colony of British Columbia, he also brought forth a mechanics lien bill, which was rejected. Margaret Ross, "Amor DeCosmos," pp. 62-63; Hendrickson, ed., *Journals of the Colonial Legislatures*, vol. 3, pp. 592-595. Between 1860 and 1879, eight mechanics' lien bills were introduced to the legislatures of Vancouver Island and British Columbia. Prior to passage of the 1879 bill, the measures were rejected because legislators found the wording vague, confusing, or cumbersome, feared the legislation would lead to massive litigation, or opposed the lien being attached to land titles, which would hinder land transfers. *Daily Standard*, 3 April 1872, 13 May 1876, 22 March 1877, 18 February 1879.

engineering was not a new idea, especially in the colonial context. Reformers were simply attempting to reverse the results of the British Colonial Office's plan to implement the Wakefieldian system with its vision of a rigidly hierarchical social structure.[47]

By abolishing imprisonment for debt, reformers intended to lessen the risks taken by the industrious in attempting to achieve economic security. By the 1860s, credit was essential to conducting business in British Columbia. Tina Loo writes that "As it became more common, indebtedness shed some of its association with moral failure — among the commercial classes, at least — and was viewed instead as a consequence of respectable economic activity."[48] Assemblyman Leonard McClure editorialized in the *British Colonist* in 1865 that "of all men it is well known the enterprising are most liable to reverses," and suggested that protecting them from imprisonment would stimulate the economy and colonial growth. Yet to leave the matter here would be to neglect an important point. While indebtedness and risk-taking may have been shedding some of their immoral connotations, the process was far from complete. Legislators in the 1860s were still working to encourage the acceptance of these behaviours, remoralizing the population to condone and participate in risky business ventures. By abolishing imprisonment for debt, they hoped to slowly modify the social appraisal of risk-taking businessmen. Furthermore, reformers realized that if they wanted long-term settlement by

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[47] Mackie, "The Colonization of Vancouver Island," pp. 3-40.

[48] Loo, *Making Law, Order, and Authority*, p. 103.

small producers, they would have to protect their families. So legislators not only protected independent producers from penalties for market activity, but through homestead exemption tried to secure their furniture, their homes and the tools necessary to their occupations. This too was closely linked to the moral rehabilitation of risk-takers. With his family protected, the risk-taking businessman shed even more of his association with irresponsibility. And finally, reformers introduced mechanics' lien laws to secure the independent producing breadwinner's source of income. Although local politicians often declared that Mechanics' lien laws were intended to protect the "honest and poor man," they were not actually intended to aid the wage-earning workingman or labourer. No mechanism was provided to recover unpaid wages from employers. As De Cosmos and Wood made clear in the homestead debates, they had no intention of encouraging the growth of a wage-earning class. Liens, rather, were to attach directly to the property under development or repair, allowing independent artisans and contractors to sell the property at auction after a preset period to recover their fees and expenses from the proceeds.[49]

The existence of the legislative package reveals a fundamental paradox in the reformers' nation-building programme. Reformers wanted to protect and encourage the development of an independent producing class of men from destitution, while at the

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[49] On imprisonment for debt see Loo, *Making Law, Order, and Authority*, p. 103, and Assemblyman Leonard McClure's editorial in the *British Colonist*, 7 December 1865. Reformers' opinions on the Mechanic's Lien Law are drawn from McClure's editorial in the *British Colonist*, 4 March 1865, and the 1876 debates reported in the *Daily Standard* and *British Colonist* issues of 10 May 1876. The Mechanics' Lien Law passed in 1879 is found in British Columbia, *Statutes of the Province of British Columbia*, 1879, 42 Vict., ch. 24.

same time maintaining the economy responsible for their difficulties. The free market economy was linked in the liberal psyche to economic opportunity and national growth. But it was also volatile, tending toward excesses and extremes. Through homestead exemption and related measures, reformers believed they could shield the yeoman patriarch from economic misfortune, stimulating natural population growth and immigration. Simultaneously, by providing a certain level of material security for the economic agent and his family, homestead exemption would minimize the risks of market activity, and encourage the growth of independent enterprise. The individual could freely pursue economic goals without compromising his family's future.[50] In addition to reconciling the imperatives of production and reproduction, providing bachelors and families with a stable property base was intended to encourage the growth of the broad property-owning producer class reformers believed so crucial to the proper functioning of democracy.

One final element in the legislative package demands greater attention. Reformers' commitment to equal opportunity for an independent producing class, or alternatively, their hatred of privilege and aristocracy, manifested itself most overtly in inheritance law reform. Amor De Cosmos equated property with prosperity and security, and viewed property law as a crucial element in defending the interests of families over both the short and the long term. Thus, while promoting homestead exemption legislation in the period 1864-66, he was also advocating reform of Vancouver Island's real property

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[50] See Goodman, "Emergence of Homestead Exemption," 475-476.

inheritance laws. In doing so, De Cosmos was attempting to effect a redistribution of property within families and ultimately throughout society, eliminating class disparities. Other reformers would join him in those endeavours. Social conservatives, however, viewed inheritance law as central to the maintenance of entrenched hierarchical familial and social structures, and vigorously opposed reform. The battle over inheritance rights shows that for De Cosmos, his allies, and his opponents, familial and social structures were consciously and closely linked.

When the colony of Vancouver Island was created the descent of undevised real property[51] was governed by the English common-law rule of primogeniture: if a man died intestate (without a will), all of his real estate passed to his eldest son.[52] The number of propertied estates affected by the intestacy laws in British Columbia was significant. Rates of intestacy prior to 1872 are unknown. However, between 1873 and 1888, an average of thirty-eight per cent of all adult decedents left estates which passed under the intestacy laws.[53] While reformers in 1860s and 1870s lacked precise statistics on

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[51] Real property lacking provision for its transfer in a will. Testate succession occurs when property is disposed of according to the provisions of a will. Marvin B. Sussman, Judith N. Cates and David T. Smith, with the collaboration of Lodoska K. Clausen, *The Family and Inheritance* (New York: Russell Sage Foundation, 1970), p. 16.

[52] Importantly, a person can die *partially intestate*. If a person makes a will, any property not provided for in the will passes according to intestacy laws. This is generally avoided by making explicit provision in the will for dividing the 'residue' of the estate. Sussman et al., *The Family and Inheritance*, p. 16. Carole Shammas, "English Inheritance Law and Its Transfer to the Colonies," *The American Journal of Legal History*, vol. 31 (1987), p. 146.

[53] This does not mean that the other sixty-two percent of British Columbians wrote wills. Nineteenth- and twentieth-century studies show that the majority of adults did not even leave estates to go through probate, which means they left little or no property upon their deaths. Some men and many women would have died without property. Their estates would have gone unadministered. See Shammas et al., *Inheritance in America*, pp. 16-18; Sussman et al., *The Family and Inheritance*, p. 37.

English and American studies also suggest that rates of intestacy were high prior to the twentieth century. Carole Shammas sets the rate of testation among adult decedents in Early Modern England at

intestacy, they were aware of specific cases; moreover, the principle of primogeniture ran counter to their egalitarian vision. In 1864-65 and 1866 Amor De Cosmos proposed to divide the real property of intestates equally among their lineal descendants without age or gender preference, making further provision for the property to succeed to the parents, or collateral relatives, if the intestate had no lineal descendants.[54] The Legislative Council rejected the 1864-65 measure amidst allegations by Colonial Secretary Henry Wakeford that "the cutting up of real property into small portions was decidedly ruinous to families."[55] This prompted *British Colonist* editor Leonard McClure to retort that it was the existing state of the law that injured the family, "giving to probably the only [family] member that could do without it the property which should afford the sustenance for the young and helpless." McClure wrote that in matters of inheritance, "justice would point out the youngest rather than the eldest, the girl rather than the boy, the weak rather

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approximately 25 percent. Shammas, Salmon, and Dahlin report an identical rate of testation in the United States at the end of the nineteenth century. A number of early twentieth-century American studies have found even lower rates of testacy, ranging from 9.6 percent to 20.1 percent. Shammas, "English Inheritance Law," p. 151; Shammas et al., *Inheritance in America*, pp. 15, 17.

The intestacy rate for British Columbia was determined by dividing the total number of deaths of individuals over the age of twenty-one into the number of intestate estates, including incomplete files. This information was available for each year between 1873 and 1888. Records of intestate estates are found at British Columbia, *Sessional Papers*, 1885, pp. 475-528; Ibid, 1889, pp. 447-479. For the yearly return of deaths in the Province, see Ibid., 1875, p. 9; Ibid., 1876, p. 156; Ibid., 1877, p. 69; Ibid., 1878, p. 75; Ibid., 1879, p. 7; Ibid., 1880, p. 317; Ibid., 1881, p. 380; Ibid., 1882, p. 240; Ibid., 1883, p. 312; Ibid., 1883-1884, p. 224; Ibid., 1885, p. 445; Ibid., 1886, p. 295; Ibid., 1887, p. 9; Ibid., 1888, p. 9; Ibid., 1889, p. 429; Ibid., 1890, p. 119.

[54] I have found no details of the 1864-65 bill's provisions, but have based my interpretation of it on the 1866 bill and the 1872 act, which contained these provisions. See *British Colonist*, 9 Jan 1866; British Columbia, *Statutes*, 1872, 35 Vict., no. 29. De Cosmos' bill was similar to American statutes reforming the distribution of the real property of intestates. Most of these laws simply assimilated the descent of real property to the 1670 English Statute of Distribution, which applied to personalty only. Sussman et al., *The Family and Inheritance*, pp. 16-17.

[55] *British Colonist*, 8 June 1865.

than the strong as marks of special favor."[56] McClure argued that the colony's real property inheritance laws were outdated, morally unjust, and inconsistent with the descent of personal property, which was divided equally amongst lineal descendants, at least in theory.[57] Moreover, he stressed, an egalitarian inheritance law would also address public welfare concerns, preventing wives and younger children from being "thrown helpless into the street."[58]

Although no further attempts to introduce inheritance legislation occurred for several years, De Cosmos had not abandoned the idea. In an 1871 editorial he wrote that "every province in British America and every State in the American Union where [primogeniture] once prevailed have abolished it."[59] De Cosmos called primogeniture a "barbarous," "feudal" custom, which "enrich[ed] one son ... and [left] the others paupers." He believed it a "natural presumption that a parent has no more preference for

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[56] Ibid., 10 June 1865.

[57] Under the Statute of Distributions, 1670, all children, regardless of age or gender, received an equal share of personal property. In many continental European countries, wills were not permitted, and land passed in strict accordance to the rules of descent, under which land was generally partitioned, at least among sons. Sussman et al., *The Family and Inheritance*, pp. 16-17; Spring, *Law, Land, & Family*, p. 67; John E. Crowley, "Family Relations and Inheritance in Early South Carolina, *Histoire sociale — Social History*, vol. 17, no. 33 (May 1984), p. 35; John V. Orth, "After the Revolution: 'Reform' of the Law of Inheritance," *Law and History Review*, vol. 10, no. 1 (Spring 1992), p. 42.

[58] *British Colonist*, 10 June 1865.

[59] This was only partially true. Primogeniture persisted in Ontario. In 1877, Eyre Lloyd wrote, "In Upper Canada (now called the province of Ontario) the statute 3 and 4 William IV.c.106 (Inheritance Law Amendment Act), has been adopted by a local act of the legislature of that province, and in all respects the descent of and the power of disposition over property is the same as in England." Primogeniture was not abolished in England until 1925. Eyre Lloyd, *The Succession Laws of Christian Countries, with Special Reference to the Law of Primogeniture as it Exists in England* (London: Stevens and Haynes, Law Publishers, 1877), p. 37; Orth, "After the Revolution," p. 35; Crowley, "Family Relations and Inheritance," pp. 37, 39-40; Grossberg, *Governing the Hearth*, pp. 25, 211-212; Shammas et al., *Inheritance in America*, pp. 22, 67, 79; Shammas, "English Inheritance Law," pp. 154-155, 156-157; Orth, "After the Revolution," pp. 33-35, 40-42.

one child more than another; and that he would divide his property equally between them [in a] case [where] he made his will." Where reformers in other jurisdictions have been accused of failing to account for the ability to override intestacy laws through wills, De Cosmos was quite aware of their use and effect. He assured readers that abolishing primogeniture would not prevent will writers from distributing their property as they wished; but it would "relieve the state from being a party to the distribution of an intestate's estate in such a way as to violate every notion of common justice and humanity."[60] Others agreed. In the following legislative session reformer Charles Semlin introduced a bill to abolish primogeniture. Semlin's measure passed without objection or amendment.[61]

The major obstacle to passing the bill had not been public opinion, but the class interest of a wealthy, landed, and conservative elite. Only the appointed members of the Legislative Council were opposed to ending primogeniture, a practice intended to concentrate extensive land holdings in a single family line, reinforcing the Tory values of class and aristocratic privilege. When Henry Wakeford alleged that abolishing

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[60] *Daily Standard*, 3 June 1871. It is interesting to note that American studies have revealed a tendency among the families of intestates to redistribute their estates after the legal distribution to conform with their own ideas of distributive justice and equity. In Cayahoga County, Ohio in the mid-1960s, Sussman et al. found that major redistributions took place in over fifty percent of all intestate estates. In cases where the deceased left a spouse and children or more distant lineal descendants (grandchildren, great-grandchildren), the rate of redistribution was over 80 percent. In the vast majority of these cases, the children gave their shares to the surviving spouse. Sussman et al. report two rationales for such redistributions: a sense that the surviving spouse is entitled to the inheritance; and a desire to provide the surviving spouse with the means to remain financially independent, postponing the necessity for the children to support their parent. Sussman et al., *The Family and Inheritance*, pp. 125, 127-128, 143.

[61] British Columbia, *Statutes*, 1872, 35 Vict., no. 29.

primogeniture was "decidedly ruinous to families," he was referring to the concentrated wealth of certain families, and the hierarchical vision of society it inspired; he was not referring to families in general. His opposition echoed the opinions of nineteenth-century British aristocrats, who argued that primogeniture was the foundation of British society, polity, and economy.[62] Local reformers shared this understanding of primogeniture; they did not, however, share an appreciation of the social vision it supported. John Robson wrote that primogeniture was "the key-stone, so to speak, of England's blue-blooded aristocracy," responsible for "that huge class monopoly of land, wealth, power, and position which has for centuries stood with its iron heel upon the pleb[e]ian neck."[63] Angry reformers accused the Council members of "fancy[ing] that they are really lords, and in duty bound to protect the interests of territorial aristocracy."[64] Social and economic equality could never be realized if property ownership rested on privilege.

In the debate over inheritance, reformers describing the property distribution they desired both in family and society spoke of equality, justice and humanity. The changes engendered by the Inheritance Act were significant: intestate estates no longer passed

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[62] Whenever English radicals agitated for the abolition of primogeniture in the nineteenth century, English Aristocrats rallied to its defense in terms similar to Wakeford's. In the House of Lords, Lord Arundell of Wardour warned that abandoning primogeniture would "be tantamount to a sentence of death and extinction for many ancient families." In 1859, the *Times* of London declared primogeniture the bedrock of English society and economy: "[W]e English do not understand rank as separated from landed wealth.... England could not exist as England now is without large estates. Our constitution, our agriculture, our power as a people, and our stability as a nation rest upon this very principle of primogeniture." Spring, *Law, Land, & Family*, p. 88.

[63] *British Colonist*, 7 April 1872.

[64] *British Colonist*, 10 June 1865.

automatically to the eldest son. Instead, they passed equally per stirpes[65] to lineal descendants without age or gender preference; if no descendants existed, then to the father; if he was deceased, or the intestate's estate came from his mother, then to the mother; and if no mother, to the collateral relatives (male and female siblings and their descendants). The systematic preference of an intestate's father over his mother was the sole but significant example of gender discrimination.[66] In general, however, the bill was based on broad ideals of inclusiveness and equality: further provisions stipulated that half- and whole-blood relatives were to inherit equally, and that descendants begotten but unborn at the time of the intestate's death were entitled to inherit.

In restructuring inheritance, liberal reformers were not only concerned with the family. They were also attempting to reorganize society on a more egalitarian basis. In the debates over inheritance law, reformers specifically compared the structure of family and society and indicated a causal relationship. The patterns of inheritance within the family, legislators asserted, had a definite impact on social class structures. Primogeniture led to the concentration of wealth in specific family lines and, ultimately, to the creation of an unequal and self-perpetuating class society. Those with wealth,

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[65] Distribution per stirpes means that if a descendant predeceases the intestate, that descendant's nearest living lineal descendant(s) acquires the share that person would have taken in the intestate's estate. An example would be that if an intestate left four children, plus two grandchildren through a predeceased child, each of the four children would take one-fifth of the estate, while the two grandchildren would split the remaining fifth. The grandchildren take equal parts of their deceased parent's share. See Sussman et al., *The Family and Inheritance*, p. 19.

[66] Mothers were also discriminated against in the distribution of personalty. Under England's 1670 Statute of Distributions, a father would inherit his child's entire estate, provided the child died without a spouse or offspring. A 1680 statute, however, prevented widowed mothers from inheriting all of their child's personalty. Under the statute, they had to share the personalty with the child's brothers and sisters. Shammas, "English Inheritance Law," p. 160.

monopoly, and privilege were able to retain power within their families, to the detriment of those outside the bounds of the privileged class. To reformers, who believed above all in meritocracy — that the 'natural' leaders of society should rise out of all classes — primogeniture symbolized everything that was wrong with the old order, most specifically the arbitrary assignment of power and wealth. Primogeniture and privilege prevented individuals from realizing their potential, retarding progress and national development.

In a 1992 *Law and History Review* article, John V. Orth wrote that in reforming intestacy laws, nineteenth-century reformers failed to account for the use of wills. Following Tocqueville, Orth contended that reformers believed that reform of the intestacy laws would result in the creation of self-acting legal mechanism which would level the class formation. Yet, Orth cautioned, since few great landowners died intestate, the laws would have little effect. He concluded that reformers had succeeded only in constructing an elaborate mirage.[67] This interpretation is not supported by the evidence in British Columbia. The debate over inheritance shows the significance reformers attributed to mass public remoralization. Reformers were quite aware of the use of wills,

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[67] Tocqueville wrote "When the legislator has once regulated the law of inheritance, he may rest from his labor. The machine once put in motion will go on for ages, and advance, as if self-guided, towards a point indicated beforehand." This was true in post-revolutionary France and other continental European countries, where wills were not permitted to alter the statutory rules of descent. Tocqueville recognized the importance of wills, and concluded that France's reformed inheritance laws were "infinitely more democratic" than America's. Will writing allowed testators to circumvent the democratic intentions of legislators. While means of evading the common law rules of descent had been available for hundreds of years, the advent of will writing, made possible by the Statute of Wills in 1540, put the common law rules, according to Eileen Spring, "officially on the way to becoming default rules, rules that would apply only upon intestacy." Orth, "After the Revolution," pp. 35, 42; Spring, *Law, Land, & Family*, p. 32.

yet they laid great emphasis on the law's role in sanctioning certain social behaviours: reform of the intestacy laws was directed, in part, at undermining the moral foundations of aristocracy. By the nineteenth century, for all practical purposes, primogeniture had no practical effect upon the upper classes, and knowledgeable observers were quite aware of this fact.[68] After the thirteenth century, landowners had developed entails and uses to circumvent primogeniture and make modest provision for their younger and female children.[69] Prima facie, the Statute of Wills (1540), which legally sanctioned wills directing the disposition of land, appears a momentous event. Yet landowners' behaviour changed little: over the following centuries, they developed the strict settlement, a means of ensuring that most property would remain in the eldest son's hands, and small portions would be provided to younger and female descendants.[70] Thus, England's class system was not the result of an automatic and inflexible legal mechanism. It resulted from mass cultural behaviour, repeated on countless occasions. Landowners were individually

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[68] In fact, Eileen Spring makes a persuasive argument that for demographic reasons, primogeniture's impact on *intestate families* was less pronounced than the principle suggests. The belief that families were large prior to the nineteenth century has resulted in the mistaken assumption that there were always younger children to be deprived of an inheritance. But until 1750, stable populations were the rule in Europe, and under such circumstances, the great majority of couples had only two surviving children. Given the naturally-occurring sex ratio, half of these children would have been female. Thus, the number of younger sons disinherited by primogeniture would have been limited. In addition, under the common-law rules of succession, if there were no male heirs, female descendants inherited. Using statistical probabilities based on average family size, Spring has calculated that females would have inherited in 25 percent of all cases under the common law. Spring, *Law, Land, & Family*, pp. 9, 12, 14-15, 90. It is possible that more land passed according to intestacy laws in British Columbia than in England: in British Columbia land was cheap and readily available, access to legal professionals was restricted in remote areas, and the less wealthy are less likely to make wills. Shammas et al., *Inheritance in America*, p. 18. Sussman et al., *The Family and Inheritance*, pp. 38, 62-63, 74.

[69] Spring, *Law, Land, & Family*, pp. 27-29, 30-32, 68-69, 71, 73, 90, 123-147 *passim*.

[70] Ibid.

responsible for the concentration of landholdings, and they sought to retain primogeniture as a legal and social validation of their practices. Reformers wanted to strip them of that validation.

Yet if reformers were fighting conservatives in the battle over inheritance law reform, they were also at war with themselves, and this internal conflict limited the extent of reform. Inheritance conflicts directly with the liberal ideal of equal opportunity. Michael Levy has written that inheritance "prevents full equality of opportunity and conceivably equality of liberty, and it seems to be in direct conflict with the liberal egalitarian ethic." Inheritance gives some individuals an unearned advantage over others, improving their opportunities. Thus, in liberal theory, inheritances must be equalized or abolished in order to level the playing field. This commitment to equality of opportunity underlies not only liberal concerns with inherited wealth, but also the liberal desire to nullify other inherited characteristics: hence the liberal involvement in public education, women's rights, and land policy.[71]

While liberals are committed to equality of opportunity, they reject equality of reward. The meritocratic tendencies of liberalism posit unequal rewards as the fruit of individual development. In themselves, meritocratic ideals do not provide a justifying rationale for inherited wealth. In fact, the ideals of meritocracy militate against the inheritance of wealth, since inherited wealth prevents the equal opportunity necessary for a meritocracy. Yet in interaction with capitalism and accumulationist theories of human behaviour, the

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[71] Michael B. Levy, "Liberal Equality and Inherited Wealth," *Political Theory* , vol. 11, no. 4 (November 1983), pp. 547-549, 551-2, 555

liberal ideal of meritocracy turns back on itself, providing a justifying rhetoric for inherited wealth. The capitalist twist on meritocracy is that human beings will not endeavor to achieve unless rewarded in a capitalist sense: they must be guaranteed the right to accumulate property through their effort. According to the great liberal political economists of the late-eighteenth and early-nineteenth centuries, individual capital accumulation is critical to economic growth, and individuals will only accumulate capital when the stability of property is relatively certain. Adam Smith and Jeremy Bentham wrote that to encourage the accumulation of capital, the owners of capital had to be freed from the fear of confiscation of wealth.[72] In order to encourage individual initiative, the fruits of individual effort must be secure. In relation to the questions of inheritance, when confronted with the contradictory demands of equal opportunity and the security of property, liberals have almost always upheld the latter at the former's expense. While the principles of equality were integrated into inheritance laws, the right to opt out and convey property by will, unrestricted by government direction, was generally guaranteed.[73] In this respect, British Columbia was no exception.

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[72] Levy, "Liberal Equality and Inherited Wealth," p. 548, 550.

[73] Freedom of testation, defined by Anthony R. Mellows as a person's "inalienable right to leave his property to whoever he wishes," is often cited as an immutable British legal principle. Such claims are rooted in the ideological baggage the practice carries. Over the course of time, some have claimed that testamentary freedom favours the creation of aristocracy, allowing testators to concentrate their wealth in a single family line. Yet the converse has also long been asserted: that testamentary freedom was "chiefly valued for the assistance it gave in making provision for a Family, and in dividing the inheritance more evenly and fairly than the Law of Intestate Succession would have divided it." In England, where primogeniture governed intestate succession, this may well have been true. More recently, a third school of understanding has contended that the freedom to dispose of property freely by will "is an inevitable concomitant of democracy, of capitalism, of western civilization." Ideologies aside, complete liberty of testation has existed only sporadically throughout history; in England, it existed for just over one hundred years, from the 1833 Dower Act to the passage of family provision legislation in 1938. Leopold Amighetti, *The Law of Dependants' Relief in British Columbia* (Calgary, Alberta: Thomson Professional

It should be borne in mind, however, that reformers believed they could alter the social structure without recourse to coercive legislation. Reformers believed strongly in the state's powers of moral suasion. Hence De Cosmos' anxiety, voiced in the *Daily Standard*, that by sanctioning primogeniture the state was "a party to the distribution of an intestate's estate in such a way as to violate every notion of common justice and humanity."[74] Legislators intended to influence testators by suggesting that an equitable distribution was approved, even desired, by society. The measures were above all intended to be symbolic and normative. Prior to the Inheritance Act, for example, the norm — that is, the default position if one failed to make a will — left the entire estate to the eldest son. After the act, the norm included provision for all children. Data from American jurisdictions suggests that testamentary behaviour actually did follow intestacy reform. Yet the relationship may have been the inverse, and it is more accurate to say that both will-writing and statutory distributions were moving in the same general direction.[75]

Publishing, 1991), pp. 1-2 (esp. fn. 8), 3, 5; Manitoba Law Reform Commission, *Report on "The Testator's Family Maintenance Act"* (Winnipeg: The Commission, 1985), pp. 2-3 (fn. 5); Macdonald, *Fraud on the Widow's Share*, pp. 38-41, 290.

[74] *Daily Standard*, 3 June 1871.

[75] See Shammas et al., *Inheritance in America*, p. 121. Readers should be wary in accepting De Cosmos' argument that intestacy laws would act in a normative fashion as an explanation for changes in will writing patterns over the course of the nineteenth century. Some American research indicates more egalitarian, less age- and gender-biased will-writing patterns following reform of the intestacy laws, although Toby Ditz relates these changes to new conceptions of womanhood, and the changing economy. See Shammas et al., *Inheritance in America*, p. 120, Toby Ditz, "Ownership and Obligation: Inheritance and patriarchal Households in Connecticut, 1750-1850," *William and Mary Quarterly*, vol. 47, no. 2 (1990), pp. 263-264. This was not the case in all jurisdictions. In Bucks County, Pennsylvania, for example, the effect of intestacy law reform on testators appears to have been negligible. Testators tended to favour sons over daughters over the entire period from 1790 to 1890, despite the passage of egalitarian intestacy laws. Other research, including Eileen Spring's study of English testamentary behaviour and John Crowley's research on North Carolina, shows that testators were more egalitarian than the unreformed intestacy laws. (See also Shammas, "English Inheritance Law," p. 151). In these cases, then, testamentary egalitarianism preceded statutory reform.

CHAPTER THREE:

FAMILY PROTECTION IN THE 1870S

In the early 1870s, reform-minded legislators in the newly-created Province of British Columbia enacted a controversial new piece of legislation, the married women's property act. Through newspaper accounts of the legislative debates, this chapter examines the connections between the married women's property act and the legislative package of the 1860s. The chapter also explores feminist sympathies in the legislature. An examination of municipal suffrage legislation is used to gauge the extent of support for women's rights among legislators, while debates over dower legislation outline the limits of that support. Subsequently, the discussion turns to reformers' determined but unsuccessful quest to establish legal relations between couples unwed at English law, and their children, examining the intentions of those promoting the legislation, and the reasons for opposition. Finally, the chapter concludes with the resumption of this quest by Chief Justice Matthew Baillie Begbie and his partial success in gaining inheritance rights for the members of irregular families through an appeal to public expenditure concerns and social morality.

British Columbia's economy continued to stagnate through the late 1860s and into the 1870s. London money markets remained tight, with interest rates fluctuating between twelve and eighteen percent. Heavy borrowing costs stifled business opportunities, and

crippled the highly-indebted government. Nearly one-third of government revenue was set aside to cover interest on the public debt. In Victoria and New Westminster houses and warehouses sat empty. Population levels declined.[1] Politically, the colony's economic woes led to union with Canada in 1871. "The central issue" in the Confederation debates, writes Jean Barman, "rapidly became economic, how to counter stagnation and attract a large settler population."[2] The Dominion government assumed the new province's debt and provided it with generous subsidies, but the economic situation remained perilously unstable. With the onset of the North America-wide recession in 1873, the provincial deficit rose again, reaching $300,000. Even so, legislators continued borrowing heavily to finance public works projects in the hope of relieving unemployment. By 1876, the public credit was exhausted. Meanwhile, legislators worked to create the conditions necessary to reinject life into the economy. They pressured the federal government to begin work on the railway and dry-dock promised in the terms of union, attempted to encourage agricultural growth with various land policies, and argued interminably over tariff protection for agriculture and domestic industries.[3]

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[1] Ormsby, *British Columbia*, 225, 241-242.

[2] Barman, *The West Beyond the West*, p. 96.

[3] The general economic conditions of the period are covered in the relevant chapters of Ormsby's *British Columbia: A History* and Barman's *The West Beyond the West*. For a more comprehensive and accurate interpretation of political events in the post-confederation period to 1883, see Daniel Patrick Marshall, "Mapping the Political World of British Columbia, 1871-1883," University of Victoria, M.A. thesis, 1989.

The political situation in the early 1870s was complex. Responsible government arrived shortly after Confederation. Party politics did not. Historically, political parties and responsible government have generally developed hand-in-hand. While the process is not lock-step — loose fish and unruly factions remain — the general trend is toward cabinet domination of a disciplined majority group in the legislature. In the theory of responsible government, cabinet is responsible to the legislature and must maintain their confidence. The theory, then, appears to place significant power with the members. Under party systems, however, the reverse is true: cabinet exercises domination over the legislature. Nearly all legislation is determined by cabinet, or in caucus under cabinet direction, and governing party members support all government measures. Strict discipline in voting is demanded of the party members. Open dissent is rare. Dissenters face ejection from the ruling faction and loss of the benefits associated with membership in the party, including the ability to dispense patronage and funds in their home ridings, and electoral support from the party. The overall effect is to create cohesive, united governments, the leaders of which exercise a relatively free hand in governing over the term of their mandate. Backbench government members have little input; their power is circumscribed. Few have any expectation of personally influencing policy. What opposition exists tends to be in a minority position, exercising little direct influence on legislation.

In British Columbia, organized, permanent political parties did not arrive until 1903. During the first two years of responsible government, organization in the legislature was loose; later, better-organized governing coalitions would develop. This was true of the

succession of premierships comprising the Walkem regime (1874-1876 and 1878-1883), and even more so of the Smithe Dynasty (1883-1898). But in 1872 and 1873 lines had not solidified. Dan Marshall's analysis of voting patterns in the 1872 legislature identifies three separate groups of roughly equal size: one led by John Foster McCreight, one by Robson, and one by De Cosmos. When De Cosmos took power in 1873, Lieutenant-Governor Trutch predicted that there would be a "grand fight" between the three competing factions. But the fight never materialized. De Cosmos picked his Cabinet from among all three groups; Marshall's analysis of voting patterns shows that out of an assembly of twenty-three, De Cosmos gained eleven solid supporters. Seven additional members, including McCreight, were loosely aligned with him. No unity existed among those in opposition.[4]

Yet this summary of Marshall's analysis gives the De Cosmos legislature the illusion of a solidity which probably did not exist. These are voting patterns, not party lines. The absence of actual parties and party discipline cannot be stressed enough. Since there were no party lines, individual members had a measure of voting freedom, especially when confidence in the government was not at stake. This is especially important when one considers the importance of private members' bills to the reform process. Most of the legislation considered during the 1870s was introduced by private members. As long as the bills did not originate from the Cabinet, the government was not in jeopardy. So members voted on their individual consciences, and Cabinet members were often

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[4] Marshall, "Mapping the Political World of British Columbia," pp. 27-28, 30.

divided.[5] Significantly, if the Cabinet wanted to retain the support of private members, they had to give due consideration to private members' proposals. Thus, private members collectively exercised greater influence over the political process in British Columbia in 1872 and 1873 than they ever would again. Moreover, since these private members answered to no one, except periodically to the electorate in their home ridings, it may be that the legislation they proposed was representative of their own concerns, and perhaps those of their ridings.

When Amor De Cosmos took over the premiership from John Foster McCreight in 1873, the declining economy and the slow rate of settlement were cause for concern. During the session, Chief Commissioner of Lands and Works Robert Beaven tabled figures indicating that provincial settlement was occurring at very slow rate.[6] The future looked grim to the rural members who formed the core of De Cosmos' support. At the previous sitting of the legislature, they had lost a bitter struggle against the introduction of the Canadian tariff by the urban-dominated McCreight government. The decision was irreversible, and the result was reduced protection for local agricultural goods. Cheaper produce from Washington, Oregon, and California flooded the local market and devastated local farmers.[7] Those members representing farming districts, including De

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[5] See the division on the Municipal amendment bill, *Daily Standard*, 12 February 1873.

[6] Beaven's report is referred to in Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: University of British Columbia Press, 1974), p. 24.

[7] Article seven of the terms of union permitted British Columbia to retain its higher tariff structure until the completion of the transcontinental railway, with the added provision that the provincial legislature could adopt the lower Canadian tariff sooner, if it so desired. Marshall, "Mapping the Political World of British Columbia," pp. 50, 52, 59, 136.

Cosmos, Arthur Bunster, T. Basil Humphreys, William Smithe, and Henry Cogan desperately sought new means of protecting farmers. Bunster introduced a bill to provide compulsory homestead exemption to various small producers, which was rejected. Legislators were opposed to compulsion, opting instead to increase the personal property exemption under the existing optional homestead legislation to $500. In addition, the Land Act was amended to provide free land grants with automatic homestead exemption protection to settlers. Equal rights to pre-empt crown lands were extended to women.[8]

In less obvious fashion, legislators also moved to encourage family settlement in the province through the passage of the 1873 Married Women's Property Act (MWPA). The act virtually duplicated Ontario's 1872 MWPA.[9] It allowed a married woman to hold separately any real estate she possessed at the time of marriage, and to acquire or receive additional real property in her own name. This property, and the earnings derived from it, were to be free from her husband's control and debts. With regard to personalty, a

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[8] In extending preemption rights to free lands to women, British Columbia was a definite front-runner (despite the Walkem administration's revocation of *unmarried women's* preemption rights in 1874), reflecting the De Cosmos government's concern with Woman's Rights. Women on the prairies began a campaign for equal homesteading rights in 1909. Federal authorities who maintained control over Crown Lands were not sympathetic. By the time the prairie provinces gained control of their public lands in 1930, most free grant lands had already been settled. Saskatchewan and Manitoba revoked homesteading privileges altogether. Alberta legislated to allow any 'person' over the age of eighteen to homestead, and a few women were able to pre-empt lands, for the most part in the Peace River District. See Catherine Cavanaugh, "The Limitations of the Pioneering Partnership: The Alberta Campaign for Homestead Dower, 1909-25," *Canadian Historical Review*, vol. 74, no. 2 (1993), pp. 199-200.

Bunster's Bill is printed in the *Daily Standard*, 8 February 1873; for criticism see the *British Colonist* and *Daily Standard* issues of 18 February 1873. The Homestead Act amendment is reported in the *British Colonist* and *Daily Standard*, 20 February 1873. For the 1870 Land Act and its 1873 amendment, see "An Ordinance to amend and consolidate the Laws affecting Crown Lands in British Columbia, 1870," in *Laws of British Columbia*, pp. 492-503, and British Columbia, *Statutes*, 1873, 36 Vict., no. 1.

[9] The exception being a single clause regulating the purchase of life insurance.

married woman's separate earnings, and any personal property she acquired with those earnings, were exempted from her husband's control and the claims of his creditors; she could also invest in corporate stock and savings banks. Additional provisions empowered married women to contract, sue, or be sued in matters regarding their separate property. These were substantial new rights, yet they were accompanied by equally substantial limitations. Married women's control over realty was sharply restricted: they were not given the power to convey real estate. Moreover, any personalty not derived from a married woman's own earnings was subject to her husband's control.[10]

Study of the married women's property acts in Canada and the United States has been extensive. In Canada, Constance Backhouse, building on an outline created by Richard Chused for the United States, has outlined three waves of married women's property law reform.[11] The first wave of statutes was passed to deal with abandoned wives, providing them with provisional property rights. The second wave, characterized as debtor-relief measures, involved the insulation of a married women's property from her husband and his creditors. The third and final 'egalitarian' wave of reform, writes Backhouse, "attempted to grant married women control of their earnings, as well as dispositive powers over their separate property." Backhouse provisionally places the 1873 British

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[10] In Ontario an 1859 act extended the basic principles of the equitable separate estate into statute law. For details of the 1872 Ontario and 1873 British Columbia MWPAs see Ontario, *Statutes of the Province of Ontario*, 1872, 35 Vict., c. 16; British Columbia, *Statutes*, 1873, 36 Vict., no. 29; Backhouse, "Married Women's Property Law," pp. 230-231.

[11] For the latest variant of the 'wave' thesis in the United States, see Sara L. Zeigler, "Uniformity and Conformity: Regionalism and the Adjudication of the Married Women's Property Acts," *Polity*, vol. 28, no. 4 (Summer 1996), pp. 478-479.

Columbian law in the second wave.[12] Yet as she indicated, many statutes do not fit neatly into the classification scheme.[13] British Columbia's 1873 statute was one of these. The statute was multifaceted: overtly it had both protective and egalitarian implications; covertly, it aimed to provide debtor protection and regularize married businesswomen's credit relations.

In introducing the bill, Robert Beaven stressed that it was not a government measure. Confidence in the cabinet was not at stake, and members could vote according to their consciences. Beaven explained the bill clause by clause, portraying it as a "wife protection" measure. What he meant by these words is not clear. Certainly, as many of the legislators pointed out, the bill would aid deserted wives by protecting their independent earnings and the property purchased with those earnings from their husbands and creditors claiming against them. Unlike the 1862 legislation, it required no protection order. Yet the bill's effects went beyond 'broken' families. It also gave protection to wives and children in 'intact' families, since realty placed in the wife's name was exempt from the claims of the husband's creditors. Likely, Beaven intended and understood both effects.

John Robson immediately stood to address the measure. As a married man and a devout Methodist, Robson was both personally affected by the legislation and ideologically attached to a specific family form. While twenty-first century readers may

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[12] See Backhouse, "Married Women's Property Law," p. 250 (fn. 85).

[13] Backhouse, "Married Women's Property Law," p. 212.

disagree with Robson's ideals, his apprehensions were perceptive. Robson noted that the bill seemed to go further than was necessary to protect wives. He feared that the bill "proposed to establish two authorities in the same household[,]... savored of 'Woman's Rights'" and "was calculated to revolutionize the marriage state." In the home, the bill "held up a sort of premium to the wife to commit acts of insubordination." Moreover, Robson argued, it would open the door for married women to enter the public sphere, "encourag[ing] some wives to throw the children on the husband's hands, leave him, and go into business on their own 'hook.'" For Robson, the bill was the thin edge of a pernicious wedge which valued Women's Rights to the detriment of patriarchal hierarchy and stability. Several other members echoed these opinions.[14]

Legislators also raised economic concerns. They revived the claims of homestead exemption opponents that altering family liabilities would disrupt credit relations. Despite a clause specifying that a man could not transfer "moneys" or "investments" into his wife's name to evade his creditors, they steadfastly maintained that the bill would encourage fraud; indeed, as Lori Chambers has pointed out, the clause would be difficult to enforce, since the plaintiff would have to prove that the transfer was deliberately made to defraud creditors;[15] moreover, no provisions protected against the fraudulent transfer of real property. New Westminster M.P.P. Henry Holbrook worried that if the bill passed, extending credit to families would be impossible, "knowing their property could be, and

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[14] *Daily Standard*, 15 Jan 1873.

[15] Chambers, *Married Women and the Law of Property*, p. 118.

probably would be, placed exclusively in the name of the wife."[16] The husband's ability to transfer assets to his wife to protect them from creditors offended advocates of the traditional family. In this way, family assets were shifted from one member to another, specifically to evade family liabilities. For opponents, this practice, as Philip Girard and Rebecca Veinott note in their study of married women's property law in Nova Scotia, "reeked of fraud on creditors as it did not accord with the common perception of marriage as a community."[17]

Robson and Holbrook demonstrated remarkable insight. Each had struck upon a central facet of the legislation. As Paulette Falcon has argued, the MWPA's supporters intended to regularize married women's participation in business. They also intended to permit husbands to transfer property to their wives and beyond the reach of creditors. The first aim grew out of the realization that despite their lack of property rights, married women in British Columbia were already engaging in contracts and business speculations. Indeed, their business activities were regularly bringing them before the courts. Married businesswomen in the Cariboo were suing and being sued regularly in the 1860s, well before the enactment of the 1873 MWPA. Malvina Toy, a Clinton innkeeper, was involved in ten different suits between 1866 and 1869. Another Cariboo innkeeper, Catherine Lawless, appeared in court nine times from 1863 to 1865. In an 1868 prosecution by Toy, the defendant argued that she could not sue him because she was a

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[16] The Committee debates are reported in the *British Colonist*, 15, 16 January 1873; and the *Daily Standard*, 15 January 1873.

[17] Girard and Veinott, "Married Women's Property Law," p. 74.

married woman. Judge E.M. Sanders of the Lilloett County Court ruled that a married woman conducting a business separate from her husband could sue and be sued independently.[18] However, there was no provision for such actions under the common law, and county courts rarely established binding precedents. As Lykke de la Cour et al. have written, "the de facto operation of small businesses by married women" created a "regulatory crisis ... for the bourgeois patriarchal legal order..."[19] Creditors could not rely on enforcement of contracts with married women with any degree of security.

Two cases reported in the *British Colonist* in 1863 support this interpretation. Extending credit to married women was risky business. In *Thomas* v. *McGee*, Mrs. McGee had borrowed $60, representing herself as unmarried. When pressed for payment, however, she revealed that she was married, and that her husband lived in San Francisco. Chief Justice Cameron ruled that since Mrs. McGee was married, she could not be sued. Since her husband was beyond the court's jurisdiction, he could not be sued either. Thomas was out of luck. Some months later another case involving a married woman produced a similar result. In *Hoffman* v. *Engell and wife*, a married woman and her second husband were sued for a debt she contracted prior to her first marriage. Mrs. Engell's first husband was dead. In this case, Chief Justice Cameron ruled that debt in question belonged properly to the dead husband, and that neither Mrs. Engell or her

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[18] Falcon, "'if the evil ever occurs,'" pp. 41-42.

[19] Lykke de la Cour, Cecilia Morgan, and Mariana Valverde, "Gender Regulation and State Formation in Nineteenth-Century Canada," *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada*, ed. Alan Greer and Ian Radforth (Toronto: University of Toronto Press, 1992), p. 168.

second husband was liable.[20] As such cases reveal, the married women's property act was necessary to secure the rights of creditors. The security of property in the province demanded it.[21] The MWPA attempted to resolve the uncertainties created by married women's anomalous status: in addition to making wives liable to be sued in respect of their separate property, the 1873 MWPA made women liable for debts incurred prior to marriage, and absolved husbands of that responsibility.[22] There is, it should be noted, no direct evidence attesting to legislators' desire to regularize married women's participation in business. Yet they could not have been unaware that the legislation would have this effect. After all, as critic Robert Smith had observed, "What a gay scene it would be to witness ladies, on 'Change,' bobbing around in their Dolly Vardens, speculating on Stocks. They would become public contractors, and would have their husbands at their feet, soliciting a job as choppers or graders."[23]

Debtor protection also motivated some proponents of the bill. Amor De Cosmos had been interested in extending an equivalent of the married woman's separate estate into statute law as a form of family protection for some time. When supporting homestead legislation, De Cosmos and Thomas Lett Wood referred to equitable trusts and agreements, noting that by bestowing upon his wife a certain amount of property, a man

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[20] For *Thomas* v. *McGee* see *British Colonist*, 24 January, 5 February 1863; *Hoffman* v. *Engell* and wife is reported in the *British Colonist*, 7 August 1863.

[21] Falcon, "'if the evil ever occurs,'" pp. 80-81.

[22] British Columbia, *Statutes*, 1873, 36 Vict., no. 29, s. 7.

[23] *Daily Standard*, 15 Jan 1873.

could protect it from his creditors.[24] The homestead legislation was intended to offer equivalent protection.[25] The evidence indicates that in its first seven years of operation, it was well-used, and used by De Cosmos' intended demographic. A report to the legislature detailing the number and cumulative value of homestead exemptions registered in each land registry district from 1866 to 1873 indicates that the realty exemption provisions of the act were invoked by a total of ninety-two people. Eighteen had since been abandoned.[26] British Columbia's 'homesteaders' — and the term is used quite loosely — were largely city dwellers. While the word homestead stirs up visions of rural farmers eking out a living, the exemption was most often used by urbanites. The

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[24] This understanding of the use of equitable settlements was apparently quite widespread. A correspondent to the *British Colonist* in 1869 wrote that homestead exemptions were as "good and effectual as a marriage settlement which but few are able to make at the outset of life." *British Colonist*, 3 August 1869. Under normal circumstances, equitable doctrine declared that property transferred from one individual to another was held by the recipient in trust for the donor. The donor's creditors could still attach the property because legal title remained with the donor. However, under the equitable precedents established with relation to marriage settlements, the court of chancery permitted a husband to make a settlement of property on his wife for her future security, and this transfer was considered an absolute gift: the assumption of trusteeship did not apply, and title legally transferred from husband to wife. In allegedly fraudulent transfers of property from husband to wife, the burden of proof shifted to creditors. They had to prove fraudulent intent. Chambers, *Married Women and the Law of Property*, p. 118.

[25] De Cosmos had spent a considerable amount of time in the United States; this was undoubtedly where he had learned of homestead legislation, and may have where he first encountered precedents for extending married women's equitable separate estates into statute law. Carole Shammas writes that some of the earliest American MWPAs, passed in the 1830s and 1840s were passed "to cushion the blows of [the] market economy and aid bankrupt men." Sara Zeigler clarifies the function, noting that since a wife's separate property "could not be seized to pay [her husband's] debts, [the MWPAs] decreas[ed] the likelihood that the husband's mismanagement or misfortune would leave his wife and children destitute." Moreover, Zeigler has also recognized that the laws were often quite clearly aimed to protect male interests: through many states' MWPAs, men could shelter property, and while the wife had management rights, could not convey the property without her husband's consent. Thus, while "the wife might possess her own property, she could not use it to gain a measure of independence vis-a-vis her husband." Legislatures later changed perspective on the MWPAs, and attempted to make it more difficult for husbands in economic trouble to transfer wealth to their wives. Shammas, "Re-assessing the Married Women's Property Acts,"p. 24; Zeigler, "Uniformity and Conformity," pp. 480-481.

preponderance of homesteads, seventy of ninety-two, were registered within municipal limits. The bulk of these, totaling sixty-four registrations, were in Victoria. The reasons for this urban-biased distribution are difficult to establish with any certainty, although it may have resulted from local knowledge of the act and proximity to a land registry office. Those who registered homesteads were relatively wealthy individuals, and this is a fact of some importance. The average value of all homestead exemptions was $1989.[27] While there were a few less wealthy individuals who registered homesteads,[28] for many, the exemption was not large enough to cover their entire home property. Fourteen of seventeen registrations where the value can be individually ascertained were for the maximum amount, $2500. Many of these homesteads were undoubtedly worth more than $2500.[29]

Through homestead legislation, De Cosmos had intended to offer protection to wealthy and successful independent entrepreneurs, in the hope that they would invest in British Columbia and stimulate the economy. For this purpose, he had sought a $5000 exemption, which was later reduced to $2500. The exemption, it appears, was not large

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[26] If the owners were married, their wives were apparently willing to assent to the abandonment of the family homestead when necessary. There is, of course, no way of knowing how often wives refused to assent to homestead sales. British Columbia, *Sessional Papers*, 1874, pp. 33-34.

[27] The average value of urban homesteads ($1895) was significantly lower than the average value of rural homesteads ($2311), which likely reflects the value of farm lands in comparison to town lots. British Columbia, *Sessional Papers*, 1874, pp. 33-34.

[28] A single $250 exemption registered in the New Westminster District provides evidence that some less wealthy individuals registered real estate exemptions. Considered along with the relatively high average exemption, however, we can see just how rare such individuals were. Moreover, this particular individual seems to have failed or chosen to move on. Or perhaps he needed credit. His exemption was abandoned by 1873. British Columbia, *Sessional Papers*, 1874, pp. 33-34.

[29] British Columbia, *Sessional Papers*, 1874, pp. 33-34.

enough to protect many wealthy individuals' homes. In contrast, the Married Women's Property Act, based on the married women's equitable separate estate, offered families a means of protecting larger amounts of property from creditors. In fact, the act appears to have been formulated precisely for this purpose: it omitted the 1859 Ontario MWPA's restriction preventing a woman's husband from giving her real estate to protect it from seizure, and specifically freed a married woman's separate property from the claims of her husband's creditors. The 1873 act would allow De Cosmos' proverbial "men who were carrying on the country" to transfer large amounts of real property to their wives before securing credit or undertaking business ventures, thereby protecting their homes and families from creditors and economic failure. It offered the additional safeguard to husbands that any real property protected in this manner, would be doubly secure, since the wife could not convey it.[30] Leaving this aspect of the MWPAs unspoken was not unusual. In his 1905 treatise on married women's property law in Ontario, George Holmested wrote that although legislators made no explicit mention of a husband's ability to protect property from creditors through MWPAs, the principle was well understood and central to the passage of the acts.[31]

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[30] While I have argued that the absence of dispositive provisions was intended to provide husbands a means of securely protecting property from creditors in their wives names', Lori Chambers attributes the absence of dispositive provisions in the 1859 and 1872 Ontario MWPAs to the belief that "to give women such powers would be to provide [vicious] husbands with a new means of squandering their wives' property." Both contentions have merit. Chambers, *Married Women and the Law of Property*, p. 123. Canada, *Statutes of the Province of Canada*, 1859, 22 Vict., cap. 34, s. 1; Ontario, *Statutes*, 1872, 35 Vict., c. 16, s. 1; British Columbia, *Statutes*, 1873, 36 Vict., no. 29.

[31] Chambers, *Married Women and the Law of Property*, p. 78.

Neither credit regularization nor debtor-protection were advocated by the bill's supporters in the legislature. Given the vocal opposition to the bill's possibilities for generating fraud and its egalitarian implications, supporters tended to focus on its protective aspects, appealing to conservative legislators' paternalistic sensibilities. In the Legislature, only Cariboo M.P.P. Cornelius Booth supported the legislation's egalitarian potential and the ideal of companionate marriage it suggested. Booth asserted that he "could not see on what ground a wife should be held in subjection and not placed on a level with her husband," arguing that "Man and wife should be in the same relation to property as other partners." Booth's opinion only inflamed the opposition. Most supporters took a less antagonistic approach. If the measure was to pass, it would require the support of socially conservative legislators. Reform legislators, so acutely aware of the remoralizing effects of inheritance legislation, were silent on such matters where the MWPA was concerned. Curiously, only John Robson raised the possibility that legislation could influence social behaviour.

Lillooett's T. Basil Humphreys drew on the authoritative discourse of the English Woman's Rights movement, which associated married women's property acts with wife protection. The wily Humpreys, although fully aware of the property protection the measure offered to married couples who could shift the ownership of property into the wife's name, made no mention of this aspect. He understood his audience, and emphasized the protection the measure provided for deserted and brutalized wives, attempting to elicit a chivalrous response from conservative legislators. Humphreys claimed that "the English papers" were rife with incidents of "brutality on the part of

husbands" and cited "a case wherein a man had drawn his wife's money from the bank, sold her property, and then decamped." He argued that if legislators passed the MWPA, "unjust and tyrannical men could not rob their wives of their property and hard earnings."[32] Although he was focussing on the protective element of the legislation to shift critics' focus, Humphreys was correct. Since the act granted married women control over their earnings, and protection from liability for their husbands' debts, it removed the need for a protection order in most deserted wives cases.[33]

This was quite important. Experience with the Deserted Wives Act had shown the protection order to be an impediment. Although Amor De Cosmos had been worried that the Deserted Wives Act would lead to the disintegration of family life on Vancouver Island, he need not have been. The Duke of Newcastle's concerns were prescient: the need to take legal action and secure a court order to enjoy the benefits of the act meant that the rights it provided were seldom invoked. A register of protection orders maintained by the Supreme Court records only fourteen orders issued between 1863 and 1889.[34] These orders reveal the abuse[35] and financial difficulties[36] faced by deserted

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[32] *British Colonist*, 15 January 1873; cf. *Daily Standard*, 15 January 1873.

[33] British Columbia, *Statutes*, 1873, 36 Vict., no. 29, s. 2.

[34] Under similar Nova Scotia legislation, Girard and Veinott report only six orders between 1866 and 1884. The Act required that all protection orders be entered with the Supreme Court registrar within ten days. Thirteen of the orders were issued to women on Vancouver Island. Interestingly, one case originated on the mainland, under the terms of the 1857 English legislation, which applied to the mainland colony. Information on protection orders was obtained from the register of protection orders, which contains the order as issued — generally a somewhat formulaic repetition of the rights being conferred on the deserted wife — and often a few details regarding the date of marriage, date of desertion, and number of dependents; Judges' Bench Books, which are available for two cases, contain the informal notes of the Judge hearing the case; and finally, contemporary newspaper accounts, which offer a few ancilliary details. See British Columbia, Supreme Court, Register of Orders Protecting the property of a Wife deserted by her husband, BCARS, C/AB/30.3D; Girard and Veinott, "Married Women's Property Law," p. 75.

wives. They also show that the protection order clause greatly limited the effectiveness of the act in relieving these difficulties.[37] A woman had to be aware of the law, and have the personal strength to invoke it during a crisis. Few would have had the awareness of Ellen Harmon, who obtained an order under the act six days after her husband Philip abandoned her and her three children in February of 1886.[38] As Harmon was likely

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[35] As in other jurisdictions, judges appear to have been largely sympathetic to the cases of abused women. Victoria's Police Magistrate, Augustus Frederick Pemberton, set the judicial tone in November 1862, when he used the act as a deterrent to spousal assault, advising the aboriginal wife of one C. Raymond that "if he abused her again, she might apply to him for protection under the new Marriage Act." Some twenty-seven years later, Judge Crease was still willing to provide a protection order to ease the fears of an abused wife and her father, even though the 1887 Married Women's Property Act had rendered such an order unnecessary. *Colonist*, 4 November 1862. British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 717 (1889-1891), p. 368.

[36] Deserted wives faced an uncertain economic future. So too did their children. Only three of the fourteen protection orders comment on children, but those which did are illustrative of the position in which a deserted wife could find herself. The most extreme example was Helen Nunn, whose husband George deserted her after fifteen years of marriage, leaving her with eight children "wholly dependent on her earnings." Those earnings were unlikely to provide a decent living. Studies of women's employment in nineteenth-century Canada uniformly cite low wages in comparison to those of men. By 1901, women's wages remained, on average, about half those of men's. From various 1901 census schedules and their own seven-city sample, Sager and Baskerville report average wages for women ranging between $180 and $224 yearly; men's wages ranged between $365 and $429 annually. British Columbia, Supreme Court, Register of Orders Protecting the property of a Wife deserted by her husband, BCARS, C/AB/30.3D, p. 8; Bradbury, "Women and Wage Labour in a Period of Transition: Montreal, 1861-1881," *Histoire sociale / Social History*, vol. 17, no. 33 (May 1984), pp. 122-123; Bryan D. Palmer, *Working-Class Experience: Rethinking the History of Canadian Labour, 1800-1991*, 2nd ed. (Toronto: McClelland & Stewart, 1992), pp. 100-101, 135; Susan Trofimenkoff, "One Hundred and Two Muffled Voices: Canada's Industrial Women in the 1880s," *Canadian Working Class History: Selected Readings*, ed. Laurel Sefton MacDowell and Ian Radforth (Toronto: Canadian Scholars' Press, 1992), pp. 191-203; Peter Baskerville and Eric Sager, "Finding the Work Force in the 1901 Census of Canada," *Histoire sociale / Social History*, vol. 28, no. 56 (1995), pp. 534, 537.

[37] No husband appears to have contested the issuance of an order. Nor did any husband make a successful application for the revocation of an order, and no orders were voluntarily surrendered or cancelled. We cannot know how many orders were refused, if any, from the sources in British Columbia. In Ontario, Chambers reports that no applications were refused in a sample of over 100 cases. In Nova Scotia, one of six recorded orders was contested by the husband. Chambers, *Married Women and the Law of Property*, p. 129; Girard and Veinott, "Married Women's Property Law," p. 76; British Columbia, Supreme Court, Register of Orders Protecting the property of a Wife deserted by her husband, BCARS, C/AB/30.3D

[38] British Columbia, Supreme Court, Register of Orders Protecting the property of a Wife deserted by her husband, BCARS, C/AB/30.3D, pp. 18-19.

aware, the order was only effective once issued. It did not protect any property accumulated prior to that date. George Hunter Cary's amendment, making the order effective from the date of issuance, severely limited the utility of the act. Two cases reveal the difficulties the amendment created for women seeking protection orders.

In July 1872, Maria Cheffrey[39], a Spanish resident of Lytton, traveled to Victoria and secured the services of a lawyer to obtain a protection order. She was determined to have the order issued by Chief Justice Begbie and would accept it from no one else.[40] At the same time, she applied for an order for physical protection from her husband. Cheffrey testified that she married in 1866. After four months of marriage, she and her husband entered into a separation agreement, and shortly thereafter, Mr. Cheffrey left for the Peace River Country. Over the next six years, Maria supported herself and received nothing from her husband. She was evidently quite successful, having purchased land in Victoria and Lytton. However, three weeks before her appearance in court, and six years after leaving his wife, Mr. Cheffrey had returned. Maria Cheffrey feared for both the security of her property and person. She produced the separation agreement, which Begbie noted could not be enforced. His Bench Book provides no details of its contents. However, Begbie did use the document to establish the date of the 'abandonment' in

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[39] This is the spelling used in the protection order and in the *British Colonist* report of the proceedings. Begbie recorded the name as both Schreffer and Thieffrey, and the *Daily Standard* reported it as Chutterly.

[40] Cheffrey may have been aware of the necessity of having the order registered in Victoria within ten days under the Vancouver Island Act. This may have been difficult to do from a distance. In any case, as shall be described below, Begbie applied the English legislation to Cheffrey's case, and the ten day registration period probably did not apply.

1866. Begbie also noted that Maria made her application under the 1862 Vancouver Island legislation. The Vancouver Island act, he noted, "only enables me to protect prop[ert]y & earnings acquired since the date of the order." Thus, under the Vancouver Island act, all of Maria's property accumulated over the six years following the separation could have been taken by her husband, even if an order was issued. She would only gain property rights in acquisitions made subsequent to the issuance of the order. She would lose everything, and have to start over.

Fortunately, Maria Cheffrey's faith in Chief Justice Begbie paid off. Begbie noted that as the parties were living at Lytton on the mainland, the case before him could be considered under the laws of the colony of British Columbia, rather than under the Vancouver Island statute.[41] The English Matrimonial Causes Act of 1857, being in force at the creation of the mainland colony in 1858, applied to the mainland and had not been since abrogated. "The English Act [of] 1857," Begbie noted, "is more fair & extensive. It enables the earnings of the wife to be protected as from the comm[encemen]t of the desertion." Thus, Begbie issued the order under the 1857 legislation, granting protection to Maria's property from the date of the separation agreement. Protection of her person, however, was not provided for in the statute, and Begbie suggested she apply to the Magistrate at Lytton.[42]

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[41] The Vancouver Island statute applied to the within its previous jurisdiction after union of the colonies and entrance into confederation. It did not apply to the mainland.

[42] British Columbia, Supreme Court, Register of Orders Protecting the property of a Wife deserted by her husband, BCARS, C/AB/30.3D, p. 6; British Columbia, Supreme Court, Bench Book, Begbie, C.J., BCARS, GR 2025, vol. 8 (1871-1873), p. 303; *Daily Standard*, 31 July 1872; *British Colonist*, 1 August 1872.

Not every applicant was as fortunate as Maria Cheffrey. Ellenor Clark came before Victoria Police Court Magistrate A. F. Pemberton in November of 1868. Her husband Thomas, a carpenter, had deserted her a year earlier, departing for California. Thomas Clark left Ellenor with three children under the age of ten to support. She received no money from him, and supported herself and the children through her own efforts. In addition to being a deserter, Thomas Clark was a "skedaddler" in the local parlance. He left with debts unpaid, and judgments were issued against him in Victoria County Court. Friends advised Ellenor Clark that her property and earnings would be liable to seizure in satisfaction of her husband's debts unless she obtained a protection order from the court. Magistrate Pemberton willingly issued the order; in practice, however, its effects would have been limited: under the terms of Vancouver Island's legislation, only property acquired subsequent to the date of the order was protected against the claims of Ellenor's husband and his creditors. Any property she had acquired previously remained liable for her husband's debts. Thus, while George Hunter Cary's amendment may have precluded fraud, it also placed creditors' rights above the needs of women and children. The protection order was a cumbersome legal device which left wives vulnerable. It was for this reasons, in part, that conservative legislators would be amenable to reform of married women's property law necessary in 1873.[43]

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[43] The case of *Balden* v. *Strong*, cited by Paulette Falcon as a motivating factor leading to the alteration of Married Women's Property law in 1873, was not launched until 1874. Thus, coming over a year after the 1873 MWPA, the case itself could not have been a factor in the alteration of the law. Falcon claimed that the case revealed how an order of protection could complicate credit relations, and influenced the movement for reform. In this rather complex case, a husband's liability for his wife's necessaries and burial were complicated by the alleged existence of a protection order which had not been registered with the Supreme Court, as required in section 2 of the Act. See Falcon, "'if the evil ever occurs,'" pp.

Like T. Basil Humphreys, Premier De Cosmos was also familiar with campaigns for married women's property legislation in other jurisdictions. In the legislature, he claimed that "no liberal government could justly oppose this Bill." He noted that the bill was largely the same as the one recently passed in Ontario, and cited John Stuart Mill's support for the measure in England. Yet despite knowledge of the egalitarian leanings of the English movement, a personal liberalism which made him sensitive to women's demands for greater legal and political rights, and the bill's potential to achieve one of his long-term goals — protecting intact, functioning families from financial ruin — De Cosmos too stressed its value in dysfunctional families. In both the Legislature and his editorials, De Cosmos, like Humphreys, tried to win over conservative legislators by appealing to their paternalism: the bill was "intended as a safeguard," he told the Legislature; "it brought the woman into a freer atmosphere, and prevented the worthless husband from concentrating his thoughts on the sole object of making money from the resources of his better half." Repeating this argument in the *Daily Standard* De Cosmos declared, "it is to remedy this evil, and to throw the aegis of the law's protection around married women who have been thus unfortunate in their matrimonial connections, that Mr. Beaven has introduced the bill under consideration."[44]

78-79; see also British Columbia, Supreme Court, Bench Book, Begbie, C.J., BCARS, GR 1727, vol. 729, p. 209.

[44] See coverage of the legislative debates in the *British Colonist* and *Daily Standard*, 15 January 1873, and De Cosmos' editorial in the *Daily Standard* on the same day.

While there is no evidence of grassroots agitation for the married women's property law in British Columbia,[45] and no evidence that it was an issue in the 1871 electoral campaign,[46] several letters in favour of the measure were printed in the *Daily Standard.* One letter, written under the pseudonym 'Proletarius,' addressed the question with Woman's Rights issues as its frame of reference: 'Proletarius' objected to the idea that married women should be subordinate to their husbands, suggesting "that marriage should be based upon perfect equality of rights," and asserting that female inequality was antithetical to the "enlightened freedom and liberalism" of the late nineteenth century. But even this radical partisan was willing to include a caveat, perhaps to court favour with opponents: [W]omen," 'Proletarius' wrote, "ought to possess the same personal and individual rights, *at least as regards property*, as men." Another writer, 'Sarah Jane,' addressed the question with family protection as her main focus. Opponents of the act, she wrote, feared that if women were granted power or property, they would use it to the detriment of their husbands and families. But other jurisdictions had found differently: in Ontario and "in more than three-fourths of the American states," such laws were in already in place and were "highly beneficial." In fact, 'Sarah Jane' suggested that a combination of maternal instinct and the married women's property law just might strengthen the economic base of the family:

> After considerable observation, I will venture that in every community where such a law has existed for any length of time, ten cases can be found where women have used every cent of their separate property for the support of their husbands and

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[45] In fact, the only organized public movement opposed the act. See below.

[46] None of the printed platforms for the 1871 election in the Victoria newspapers discussed the married women's property law. Nor was it a topic of concern at political meetings in Victoria, Esquimalt, or Barkerville. *British Colonist*, 13, 16 October 1871; *Daily Standard*, 30 October 1871.

> families — husbands often drunken and worthless — to one, where their separate property has been the cause of trouble or disruption in the family, or where they have selfishly refused to allow their property to be used for their families in case of need.

A third writer, 'Observer,' also supported the ideal of maternal instinct, claiming that "[a] woman may be lost to all sense of decency, in so far as her own conduct is concerned... but her natural affection for her offspring prevents her from allowing her children to want."[47] Far from urging destruction of the family, as their opponents alleged, these writers were advocating a new view of the family, centered around the ideal of companionate marriage, and informed by separate spheres ideology: the husband was corrupted through his involvement in the competitive, uncaring marketplace; but the compassionate, family-oriented wife could be trusted to look after the needs of the family. With the nascent emergence of the "cult of true womanhood" stressing the importance of maternal instinct and women's role in the home, these writers believed that putting property in the hands of wives could only strengthen the family. The protection which MWPA advocates sought for married women was protection for the wife and children from the misdeeds or misfortune of their breadwinner.

Their opponents certainly did not see things this way. The act engendered a public and political backlash of enormous proportions. In a *British Colonist* editorial, John Robson suggested that the bill disregarded "existing systems and conditions," and was "too revolutionary." It would, he wrote, "unnecessarily disturb the matrimonial fabric," and

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[47] *Daily Standard* letters: 'Proletarius' and 'Sarah Jane,' 3 February 1873; 'Observer,' 25 January 1873.

throw credit relations into disarray. Robson was not taken in by the passionate appeals of the bill's supporters. He advocated insurance legislation and a dower bill as less sweeping measures which would produce the desired effect: protecting dependents. The editorial staff, he wrote, did not want to be

> understood as asserting that there are not instances in which the wife should have some protection as the bill proposes. Unhappily there are cases of the kind; but we are happy to think them exceptional, and we must question the wisdom, the necessity of producing a social and commercial revolution, especially when a much more simple remedy may be applied.[48]

In tampering with the family, Robson believed legislators were jeopardizing the province's future.

In the Legislature, he was joined in his opposition to the Married Women's Property bill by William Smithe, who argued, unsuccessfully, that the measure should be amended to make a married woman with separate property "liable for the support of her children and household, in an equal and proportionate degree with her husband."[49] Smithe's amendment was rejected, and the act passed by a vote of 16 to 5.[50] The absence of any attempt to address Smithe's concern is particularly interesting. Clauses 13 and 14 of the 1870 English MWPA specifically established the liability of a married woman with a separate estate for the support of her husband and children. Failure to include such a clause in the British Columbian MWPA might be interpreted as evidence that the

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[48] *British Colonist*, 24 January 1873.

[49] *Daily Standard*, 25 January 1873. See also British Columbia, *Journals of the Legislative Assembly of the Province of British Columbia*, 1st Parliament, 2d session, 1872-73, p. 39.

[50] *British Colonist*, 1 Feb 1873.

purveyors of the bill were in tune with equal-rights feminist ideals: in England, radicals vigorously objected to the liability clause, arguing that a wife was entitled to support — her maintenance was an equivalent for the services she performed in managing the household — and that she should not legally be held responsible for the support of her children, as long as the law recognized her husband as their sole parent and guardian.[51] Yet the reality is probably more mundane: making the wife's property liable for familial support held out the possibility that its protected status would be annulled.

William Smithe's concerns went unaddressed. Yet judging from a number of letters to the local newspapers, Smithe voiced the concerns of a sizable constituency. One critic argued that the bill bestowed upon "the wife the same rights as the husband and an entire immunity from the responsibilities attached to him as nominal head of the household." Many others opposed the bill in its entirety, fearing that the freedom the MWPA provided a woman from patriarchal authority would result in serious consequences for the family and social breakdown: one wrote, "by creating two separate and distinct purses, two powers are created where only one should exist"; this, he contended, would tend "in every way to create coldness, bad feeling, jealousy and dissension in the family, where naught but love and trust should exist"; the end result of such a turn of events would be "a quick and easy divorce law" and "total disregard of the institution of marriage." Another believed the act would "make the woman unwomanly" and "by its action promote bachelorhood and its concomitant evils," eventually leading to "social and

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[51] Holcombe, *Wives and Property*, pp. 245-246.

commercial demoralization."[52] Like proponents of the act, opponents believed that the shape of the family, the social structure, and hence, the national destiny, were closely linked. Comments penned under the pseudonym 'Romeo' are perhaps the most overt expression of these beliefs:

> A married man and woman who have hitherto been in the eyes of the law to all intents and purposes one flesh, are by this Bill made separate and distinct entities, whose interests may be antagonistic to each other; the unity, therefore, that ought to exist between them is destroyed and where there is no union of interests there can be no peace and concord. Separate and alone man and woman are each imperfect. Nature has decreed that a perfect state of existence can only be attained by the union of the two sexes, and yet this Bill [will] prevent or destroy that perfect and cordial union so necessary to the well-being of our race [and] produce disorder and disorganization in society.[53]

Opponents' rhetorical flourishes should not be construed as gross exaggeration simply because they seem overly dramatic to modern ears. The concern was real. Shortly after the bill's passage, a petition circulated in Victoria and Nanaimo calling on Lieutenant-Governor Trutch to withhold his assent from the measure.[54] Despite its 450 signatures, Trutch, who had reserved previous pieces of legislation, decided not to act on the petition, perhaps because the British and Ontarian MWPA precedents would have made such an action difficult to justify.

The MWPA, like its predecessors in family property law reform — deserted wife protection and homestead exemption — was passed to protect the legislature's reproductive priorities from the volatility of marketplace relations in the Pacific colonies.

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[52] *Daily Standard*, 1 February 1873; *British Colonist*, 29 January 1873.

[53] *British Colonist*, 2 February 1873.

[54] Falcon, "'if the evil ever occurs,'" pp. 65-66; *Daily Standard*, 10 February 1873.

But this concern was tempered by intentions to maintain marketplace relations. Reformers did not intend to inhibit market activity. Initially, by protecting deserted wives, legislators attempted to improvise a means of redressing the problems faced by already 'broken' families. Later, they would move to forestall the pauperization of 'intact' families: to reduce family vulnerability in the new market economy, reformers tried to prevent family proletarianization by securing families a stable property base. In doing so, they looked to American and British precedents, and found that either homestead exemption or the married woman's separate estate would suit their purposes. They were not alone in this observation. Several American states combined married women's property laws and homestead exemption laws into a single measure, or passed both measures together. According to Paul Goodman,

> The movement for homestead exemption converged with reform of married women's property law. Both recognized that the market revolution had weakened the traditional assumption that wives and children could rely on male household heads as breadwinners. The ups and downs of the economy, failure in business, or loss of jobs made families destitute. Even husbands who entered the marriage with property, sometimes brought by the wife, could suffer sudden reversals of fortune, as did thousands in the collapse of the late 1830s.[55]

Norma Basch adds that both measures were related to the drive to abolish imprisonment for debt.[56] Robert Beaven's MWPA, passed under De Cosmos' ministry, was an upgrade to the legislative package of the mid-1860s. Beaven's act increased the family's protected property base (above the protection offered by homestead exemption); but in doing so it shifted familial power structures and neglected certain patriarchal priorities: it provided

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[55] Goodman, "Emergence of Homestead Exemption," pp. 488-489.

[56] Basch, *In the Eyes of the Law*, p. 122.

protection to wives who left their husbands, promoted companionate marriage, and extended married women's rights within the public sphere.

Because of its break with patriarchy, the MWPA occasioned a split amongst reform legislators. Up to this point, John Robson agreed with the aims of the reform package: establishing the security of the independent producing family, developing representative and responsible property-based democracy, and encouraging colonial and provincial economic growth. But he and De Cosmos divided at their conception of family structure. While Robson held a patriarchal conception of the family as a hierarchically organized community of interests with the husband / father at its head, De Cosmos, Beaven, and others were open to the idea of the companionate family. Robson, as has been shown, was willing to extend married women's rights within their role as wives and mothers confined to the domestic sphere. Wives could prevent disposal of the homestead to protect their families, and in so doing were acting within the proper boundaries of their role: they were defending the requirements of the domestic sphere. Nonetheless, their ability to do so was constrained by the husband from his superior position as head of family and representative in the public sphere. Only he could invoke homestead protection. Wives were not to be given legal abilities which would allow them to exceed their well-defined domestic role. So Robson opposed the MWPA, which would allow married women to enter the public sphere, participate in the economy, and possibly to compete socially and economically with their husbands.

Proponents of the MWPA subscribed to completely different gender norms. They believed in increasing power for wives and mothers in their roles within the family, and

if necessary, in the public sphere. A mother could be counted on to look after the best interests of her children. But their reforms went beyond a simple admiration for women in the roles of wife and mother. Those who promoted legislation giving married women more power within the family, were also giving more power to women outside the family. In fact, several reform legislators supported Woman's Rights and agitated for recognition of women's independent political status. Shortly after the MWPA was passed, during a review of the government's Municipality Amendment Bill, Charles Semlin, member for Yale, "moved to allow females to vote." Over the raucous objections and ridicule of John Robson, George Walkem, and Robert Smith, Semlin noted that there was a precedent for his motion. In Ontario, he said, women could vote in some matters. Cornelius Booth supported this assertion, and De Cosmos said the same was true in England, Italy, and other continental European countries.[57]

De Cosmos had supported women's suffrage in his *Daily Standard* since June 1871. Others had rallied to the cause, perhaps influenced by American activist Susan B. Anthony, who lectured on Woman's Rights in Victoria in October 1871.[58] In 1872, a similar amendment to the Municipal Act to enfranchise women had been defeated under the McCreight administration.[59] But when Semlin's amendment came up for

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[57] *British Colonist*, 13 February 1873; *Daily Standard*, 12 February 1873.

[58] The audience for Anthony's initial lecture was somewhat smallish (seventy-five people according to the *Daily Standard*) and contained only "two or three ladies" but increased in size on subsequent nights. Anthony was, then, lecturing mainly to men, and judging from newspaper accounts of their responses, many were sympathetic. *British Colonist*, 24-27 October 1871; *Daily Standard*, 24-27 October 1871.

[59] *British Colonist*, 10 April 1872; *Daily Standard*, 10 April 1872.

consideration in 1873, Premier De Cosmos lent it his support. He declared in a *Daily Standard* editorial that women, in certain cases, should have the franchise: he repeated Susan B. Anthony's argument that it was unfair to tax women and yet withhold the franchise from them. "Among men," he asserted, "taxation without representation is held to be an unbearable species of despotism — why should it be held to be any less despotic where females are concerned?" Yet he felt it necessary to temper the effect of his editorial. He distanced himself from the most radical leaders of the Woman's Rights movement — including Anthony, Lucy Stone, and Victoria Woodhull[60] — and repudiated any overt change in social roles, assuring readers "that in many respects the rights of females might be extended considerably without doing violence to anyone, or in any degree impairing that native modesty in the female character, which the other sex profess so greatly to admire."[61]

The Legislature split into opposing factions over Semlin's amendment. In the midst of the debate, McCreight proposed that the amendment be reformulated to allow *unmarried* women ("spinsters and widows") over twenty-one years of age to vote in municipal elections. Semlin withdrew his amendment. The McCreight motion was based on the rationale, as the *Daily Standard* expressed it, that "Where women are married the men should do the voting." According to McCreight, "it might be difficult to settle disputes arising over ownership of property. So he would limit the right to unmarried women."

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[60] Woodhull ran for the American presidency in 1872 against Horace Greeley and Ulysses S. Grant. The Victoria *Daily Times* of 25 Nov 1924 includes a short biography.

[61] *Daily Standard*, 13 February 1873.

Even such an accommodating amendment was rejected by the conservative faction. The legislature was evenly divided. Reformer Dr. James Trimble, Speaker of the Assembly, was called upon to cast the deciding vote, and the motion carried.[62] Notably, John Robson, while critical of Semlin's amendment, supported McCreight's reformulation of the measure. As long as the bill was not bestowing rights in the public sphere to *married* women, Robson was willing to support it. Others, however, were more upset. Less than a week later, Robert Smith moved an amendment to revoke women's access to the municipal franchise, which was soundly defeated.[63]

The municipal act amendment shows that almost all of the legislators believed that in the public sphere, the patriarch should represent the family's interests. Married women were not to have the vote. In fact, a large minority of legislators argued women should not be enfranchised whether married or single. The majority that enfranchised single women was made up of two factions: a larger group who believed that little harm could be done by extending the municipal franchise to *unmarried* women; and a very small core group of feminists in the legislature, favouring the extension of women's legal and political rights regardless of their social role or position in the family; the latter's influence was larger than their numbers would suggest. These members, among whom Robert Beaven, Cornelius Booth, and Amor De Cosmos were prominent, were the same members who gave the MWPA their unqualified support and orchestrated its passage. They were joined in that endeavour by other members who saw in the MWPA an

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[62] Ibid., 12, 13 February 1873.

[63] *Daily Standard*, 18 February 1873.

opportunity to protect families, to enable mothers to perform their tasks, or to protect battered or deserted wives and their children.[64]

Even so, the 1873 MWPA placed strict limits on married women's property rights. The act granted wives the right to hold any realty they acquired prior to or during marriage, and the rents, issues and profits generated from those lands; it further granted married women rights over their wages and earnings, and any property purchased therefrom. The MWPA did not give married women an interest in property jointly accumulated with their spouses. Any property purchased by a married man was his separate property, entirely under his control and disposition. Since the husband was most likely to be engaged in paid labour, and to have greater earning power, and since title to any acquisitions purchased with those earnings would rest with him, the act provided no recognition of the importance of the spouses' combined labour in amassing family wealth. Wives engaged in unpaid domestic labour contributed greatly to family wealth. Yet wives had no rights in family property, and could be left penniless by their husbands.[65]

The absence of rights in jointly-accumulated property for married women did not go unnoticed in British Columbia. In both 1872 and 1873, Arthur Bunster proposed bills to legislate mandatory dower.[66] Under English common law, married women's rights in

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[64] Girard and Veinott have observed a similar mixed base of support for the 1884 Nova Scotia MWPA. Girard and Veinott, "Married Women's Property Law," p. 80-84.

[65] Chambers, *Married Women and the Law of Property*, pp. 4-5.

[66] His 1872 bill was a short document, containing only two clauses: the first provided a wife with a dower right in one-third of all the property her husband had held during her coverture; the second stipulated

family property had been traditionally secured through their dower right, the right of a widow to a life estate in one-third of the property her husband had possessed *at any time* during their marriage.[67] Dower provided married women with more than simple inheritance rights. It granted wives an enforceable interest in family property and significant familial power: under common-law dower, a woman's husband could not sell or otherwise transfer property without his wife's consent. He needed his wife to acknowledge the transfer, thus barring her dower.[68] If she refused, she retained an inchoate right in the land, which she could enforce against any purchaser at her

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that the husband could not mortgage, dispose, or otherwise alienate his real property without the consent of his wife; and that every instrument of conveyance must specify whether the wife was releasing her dower claim. In 1873, Bunster presented no bill. Rather, he asked Attorney-General George Anthony Walkem to frame a Dower Bill. Walkem refused, directing Bunster to the legislature's law clerk. See the *Daily Standard*, 9 April 1872; *British Colonist*, 22 January 1873.

[67] Various forms of dower predate the Conquest. Prior to the Conquest, wives were entitled to a life estate in one-fourth, one-third, or one-half of their husband's lands. In the twelfth and early thirteenth centuries, a husband could reduce his widow's legal dower entitlement from one-third by specifying a lesser amount at the time of marriage. By the late thirteenth century, common-law dower was firmly established. Spring, *Law, Land, & Family*, p. 40.

[68] From the sixteenth century onward, English lawyers devised uses and jointures as prenuptial means of defeating or reducing dower. Since a man never technically owned land held in a use (trust), his widow could not claim dower. Therefore, if a man created a use prior to marriage, his wife lost her dower claim. To provide for themselves and their wives, landowners whose property was held in a use often set up a 'jointure' giving the man and wife use-rights to the land during their lives. Through this jointure, the widow would retain use of the land. Uses were abolished by statute in 1536, and it might be assumed that their abolition, and the accompanying declaration that the creator of the use was the true owner of the land, would result in an absolute restoration of dower. This was not so. In the Statute of Uses, English legislators reworked the concept of jointures. The new 'jointure' was a prenuptial contract, in which the wife relinquished her dower; at the husband's death the land went directly to the heirs, and the wife was entitled to a rent charge against it, specified in the jointure agreement.

Initially, English legal authorities had believed a wife's dower right, once in existence, could not be extinguished; but over time they abandoned this position, allowing a married woman to consent to 'barring' her dower. The wife's consent had to be obtained in a separate examination before a minor official. Lilias M. Toward, *Dower and Curtesy: A Study Paper* (Halifax: Nova Scotia Law Reform Advisory Commission, 1973), pp. 9-10; McCallum, "Prairie Women," 20; Macdonald, *Fraud on the Widow's Share*, pp. 60-61; Spring, *Law, Land, & Family*, pp. 40-41, 42-43, 45, 47-48, 49, 56; Shammas et al., *Inheritance in America*, pp. 74, 77.

husband's death.[69] In 1833, a new Dower Act dramatically reduced the widow's dower rights, to the husband's benefit: after 1833, an English widow was entitled to one-third of the real property her husband possessed at his death, should he die intestate. If a husband chose to divest himself of property during his lifetime, his widow had no remedy; her dower rights were automatically barred with the transfer. Moreover, if her husband made a will, her dower right was abrogated, and he could distribute his property as he wished.[70] The new dower protection offered by British Columbia's homestead legislation was no more certain. In British Columbia, homestead dower was not automatic; it was dependent upon homestead registration, which was the prerogative of the property-owner, usually the husband.[71]

Bunster understood that dower conferred more than inheritance rights upon married women. He informed the legislature that "the [present state of the] law made no

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[69] In many English jurisdictions, dower had been complemented by widows' entitlement to one-third of their husband's personalty at his death. This right, like the right to realty, could not be over-ridden by will. By the close of the seventeenth century, however, the widow's absolute rights to personalty were abolished by statute. Thereafter, a widow's entitlement to her husband's personalty was nullified if her husband made a will. Should the husband fail to make a will, the Statute of Distributions accorded his widow one-third of his property if the marriage had produced heirs, and one-half if it had not. Macdonald, *Fraud on the Widow's Share*, pp. 49, 52; Shammas, "Re-assessing the Married Women's Property Acts,"p. 10; Shammas, "English Inheritance Law," p. 158; John Raithby, ed., *The Statutes at Large of England and of Great Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland*, vol. 3 (London: George Eyre and Andrew Strahan, 1811), 22 & 23 Car. II., c. 10, 1670, pp. 192-195.

[70] On the English Dower Act, see Holcombe, *Wives and Property*, pp. 21-22.

[71] It should be added that while dower rights were being increasingly circumscribed by legislators, their effectiveness was decreasing in any case. As greater amounts of wealth were held in personalty, especially with the nineteenth century increase in paper wealth, dower provided married women with a steadily diminishing proportional claim to family property. For the poor, the value of dower was even less. For that proportion of the population whose families were landless, dower was meaningless. Macdonald, *Fraud on the Widow's Share*, p. 3; Bettina Bradbury et al., "Property and Marriage: The Law and the Practice in Early Nineteenth-Century Montreal," *Histoire sociale—Social History*, vol. XXVI, no. 51 (May 1993), p. 14.

provision whatever to protect women in their rights to property." He introduced the measure not simply to give widows an inheritance right, but to give married women "an interest in the real estate of their husbands." Dower, Bunster knew, was an interest which would benefit married women during their husband's lifetime, and improve their marital power. Bunster announced that he was aware of several "cases where great hardships and injustice had been done to women by reckless and cruel husbands." He wanted to redress the situation, and provide married women with the tools to protect themselves from "heartless, drunken husbands, who, as the law stands, have it in their power to sell them out of house and home." With dower in effect, a husband could not take unilateral action with family property. He would need his wife's consent. The legislation was not only a woman's rights measure, though Bunster approved of the movement. Nor were his intentions merely chivalrous, though some historians have suggested that masculine chivalry undergirded married women's property rights. There were pressing practical reasons for Bunster's concern: many of these women, he told his fellow legislators, "were struggling to raise families." The need to protect families was a key point, upon which he laid great emphasis. Indeed, Bunster's concerns were not limited to broken or dysfunctional families. He revealed that he also intended to protect intact families from economic difficulties with his dower bill. He explained,

> A merchant became unfortunate in his business and the creditors swept away everything; but the wife's interest in the real estate must be untouched. The family roof-tree was sacred. Thus good and valuable citizens would be kept in the country, because with this bill they would be able to redeem themselves.[72]

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[72] *Daily Standard*, 10 April 1872; *British Colonist*, 22 January 1873.

Bunster's observations reveal two interesting perceptions: the association of the wife's interests with those of the family; and the identification of family protection with the national interest. These were insights which inspired homestead exemption and the Married Women's Property Act. Yet in both 1872 and 1873 legislators were uninterested in dower, and Bunster's initiative failed.

In both years, Cabinet Minister George Walkem led the opposition to Bunster's attempts to establish legislative dower. Walkem explained that to re-establish dower rights would be counter to long-term trends: "in 1833," he informed the legislature, "the English nation found it was expedient to do away with the question of dower. There has been a struggle in Upper Canada to do away with it; it is extinct in Lower." In any case, the Minister argued that dower was unnecessary and redundant. "Here," Walkem scolded, "we have the Homestead law to provide for such cases as is proposed to be provided in the Dower Bill."[73] Bunster was wasting the legislature's time. The newspaper accounts provide no more detail into Walkem's opposition. Yet with a little context, his objections become clear: Walkem's opposition to dower arose from his concern over dower's effects on land transfers.[74] Walkem was extremely interested in facilitating land transfers: in the 1873-74 session he would introduce two bills dedicated to that end, both of which became law. England and Quebec, he was quite aware, had pressing economic reasons for abolishing the type of dower rights Bunster was trying to

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[73] *Daily Standard*, 9 April 1872.

[74] These acts were "An Act to facilitate the Conveyance of Real Property," and "An Act to facilitate the Granting of Certain Leases." See British Columbia, *Journals*, 1st Parliament, 3d session, 1873-74, pp. 10, 55.

establish: they were not necessarily abrogated by land transfer; that is, the land could be sold without barring dower. A wife's consent was necessary to remove the dower charge from the title, but the transfer could still take place without securing her consent. If it did, her rights in the property remained. A purchaser, or any individual in a chain of purchasers, could acquire a piece of land and lose one-third (or in Quebec one-half) of it years later.[75] Thus, dower rights on the common-law model could act as a hindrance to the free disposition of property, a necessity in a settler society with a speculative economy.[76] Moreover, the difficulties posed by dower were especially acute in frontier settlements where many men had preceded or abandoned their wives.[77]

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[75] Holcombe, *Wives and Property*, pp. 21-22; Cavanaugh, "The Limitations of the Pioneering Partnership," p. 203-4; Bradbury, "Surviving as a Widow in 19th-Century Montreal," *Urban History Review / Revue d'histoire urbaine*, vol. 17 (February 1989), p. 149; Bradbury et al., "Property and Marriage," 13-14.

[76] In the United States, Shammas et al. write, following Morton Horowitz, that "[b]y the late eighteenth and early nineteenth centuries, widows' dower rights were perceived more and more as an 'irritation.' They interfered with the transfer of property, operating, as ... a 'clog' to economic development." Other settler societies with speculative economies also attempted to remove the constraints dower posed on speculation. In 1868 Ontario passed an act preventing the recovery of dower from wild (unimproved) lands — lands heavily invested in by speculators. Connecticut jurists also eliminated widows' dower rights in uncultivated lands, using the self-serving argument that such lands produced no income, and could not be used for widows' support. Manitoba and the Northwest Territories also abolished dower in 1885-86, ostensibly in an attempt to encourage settlement by facilitating the transfer of land, but likely also to generate investment opportunities in land speculation. Toronto *Globe*, 11, 27 November 1868; Ursel, *Private Lives, Public Policy*, p. 103; Cavanaugh, "The Limitations of the Pioneering Partnership," p. 211; McCallum 21. For the United States, see Shammas et al., *Inheritance in America*, pp. 69, 73, 87-88; Macdonald, *Fraud on the Widow's Share*, pp. 62-63; Shammas, "Re-assessing the Married Women's Property Acts," p. 24

[77] Ray August, "The Spread of Community-Property Law to the Far West," *Western Legal History*, vol. 3, no. 1 (Winter/Spring 1990), p. 45. Common-law dower was also especially cumbersome in jurisdictions which had abolished primogeniture. Since a widow's dower share was traditionally allotted by metes and bounds, that is, as a physical portion of each separate piece of property, division of realty into small portions for all the children would often result in several tiny and perhaps difficult to use plots for the widow. Shammas et al., *Inheritance in America*, pp. 67-68, 120.

Yet it was not simply economic concerns which sank the dower bills. The compulsory aspect of Bunster's dower bill also generated opposition. Its protection was automatic, imperiling patriarchal and laissez-faire liberal prerogatives. To reduce the free alienability of land would have been considered a major restraint of personal liberty by British Columbia's liberal reformers. Cole Harris writes that in British Columbia, many considered speculation "a basic right. The long history of English individualism was tied to the right of individuals to own and dispose of their own property as they saw fit."[78] These objections explain why George Walkem understood the homestead act to be the perfect replacement for dower. Homesteads were implemented at the discretion of the husband.[79] Moreover, for the property to be conveyed or mortgaged, the wife's consent was mandatory. Her 'dower' right had to be abrogated before the property could change hands. There was no possibility of residual homestead dower claims encumbering land titles.

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[78] Harris, *The Resettlement of British Columbia*, p. 100.

[79] This contention, that married women's property rights were restricted because of a belief that the patriarch should possess ultimate authority within the family, is supported by the debate surrounding the 1873 Wives and Children's Assurance Bill. The bill proposed to allow a husband or wife to purchase life insurance with the wife and/or children as beneficiaries; in addition, it specified that any such policy was to be paid directly to the family, exempt from the claims of creditors. The sole objection to the legislation concerned the distribution of the benefits. John Foster McCreight successfully insisted that the bill be amended to provide that where no apportionment was specified in an insurance policy, its proceeds should be divided equally among the man's dependents. "This bill," McCreight argued, "would place it all in [the widow's] hands, and who could say what she might do with it?" Although McCreight claimed to be "provid[ing] for the safety of the children in the matter" the legislature's decision to amend the act also illustrates a lack of confidence in and mistrust of women. No similar constraints developed with regard to the husband's exercise of parental power. Socially conservative legislators feared the devolution of power within the family and justified their stance with the assertion that women were incapable of making rational and compassionate decisions regarding the welfare of their children. They spearheaded a movement to restrict widows' inheritance rights, a development which underlines the contention that conservative support for family property law reform often arose from a concern for family protection and nation-building, and not 'Woman's Rights.' See British Columbia, *Statutes*, 1873, 36 Vict., no. 26 and the *Daily Standard*, 15 January 1873.

Charles McKeivers Smith, brother of Amor De Cosmos, and editor of the *Daily Standard*, had harsh criticism for the decision to kill Bunster's 1872 dower bill. Smith wrote,

> The principle objection urged against the law of dower is, that it would sometimes put men to inconvenience who might want to sell or mortgage their real estate, if their wives refused to give their consent — that it would have a tendency to cramp men in their business arrangements, if they had to depend on the consent of their wives before they could realize money on the security of their estates in case they felt disposed to go into business speculations.

Smith dismissed such arguments, writing that "[w]omen as a rule are neither unreasonable nor unreasoning beings." Where dower laws were in effect, he understood that "it rarely indeed happens that women thwart the enterprise of the husbands by withholding their signatures when legitimate business transactions depend upon them." As the law stood in British Columbia, he felt that the contributions of women to the family economy were not satisfactorily appreciated or compensated. In British Columbia, Smith admonished, it would be easy enough to "come to the conclusion that [women] were esteemed rather in the light of useful domestic animals, whose office it is to minister to the daily appetites of man, than as his social or intellectual equal." There was, he continued, no "good reason why married women should not have in their own right a share of what real property may be accumulated by their husbands during their lifetime, which should neither be mortgaged nor alienated by the husband without the written consent of the wife." Smith suggested an interesting reason for the inadequate provision for the wife's interest. "[A] very large majority of the present House is composed of unmarried gentlemen, who cannot be expected to look upon married women in the same

light that those do who have wives." Such men, having little sympathy with the demands and needs of other family members, secured only the rights of those with whom they could identify: adult males. Bachelor legislators valued adult men's rights above all else, "and to do anything to curtail [a man] in the exercise of his undoubted prerogative to do what he likes with his own, including his wife, in the estimation of our law-makers, would be an undue interference in the vested rights of individuals."[80]

That Smith's understanding of the issue was extraordinary is something of an understatement. Equally extraordinary and revealing is the fact that he stood alone in his criticism. In the legislature, Arthur Bunster was met by roars of laughter and derision. Yet should the reader 'listen' a little closer, there is an inexplicable silence. When Bunster moved to put his 1872 bill into committee, none of the stalwart feminists behind the 1873 MWPA could be found. Certainly, they were in the legislature. Indeed, some had probably enjoyed a good laugh at Bunster's expense. But all stayed silent, refusing to support the dower bill. Again, a year later, and within days of the MWPA's passage, they could not be persuaded to support this meaningful extension of married women's property rights. The reason for their lack of interest was not that Bunster had failed to provide solid reasons for passing the legislation. Rather, their commitment to expanding women's rights ended where those rights conflicted with liberal theory, national growth, and masculine perogative.

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[80] *Daily Standard*, 11 April 1872.

Thus far, the discussion of legal reform has been limited to legal families. Yet British Columbia contained substantial numbers of country marriages, solemnized according to aboriginal rites; the Province undoubtedly had its share of cohabiting couples as well. Paulette Falcon has written that despite the many mixed marriages in the province, and the attention given mixed marriages by the Canadian judiciary, British Columbian legislators included "no provisions for common law native wives in the 1873 [married women's property] statute."[81] Falcon's statement, while technically accurate, is misleading nonetheless. Certainly, there were no provisions addressing the property rights of country wives in the 1873 MWPA. Yet Robert Beaven, the sponsor of the 1873 married women's legislation, was well-informed about the central-Canadian cases and made repeated attempts to redress the absence of legal rights and responsibilities in country marriages. In fact, Beaven not only made attempts to address the position of country wives, but that of their children as well.

The children of country marriages faced great disabilities. At common law, the children of unmarried parents were considered *filius nullius*, the children of no one.[82] Illegitimate children had no legal relationship with either parent. In an era when paternity was difficult to determine with any degree of precision, the lack of a legal relationship

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[81] Falcon, "'if the evil ever occurs,'" pp. 72, 94. While Falcon uses the term "common law" to describe cohabiting couples, the reader should take note that the appellation 'common law' is a modern misnomer, at least in the English context. English common law recognized no relationship between cohabiting couples.

[82] The common law made it difficult to 'bastardize' the child of a married woman. Generally, the only proof acceptable to prove the illegitimacy of the child of a married woman was evidence that her husband had been outside the country during the months from conception to birth. Grossberg, *Governing the Hearth*, p. 201.

between illegitimate children and their fathers is perhaps understandable, though it illustrates the legal system's emphasis on the pre-eminence of adult male rights. Presumably, however, the identity of the mother was easily enough determined in the vast majority of cases. Yet illegitimate children were not entitled to inheritance or support from either parent; nor did either parent have custodial rights. This situation remained unaltered by the English Poor Law of 1576, which placed responsibility for supporting illegitimate children on local poor law officials, who were empowered to compel restitution from parents of both sexes. Criminal remedies were created to encourage the reluctant.[83] Customarily, illegitimate children remained in the care of mothers capable of providing support, and destitute mothers willing to name the father of their child could expect financial support from the Poor Law authorities until the child was apprenticed.[84] In 1834, the Poor Law was revised again, according to the tenets of liberal individualism and Malthusian fears of overpopulation. The new law, aimed at deterring rising illegitimacy rates and relieving the public of the burdens of individual decisions, placed the burden of supporting illegitimate children solely with single mothers. Unwed mothers and their children were no longer eligible for outdoor relief

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[83] Mary Ann Mason, *From Father's Property to Children's Rights: the History of Child Custody in the United States* (New York: Columbia University Press, 1994), pp. 25-27, 29, 68, 72-73; Grossberg, *Governing the Hearth*, pp. 197-198, 200, 207, 218; Susan Tiffin, *In Whose Best Interest? Child Welfare Reform in the Progressive Era* (Westport, Connecticut: Greenwood Press, 1982), p. 167; Peter Ward, "Unwed Motherhood in Nineteenth-Century English Canada," *Historical Papers*, 1981, pp. 39-40.

[84] Mason, *From Father's Property to Children's Rights*, pp. 25-27, 29, 68, 72-73; Grossberg, *Governing the Hearth*, pp. 198, 200; Lisa Forman Cody, "The Politics of Illegitimacy in an Age of Reform: Women, Reproduction, and Political Economy in England's New Poor Law of 1834," *Journal of Women's* History, vol. 11, no. 4 (Winter 2000), pp. 134-135.

from Poor Law Officials; if destitute, their only recourse was to the workhouses.[85] In areas without such facilities, they may have had no avenues of relief.

While common-law maintenance obligations had been substantially altered, common law inheritance rules remained unaltered. Inheritance was restricted inheritance to children born within wedlock. The intention of illegitimacy, wrote Blackstone, was to encourage marriage and discourage immoral extramarital unions.[86] Yet reformers often wondered, quite legitimately, how punishing children would ever achieve these aims. The reality was that moral concerns were *post hoc* rationalizations of illegitimacy law. Illegitimacy did not originate as a corrective to parental immorality, although obviously some contemporaries understood it that way. Like primogeniture, illegitimacy supported family aristocracies, restricting the inheritance of familial property to the offspring of legal marriages. 'Outsiders' could launch no claims.[87] The legitimate/illegitimate distinction made legal succession to family property stable and predictable. This was undoubtedly of great value to aristocratic patriarchs planning alliances through the marriage of their children, and securing social positions for daughters and potential grandchildren.

Concern over the disabilities of illegitimate children in British Columbia dates back to the descent of real property debates of the mid 1860s. During the debate over inheritance

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[85] Cody, "The Politics of Illegitimacy," pp. 131-134.

[86] Mason, *From Father's Property to Children's Rights*, pp. 24-25; Shammas et al., *Inheritance in America*, pp. 70-71.

[87] See Grossberg, *Governing the Hearth*, p. 196; Shammas et al., *Inheritance in America*, p. 96.

law reform, Committee Chairman Dr. James Trimble noted Scottish precedents permitting illegitimate children whose parents subsequently married to inherit; and Dr. J. S. Helmcken opined that at the very least "[i]f there [we]re no legitimate children an illegitimate one should be allowed to inherit. It isn't the child's fault."[88] Despite these concerns, no provisions were made for illegitimate children. Radical changes might have deterred an already hostile Legislative Council from giving the Descent of Real Property Bill due consideration.

The concern over illegitimacy re-appeared along with the movement to reform primogeniture in 1872. In the same session that saw Charles Semlin reintroduce the Descent of Real Property Bill, Robert Beaven proposed a measure to legitimize children born out of wedlock whose parents had subsequently married, or agreed to do so within a specified time period. The bill's principle was enshrined in continental European law, and had been adopted by several American States following the Revolution.[89] American legislators were quite vocal in their denunciation of illegitimacy as a dynastic support, and provided statutory legitimation machinery at the same time as they abolished primogeniture and entail.[90] Thomas Jefferson believed Virginia's legitimacy laws, along with the abolition of primogeniture and entail, formed "a system by which every fibre

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[88] *British Colonist*, 9 January 1866.

[89] British Columbia, *Statutes*, 1872, 35 Vict., no. 37. For precedents see Jenny Teichman, *Illegitimacy: An Examination of Bastardy* (Ithaca, New York: Cornell University Press, 1982), p. 35, and Grossberg, *Governing the Hearth*, p. 204.

[90] Grossberg, *Governing the Hearth*, pp. 205, 212, 221; Shammas et al., *Inheritance in America*, p. 72; Tiffin, *In Whose Best Interest?*, p. 167.

would be eradicated of antient [sic] or future aristocracy; and a foundation laid for a government truly republican."[91] In England, where republican sentiments were less widely held, and the aristocratic House of Lords wielded the power to obstruct legislation, the inheritance-based foundations of aristocracy were maintained intact throughout the nineteenth century: primogeniture was not abolished in England until 1925; legitimation by subsequent marriage was not permitted until 1926.[92]

Amor De Cosmos and Charles McKeivers Smith were well aware of the connection between primogeniture, illegitimacy, and aristocracy.[93] The majority of legislators, however, spoke to local concerns and issues of individual equity when addressing the legitimation bill. Originator Robert Beaven observed that he intended to remedy the difficulties faced by the children of country marriages:

> In early times it was impossible for white parents to get married to Indian women[;] consequently it was a great hardship to the children of such connections. According to Indian law they were legal marriages. In Ontario a law-suit [*Connolly* v. *Woolrich*] had arisen in a like case and it was decided in favor of the first child as by Indian law the parents were legally married.[94]

The Connolly case was of great interest in British Columbia. Amelia Douglas, the wife of former Governor James Douglas, was one of the Connolly daughters.[95] In 1873, T. Basil Humphreys spoke in support of the legitimacy bill, recounting the case at length. He had

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[91] Grossberg, *Governing the Hearth*, p. 212.

[92] Orth, "After the Revolution," p. 35; Teichman, *Illegitimacy*, p. 35.

[93] An editorial in the *Daily Standard*, 24 January 1873, referred to common-law illegitimacy "a twin brother to the law of primogeniture."

[94] *British Colonist*, 26 March 1872.

[95] Falcon, "'if the evil ever occurs,'" p. 71 (fn. 5).

a general, if somewhat sketchy, knowledge of the facts: while living in Manitoba, Connolly married a First Nations woman according to tribal rites, and fathered several children. He then moved to Ontario, married a white woman, and fathered additional children. When Connolly died, his Manitoba children sued for a share in his estate. The Ontario court upheld their claim. Humphreys erroneously understood this as precedent for allowing illegitimate children to inherit. "It was monstrous to say that a child born out of wedlock," he argued, "should not share the same privileges as those born in wedlock." Cornelius Booth, who understood the case in greater detail, noted that *Connolly* v. *Woolrich* provided no basis for allowing illegitimate children to inherit. "[T]he Indian heirs of Connolly," Booth remarked, "were awarded the property because the mother had been married to the father according to Indian rites." The Ontario court had ruled that since aboriginal law was in force at the time of the country marriage of William and Susanne Connolly, the marriage was valid, and nullified his subsequent marriage; the children of the first marriage were legitimate, and entitled to inherit.[96] Beaven's act, on the other hand, did not uphold aboriginal marriages as valid. Rather, couples married under aboriginal law could retroactively validate their marriages and legitimize their children by remarrying under Canadian law. The act gave the same opportunities to unmarried parents and their children.

The measure ran into harsh opposition in 1872. Premier McCreight feared the bill would retroactively disinherit legitimate children, as had occurred in the Connolly case.

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[96] *British Colonist*, 23 January 1873. Backhouse discusses *Connolly* v. *Woolrich* at length in *Petticoats and Prejudice*, pp. 9-22.

To address this problem, John Robson inserted an amendment specifying that existing inheritance rights would not be "prejudic[ed] or annul[led]" by the legislation. Several other members argued that the bill was *ultra vires*: that is, that the province had no constitutional jurisdiction over marriage and divorce. Although these constitutional objections appeared strong, the bill passed. Reformers were adamant in their support. Robson stressed the bill's links to individual rights and class formation, arguing that although the bill did touch on the *ultra vires* matters of marriage and divorce, its real bearing was upon the "'property' and 'civil rights'" of illegitimate descendants, matters within Provincial jurisdiction. On third reading, despite Premier McCreight's motion to hoist, the bill passed.[97] It was not, however, destined to become law. McCreight, in his capacity as Attorney General, advised Lieutenant-Governor Trutch to withhold assent from the bill to permit the federal government to examine its constitutionality. Trutch complied.[98]

In the following session, Beaven reintroduced the bill. A case had recently arisen, he told legislators, confirming the need for a legitimation bill in the Province. The case to which Beaven referred was that of Adam P. Heffley, a wealthy Thompson Valley rancher. Heffley had arrived in British Columbia in 1858, and built up a large and thriving ranch with several hundred head of cattle. When he died suddenly of a heart attack while visiting Victoria in June 1872, it was discovered that he had made no will.

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[97] *Daily Standard*, 26, 28 March 1872; *British Colonist*, 26, 28 March, 3 April 1872.

[98] "Draft Report on 'Legitimacy Act, 1872," BCARS, Attorney-General, GR 1459, Box 1, File 11; British Columbia, *Statutes*, 1872, 35 Vict., no. 37.

As an intestate, his assets were seized by the official administrator of intestate estates and sold at auction, raising over twelve thousand dollars. After settling outstanding accounts, the estate held $7723.[99] Where this money went is not clear. It may have passed to collateral relatives or escheated to the Crown. One thing is clear, however: Heffley's children received nothing. The children were illegitimate, and, Beaven told legislators, they "suffered through the death of their father because no such law as this was in force, notwithstanding he was anxious to have them righted shortly before his death."[100] Beaven's bill received strong support from Yale's Robert Smith, who wondered aloud what would become of the Heffley children. Smith, an interior resident familiar with many country marriages, accused those who opposed the bill of "wish[ing] to visit the sins of the parents upon their children. No matter where the child came from — be it black or white — the father ought to have the opportunity of doing the 'correct thing' towards it."[101] The majority of legislators agreed, and the measure passed for the second time in as many years.[102]

In his *Daily Standard*, Amor De Cosmos noted the substantial legal grounds upon which the bill was opposed, but applauded the decision to pass it. He expressed relief that most of British Columbia's legislators were not lawyers, but "men of practical ideas,

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[99] *Daily Standard*, 11, 12 June 1872; *British Colonist*, 17 September 1872; British Columbia, *Sessional Papers*, 1872, pp. 547-549.

[100] *British Colonist*, 23 January 1873.

[101] *Daily Standard*, 23 January 1873; *British Colonist*, 23 January 1873.

[102] British Columbia, *Journals*, 1st Parliament, 2d session, 1872-73, p. 38.

whose minds have not been [so] cramped by years of study on nice points of law ... as to be incapable of giving expression to an original idea or taking a single step beyond that old beaten track marked out for them by Coke, Blackstone & Co." De Cosmos characterized the measure as one of "justice and equity," intended to remedy an unfortunate situation. Disqualifying the children of unmarried parents and country marriages from inheritance was manifestly unfair, he wrote, since the "parents are in a measure indebted to their [children's] labours and exertions for the wealth they have accumulated, and yet ... [the children] might be turned loose upon the world without a dollar."[103] De Cosmos' commentary reveals two interesting opinions: he viewed inheritance as a fair share of labour expended in youth; and he was worried about individuals being left without that inheritance: they were at a social and economic disadvantage compared to those born legitimate, and his imagery ('turned loose upon the world') suggests that non-inheriting individuals were less attached to the social system. Such people might form a dangerous underclass. The bill was intended to remedy this situation.

It was certainly not intended to be an affront to morality. Both De Cosmos and Alexander Rocke Robertson argued that the bill was not intended to encourage or sanction adultery, but to induce those living together unlawfully to marry and legitimize their children. Robertson made no distinction between the absence of marriage and country marriages. He believed the act would be a benefit to the nation, holding out to

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[103] *Daily Standard*, 24 January 1873. Coke and Blackstone wrote influential commentaries on the common law.

unwed couples "a very strong inducement to discontinue living in a state of things at once disgraceful to themselves, discreditable to the country, and pernicious in its general effect."[104] Thus, the bill was intended not only to legitimize the children of unwed parents and country marriages, but also the parental union. Robert Beaven saw the situation somewhat differently. His legislation and his comments in the legislature indicate that he believed (somewhat paradoxically) that country marriages were valid, but in need of state sanction to gain full rights; thus, he was unwilling to provide equivalent property rights to country wives and illegitimate children if they remained such; but he was attempting to create a means of legitimizing the country marriage and endowing its members with full legal rights. Beaven wanted to use the legitimation of their children to encourage cohabiting couples themselves to become legitimized by the state, brought within the compass of the law, and tied to the established social system. But he was prevented from doing so. The measure was again reserved.[105]

Legislators, it so happens, were not alone in their concern for illegitimate children and unmarried mothers. Chief Justice Matthew Baillie Begbie was equally concerned. Begbie believed that country marriages were essential to many hard-working settlers, ranging from backcountry pioneers to isolated magistrates. Native wives, he wrote, "were in many respects 'help' more 'meet' for them than most women of European descent or education could be." He defended the morality of country wives, writing that they "consider themselves to be, and are according to the native customs, lawful wives

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[104] Ibid., 26 March 1872. De Cosmos repeated this argument in Ibid., 24 January 1873.

[105] British Columbia, *Statutes*, 1873, 36 Vict., no. 43.

generally." In his own courtroom, Begbie consistently ruled that women married by aboriginal rites were lawful wives, and could not be compelled to testify against their husbands. Yet his stand on the issue was paradoxical. Despite his defence of country marriages, Begbie approved the federal disallowance of the Legitimacy Acts. According to his biographer, David Ricardo Williams, Begbie's opposition was the result of his "temperament" and "upbringing" which prevented him from actively encouraging such unions. Perhaps concerns that the legislation was *ultra vires*, and its attack on established common law principles also influenced Begbie's position. In any event, while opposed to retroactively validating country marriages, Begbie was not opposed to extending enforceable rights to unmarried women and illegitimate children. He took up their cause in 1873, calling on both levels of government for legislation to compel deserting men to support their country wives and children, and to grant country wives and children an interest in the patriarch's estate at his death.[106] His efforts met with no success.

Three years later, Begbie's interest in the issue was rekindled. The cause of his renewed interest was *Re Seater*, a case brought by an aboriginal woman identified only as Mary, against the official administrator. Mary had lived with D. B. Seater for two years prior to his death in Yale in 1876. Seater left no will. Since Mary was not his legal widow, she was not entitled to claim an inheritance from his estate. Faced with this situation, Mary sued Seater's $453 estate for $240, which she claimed as wages owed her for twenty-four months of domestic labour. In his decision, Begbie wrestled with the

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[106] Williams, *Sir Matthew Baillie Begbie*, pp. 106-107.

issue of whether Mary was a servant or a wife. If a servant, Mary had a legitimate claim against Seater's estate. If a wife, her claim was untenable. Under common law, wives owed their labour to their husbands as part of the marriage contract. They could not claim compensation for domestic work.

Ironically, the arguments of Mary's counsel led Begbie toward concluding Mary was Seater's wife. A. Rocke Robertson was in a double-bind. He wanted to establish his client's status as a servant, yet he was also forced to stress her morality, so that the case would not be thrown out as involving an immoral and illegal consideration: payment for sexual services. Begbie observed that he understood that "these arrangements for concubinage ... are considered by [aboriginal women] as not immoral at all, but as constituting full marriages..." Yet by arguing the morality of Mary's position, Robertson was undermining her claim. "Here, the more you insist on the purity of the pl[ain]t[if]f's conduct, according to Ind[ia]n notions," Begbie explained, "the more nearly you approximate her position to that of a legitimate wife, [and] the more you explode the notion of there being any claim for wages." With this analysis, Begbie had inherited Robertson's dilemma. Mary was not Seater's wife for the purpose of making a claim against his estate; yet in her claim for wages, Begbie felt compelled to rule against her because she was in the position of a wife. Faced with this absurdity, Begbie postponed making a decision in order to consult with the Attorney General.[107]

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[107] British Columbia, Supreme Court, Bench Book, Begbie, C.J., BCARS, GR 1727, vol. 730 (1877), p. 16-17.

These consultations were of no benefit to Mary. Seater's estate escheated to the Crown.[108] However, Begbie's inquiries did have policy results, leading to the introduction of the Destitute Orphans Act in 1877 by Premier Andrew Charles Elliott. Begbie may have had a hand in drafting the bill. It was certainly the result of his pressure.[109] Premier Elliott justified the measure with reference to government expenditure, social morality, and crime. Elliott explained that his intention was to relieve the public of the burden of supporting 'concubines' and illegitimate orphans: "unfortunately," he said, "we know that men have died leaving their offspring without support and wholly dependent on the public. Those men have died rich and their riches have been claimed by relatives, the woman getting nothing for the children." In the bill's preamble, he disclosed the further apprehension that under impoverished circumstances, "children are exposed to physical and moral deterioration, to the further injury of the community." Like De Cosmos, Elliott was concerned about the formation of a non-inheriting underclass. However, despite Elliott's rhetoric, social concerns remained subordinated to ideological concerns and masculine prerogatives. When Cariboo M.P.P. Captain John Evans moved to extend the bill to men who had left a will, Elliott, revealing a laissez-faire disdain for tampering with the patriarch's freedom of contract,

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[108] The financial details and disposition of Seater's estate can be found in British Columbia, *Sessional Papers*, 1885, pp. 475-528.

[109] Judge Crease's bench books make Begbie's influence certain. Crease deferred judgment in an 1879 case under the Destitute Orphans Act to speak with Begbie, noting that "this was his [Begbie's] Act" and Crease wanted "to proceed with uniformity." Williams, *Sir Matthew Baillie Begbie*, p. 107; British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 697 (1879-1880), p. 503.

replied that he "did not think affairs bad enough to warrant it." Regardless of the danger of his children becoming delinquents, a man's will was not to be abrogated.

In its final form the bill relied heavily upon judicial discretion, providing irregular families with few secure, irrevocable rights. Perhaps the most glaring aspect of the bill was its wariness with regard to the character of concubines and their children. The act evinced great concern with the morality of applicants, restricting eligibility to 'concubines' protected or supported by the intestate, and those children reputed to be his, and maintained or protected by him within twelve months of his decease. The only valid evidence of a man's liability was his own acknowledgment of responsibility during his lifetime; if the patriarch chose not to support his dependents, neither would the state; and even if he had acknowledged paternity through support, his cessation of support was seen as sufficient reason to deprive dependents of support from the estate. Women whose partners stopped supporting them were deemed morally suspect.

Indeed, all 'concubines' and illegitimate children were perceived as morally suspect, and were not permitted to make application under the act on their own behalf. The application had to be made by a third party. Presumably, such stipulations were intended to frustrate the predatory machinations of 'designing women' and 'grasping children.' At the hearing, Judges were granted power to inquire directly into the "existence and mode of life" of any concubine or infant; undoubtedly, such an inquiry would be directed toward assessing the morality of the applicants. Finally, in the event that the intestate also left a legal wife and / or legitimate children, the legal family or their representatives were to be notified and should "have an opportunity of being heard" before distribution of the

estate was made. The impact of this hearing on the estate was left to judicial discretion. If, after hearing the relevant evidence, the Judge determined the 'concubine' and / or illegitimate children eligible, each could be awarded up to $500 or ten per cent of the estate, whichever sum was larger.[110]

The Destitute Orphans Act did not entirely satisfy Begbie's concerns. It allowed Judges to make provision for country wives and their children out of their deceased patriarch's estate. But there was still no way to force a living man to provide for his concubine and illegitimate children; indeed, a man could not be effectively forced to provide for his legal family! In a memorandum in his 1878 bench book, Begbie drafted provisions compelling the keepers of concubines and the putative fathers of illegitimate children to provide for their support. He noted the existence of English desertion and putative fathers' laws, queried whether these were in force in British Columbia, and wondered if these acts could be extended to deserted 'concubines.'[111]

Begbie was not alone in his concern for the situation of 'concubines' and illegitimate children. 'Lex', a rather knowledgeable correspondent to the *British Colonist*, wrote in 1875 of the great hardships faced by the children of country marriages. He called for putative fathers' legislation to force a man to provide for his illegitimate children, noting that the British laws on the subject were not in force in British Columbia, but that a

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[110] British Columbia, *Statutes*, 1877, 40 Vict., no. 28; *British Colonist*, 16 March 1877; see also *Mainland Guardian*, 10 March 1877.

[111] British Columbia, Supreme Court, Bench Book (Begbie, C.J.), BCARS, GR 1727, vol. 730 (1877), p. 492.

remedy was close at hand: British Columbia need only adopt Ontario's putative fathers' legislation.[112] In 1881, 'POINT BLANK' renewed the call for legislation compelling support by the fathers of 'halfbreed' children and Indian wives. He feared that the children slipped through the cracks of the legal system: their fathers could not be forced to support them, and since they were not full-blooded 'Indians' they were not provided for by the Indian Department. Instead, they relied on charity, and 'POINT BLANK' feared the long-term effects of charity, which he believed led to social parasitism and criminality. Tellingly, 'POINT BLANK' offered no explanation of how being supported by their absentee fathers would improve the character of such children.[113] In the end, despite these local concerns, desertion and putative fathers' legislation never arrived in nineteenth-century British Columbia. Neither concerns over the economic hardship faced by 'concubines' and illegitimate children, fears of spawning criminality, nor knowledge of imperial legal precedents could move legislators to action. Such legislation would have required interfering with patriarchal property rights to an extent unacceptable to British Columbia's law-makers. This was the dark side of nineteenth-century liberalism: its focus on the rights of individuals required ignoring the needs of the many.

Examining the origins of legislation is a useful means of deconstructing the concept of 'the state' as an entity with interests of its own. Historical specificity undermines both the existence of 'the state' and its supposed neutrality, revealing the identity of those

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[112] *British Colonist*, 28 August 1875.

[113] *British Colonist*, 19 November 1881.

responsible for the statutes, and delineating their agendas and ambitions. The legislation of the 1860s and 1870s was produced by individuals from specific social backgrounds with concrete interests, ambitions and objectives, all of which were far from neutral. As Bruce Curtis has noted, their objectives were largely self-reflective, embodying the bourgeois materialism of their middle-class origins. Throughout their legislation, these reformers attempted to construct a society based on ideals which were at once liberal, democratic, competitive, progressive, and evolutionary. The reformers of the 1860s and 1870s sought to create a society which was expanding and competitive, both demographically and in terms of material wealth. Yet they also hoped this ever-expanding nation would be in tune with their social ideals: a meritocracy of yeoman smallholders capable of supporting and protecting democratic government. Certainly, there can be little doubt that reformers thought this society would provide broad benefits. It was, nonetheless, undeniably a society which they believed would be to their own advantage, and would accord substantial rights and respect to men of their own social position.

Justifying and popularizing these goals required cross-class appeals, which were made through the unifying rhetoric of nationalism. This appeal to national progress and advancement was one aspect of the double disruption of identities. Reformers identified themselves and their neighbours as British colonists, and later as British Columbian Canadians, and justified their actions as taken for the collective benefit of this fictive community. The second disruption of identity was a massive project of remoralization, convincing people to understand themselves in new terms. The legislation involved

explicit and implicit categorizations which on the surface appear obvious, natural, and neutral. These 'self-evident' descriptive terms were used to assign legal rights, organize individuals into hierarchies of power and authority, and restrict legitimacy to those meeting certain culturally prescribed standards.

For reformers, the yeoman was the idealized masculine type. Here was a propertied, independent, self-determining man. The equation of property and independence was crucial. The propertied male was understood to be both economically and intellectually autonomous. Propertied men were able to assert their interests and hold a strong public presence, qualities believed necessary for the maintenance of democracy. In the context of widespread wage labour and increasing proletarianization, however, men had to be given special rights to achieve this status. Perhaps the most pivotal and challenging aspect of the reform drive to create an independent masculinity was the need to rehabilitate the image of the risk-taking debtor, and provide him with extraordinary legal rights. Reformers argued that men should endeavour to achieve material independence, and should not be penalized for taking the risks necessary to achieve that status. In making this claim, they were largely indifferent to the position of creditors. In fact, making a grand leap in logic based on the newly-established fact that risk-taking behaviour was natural, respectable, and necessary, legislators argued that it was *creditors* who were destroying families and undermining nation-building priorities.

Yet reformers' apologetics were hardly a satisfying answer to the problems posed by risk-taking behaviours. After all, in addition to carrying the taint of fraud, risk-taking was in direct conflict with the need to protect reproductive nation-building priorities. Given

the latter fact, reformers passed legislation which would protect wives and children and thereby rehabilitate the image of risk-taking men. Risk-taking, according to the reform logic, was not irresponsible when the government provided men with a means of protecting their families from destitution. The homestead exemption and MWPA, it will be remembered, were often characterized as means of addressing masculine failures and follies. Yet it is important to understand the distinction between these two problems. Masculine failures, that is economic setbacks, were the product of 'respectable' attempts at individual attainment frustrated by uncontrollable economic fluctuations. These 'respectable' men were to be given every assistance and protection in their endeavors. Masculine follies, on the other hand, were the result of aberrant behaviour. Men were supposed to support their families, which was, of course, essential to national growth. Those who departed from their 'proper' role as providers, and departed from respectable bourgeois norms, could be stripped of basic masculine prerogatives under the Deserted Wives Act; their wives were provided with the means to assume their roles.

Outside of this 'natural' division of men into respectable risk-takers, unworthy shirkers, and, lest we forget, wicked creditors, adult men were left largely unregulated. Although men were publicly defined according to the categories of patriarchy — they were variously termed bachelors, fathers, husbands, and heads of families — they were never regulated according to these categories. While it was suggested, legislators simply could not bring themselves to deprive bachelors, for instance, by restricting the benefits of free land grants or homestead exemption to heads of families. Again this difference was related to the yeoman ideal: all men were supposed to be at liberty to compete in the

marketplace and rise to their proper level: meritocracy demanded that they be equally regulated. Or rather, that all 'white' men be equally regulated. Legislators had few qualms about fragmenting the male gender by race. Preventing Native and Chinese men from enjoying the full benefits of masculinity was directly related to the vision of the nation. Many of the politicians most active in promoting policies designed to prevent the proletarianization of white men, including De Cosmos, Robson, Arthur Bunster, and Robert Beaven, were also vigorous supporters of the early anti-Chinese movement.[114] Non-whites were not invited to the yeoman party.

The legislation, as a whole, defined 'white' men as independent producers. For 'white' women, it envisioned a different role, defined by their reproductive capacity. Throughout the legislation, the regulation of women had a common purpose. The new femininity created in the legislation was defined in relation to reproductive policy: each extension of women's property rights was intended to safeguard and facilitate reproduction. In every statute in which women's property rights were extended, including the Deserted Wives, Homestead, Married Women's Property, and Destitute Orphans Acts, the extension was granted in relation to specific reproductive needs, and justified in those terms. Beyond these strict exceptions, intended to aid women in their maternal role, their rights remained sharply constrained. The controlling variables of that restraint were a woman's relationship to her patriarch, and legislators' solicitude for male liberty.

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[114] See Roy, *A White Man's Province*, pp. 3-85 *passim*, especially pp. 6, 8, 10, 42-44, 48-49, 68, 71, 75. For an examination of independent craftsmens' association of wage labour, and later as they themselves became proletarianized, low wages, with racial groups see Glickman, "Inventing the 'American Standard of Living,'" pp. 221-235.

Lykke de la Cour, Cecilia Morgan, and Mariana Valverde have argued that "women were . . . often regulated through socio-legal categories that fragmented gender."[115] Women were defined by the role they played in relation to their husbands or families, and legislation dealt with them on that level: as widows, spinsters, married women, 'country' wives, deserted wives, and 'concubines'. The numerous categorizations existed to reserve power to men. Women's rights depended upon exactly how they were related to men, and hence, how those rights would affect men. The legislative decisions of the 1873 session reveal just how complete the equation was: married women's property rights were extended to protect both broken and intact families, and hence, reproductive concerns. However, both the limited nature of married women's property rights and the failed dower proposals reveal legislators' pre-eminent concern to protect married men's freedom in dealing with family property; moreover, under the municipal act, only women *without men* were granted the political voice which generally accompanied property rights.

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[115] Lykke de la Cour, Cecilia Morgan, and Mariana Valverde, "Gender Regulation and State Formation in Nineteenth-Century Canada," *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada*, ed. Allan Greer and Ian Radforth (Toronto: University of Toronto Press, 1992), p. 169.

CHAPTER FOUR:

THE CONSEQUENCES OF SOCIAL LEVELING

The reform legislation of the 1860s and 1870s was intended to create a broad class of 'white' male independent producers and property owners. This chapter examines the implementation of the laws through judges' bench books, newspapers, and published law reports. Judges' bench books are not an official legal transcript. They are, rather, notebooks in which judges recorded the testimony, arguments, and outcome of a case. Often the books also include a detailed summation of the reasons for judgment, and occasionally, judges' personal opinions on the various matters before them. Thus, the bench books often provide greater detail than published reports, which usually include the bare facts of the case and an official transcript of the reasons for judgment. The bench books have the added advantage of providing information on both published and unpublished cases. Newspaper reports have also proven invaluable to this study. British Columbia's first published law reports did not appear until the late 1880s. While the first two volumes of these published reports address cases dating back several decades, they are incomplete, especially where repealed laws are concerned: for those publishing the reports, only precedents set on then-current laws were of any concern. Consequently, important judgments concerning statutes repealed prior to the late 1880s are not included. Fortunately, the newspapers proved a valuable source of case reports. Newspaper reports generally contain several kinds of information: a summary of the

circumstances surrounding the case; descriptions of the testimony and arguments involved; and an account of the judgment delivered, including a reprint of the judges' written judgment if one was available.

This chapter examines the administration of the homestead exemption, MWPA, and Destitute Orphans' Act. The chapter explores three central themes, including an emerging concern for the rights of creditors, judicial approaches to the legislation, and the individual agency exercised by those who entered the courtroom. The chapter begins with a period of relative calm, followed by an unanticipated interpretation of the homestead statute and its implications for credit relations. The chapter then focusses on several strategies used by couples to protect property from creditors through the newly-interpreted provisions of the homestead exemption and MWPA, and creditors' increasingly precarious position. Throughout these discussions, attention is given to the agency of the men and women involved in these suits. At the same time, the narrative examines the effects of legislative discourses on judicial interpretation of the acts. Judges' rulings, previously characterized as obstructive, take on a new appearance when viewed with close reference to the legislative debates.

Through the mid-1870s, the legislation of the 1860s and early 1870s appears to have occasioned little legal controversy. The homestead act, for example, occasioned no recorded legal difficulties, although some 92 individuals had registered exemptions by 1873.[1] The absence of cases may reflect the fact that the existence of an exemption was

[1] British Columbia, *Sessional Papers*, 1874, pp. 33-34.

clear enough and unlikely to be controversial in court. In order to be effective, the homestead exemption had to be registered with the Land Title Registry prior to the assumption of indebtedness or liability.[2] Apparently, these registrations were rarely, if ever, contested. The Married Women's Property Act appears to have been invoked regularly and operated smoothly as well. A significant number of cases involving married women arose in the county courts. Most appear to have been relatively routine. None was controversial enough to arouse an appeal.[3]

The situation was similar with respect to the Inheritance Act. While the number of intestates was fairly large — thirty-eight per cent of all adult decedents' estates were administered according to the intestacy laws between 1873 and 1888 — the number of intestates with real property was small, representing twelve percent of all intestates, or less than five per cent of all adult decedents. These individuals, however, were concentrated among the wealthiest intestates, and it would be tempting to suggest that the act was working as intended. After all, it was facilitating the partition of many of the largest estates. Yet while of some significance, this leveling affected only intestate estates.[4] The wealthy are much more likely to make wills than the poor,[5] and the vast

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[2] British Columbia, *Laws of British Columbia*, pp. 227.

[3] A quick survey of the Victoria County Court Plaint and Procedure Books for the years 1873 and 1874, immediately following the passage of the MWPA, yielded 12 suits signifying the involvement of married women, six joined with their husbands, and six suing or being sued independently of their husbands. British Columbia, County Court (Victoria), Plaint & Procedure Book, BCARS, GR 656, vol. 1 (April 1871 - November 1875).

[4] During these years the percentage of estates administered under the intestacy laws ranged from a high of 48.3 per cent in 1876 to a low of 23 per cent in 1886. The intestacy rate was determined by dividing the total number of deaths of individuals over the age of twenty-one into the number of intestate estates, including incomplete files. This information was available for each year between 1873 and 1888. Records

majority of large landed estates undoubtedly escaped direct regulation by the statute. At best, the law may have acted as a moral influence upon these testators, and such moral suasion was all that its authors had expected. In the courtroom, there were no references to the act in the 1870s. Throughout the 1880s, several complicated cases involving ancestors, collaterals, and half-blood relatives were referred to the courts; yet these were references for direction, not controversial cases. In each case the statutory provisions were logically and predictably applied to determine the heirs' respective shares, and no subsequent litigation emerged.[6] Generally, then, the laws were operating smoothly, and the reform program might be termed a modest success. While it may not have been achieving its goals in its entirety, it seemed to be creating few serious problems.

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of intestate estates are found at British Columbia, *Sessional Papers*, 1885, pp. 475-528; Ibid, 1889, pp. 447-479. These two returns purport to document all of the intestate cases administered from 1862 to 1888. The returns contain 986 files with a gross estate value of nearly 1.6 million dollars. Many of the files are incomplete, lacking a full description of the administration and disposition of the estate. However, 555 of the files, with a gross value of $559 223, are complete. All statistics relating to the types of property held by intestates and their assessed wealth have been generated from the complete files. For the yearly return of deaths in the Province, see Ibid., 1875, p. 9; Ibid., 1876, p. 156; Ibid., 1877, p. 69; Ibid., 1878, p. 75; Ibid., 1879, p. 7; Ibid., 1880, p. 317; Ibid., 1881, p. 380; Ibid., 1882, p. 240; Ibid., 1883, p. 312; Ibid., 1883-1884, p. 224; Ibid., 1885, p. 445; Ibid., 1886, p. 295; Ibid., 1887, p. 9; Ibid., 1888, p. 9; Ibid., 1889, p. 429; Ibid., 1890, p. 119.

[5] Shammas et al., *Inheritance in America*, p. 17.

[6] *In Re the Estate of Cranoelli, Deceased*, British Columbia, Supreme Court, Bench Book, Begbie, C.J., BCARS, GR 1727, vol. 734 (1884-1885), p. 445-446. For distribution among collateral relatives and their representatives, see *Featherston* v. *Featherston Haugh*, Ibid., Crease, J., vol. 704 (1884-1885), p. 636; *In Re Estate of Mannie Bradley*, Ibid., vol. 706 (1886-1887), p. 67 and attachments; *Re Samuel Miller*, Ibid., vol. 718 (1891), pp. 5-7, 465. On equal distribution to relatives of the half- and whole-bood, see *Re John McCormick*, Ibid., vol. 695 (1877), p. 264; *Re the goods of Charles Patrick Donelly*, Ibid., vol. 705 (1885-1886), pp. 513-514; *In the matter of the Estate of Herbert Abraham Harrison, Deceased, Intestate*, Ibid., vol. 713 (1888), p. 367 (attachment), and *In Re Parshalle. Kunhardt* v. *Cox and Quaile*, *British Columbia Reports*, vol. 42 (1930), pp. 413-423; *In Re Samuel Miller*, deceased, British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 718 (1891), pp. 5-7.

This tranquil situation was disrupted in the late 1870s, when a rising young lawyer, Theodore Davie, launched a series of cases in which he contended that the homestead act's $500 personalty exemption could be invoked by any debtor; no registration was necessary. Hampered by procedural and technical difficulties, Davie would win none of the cases; yet his interpretation of the act would prevail. Davie first presented his argument in *Clay* v. *Woolacott*, heard before Judge Crease in December 1878. His position was that the realty and personalty provisions of the Homestead Exemption Act were separate and distinct. In order to enjoy the benefit of the realty exemption, an individual was required to file an exemption with the Registrar of Real Estate Titles.[7] This registration was intended to provide public notice to potential creditors that the property was not available for seizure, and thus not a useful means of securing a loan or contract. The need to register realty was clear and uncontested. However, Davie argued, no registration was necessary to qualify for the personalty exemption: the personalty provisions, which he read to the court, explicitly exempted $500 in "personal property ... from forced seizure or sale ... the same not being homestead property under the provisions of the said 'Homestead Ordinance, 1867.'" Although this personalty exemption was included in the Homestead statute, it was not part of the homestead exemption. The personalty section, noted Davie, was "in addition to and distinct from the Homestead which has relation solely to real estate." No registration was necessary, and *every* debtor could select up to $500 worth personal property which could not be seized

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[7] See *Revised Statutes of British Columbia*, 1877, 30 Vict., no. 77, s. 3.

to satisfy outstanding debts. Should the court have any doubts about the propriety of such a privilege, Davie noted that the personalty exemption was a replacement for earlier English statutory exemptions, which permitted a debtor to retain his or her wearing apparel, bedding, and £5 worth of tools.[8] Davie's argument was convincing. Yet he lost the case. The personal property he was trying to exempt from seizure was a cheque, and Judge Crease ruled that exemption protected only goods and chattels. It did not protect money or cheques. Yet in making this distinction, Crease had accepted Davie's construction of the personalty exemption. Since he was forced to rely on the fact that a cheque did not fall into the exemption category, he was admitting that had the property consisted of goods or chattels, it would have been exempted.

In the meantime, Davie and his associate John Foster McCreight attempted to make use of the personalty exemption in a second case, *Johnson* v. *Harris*. Yet since the type of claim they were making had never been made before, they were unsure of the procedure for invoking the exemption. In this case, Sheriff Harris of Victoria had seized Johnson's personal property to be sold in satisfaction of his outstanding debts. Davie and McCreight served notice on Harris of Johnson's exemption. The Sheriff, having never been served such a notice before, sold the property. Johnson subsequently sued for recompense. Judge Gray, following well-established precedent, ruled that the sheriff was bound to follow the directions of the court and could not be sued for doing so, regardless of whether he had seized privileged or protected goods. Rather, the injured party should

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[8] *Clay* v. *Woollacott*, British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 696 (1878-1879), pp. 243-247, 252-261; Victoria *Colonist*, 21 December 1878, 11 February 1879.

have applied to the court for an order upon the Sheriff to restore the property. It was up to the court, not the Sheriff, to decide questions of law.[9]

In making this ruling, Judge Gray noted that a Sheriff, being bound in his duty as an officer of the Court, was different from other persons. A Sheriff's actions were not voluntary, but ordered by the courts, and he was not personally responsible at law. Other persons, however, must be able to justify their exceptional acts. Based on this distinction, Davie amended the action and sued Johnson's creditors, alleging that they had been responsible for selling the exempted goods. In his statement of the facts before the Full Court, Davie alleged that Sheriff Harris had been unsure of what action to take when served with Johnson's notice of exemption. He contacted the creditors, who directed him to ignore the notice and sell. The Sheriff agreed, but with reservations. He insisted that the creditors put up a bond of indemnity for $2000, to cover his costs should he later be sued for executing the sale following the notice of exemption. These revelations made no difference to the case. Yet the case made all the difference to the understanding of the law. In rendering decision, Chief Justice Begbie confirmed that Davie was correct in his understanding of the law, affirming that the Homestead Act granted Johnson the right to a personalty exemption notwithstanding the fact that he lacked a registered homestead.[10]

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[9] *Johnson* v. *Harris*, *British Columbia Reports*, vol. 1 (1878), pp. 93-100.

[10] Begbie's judgment in Crease's nearly illegible account of the trial appears to read: "Affirmin[g] Right that [is] taken [under the] Homestead Act is to have an Exemption of 500." Johnson could not have had a registered homestead, since the seized goods were the sum total of his property. Interestingly, the exemption was so unfamiliar to Begbie that he asked Davie how he thought the value of the goods was to be ascertained. Davie replied that an appraiser might be hired. *Johnson* v. *Mayereau et al.*, British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 701 (1880-1881), pp. 30-36

That being said, the Full Court determined that the creditors could not be held liable for the Sheriff's sale. They concurred with Judge Gray's earlier decision, stating that Johnson was "mistaken in his remedy." He should have applied to the court for an order of exemption instructing the Sheriff to desist from the sale. In the absence of such an order, the Sheriff was at liberty to sell the goods.[11]

Following the Full Court's decision the personalty exemption was available to all debtors without registration. The published case reports reveal that the $500 personal property exemption was invoked on a regular basis to protect both domestic and business property against seizure. Theodore Davie, it would seem, had thrown creditors to the wolves. When the personalty provisions were available only to those with registered homestead exemptions, they affected a small number of individuals, and creditors could easily ascertain their exempt status. Suddenly, with the *Johnson* v. *Mayereau* ruling, every debtor was eligible for a personalty exemption. The change was unexpected and an injustice to creditors, who were barred from seizing property they had previously believed liable.

Even worse, the personalty provisions were general and established no procedural guidelines for exemption claims. *Johnson* v. *Harris* and *Johnson* v. *Mayereau* established only the need to obtain an order of exemption from the Court. Many other issues remained to be determined on a case-by-case basis, and the courts' rulings were difficult to predict. Where creditors had previously known exactly which property they could

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[11] *Johnson* v. *Mayereau et al.*, British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 701 (1880-1881), pp. 30-36; Victoria *Colonist*, 15 May 1880.

seize, now they were uncertain. In the 1880s, the courts were called upon to decide the priority of personalty claims relative to those of creditors and other interested parties, the methods for appraising exempted goods, and the operation of exemptions in business partnerships.[12] Yet despite the courts' efforts, the vagueness of the personalty clause permitted exemptions in situations which were inconsistent with the legislation's original purposes and sometimes outrightly fraudulent. The precarious situation of creditors would be a great concern to legislators throughout the 1880s and 1890s.

Meanwhile, creditors' rights issues began surfacing in relation to the Married Women's Property Act as well. The cases reveal that couples used the act to protect real property from creditors, as legislators had hoped. Many married women owned the family home. In this situation, the property was immune from the husband's debts. Married couples also combined the protection offered by the MWPA with the homestead act's personalty exemption to protect substantial amounts of personal property. Judicial decisions were in tune with legislative aims, construing the legislation in narrow, protective terms. In doing so, the judiciary permitted couples to reserve property beyond the reach of their creditors; this was a new situation, to which creditors would have to

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[12] *York* v. *Meiss*, British Columbia, Supreme Court, Bench Book, Begbie, C.J., BCARS, GR 1727, vol. 733 (1882-1883), pp. 459, 462; *Spencer* v. *Brooks*, Ibid., vol. 736 (1887-1889), pp. 288, 295, 309; *Green* v. *Clute*, Ibid., Crease, J., vol. 701 (1880-1881), pp. 284-288, 300; *Naylor* v. *Jackson*, Ibid., Begbie, C.J., vol. 732 (1880-1881), p. 119; *Lenz* v. *Isaac*, Ibid., vol. 735 (1885-7), p. 389; *Green* v. *Strong*, Ibid., Crease, J., vol. 716 (1888-1889), pp. 291-293; *Hudson Bay Co.* v. *Oppenheimer Bros.*, Ibid., Begbie, C.J., vol. 732 (1881-1882), p. 102, and *British Colonist*, 9 April 1881; *Gum Lun Sung* v. *Wah Soon and Wah Yoon*, British Columbia, Supreme Court, Bench Book, Begbie, C.J., BCARS, GR 1727, vol. 735 (1885-7), pp. 382-383.

accommodate themselves. Yet along with the difficulties posed by this adjustment, there were unexpected complications: the judiciary's conservative interpretation of the MWPA as a protective measure also deprived married businesswomen's legitimate creditors of legal remedies. These decisions injured creditors and hampered married women's business opportunities. Yet the judicial interpretation of the acts requires contextualization rather than condemnation.

Judicial reception of the married women's property acts has been studied extensively. The accounts are dominated by a single over-arching interpretation: that an obstructionist judiciary stifled the liberal intentions of the legislatures. This thesis originated in the United States in the work of Richard Chused and Norma Basch, and has been most fully developed by Sara Zeigler.[13] In Canada, the judicial obstruction interpretation was first applied in a pioneering survey article by Constance Backhouse. Backhouse argued that judges "deliberately embarked upon a campaign of statutory nullification," refusing to grant married women disposal rights over their property and restricting their right to contract.[14] Her interpretation is routinely cited in Canada and the United States,[15] and was adopted by Paulette Falcon in her study of the 1873 British Columbia MWPA.

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[13] See Backhouse, Married Women's Property Laws," p. 252 (fn. 113); Chused, "Late Nineteenth Century Married Women's Property Law," pp. 19-20; Basch, *In the Eyes of the Law*, pp. 206-207; Zeigler, "Uniformity and Conformity," pp. 472, 494; Zeigler, "Wifely Duties: Marriage, Labor, and the Common Law in Nineteenth-Century America," *Social Science History*, vol. 20, no. 1 (Spring 1996), p. 67; Shammas, "Re-assessing the Married Women's Property Acts," p. 14.

[14] Backhouse, "Married Women's Property Law," p. 241.

[15] Bradbury, Introduction to *Canadian Family History*, p. 7; de la Cour et al., "Gender Regulation and State Formation," p. 168; Peter Baskerville, "'She has Already Hinted at "Board"' Enterprising Urban Women in British Columbia, 1863-1896," *Histoire sociale—Social History*, vol. 26, no. 52 (November 1993), pp. 208-9; Shammas, "Re-assessing the Married Women's Property Acts," p. 15.

Falcon, in examining two of Judge J.H. Gray's decisions, wrote that he "ignored the legislation's more liberal provisions," and "effectively nullified the more egalitarian aspects of the 1873 statute."[16] This dissertation does not take issue with the assertion that many Judges were conservative in their outlook. Judges were often both socially and legally conservative, and applied the law according to certain conservative standards. Yet new evidence and a stronger focus on legislative intent suggests that the judicial obstruction interpretation is problematic in its contention that the judiciary intentionally stifled the legislature's liberal intentions. In British Columbia, this was not the case. Yet for a number of reasons, which go beyond the specifics of British Columbia's situation, the thesis can be impeached on general grounds.

Historians of the married women's property acts have frequently commented on the judicial tendency toward strict construction of the statutes against the background of the common law. The evidence supports these observations. Judges gave great weight to the common law, and statutes were constructed as variation from the norm. Michael Grossberg has written that judges distinguished between statute law, "which they held to be merely human constructions and thus transitory, and judicial doctrines, which they considered to be expressions of immutable legal principles."[17] Sara Zeigler writes that in matters where statutes conflicted with or modified common law rules "judges were guided by common law rules of statutory construction. These required judges to look to the mischief that the statute sought to remedy and interpret so as to effect the remedy

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[16] Falcon, "'if the evil ever occurs,'" pp. 2, 94.

[17] Grossberg, *Governing the Hearth*, pp. 13-14

with a minimal disruption of common law standards."[18] David R. Williams confirms the existence of this broad judicial tendency in nineteenth-century British Columbia, writing that while judges "increasingly ... f[ou]nd themselves construing legislation passed by elected bodies ... the Common Law or judge-made law reigned supreme."[19] Over time, as statutes became more numerous, and began to form a greater part of the bulk of the law, they gained more weight, but this was a lengthy process.[20]

The granting of great weight to the common law by the judiciary has a certain logic. Since the common law was the pre-existing and vastly more comprehensive body of law, judges evaluated statutes, which addressed specific issues, as alterations of that law. Simply because a statute was created addressing specific legal situations did not justify disregarding all other jurisprudence in that domain. The common law provided precedents for dealing with a great variety of situations; statutes addressed only a few. Faced with the task of integrating the two bodies of law, judges retained the common law to the extent that it was not abrogated by statute. Thus, statute law was effective in its field of reference. The common law continued to apply in all other situations. The alternative, that Judges apply statutes liberally, is likely to be equally as tyrannical as an overly conservative reading, resulting in vast amounts of judge-made law. Through

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[18] Zeigler, "Uniformity and Conformity," pp. 481.

[19] Williams, *Sir Matthew Baillie Begbie*, p. 148.

[20] Grossberg, *Governing the Hearth*, pp. 13-14.

overly-liberal interpretations, Judges might have applied the law to situations unintended by the legislatures. Historians have tended to ignore this possibility.

However, surely the most important point is the observation that Judges interpreted the statutes against the background of the common law everywhere. If historians have noticed this fact, it is equally likely that legislators would have understood it. Certainly the many lawyers in the legislatures were aware of how the law was applied. The argument that the judiciary thwarted the intentions of the legislatures presumes that legislators were not aware of the rules of statutory construction. New evidence suggests otherwise. For example, where we once thought Ontario's judiciary obstructed married women from conveying or disposing of property in spite of legislative provisions which guaranteed a woman's right to "have, hold and enjoy" that property, several new pieces of information cast a different light on the matter. The word 'enjoy,' which appears to grant rights of conveyance, does not. With respect to realty, the right to enjoy property entitles the property owner to unmolested possession and use of property; it grants no rights of disposal or conveyance. Those formulating the legislation understood this meaning. When one legislator suggested that the government had forgotten to include conveyance provisions in the 1872 MWPA, Ontario Attorney-General Adam Crooks replied the drafters of the legislation "did not intend to provide any machinery for the conveyance of property by married women..."[21] Following both the 1859 and 1872 MWPAs, Ontario's legislators demonstrated their recognition of the absence of

[21] Toronto *Globe*, 23 January 1873.

conveyance provisions, passing additional legislation permitting married women to convey realty in specific situations with the consent of their husbands, or at the discretion of a judge.[22]

Historians have also believed the judiciary obstructionist for narrowly construing married women's ability to contract under the MWPAs.[23] The ability to contract is a key element in conducting business, obtaining credit, and investing.[24] For married women to enter business, their contracting abilities would have to be broadly construed. But judges consistently ruled that a married woman could not make a binding contract unless she possessed separate property at the time that contract was made.[25] Conversely, a man could make a binding contract regardless of his possession of property. The distinction stemmed from the fact that a married woman could not be held personally responsible for contracts. Only her property could be held liable. This principle originated in equity. Under the common law, married women had no right to contract on their own behalf. Under the rules surrounding equitable trusts and settlements, however, married women could render their separate property liable for their contracts. Why would judges have extended this construction to the married women's property statutes, rather than simply

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[22] In 1859, conveyance was permitted with the consent of the husband. The 1873 legislation provided for the conveyance of a married woman's property, with the consent of her husband, or with a judge's dispensation, if the husband's whereabouts were unknown, he was imprisoned, or incapacitated. For the legal meanings of the word 'enjoy,' see *Black's Law Dictionary*, 6th ed. (St. Paul, Minnesota: West Publishing, 1990). Backhouse, "Married Women's Property Law," p. 229; Ontario, *Statutes*, 1859, 22 Vict., c. 35; Ontario, *Statutes*, 1873, 36 Vict., cap. 18.

[23] Backhouse, "Married Women's Property Law," p. 233; Falcon, "'if the evil ever occurs,'" p. 84.

[24] Backhouse, "Married Women's Property Law," p. 227.

[25] Backhouse, "Married Women's Property Law," pp. 233, 235.

allowing married women to be held personally liable on contract, whether they possessed property or not? The answer lies in their understanding of the roots of the statutes. Both the legislators and the judiciary understood the acts to be an extension of married women's rights in equity to statute law.[26] Equitable laws were being extended by statute to those unable to proceed in equity because of the high cost and the legal complexities of creating an equitable settlement.[27] Given Judges' understanding of the origins of the laws, it is hardly surprising that they interpreted the statutes through equitable precedent. In equity, the "terms of the settlement dictated the rights a married woman had over [her] separate property," writes Backhouse. [28] Judges consistently ruled that the MWPA should be read as a general equitable settlement, applicable to all married women.

In evaluating whether Judges intentionally thwarted the intentions of the legislatures, historians must also account for the judiciary's use of the married women's property acts precisely for the protective purposes stated by the legislators. Lori Chambers has stressed that Judges in Ontario were sympathetic in applying the law to deserted or abandoned wives. Ontario's Judges were willing to ignore precedent in certain cases in order to provide women with the resources necessary to support themselves and their children. This was especially so in cases where the husband had violated social standards.[29] Both

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[26] Chambers, *Married Women and the Law of Property*, pp. 55, 69, 142-143; Shanley, "Suffrage, Protective Labour Legislation and Married Women's Property Laws," pp. 72, 74-75. One of the major aspects of law reform in the nineteenth century was a drive to consolidate the common law and equity.

[27] Chambers, *Married Women and the Law of Property*, pp. 7-9.

[28] Backhouse, "Married Women's Property Law," p. 215.

[29] Chambers, *Married Women and the Law of Property*, pp. 123, 129, 172.

Chambers and Paulette Falcon write that the judiciary in Ontario and British Columbia stressed the protective aspects of the legislation but were reluctant to read the statutes from an egalitarian standpoint.[30] The judiciary often explained this position with reference to the legislative debates which accompanied the statutes. Standard interpretive practice called upon judges, when in doubt, "to look first at the circumstances attending the passing of the act."[31] As we know, politicians in Ontario and British Columbia had emphasized the protective aspects of the bills.[32] Surely, here is evidence that the judiciary was trying to implement precisely what they believed were the intentions of the statutes. When supporting the married women's property bill, legislators contended that the measure was intended as a form of wife protection: they stressed the bill's impact on wives in broken families; yet most were aware of the protections it offered to family property held in the wife's name. The cases reveal that the judiciary was in tune with these purposes.

Humphreys v. *Sehl*, heard by Judge J. H. Gray in 1886, illustrates the MWPA's capacity to protect a married woman's property from her husband's creditors. The court

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[30] Chambers, *Married Women and the Law of Property*, p. 127; Falcon, "'if the evil ever occurs,'" pp. 1-2.

[31] Vice-Chancellor Wood, in *Cope* v. *Doherty* (1858), laid down the following formula for interpreting statutory language: "I think that in construing any Act of the Legislature the actual verbal construction of the clause itself, if plain and simple, must govern the Court. If there is any degree of doubt or difficulty upon the wording of the section itself, one is entitled to look first at the circumstances attending the passing of the Act, next to the preamble, so far as it affords any indication as a key to the interpretation of it, and next, I may say, to the whole purport and scope of the Act, to be collected from its various clauses, and beyond the question which may arise upon the construction of the clause itself which is in dispute." *Gagen* v. *Gagen*, *British Columbia Reports*, vol. 48 (1934), p. 490.

[32] Backhouse, "Married Women's Property Law," p. 223; Chambers, *Married Women and the Law of Property*, p. 99.

read the statute through the lens of equity, and made explicit reference to the legislature's protective intentions in pronouncing judgment. *Humphreys* v. *Sehl* also reveals the complex and confusing categories of personal property created by the MWPA, complexities which contributed to the pressure to revise or replace the legislation. The facts of the case are as follows. In 1878, T. Basil Humphreys purchased household furnishings from Jacob Sehl, valued at slightly over $300, on the condition that he would pay Sehl $75 per month. Humphreys defaulted, and after several attempts to arrange payment, Sehl sued and was awarded $223. Humphreys could not pay, and in 1883, Sehl's attorneys instructed the Sheriff to seize Humphreys' possessions for sale at auction to repay the debt. The Sheriff seized furniture and various other possessions from Humphreys' home. Humphreys responded by claiming $446 worth of the possessions as his own and exempt under the Homestead Exemption. The remainder of the household goods and furnishings, Humphreys claimed, belonged to his wife Caroline, who launched an interpleader suit on her own behalf.[33]

Of course, this was the very same T. Basil Humphreys who had promoted the MWPA as protective legislation, and his wife Caroline was quite aware of her rights. Mrs. Humphreys' late uncle had left her real estate and a legacy of $5000. With the proper receipts, she proved her purchase of a piano, parlour furniture, and various other goods amounting to about $600 in value. Since the MWPA provided Mrs. Humphreys with no interest in jointly-accumulated property, her ability to provide these receipts was crucial.

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[33] *British Colonist*, 18 March 1886.

In their absence, the court would have assumed that the property belonged to her husband. Most of the furniture, she testified, had been purchased with the rental income from her land, although she had not kept account of the interest from the $5000 bequest, which she admitted had been co-mingled with the rent monies. Ultimately, she constructed a new house with the $5000 principle. Mrs. Humphreys also claimed possession of one other item: a sewing machine, which had been a present from her uncle before his death. How Caroline Humphreys obtained and used her inheritance is of great importance. Only property of particular types, received in very specific ways, was protected under the MWPA.

Jacob Sehl's lawyer, Montague Drake, argued that the Married Women's Property Act should be construed to hold Caroline Humphreys' property liable for her husband's debts. Drake noted that at common law, a wife's personal property, and the rents and profits from her real estate, were her husband's during marriage and subject to his debts. Though the local statute provided that the rents and profits of the wife's real estate were her own, Drake argued that under equitable precedents, once she purchased personal property with such monies, that personalty became her husband's. Alternatively, he noted that the MWPA provided no protection to inherited money. Fortunately for Caroline Humphreys, she had built a house with her $5000 inheritance; since it had been converted to realty, it was indisputably her separate property; as inherited cash, it would have been subject to seizure for her husband's debt. Drake made no claim to the real estate purchased with the principal; he did argue, however, that the interest from the $5000 inheritance was subject to seizure. Since that interest had been mixed in with the rents from Caroline

Humphreys' property, Drake believed the statutory protection accorded to the rental income was nullified. In Drake's opinion, since the furniture had been purchased in part with funds liable for the husband's debts, it was liable to seizure.

In making his decision, Judge Gray cited the 1873 MWPA's sections on real and personal property in their entirety. To a certain degree, the Judge advised counsel, the common law had been changed in British Columbia. With relation to the case under consideration, Gray recounted, the following personal property of a wife was protected from her husband's debts: the rents and profits of the wife's real estate; her wages, earnings and separate business profits, and any acquisitions therefrom; and all her personal property "in actual or constructive" possession by her husband. None of the property under consideration, he noted, had been bought with Mrs. Humphreys' wages or earnings. She had testified that the goods were purchased with money from land rent, not the interest income, and her testimony had not been disproven by the defence. Thus, despite the fact that the funds were co-mingled, Gray would accept her word on the matter. With respect to Drake's next assertion, that under equitable precedent, Mrs. Humphreys' purchase of goods with the income from her realty converted them to personalty, voiding their status as separate property, and rendering them seizable for her husband's debts, the Judge could not agree. Gray wrote that he concurred with Drake's "observations that the act is simply a 'statutory settlement,'" or statutory equivalent of an equitable separate estate, but added "we must look to the language of the act to see what the settlement is, not to decisions long before it was passed on the construction of other settlements not statutory." In other words, the act's provisions determined the type of

separate property rights a married woman enjoyed. Decisions based on older, unidentical equitable settlements did not apply. In this light, Gray noted that the act specified that the rents and profits of the separate realty "shall be held and *enjoyed by her for her separate use* free from any claim of her husband." He cited legal authorities to strengthen his position, noting that to 'enjoy' rents and profits entailed being able to use them. Under the statute, the wife was supposed to be able to 'enjoy' those rents and profits free from any claim of her husband. Moreover, Mrs. Humphreys' use of the money was well within Gray's ideals of proper spending for a married woman: "In what way," Gray wondered aloud, "could she more creditably enjoy [the rents and profits of her realty], than in purchasing furniture and clothing and comforts for herself and family..." Given these observations, Gray ordered the Sheriff to return Caroline Humphreys' possessions.

Or rather, all of her possessions but one. The sewing machine was not purchased with Caroline Humphreys' rental income or wages. It was personal property received as a gift. Since the act classified only realty, rental income, and earnings — and the acquisitions purchased with those earnings and income — as a married woman's separate property, it seemed that the sewing machine could be seized. But Judge Gray noted again that the act must be read carefully, as an equitable settlement upon a married woman, and emphasized the strange wording at the end of the second section, which declared that the "possession, whether actual or constructive of the husband of any personal property of any married woman shall not render the same liable for his debts." What this meant was that *none* of a married woman's personal property was liable for her husband's debts, even if that property transferred to his possession and control by the residual common

law rules of coverture. The sewing machine had been given to Caroline Humphreys, and under the common law it transferred to her husband's possession. But by the terms of the statute, although T. Basil Humphreys possessed the machine, it could not be seized by his creditors. Yet this left the machine in limbo. Though it could not be seized, neither could the Court return legal possession of it to Caroline Humphreys, since it belonged in her husband's possession. This was a "singular anomaly," wrote the Judge, "and could not arise if the British Columbia statute on this subject was assimilated to the English statute of 1883, or to the law on this subject in some of the other provinces of the Dominion." Gray left the matter to the Sheriff, who, he said, "will no doubt be properly advised what to do."[34]

In giving judgment, Gray was not content to rest his decision solely on legal technicalities. He also felt the need to express his belief that he was acting in accordance with the spirit of the law: "The object of the statute is perfectly plain," he wrote. It was to "prevent the misery and destitution and unhappiness sometimes brought on wives and their families by the misfortunes or failures or follies of the husband." Gray viewed the act as protection for wives. Unlike some who supported the act as wife protection, however, his understanding of that protection was not limited to protection of wives in 'broken' families. Like De Cosmos, he saw the act as an equivalent to the Homestead Act, permitting certain property to be reserved in the wife's name for the support of 'intact' families.[35] This understanding of the Homestead Act and the MWPA as

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[34] Presumably, the sewing machine would have been returned to T. Basil Humphreys' possession, had he launched a subsequent action for its retrieval.

[35] *Caroline Humphreys* v. *Jacob Sehl*, *British Colonist*, 4 December 1886.

measures with a similar function was held by litigants as well. In three other cases, married couples claimed both a homestead exemption and ownership of some of the personalty by the wife.[36] Such methods could be quite effective in protecting large amounts of personal property, as was the case in *Humprheys* v. *Sehl*.[37]

Humphreys v. *Sehl* and its analogues illustrate the use and effectiveness of the MWPA as an auxilliary to the homestead act in protecting *personal* property. A husband could protect $500 of his own personal property by claiming the homestead exemption. In addition, any personal property held in the wife's name, or coming to the family through the wife, was protected. As one Vancouver legislator observed in the legislature in 1894, "it was invariably the case that when a man applied for the exemption of his stock in trade, the wife owned the furniture, and they thus had both exempted."[38] Perhaps equally as significant as the property contested in these cases is the property which was not

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[36] *Findlay, Durham & Brodie* v. *King*, British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 698 (1880), p. 263-272, and vol. 701 (1880-1881), pp. 15-16; *Guillaume* v. *A. Martin and Harriet Martin*, Ibid., vol. 716 (1888-1889), pp. 150, 166, 172; *Weiler* v. *Collier*, Ibid., Begbie, C.J., vol. 735 (1885-7), p. 467.

[37] However, the claims had to be precisely worded. If they were not, the ploy could backfire. In *Weiler* v. *Collier*, Mr. Collier's counsel was in the process of claiming homestead exemption on his behalf, which would easily have exempted all of Collier's possessions, when he made the mistake of adding, "Besides, these goods are claimed by Mrs. Collier: Collier himself conveyed them to her..." To this, Judge Begbie replied, "Mr. Walls, you have put yourself out of court. If these are not your goods, — were not yours when seized by the Sheriff, — how can you claim the Homest[ead] Act exempt[io]n in resp[ec]t of them?" To protect their household goods, valued by an appraiser at $179, Mrs. Collier would now have to go to the expense of launching a separate suit on her own behalf. Whether she did so is unknown. However, the case has an interest beyond its face value. It reveals that husbands did transfer personal property to their wives, and that the courts accepted that such transfers could be legitimate. *Weiler* v. *Collier*, British Columbia, Supreme Court, Bench Book, Begbie, C.J., BCARS, GR 1727, vol. 735 (1885-1887), p. 467.

[38] *Daily Times*, 12 December 1894.

disputed: the wife's real estate. The seizure of Caroline Humphrey's real estate was never contemplated. Her realty was safe from her husband's creditors.

Exactly how safe a wife's realty was from her husband's creditors is illustrated by the dealings of James and Louisa King. In the early 1880s, the Kings were in serious financial trouble. Both were in business in Victoria, Louisa running a millinery and James a saloon. In April 1880, goods from the saloon were seized to be sold in satisfaction of rent owed. In response, James King claimed a homestead exemption and Louisa filed an interpleader suit, claiming some of the goods as her own. In addition, Mrs. King noted that the family home was her separate property. Judge Crease ordered that the goods should stay in Mrs. King's possession until the ownership could be determined at trial. As in *Humpreys* v. *Sehl*, no mention was made of the house in the judgment. It was well understood to be safely protected in Louisa's name.[39]

In a second trial in late 1881, Louisa King unscrupulously attempted to use this protection as a means of defrauding her brother. In July of 1878, the Kings had borrowed $1500 to build Louisa's house from her brother, Peter Fraser. They had never attempted repayment, and Fraser took his sister to court. In his testimony, Fraser stressed that he had lent the money to his sister, not her husband. The day following the transaction, she gave him a note stating: "Three years after date for value received We promise to Pay Peter Fraser on this order the sum of $1,500, one thousand, five hundred, Dollars..." The body of the note was in Louisa's handwriting, but it had been signed by James King

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[39] *Findlay, Durham & Co.* v. *King. Interpleader of James Neill and Mrs. Louisa King*, British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 701 (1880-1881). pp. 15-16.

alone. Fraser protested, demanding Louisa's signature, but she would not sign. She simply assured him that she would see that the debt was paid. Following this incident, relations between the three deteriorated. Within a month after receiving the money, the Kings would have nothing to do with Fraser. They asked him to leave their house, where he had been boarding for several years, and refused to speak to him. All contact between them ceased. When the three-year term of the note expired, Peter Fraser returned and requested repayment. James King informed Fraser that he was broke, and directed him to Louisa. Fraser called upon her and wrote, but was unable to secure repayment.

Louisa King, now an experienced litigant, understood from her previous trial that her house could not be seized for her husband's debts. Given this security, she argued that the debt was solely and entirely her husband's. Her lawyer, J. Roland Hett, denied that her separate estate was bound by the loan, and assured the court that Mr. King admitted his liability. It was in James King's interest to feign sole liability, since the family house and much of the family property was in Louisa's name. Moreover, since the execution against his saloon in 1880, James himself was almost penniless. That he remained so was confirmed by testimony at the trial. Peter Fraser faced a difficult position. Yet Fraser was not without resources, the most valuable of which was his lawyer, Theodore Davie. Davie was aware of the complexities of spousal liability in the law, and argued that James and Louisa King were jointly liable. He effectively brought attention to the 'We' in the Kings' note, and stated that Fraser had lent the money to Louisa King, with security from James King. Fraser's testimony corroborated this theory. Davie, widely regarded as a talented young lawyer, was imposing in the courtroom. Under his cross-examination,

Louisa King's story fell apart: she confessed that she had "intended to pay [Fraser] if ev[er]y thing went right." James King also confessed under cross-examination that the money had been lent to Louisa. Peter had insisted on additional security from James.[40] In his decision, Judge Crease held Louisa King liable for the loan and five percent interest. With reference to equitable precedents and the wording of the statute, he also found that her liability was proprietary, not personal. Since the money was lent on her separate property, that separate property, including the house, was bound by the judgment and liable to seizure.[41]

So the matter seemed to end. However, Louisa King would not go down quietly. Within a month of Crease's judgment, she applied for a homestead exemption for her personal goods and furniture. While John Robson had written the gender neutrality clause out of the homestead exemption act in 1867, a subsequent act, guiding the interpretation of statutes, reinstated gender neutrality.[42] Louisa King's lawyer, J. Roland Hett, argued that "[b]y the interpret[atio]n Act male includes female." He also noted that the property was definitely Louisa's, having been purchased with her earnings as a hat-maker: "L[ouisa]K[ing] is doing bus[iness] for herself[.] This is her sep[arat]e prop[ert]y & she has as much right to claim an exemption as a man." In considering this argument, Crease concurred: "I think sec[tion] 8 of the Marr[ie]d Womans Prop[ert]y Act is very strong &

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[40] *Peter Fraser* v. *Louisa King*, British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 700 (1881), pp. 392-408; *British Colonist*, 19 November 1881.

[41] *British Colonist*, 1 December 1881.

[42] British Columbia, *Statutes*, 1872, 35 Vict., no. 1.

includes this.... the Sheriff is in poss[essio]n against her." He ruled that Louisa King was entitled to the exemption.[43]

Caroline Humphreys' and Louisa King's cases reveal that the MWPA worked for protective purposes. Yet having come to this conclusion, we come to a rather intriguing problem. Married women continued to make application under the 1862 Deserted Wives Act well after the passage of the MWPA and into the late 1880s. If the MWPA was interpreted and enforced as a protective measure, surely such applications would have been unnecessary. After all, under the 1873 legislation, a married woman's earnings, the personal property acquired from them, and her realty were placed beyond the reach of her husband or his creditors. She had control over these assets and the protection offered by an order under the Deserted Wives Act should have been unnecessary. Still, this is theory; in practice, at least nine protection orders were issued after the passage of the MWPA, during a time when such orders were apparently redundant. Surely women would not have sought these orders if they did not grant some benefit. Nor would the courts have granted frivolous petitions. The cases themselves provide no rationale for the orders. Yet a comparison of the two acts reveals that protection orders provided greater rights than those offered by the 1873 MWPA: protection orders granted a deserted wife the right to dispose of or encumber her realty. Deserted wives who applied for these orders after 1873 sought the right to convey and mortgage, rather than merely 'hold,' their real property. In situations involving desertion, where wives required the aid and

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[43] *Peter Fraser* v. *Louisa King*, British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 702 (1881-1882), pp. 97-98.

protection of the law to make the fullest use of their assets, Judges were apparently quite willing to grant additional property rights.[44] This policy, after all, fit in well with the protective rhetoric of the legislatures.

While the MWPA was effective as protective legislation, it was much less effective in clarifying married women's individual liability on contract. This is perhaps not surprising. Aside from Cornelius Booth's egalitarian pronouncements, the intention to provide married women with autonomous property and contractual rights, and to clarify their business liabilities, went largely unspoken. Indeed, such a purpose was probably limited to a small group of egalitarian legislators, and a few lawyer-legislators interested in clarifying debtor-creditor relations. Two cases, *Wah Fung* v. *Loy You* and *Cranoelli* v. *Snow*, reveal that married women's liability on contract remained problematic under the 1873 MWPA. These were significant impediments to married women who wished to conduct business. Nonetheless, it would manifestly unfair to lay the blame for this situation on the judiciary. Both cases, heard before Judge Gray, reveal a confident belief that legislators intended the statute solely as a protective device. What followed was a predictable interpretation of married women's contractual liability according to the common law rules of statutory construction and equitable precedent.

Loy You was a married woman who carried on a washing and ironing business separately from her husband. Plaintiff Wah Fung alleged that Loy You owed him $120 in overdue rent, and that he believed she was preparing to leave for Washington Territory

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[44] British Columbia, Supreme Court, Register of Orders Protecting the property of a Wife deserted by her husband, BCARS, C/AB/30.3D, pp. 7-19.

without paying her debts. For Judge Gray, the legal point at issue was whether Loy You had bound her separate estate by the rental contract in question. Gray noted that the MWPA held a married woman liable to be sued for her separate debts. But like other judges of the period, he explicitly relied on the common law rules of statutory construction: "This statute," he wrote, "gives remedies and creates liabilities in excess of the Common Law — For its application therefore every ingredient must be affirmatively shewn to exist that would bring the Case within the Statute..." Gray noted that the "Policy of the Common Law was to merge the separate identity of man and wife — to promote union..." The statute was "not to be construed in violation of that policy." Rather, he understood the statute to be "remedial." Its intention was to protect the wife "when the duties and objects of the marriage have been departed from and disregarded by the husband." The MWPA should not be construed to encourage the development of separate interests between husbands and wives generally, but rather to "shield her where she has been wronged — or to aid her where it would be for her benefit." Where did Gray come up with this sense of the purpose of the legislation? From the legislators. Gray believed he was implementing the statutes precisely in the manner the legislature had intended. In fact, he stated in no uncertain terms that "The statute was meant to protect women under certain circumstances — The History of its Policy can be traced in the varied legislation of the last thirty years." This understanding of the legislation's purpose is supported by the evidence. In order to bring conservative legislators onside, reformers had stressed one facet of the legislation, wife protection, to the exclusion of its other possible effects. Perhaps, if they had stressed the liberating benefits of the measure, Gray would have

applied it in that sense. But they could not have done so and succeeded in placing the measure in the statute books. In fact, then, Gray *was* implementing the wishes of the majority of the legislators. As we have seen, the majority had to be brought onside. Very few supported equal rights for married women.

In this case, Gray decided that the statute did not apply. Before proceeding under the statute, Gray wrote, "the ordinary legal presumption" of the common law "must be negatived." The plaintiff had to show, and at least allege in the preliminary affidavit (his declaration of the facts of the case), that the wife's separate liability existed. Wah Fung's affidavit stated that the Loy You carried on her business separately, but it did not state that the rent was owed on behalf of that business. Gray noted that even if a married woman ran her own business, she could still make contracts which would render her husband liable. The court could not assume that everything she did was on behalf of her separate business. Since the statute was remedial and protective, it augmented, but did not replace the common law. Under normal circumstances, the wife could still act as the husband's agent when authorized by him. She could also enter contracts binding him in cases of necessity. Any person who wished to deal with a married woman and utilize the statute, Gray wrote, "must satisfy themselves that the dealing is for her separate interest." If they did not, then the court would maintain the standards of the common law, under which a married woman could not contract on her own behalf. In this case, since the initial documents did not include a direct allegation that the money was borrowed by Loy You on behalf of her separate estate, she was not held liable. Wah Fung, her legitimate

creditor, could not collect.[45] Judge Gray reiterated this position less than a year later in *Cranoelli* v. *Snow*.[46] Gray's construction was consistent with the legislature's protective rhetoric, and with the court's rules of statutory construction. Despite its rationality, however, Gray's interpretation undoubtedly made it quite difficult for married women to conduct business in the province. Moreover, it deprived creditors of redress for legitimate debts. Between the homestead exemption and the married women's property act, then, the legal position of legitimate debtors was becoming increasingly precarious. In the 1880s, as the legislature became increasingly dominated by lawyers, speculators and businessmen supporting and dependent upon oligarchic capital, legislators looked increasingly to correct the problem. This issue weighed especially heavy on the shoulders of Theodore Davie, whose legal manoeuvers in homestead cases had done such mischief to creditors' position.

The judiciary's strict construction of the MWPA was directly related to Judges' desire to implement legislative intentions. Understanding legislative intentions was crucial in applying a strict construction. Standard practice called upon the judiciary — when in doubt — to look to the rationale provided by the legislators. Judges were not attempting

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[45] *Wah Fung* v. *Loy You*, British Columbia, Supreme Court, Bench Book, Gray, J., BCARS, GR 1727, vol. 769 (1875-1877), pp. 668-680.

[46] The case involved a married woman running a business on the Nass River. Judge Gray again held that the common law prevailed unless the plaintiff brought the case within the purview of the statute. In order to do so, he had to prove that the defendant carried on a separate business, and that the contract on which he was suing was made with respect to that business. In this case, however, other factors came into play. Cranoelli had previously sued and obtained judgment against Mrs. Snow's husband for the same debt. Gray ruled that this amounted to an admission that Mr. Snow had made the contract. Cranoelli would have to continue his efforts to collect from him. *Cranoelli* v. *Snow*, British Columbia, Supreme Court, Bench Book, Gray, J., BCARS, GR 1727, vol. 761 (1878), pp. 134-135.

to limit the legislation *against the wishes* of legislators, but rather — and this is the crucial distinction — they were using traditional methods of limiting the legislation *to the wishes* of legislators. Judges were to address the situation specifically contemplated by the legislature; they were not to create unintended effects. In this case, judges understood the act to be protective in nature, and applied the statutory language accordingly. The jurisprudence surrounding the Destitute Orphans Act confirms this analysis. When expressly called upon by legislators to exercise personal discretion, judges were liberal, applying the legislation to a range of situations which, while in keeping with legislative intentions, were not specifically anticipated by its authors. Yet in doing so, Judges carefully respected the limits of the discretion accorded them; where the letter of the law was clearly fixed, the judiciary carefully followed its provisions.

The Destitute Orphans Act provided no assertable, secure rights to country wives and cohabiting women.[47] Rather, it gave great weight to male prerogative and judicial discretion: only dependents supported voluntarily by a man within twelve months of his decease were to receive support from his estate. Moreover, the court was given discretionary powers to investigate the morality of the dependents, determine the amount of the award, and establish a payment schedule. Judges were also instructed to allow any legal widow or legitimate children of the deceased an opportunity to be heard *prior* to any distribution of the estate. While any award to these legal relatives was discretionary,

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[47] I have chosen not to use the appelation 'common-law wife' since 'common-law marriage' is a modern misnomer. English common law recognized no relationship between cohabiting couples. Instead I understand the situation to involve three different statuses: marriage, 'country' marriage according to Aboriginal rites, and cohabitation involving no rites, which I have termed 'de facto' marriage, since the relationship exists in fact, if not in law.

the clause on its face seems to accord pre-eminent rights to the legitimate family. Given the suspicion of irregular dependents and the weight accorded to the claims of the legal family, collecting under the Destitute Orphans Act might presumably have been quite difficult.

Despite the suspicion evident in the legislation, the tendency of the judiciary was toward a generous administration of the act. Judges assumed the role of benevolent patriarch, weighing the needs of all interested parties, and taking full advantage of the discretion granted them by the legislation to rule in accordance with their understanding of the legislature's intentions. Chief Justice Begbie had promoted the legislation for humanitarian reasons, and the judiciary was obviously sympathetic to dependents' plight. Yet issues of public expenditure also figured prominently in their decisions. Premier Elliott's preamble shifted the focus to government expenditure and the social consequences of poverty, and the courts took the act's preface seriously. From the proceedings it is apparent that their intention was to use intestate men's funds to support their dependents, and relieve the government and charities of the burden of supporting unwed women and illegitimate children.[48]

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[48] The administration of Phillipine Simone's estate is useful in understanding the use of the legislation to defray public and charitable expenditures for the support of illegitimate children. It appears that Simone died in the latter half of the 1870s, perhaps in 1877. He was survived by his 'country wife', Buckskin, of Alkali Lake, and four children — two daughters aged four and nine, and two sons aged eleven and thirteen. The sons were sent to the Oblate St. Joseph's Mission, the elder daughter to St. Ann's Convent, both at Williams Lake. The younger daughter remained with Buckskin until her death in 1878, when she joined her sister at St. Ann's. In May of 1879, the two institutions petitioned the court for the balance of Simone's estate. In return they agreed to educate, feed, and clothe the four children until they reached sixteen years of age. The Simone estate was likely insufficient for the purpose, yet the principle of the bill was to use the parent's estate to support the children, relieving the public of this burden. Thus, Judge Crease awarded each institution half of the estate, valued at a total of $306.32. See British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 697 (1879-1880), pp. 17-18.

The disposition of the cases reveals that the judiciary was in tune with both the legislature's protective and public expenditure concerns. Cases involving very small sums were often dealt with summarily and rather informally. Judges gave little attention to points of law and simply laid out the bare terms of distribution.[49] This was not unusual: judges also summarily disposed of small estates involving legal widows.[50] In these cases, the focus was practical: the family's need for maintenance was evident and the small size of the estates meant there was little possibility that any distribution would be contested. Judges could act freely with little possibility of censure. Where cases involved even modest estates, judges subjected women's claims to more rigorous scrutiny.

When Jacob Loerz died in the early 1880s, he left an estate worth about $300. His country wife, Eleanor Felladeau, had a young son to support, but could not press her own claim. A claim was made on her behalf by Loerz's nephew, the administrator of the estate. Nor was Felladeau's testimony sufficient to establish the claim. When she testified

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[49] In April of 1888 on his circuit through Nanaimo, Judge Crease heard the case of Edward Foster, who died intestate, leaving a first nations woman, Jenny, and six children, one of whom had been born after Foster's death. Crease noted that the couple were not married; or rather, no marriage had been registered. They may have been married according to tribal custom. Although the case came under the Destitute Orphans Act, and any disbursements to the family could only be made under its provisions, Crease made no mention of the act, or whether the case at hand met its terms and requirements. He simply ordered that the small balance of the estate, totalling $96.82, be paid out over the following winter to the mother in small disbursements of provisions or cash. British Columbia, Supreme Court, Travelling Bench Book, Crease, J., BCARS, GR 1727, vol. 548 (1887-1889), p. 98.

[50] When handling the estate of Robert Hughes in 1883, who left an estate valued at under $300, a widow and two legitimate children, Judge Crease ordered the administration to the widow. Judges usually required a refundable performance bond from administrators, to ensure they handled the estate properly, but in this case, Crease required no security from Mrs. Hughes, explaining that "The amount [is] very small in this case. I require no bond as she has ch[ild]ren to bring up." British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 703 (1882-1884), p. 282.

to her relationship with Loerz, each fact had to corroborated by third party testimony. Such scrutiny might easily be portrayed as evidence of judicial hostility to the members of irregular families. However, the requirements of evidence and proof of relationship were no more strict than those required from legal relatives in inheritance cases.[51] More importantly, after debts and legal costs were deducted, Judge Crease awarded Eleanor Felladeau the entire balance of Jacob Loerz's estate. He was hardly hostile to her claim.[52]

In fact, Judges construed eligibility broadly. A salient example is the case of Matilda LaPlante. LaPlante, eighteen years old at the time of her hearing, had never cohabited with the deceased James Kennedy, although she had been sexually intimate with him for several years. These living arrangements did not meet the expected situation of a concubine. Certainly, concubines were not envisioned to be living at home with their mothers! Nor is it clear that the framers of the legislation had contemplated the situation of minor concubines. Yet given the circumstances of the relationship and Matilda's apparent poverty, Judge Begbie felt an award would be in keeping with the intention of the legislation: he awarded LaPlante the maximum permitted by the statute.[53]

The judiciary's understanding of legislative intentions also tempered the rights of legal family members to the advantage of irregular dependents. The provisions of the act

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[51] Legal relatives often had to go to great difficulty to secure sufficient documentary proof or third-party testimony attesting to their relationship.

[52] These deductions were standard. British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 697 (1879-1880), p. 503; Ibid., vol. 701 (1880-1881), pp. 38-39; Ibid., vol. 703 (1882-1884), p. 84.

[53] British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 705 (1885-1886), pp. 125, 477; Ibid., vol. 714 (1888), p. 30, attachment; Ibid., Begbie, C.J., vol. 734 (1885-1886), pp. 321, 323, 441-442, 462.

required the legal widow or legitimate children of the deceased be given an opportunity to be heard prior to any distribution of the estate. Such a clause could be interpreted to accord pre-eminent rights to the legitimate family. Yet the statute left the amount of any award entirely at the discretion of the judge hearing the case, and here too, judicial discretion overruled any pre-ordained outcome. Both Chief Justice Begbie and Judge Crease routinely adjourned proceedings in Destitute Orphans cases in order for the legal relatives of the intestate to file their claims.[54] Yet there were limits to the status accorded to legal heirs, and the court weighed their claims against the needs of dependents. When Joseph Rodello died in 1889 leaving a country wife and fifteen-year-old child, Judge Begbie attempted to balance the needs of Rodello's immediate dependents with the rights of his more distant kin. When the matter first came to Begbie's attention, the value of the estate was not known; nor was it known if any legal heirs existed. Begbie was familiar with the circumstances of the case, and understood that the position of the widow and orphan was precarious. He postponed the hearing for six months to allow any relatives to be heard. In the meantime, he granted the administrator liberty to advance up to $100 to the widow and orphan "as he may think best."[55] While Begbie was not legally permitted to make any award before hearing from the heirs, his decision is important, showing his

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[54] In fact, the judiciary was more solicitous of legal heirs' interests than the act required. Judge Begbie adjourned the Kennedy / LaPlante hearing for a month in order to permit the Kennedy's sister, Mary Ann Ogilvie, to substantiate her claim to his estate. He was not required to do so. The act required only that the legal widow and illegitimate children be heard. His decision to hear a sibling's claim was discretionary, and indicates the importance assigned to the claims of all legal heirs. Ogilvy ultimately received the balance of Kennedy's $2000 estate less LaPlante's $500 award. British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 705 (1885-1886), pp. 125, 477; Ibid., vol. 714 (1888), p. 30, attachment; Ibid., Begbie, C.J., vol. 734 (1885-1886), pp. 321, 323, 441-442, 462.

[55] Heirs were ultimately located. British Columbia, Supreme Court, Bench Book, Begbie, C.J., BCARS, GR 1727, vol. 737 (1889-1890), p. 346; Ibid., Crease., J., vol. 720 (1891), pp. 226 [attachment], 227.

concern for the plight of unmarried women and children. The same judicious balancing of the interests of legal families and the needs of country wives and children was shown by both Begbie and Crease on several other occasions.[56]

Cases involving married 'concubines' reveal the limits of judicial liberality, and highlight the uncertainties created by judicial discretion. Married women who separated from their husbands and established new conjugal relationships were not anticipated by the framers of the act. There is no specific language addressing their situations. Yet such situations did occur: after all, as Lori Chambers has pointed out, given limited opportunities for paid labour, and the low remuneration available, finding another male provider was often a sensible survival strategy.[57] The act's silence on the matter meant that its application in such circumstances was left to judicial discretion. When one such case came before Crease in 1882, he made an award, but stressed that he was under no obligation to do so.[58] His ruling, then, set no secure precedent. In a similar case in 1891,

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[56] When William Coun of Kupar Island died intestate in October of 1877, he possessed an estate estimated to be worth nearly $1000. He was survived by two families: a legal widow and legitimate children in Nova Scotia, whom he had abandoned in the 1850s; and a country wife and illegitimate son in British Columbia, with whom he lived at his death. Under the terms of the legislation, Crease could have awarded the entire estate to either family. Yet he attempted to weigh the relative merits of both, considering the moral and legal claims of both parties, and their subsistence needs. The existence of a legitimate family did not preclude an award to the country wife, although it may be significant that Coun's widow did not contest his country wife's application. Informed of the facts, Judge Crease awarded Coun's country wife Eliza $250. His legal widow and children received $550. British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 701 (1880-1881), p. 154; Ibid., vol. 702 (1881-1882), pp. 304-305.

[57] Chambers, *Married Women and the Law of Property*, p. 35

[58] In January of 1882 a case was heard by Judge Crease involving a Mrs. Sutherland, who had been cohabiting with W.H. Cox, a Saanich farmer, for several years, and their several illegitimate children. Cox, a man Crease noted had 'good English connections,' had died in the lunatic asylum. Cox's stay in the asylum had placed his dependents in financial trouble. His family in England had sent out £160, or about $800, which had been deposited in the bank, unspent at his death. Moreover, the farm was liable for $230 in outstanding debts, and Mrs. Sutherland and the children were being forced to leave. They

Chief Justice Begbie refused to make an order, noting that since the applicant's legal husband remained alive and living only a mile away, the children were presumed legitimate at common law, and were not entitled to the benefit of the act. Begbie offered no explanation of his refusal to grant an award to the mother. In this case, the dependents were left destitute.[59]

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were destitute. Crease's personal opinions are of some interest, since the decision was entirely discretionary. In his case notes, Crease was equivocating in his assessment of Mrs. Sutherland. He seemed unsure of how to assess her character, understanding the complexity of the situation, and trying to balance the positive and negative aspects. He described Mrs. Sutherland as "a hard working woman" who did not drink. Yet he also commented on her "vile temper," and noted that her 'real' husband, Sutherland, was still living. Mrs. Sutherland, then, was not "a 'concubine' in the eye of the law." Crease referred to her as a "supposed" widow, but ultimately "expect[ed her] to come under the concubine's act." Crease was well aware of the power he held in the matter. Near the end of his notes, he reassured himself that "neither Mrs. Cox (so called) nor the children have any right to a penny of Cox's money — but under the Concubine act it b[ein]g solely in the discretion of the Judge," he was free to make such disposal of the estate as he considered fit. Given his understanding of his right to act freely in the situation, and the impoverished circumstances of Mrs. Sutherland and the children, Crease awarded them the balance of the estate after the outstanding debts were settled. As usual, disbursement of the monies awarded was to be in small sums at the discretion of the administrator. British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 702 (1881-1882), p. 538; Ibid., vol. 703 (1882-1884), pp. 3-4.

[59] In 1891, Judge Begbie disallowed a claim for reasons which likely could have been applied to deprive the concubine and children in the Cox case, had Crease chosen to do so. The case involved a Mrs. Rutledge, who had left her husband for a neighbor, Joseph Dougan, who lived less than a mile from her husband's residence. Inquiry was immediately directed to the paternity of Mrs. Rutledge's daughter Maud. Dr. Milne testified that the child resembled Dougan in "feature[,] voice[,] manner[, and] gesture." A neighbour, Edwin Green, corroborated Milne's testimony. He also testified that Mrs. Rutledge had once left Dougan and moved to Seattle. Dougan was upset, drank heavily for three days, and told Green that he could not bear to part with Maud. He later went to Seattle and convinced Mrs. Rutledge to return. Finally, David Spencer, the owner of a Victoria department store, told the court that Mrs. Rutledge and Dougan had been to his store shopping for a child, although he could not identify the child with certainty. The weight of the testimony, then, indicated that the child was Dougan's.

Begbie, in his decision, noted that Mrs. Rutledge's husband lived less than a mile from her residence with Joseph Dougan. Edwin Green had testified that he knew Mr. Rutledge and never knew him to have visited Dougan's farm. But Begbie followed the common law. Since the husband lived so close to Mrs. Rutledge before, during and after the child's birth, the child must be presumed to be legitimate. At common law, given the husband's proximity, any evidence of non-access by the husband was inadmissable. Moreover, evidence of concurrent adultery was immaterial. The common law assumes a woman's legal husband is the father of her children unless he can be proven to be 'out of the realm.' Since the child was legally legitimate, no claim could be made on its behalf under the Destitute Orphans Act. It appears no claim was admitted on behalf of Mrs. Rutledge either. Claims could be made by concubines without children, and it is difficult to explain Begbie's lack of an award to Mrs. Rutledge, excepting the fact that any award was discretionary rather than mandatory. British Columbia, Supreme Court, Bench Book, Begbie, C.J., BCARS, GR 1727, vol. 739 (1891-1892), p. 5.

While the law's protective focus and its emphasis on reducing public expenditure sometimes benefited unwed mothers and their children, it also constrained their liberty. Unmarried women were allowed little control over their 'inheritances.'[60] In accordance with the terms of the act, disbursements were determined by the courts, or left to the discretion of the official administrator. Moreover, all funds remained with the official administrator, to be disbursed as required for the maintenance and education of dependents.[61] These monetary controls derived directly from the legislature's interest in reducing public expenditure. In leaving the funds in the hands of public officials, the legislature was attempting to ensure that the funds awarded were not squandered frivolously, but applied directly to maintenance needs. Yet the controls also reveal the deep distrust of women's financial and parenting skills, the extent of which is illustrated by *Re Youmans*.

The Youmans, who were merchants at Skeena Forks, had five children. Four of the children were illegitimate, and the fifth was born after the couple married. At his death intestate, Mr. Youmans left a sizable estate, which was fairly liquid and sufficient to meet all outstanding debts;[62] Mrs. Youmans subsequently took over trading operations, and should have had little trouble in raising and supporting her family. Yet in separate

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[60] British Columbia, Supreme Court, Bench Book, Crease., J. BCARS, GR 1727, vol. 703 (1882-1884), p. 282.

[61] British Columbia, *Statutes*, 1877, 40 Vict., no. 28, s. 4 reads: "The amount directed to be allotted and retained by any order on such application ... shall be expended and laid out in such way, as such Court or Judge shall by the same or any other order from time to time direct, for the maintenance of such concubine, or for the maintenance, education and advancement in the world of any such child."

[62] The Youmans estate included a house, store, trading goods, livestock, cash and accounts owed, with a cumulative gross value of estate was $7547.47. Youmans also left outstanding debts of $3571.79.

guardianship and Destitute Orphans Act proceedings, she was stripped of control over both her children and their estates. Guardianship of the children went to her father-in-law, although she retained temporary custody of those under the age of nurture.[63] Control over the funds awarded to the illegitimate children remained with the official administrator. The outcome of *Re Youmans* is a clear example of the tenuous nature of women's position under the law. The common law recognized no relationship between illegitimate children and their parents, and while their mothers were customarily allowed to keep the children so long as they did not become destitute and dependent, such mothers held no legal custody rights. Moreover, the Destitute Orphans Act permitted women no control over their children's funds. Yet the case, if read carefully, reveals that the condition of unwed mothers and their illegitimate children was far from unique. Mrs. Youmans was married, and she was deprived of custody of her legitimate child along with that of her illegitimate children.[64] Legal widows had no greater rights than 'concubines' in matters relating to their children.[65] Conversely, in the absence of

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[63] *Black's Law Dictionary* defines a guardian as "A person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property of another person, who, for defect of age, understanding, or self-control, is considered incapable of administering his own affaris. One who legally has responsibility for the care and management of the person or the estate, or both, of a child during its minority." Custody involves "the care, control, and maintenance of a child." *Black's Law Dictionary*, 6th ed. (St. Paul, Minnesota: West Publishing, 1990).

[64] British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 704 (1884-1885), pp. 510, 513; Ibid., vol. 717 (1888-1891), p. 222.

[65] In January of 1888, coal miner John McNeill was killed in a mine explosion at Wellington. He was survived by his widow Agnes and six children. Since McNeill was a miner, any estate he might have left his dependents would likely have provided his family with a precarious existence. Fortunately, he belonged to a benevolent association, the Knights of Pythias, which paid out $2000 for the benefit of the widow and children upon his death. Judge Crease appointed Agnes McNeill and one George Manson, to act as co-administrators of the estate, and guardians and trustees for the children. A widow had no legal claim to the custody of her children, unless her husband appointed her in his will. John McNeill, of

evidence of unfitness, fathers held automatic rights to the guardianship of children and their estates.[66]

The judicial behaviour described in the MWPA and Destitute Orphans Act cases should prompt a reconsideration of judicial behaviour. The central tenet of judicial obstruction analyses has always been the assertion that legislators, not judges, should make law. Legislators had expanded women's property rights; yet the courts subverted those rights. However, given judges' interpretive guidelines for statutory construction and the evidence of legislative intentions, we should re-evaluate their rulings. Far from intentionally hindering the progress of liberal legislation, judges were implementing what they understood to be that legislation's express protective purpose. To have construed that legislation more broadly would have been the real subversion of the legislative process. Judges would have been guilty of writing new law by condoning behaviour which the majority of legislators had not intended.

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course, had made no will: Agnes McNeill did not 'inherit' custody. Judge Crease appointed her co-guardian at his leisure. Moreover, Judge Crease sharply circumscribed Agnes McNeill's control over her children's estates. The children's two-thirds of the Knights of Pythias benefit was to be held in trust. Sums could be paid out by the co-administrators for their maintenance and education, in equal proportion, the total not to exceed sixty dollars monthly. Crease had imposed strict controls on Agnes McNeill's use of her children's estates, and subjected her to the superintendence of a third party. British Columbia, Supreme Court, Travelling Bench Book, Crease, J., BCARS, GR 1727, vol. 548 (1887-1889), p. 107.

[66] Mason, *From Father's Property to Children's Rights*, pp. 58-61; Grossberg, "Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth-Century America," *Feminist Studies*, vol. 9, no. 2 (1983), pp. 235-236, 238-241, 245; L. I. Stranger-Jones, *Eversley's Law of Domestic Relations*, 6th ed. (London: Sweet & Maxwell, 1951), p. 440.

The jurisprudence, then, demonstrates the power of extra-statutory discourses on legal decisions. Judges implemented the law according to the expressed intentions of the legislators. This was well within the bounds of established interpretive practice. Still, this means of construction may have frustrated legislators' *unspoken* intentions. As *Wah Fung* v. *Loy You* illustrates, the act did not simplify creditors' remedies. Judicial adherence to legislators' protective rhetoric meant that an egalitarian interpretation and the clarification of credit relations it entailed was subordinated to the protective interpretation unless that assumption was specifically negatived. Of course, legislators' choice of equitable precedents also hindered the clarification of credit relations. Equity, in addition to being cumbersome and antiquated, granted partial property rights created specifically for married women's protection; these partial property rights were much less useful for clarifying and simplifying debtor-creditor relations.

The cases also produced unexpected outcomes because those making use of the legislation did not behave according to expectations. Legislators expressly hoped that both intact and broken families would use the property rights conveyed under the homestead and MWPA for their protection. Certainly, both acts were used for these purposes. The MWPA was used to protect realty, and the protective understanding of the legislation influenced the judiciary's acceptance of such behaviours. The homestead act was likewise used to protect families' real property base, and went uncontested. However, Theodore Davie's reinterpretation of the personalty clauses of the homestead act made the act's benefits much more widely available than expected, and offered new opportunities to debtors. Married couples were among those who took advantage,

combining the protection offered to personalty under the homestead act with that offered by the separation of spousal property rights. By combining the protection offered by these two pieces of legislation, large amounts of personal property could be protected, as the Humpreys and King cases reveal.

Louisa King's use of the legislation is particularly interesting. King repeatedly invoked the provisions of the MWPA and homestead act to protect her property. She invoked the MWPA to save her personalty from her husband's creditors. She attempted to use the legislation again to defraud Peter Fraser. This was a less than admirable endeavour; yet it was one of a number of actions revealing Louisa King pushing the boundaries of the law and asserting her claims as an individual in a public forum. In the aftermath of *Fraser* v. *King*, she would return to court to make legitimate use of the homestead legislation, being perhaps the first woman to invoke the personalty exemption. The public assertion of individual rights by women under the legislation is an important development. Louisa King and Caroline Humphreys, married women, invoked their individual rights in very public ways. Both cases were reported in the newspapers and made known to countless individuals. The cases not only changed the ways in which these women thought about themselves, but also played a role in changing the way other women understood themselves, their individuality, and their legal rights.

PART TWO:

A VISION OF MUTUALISTIC HIERARCHY

CHAPTER FIVE:

THE POLITICAL AND ECONOMIC CONTEXT OF THE 1880S AND 1890S

The period spanning the 1880s and 1890s witnessed great economic, political, social and demographic change. The following discussion sets the stage for amendments to the homestead exemption and married women's property acts. The chapter outlines economic developments following the construction of the Canadian Pacific railway, chronicling the development of resource extraction industries and the social conditions precipitated by widespread wage relations. The discussion then turns to the birth of British Columbia's first stable governing coalition in the 1880s, a government committed to capital accumulation and unequal class relations. Finally, we look at emerging frustrations among the working and middle-classes. Among the working classes, the development of wage labour frustrated ambitions which appear largely based upon persistent adherence to the ideal of property-owning masculinity. Within the middle class, concerns were developing with respect to the influence of social conditions on social morality and national health. These concerns would ultimately develop into a powerful discourse, prompting sweeping changes in family members' property rights in the twentieth century.

Construction of the Canadian Pacific Railway increased economic activity in British Columbia in the 1880s. Rail construction opened up a huge new demand for labour, much of which could not be supplied by the local market, or at least, not at the low wages offered. In the spring of 1881, contractor Andrew Onderdonk began importing thousands of contract labourers from China. Rail construction also stimulated a host of ancillary industries supplying construction tools, input materials, and consumer goods for the vast workforce. In Yale, the terminus of navigable waters on the Fraser River, blacksmiths and stables, hotels, restaurants and stores made their appearance. Victoria also boomed in the 1880s, due to the completion of a drydock in Esquimalt and construction of the Esquimalt & Nanaimo railway. Manufacturing production increased, and land values skyrocketed, increasing six-fold between 1882 and 1891.[1] In the same period, the population of the city more than doubled to over 16,000. Throughout the province, the boom exceeded even the headiest days of the Gold rush.

The completion of the transcontinental railroad in 1886 created new opportunities for infant industries. Rail access to new markets stimulated growth in the resource extraction sector. Of equal importance, the railroad brought population and capital. Between 1881 and 1891 the non-native population tripled, rising from 18,044 to 55,435. Over the next ten years it more than doubled again, rising to 115,633 in 1901. Meanwhile, eastern-Canadian, American and British capital poured into the province's resource exploitation industries. Lumber, fish canning, and hard-rock mining saw tremendous growth. Coal

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[1] Ormsby, *British Columbia*, p. 281; Baskerville, "'She Has Already Hinted at "Board,"'" p. 208.

production also increased dramatically. Overall, the province's gross domestic product increased by 285 per cent from 1880 to 1890, and by another 100 per cent between 1890 and 1900. While industrial production exhibited large increases, it was at times outpaced by the growth of the service sector which it spawned. Vancouver was beginning to assume its role as the provincial service center. The city grew rapidly. By 1888, just two years after its incorporation, the population had exceeded 8,000. Three years later, the population would reach 13,000. Seventy-five percent of the city's workers were in trade, clerical, professional, transportation, or domestic occupations. On the once-forested terrain stood warehouses, wharves, office buildings and hotels. Speculation and boosterism ran rampant.[2]

While primary industry and its supporting services blossomed, local secondary manufacturing businesses slowly disappeared over the course of the 1890s. The decline was mainly due to the predominance of non-local capital in resource extraction. Manufacturing in British Columbia had been closely integrated with local resource development and transportation ventures. As the proportion of local capital involved in resource extraction declined, local manufacturers lost their market. Distant capitalists were involved in a web of business relations with non-local suppliers, resulting in near exclusion of local manufacturers from the producer goods sector. As John Lutz has written, "eastern based firms tended to purchase from other eastern based firms based on historic trading relationships, personal contacts, or physical proximity to the decision

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[2] Barman, *The West Beyond the West*, pp. 110, 116-125, 369 (Table 11), 374 (Table 17), 375 (Table 19); Lutz, "Losing Steam," p. 50; Ormsby, *British Columbia*, pp. 299-300;

makers."[3] Victoria felt this decline most severely. The island city, having lost its battle for the railway terminus to Vancouver, slowly lost its role as the province's commercial hub to Vancouver as well.

Politically, the era witnessed the development of the province's first stable governing coalition. Known as the Smithe Dynasty, this succession of premierships from 1883 to 1898 was decidedly pro-capitalist.[4] The governing group was composed of land speculators, merchants, industrialists, and lawyers, their fortunes gained through investments in realty, transportation, mining, lumbering, and salmon canning. Prosperity had come to many of these men quite suddenly, largely the result of the rail construction boom, and the access to new markets brought by rail transportation and steamboat navigation. Their policy-orientation arose from this experience, reflecting a simple belief that prosperity could be continually stimulated by the further development of transportation and communication. The Smithe government and its successors embarked on a program of subsidizing transportation projects, chiefly railways, but also roads, canals and steamboat lines, with the only resource they held: land. Margaret Ormsby wryly termed the policy "The Great Potlatch." To contemporary critics, it was known as the "Policy of Give-Away." In Smithe's first term, over two million acres were alienated to private firms and individuals. By 1900, well over eight million acres had been granted to private individuals and corporations by the province. Millions more had been reserved

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[3] Lutz, "Losing Steam, p. 129-139.

[4] After William Smithe, Premier from 1883-1887.

in legislation for the bonusing of railroads which were never constructed. This land, much of it useful, lay in limbo for decades.[5]

Margaret Ormsby has remarked that the major players in the Smithe dynasty "knew that they had an assured social position." They were among the privileged few. The spoils of the economic boom were unequally divided. For most, the new economy of the 1880s and 1890s meant continued dependence upon wage labour. Wage labour had concrete meaning for those whose lives it impacted. From the 1891 federal census, Sager and Baskerville have found a solid connection between wage work and unemployment. The vast majority of the unemployed were involved in primary resource extraction, industrial occupations, and general labour. Unemployment arose from both seasonal and market fluctuations. For workers, irregular employment could mean periodic deprivation and transiency. Low wage rates added to their difficulties. In the Kootenays, writes Cole Harris, unstable employment and low wage rates made family life untenable. The high cost of living and poor camp conditions complicated matters even further. Workers had to earn enough to support themselves at the worksite, and a family in town. The result was that few did: "Probably no more than one-fifth of the miners in the Slocan before World War One were married," writes Harris, "and most of these married men sent money to families elsewhere." Such patterns were replicated throughout the province in

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[5] On the background of Smithe dynasty legislators, see, Ormsby, *British Columbia*, pp. 304-305. For the policy of give-away see Howay, pp. 431-451 *passim*; Barman, *The West Beyond the West*, p. 127; Ormsby, *British Columbia*, pp. 305-309.

numerous locales: prior to 1901, 71 percent of all British Columbians were male.[6] The stable, landed yeomanry envisioned by earlier reformers never materialized. Nor, for many men, did family life.

Limited expressions of discontent were commonplace by the mid-1880s. Local Assemblies of the Knights of Labor first appeared in British Columbia in 1883. Over the next few years, fourteen local assemblies were founded, six in Vancouver alone. In 1886, a Workingmen's Party, closely associated with the Knights, unsuccesfully ran four candidates on Vancouver Island for the provincial legislature. Four years later, organized labour's efforts to achieve political representation were much more successful. In 1890, the Miners' and Mine-Labourers' Protective Association elected three Vancouver Island candidates to the legislature. The character of the workingmen's movement in British Columbia has often been misrepresented. While attempts have been made to suggest that labour strife in British Columbia was a radical socialist import, fragmentary evidence from differing locales suggests that this was not initially the case. If the dream of an independent yeomanry and broad electoral democracy survived anywhere in British Columbia after the 1870s, it was within the working class. In Vancouver, in the Kootenays, and on Vancouver Island, wage workers appear to have harboured a rather bourgeois materialist ethos. Robert Macdonald writes that Vancouver workers were not particularly radical. They focused on fair compensation for their labour, workplace

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[6] Ormsby, *British Columbia*, p. 304; Eric W. Sager and Peter Baskerville, "Locating the Unemployed in Urban British Columbia: Evidence from the 1891 Census," *Journal of Canadian Studies*, vol. 25, no. 3 (Fall 1990), pp. 45-47; Cole Harris, "Industry and the Good Life Around Idaho Peak," *Canadian Historical Review*, vol. 66, no. 3 (1985), pp. 305-306; Barman, *The West Beyond the West*, p. 369 (Table 11).

control, and political participation. During boom periods, some became involved in speculation. Many endeavoured to purchase homes. Wage workers sought material advancement, and saw prominent examples of individuals who had made the transition from the working class to small proprietorship. In fact, there seemed to be room in the working-class outlook, even admiration, for the small proprietor. The Knights of Labor welcomed small proprietors, as long as they had previously been wage workers. Some figured prominently in the movement. In politics, the workingmen's candidates in 1886, and a clique of labour-oriented aldermen in turn-of-the-century Vancouver, were small proprietors and independent contractors.[7]

The presence of this outlook amongst wage workers has been captured most strikingly by John Douglas Belshaw in his study of Vancouver Island's coal miners. Belshaw writes that most miners on Vancouver Island had spent significant sums to emigrate, and expected high wages and good opportunities in return. Their choices had been influenced by emigration propaganda, which led them to expect occupational and social mobility in the Pacific Northwest. This desire for self-improvement was clearly expressed by the Knights of Labor in 1885, who contended, "We should have had the chance, at least, of becoming ourselves employers of labour." Many conceived of wage labour as a stage in

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[7] *The Industrial News*, 12 June 1886; Nanaimo *Free Press*, 19 May 1886; Ormsby, *British Columbia*, p. 306; David Jay Bercuson, "Labour Radicalism and the Western Industrial Frontier, 1897-1919," *Canadian Historical Review*, vol. 58, no. 2 (1977), pp. 154-175; Robert A. J. McDonald, "Working Class Vancouver, 1886-1914: Urbanism and Class in British Columbia," *A History of British Columbia: Selected Readings*, ed. Patricia E. Roy (Toronto: Copp Clark Pitman, 1989), pp. 324-353; Harris, "Industry and the Good Life Around Idaho Peak"; John Douglas Belshaw, "The British Collier in British Columbia: Another Archetype Reconsidered," *Labour/Le Travail*, no. 34 (Fall 1994), pp. 11-36; Thomas Robert Loosemore, "The British Columbia Labour Movement and Political Action, 1879-1906," University of British Columbia, M.A. thesis, 1954, p. 39.

their lives, representing a means to an end. They hoped one day to achieve economic independence, or in the terms of the nineteenth century, a modest competency. Of the 324 miners who lived in and around Nanaimo in 1880, at least ten per cent attempted to become independent farmers. Others became shopkeepers, ran boardinghouses, or small shipping outfits. In all, sixty per cent left mining over the next twenty years. For those who stayed, much of the 'radicalism' that emerged was the result of unmet financial and status expectations. Protest often focussed on the employment of unskilled Chinese workers in the mines, which European miners believed undermined their workplace control and wages, and prevented them from training their children into skilled positions. The miners, though at times militant, were hardly radical in any political sense.

The absence of a developed sense of class antagonism rendered the working class susceptible to capitalist apologetics. The Smithe Government, in fostering the development of large corporations, had abandoned the yeoman dream. In its place, they promoted a vision of mutualistic hierarchy, a vision of all classes working harmoniously toward the advancement of collective interests.[8] The diction of this vision's defenders suggests they envisioned a patron-client relationship, where the upper classes protected the interests of the lower, and the benefits would trickle down through the social order. Indeed, after Robert Dunsmuir secured a two-million-acre land grant on Vancouver Island as part of the Esquimalt and Nanaimo Railway agreement, the Nanaimo *Free Press* opined that

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[8] Nanaimo *Free Press*, 19 May 1886.

> the people see the risk they ran from strangers getting control of these lands, who would of necessity have been compelled to open up mines at a distance from Nanaimo and thus depreciate the value of property in this city.... True it is, that in [securing the land grant], Mr. Dunsmuir protected his own [commercial] interests, but that protection extended to the Vancouver Coal Company [his competitor in Nanaimo] and every owner of property in Nanaimo.[9]

Working-class leaders advanced a remarkably similar view. With their focus on the ascent to bourgeois status, they could admit of no permanent class antagonism. In 1886, editor John Duval of Victoria's *Industrial News* opined that there should be no antagonism between capital and labour, "but that both should work together harmoniously."[10] Workingmen's Party candidates in the 1886 election joined the chorus. They promised their "best endeavors to encourage all honest industries and to promote the interest of Capital and Labor so they may work harmoniously to develop the resources of the province."[11] That the working class took such sentiments to heart is evident in the election results. Robert Dunsmuir carried working-class Nanaimo in a landslide.[12] Similar results would follow throughout the nineteenth century. Despite a broad franchise and the presence of labour candidates, the working-class-dominated

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[9] Nanaimo *Free Press*, 26 June 1886.

[10] *The Industrial News*, 22 May 1886.

[11] It was quite difficult to tell the difference between petit-bourgeois working-class candidates and capitalists in practice. When asked for his views on a reduced work week during the 1886 election, Workingmen's Party candidate A. J. Smith, a Victoria building contractor, explained "that he was in favor of shorter hours" but his firm "happened to have a great deal of work on hand at that time, and a reduction in hours just then meant a more considerable loss than he was disposed to bear." *Industrial News*, 3 July 1886.

[12] Loosemore, "The British Columbia Labour Movement," p. 38.

mining ridings of Vancouver Island elected businessmen, mine managers and prominent capitalists much more often than labour representatives.[13]

Muted rumblings of discontent were also emerging among bourgeois women in the 1880s. A chapter of the Women's Christian Temperance Union was founded in Victoria in 1882, and a year later petitioned the Premier for women's suffrage. In 1885, the legislature began receiving numerous petitions opposing the sale of liquor on Sundays. Petitions for female enfranchisement made a simultaneous appearance, often signed and collected by the same individuals, and tabled in the house by the same legislators.[14] John Robson, a staunch opponent of women's suffrage in the 1870s, had changed his opinion by the 1880s, largely because women's suffrage and temperance were connected in popular thought: women, most people believed, would support prohibition. Robson himself introduced women's suffrage measures in 1887 and 1888.

Several letters sent to the *British Colonist* in 1886 underline the connection between temperance and women's suffrage; more than that, the letters reveal the deeper complex of issues which temperance and women's suffrage represented. 'A Lady' wrote that women "were as well educated, as much interested, and as fully capable of taking an intelligent interest in the great questions of the day as the gentlemen are." More interesting than her justification of women's suffrage, however, is her understanding of exactly what those 'great questions' were: 'A Lady' unselfconsciously mixed together her

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[13] Belshaw, "The British Collier in British Columbia," pp. 11-36 *passim*, esp. p. 22.

[14] British Columbia, *Sessional Papers*, 1885, pp. 322-324; British Columbia, *Journals*, 4th Parliament, 3d session, 1885, pp. 24, 26, 28, 31.

desire for moral reform and material advancement. Women, she wrote, "watch over the morals of the country with as jealous an eye as our men," and wanted to elect representatives "whose lives are upright, whose characters are pure, and whose word is sacred." In the next sentence, she easily adverts to women's deep interest "in seeing their country prosper, in watching art and science making rapid strides, and in the many improvements which every branch of industry is making."[15]

Yet continued advancement was not assured. In a second letter, 'A Lady' worried that national health was endangered by the presence of vice amongst the population:

> If I were not a mother perhaps I would not look with such anxious care to the government and morality of the country; but as such I tremblingly let my children pass out of the door of our home to be tempted by the haunts of infamy and dens of corruption which are scattered throughout our city, all the while wishing that as mothers of the land we might unite our votes and elect those men who would help to purify the moral atmosphere of the province.[16]

These sentiments were echoed by 'A Mainland Woman,' who believed that women's vote would help to eradicate drunkenness and crime. Women voters would elect men who would enact "righteous laws, which would tend to make their country and neighborhood a safe and happy home in which to educate their sons and daughters." Continuing her concern over the future welfare of her children, 'A Mainland Woman' warned that the

> family roof covers but a short time the children born beneath it. They soon go out to breathe the pestilential air of inebriety and sensualism, or fall into some pit hole of destruction covered by legislative enactment. And woman's hand is shortened; it cannot save the children God has given her.

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[15] *British Colonist*, 26 February 1886.

[16] *British Colonist*, 13 March 1886.

Here is the language of the bourgeois: a focus on sobriety, security, order and progress, leavened by a distrust of sensuality. There is a praise of advancement, and yet a simmering anxiety over coarse materialism and bodily pleasure: "Oh luxury-loving, pleasure-seeking mothers," wrote 'A Mainland Woman,' "you are selling your birth-right for a mess of pottage, and your beautiful children are being destroyed, by the legalized vices that the mother's ballot could throttle and keep at bay."[17]

Such letters provide evidence of a shift in thinking characteristic of the 1880s. These writers have no quarrel with capitalism. In fact, the capitalist economy is understood to denote progress. The focus is on morality and behaviour. There is no search for first causes, but rather a desire to regulate effects. In this strong focus on the remoralization of the population, the emphasis on the mother's role, and the remaking of society through the moulding of children, are hints of the era to come. These reformers have less in common with the reformers of the past and their vision of a level society of small producers than with the progressives of the future and their quest for a rational, regulated, and just industrial society. Their anxiety is of a different character: the temperance movement is a bourgeois quest for control. Such a quest is understandable in the chaotic conditions of 1880s and 1890s British Columbia. In British Columbia in 1881, small proprietors were more likely than wage workers to be married.[18] They were likely less transient as well. With the large number of single male wage workers, and the dramatic

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[17] *British Colonist*, 9 March 1886.

[18] Harris writes, "Shop and restaurant keepers were somewhat more likely to have wives in British Columbia than fishermen, cooks, or labourers." Harris, *The Resettlement of British Columbia*, p. 145

influx of population, bourgeois norms and standards must have seemed perilously unstable. The society which emerged was strange and unfamiliar: Cole Harris has written that "[a] certain astonishment was in the air, a quality that some of the province's best writers have caught."[19] It may also be that, like the revivalist middle-class shopkeepers described by Paul Johnson in *A Shopkeeper's Millennium*, temperance advocates were uncomfortable with the absence of social control in a wage-based society.[20] Unlike previous times and places, where labourers and craftsmen were more closely regulated by their employers, often living in their households and bound by master and servant contracts, the predominance of wage labour meant that workers in British Columbia were only loosely regulated outside the workplace. The middle class would have had little control over these men. The fluid, transient single male population, with its working-class bachelor culture, and the periodic urban visits of rural workers, understandably made bourgeois urbanites uncomfortable.

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[19] Harris, *The Resettlement of British Columbia*, p. 253

[20] Paul E. Johnson. *A Shopkeeper's Millennium: Society and Revivals in Rochester, New York, 1815-1837* (New York: Hill and Wang, 1978).

CHAPTER SIX:

CREDITORS' PROTECTION IN THE 1880S AND 1890S

Over the course of the 1880s and 1890s, the family protection legislation of the 1860s and 1870s was extensively modified. These modifications reflect both the reception and use of the statutes in the courts, and the changing political climate: the use the legislation was put to by the populace, and its construction by the judiciary, were seen as shortcomings by legislators in the 1880s and 1890s. Of course, this appraisal was subjective, and the definition of the legislation's 'shortcomings' was based on a much different set of ideals and standards than that which motivated earlier legislators. Where reformers in the 1860s and 1870s sought to create the conditions necessary for a relatively level, meritocratic society of independent producers, and were willing to sacrifice creditors' rights to do so, their successors were devoted to capital accumulation, saw nothing unsavoury in providing large subsidies to incorporated companies, and were satisfied with the wage relation. Given the vast differences in goals and beliefs, the changes which underpin the new legislation should not be surprising.

In the context of increasing concern over creditors' rights, major changes were made to the Married Women's Property Act. British Columbia's 1887 MWPA was based on Ontario's 1884 legislation, with several significant alterations. It granted a married woman the right to hold any real or personal property owned by her at the time of

marriage, or acquired by or devolved upon her after marriage. In a departure from the Ontario legislation, British Columbia's act specifically laid out the right of the husband to convey property to the wife. However, the husband could no longer be certain that such property would remain where he deposited it. In a major departure from the previous British Columbia legislation, the act granted married women the right to dispose of their real and personal property. In fact, the legislature added a clear stipulation to the Ontario legislation providing that a husband's consent was not required for a married woman to convey real property. While married women's control over their property was dramatically broadened by the act, their liability on contract was not. A married woman's liability remained proprietary rather than personal, although this liability was slightly expanded. Precedents established under the previous legislation made only property possessed by a married woman at the time of a contract liable for its performance. Under the new act, property acquired subsequent to a contract was also liable.[1]

The 1887 MWPA also conferred upon married women the right to will their estates, and laid out intestate succession patterns for personal property. The personalty of a married woman who died intestate would subsequently pass to her husband and children in the same manner as a husband's property passed to his wife and children: that is, the husband would take one-third, with the residue being divided equally amongst the children. If there were no children, the personalty passed to the husband in its entirety. With this legislation, husbands were clearly in a better position than wives in cases of

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[1] Chambers, *Married Women and the Law of Property*, pp. 109, 149.

spousal intestacy. If the marriage produced no children, the wife was entitled only to one-half of her husband's personalty.[2] This would become a contentious issue for women's reform groups after the turn of the century.

Unlike the situation in 1873, the passing of the 1887 MWPA occasioned no reported debate. There were no editorials on the subject, and no flurry of letters supporting or criticizing the legislation.[3] The measure seems to have occasioned little controversy. Perhaps, however, the use of contextual evidence can provide an understanding of the reasons behind the legislation. It is conceivable that the act might be attributed to the influence of the temperance and women's suffrage campaigns of the mid-1880s: the legislation may have been a response to women's demands for greater equality. Yet none of the letters supporting women's suffrage mention married women's property rights. While the concern with social issues and equal political rights is evident, there was no campaign for equal property rights.[4]

Theodore Davie, the originator of the legislation, was a well-connected backbencher in the governing coalition, and introduced the measure as a private members's bill. There can be little doubt that Davie was not in tune with the aims of British Columbia's

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[2] British Columbia, *Statutes*, 1887, 50 Vict., ch. 20, s. 22. Husbands' intestacy rights in personalty may be found in John Raithby, ed., *The Statutes at Large of England and of Great Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland*, vol. 3 (London: George Eyre and Andrew Strahan, 1811), 22 & 23 Car. II., c. 10, 1670, pp. 192-195.

[3] The newspapers note the advancement of the bill through its various stages, but provide no account of the debates on the measure, aside from an attempt to add a dower clause, which is discussed below. See the *British Colonist*, 11, 23 February, 11 March 1887; *Daily Standard*, 23 Feb 1887. The provisions of section 5 of the bill were printed in the *British Colonist*, 8 February 1887. For the dower amendment, see the *British Colonist*, 3, 10 March 1887; *Daily Standard*, 10 Mar 1887.

[4] *British Colonist*, 26 February, 3, 9, 13, 18 March 1886.

petitioning women. To begin with, he was a Catholic convert. He likely had little sympathy for temperance issues, and would have been under little pressure to undertake temperance measures from his own church. More importantly, Davie's public pronouncements reveal that he was an ardent foe of women's rights. In 1887, the editor of the *Daily Times* noted that he was "credited with entertaining a morbid dislike to petticoats."[5] When a women's suffrage bill came before the house in 1885, Davie was vehemently opposed. He claimed that the greater portion of the petitioners were girls between twelve and eighteen, and believed the bill should be thrown out. It would, he said, "destroy the effeminacy of women." A woman's "proper sphere," Davie thundered, "is in her home; when she goes into politics her domestic duties must be neglected." Moreover, Davie argued that "a majority of the desirable class of women did not desire the privilege or responsibility of voting." Good women would shun politics. It would be "unseemly" for them to attend public political meetings, and they would avoid the violence and publicity of the polls. Thus, he reasoned, the only women who would take advantage of voting privileges would be "abandoned and depraved women, with no principles or modesty" with the shocking result that "the undesirable class of women would carry things their own way." Such had been the case in the United States, Davie claimed, where after an initial experiment, New Jersey and Wisconsin had revoked women's suffrage. Women's suffrage still existed in the Washington and Wyoming territories, but he was "informed by reliable citizens of Seattle, [who] spoke very unfavorably for the women voters of the place." Davie concluded that he would "oppose

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[5] *Daily Times*, 25 March 1887.

the measure heart and soul."[6] Voting records and debates show that Davie consistently opposed women's suffrage measures from 1885 to 1893.[7]

So Theodore Davie was not interested in the married women's property act as an equal rights measure. Yet it is clear that the married women's property rights were of great importance to him, and received his continual attention during his years as a private member. He attempted to introduce new married women's property legislation in 1886, but was rebuffed. Earlier, in 1883 and 1885, Davie had successfully introduced amendments to the 1873 MWPA. In both of these instances, his interest was economic rather than political. In 1883, Davie introduced legislation to make a husband liable for his wife's debts incurred prior to marriage, to the extent of any property he had acquired from her. The aim of this legislation was creditors' relief: with the amendment, a husband and wife could no longer defraud creditors by having the wife purchase items on credit prior to marriage, and subsequently transfer her assets to her husband after marriage and refuse to pay.[8] Davie's 1885 amendment to the MWPA altered the clause on life insurance, broadening the categories of government funds in which trustees could invest insurance moneys on behalf of their clients.[9]

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[6] *British Colonist*, 18 February 1885; *Daily Times*, 18 February 1885; *Mainland Guardian*, 21 February 1885.

[7] *British Colonist*, 4 April 1886; *British Colonist*, 17 February 1887; *Daily Times*, 17 February 1887; *Daily Times*, 25 April 1888; *Daily Times*, 10 February 1893.

[8] See British Columbia, *Statutes*, 1883, 46 Vict., ch. 18; *Daily Standard*, 24, 27, 28 February 1883; *British Colonist*, 27, 28 February 1883.

[9] British Columbia, *Statutes*, 1885, 48 Vict., ch. 20.

Davie's legislative record indicates that he took a broad interest in financial reforms and debtor-creditor relations. The 1887 MWPA formed a facet of that interest. As a private member, Davie introduced several debtor-creditor measures, including bills to establish a small debts court, give wage-claims priority amongst creditors in an execution, exempt wages from attachment for debt, and consolidate the law of imprisonment for debt. Moreover, on the same day he introduced the 1887 MWPA, Davie introduced bills to facilitate the payment of creditors, deal with absconding debtors, and reform the homestead act. In homestead exemption debates in 1883, Davie evinced an over-riding concern with clarifying the rights of debtors and creditors. Unlike other legislators, Davie did not come down in favour of either debtor protection or creditors' rights, but suggested a "middle course should be adopted between debtor and creditor." His main concern was that the legislature use "every means in its power to prevent fraud."[10] Of course Davie, having facilitated great frauds in the courtroom, was aware of the serious nature of the problem! His married women's property act was intended to clarify the legal obligations of married women. The choice of the Ontario legislation in particular may have been a response to Judge Gray's call in *Humphreys* v. *Sehl* for the adoption of legislation in line with that of the other Provinces or England.

Two elements of the 1887 MWPA were intended to clarify spousal credit obligations. First, the legislation directly addressed the anomalous situation revealed in *Humphreys* v.

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[10] *British Colonist*, 1 March 1883. On March 9, 1883, Davie again advocated a middle course, suggesting that the legislature needed to ensure "that the creditor be protected against the dishonest debtor." However, he simultaneously indicated a concern for the rights of debtors, affirming that "the sum of $500 was not one cent too much exemption for this country, and he for one would raise his voice loudly against any attempt to cut that sum down." *Daily Standard*, 9 March 1883.

Sehl. Under the 1873 MWPA, any personalty which a wife did not acquire with her own earnings or land revenue, entered her husband's possession. It was his to use and dispose of. However, it was not liable for his debts. Understandably, creditors could easily be confused by personalty which a husband controlled, but which was not subject to his debts. By granting married women the right to hold separately any personal property acquired by or devolved upon them before or after marriage, the 1887 legislation made the laws surrounding personalty much simpler and removed the possibility for anomalies like Caroline Humphreys' sewing machine. The new MWPA simplified the situation, making all property in a spouse's possession responsible for his or her debts. Secondly, the 1887 MWPA addressed the issue of married women's liabilities. While married women's liability on contract remained proprietary rather than personal, the act expanded that proprietary liability. Under the 1873 MWPA, Ontario precedent held that only such property as a married woman held at the time of making a contract was liable for that contract; if the property was subsequently conveyed, the creditor had no remedy; moreover, any property acquired after the assumption of indebtedness was not liable for the contract. Under the 1887 MWPA a married woman's contract bound her subsequent acquisitions, making *any* property she might hold liable for her contracts and obligations.[11] This amendment, then, dramatically improved a creditor's position.

Thus far, the legislation has been used to show Davie's interest in improving the position of married women's creditors; yet the legislation also provides strong support for the contention that Davie was uninterested in strengthening married women's property

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[11] Chambers, *Married Women and the Law of Property*, pp. 109, 149.

rights as means of achieving female autonomy or equal rights. Davie was unconcerned about married women's ability to conduct business. In the booming economy of the 1880s, there can be little doubt that married women would have exploited business opportunities. As *Wah Fung* v. *Loy You* and *Cranoelli* v. *Snow* demonstrate, the proprietary liability created by the 1873 MWPA required diligent enquiry on the part of creditors, and great attention to detail in wording suits. The equitable forms used for establishing this liability were antiquated and cumbersome in an increasingly impersonal economy with extended credit relations and high rates of exchange. Yet Davie, although he made considerable alterations to the legislation where he felt it necessary, never considered altering the legislation to grant married women personal liability on contract. Facilitating married women's business activities was not on his mind.

Nor did Davie consider providing wives with any interest in jointly-accumulated family property. The language of the act is important in this respect. The act carefully granted a married woman "all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage..."[12] This wording ensured — as had the 1873 act — that any of a family's property not specifically acquired by or granted to a married woman belonged to her husband. The mingled earnings of their combined labour during the course of marriage belonged to him, as did the fruits of her unpaid labour.

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[12] British Columbia, *Statutes*, 1887, 50 Vict., Chap. 20, s. 3.

Across the border, the situation was different. In the western United States several states had passed community property laws based loosely upon the French and Spanish civil codes. Under these laws, all property acquired during the marriage by either spouse, with the exception of gifts and inheritances, was classified as common property, with each spouse holding equal ownership rights.[13] Gifts, inheritances, and property acquired by either spouse prior to marriage remained their separate property, under their separate control. The common property was managed by the husband.[14] Community property statutes were not intended to grant women equal rights, but to make secure provision for wives and children from family property.[15] Legislators envisioned community property as a mandatory form of homestead act, granting every married woman a secure interest in one-half of family property, immune from the depredations of her husband's creditors during financial setbacks.[16] Equally importantly, American legislators passed community property acts to ensure provision for widows. Community property laws guaranteed married women one-half of the community property upon the deaths of their husbands.

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[13] Donna C. Schuele, "Community Property Law and the Politics of Married Women's Rights in Nineteenth-Century California," *Western Legal History*, vol. 7, no. 2 (Summer/Fall 1994), p. 249; Shammas et al., *Inheritance in America*, p. 84; Sussman et al., *The Family and Inheritance*, pp. 25-26; August, "Community-Property Law, pp. 50, 57-58.

[14] Under the civil law, the husband held the right to manage the common property, subject to strict controls designed to protect the wife's ownership interest; each spouse managed his or her own separate property. American legislators granted the husband absolute rights of management over common property, and over the rents and profits of separate property, a right which was subsequently struck down by the courts as an unconstitutional taking of property. Schuele, "Community Property Law," pp. 250, 262-263; August, "Community-Property Law," pp. 44, 57.

[15] Schuele, "Community Property Law," pp. 259-260. In Texas, a small minority of legislators spoke to women's rights issues, but when one legislator suggested clarifying married women's property management rights, he was ignored. August, "Community-Property Law," pp. 51-52.

[16] Schuele, "Community Property Law," pp. 258-259.

This right could not be defeated by will.[17] Since most couples gained the bulk of their estates after marriage and not as part of a gift or inheritance, widows' rights in community property were of great importance.[18]

While community property rights for wives were probably never considered in British Columbia in 1887, dower rights were again rejected outright. When William Henry Ladner of New Westminster District moved an amendment to the MWPA restoring a married woman's right to dower in one-third of all lands possessed by her husband during the marriage, the house balked. The report of this incident gives few details, but the entire legislature, save Cariboo's Robert McLeese, opposed the measure.[19] Dower, as has been noted, would have limited transactions in land, slowed the economy, and constrained married men's property rights.

Davie was, however, willing to extend married women's property rights where they did not violate his economic vision and gender ideals, both by amending the form of the parent Ontario MWPA and in other pieces of legislation. He was definitely in favour of protective legislation for families, both broken and intact. The 1887 MWPA, like its predecessor, continued to be solicitous of the condition of neglected, abused, and

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[17] August, "Community-Property Law," pp. 52; Schuele, "Community Property Law," pp. 250-251. The testation provisions give further credence to the position that community property rights were about dependents' protection and not women's rights: in four of eight states which enacted community property rights by 1890, wives were granted no right to will their half of the community property. It simply passed to their husbands. Shammas et al., *Inheritance in America*, p. 84; Sussman et al., *The Family and Inheritance*, pp. 25-26.

[18] Shammas et al., *Inheritance in America*, p. 84.

[19] *British Colonist*, 3, 10 March 1887; *Daily Standard*, 10 March 1887.

deserted wives. In addition to the wage protection provided by the 1873 act, the new legislation accorded wives complete control over their realty. Protection orders were no longer necessary. The 1887 act also included a new provision allowing a married woman to apply to the court for an order of protection for the wages of her children. The language in this protection-order section was the language of morality, allowing deserted and abandoned wives, as well as the spouses of lunatic, criminal, cruel, drunken, or profligate husbands to apply under its terms. As in the 1862 act, the husband and his creditors could apply to have the order rescinded. Also following the 1862 act, the protection order was not retroactive, but valid from the date issued. All of these protections were adopted from the Ontario legislation.[20]

Yet Davie's concern went further than a mere sanctioning of the pre-existing protections in the Ontario legislation. In 1887, along with the Married Women's Property Act, Davie introduced an act permitting the wives of alcoholic husbands to petition for the suspension of their property rights. The 'drunkard's' estate was to be supervised by a trustee. The wife might presumably be appointed to this position, but significantly, the choice of this trustee was reserved to the court. Giving married women control over their husbands' estate was a weighty decision, to be considered on a case-by-case basis. A year later, Davie modernized legislation allowing a husband to assign life insurance to his

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[20] British Columbia, *Statutes*, 1887, 50 Vict., ch. 20, s. 20. The legislation, then, continued to respect patriarchal prerogatives. In addition, the act perpetuated another major shortcoming of its progenitors: proprietary liability. Proprietary liability was a major obstacle to poor and deserted wives. An impoverished married woman would have great difficulty in securing credit. If she held no property, she could not be held liable.

wife and children, free from the claims of his creditors.[21] Davie also tried to address the condition of intact families: he modified the Ontario MWPA, adding a section which ensured the right of the husband to convey property to the wife. This modification reflects his desire to continue to allow husbands to transfer property to their wives, thereby preserving it from market liabilities. Wives could hold property safely protected from the husband's creditors, unless the transfer was specifically made to evade creditors.

Changes to the homestead act in the 1880s and 1890s also reflect a desire to rationalize debtor-creditor relations. In *Johnson* v. *Mayereau* (1880), the Full Court ruled that in order for a debtor to release his $500 worth of exempted goods from seizure by the sheriff, he must apply to the Supreme Court for an order notifying the sheriff of an exemption.[22] This ruling complicated the exemption process and increased the costs involved. In 1890, a legislator named Smith sponsored an amendment eliminating the need for the Supreme Court order. The new legislation allowed the debtor to apply directly to the sheriff to claim his or her exemption. The statute also provided a mechanism for resolving disputes over the value of the exempted articles, which could be

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[21] For the statute permitting the interdiction of habitual drunkards, see Victoria *Colonist*, 23 February 1887; British Columbia, *Journals*, 5th Parliament, 1st session, 1887, pp. 21, 27, 38, 79, 84, 90; British Columbia, *Statutes*, 1887, 50 Vict., Ch. 11. On the Families Insurance Act, see British Columbia, *Journals*, 7th Parliament, 1st session, 1894-1895, pp. 63, 69, 75, 88, 112, 146; *British Colonist*, 11, 24 January, 9, 16 February 1895; *Daily Times*, 11, 16 January, 8 February 1895; British Columbia, *Statutes*, 1895, 58 Vict., Ch. 26.

[22] *Johnson* v. *Mayerau*, British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 701 (1880-1881), pp. 30-36; *British Colonist*, 15 May 1880.

administered by a Justice of the Peace resident in the locality.[23] Smith told the legislature that the bill was intended to facilitate the operation of the homestead act in the interior. As it stood, he said, the homestead exemption law worked very well for Vancouver Island and the lower mainland, but "it was quite different with the upper country where it was a costly piece of business to obtain legal assistance..." The need to act quickly to prevent an execution sale posed additional problems for those in distant locales. Allowing the exemption to be administered directly by the local Sheriff and Justice of the Peace would resolve these problems.[24]

Smith's 1890 amendment was the last time that debtors' rights would be at the center of a homestead amendment controversy. Interest in protecting creditors' rights had been building for some time. In 1883, Montague Drake proposed that those wishing to protect items from seizure should have to register an inventory of the items with the district registrar. If a debtor failed to do so, his exemption would be limited to $150. Drake's intention, he explained, was "to afford the creditor an opportunity of knowing what property he can seize or restrain on. At present it was impossible to tell what property came under the homestead exemption." As the editor of the *British Colonist* explained, since the homestead act exempted $500 worth of personal property at the debtor's option, the debtor would wait for the sheriff to seize goods in satisfaction of the debt, and then

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[23] British Columbia, *Statutes*, 1890, 53 Vict., chap. 20.

[24] *Daily Times*, 27 February 1890; *British Colonist*, 27 February, 12, 14 March 1890; *News-Advertiser*, 15 March 1890.

claim those identical goods.[25] However, if the debtor was forced to register the items exempted, the Sheriff could select unregistered items to satisfy the debt.

The great majority of the members who spoke to Drake's bill commended its aims, but several were hesitant to accept his means.[26] Premier Smithe spoke for the majority, when he called for amendments to the measure: "if the Bill passed in its present state[,] while it might do some good, it would do a great deal of evil." The nature of that evil was explained by Robert Beaven, who disagreed with the measure in its entirety. Beaven remarked that the bill ought to have been entitled "A measure to drive away settlers and prevent immigration." He remained, as he had been in 1873, a friend of the debtor. "The creditor," he explained,

> was not like the debtor. The former could protect himself, but the latter could not do so. It was the duty of the creditor to exercise discretion as to whom to give credit. It was part of his business and if a man had not a character for general honesty and honor then of course he could not obtain credit.

Beaven believed that the registration provisions would destroy the homestead act. The inventory would have to be renewed every time a person bought new articles, or those articles would have no protection. This would entail great effort and expense. Moreover, he added, few of the people entitled to the exemption would understand how to avail themselves of it.[27] New Westminster's *Mainland Guardian* caught the spirit of Beaven's arguments:

> The idea of asking an uneducated farmer or artisan, to make out and register a list of such articles as he desired to be exempt from seizure, is to insist upon his being

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[25] *British Colonist*, 25, 28 February, 1 March 1883; *Daily Standard*, 1 March 1883.

[26] *British Colonist*, 1 March 1883.

[27] *Daily Standard*, 1 March 1883.

> endowed with such an amount of sagacity and knowledge of the law, as to fit him to contend with the whole legal fraternity.[28]

In committee, Beaven pointed out that the measure would also increase the difficulties for residents in distant areas of the province in taking advantage of the Homestead act. While many members continued to express agreement with the aim of protecting creditors, the practical difficulties of the bill brought about its demise.[29]

The issue, however, did not disappear. The operation of the homestead exemption continued to offend legislators' sensibilities. In 1887, Theodore Davie introduced an amendment specifying the exempt items in detail. Davie's exemption would have limited the homestead exemption to various household necessities, including limited quantities of wearing apparel, beds and bedding, furniture, cooking utensils, food, livestock, and the tools and implements of the debtor's occupation. In part, Davie likely intended to address the same concern for creditors as had Drake. His measure was intended to provide a clear indication of which of a debtor's goods were exempted and which were not. In the meantime, another concern had also arisen. A correspondent to the *British Colonist* complained that each of the partners in an insolvent firm was able to claim the exemption. If there were two partners, they could claim an exemption of $1000, if three partners, $1500, and so on. Such multiple claims were made in *Hudson Bay Co.* v. *Oppenheimer Bros.* in 1881. While legislators would address this concern later, they did

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[28] *Mainland Guardian*, 7 March 1883.

[29] *British Colonist*, 9 March 1883; *Daily Standard*, 9 March 1883.

not do so in 1887. Davie withdrew his measure late in the session. His reasons for doing so are not clear, but it may be that other legislators found the legislation unwieldy.[30]

New legislation to prevent fraud was introduced by Davie in 1893. There are no reported debates on the measure. It was a short amendment, which stated simply that the homestead act "should not be construed to exempt any goods or chattels from seizure in satisfaction of a debt contracted for or in respect of such identical goods or chattels."[31] Since the existing legislation permitted the debtor to choose the exempted goods, a person could purchase goods on credit and refuse to pay for them. When the creditor came to seize those goods, the debtor would claim them as exempt. Apparently the problem of persons buying goods on credit and then claiming the same goods as exempt under the homestead personalty exemption was well understood at the time. In a case heard a few weeks after the bill's introduction, Judge Crease explained that

> If $700.00 worth of goods had been supplied and delivered to a small trader to start in business on credit and without security, and shortly after the trader failed and a *fi. fa.* [writ of seizure] was put in, the trader could still in the absence of proof of fraud in the transaction, claim his $500.00 exemption. Indeed, Mr. Wootton intimated there had been such a case under the Act [in Victoria]. The benevolent suppliers of the goods got nothing and the trader netted $500.00 by the transaction. This has been clearly pointed out many times by the judges, [though] they can only follow the law.[32]

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[30] A similar bill was defeated in 1895 for this reason. See below. *British Colonist*, 2, 5 March 1887; *Daily Standard*, 5 April 1887; *Hudson Bay Co.* v. *Oppenheimer Bros.*, British Columbia, Supreme Court, Bench Book, Begbie, C.J., BCARS, GR 1727, vol. 732 (1881-1882), p. 102; *British Colonist*, 9 April 1881.

[31] British Columbia, *Statutes*, 1893, 56 Vict., Chap. 16.

[32] *Vye* v. *McNeill*, *British Columbia Reports*, vol. 3 (1893), p. 25. In Crease's Benchbooks, he identified the case Wootton referred to as involving a store on Yates Street in Victoria. British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 723 (1892), p. 330.

As a matter of interest, T. Basil Humphreys used the same tactic in *Humphreys* v. *Sehl*. His initial debt was incurred when he purchased furniture from Jacob Sehl. When Sehl finally moved to recover from Humphreys, he claimed his household furnishings as exempt. Though Humphreys had never paid for these furnishings, he was allowed to keep them. In his decision in the Humphreys case, Judge Gray implied that such a manoeuver was morally suspect.[33] The legislators must have agreed. Davie's bill was simply and clearly worded, affecting nothing but the case in point. Thus it occasioned no controversy, and passed smoothly through all of its stages.[34]

Yet the 1893 amendment did not address all concerns with the legislation, most significantly legislators' sense that the legislation was not intended to protect business stock, but only a debtor's home and household necessaries. The next three years saw repeated attempts to resolve this issue. Three times from 1894 to 1896, Nanaimo's Dr. William Wymond Walkem introduced bills to restrict the homestead exemption to household goods.[35] Walkem's first bill simply prevented a debtor from claiming his "stock in trade" as part of an exemption. Theodore Davie, by this time sitting as Premier of the Province, favoured the amendment in principle, but expressed reservations about

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[33] *Sehl* v. *Humphreys*, *British Columbia Reports*, vol. 1 (1886), pp. 257-260; *British Colonist*, 5 March 1886.

[34] British Columbia, *Journals*, 6th Parliament, 3d session, 1893, pp. 11, 16, 49, 130.

[35] A Mr. Kitchen also introduced a homestead amendment in the 1894 session, which he said was intended to prevent fraud. The details are sparse, but the measure was apparently intended to restrict homestead exemption to household furniture and occupational tools. It failed, perhaps because it was poorly drawn. *British Colonist*, 20, 30 March 1894; *Daily Times*, 19, 30 Mar 1894; *Daily Standard*, 19, 29 March 1894; *News-Advertiser*, 21 March 1894, 1 April 1894.

its wording. Davie observed that "it would be rather difficult to agree upon exactly what is meant in all cases by stock in trade."[36] Yet he continued,

> It is well known ... that in many cases the stock of a small storekeeper does not commonly exceed in total value the amount of the present exemption of five hundred dollars, and such persons therefore have been permanently exempted from the seizure of their stock for debts which they have incurred. He would vote for the second reading, but he hoped that in committee the bill would be somewhat altered.

Victoria District's David Eberts added that he disapproved of multiple exemptions for homestead partners. "[A]s the law now stands," he informed the legislature, "it has been held that in case of five partners, for instance, each one of them may claim exemption to the extent of $500, which certainly was never intended." Vancouver's A. Williams echoed Eberts' concern, yet he too, like Davie, was uncomfortable with the wording of the bill under consideration. He believed that the bill should "specify exactly what articles should be exempt."[37]

The following session, Walkem returned with a measure tailored to address his critics' complaints: it specified a list of personal property to be exempt from forced seizure or sale, including various household goods, food, livestock, and occupational tools. Yet this

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[36] In this respect, Davie was rather prescient. In *Endrizzi* v. *Peto and Beckley*, *Western Weekly Reports*, 1917, no. 2, pp. 1439-1440, the court grappled with the definition of the term "stock-in-trade," eventually holding that the safe, cash register, counter and other tools of a butcher were included within the term, and thus not exempt from forced seizure and sale by creditors. This almost certainly was not what Walkem had intended. Rather, he had wanted to exclude from the exemption merely the stock — ie. those goods kept for sale. Certainly, the original drafters of the measure would have been aghast at this decision. The tools of tradesman were explicitly protected from creditors in De Cosmos' original draft of the Homestead legislation.

[37] *British Colonist*, 12, 20 December 1894; *Daily Times*, 12, 19 December 1894; *News-Advertiser*, 13, 21 December 1894; *Province*, 15 December 1894.

bill also failed to satisfy legislators. Vancouver's Francis Carter-Cotton complained of the length and complexity of the measure, comparing the exempted livestock to the passages "in Genesis where the animals went into the ark." Despite the bill's close similarity to his own 1887 bill, Theodore Davie ridiculed Walkem's amendment, and Walkem subsequently withdrew it.[38]

A year later, Walkem returned with a copy of his initial bill. Surprisingly, it passed without debate.[39] The reasons for the measure's quick passage and the legislature's strange silence on the matter may be found in two cases heard by the Supreme Court in the Spring of 1895. *Hudson's Bay Company* v. *Hazlett* involved a small storekeeper who had sold out, closed shop, and defaulted against his creditor. Hazlett's grocery was placed in receivership, and while there were no tangible assets to seize in satisfaction of his debts, there were a number of outstanding debts owed by his customers. The receiver was instructed to collect these book debts and pay them to the Hudson's Bay Company. Hazlett then tried to claim the book debts as exempt under the personalty provisions of the Homestead Act. The court ruled against him, on the grounds that the homestead exemption applied only to tangible goods which could be physically seized. Although Hazlett was thus prevented from claiming these particular business assets, the case was reported in the press and thrust the possibility that the homestead act might be used to

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[38] The provisions of the bill can be found in the *News-Advertiser*, 20 February 1895. Cotton's comments are recorded in the *British Colonist* of 19 February 1895; Davie's are found in the *News-Advertiser* of 20 February 1895. For Walkem's motion to discharge, see *Daily Times*, 21 February 1895, or the *British Colonist*, 21 February 1895.

[39] There was no debate on second reading, and no amendments were made to the bill in committee. *Daily Times*, 6 February 1896; *British Colonist*, 14 February 1896.

protect business assets back into the public eye. Judgment in the appeal was rendered on the very day Walkem introduced his bill.[40] In a second case, *Pilling* v. *Stewart*, two partners in a general store questioned whether they could each claim $500 out of the forced sale of their stock by creditors. The Court ruled that the claim must be made out of the goods, prior to the sale. In this case, the partners had waited too long. Since no claim was allowed, the judge found it unnecessary to rule on the partners' right to each claim a $500 exemption. However, the partners had raised another interesting question: were they each entitled to claim an exemption with regard to both the partnership property and their own personal property? An answer to this question, Judge Drake wrote, would have to await the occurrence of a specific case. No hard and fast rule could be laid down to govern all cases.[41]

In light of such uncertainty, the Legislature moved quickly to amend the homestead act. The amendment held that the homestead act should not "be construed so as to permit a trader to claim as an exemption any of the goods and merchandise which form a part of the stock in trade of his business."[42] The Vancouver *News-Advertiser* praised the measure citing "numerous instances" in which traders had used the measure to purchase stock on credit and then exempt the identical goods, or used multiple claims to exempt even greater amounts of stock. "As a result," the editor wrote, "creditors were unable to recover goods which [had been] obtained from them on credit and for which they had not

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[40] *Hudson's Bay Company* v. *Hazlett*, *British Columbia Reports*, vol. 4 (1895-96), pp. 450-459; *Daily Times*, 31 January 1896.

[41] *Pilling* v. *Stewart*, *British Columbia Reports*, vol. 4 (1895), pp. 95-100.

[42] British Columbia, *Statutes*, 1896, 59 Vict., Chap. 23.

received one cent in payment." He went on to distinguish between the "unfortunate debtor," whose household goods continued to be protected by the homestead exemption, and the "dishonest trader" who would no longer be able to take advantage of its provisions.[43]

Legislators' concern over the homestead act in the 1880s and 1890s should not be misconstrued to indicate concern for debtors. While a few individual legislators, most notably Robert Beaven, remained committed to the original principles behind debtor protection, the general trend was toward greater concern for creditors' rights; or, as Theodore Davie would have put it, balancing the rights of debtors and creditors. In the 1860s and 1870s, legislators saw debtor protection as fundamental to mass property ownership and meritocracy. For their successors, the MWPA and homestead exemption had lost their initial ideological meaning. The yeoman dream was, for all purposes, over. The members of the governing 'Smithe Dynasty' in the 1880s and 1890s were accustomed and receptive to large-scale capitalist concerns and the class relations they created. This sea change in political thought is nowhere more evident than in the brand of legislation which was rapidly displacing the homestead act in importance: wage protection.

In fact, by 1896, the press referred to a wage exemption bill as a "Homestead for wage earners."[44] The bill exempted wages to the value of $40 from garnishment. Interestingly,

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[43] *News-Advertiser*, 11 February 1896.

[44] *Province*, 8 February 1896.

one legislator promoted the measure in the same terms as the original homestead act had been promoted. James McGregor, representative for working-class Nanaimo, cited "many instances where men had to leave the country because month after month their whole pay would be garnisheed, leaving them nothing for their support." The wages exemption provision would help the province to retain wage-earning settlers. McGregor advised the legislature that had these men been allowed to retain $40 in wages, "they would have remained and gradually paid off their debts."[45] Though it faced opposition from those who believed it would provide an avenue for fraud, the bill passed without amendment.[46] Legislators and the press were apparently unaware of the ironic shift which had occurred in the meaning of the term homestead: the homestead act, as originally conceived, was intended to prevent the formation of a wage-earning class. Now the concept was being used to buttress the wage relation. Interestingly, the same member, Walkem, introduced both the homestead amendment to protect creditors and the wage exemption provision. Moreover, at the same time, a second measure was being pressed forward, intended to give wage claims preference over all other creditors.[47]

It was not so strange that Walkem introduced both measures. Theodore Davie, also prominent in the movement to protect creditors from homestead claims, had introduced bills to abolish the attachment of wages[48] and give wage claims preference over other

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[45] *British Colonist*, 7 February 1896.

[46] *British Colonist*, 7, 14 February 1896; *Daily Times*, 7 February 1896.

[47] *Daily Times*, 11 February, 7, 10 March 1896.

[48] The order for this bill was discharged on second reading. British Columbia, *Journals*, 4th Parliament, 1st session, 1883, p. 32. For the details of the bill see *Mainland Guardian*, 7 March 1883.

creditors in 1883.[49] Walkem and Davie apparently held a common interest in smoothing credit relations, securing creditors' rights, and protecting wage earners. In fact, during his tenure in the legislature, Davie was behind several other measures regulating employer-employee relations, including bills to secure the payment of workmen, deal with workmen's injuries, and establish employers' liabilities. Davie's concern for workers appears to have been genuine. But his commitment to establishing and maintaining the wage relation must not be overlooked. Davie was committed to an unequal, class-based, capitalist society. In this, he differed dramatically from his predecessors in the early 1870s.

Davie was not alone in these views. By 1885, the idea of homesteads as a bulwark against wage-dependency had been lost altogether. That year, the *British Colonist* printed an editorial advocating the establishment of small homesteads of "a few acres" to alleviate the problem of unemployment. The unemployed, the editors argued, were the cause of great unrest, forming

> an army of tramps who, being compelled to spend half the year wandering around in search of work, soon acquire a distaste for work at all, and go to swell the number of criminals or confirmed loafers whose hard feelings against society in general make them the ready recruits of any demagogue who chooses to rouse their resentful feelings against the government which they blame for their condition.

However, the *Colonist*'s editorial staff were not encouraging the replacement of wage labour with homesteads. They saw these small acreages as complementary to wage-

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[49] See *British Columbian*, 3 March 1883; British Columbia, *Journals*, 4th Parliament, 1st session, 1883, pp. 10, 17, 24, 25, 28, 90.

labour, a means of reconciling wage earners to the cycles of capitalism, and of dissipating discontent:

> After periods of great activity and prosperity there are sure to come times of depression when little work is progressing and laborers find nothing to do. If they had their homesteads to attach them to the country we should be spared the sight of crowds of idle and sullen men...

A few acres, the editors wrote, would supply a man "with a profitable outlet for his labor during a dull season, and ... would bring him into sympathy with the landowners of the district."[50] The interest in homesteads is no longer one of establishing a society of independent equals, but of giving dependent wage labourers a means of survival during recessions and accommodating them to the unequal social order. Within a decade of this editorial, even this limited association of homesteads with control over productive resources would vanish. The idea of a secured home and parcel of land slowly gave way to the concept of exempting wages. After the rewriting of homestead law to protect creditors in the 1890s, legislators' interest in the subject waned. The homestead act was never revisited.

Examining the origins of legislation in the 1860s and 1870s revealed the authors of the legislation, aiding us in demystifying 'the state.' The legislators of the earlier period envisioned a society of small producers and sought to foster its development by lessening the risks involved in entrepreneurship. This was undeniably a self-interested vision, based

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[50] *British Colonist*, 4 February 1885.

on an appealing ideal of masculinity, and a social order which would value and reward the contributions of men of their own social status. The yeoman dream promised a broadly shared quality of life, both economically and politically, for European men. This chapter takes the unmasking of 'the state' a step further, exposing the changing identities of those in power, and the changing nature of legislative strategies. This is an important recognition for those writing history. The state's origin and use lie in its function of mystifying social relationships. This mystification often confuses historians as much as contemporaries. Conceptualizing 'the state' as a continuous corporate entity entices the historian to assume and look for continuities of purpose, and permits the logical assumption of long-term progressions. If the state is conceived as a singular entity in continuous existence through time, it logically follows that it might have a single continuous agenda. In fact, the state often acts as a historical plot device, serving as the basis for over-arching metanarratives. In Marxist analyses, for example, the state plays a pivotal role in hastening the long-term historical development of capitalism. The effect of 'the state' in metanarratives, then, is to explain the overall consistency of historical progress. This consistency is an imposition. It is an illusion created by the sleight of hand involved in aggregating diverse groups of people into unitary abstract things.

In reality, legislative concerns altered dramatically in the last two decades of the nineteenth century. In the 1880s and 1890s, legislators exhibited increased concern for the rights of creditors. This was only natural. The members of the Smithe Dynasty were propertied men, and empathized with the situation of those with assets to lend. Moreover, these men, some of them employers of wage labour, were satisfied with the social order

emerging on the Pacific coast. By the 1880s, the ruling coalition was committed to large-scale capitalist accumulation, and sought to solidify the developing hierarchical capitalist social order. Theodore Davie spoke of balancing the rights of debtors and creditors. His objective, balance, is an indication of his satisfaction with the status quo. Where earlier legislators saw society and sought change, Davie looked at the social order and sought balance, order, and stability. His desire to secure the rights of the wealthy vastly outweighed any desire to secure avenues for social advancement out of dependency. In fact, by the late 1880s, those in power understood wage earners to be a permanent constituency in the new nation: the wage protection acts reveal that the Smithe government was committed to securing and firmly establishing the rights and position of wage earners. Wage earners, however, had not entirely resigned themselves to the permanence of this arrangement.

CHAPTER SEVEN:

THE IMPACT OF THE 1887 MARRIED WOMEN'S PROPERTY ACT

The following chapter discusses the social and economic effects of the 1887 MWPA. The chapter begins with a discussion of increasing property ownership among married women, based on quantitative data generated by Peter Baskerville. The discussion then turns to an examination of court cases, both published and unpublished, in an effort to find the reasons for married women's increasing property ownership, and the social meaning of property ownership for women. Why were wives increasingly likely to own realty? and did it involve a shift in familial power? Following this discussion, emphasis shifts to married women's borrowing patterns and participation in business. The latter discussion employs quantitative data and case materials to explore the contours and meanings of married women's economic activities.

In the period surrounding the passage of the 1887 Married Women's Property Act, property ownership by married women increased dramatically. Quantitative data produced by Peter Baskerville demonstrates that from 1881 to 1901 an increasing percentage of all married women in Victoria owned real property, rising from 3.8 per cent to 10 per cent. Over the same period, the percentage of assessed landed property owned by all women, whether married, widowed, or single, increased from 5.9 per cent to 20.8 percent. In fact, in an amazing finding, given preconceptions about the extent of

women's property ownership, Baskerville reveals that "if one were over the age of nineteen in Victoria in 1901, the odds of owning land were not affected by one's gender." In 1901, 17.2 per cent of adult men owned land. So too did 17.2 per cent of adult women.[1]

The changing gender profile of real property owners in Victoria stands in marked contrast to patterns of real property ownership in Hamilton, Ontario in the same time period. Married women in Victoria held much more property than their Hamilton counterparts. In 1901, when ten per cent of all *married* women in Victoria owned realty, the comparable figure for Hamilton was 2 per cent. Overall, 17.2 percent of all women in Victoria, and 6.1 per cent of all women in Hamilton owned real property. In searching for the reasons for this discrepancy, Baskerville suggested that Hamiltonian women might have sunk more of their wealth into alternative investments, such as stocks and mortgages. This theory turned out to be correct. Yet despite the presence of alternative investments in Hamilton, probate records revealed that after accounting for all types of property, women investors in Victoria still held double the wealth of their Hamilton counterparts. Moreover, Victoria's women wealthholders were more likely to be married: fifty-eight percent of women investors in Victoria were married. The comparable figure for Hamilton was thirty-two percent. Most female property owners in Hamilton were widows.[2]

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[1] "Women and Investment in Late-Nineteenth-Century Urban Canada: Victoria and Hamilton, 1880-1901," *Canadian Historical Review*, vol. 80, no. 2 (June 1999), pp. 196 (Table 1), 197-198, 205 (Table 6).

[2] Baskerville, "Women and Investment," pp. 196 (Table 1), 205 (Table 6), 206, 210 (Table 8), 211.

Baskerville has suggested that the unbalanced sex ratio in British Columbia may have played a role in married women's property ownership. Social psychologists have posited that a high sex ratio — greater numbers of men than women — can have "dramatic social consequences." High sex ratios can provide women with "greater agency in their social interactions with men," although too high a sex ratio can lead to greater attempts by men to control women.[3] Baskerville has identified forty-one women married between 1872 and 1880 who acquired land after 1881. Twenty were widows when they acquired land, four were remarried, and seventeen were still married to their first husband. While many women acquired land through inheritance or later during their widowhood, and a small number may have brought land to their second marriage, a significant number of married women were acquiring land while they were married. Moreover, they were acquiring land at a much greater rate than married women in Hamilton. Baskerville suggests that this was a social phenomenon, where married couples were observing their neighbours' actions and following suit. Testing this hypothesis, he adds, "requires close attention to possible interaction between women and their husbands..."[4] Indeed, new evidence suggests that cultural understandings of the legislation were crucial to married women's property ownership and explain why the legislation produced different results in the two jurisdictions. A different understanding of the act's purpose was widespread in British Columbia, and was integrated into the modified British Columbian version of the

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[3] Baskerville, "Women and Investment," p. 212.

[4] Baskerville, "Women and Investment," pp. 215-216.

act: Theodore Davie had amended the Ontario legislation to facilitate the transfer of land from husband to wife. His understanding of the act was cultural, rooted in equitable practices and the aims of earlier British Columbian legislators.

The cases, both published and unpublished, reveal two family strategies which contributed to the general increase in married women's property ownership: first, the evidence indicates that some married couples in British Columbia understood the legislation largely in the same terms as Amor De Cosmos, as a means of protecting family assets from creditors; second, cases show that married couples used the act as an inheritance device: couples established survivorship agreements, under which family property was placed in the wife's name; the wife then made a will in her husband's favour, in case she should predecease him. Such an agreement was a practical means of dealing with succession, since, statistically speaking, it was more likely that a husband would predecease his wife; with the property in her name, there would be less chance of incurring succession duties and the legal fees associated with probate. These two uses of the act were consistent with legislative intentions. Theodore Davie explicitly introduced provisions to the legislation permitting couples to safeguard property in the wife's possession. Moreover, the use of the act as an inheritance device was in keeping with Davie's desire to protect and provide for married women. It created no divergent interests between the two spouses. However, a third reason for wives' increasing property ownership also exists, and this may have been an unintended consequence, permitting wives an independence not specifically desired by Davie. In significant numbers, married women were using the act's provisions to enter business.

Following 1887, husbands and wives continued to see the MWPA as providing means for protecting personal property, such as household furniture, in addition and complementary to those provided by the homestead act.[5] Couples also used the act to transfer real estate into the wife's name, exempt from the husband's liabilities. As the legislators had intended, the courts would not uphold transfers of property from the husband to the wife made after the husband had incurred debts. Nor would it uphold transfers made when the husband was insolvent.[6] Yet the courts, like the legislators, were increasingly concerned for creditors' interests. In fact, the level of their concern made it difficult for couples to use the act for the express purposes of the early legislators. The courts would not uphold some transfers of property between husband and wife made *before* liabilities were incurred. Amor De Cosmos, it will be recalled, saw the homestead act and the married women's property act as means for men going into business to transfer large amounts of property to their wives in order to shield it from creditors. The courts, desirous of protecting the rights of creditors and sensitive to the precedents of debtor-creditor law, were quite strict in their evaluation of such transfers.

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[5] *Cordingley* v. *MacArthur*, heard before the Full Court in Victoria in 1899, is a case in point. In this case, the husband was indebted to the defendant MacArthur for the purchase of household furniture. The furniture was liable to seizure since it had been rendered ineligible for exemption under the 1893 'identical goods' amendment to the Homestead Act. In an attempt to prevent the seizure, the wife, Georgina Cordingley, contended that her husband was indebted to her for $600, and had repaid her by signing over the household furniture. The court ruled that since there had been no promise by the husband to repay his wife, no record of the debt, and the wife had made no attempt to recover in the three years between the incurring of the 'debt' and the signing over of the furniture, the 'repayment' must be treated as a gift. Since this gift was given after the husband had been sued for the price of the furniture, it was deemed fraudulent and annulled. *British Columbia Reports*, vol. 6 (1899), pp. 527-531.

[6] In *The Robert Dollar Company* v. *Walker et al.*, *British Columbia Reports*, vol. 36 (1926), pp. 405-413, the Court of Appeal upheld a lower court ruling that negated L.W. David's transfer of corporate stock to his wife and son while in insolvent circumstances.

Of course, while this concern frustrated De Cosmos' vision, it would have been applauded by Davie, and was quite in tune with the increasing concern for creditors' rights characteristic of the period.

Newlands Sawmills Limited v. *Bateman and Bateman* illustrates the judicial concern for creditors' rights. On April 28, 1920, James Bateman entered a timber-cutting contract with Newlands Sawmills in the Cariboo. He began logging operations on the tenth of May, 1920. Several days later, Bateman conveyed his farm at Eaglet Lake in the Cariboo to his wife Minnie. The logging operation did not go well. By July 1920, Bateman was broke. His cheques failed to clear and he was unable to continue logging. In August the company cancelled the contract. After a series of suits and countersuits, the company emerged victorious, and was awarded damages and costs. Yet the company could not recover the judgment. Minnie Bateman held the Batemans' homestead and James had little other property. The Batemans' lawyer argued that Minnie Bateman had made several advances of money to her husband. The farm was transferred to her in repayment. The trial judge rejected the claim that Minnie Bateman was her husband's creditor, ruling the transfer of the homestead from James to Minnie a gift. However, he ruled the gift valid, since title passed from husband to wife before any judgment was registered against the husband.

Newlands Sawmills appealed the trial judge's decision, arguing that the conveyance should be voided, since it was made on the eve of entering a hazardous business transaction. A conveyance made in contemplation of defeating future creditors, the company's lawyer argued, should be annulled. Bateman's lawyer, in turn, argued that the

conveyance should be ruled valid since it was made in May and Bateman was not in financial difficulties until the end of August. Justice Martin, who gave the most comprehensive explanation of the Court of Appeal's decision, admitted that at the time of the conveyance, Bateman was not indebted to the company.[7] Indeed, since he had commenced logging operations, the company was likely indebted to him. However, at the time Bateman conveyed the property to his wife, Martin noted, he had embarked on a risky enterprise. Bateman was close to sixty years old, had not logged for nine years, and was logging rough terrain. Bateman admitted that his wife was concerned about the hazardous nature of the enterprise and this was the reason he gave her the farm. Martin, like the trial Judge, held on the basis of Bateman's testimony that the conveyance was a gift rather than a repayment. Yet under these circumstances, Martin ruled the transfer a fraudulent attempt to defeat future creditors.

At this point, it could be legitimately objected that the case at hand is complicated by the fact that the conveyance took place after the contract was signed. The case might not apply in situations where a husband conveyed property to his wife *before* entering business. However, in his decision Justice Martin went well beyond the particulars of the case before him, elaborating rules based on equitable precedents for determining future cases. He referred to British Chancery rulings under which conveyances made in anticipation of defeating subsequent creditors could be overturned. In fact, under the precedent set in *Mackay* v. *Douglas*, the judge wrote, "a man who contemplates going

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[7] Justice McPhillips dissented from the majority decision, believing that the Batemans had proved that the transfer was not a gift, but a repayment by the husband, who was indebted to his wife.

into trade cannot, on the eve of doing so, take the bulk of his property out of the reach of those who may become his creditors in his trading operations." Moreover, Justice Martin noted that the risks of the enterprise did not have to be great. Although in this case there were great risks, anticipating the normal risks of entering a business was sufficient grounds to impeach a conveyance from husband to wife. The length of time between the conveyance and entrance into business was crucial in determining its legitimacy. A conveyance was supportable if made in solvent circumstances, at a time when entrance into any contract which might lead to insolvency was not contemplated. Justice Martin suggested that a lapse of several years between the gift and the assumption of the obligation would prove satisfactory.[8]

Such reasoning reflects the judicial mood of the time: in *Koop* v. *Smith* (1915) both the British Columbia Court of Appeal and the Supreme Court of Canada called for scrutiny of property transfers between close relatives. In the Supreme Court, Justice Duff wrote that when the circumstances surrounding transfers of property between near relatives appear suspicious, "the fact of relationship itself is sufficient to put the burden of explanation upon the parties interested and that in such a case the testimony of the parties must be scrutinized with care and suspicion." In most cases, the testimony of the interested parties would be insufficient; third party corroboration of the facts would be required.[9] These rulings were applied by the British Columbia courts to transfers

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[8] *Newlands Sawmills Limited* v. *Bateman and Bateman*, *British Columbia Reports*, vol. 31 (1922), pp. 351-362.

[9] *Koop* v. *Smith*, *Western Weekly Reports*, vol. 8 (1915), p. 1203. See also *Koop* v. *Smith*, *British Columbia Reports*, vol. 20 (1914), pp. 372-389.

between husband and wife in *Union Bank* v. *Tyson* (1915)[10] and *In Re Ready and Cass* (1924).[11] In the years which followed, only transfers meeting the strict requirements set out in *Koop* v. *Smith* and *Newlands Sawmills* were upheld in the published reports.[12] All transfers between husband and wife were treated as suspicious until proven otherwise.[13] The act could not be used exactly as Amor De Cosmos had hoped.

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[10] Judge Gregory cited the recent decision of the British Columbia Court of Appeal in *Koop* v. *Smith*, that in the absence of evidence to the contrary, the law might presume intent to defeat creditors on the part of close relatives. *Union Bank* v. *Tyson*, *Western Weekly Reports*, vol. 7 (1915), pp. 1117-1121.

[11] *In Re Ready and Cass*, *British Columbia Reports*, vol. 33 (1924), p. 372.

[12] In *North* v. *Siciliano* (1922) and *Langer* v. *McTavish Brothers Limited* (1932), transfers were upheld on the basis of corroborated testimony that the gifts were made when the husband was free of debt. In *Union Bank* v. *Tyson*, the transfer was upheld because the debt was not incurred until two years after the transfer, and no intent to defraud creditors had been established; moreover, the transfer was ruled a valid repayment rather than a gift. *North* v. *Siciliano*, *British Columbia Reports*, vol. 31 (1922), pp. 463-467; *British Colonist*, 14 December 1922; *Langer* v. *McTavish Brothers Limited*, *British Columbia Reports*, vol. 45 (1932), pp. 494-502; *Union Bank* v. *Tyson*, *Western Weekly Reports*, vol. 7 (1915), pp. 1117-1121.

[13] The courts were unwilling to uphold transfers of property between unwed couples. In *Holton et al.* v. *Vandall et al.* (1900), Vandall conveyed his hotel to Miss Millie Black, a.k.a. Mrs. Vandall, shortly before entering bankruptcy proceedings. Millie Black had taken a position with Vandall as a hotel servant in Revelstoke in 1896. A few months later, Vandall built a house, and the two lived there as husband and wife. In November 1898, Vandall conveyed the hotel to Black, ostensibly for $1200 owed in wages. He then commenced making arrangements with his creditors. The creditors, upon discovering this transfer, filed suit. Judge Walkem believed that since Black and Vandall had been involved in an intimate relationship, and she had made no request for wages until the eve of Vandall's insolvency, they were colluding to defraud Vandall's creditors. Moreover, he argued that the wages set by Vandall and Black were exorbitant and based upon an immoral consideration — that she would consent to be his mistress — and the conveyance was void on this ground as well.

The situation of unmarried couples arose again in *Stagg* v. *Ward and Ward*. In 1913, the plaintiff Stagg, a bricklayer from Niagara Falls, New York, moved to Victoria with his three children and his companion, Mary Heywood, who called herself Mrs. Stagg. Mr. Stagg purchased a lot in the name of Mary Stagg, and built a house on the property with the assistance of her son and son-in-law. The couple lived in the house for two years, although they quarrelled frequently. Mary left in September of 1914, and after a short reconciliation, left permanently in 1915. Her certificate of title to the property remained with Stagg. Later, she convinced the Registrar-General of Titles to issue her a duplicate certificate, claiming the original had been lost in a fire, and transferred ownership of the property to her new husband, Mr. S. H. Ward. Soon afterward, Mr. Ward wrote to Stagg's tenant, claiming to be the proper recipient of the rent for the house. Stagg filed suit. In court, Mary Ward claimed to have purchased the property with her own earnings, but given evidence from Stagg's bank statements, and Mary's duplicity in obtaining the duplicate certificate of title, Judge Lampman was convinced that Stagg had purchased the property. Under the rules of equity, title always passes to the person paying the purchase price. The

Or so it would seem. Several cases reveal that couples had discovered a new means of avoiding the strict rules surrounding transfers of property ownership: they avoided registering the property in the husband's name. While the property was purchased out of the husband's wages, the payments were made by the wife, and title was taken in her name. The manoeuver appears to have been quite effective: it was never challenged by creditors. The existence of this means of placing property in the wife's name only came to light during disputes between the couples themselves. *Dudgeon* v. *Dudgeon* and Parsons involved a husband who had advanced money to his wife for the purchase of a homestead. The husband had put a down payment on the property; the payments were made through his wife out of his wages, and the deed was taken in her name. Had the matter been one of protecting the property from creditors, Mr. Dudgeon undoubtedly would have claimed that the property belonged to his wife. However, in this case, his wife had sold the property at a handsome profit without his consent, and appropriated the proceeds of the sale.

Under these circumstances, Mr. Dudgeon sued the purchaser, taking the position that Mrs. Dudgeon held the land in trust. In his decision, Justice Irving recited the equitable rule that title is invested in the individual providing the purchase money; the person or persons registering the deed hold the property in trust. The sole exception to this rule, he noted, is a purchase made by a patriarch in the name of his wife or child. This is a

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person in whose name the deed is registered is holds title to the land as a trustee for the purchaser. The only exception to this rule occurs when the recipient of the deed stands in close relation to the purchaser, and the purchaser intended to convey the property as a gift. Judge Lampman ruled that since Mary Ward had never married Stagg, she did not stand in the legal relation of wife, and he could not make such a gift to her. The property was his. *Holten et al.* v. *Vandall et al.*, *British Columbia Reports*, vol. 7 (1900), pp. 331-337; *Stagg* v. *Ward and Ward*, *British Columbia Reports*, vol. 30 (1921), pp. 385-388.

"circumstance of evidence" held to indicate an intention on the part of the donor to bestow a gift to the recipient. However, he wrote, "this circumstance of evidence may, in turn, be met with other evidence tending to show a contrary intention." Mr. Dudgeon contended that he had not consented to his wife taking the deed in her name. Straining the credulity of the court, he claimed to have seen the deed, but never examined it. Conversely, Mrs. Dudgeon argued that the money was received from her husband as a gift, and that this money, along with money from her father, had been used to purchase the property. Justice Irving did not believe either claim. Rather, he believed that the couple had placed the title in Mrs. Dudgeon's name, but that the title was held in trust, and conferred no independent rights in the family property.

> I cannot believe that it was ever intended that this property when purchased should become the absolute property of the wife, or that she should be in a position to sell it without regard to his wishes in any way. I believe that it was intended it should be held by her as a home for him and his family. Her story goes too far, and I am unable to accept it.

Justice Irving reached the conclusion "that the money with which this property was purchased was [Mr. Dudgeon's] money, purchased for his own benefit, and a resulting trust arises in his favour."[14] Given this decision, it is possible that a husband could place property in the name of his wife, gaining the ability to protect it from his creditors, and still not lose control over that property. A number of similar decisions followed.[15]

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[14] *Dudgeon* v. *Dudgeon and Parsons*, *British Columbia Reports*, vol. 13 (1907), pp. 179-186.

[15] *McKissock* v. *McKissock*, heard by the Court of Appeal in 1913, involved a dispute between a husband and wife over the ownership of several pieces of realty. Mrs. McKissock left her husband in 1912 and her husband sued for an order compelling his wife to transfer to him his share in the properties. Initially, he claimed co-ownership of a single property with his wife. Later, he amended his claim, alleging that he had advanced all the money for all the properties Mrs. McKissock had purchased during their marriage,

While couples placed title to property in the wife's name for the reasons intended by the legislators, they also had their own reasons. Several couples chose to register property in the wife's name to ensure spousal inheritance and avoid succession duties. As in the previous case, records of these agreements exist only because they were subsequently broken. In *Breitenstein* v. *Munson et al*, the plaintiff Breitenstein, a stonemason, sued for the return of property willed by his wife to her daughter. Breitenstein alleged that he and his wife Mattie had entered an oral agreement in 1903 regarding their only piece of real estate. It was agreed that they should take joint interest in the lot, with a right of survivorship: that is, whoever outlived the other would assume ownership of the lot in its entirety. In order to achieve this end, Breitenstein, who was considerably older than his wife, assigned his entire interest in the lot to her, and she agreed to make a will in his favour. If he should predecease her, which appeared most likely, the property would already be in Mattie Breitenstein's name, and there would be no estate administration complications and no succession duties to pay.[16] *Ward* v. *Ward* (1932) tells a similar tale. In this case, a Nanaimo miner sued his wife for a share of realty and money held in

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including the four she currently held. During the trial, he further amended his claim, alleging the existence of a verbal partnership agreement, whereby Mrs. McKissock used his wages to purchase property for their mutual benefit. Despite Mr. McKissock's multiple amendments to his story, the trial judge found on the evidence that such an agreement did indeed exist. Mrs. McKissock appealed this decision on the basis that the amendment claiming the partnership was never properly filed, but the appeal was rejected. *McKissock* v. *McKissock*, *British Columbia Reports*, vol. 18 (1913), pp. 401-406. See also *Ward* v. *Ward*, *British Columbia Reports*, vol. 45 (1932), pp. 248-255, and *Fillier* v. *Fillier*, Vancouver *Province*, 25 February 1914, discussed below.

[16] The case stemmed from the fact that in 1909, Mattie Breitenstein, accompanied by her daughter Lilian Munson, drew up a new will leaving half her property to her husband, and half to Munson. Testimony revealed that this new will was not disclosed to the husband. Justice Macdonald ruled that the survivorship agreement continued up to the death of the wife, and that Breitenstein was entitled to sole interest in the property. *Breitenstein* v. *Munson et al.*, *British Columbia Reports*, vol. 19 (1914), pp. 495-499.

her name. Mr. Ward alleged that he handed over his earnings to his wife for the purposes of avoiding administration of his estate if he were killed in a mining accident. This money, he claimed, along with money earned by Mrs. Ward, was used to purchase several lots in Nanaimo and six head of cattle; another $4,000 was held by Mrs. Ward in a savings account.[17] The outcomes of the cases are of much less significance than the agreements which they reveal. What the cases show is that transferring property from husband to wife was not only an act designed to protect that property from creditors. Couples sometimes used married women's property rights for reasons unanticipated by the legislators. In a Province where married women's interest in family property was unprotected, some couples used the law in unexpected ways to ensure that widows would be provided for at a level exceeding intestacy, and in a fashion which would minimize legal fees and taxation.

The cases, then, are important in outlining family strategies; they may also provide insight into the reasons why married women held greater amounts of property in British Columbia than elsewhere, although we cannot be certain of the extent of these practices.

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[17] The evidence of the parties was conflicting and unsatisfactory. The trial judge gave the land and $3000 to the wife; to the husband he alloted $1000 of the savings and the cattle. Mrs. Ward appealed this decision, arguing that Mr. Ward had failed to prove any interest in the property and had given no statement of his claimed interest. Yet the judgment was confirmed by the Court of Appeal, the Justices citing the Married Women's Property Act, which permitted a Judge to summarily determine disputes over property between husbands and wives. Chief Justice Macdonald and Justices McPhillips and Macdonald all referred to the inadequacy of the evidence. However, Justice McPhillips remarked that Mr. Ward's claim to have given the property to his wife as a means of avoiding inheritance costs and complications was plausible and sufficient to counter the claim of his wife that the money was a gift. He ruled it a trust, and agreed with the Chief Justice's statement that the trial judge's decision "must be regarded as an equable division" between the Wards. *Ward* v. *Ward*, *British Columbia Reports*, vol. 45 (1932), pp. 248-255.

Yet the cases are equally valuable as a corrective to the assumption of harmonious family interests. While family members often cooperated to ensure both corporate and individual security, that unity of purpose was far from constant. Families existed in a tension between mutualism and individualism. Moreover, and equally significant, both tendencies existed within the same families. There were not two distinct variants of families, some group-oriented and others individualistic. Rather, across classes, families existed within a tension between both tendencies: a family or couple which at one point in time pursued mutual aims and security often lost that sense of mutualism over time. Yet the 'common sense' conclusion, that selfish individualism was the cause of the strain on mutuality, may be inappropriate. Sometimes, individual needs changed: Mattie Breitenstein, practically an invalid, appears to have broken her survivorship agreement with her husband in exchange for care and domestic help from her daughter.

What did increased property ownership mean for married women? On the face of it, increased property ownership by married women would appear to imply a shift in familial power. If we accept the maxim, introduced at the beginning of this dissertation, that control over property confers substantial power and authority upon the title-holder, then wives should have gained power within families. Outside the courtroom, this may indeed have been the case. Once in the courts, however, any power or leverage the wife gained was substantially reduced. The judiciary was well aware that transfers from husband to wife were based on informal considerations and verbal agreements. Moreover, under equitable procedures, those underlying agreements held greater authority than written documents. Therefore, Judges were willing to void those transfers

when a husband raised doubt as to the nature of an agreement, or his wife's compliance with its terms, permitting a husband to retrieve property registered in his wife's name. In fact, the judiciary appears to have been too easily convinced to void the transfers, especially given the fact that many of these cases were brought forth by husbands estranged from their wives, or who wished to prevent their wives from disposing of transferred properties. Not one wife was able to establish her clear right to possession of a gift when her husband alleged that the gift was actually a trust. Only two published cases exist in which the courts did not return transferred property to husbands. In both cases, the transfers were upheld to protect the rights of creditors.[18] Wives often held family property; yet many still lacked control over it.

Despite their weak legal position, married women were not powerless. *Buscombe* v. *Holden*, heard in 1924 before the Supreme Court and subsequently before the Court of Appeal provides a sense of married women's personal power. In this case, as part of an antenuptial agreement, William Holden had transferred the Pender Hotel to his wife Lillian, who agreed to will the property to him. Mr. Holden was to have the use of the

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[18] In the published cases, the only parties whose interests were paramount to a husband's were creditors. In *Trumbell* v. *Trumbell*, the court ruled that it would not restore property to a husband who had transferred the property with intent to defraud his creditors. The court would not aid such an action. Nor would the court return property held in trust to defeat the holding spouse's creditors. *Morris* v. *Morris et al.*, involved the property held by James Morris but purchased by his wife, Alice. Under the rules of equity, the existence of a trust was evident (a transfer or property from wife to husband was definitely a trust; of this there was no question. After all, she had paid the purchase price, and the equitable presumption of an absolute gift applied only to property transferred from a patriarch to his wife or child) but the court would not return the property. In this case, the spouse holding the land in trust, James Morris, had taken credit when in possession of the land. The court held that the creditors were entitled under the Land Registry Act to rely upon the registered title, and the trust was therefore void. The same ruling would have applied where a husband had registered property in his wife's name. Even if he could convince the court that his transfer of property was a trust and not an absolute gift, he could not have the property restored to him to defeat his wife's creditors. *Morris* v. *Morris et al*, *British Columbia Reports*, vol. 44 (1931), pp. 166-170. *Trumbell* v. *Trumbell et al*, *British Columbia Reports*, vol. 27 (1919), pp. 161-166.

rents and profits during his lifetime. Third-party evidence revealed that William Holden conveyed the property to Lillian only after having examined her will to ensure that he was beneficiary. By this agreement, Lillian Holden had ensured that she would be provided for should her husband predecease her. Later, she wrote a new will, leaving the hotel to her mother. In the original trial, Justice McDonald held that William Holden had failed to prove the existence of the verbal agreement. The Court of Appeal, in a split decision, reversed this finding, upholding the agreement and affirming Holden's claim to the hotel.[19] On the surface, *Buscombe* v. *Holden* appears simply another case in which a husband was able to retrieve property from his wife's possession. Yet the case shows that some women were able to exercise considerable power, strengthening their interest in family property: prior to marriage, Lilian Holden insisted that her future husband make sufficient provision for her widowhood. Had her husband predeceased her, Holden's bargaining power would have accrued to her advantage.

Another example of married women's individual power is found in *Fillier* v. *Fillier*. In this case, James Fillier had advanced his wages to his wife for the purchase of two lots in New Westminster. Title was subsequently registered in Katrine Fillier's name. When trouble arose between the couple some eleven years later, James contested ownership, claiming that his wife had registered the titles in her name without his knowledge! This may have been a fabrication designed to bolster his legal claim to the property. Yet it also may have been the truth. James Fillier worked in remote locales for long periods of time,

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[19] *Buscombe* v. *Holden*, *British Columbia Reports*, vol. 33 (1924), pp. 431-439 and vol. 34 (1924), pp. 289-311.

and his wife did not lack opportunity to register the property without his knowledge. If this was the case, it reveals that Katrine Fillier was both unsatisfied with her rights in family property, and took independent action to seize what she believed was her fair share. In either case, Katrine had since established a boardinghouse on the premises, and was supporting herself and the couple's four children. The case was ultimately discontinued and settled out of court, and in this rare instance, the newspaper account provides the details of the out-of-court settlement. James Fillier agreed to accept a sum of $3000 cash. Katrine would retain ownership of the properties, valued at $19,000. However, there was an implicit admission of James' interest in the property over and above the $3000 cash settlement. The Filliers agreed to submit a separation agreement to Justice Macdonald, in which James was to be relieved of all liability for the support of Katrine and the children, a valuable consideration in return for the property. James was also to have visiting rights at his discretion.[20]

The Fillier case is interesting for several reasons: first, there is the legal issue: the tacit admission that James was the owner of the property and Katrine held it in trust. Second, there is the issue of marital power. Although her legal claim to the property was uncertain, Katrine was able to use her husband's legal obligation to support her and her children to her advantage. This combined with prevailing ideals of patriarchal obligation to allow Katrine the independence she so obviously desired. Finally, the case shows a woman asserting her independence to enter business. Katrine Fillier was running her own

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[20] *Province*, 25 February 1914.

business, and fully expected that she would be able to support herself and her children. Undoubtedly, a number of circumstances had converged to allow this to happen. Yet such contingencies should not be permitted to obscure the agency of Katrine Fillier, and the force she exerted within the constraints of time, place, and culture.

The decisions outlined above suggest that it would have been difficult for married women to obtain credit. Since creditors could not be certain as to the status of married women's property, and since husbands were liable to retrieve property held in trust, creditors should have been wary of lending to married women on the security of such property. However, Peter Baskerville's research does not support this conclusion. Baskerville's study of women borrowers at two financial institutions between 1889 and 1896 shows that women were remarkably successful in borrowing money in British Columbia. Creditors lent large amounts of capital to married women after the 1887 MWPA. Between 1889 and 1896, one of every eleven dollars loaned by the two companies went to women. Judged as credit risks, men and women were remarkably similar: women defaulted on twenty-seven per cent of their loans; men on twenty-three percent. Eighty per cent of the women receiving loans were married. They were also generally young. Sixty per cent were under the age of forty. Most women borrowed small amounts, and nearly ninety per cent borrowed only once. However, their behaviour cannot be characterized as conservative. Most men also borrowed less than $1500 dollars and only borrowed once. Baskerville believes that married women's borrowing was generally not speculative. They were not borrowing to turn a profit or enter business. They were borrowing to build or renovate homes. A new two-story house could be built

in Vancouver in the early 1890s for about $1500. This supposition is supported by the cases, and makes sense in the light of the absence of a strong dower law in British Columbia. Married women were borrowing in order to secure their economic situation over the long term. A house in her own name was a valuable protection for a married woman whose rights to her husband's property were strictly constrained, and existed largely at her husband's leisure. Much of the reason for the discrepancy between the assumptions to be drawn from the cases — that married women would have had difficulty borrowing — and married women's actual borrowing patterns derives from the methods used to secure the loans: creditors tended to be cautious with loans to married women, usually demanding a husband as co-signer wherever possible.[21] With the husband as co-signatory, fraudulent transfers and equitable trusts would have had little effect on the couple's liabilities.

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[21] Baskerville, "'She Has Already Hinted at "Board,"'" p. 212-217. Although there is no data for the 1873 to 1887 period, Baskerville speculates that decisions under the 1873 MWPA and its kindred legislation in Ontario would have made borrowing difficult for married women, since Judges repeatedly refused to enforce their contractual liability. However, two observations suggest that this may not have been the case. First, married women's liability was still proprietary rather than personal following the 1887 MWPA, and creditors faced the same strict requirements in wording their claims that they faced under the 1873 legislation. This had not changed. Second, *Fraser* v. *King* suggests that the practice of securing a loan against the wife's separate property, with the additional security of the husband as a co-signatory, successfully used to secure loans during the 1889-96 period, would have worked equally well under the 1873 legislation. In *Fraser* v. *King*, Peter Fraser had lent money to his sister, insisting that her husband guarantee the repayment. Although this understanding was verbal, and the Kings tried to evade it, the court accepted its existence and held that Mrs. King's home and property were bound by the agreement. Her husband, as guarantor, was liable should Mrs. King default. These observations do not, of course, imply that married women did secure loans in any great quantities. The simple fact that married women's property rights were complicated and untested would have made many creditors wary. However, given the possibilities of successfully securing loans to married women, we should await hard evidence before reaching any conclusion. See *Peter Fraser* v. *Louisa King*, British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 700 (1881), pp. 392-408; *British Colonist*, 19 November, 1 December 1881.

As noted in the introduction to this section, the cases and research suggest that married women's increasing property ownership was in tune with its originator's ideals: Theodore Davie had hoped to clarify creditors' rights; he was certainly no advocate of female autonomy. Yet within the proper context, Davie had no objection to married women's property ownership: in fact, he had inserted provisions in the act to facilitate conveyances from husband to wife. Couples who placed property in the wife's name for the purposes of family security — either as a legitimate safeguard from the husband's creditors, or an inheritance device — were behaving within Davie's conception of proper patriarchal relationships. These behaviours were symptomatic of no divergence of interest within the family. They were generally orchestrated by the husband for his dependents' benefit. Moreover, the new act went a long way toward clarifying and strengthening creditors' rights. Within these areas, the act seemed to be working as well as could be hoped. Yet the cases, and Baskerville's research, indicate that married women also used their independent property rights to conduct business. Given Davie's very public antipathy to women's rights, it is possible that opportunities for married women to enter business were an unintended consequence of the legislation, providing married women with an autonomy Davie certainly would not have supported.

Several cases involving married businesswomen established married women's separate legal rights and independence from their husbands. *Jackson* v. *Jackson and Mylius* (1893) established that a husband could not control his wife's business activities or represent her without consent. Subsequent judgments in British Columbia would sustain married women's legal independence and further circumscribe a husband's right

to represent his wife in business transactions. In *Jackson* v. *Jackson and Mylius*, Margaret Jackson sued her son Alexander and his business partner, Celia Mylius, for money loaned to their jewellry and watchmaking firm. Alexander Jackson testified that he had originally partnered with Celia Mylius' husband Peter, who subsequently informed Jackson that he was indebted to Nova Scotia creditors. However, Mylius claimed to hold power of attorney on behalf of his wife, and suggested they form a new partnership between Jackson and Celia Mylius, in order to protect Jackson from the claims of Mylius' creditors. Jackson never saw the power of attorney; none could be produced at the trial, and thus the partnership documents were excluded from evidence. Neither Peter nor Celia Mylius were present at the trial. Nonetheless, on the basis of Jackson's testimony and a homestead exemption made in Celia Mylius's name, Judge Crease ruled that the partnership had been proven, and that Celia Mylius was liable for its debts. From his comments, it appears Crease wanted to hold the Mylius's to account. The judge believed the Peter Mylius had used Alexander Jackson to extract money from Jackson's mother. Creating the partnership in Celia Mylius's name was not intended to protect Jackson. Rather, the partnership agreement insulated Peter Mylius from the firm's debts. He had the use of the money; any liability belonged to his wife.

On appeal to the Full Court of British Columbia in 1894, Crease's ruling was sustained in a split decision. Chief Justice Begbie and Judge Drake ruled that Mrs. Mylius' denial of the partnership was evasively worded, and the partnership was proven on this technicality. As this decision was being delivered, the Court offered Mrs. Mylius' counsel, Mr. Gregory, opportunity to amend his appeal so that the issue of partnership

could be properly raised and the matter re-tried. He refused, but interjected that Mrs. Mylius had no separate property at the time the contracts were made. For a judgment to be made against a married woman, it was necessary to prove she had a separate estate. This argument had not been raised at the original trial. It was contained in Celia Mylius' notice of appeal, but Gregory apparently neglected to raise the issue during his arguments. Because of these omissions, Begbie and Drake dismissed this aspect of the appeal.

Judge John Foster McCreight's dissenting judgment attacked the majority ruling on two grounds. First, he believed that Mrs. Mylius' denial of the partnership was properly worded, and that the evidence of the partnership was inadequate. This seems to be the best analysis of the situation, since there was no evidence that Peter Mylius held the authority to bind his wife in contractual matters. The alleged power of attorney was never proven to exist. Secondly, McCreight wrote that the matter of Celia Mylius' lack of a separate estate had been raised in the notice of appeal, and had not been contradicted. "The onus," he wrote, "was on the plaintiff to shew that she the defendant had separate property at the time she made the alleged contract, if any. No such evidence appears to have been given." McCreight cited several cases referred to by Gregory on behalf of Mrs. Mylius with approval. Mrs. Mylius, he concluded, should not be held liable. Although he was in the minority in the provincial venue, McCreight's analysis of the matter eventually prevailed. The Supreme Court of Canada reversed the Full Court's majority decision, upholding McCreight's judgment.

The ultimate decision in *Jackson* v. *Jackson and Mylius* resulted in a deplorable injustice. Margaret Jackson, an elderly widow, was swindled out of over $12,000 in savings. Her only avenue of redress was against her son, who had no assets. The knowledge of this injustice may have driven the British Columbia courts to read the Mylius's defence statements with a critical eye to undermining their claim. After all, Begbie and Drake likely agreed with Judge Crease that Peter Mylius had used Margaret Jackson's naive son to defraud her of thousands of dollars. Yet, viewed from a broader perspective, the majority decision of the British Columbia Full Court would have perpetrated a larger injustice. If married women could be bound to honour contracts entered on their behalf by their husbands, on the flimsiest of supporting evidence, the independent legal status created by the married women's property acts would have been placed in a precarious position. McCreight's judgment, supported by the Supreme Court of Canada, upheld the right of married women to a separate legal existence in business matters.[22]

Several subsequent decisions expanded and elaborated upon this independence. In *Aikman* v. *Burdick Brothers, Limited, and Aikman*, Mrs. Aikman purchased stock in the Canadian Pacific Railway through the Burdick Brothers brokerage. Mrs. Aikman wrote a cheque, and her husband used it to pay Burdick Brothers for the stock. Burdick Brothers accordingly registered the shares in Mrs. Aikman's name. A second purchase of stock, again with Mrs. Aikman's cheque, was recorded in her husband's name. Later, after the

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[22] *Margaret Jackson* v. *Alexander Jackson and Celia Mylius*, *British Columbia Reports*, vol. 3 (1894), pp. 149-159.

initiation of divorce proceedings, Mr. Aikman convinced Burdick Brothers to merge the two accounts in his name. He subsequently sold the stock and took the proceeds. Mrs. Aikman brought suit against both Mr. Aikman and the brokerage firm. At trial, the husband was held liable, but Burdick Brothers successfully argued in their defence that the husband acted as agent for the wife. with authority to buy and sell. Mrs. Aikman appealed this decision, and the British Columbia Court of Appeal ruled in her favour. The Court noted that the husband's authority to buy stock did not necessarily confer authority upon him to sell that stock. However, the Judges declined to rule on this point, because it did not influence the outcome of the case. The more central point was that the brokerage could not claim to have discharged its liability to Mrs. Aikman by paying the proceeds of the sale to her husband. The price of the shares should have been paid to her directly.[23]

In *Millard* v. *The Bevan Lumber and Shingle Company*, a director of the Bevan company, Mr. Hilton, approached Dr. Millard for a loan of $5500. The doctor declined, but advised Hilton that his wife might be interested in making the loan. Hilton applied to Mrs. Millard personally, in the company of her husband, and she agreed to loan the money. She had previous business relations with the company, and insisted upon no formal documentation at the time of the transaction. Both plaintiff and defendant admitted the loan at trial. However, Hilton alleged that a few days after the loan was made, Mrs. Millard's husband asked that the loan be converted to shares in the company.

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[23] *Aikman* v. *Burdick Brothers, Limited, and Aikman*, *British Columbia Reports*, vol. 33 (1923), pp. 23-28,

This was denied at trial by Dr. Millard, who added that his wife had conducted her business separately from him for fifteen or twenty years. The weight of the testimony supports this claim. At the initial trial, Judge McDonald found in favour of the Bevan company. Mrs. Millard appealed this decision. Justice Galliher noted that the trial Judge had been predisposed to consider Dr. Millard as his wife's agent, acting on her behalf, and so ruled that he had bound her in taking the shares. However, Galliher ruled that the husband was not *prima facie* his wife's agent. Nor was their any reason to suspect that Mrs. Millard had authorized him to act on her behalf. Since the company's allegation that the loan had been converted to shares rested on the assumption that her husband could act on her behalf, it was unsupportable. The loan was a loan, not a stock purchase, and remained outstanding.[24]

Canary v. *Cohn*, heard in 1925, circumscribed the limits of married women's autonomous property rights. In this case, George Canary secured judgment against Lesser Cohn for unpaid debts, and the Sheriff seized numerous articles in the household of Lesser and Nellie Cohn to be sold at auction to satisfy the debt. Nellie Cohn then launched an interpleader suit, claiming several articles of furniture, a piano, and an automobile as her own. The furniture is of central concern here: Nellie Cohn claimed to have purchased it with wages paid her by two companies in which she was an equal partner with her husband. Canary's counsel contended that Nellie Cohn could not succeed in her claim, because section eight of the MWPA disentitled her to any earnings

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[24] *Millard* v. *The Bevan Lumber and Shingle Company*, *British Columbia Reports*, vol. 39 (1928), pp. 430-449.

in partnership with her husband. The section is worth quoting, as it became the main point of contention. It declared as the separate property of the wife "Any wages, earnings, money, and property gained or acquired by her in any employment, trade or occupation in which she is engaged, or which she carries on separately from her husband." According to Justice McDonald, the clause in question, "if one were to fill in all the words which are plainly understood," would entitle a married woman to "[a]ny wages, earnings, money, and property gained or acquired by her in any employment, trade or occupation in which she is engaged, or *gained or acquired by her in any employment, trade or occupation* which she carries on separately from her husband." In Judge McDonald's opinion, the first section of the clause entitled the wife to earnings in partnership with her husband; the second part of the clause, which he understood as an elliptical statement, and filled in the necessary words, entitled a married woman to earnings acquired separately from her husband. Given this understanding of the matter, and the Judge emphasized that he was "unable to read any other meaning into the words used in the statute," he ruled in favour of Mrs. Cohn. The furniture was hers, and could not be seized by her husband's creditor.

Canary appealed this decision. In the Court of Appeal, the Justices unanimously overturned McDonald's lower court ruling. Chief Justice Macdonald explained that he understood the phrase "or which she carries on separately from her husband" as a qualification of the foregoing words. In his analysis, a married woman was entitled to remuneration only from a business conducted separately from her husband. Justice Martin distinguished this decision by noting decisions in other jurisdictions where it had

been determined that a husband could be an employee in his wife's separate business, but he cited precedents holding that where a husband was involved in a business with his wife to the extent of rendering himself personally liable, as in a partnership, it was not a separate business. So long as a married woman's business was conducted at arm's length from her husband, he assuming no liability, she held independent control over its capital, stock and profits. Neither her husband, nor his creditors, had any claim to this property. However, the case revealed the limits of a married woman's independent business existence. To protect creditors' rights, the legislature and courts were unwilling to grant married women an independent share of the profits of a business conducted in partnership with their husbands. The rationale behind this restriction was that spousal partnerships would provide an easy means of collusion to evade liabilities: while one spouse assumed the liabilities, the other could receive some or all of the profits, and both could enjoy the benefits of these profits free from liability. Gender bias led the courts to assume that the husband would be in actual control of the business, and should be held liable for all its accounts.[25]

Overall, then, the evidence from the cases suggests that married women who adequately insulated their businesses from their husbands' interests could operate quite successfully as independent entrepreneurs under the 1887 MWPA. Other evidence bears this out. Many married women in business were definitely at arm's length from their husbands, but in a manner which could not be predicted from the cases, and did not

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[25] *Canary* v. *Cohn*, *British Columbia Reports*, vol. 35 (1925), pp. 479-480 or *Western Weekly Reports*, 1925, no. 2, pp. 563-565. For the appeal, see *British Columbia Reports*, vol. 36 (1925), pp. 185-190 or *Western Weekly Reports*, 1925, no. 3, pp. 357-360.

conflict with Theodore Davie's intentions. Peter Baskerville's findings are instrumental in revealing the dimensions of married women's participation in business. The majority of married businesswomen came from lower economic strata. Land ownership and the presence of domestic servants in the home are widely accepted markers of middle-class (or better) status among historians of the nineteenth century. By these standards, only twenty-eight percent of married businesswomen in 1891 could be classified as middle class. For these women, the decision to combine marriage and a career may have been an emancipating choice. For the remaining seventy-two percent there was likely much less choice involved. The economic value of their businesses was likely crucial to familial survival.

This supposition is borne out by another of Baskerville's findings. Between 1881 and 1891, he reports an increasing number of married businesswomen with no husband in the home. In 1881, twenty-one percent of all married businesswomen had no husband in the home; in 1891, the comparable figure was forty percent. From the census data, Baskerville estimates that in 1891, the overall rate of married women living apart from their husbands was ten percent.[26] Thus, separated women were greatly overrepresented among married businesswomen. By 1891, separated women were about six times more likely to enter business than married women with husbands in the home.[27] Separated businesswomen were overwhelmingly under the age of fifty and generally from the lower

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[26] Baskerville, "'She Has Already Hinted at "Board,"'" fn. 37, p. 222.

[27] The information for making these calculations was taken from Baskerville, "'She Has Already Hinted at "Board,"'" pp. 216, 218, 222-223.

economic strata. Of these women, none owned land and under seven percent had domestic servants.[28] They generally ran businesses out of their homes, in 'traditionally female' domains, as cooks, boardinghouse-keepers, milliners, dress-makers, and music and art teachers. Unlike married women realty owners, investors and speculators, who tended to invest by choice, these women worked out of necessity. As Baskerville notes, since the MWPAs were in part passed to protect deserted wives, such a finding should not be surprising. Indeed, the presence of so many separated women among married businesswomen indicates that legislators' implicit premise, that separated wives could enter business or take up wage work to maintain themselves, had a real cultural foundation. Both separated women themselves, and the general public, especially their customers, were satisfied that business was an acceptable and necessary pursuit in such circumstances.[29]

The dramatic importance of small business as an economic niche for separated, divorced and widowed women is apparent from Baskerville's most recent research, derived from a five percent sample of the 1901 census. Baskerville argues that the census of 1901 under-enumerated women's employment by failing to account for women with lodgers and boarders. Adjusting the figures to account for these women produced remarkable results. Male and female labour force participation was virtually equal. Men, who composed seventy percent of the population, made up seventy-one percent of the

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[28] Even these 'servants' may have been illusory indicators: in some cases, especially with regard to boardinghouses, the servants may actually have been employees.

[29] For information on married businesswomen see Baskerville, "'She Has Already Hinted at "Board,"'" pp. 217-224, *passim*.

sample workforce. Moreover, women were much more likely than men to be self-employed: twenty-nine percent of all working women were self-employed, compared to thirteen percent of men. Necessity continued to play a major role in women's self-employment. Single women tended to be employees, while married, widowed and divorced women tended to be self-employed. Widowed and divorced women were greatly over-represented among the self-employed, suggesting that, had it been possible to determine, many of the married women would have been separated or deserted. The reasons for self-employment were likely convenience, social sanction, and remuneration. Many self-employed women worked out of their homes, close to their children and within the domestic sphere; moreover, self-employed women tended to earn more than wage workers, a valuable consideration for a woman with a family to raise or a home to maintain.[30]

A qualitative example of deserted wives' predicament appears in the final case in the register of protection orders issued under the Deserted Wives Act. In September of 1889, Catherine Randall applied to Judge Crease for a protection order under the Deserted Wives Act. She and her husband Moses, a ship's steward, had lived together for a total of three months during their three year marriage. After two months of marriage, Moses left Victoria for San Francisco. Catherine sought to accompany him, but her husband refused, saying "she w[oul]d be c[alle]d a squaw." Catherine was left without funds; fortunately, she was able to depend upon her family. She borrowed money from her father, who lived

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[30] Presentation by Eric Sager on behalf of Peter Baskerville to the Canadian Families Project Conference on the History of Families in Canada, Glendon College, York University, Toronto, April 27, 2001.

in Moodyville on the mainland. Her husband sent money once, about three months after his departure, with which she retrieved certain items from pawn and repaid her father. As soon as she could, she began to maintain herself. Moses returned to Victoria sporadically throughout 1887, assaulting Catherine on several occasions; after one of these beatings, she miscarried. He had not returned since 1887, and by 1889, Catherine's father was interested in establishing her in a millinery. However, he was only willing to do so if an order of protection could be secured to prevent the business from falling into Moses Randall's hands. Judge Crease noted that under the new Married Women's Property Act, there was no longer any necessity for the order, but he granted it in any case, undoubtedly to reassure the father and allow Catherine to get on with her life.[31] Supporting herself through wage work was likely difficult, and perhaps unremunerative. Going into business was apparently one of her best options.[32]

The jurisprudence following the 1887 MWPA, like the cases heard under earlier legislation, reflected contemporary legislative intentions. Judges zealously protected the interests of creditors. This change in judicial disposition was so radical that the MWPA could no longer be used in the manner Amor De Cosmos had envisioned. As Newlands Sawmills and its analogues illustrate, married men could no longer transfer property to

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[31] British Columbia, Supreme Court, Register of Orders Protecting the property of a Wife deserted by her husband, BCARS, C/AB/30.3D, p. 20. British Columbia, Supreme Court, Bench Book, Crease, J., BCARS, GR 1727, vol. 717 (1889-1891), p. 368.

[32] Baskerville, "'She Has Already Hinted at "Board."'"

their wives to protect it from future creditors. Despite the clear parallel of judicial decisions and legislative intentions, however, the concrete references to legislative intention seen in the cases heard under the 1873 MWPA are nowhere to be found in these cases. Still, the parallelism should hardly be surprising. Many members of the bar and judiciary had previously sat as members of the legislature. They were quite aware of legislative intentions. Moreover, their comrades on the government benches were businessmen: in the process of formulating legislation, prominent members of the legal profession rubbed shoulders with major industrialists. Understanding that one-time Premier and Chief Justice Theodore Davie and coal baron Robert Dunsmuir sat on the same side of the legislature goes a long way toward explaining judicial receptivity to Smithe Dynasty goals. Judges were not only receptive to legislators' aims. Many of them moved in the same social and political circles and shared a common cultural outlook.

By the 1920s, then, an entire legislative agenda — the creation of a broad class of property-owning independent commodity producers — had been neutralized by subsequent legislators and judges with differing aims. The legislation was not part of a consistent social vision; nor was it the product of some irrepressible force beyond human control. Understanding the changing identities of governors, and their changing agendas, breaks down the image of the state as a permanent, unchanging, irrepressible entity, slowly forcing the achievement of some predestined society and economy. Through this appreciation of social and political complexity, we gain a much more nuanced and comprehensible understanding of the legislation and the society which emerged. Certainly, while there are underlying similarities within the positions of early reformers

and the Smithe Dynasty — the materialist, accumulationist, progressive outlook — there are nonetheless significant differences between the limited egalitarianism and overt hierarchies they aspired to create. The capitalist society which emerged was influenced by the consecutive displacement and residual effects of multiple agendas with varying ends.

The Smithe Dynasty outlook was not shared by the less wealthy. If Smithe Dynasty legislators and their successors were happy to shift their focus to securing creditors' rights and protecting the less wealthy in their wage-earning capacity, the less wealthy themselves were hardly content with wage dependency. The cases reveal that wage-earning and independent producing families retained an older sense of family security based on property ownership. Regardless of the changing views of the legislature and the courts, the lower classes often sought to use the legislation to protect their family property base from economic volatility. When challenged, some of these couples fought tenaciously in the courts to retain that property. When the judiciary's hostility to families insulating property from creditors through spousal transfers became clear, couples adapted, developing new methods of property protection: rather than transferring property from husband to wife, they made the initial purchase in the wife's name.

Married women also demonstrated their individual dissatisfaction with the legal order established by nineteenth-century legislators. Legislators' priorization of male liberty and the transferability of property held little weight for women concerned about their personal situations. Against a backdrop of very limited inheritance rights, a rather significant number of married women managed to have the family home conveyed into

or purchased in their names, and this possession appeared to provide valuable security in a province with no dower or community-property rights. Sometimes, married women's possession of family property resulted as an incidental benefit of protecting family property from creditors. At other times, couples transferred property into wives' names for the express purpose of succession. These survivorship agreements reveal that married women were often discontent with their limited rights in family property, and negotiated with their husbands or prospective mates to ensure their personal security. Since the judiciary accorded great weight to the verbal understandings underlying equitable trusts, womens' property rights gained through survivorship agreements should have been upheld by the courts. Yet surely as relevant as the case outcomes is that married women made the attempt to defend their interests. These women were hardly content to be manipulated; nor were they content with subordinate property rights. Katrine Fillier's successful retention of family property speaks volumes about her independence; but so do those cases in which wives were ultimately unsuccessful in securing rights to family property.

Women's property ownership and autonomous legal actions are of broader historical significance than may initially be apparent. By 1900, it was clear that the dream of the yeoman smallholder was dead, the victim of subsequent legislative agendas. A small minority held control of British Columbia's natural resources and productive assets. The vast majority of British Columbians were wage earners. Yet the reform package of the 1860s and 1870s was not without residual consequences. Broad property ownership and self-employment among men did not emerge. What resulted was an increasing number of

property-owning and self-employed women. As a direct consequence of the MWPAs, greater and greater numbers of women in British Columbia were owning property or self-employed. As Peter Baskerville points out, by 1901, women in Victoria were as likely to own real property as men. Some were using this property to raise capital. Others were using their independent property rights to start businesses. Women were moving toward the yeoman profile much more rapidly than men.

Liberal reformers were unsuccessful in achieving the gender profile of property ownership they sought in the 1860s and 1870s. Yet they were correct in their theoretical association of property rights and political activity. Married women's property rights contributed greatly to the emergence of organized female political activity. Jose Iguarta's work is of relevance here. Iguarta has made a convincing argument that following the Conquest, Francophone merchants in Quebec were at a distinct disadvantage compared to their English counterparts because their political culture included no sense of individual rights and liberties. In the immediate aftermath of the Conquest, these Francophone merchants, schooled in habits of respect and deference to authority, faced great psychological impediments to asserting their demands in the English manner. Their English competitors, on the other hand, assertively pressed their demands upon government.[33] Yet over time, there can be little doubt that the French learned to assert themselves. By the late 1830s, they figured centrally in a republican rebellion!

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[33] Jose Iguarta, "A Change in Climate: The Conquest and the *Marchands* of Montreal," in R. Douglas Francis and Donald B. Smith, eds., *Readings in Canadian History: Pre-Confederation*, 4th ed. (Toronto: Harcourt Brace & Company, 1994), pp. 285-286.

The situation of women after the MWPAs was analogous. The legal landscape had changed. The MWPAs conferred property rights upon married women, rights they could independently assert in a public forum. As Lori Chambers has pointed out, women need never enter the courtroom to gain new expectations when their rights are altered. Yet women were entering the courtroom. From the 1870s onward, British Columbian women were independently invoking their rights, a behaviour which was repeated on countless occasions over the following decades. In the process, women in the courts were learning their rights and training themselves in public assertion. Perhaps even more importantly, the rest of society was remoralized along with them: it was not only women who were being schooled. Men were also learning that women had rights. The cases discussed above were news and reached a wide audience. They were reported in the newspapers, and equally importantly, provided editorial fodder. Undoubtedly the situations involved were a topic of general conversation among the politically aware. John Robson's fears had proven prescient. Property rights for women were a culture-changing phenomenon.

PART THREE:

'MAINTAINING' A PROGRESSIVE SOCIETY

CHAPTER EIGHT:

THE POLITICAL AND ECONOMIC CONTEXT

OF THE EARLY TWENTIETH CENTURY

At the turn of the twentieth century, British Columbia's politicians took their first, tentative steps into the field of maintenance legislation, attempting to compel men to support their dependents. By the eve of the World War I, middle-class women's organizations had commenced agitating for improvements to these maintenance laws and increased rights in family property. This chapter sets the stage for these changes in family property rights, discussing the nature of the economy, the speculative, destabilizing policies of the McBride government, and the sometimes chaotic, often unfamiliar character of the society emerging on the pacific coast. Emphasis then shifts to the emergence of a broad middle-class reform constituency which sought to control social development and route it along particular channels. Particular attention is devoted to the emergence of environmental theories of social behaviour and child-centered reform efforts among those influenced by the Social Gospel and progressivism. In concluding, the discussion turns to an analysis of the influence of these movements within British Columbia's middle-class women's organizations.

From the late 1890s to the eve of the first world war, British Columbia experienced massive economic and population growth. The world-wide recession of the early 1890s, largely resulting from an American financial crisis, brought a slackening of demand and lower prices for British Columbian resources: forestry, mining, the fisheries, and agriculture all suffered. Economic growth stalled, and the speculative cycle following from the completion of the Canadian Pacific Railroad abruptly bottomed out. The lowest point in the recession came in 1895, after which the economy slowly recovered. By 1901, slow growth was giving way to rapid, exponential expansion. The economy that resulted, however, was far different from that which had existed prior to the Panic of 1893. Over the course of the 1890s, manufacturing, both the primary processing of raw resources and the secondary production of finished goods, declined in relation to overall economic growth. While resource processing grew at a faster rate than secondary manufacturing, both sectors were rapidly supplanted by the resource extraction industries. The new economy was built on the trinity of forestry, mining, and fishing. Development was financed and heavily consolidated by foreign capital and dependent on external markets. Rapid demographic expansion accompanied economic growth. Population growth was shaped by the new economy, and as unbalanced as the work that drew the workers. Between 1901 and 1911, British Columbia's non-native population increased from

149,708 to 372,306. The influence of resource work in attracting immigrants was more than obvious: seventy percent of all adults were male.[1]

Overall, the prosperity which gripped British Columbia in the early part of the new century was fragile, dependent as it was on external markets and sources of capital. While the resource exploitation economy spawned a substantial service sector, it supplanted the much more diverse economic order characteristic of the pre-1890 era. Local government had little control over these external factors, and could do little to stem the simplification of the economy. Yet the Conservative government of Richard McBride did have an enormous impact on the situation. McBride, described by Margaret Ormsby as "an incurable optimist, a 'booster' and a promoter," encouraged economic development in the time-honoured tradition of British Columbian governments: through a continuation of the policy of give-away.[2] In doing so, he helped to push an unstable economy toward greater volatility. McBride's policies fanned speculation, leading to overinvestment, and ultimately, to a collapse of greater proportions than would have otherwise occurred.

Upon taking office, McBride's government assumed great financial difficulties. The public debt stood at over twelve million dollars. The economic upturn and prudent economies introduced by finance minister R. G. Tatlow would remedy the situation

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[1] Lutz, "Losing Steam," p. 90-91; Bercuson, "Labour Radicalism and the Western Industrial Frontier, pp. 141-143; Ormsby, *British Columbia*, pp. 315-317, 338-339, 341-343; Barman, *The West Beyond the West*, pp. 108, 111, 119-120, 183-184, 364, 369 (Tables 7, 11); Eleanor A. Bartlett, "Real Wages and the Standard of Living in Vancouver, 1901-1929," *BC Studies*, no. 51 (Autumn 1981), p. 33.

[2] Ormsby, *British Columbia*, p. 371.

within five years. A little tinkering with forestry licenses helped as well: in order to garner larger revenues from timber licenses, the government revamped the licensing legislation. Twenty-one year leases to cut timber on one-mile square parcels of land were made available for annual rents of $115 in the interior, and $140 at the coast. Investors and speculators snapped up vast parcels of land, especially after the United States withdrew large areas from forestry use for the creation of national forests. From a few hundred leases in 1905, the number shot up to 17 700 in 1907. In 1902, only nine percent of British Columbia's budget was derived from forest revenues; by 1908, that figure had swollen to forty percent. Yet the low rental charge and the closure of American forests do not explain the timber rush in its entirety. The Conservative government had intentionally introduced speculation into the forest sector by making the leases transferable. The result was predictable: a speculative boom ensued between 1908 and 1912, during which timber license prices approached the market value of the timber. This was followed by a major price collapse. The boom, while a temporary boon to speculators, was never good for the industry. During the boom, loggers complained that their access to timber was severely constrained by speculation.[3]

The McBride government also fueled speculation and economic volatility through its railway policy. In 1903 the Grand Trunk Railway announced plans to extend its central-Canadian line to the Pacific. The Laurier government granted subsidies to the railway in 1904 and McBride arranged the purchase of terminal lands at present-day Prince Rupert.

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[3] R. Peter Gillis and Thomas R. Roach, "A Touch of Pinchotism: Forestry in British Columbia, 1912-1939," *A History of British Columbia: Selected Readings*, ed. Patricia E. Roy (Toronto: Copp Clark Pitman 1989), pp. 82-85; Stephen Gray, "The Government's Timber Business: Forest Policy and Administration in British Columbia, 1912-1928", *BC Studies*, no. 81 (1989), p. 26.

Yet the construction of a second transcontinental was not enough for McBride. In 1909, his government agreed to guarantee twenty-one million dollars in four-per cent bonds to back the construction of a third transcontinental, the Canadian Northern Pacific. Separate arrangements and guarantees were made respecting several feeder lines. Believing the program reckless, the cautious Tatlow resigned his post as Finance Minister, and F.J. Fulton resigned as Minister of Lands and Works. These men, and their restraining influence, were replaced by men who shared McBride's booster outlook.

With construction of the Grand Trunk Pacific commencing in 1910 and the promise of the Canadian Northern in the air, a speculative frenzy broke out. American, European and British capital poured into the province's forest, mining, and real estate sectors. Fragmentary evidence suggests that corporate stock in the mining sector was greatly over-valued.[4] The same may have been true in forestry. The publication of the Grand Trunk Pacific route led to massive speculation in interior timber and settlement lands. Various townsites along the route — Prince Rupert, Stewart, Vanderhoof and Fort Fraser — were each touted as the metropolis of the future. Lots in Fort George brought up to ten thousand dollars. In the real metropole, Vancouver, land prices quadrupled and construction activity reached new heights. The annual value of construction permits rose from 1.4 million dollars in 1903 to a peak of 19.4 million dollars in 1912. The city was growing by up to a thousand persons monthly: between 1901 and 1911, the total population increased from 27,010 to 100,401. The massive growth of Vancouver in the

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[4] See Jeremy Mouat, "The Genesis of Western Exceptionalism: British Columbia's Hard-Rock Miners, 1895-1903," *Canadian Working Class History: Selected* Readings, ed. Laurel Sefton MacDowell and Ian Radforth (Toronto: Canadian Scholars' Press, 1992), pp. 333-354.

early part of the century reflected the growing importance of the service sector: in 1910, nineteen percent of the province's GDP came from primary and secondary manufacturing, thirty percent from resource exploitation, and the remaining half from the service sector.[5] It would have been strange indeed if such an influx did not seem confusing and chaotic to more settled residents.

By 1912, R.G. Tatlow was not alone in his trepidation over the McBride government's boosterism. Margaret Ormsby writes that "[c]autious businessmen had begun to warn the government that a real estate boom was unhealthy." Undaunted, McBride pressed ahead. In the spring of 1912, just prior to calling another election, the Premier passed legislation subsidizing or guaranteeing bond issues for railway expansion in most of the settled areas of the province. The largest of these plans involved the construction of a third major railway, the Pacific Great Eastern, to link Vancouver and Fort George.[6] Yet McBride's irrepressible boosterism, while it could drive speculation to new heights and inflate land values to unrealistic levels, could not alter the basic facts of the economy: an economy based on external investment and external markets was not of his making; nor was it within his control. This became apparent in the autumn of 1912. Money markets tightened and British capital withdrew from British Columbia on rumours of war. Meanwhile, demand for basic commodities slumped: copper, silver and lead markets

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[5] Barman, *The West Beyond the West*, pp. 179-193; Ormsby, *British Columbia*, pp. 343-360; Patricia E. Roy, "Progress, Prosperity and Politics: the Railway Policies of Richard McBride," *BC Studies*, no. 47 (1980), pp. 3-28; Bartlett, "Real Wages," p. 9.

[6] The Province agreed to guarantee the railway's bond issue to the extent of $35,000 per mile at 4 percent. Roy, "Progress, Prosperity and Politics," p. 17.

declined in 1913; and when the prairie boom collapsed in 1913, the market for lumber collapsed along with it. As resource commodities went, so went the dependent service sector and the real estate boom.[7]

The consolidation of capital and rampant speculation characteristic of British Columbia's early twentieth century economy had grave effects on labour relations and increased class tensions. While wage labour had been prevalent in British Columbia since the 1860s, the consolidation of capital sharpened class lines and increased the physical and psychological distance between employer and employee. Firms grew larger and ownership more remote. The simplified, stratified culture described by Cole Harris, characterized by the common industrial experiences of large groups of workers and a dominant bourgeois-working class axis, seems a reasonable depiction of the cultural universe in which resource workers lived.[8] A huge gulf separated workers and employers in their struggle over the division of the profits from resource exploitation. Some workers emigrated from Europe with a knowledge of socialism and trade unionism. Even more brought expectations of social advancement and occupational independence. The working conditions they encountered on British Columbia's industrial frontier were often dismal, sometimes dangerous, and the pay insufficient or issued in company scrip.[9]

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[7] Ormsby, *British Columbia*, pp. 365, 369, 384.

[8] Harris, *The Resettlement of British Columbia*, p. 257.

[9] Bercuson, "Labour Radicalism and the Western Industrial Frontier," pp. 154-175 *passim*; Belshaw, "The British Collier in British Columbia," pp. 11-36 *passim*.

The corporate structure of distant ownership and local management interacted with the speculative boom and workers' expectations to produce labour strife. Jeremy Mouat's description of a series of strikes in the Kootenays is likely typical of the situation in large corporations across the province during the booming McBride Era. Mouat argues that the Kootenay strikes were not the product of radical ideologies, but inflated stock prices. Shareholders pushed management to fulfill unrealistic profit expectations based on overvalued stock. Most of the costs of production were fixed, and beyond management's control. So, in order to satisfy shareholders, management tried to cut labour costs. Strikes followed.[10] Yet speculation and overoptimistic expectations did not cause the strikes on their own. The corporate structure, and the lack of face-to-face contact between owners and workers was also important. Distant owners and shareholders could push for profits at workers' expense, without ever having to confront the workers or understand the material realities wage cuts forced them to endure. Given the situation, strikes in the fisheries, mines, and in railway construction were common, with pronounced strike waves in the 1900-1902 and 1912-1914 periods.

If strikes epitomized the independence of wage workers, unemployment demonstrated their vulnerability. Sager and Baskerville draw a clear connection between unemployment and wage labour, writing that "Unemployment was a systemic form of deprivation within industrial capitalism: capitalist society obliges able-bodied adults to seek self-support through labour markets which cannot guarantee that every adult has a

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[10] Jeremy Mouat, "The Genesis of Western Exceptionalism," pp. 333-354.

job." In a seven-city sample from the 1901 census, they have calculated that twenty-one percent of all Canadian workers were unemployed at some point during the year. Eleven percent had been unemployed for over three months. In British Columbia, where greater numbers worked for wages than elsewhere in Canada, unemployment had dramatic effects, felt most sharply by recent arrivals. In the resource industries, and the dependent manufacturing and service sectors, unemployment followed cyclical demand; that is, it rose and fell with the boom and bust economy. Wage labour was also subject to seasonal variation. Resource industries, especially fishing and logging, were active primarily in the warmer months. When winter curtailed operations, unemployed workers flocked to urban areas. In Vancouver, New Westminster and Victoria, the unemployed were concentrated in low-rent districts; when cyclical and seasonal unemployment coincided, municipal relief capabilities were inadequate.[11]

Workers' situation in the pre-World War One years led to both workplace militancy, as demonstrated by strike activity, and labour radicalism, most evident in the syndicalist IWW and OBU, and the election of socialist political representatives. Governments of the period were distressed by these developments and tended to side with industry against both threats.[12] Government was not alone in its concern over labour tensions and the

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[11] Sager and Baskerville, "Locating the Unemployed," pp. 44-45, 48-49; Barman, *The West Beyond the West*, p. 125; Bartlett, "Real Wages," p. 8; Ormsby, *British Columbia*, p. 384. Given the well-known tendency of the census to under-enumerate the poor and transient, these unemployment figures are likely underestimates. Baskerville and Sager, "Finding the Work Force," p. 538.

[12] Sometimes the means were subtle. In 1907, the federal government passed the Industrial Disputes Investigation Act, requiring miners and workers in other essential 'infrastructural' industries to invoke conciliation hearings prior to striking. As Jeremy Webber writes, "The postponement of strikes could undermine a union's bargaining position, sapping enthusiasm and giving the employer time to prepare." Yet government was not always subtle in providing aid to employers. In perhaps the most overt example of one-sided government intervention, acting Premier William Bowser called on the militia to quell riots

working class. Given the bourgeois middle-class preferences for property, privacy, and sobriety, it would have been surprising if middle-class British Columbian urbanites had not taken exception to the social conditions developing in their midst. The overwhelmingly male population, the labour unrest, transiency and unemployment, and the concentration of the poor immigrant population in specific urban areas were all unfamiliar and unsettling. The close confines of city life brought the bourgeois into close contact with their working-class neighbours. While the recent immigrants and the unemployed were geographically concentrated, more generally the working class were not. In Vancouver, middle-class and working-class families lived side-by-side in the same neighbourhoods;[13] they encountered one another in the streets; and increasingly, with the proliferation of affordable print media, the middle class read about working-class lives in opinion pieces, exposes, and court reports. Benedict Anderson has written that the birth of bourgeois nationalism was due in great part to the imagined communities created by

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in Nanaimo during the lengthy Vancouver Island coal strike of 1912-1914. Not content with merely restoring peace, the government kept the militia on the scene for over a year, escorting strike-breakers to and from the mines and generally maintaining order. The provincial government was not alone in its activist intervention. The federal government took the opportunities provided by special wartime powers to detain leftist radicals and ban publication of their media during the war; this repression was maintained for two years after the armistice, as government censors and intelligence agents used wartime legislation to hamper the labour revolt of 1919-1920. Jeremy Webber, "Compelling Compromise: Canada Chooses Conciliation over Arbitration, 1900-1907," *Labour / Le Travail*, no. 28 (1991), pp. 39-40; Ormsby, *British Columbia*, p. 367; Barman, *The West Beyond the West*, p. 214; Gregory S. Kealey, "State Repression of Labour and the Left in Canada, 1914-20: The Impact of the First World War," *Canadian Historical Review*, vol. 73 (1992), pp. 281-314.

[13] Information from a class-based population map produced by Ian Buck, University of Victoria, which was presented by Larry McCann to the Canadian Families Project Conference on the History of Families in Canada, Glendon College, York University, Toronto, April 26-28, 2001.

newspapers.[14] The same is likely true of social reform: it was only when middle-class individuals began to read about their working-class neighbours, gained a forum for discussing their own values, and developed a sense of a national community with common values that social reform became a mass movement. Working-class individuals lived and behaved in ways unacceptable to their middle-class neighbours; yet these middle class neighbours tended to have few direct means of influencing their behaviour.

Middle-class social reform movements represented an attempt to develop influence over mass social behaviour. Dorothy Chunn has written that a widespread perception of "social disorganization and crisis" fueled an early-twentieth-century Ontario reform movement pre-occupied with morality, family breakdown, and the survival of the race/nation. This was a self-reflective middle-class campaign, and reform efforts, Chunn continues, "were directed primarily at the moral and political regulation of the marginal, that is, those among the working and dependent poor who would not or could not adhere to middle-class norms and were therefore at risk of becoming deviant and/or dependent."[15] Yet the depiction of a bourgeois quest to impose self-reflective ideals on the working class misses a fundamental aspect of what was taking place. The bourgeois were unhappy with the society which was emerging around them. In observing the condition of their impoverished neighbours, they realized the hollowness of the vision of a harmoniously advancing hierarchical society. Capitalism was losing its moral

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[14] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. 2nd ed. (New York: Verso, 1991). See also Arthur S. Link and Richard L. McCormick, *Progressivism* (Arlington Heights, Illinois: Harlan Davidson, 1983), p. 9.

[15] Chunn, *From Punishment to Doing* Good, p. 28

legitimacy. Elsewhere in North America, historians have described three inter-related reform movements, which set out to regenerate society during the early part of the twentieth century. The movements, variously identified by historians as the Social Gospel, progressivism, and maternal feminism, each form part of a complex, intricate whole. Although these movements have been identified and described separately, they cannot truly be extricated from one another. Memberships and ideologies overlapped, as did function: each movement sought to reinject morality into the capitalist order, and each was concerned with the health of the national community.

The Social Gospel emerged out of several crises faced by Christians in the late nineteenth century. On one hand, Christians faced an intellectual crisis, in which religious skepticism and secular explanations of man's existence and behaviour were gaining influence. On the other, the churches were forced to re-examine their social responsibilities, given the disparities of wealth and poverty generated by modern industrial capitalism.[16] The intellectual crisis arose on two fronts, each of which attacked the validity of biblical teachings by undermining biblical truth claims. With the publication of Charles Darwin's work on evolution, the biblical account of creation was thrown into dispute.[17] The emergence of German historical, or "higher" criticism of the

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[16] Ramsay Cook, *The Regenerators: Social Criticism in Late Victorian English Canada* (Toronto: University of Toronto Press, 1985), pp. 4-5, 8-9, 174-175.

[17] Some Christians opposed Darwinian evolution outright. Others tried to synthesize biblical claims with the new scientific hypothesis. None was completely comfortable with the uncertainties created by Darwin's alternative. Yet few were concerned with the mechanics of Darwin's theory. Evolution by natural selection was not the main issue. Rather, the concern was that belief in a Godless creation would undermine human morality: if there was no God, no ultimate arbiter of human lives, why would men be moral? Cook, *The Regenerators*, pp. 9, 11, 15.

bible also threw long-accepted Christian truths into doubt, questioning the authorship, authenticity, and accuracy of biblical texts.[18] Popularized versions of evolutionary theory and higher criticism were widely discussed in Canada by the 1870s. In the 1890s, these debates were reaching a crescendo.[19]

By the turn of the century, the material and social conditions of urban capitalist society were sources of widespread concern. Worker exploitation, poverty, unhealthy, dangerous working conditions, poor housing, overcrowded and unsanitary living conditions, and high rates of infant mortality were all too common. To these material consequences of urban industrial capitalism, most Christians would have added a number of social consequences: alcoholism, family breakdown, crime, juvenile delinquency and a general moral decline, especially with regard to public entertainment and Sabbath violations.[20] The mainstream churches were accused by liberal Christians, socialists, spiritualists, and secularists of supporting the established order and ignoring the needs of

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[18] The higher critics insisted that biblical texts must be understood in their historical context. They questioned the authorship of the bible, the authenticity of certain biblical books, and subjected the Gospel accounts, especially the Gospel of John, to rigorous scrutiny. Cook, *The Regenerators*, p. 17.

[19] Cook, *The Regenerators*, p. 24.

[20] Moral concerns may have taken on an added urgency in the context of an overwhelmingly male population. Such concentrations of masculinity were viewed with suspicion simply because they failed to conform with middle-class norms of domesticity and sexuality. The prevalence of specific 'vices' among an overwhelmingly male population, most notably public drinking, would not have sat well with middle-class Christians. If the material and moral effects of capitalism on the working class were not enough, it was becoming quite apparent that the working class was leaving the churches. In British Columbia, church attendance was lower than elsewhere. This too may have reflected the disproportionately male population. Richard Allen, *The Social Passion: Religion and Social Reform an Canada, 1914-28* (Toronto: University of Toronto Press, 1971), p. 28; Lynne Marks, "'Leaving God Behind When They Crossed the Rocky Mountains': A Gender, Family, Race and Class Analysis of Non-Belief in British Columbia in 1901," Paper presented at the Canadian Families Project Conference, Toronto, April 2001.

the oppressed.[21] The vast majority of these critics were not atheists, but rather aimed to invoke a reinterpretation of Christianity. Christianity should not uphold the social order, the critics argued, but rather, provide the standard against which the social order should be evaluated. Industrial society should be reformed to conform with Christian ethics. Historian Ramsay Cook writes that in the context of the intellectual and social challenges to Christianity, clergy and lay Christians alike jumped at the chance to apply Christian ethics. They ignored the foundational attacks upon Christianity's claims to historical truth, hoping to make Christianity socially relevant through its practical application.[22] In other words, Christians took the ostrich approach, burying their heads in the sands of social regeneration to avoid the more difficult issues surrounding scriptural truth.

Richard Allen, the Social Gospel's other major historian, would temper such assertions.[23] Allen sees the roots of the Social Gospel movement in the temperance movement which preceded it. In the campaign against drink, he writes, "a rude sort of environmentalism was creeping into" Christian circles. Temperance advocates were coming to the conclusion that the best way to reform the individual was to reform his

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[21] Cook, *The Regenerators*, pp. 82, 163-164, 228.

[22] Cook writes, "Attending to the practical tasks of social regeneration became a substitute for the formidable labour of reformulating theological doctrine. Christian action was given priority over Christian thought, and practice was divorced from theory." He continues, "By translating Christianity into a message of social reform and good citizenship, liberal Christians believed that their religion could be revitalized and brought into touch with the needs of the times. That, in turn, would save the church from obsolescence." Cook, *The Regenerators*, pp. 8, 229, 230.

[23] While noting Cook's position that the Christian "preoccupation with social problems may have been partly motivated by a desire to escape from theological perplexities," Allen believes that the desire to make the gospel responsive to human needs was equally, if not more important. Allen, *The Social Passion*, p. 4.

environment. This perception slowly infiltrated the churches, creating a broader focus on social reform in general, and precipitating great changes in theology.[24] In fact, traditional Christian theology was turned on its head by the Social Gospellers. Where nineteenth-century Christianity focussed on individual reform and salvation, by the early twentieth century many social gospellers shared the conviction that social salvation was the pre-eminent concern. The older focus on individual salvation was problematic, and emblematic of the self-centered competition and greed which plagued mankind. Social Gospellers held a new sense of men's collective, corporate guilt in social evils.[25] Salvation would only arrive when human beings, and their corporate structures, began to serve others rather than themselves.[26] To achieve such ends, many social gospellers looked to the state. Their experience with temperance and prohibition crusades had led them to regard the use of state control as an efficient means of accelerating social progress.[27] By 1918, the Methodist general council was advocating close government control of the private sector, the encouragement of industrial democracy, and broad

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[24] Allen, *The Social Passion*, p. 12.

[25] Allen writes, "unless men, including their corporate structures, accepted their implication in social guilt, and they and their corporate structures were prepared to stand under the radical judgment of God, there was no new way forward." Allen, *The Social Passion*, p. 45.

[26] In the words of the Reverend S.S. Craig, a Presbyterian minister, "The only sufficient apology for the existence of the church today is that it gets God's will done on earth ... Christianity may be made immediately effective in delivering the masses from industrial slavery, in the purification of politics, in the redemption of man socially, in the harmonization of all true human interests, in the perfect correlation of all rights and duties, in the realization of the Kingdom of God on Earth." Cook, *The Regenerators*, p. 194.

[27] Allen, *The Social Passion*, p. 39.

social insurance and welfare programs.[28] The Kingdom of God, it seems, was envisioned as a variant of the co-operative commonwealth.[29]

The second major influence on social and legal reform in the era cannot really be described as a movement per se. Rather, progressivism was more of a mentalité, an orientation or approach. Historians in the United States have devoted a great deal of attention to the rise of progressivism. In Canada, the phenomenon is less-well documented. Much of what can be said about the progressive mindset in Canada must be teased from other sources. In the United States, progressivism has been traced to the rise of a middling strata of professional businessmen, administrators, engineers, social scientists, physicians and lawyers around the turn of the twentieth century.[30] These people were too diverse perhaps to be labelled a class, although they generally shared a common urban-Anglo-Protestant background.[31] More importantly, they shared a certain mindset, a sense of community and confidence generated by their professional identification and affiliations, and a desire to apply their knowledge and skills to social problems. In their professional lives, many of the progressive reformers specialized in information management, in gathering and analyzing statistical data; others were

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[28] Ibid., p. 74.

[29] This was a Christian vision which appealed to socialists and the labour movement. It was also a vision which would ultimately alienate more conservative Christians. The social gospel rejected the traditional Christian faith in individual salvation and heavenly reward, substituting a faith in progress and the achievement of worldly happiness. Allen, *The Social Passion*, p. 64; Cook, *The Regenerators*, p. 60.

[30] Robert H. Wiebe, *The Search for Order, 1877-1920* (New York: Hill and Wang, 1967), pp. 111-112, 127; Link and McCormick, *Progressivism*, p. 6.

[31] Link and McCormick, *Progressivism*, pp. 4-5; Wiebe, *The Search for Order*, p. 128.

schooled in economics, in psychology, and in sociology. The common denominator among them was a belief that social problems could be solved through the application of the scientific method, the basic paradigm of all of their fields: data gathering and detailed observation, coupled with expert analysis and continuous management were the keys to resolving social problems and social divisions. Anxious to stake out occupational and professional territory, and confident in their abilities, progressive professionals and their associations were only too willing to propagandize the social benefits their particular disciplines could deliver to society.[32]

In several ways, the progressive approach differed from its nineteenth-century predecessors in reform. In the nineteenth century, reformers tended to picture a clockwork universe, functioning according to rational laws. Consequently, writes Robert Wiebe, they "customarily looked for that one great askew, that one fundamental rule violated, as an explanation for America's troubles. Reset the gear, abide by the great law, and all difficulties would vanish." Hence the nineteenth-century affinity for panaceas: the great solutions which remedy all social ills. To speak of temperance, free silver, and the single tax is only to touch on the nineteenth-century fascination with panaceas. Interest in panaceas did not end abruptly at the turn of the century; but a new mindset was emerging. Progressives saw society as "a vast tissue of reciprocal activity" too complex for simple solutions. In fact, progressives generally did not believe in permanent solutions. Rather, they held what Wiebe termed the "bureaucratic mindset," focussing on

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[32] Link and McCormick, *Progressivism*, pp. 24, 36, 71, 76, 85; Wiebe, *The Search for Order*, pp. 113-121.

the continuous management of complex flows. The solutions proposed by progressives "resembled orientations much more than laws," and stress was laid upon vigilant watchfulness and continuous management. Moreover, great emphasis was laid on efficiency, and the smooth, harmonious operation of society. Wiebe tellingly refers to "a frictionless operation analogous to the factory under pure scientific management."[33]

Due to their class and occupational positions, progressives were generally attached to the social system. Corporate capitalism had a great deal to offer to the middle-class professions: as Martin Sklar has written, corporations provided an outlet for professional skills and offered sturdy, predictable ladders of occupational mobility and financial success. For the non-proprietary professional, corporations offered "opportunity for employment and advancement based on 'merit' without the obstruction of nepotism found in proprietary enterprise." In addition to democratizing entry into positions of regional or national power, corporations offered good salaries, pensions, and an opportunity to invest without the headaches of personal management. Progressives, at base, held a love-hate relationship with corporate capital. They were outraged by the worst aspects of urban-industrial society. They acknowledged the existence of social problems and group conflict. But they accepted the permanence of large-scale capitalism

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[33] Progressives, Wiebe writes, "pictured a society of ceaselessly interacting members and concentrated upon adjustments within it. Although they included rules and principles of human behavior, these necessarily had an indeterminate quality because perpetual interaction was itself indeterminate. No matter how clear the evidence of the present, a society in flux always contained that irreducible element of contingency, and predictability really meant probability." Wiebe, *The Search for Order*, pp. 62, 145-147, 156.

and wage labour. They were reformers, not radicals. Unlike radicals, they did not want to dismantle industrial capitalism, but rather to ameliorate working and living conditions.[34]

Progressive reformers also differed from their nineteenth-century predecessors in that they held a belief in environmental rather than personal causes for poverty and destitution. In the nineteenth century, reformers often maintained that individual moral failure was responsible for poverty and other social problems. Such thinking was closely related to Protestant theology and the need for personal regeneration and salvation. This is not to say that the progressives were secular. Most influential progressives held deep religious convictions. In fact, in many cases, it was a sense of Christian duty, drawn from the social gospel movement, which impelled them to work for the betterment of the working classes, the poor, and the destitute. This religious activism imbued progressivism with one of its most notable characteristics: the marriage of religiously motivated social moralism with rational scientific methods of reform.[35] However, although they retained Christian beliefs, progressives, like social gospellers, placed emphasis on environmental causes: "The fundamental assumption of progressives," write Link and McCormick, "was their deeply held conviction that men and women were creatures of their environment." Given the materialist bias of the scientific method, this perspective was unavoidable.

Initially, progressives organized voluntary societies, gathered and analyzed information, and proposed and publicized solutions. Because of their rationalist

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[34] Sklar, *Corporate Reconstruction*, pp. 23, 26; Wiebe, *The Search for Order*, p. 165; Link and McCormick, *Progressivism*, pp. 21, 25.

[35] Link and McCormick, *Progressivism*, pp. 22-23

mentality, progressives shared a broad belief that social harmony, cohesion and justice demanded some degree of social planning and management. Usually, it became apparent that any meaningful solution was beyond the capabilities of voluntary societies. The sheer magnitude and complexity of the social problems they confronted convinced the progressives that only government possessed the means necessary to implement change. The favoured remedy, the system-wide solution in which progressives had the most confidence, was legislation accompanied by public administration. As a result, government bureaucracy expanded rapidly as new departments were developed to administer progressive programs. Yet while they often turned to government, progressives disagreed vehemently over the acceptable limits of coercion, understanding that control posed the threat of repression. Indeed, repression often did result, through definitions of justice and propriety based on religious and class prejudices and preferences, and a professional arrogance which failed to recognize that experts were not necessarily impartial.[36]

Female involvement in social reform was typical across the continent during the early twentieth century. Jean Barman explains this reform demographic with reference to middle-class women's leisure time. Nineteenth-century separate spheres ideology, popular among the middle classes, assigned men to the public world of work and women to domestic labour. By the late nineteenth century, greater numbers of middle-class families could afford domestic servants or labour-saving machinery, and some middle-

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[36] Link and McCormick, *Progressivism*, pp. 16, 21-22, 57-58, 61-62, 68-71, 77-78, 84.

class women began to gain substantial amounts of leisure time. Yet any move out of the domestic sphere had to be reconciled with contemporary gender roles. Rather than outrightly confronting established gender norms in the tradition of the equal-rights feminism of the 1860s and 1870s, women at the turn of the century justified their movement out of the domestic sphere by expanding socially acceptable roles for women into the public sphere: they built on widely-held beliefs in female moral superiority, innate maternal capacities for nurturing others and child rearing, and the "imperative within Christianity to do good works" to justify their involvement in the wider world. These women, who historians have dubbed maternal feminists, addressed social and moral issues considered the specific domain of women, and more specifically, mothers: child poverty and infant mortality, public sanitation, juvenile delinquency, prostitution, gambling, alcoholism, and wife desertion to name but a few. Women's organizations generally began in the churches, as women's auxiliaries, and were heavily influenced by the social gospel. Over time greater numbers of secular associations employing progressive methodologies developed.[37] Their aims were formulated within these associations.

The perspective of the maternal feminists reflected their middle-class origins. Maternal feminists sought no systemic change in industrial capitalism and the concentrations of wealth and poverty it created. Their program was ameliorative and

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[37] Barman, *The West Beyond the West*, pp. 202, 204, 209; Falcon, "'if the evil ever occurs,'" p. 7; Teitelbaum, "Family History and Family Law," p. 1143; Gillian Weiss, "Women and Reform in British Columbia: Some Preliminary Suggestions," *In Her Own Right: Selected Essays on Women's History in B.C.* ed. Barbara Latham and Kathy Kess (Victoria: Camosun College, 1980), p. 282.

reformist. It was hardly revolutionary. The maternal feminists were women in relatively comfortable situations, attached to their own prosperity within the prevailing economic system. They had little desire to interfere with that success. Moreover, their own families had succeeded, and they were quite aware of the individual effort those successes had required. Like others in the middle class, their personal experiences seemed to confirm the validity of meritocratic theory, and suggested that the failures of others were at some level moral failures; yet this sensibility existed uneasily alongside an keen awareness of environmental influences. Maternal feminists tended to describe and address social problems and their human casualties through an amalgam of moralism and environmentalism, associating poverty, disease, and crime. Although they periodically debated the causal linkages between these factors — for example whether poverty and disease led to crime or vice-versa — most often, writes Mariana Valverde, they "ignored causality and simply linked together physical, moral, and juridical forms of degeneration under the overall rubric of 'slum conditions.'"[38]

The combination of environmentalist thinking and moral concerns led to a focus on reforming social behaviour by reforming the legal environment. Maternal feminist reformers were convinced that numerous social problems could be redressed if adults could be persuaded to accept their familial obligations and social responsibilities. Thus, their legal reforms often sought to impose obligation or reformulate social roles and individual rights according to the moral standards of the day. Theirs was a project of re-

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[38] Mariana Valverde, *The Age of Light, Soap and Water: Moral Reform in English Canada, 1885-1925* (Toronto: McClelland and Stewart, 1991), p. 133.

education and remoralization, both of individual and collective values.[39] Their concern with social reform was rooted in a middle class social vision, and expressed through nationalistic ideology and nation-building concerns. Mariana Valverde has suggested that their voluntary associations were "far more concerned about nation-building and even about strengthening the state than the state itself; they often chastized it for not exercising enough power, particularly in the areas of social welfare, health, and immigration."[40]

The point of convergence for all three strands of reform was often a focus on children. Environmentalism and a faith in progress permeated all three movements. "If humanitarian progressivism had a central theme," writes Robert Wiebe, "it was the child."[41] In part this reflected the influence of women in the progressive era and their cultural role as child-nurturers. Yet it was more than this. The progressive belief in the possibility of social improvement, in social evolution, combined with their environmental focus to make children a natural target of their reforms. This child-centered approach meshed well with Evangelical Social Gospellers too, whose campaigns to save souls clearly recognized the importance of reaching and remoralizing children at a young age. Campaigns for mother's pensions, labour legislation, health care, urban sanitation, education, and improved recreational facilities all centered on children. The sense among

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[39] The moral reformers of the progressive era were not satisfied with mere outward conformity. Rote learning and following rules were not enough. They were concerned with building character, with securing internal assent. Valverde, *The Age of Light, Soap and* Water, pp. 26-27.

[40] Valverde, *The Age of Light, Soap and* Water, p. 25-26.

[41] Wiebe, *The Search for Order*, p. 169.

both the adherents of the Social Gospel and the progressives was that there was no more effective means of building a better future and a better society than to mould its children, the next generation. For perhaps the first time, a sense was present among the population that they were not raising children to be like their parents in time-honoured fashion, but to be better than their parents.[42] Since the progressives believed so strongly in the influence of environment on personality and character, many of their reforms focussed on altering children's environment for the better. Change the environment, the reasoning went, and you change the child. The enterprise gained a sense of urgency from a combination of competitive Social Darwinism, a falling birthrate, and fears of race suicide.

In Canada, such reasoning was reinforced by popularized versions of the work of Friedrich Froebel. Froebel argued that children had a tender, plant-like nature, susceptible to changes in their environment. Children were heavily dependent, fragile, and easily corrupted; they required firm, loving control and protection to prevent their "incipient waywardness" from taking root. Children required food, clothing, shelter and proper nurture. Where older child-rearing beliefs focussed upon correcting and weaning out the innately "restive, refractory" impulses and characteristics of children — the "Old Adam" in their bones, writes Neil Sutherland — the environmental and Froebelian beliefs of the progressive era focussed on the parent's actions in the light of children's general innocence, moral fragility, and vulnerability to temptation. In the progressive era, the

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[42] Wiebe, *The Search for Order*, p. 169; Link and McCormick, *Progressivism*, p. 79; Neil Sutherland, *Children in English-Canadian Society: Framing the Twentieth-Century Consensus* (Toronto: University of Toronto Press, 1976), p. 17

blame for poorly behaved and anti-social children rested not in the nature of the child, but in the improper nurture provided by the parent. Social reformers and social welfare workers looked for evidence of child-neglect, and they tended to define that neglect in terms of deviation from idealized orderly, comfortable, genteel middle-class standards. The general tenor of the literature is that social and child welfare work was imposed by the middle-class on the working class. Ignorance of proper child-raising techniques, willful child-neglect, and marital discord were considered more common among the working-class; pauperism, alcoholism, and crime were believed to replicate themselves; and perhaps most frightening of all, writes Sutherland, middle-class parents "feared that badly brought up or poorly cared for children would menace the well-being of their own more carefully reared offspring." In this context, middle-class volunteers and professionals invaded the households of the poor to investigate conditions and attempt remedies.[43]

How applicable is this generalized portrait of the early twentieth century reform movement to the British Columbian situation? On the surface, it seems to characterize British Columbia quite well. The social reform movement in early twentieth century British Columbia has been described by Jean Barman as "a largely female and middle-class enterprise."[44] Women active in voluntary associations, especially the urban-based

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[43] Chunn, *From Punishment to Doing* Good, pp. 36-39; Sutherland, *Children in English-Canadian Society*, pp. 11, 18-19, 96; Valverde, *The Age of Light, Soap and* Water, p. 29; Barman, *The West Beyond the West*, p. 203.

[44] Barman, *The West Beyond the West*, p. 203.

National Council of Women,[45] Vancouver's University Women's Club,[46] and rural Women's Institutes across the province,[47] were the most prominent and active group of social and legal reform advocates in early-twentieth-century British Columbia. Gillian Weiss's study of 1534 members of five voluntary organizations in Vancouver between 1910 and 1928[48] provides an interesting collective biography of these women, confirming and expanding upon anecdotal and qualitative impressions based on associational leadership profiles. Clubwomen were generally middle-aged, middle-class, married, and of British descent.[49]

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[45] The National Council of Women of Canada was formed in 1894 by Lady Aberdeen, wife of the Governor General. The Council was an umbrella group providing a forum for various women's groups to communicate their concerns and coordinate research and lobbying efforts. There were local councils of women in most major cities. The association had less of a presence in rural areas. The NCW had a broad base of membership, encompassing women of many Christian backgrounds. Indeed, the desire to include women of many sects resulted in a tradition of silent prayer at meetings. The WCTU and YWCA never affiliated with the NCW because of such practices; they favoured the spoken prayer of Evangelical Protestant traditions. Valverde, *The Age of Light, Soap and Water*, pp. 61-63.

[46] Evelyn Farris founded Vancouver's University Women's Club in 1907. Members were required to have a bachelors degree, and thus most were both well-educated and well-travelled, since there were no universities within British Columbia at the time. Elsie Gregory MacGill, *My Mother the Judge: A Biography of Judge Helen Gregory MacGill* (Toronto, Ryerson, 1955), p. 118.

[47] Women's Institutes were founded in 1909 with the aid of grants from the provincial Department of Agriculture. The mandate of the institutes was to improve the conditions of rural life and aid in the establishment of permanent farming communities, through study and education. The women's institutes took an active interest in law reform, hosting numerous speakers on the subject from 1912 onward and issuing informational pamphlets. Alexandra Zacharias, "British Columbia's Women's Institutes in the Early Years," *In Her Own Right*, pp. 55-56, 59-60, 62-63.

[48] These were the Local Council of Women, the University Women's Club, The Vancouver Women's Building Society, The New Era League [women's suffrage], and the Women's Forum [municipal ratepayers]. Gillian Weiss, "The Brightest Women of Our Land: Vancouver Clubwomen, 1919-1928," *Not Just Pin Money: Selected Essays on the History of Women's Work in British Columbia*. ed. Barbara K. Latham and Roberta Pazdro (Victoria: Camosun College, 1984), pp. 200-201.

[49] Weiss, "Vancouver Clubwomen," pp. 200-207.

Weiss characterizes women's associations in British Columbia as bastions of maternal feminist activity. Like their counterparts all across the country, Vancouver's clubwomen were dedicated to applying their "natural motherly understanding and abilities" to the moral and social problems of the day "by stepping into a wider and more public role." In fact, Weiss goes so far as to declare that although women's campaigns produced equal rights discussions, the commitment to equal rights was superficial. The rhetoric, she argues, was more the product of a suffrage campaign intended to allow mothers to exert their influence than any deep commitment to gender equality.[50] Weiss's findings also point to the influence of the Social Gospel among women's associations: sixty percent of the women whose religious affiliation could be determined were identified as Methodist or Presbyterian, the two denominations most closely associated with the Social Gospel. Nonetheless, she stresses that there is no direct evidence that the churches worked through the organizations in question.[51]

Finally, Weiss's survey also points to the influence of progressivism among the ranks of women in Vancouver's voluntary associations. Significant numbers of clubwomen were well-educated: 430 of 1534 clubwomen held university degrees. Moreover, twelve per cent of all clubwomen were employed professionals. Certainly, these women would

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[50] Weiss, "Women and Reform in British Columbia," pp. 281-282.

[51] This may be an underestimate of the influence of Social Gospel on the women's movement. Weiss's sample does not include the Women's Christian Temperance Union, active in Victoria since 1882. Nor does it include the Young Women's Christian Association. On the other hand, she provides no detailed accounting of the relative numbers of Methodists and Presbyterians, an important omission, since Presbyterians were somewhat reticent partners in the social gospel, putting less emphasis on sociology and social work, and more on the importance of individual salvation. Weiss, "Vancouver Clubwomen," 199-207; Weiss, "Women and Reform in British Columbia," pp. 281-282. Barman, *The West Beyond the West*, p. 209; Valverde, *The Age of Light, Soap and Water*, p. 54; Cook, *The Regenerators*, pp. 208-9.

have been exposed to progressive ideas and methods. If not, they gained that exposure when they joined the largest women's associations. The National Council of Women and its locals employed decidedly secular progressive methods: rather than the personal philanthropic work performed by many church-based associations, the Local Councils were encouraged "to investigate matters properly, collect statistics, and learn to make reports." Armed with such information, both the national and local bodies lobbied the state, pressing for coercive measures. The University Women's Club and Women's Institutes also encouraged their members to study important social issues and actively promote social improvement. Importantly, women active in these organizations shared the progressive/maternal feminist belief that proper child nurture was crucial to social progress from an early date. In 1909, Helen Gregory MacGill and Mary Ellen Smith established a Creche in Vancouver to provide free day care for working mothers. MacGill was also instrumental in organizing public health clinics for infants and children. As her daughter wrote, MacGill's "irreducible premise" was "'the paramount good of the child'—to her more an article of faith than of statute or training."[52]

This broad profile of associational members, while invaluable in outlining general trends, neglects some of the more subtle influences on British Columbia's women's movement. Profiles of the women's movement leadership suggest that while the Social Gospel influence was important, members of non-Social Gospel denominations were also prominent: of nineteen women's association leaders profiled by Linda Hale, four were

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[52] Weiss, "Vancouver Clubwomen," pp. 203-204; Valverde, *The Age of Light, Soap and Water*, pp. 61-63; Zacharias, "British Columbia's Women's Institutes," pp. 59-60; MacGill, *My Mother the Judge*, pp. 118, 130, 154, 206, 215.

Anglicans and three Baptists, denominations Richard Allen has counted least active in the Social Gospel.[53] Equally important was the prominence of those with more secular impeti for reform. Organized women found themselves working alongside a number of socialists, including Helena Gutteridge, Susan Lane Clark, and Laura Jamieson. Gutteridge and Clark were atheists, Jamieson a Unitarian. Though they often sought common ends, these women shared no common theological ground with their peers, and their presence was hardly an anomaly: Lynne Marks' work on the 1911 census reveals that atheism, while far from prevalent, was five times more common in British Columbia than elsewhere in Canada.[54]

Weiss's blanket characterization of women in voluntary associations as maternal feminists, and her comments regarding the insignificance and insincerity of equal rights aims are also misleading. No one can say for certain about the commitment of rank-and-file members to women's rights. However, the commitment of many women's leaders to an equal rights agenda was the product of a long-held and heartfelt commitment. Helen Gregory MacGill is perhaps the most prominent example. Her mother, Emma, had long been committed to equal political and economic rights for women, and Helen was raised and educated according to these standards. In the early 1890s, the pair relocated from Ontario to San Francisco, where mother and daughter were active in both social reform

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[53] Linda Louise Hale, "Appendix: Votes for Women: Profiles of Prominent British Columbia Suffragists and Social Reformers," *In Her Own Right*, pp. 287-302; Allen, *The Social Passion*, p. 15.

[54] By 1911, 2.1 percent of British Columbians were willing to publicly declare their atheism to the census takers, compared to 0.4 percent in the rest of Canada. Marks relates the presence of atheists to the socialist influence in hard rock mining communities. Lynne Marks, "'Leaving God Behind When They Crossed the Rocky Mountains': A Gender, Family, Race and Class Analysis of Non-Belief in British Columbia in 1901," Paper presented at the Canadian Families Project Conference, Toronto, April 2001.

and the women's suffrage movement, operating two newspapers, one of which was dedicated solely to women's suffrage. Later, in Minnesota, they were involved in suffrage, temperance, and church societies. Importantly, their commitment to equal rights for women did not simply emerge out of a desire to implement social reforms; nor was it mere rhetoric; it was longstanding belief.[55] The experience of several other leaders in British Columbia's women's movement reveals a similar commitment to equal rights.[56] This commitment was hardly superficial, and these women's influence was widely felt. British Columbia's women's movement may have been populated by large numbers of maternal feminists, but it did not escape the strong influence of equal-rights feminism. Moreover, equal-rights feminism would prove a pivotal factor in the relationship between women's organizations and British Columbia's governments in the early twentieth century.

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[55] MacGill, *My Mother the Judge*, pp. 39-40, 40-45, 47-48, 83-86, 89, 92-93.

[56] Helena Gutteridge had been a London suffragette prior to arriving in British Columbia; Susan Lane Clark had been secretary to prominent equal-rights activist Susan B. Anthony in San Francisco in the 1870s; Maria Grant had supported Anthony's visit to Victoria in 1871; and Susan Crease, long-serving president of Victoria's Local Council of Women, sponsored the visit of militant British Suffragette Emmeline Pankhurst to Victoria in 1912. Hale, "Profiles," pp. 288-290, 292.

CHAPTER NINE:

REFORM IN THE CONSERVATIVE ERA

The following chapter discusses progressive reformers' successes and setbacks to 1915. The chapter begins with the passage of deserted wives' and illegitimate children's maintenance statutes, situating these statutes within the context of progressive nation-building concerns; the discussion continues with an investigation of the legislation's effects through police court record books. Following discussion of the impact of the early laws, the chapter resumes its examination of legislative efforts, discussing the emergence of organized feminist groups lobbying for equal property and guardianship rights and better maintenance laws. Finally, the chapter looks into feminist reformers' relationship with the Conservative government, and the divisive impact of reform and the women's suffrage movement upon the Conservative coalition.

Since the 1860s, thoughtful observers in British Columbia had been attempting to devise means of providing abandoned wives, unwed mothers and their children with means of support. The common law placed an obligation on the patriarch to provide his wife and children with necessaries, a term defined in reference to the husband's economic and social position. Yet the means of compelling that support were ineffective. While wives were entitled to pledge their husband's credit for necessaries, the obligation was difficult to enforce, especially in cases of deserting husbands, who often relocated.

No merchant was likely to extend credit which could not be collected.[1] Moreover, even if the husband remained nearby, there were practical and legal impediments to securing support under the common law. Deserting husbands sometimes advertised in the press, denying all responsibility for their wives' credit.[2] In addition, a decision by Chief Justice Begbie in 1882 placed the onus for investigating married women's eligibility for their husband's credit squarely upon the creditor. If a wife had left her husband, or was left with cause, the creditor would have no redress.[3] Unwed mothers and illegitimate

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[1] Annalee E. Gölz, "'If a Man's Wife Does Not Obey Him, What Can He Do?' Marital Breakdown and Wife Abuse in Late Nineteenth-Century and Early Twentieth-Century Ontario," *Law, Society, and the State: Essays in Modern Legal History*, ed. Louis A Knafla and Susan W. S. Binnie (Toronto: University of Toronto Press, 1995), pp. 326-328.

[2] There is evidence, in British Columbia and elsewhere, of husbands advertising in the press that they would no longer be responsible for their wives debts. In 1881, for example, John Douglas left his wife Jeannie, and "advertised in the Public Press that he would not be responsible for her debts." Thus, despite the fact that the common law quite explicitly considered him responsible for his wife's necessaries, Jeannie Douglas would have had great difficulty enforcing her rights. While John Douglas's action was illegal, it was likely effective in deterring merchants from providing aid to his wife. British Columbia, Supreme Court, Register of Orders Protecting property of a Wife deserted by her husband, BCARS, C/AB/30.3D, pp. 11-12.

[3] After Chief Justice Begbie's 1882 decision in *Dexter* v. *Van Volkenburg*, deserted wives may have found gaining credit on their husband's account a near impossibility. The case involved a Victoria woman who had sold the family furniture to one Ben Van Volkenburg, claiming she required the money to purchase necessities and secure transportation to join her husband in Yale. Her husband, Robert Dexter, then sued Vanvolkenburg for the return of the furniture, arguing that his wife was not his authorized agent. Begbie ruled that a wife living with her husband could be assumed to be her husband's agent for the purpose of securing domestic necessities. When husband and wife were separated, however, that agency came into question. While a wife living apart *with consent* was "probably" her husband's agent, the Chief Justice held that a wife living apart without consent or lawful cause, *or even with lawful cause*, could not be assumed, on the face of it, to be her husband's agent. Begbie later clarified this distinction further: a wife was only her husband's agent if he had separated from her, and not she from him. The onus of proving the wife's agency, continued the Chief Justice, lay upon the contracting party. "[A] person contracting with a wife living apart does it at his own risk, & must make every inquiry: He is not justified in relying on her repre[sentatio]ns alone, as to her agency." Begbie's ruling makes a woman's position brutally clear. If she had to leave her husband, with cause, she was not entitled to his support (unless presumably, she lived on the mainland, and secured a divorce under the Matrimonial Causes Act of 1857). Even if abandoned by her husband, and entitled to support, securing necessities would be extremely difficult, since a merchant extending credit was responsible for investigating her husband's legal obligation. In practice, then, the common law provisions for deserted wives did not work. British Columbia, Supreme Court, Bench Book, Begbie, C.J., BCARS, GR 1727, vol. 733 (1882-1883), pp. 4, 76-77.

children lacked even these limited rights to patriarchal support. As explained above, the only legal right or obligation binding irregular families was created by the English Poor Law of 1834, which obligated unwed mothers to support their children. Fathers held no similar obligations.[4]

The difficulties of abandoned and irregular families did not escape nineteenth-century British Columbian legislators, who made tentative initial forays into strengthening their legal position. In the Deserted Wives and Married Women's Property Acts, means were provided for married women to support themselves, with protection against the depredations of their husbands. First by means of a protection order, and later without such an order, any property gained by a married woman's own labour was declared her own. Within these acts was a recognition that the common law methods of securing a wife's livelihood through her husband's credit were far from adequate.

Yet the new methods were hardly ideal. Expecting married women to support themselves ignored the realities created by the spousal role assumed by many women. In cases where the husband labours in the market economy and the wife in child-bearing, child-rearing and homemaking, making the transition to self-support in the marketplace could be difficult, if not impossible. A woman who has spent her early adulthood engaged in unpaid domestic work often lacks the practical skills and job training required to gain an adequate income from market activity to support herself and her children.

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[4] The legal rights of illegitimate children are discussed at Mason, *From Father's Property to Children's Rights*, pp. 24-27, 29, 68, 72-73 98; Grossberg, *Governing the Hearth*, pp. 198, 200, 218; Tiffin, *In Whose Best Interest?*, p. 167; Ward, "Unwed Motherhood," pp. 39-40. The specifics of the 1834 Poor Law can be found in Cody, "The Politics of Illegitimacy," pp. 131-135.

Bettina Bradbury's work on Montreal suggests that most women worked at wage labour, if at all, during the years preceding their marriages. The jobs they held were circumscribed by age and gender and relatively poorly paid; the skills obtained were unlikely to lead to greater remuneration.[5] For most abandoned wives and those dependent upon them, life must have been precarious indeed.

Desertion and family maintenance were also topics which concerned the Dominion Legislature. An 1869 amendment to the criminal code included a provision subjecting able-bodied persons and those with means who refused to support their families to a fine of fifty dollars or a maximum of two months in prison. In 1874, the maximum term of imprisonment was increased to six months. Under the 1869 legislation, if the husband's neglect resulted in bodily harm or endangerment of life, the penalty could be increased to three years' imprisonment. In 1892, this clause was extended to include permanent injury to the health of dependents. Criminalization of non-support satisfied a desire to punish; it may also have produced a deterrent effect, although this is impossible to gauge. Yet for those cases which were actually prosecuted under its terms, the legislation offered no effective solutions: imprisonment of the husband would not address the condition of the wife and children. Nor did a ten-dollar fine increase the likelihood that a man would resume contributing to the maintenance of his dependents.[6]

Neither the provincial or federal legislation addressed the situation of country wives and illegitimate children. Still, the situation of such irregular families did not escape

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[5] Macdonald, *Fraud on the Widow's Share*, pp. 24, 28-29; Bradbury, "Women and Wage Labour," pp. 118-123.

[6] Gölz, "Marital Breakdown," p. 328-329.

legislators' notice. In the course of the controversy over the Legitimacy Act in 1872-73, Chief Justice Matthew Begbie had suggested that the province pass legislation compelling support by common law husbands in the event of their death or desertion. A letter to the *British Colonist* in 1875 suggested Ontario's legislation on the subject was suited to the purpose. Later, the *Seater* case led Begbie to push for reform of the inheritance laws surrounding cohabiting women and illegitimate children, but the Destitute Orphans Act did nothing to relieve suffering in cases where the man was alive; in fact, it failed to recognize the obligations of intestate men if they had not chosen to support their dependents during their lifetime. Begbie recognized this fact, and again advocated the adoption of legislation requiring men to support deserted partners and illegitimate children.[7] His efforts met with resistance. No legislation resulted.

Following Begbie's failure and the 1887 MWPA, the remainder of the nineteenth century saw no further attempts to address the situations of unwed mothers, deserted wives, and their children. In England, however, wife desertion remained a topic of continuing legislative interest, driven by a feminist lobby and government interest in reducing public expenditure. Through the 1880s and 1890s, English Parliament enacted successive statutes under which deserted, abused and neglected wives could petition for maintenance orders against their husbands. Ontario, which had created unique means for deserted wives to petition for alimony in equity in 1859, rapidly adopted the less costly

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[7] Williams, *Sir Matthew Baillie Begbie*, p. 107; *British Colonist*, 28 August 1875; British Columbia, Supreme Court, Bench Book, Begbie, C.J., BCARS, GR 1727, vol. 730 (1877), p. 492.

and more widely accessible English innovations.[8] Desertion was also becoming a topic of national interest in the United States during the late 1890s, where new statistical data made desertion increasingly visible. A survey of 54 charities conducted by the New York Charity Organization Society near the turn of the century indicated that between seven and thirteen percent of all families receiving care had been deserted. Other organizations generated figures as high as twenty percent. These statistics were understood to indicate that desertion was on the rise, whereas it may be that only the awareness of desertion that was on the rise. The belief that desertion was a growing social problem had consequences, however, fueling concerns over the "fragility of the working-class family." Families were understood, writes historian Martha May, to serve as "the foundation of moral and social order." Yet progressive-era reformers feared that working-class families were threatened by the conditions of modern urban capitalism: overcrowded and unsanitary living conditions, low workplace safety standards, inadequate wages, and working mothers. Rising desertion rates appeared to confirm these fears: progressive reformers interpreted desertion rates as palpable evidence of the destabilizing impact of rapid industrialization, urbanization, and immigration on working-class families.[9]

To a great extent, these fears grew out of the progressive concern over child welfare. As one American reformer put it, the family was the "cradle of immortal souls." For

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[8] Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895* (Princeton, New Jersey: Princeton University Press, 1989), pp. 168-169, 174-175; Chambers, *Married Women and the Law of Property*, pp. 29-34, 50-52; Gölz, "Marital Breakdown," pp. 326, 330-331, 334-335; Chunn, *From Punishment to Doing* Good, pp. 47-48.

[9] Tiffin, *In Whose Best Interest?*, pp. 148-151; Martha May, "The 'Problem of Duty': Family Desertion in the Progressive Era," *Social Service Review* (March 1988), p. 42.

progressive reformers, desertion threatened strong ideals of the 'proper' family, the correct environment in which children should be raised. In their publications and pronouncements, writes Martha May, progressive reformers constructed a composite picture of the 'good family' which included "a hardworking and temperate male breadwinner as household head, a nurturing wife as a 'good manager,' and clean, obedient, Americanized children." Deserters disturbed this matrix of roles and relationships, and pushed their families, according to one Atlanta reformer, to "dependence and disease and crime." In 1895, desertion and non-support were introduced as topics of discussion at the National Conference of Charities and Correction, and American reformers pushed for broad new legislation to enforce parental maintenance of children, both legitimate and illegitimate.[10]

Illegitimacy was understood in a similar light. The production of an illegitimate child not only revealed the woman's extra-marital sexual activity, with its attendant moral stigma; in the words of Peter Ward, illegitimacy also "undermined the central principle of nineteenth century family life: that men and women *together* should beget and nurture children and should do so only within the sanctified bounds of marriage."[11] If the male-female family was the nursery of society, women having children without legal husbands

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[10] Reformers promoted amendments to increase non-support penalties, ease access to maintenance proceedings, and tighten enforcement. By 1922, most American jurisdictions had amended legislation surrounding abandonment and desertion. Forty-four states and territories had criminalized desertion and abandonment; and forty-three had also declared non-support illegal. The remainder of American jurisdictions would adopt such legislation in the 1920s. Tiffin, *In Whose Best Interest?*, pp. 141, 149-150, 158; May, "Family Desertion in the Progressive Era," pp. 42, 50.

[11] Ward, "Unwed Motherhood," p. 34-35.

were violating the norm, and their children, raised in an abnormal social environment, posed untold threats to social order. As a prominent group of British Columbia's Methodist missionaries argued in a petition to Premier Theodore Davie in 1895, illegitimate children were, as a result of heredity and upbringing "a standing menace to the laws of our land, and the wellbeing [sic] of our communities."[12] Few seemed to consider the implications of government bans on birth control information and contraceptives.[13] Unwed pregnancies were usually understood to be an individual moral failing rather than a phenomenon which was at least in part socially-constructed. Moreover, to volunteer charity workers, the problem appeared to be generally restricted to the working classes. Young women from more well-to-do families could presumably deal with unwanted pregnancies more discreetly than those with limited resources.[14]

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[12] The children, they petitioners claimed, "inherit the vices of both parents," and they cited the report of Indian Agent Lomas that "the half-breed element is the source of trouble everywhere, as they combine the worst qualities of each people, with few redeeming qualities." The petitioners also cited the effects of environment on illegitimate biracial children. Here, the parents were at fault. In the vast majority of cases, "no attempt is made by the parents," the missionaries alleged, "to instill moral lessons, or even to exercise ordinary parental control." Rather, the men often left their Indian wives at their leisure, leaving the children to their own resources. Such children often turned to the liquor trade to earn their keep, or became "vagrants of the worst type." To address such cases, the missionaries pressed the government to pass highly interventionist legislation preventing cohabitation between white men and Indian women. Those who already had children were to be forced to marry; in cases of refusal to do so, the men were to "abandon the women, and maintain their children in some educational institution." Davie, taking advantage of the province's lack of jurisiction over Indians, forwarded the petition to Ottawa. Given nineteenth-century legislators' reluctance to interfere with male property rights, this desire to abdicate responsibility is understandable. Yet the situation was changing, and by the early twentieth century, that reluctance was slowly dissipating. British Columbia, Attorney General, Correspondence, BCARS, GR 0429, Box 3, File 3, 117/ 95 and 242/95.

[13] Tiffin, *In Whose Best Interest?*, p. 168. On birth control in nineteenth and twentieth-century Canada, see Angus McLaren and Arlene Tigar McLaren, *The Bedroom and the State: The Changing Practices and Politics of Contraception and Abortion in Canada, 1880-1980* (Toronto: McClelland and Stewart, 1986).

[14] It may not have been a happy matter for a middle-class woman to bear a child out of wedlock; but American historians Susan Tiffin and Michael Grossberg note that for those who could support their

In the spring of 1901, British Columbia's A.E. McPhillips introduced legislation to compel maintenance from deserting husbands. Like his American counterparts, McPhillips appears to have been greatly interested in child welfare. In the same session, he introduced legislation respecting child labour, to protect and reform neglected and dependent children, and to regulate maternity boarding houses (which often housed unwed mothers) and protect illegitimate children.[15] McPhillips' Deserted Wives Maintenance Act (DWMA) should be understood within this context. Like the mothers' pensions legislation which would follow, the central concern underlying deserted wives' legislation was not the welfare of women, but child maintenance. In both instances, mothers represented children's interests and acted as a conduit through whom money was funnelled to minors.

Newspaper accounts of the DWMA's progress are sparse, although the measure was apparently of some public interest, and printed in its entirety in Vancouver's *News-Advertiser*.[16] Some thirty years later, in a constitutional challenge to the legislation, *Dixon* v. *Dixon*, McPhillips noted his responsibility for the legislation and claimed there was "crying need and necessity for the legislation."[17] Indeed, within days of its announcement, Attorney General Eberts received a desperate inquiry as to how the bill

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illegitimate children, it was possible to elude the public scrutiny attached to charity. For those poor forced to rely on charity, public exposure was more common. Tiffin, *In Whose Best Interest?*, p. 168.

[15] British Columbia, *Journals*, 9th Parliament, 2d session, 1901, pp. 22, 73, 79.

[16] *News-Advertiser*, 15 Mar 1901.

[17] *Dixon* v. *Dixon*, *British Columbia Reports*, vol. 46 (1932), p. 381.

could be invoked.[18] In the legislature, McPhillips indicated that the bill was based on Ontario precedent, and intimated that his intention was to provide an inexpensive and easily accessible means for deserted wives to sue their husbands for support. "The idea of the bill," McPhillips announced, was to provide a summary means of forcing "husbands who wilfully and without cause desert and neglect their wives and children ... to pay a certain amount weekly for their support."[19] The key word here was *summary*. In *Dixon* v. *Dixon*, McPhillips expanded upon these sentiments, pointing out the inability of poor women to proceed under the existing divorce and alimony laws: "What justice can be handed out to a deserted wife," he wrote,

> abandoned by her husband as so many of them are[,] leaving the wife stranded with the children, that you should say to her coolly, 'Oh, well, now, you can bring an action for divorce, you can bring an action for separation, you can bring an action for alimony,' and this poor lady without means at all asking for bread is handed a stone—an expensive lawsuit and debarred from summary remedy. That would be unthinkable....

McPhillips had introduced the act, he continued, "to alleviate the sufferings of the wife abandoned by her husband and ... provide an easy, quick and inexpensive method whereby she would receive immediate sustenance..."[20] The newspaper reports indicate no objections to the bill in committee. Yet McPhillips later recalled that the bill was

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[18] Immediately after the newspapers reported the introduction of the legislation, Eberts received a letter from a woman enquiring how she might prosecute her husband for support for herself and her five children. Eberts advised her to consult a lawyer, but her husband left the jurisdiction, and the act provided no means of dealing with such cases. Two years later, she and the children were still in destitute circumstances, living on the charity of her family. British Columbia, Attorney General, Correspondence, BCARS, GR 0429, Box 6, File 5, 984/01; British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2048, File 748/03, pp. 1-2.

[19] Colonist 12 Mar 1901; Times 12 Mar 1901.

[20] *Dixon* v. *Dixon*, *British Columbia Reports*, vol. 46 (1932), p. 381.

"hotly debated," and that the principal opposition centered on the maximum award value. Eventually, legislators settled on the figure of $20 a week, whereas the Ontario statute allowed only $20 per month.[21] Perhaps the difference reflected differing costs of living in the two Provinces. It may also be that legislators were interested in calculating awards on the basis of the father's means rather than limiting them to wives' and childrens' bare subsistence needs.

As passed, the legislation provided for an inexpensive summary procedure: a deserted wife could summon her husband to appear before any Stipendiary or Police Magistrate, or two Justices of the Peace, to show cause why he should not be ordered to make payments toward the maintenance of his wife and children. The legislation employed an expanded definition of desertion created by the most recent English and Ontarian legislation: in addition to her husband's abandonment of her, a wife was deemed 'deserted' when living apart from her husband due to his refusal or neglect to support her without sufficient cause, his repeated assaults, or other acts of cruelty. This language meant that a neglected or abused wife had to leave her husband to become eligible for a maintenance order. The difficulties of doing so were left unspoken. Upon a finding of desertion the court was empowered to order the husband to pay his wife a weekly sum not exceeding twenty dollars "for her support and the support of her family." No awards were to be made to adulterous wives, and the courts were empowered to invalidate orders in case of subsequent adultery. As Jane Ursel has pointed out, the adultery clause granted

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[21] Gölz, "Marital Breakdown," p. 331.

a husband lifetime ownership over his wife's sexuality, even if he violated great portions of the marriage contract. Wives had no reciprocal rights, and adultery was not grounds for a DWMA order. DWMA orders could be varied if the means of the husband or wife had changed since the making of the original order (or any subsequent variance). This clause seems to imply that the means of the wife were to be considered in making the order, although no instructions on this matter are found in the act. Finally, the sole provision for enforcing orders against defaulting husbands empowered the courts to seize and sell the husband's personal property at auction.[22] This penalty, of course, would be of little consequence to a deserting husband without property.

Two years later, McPhillips introduced legislation for the support of illegitimate children. The statute was based on Ontario precedent,[23] and resulted from McPhillips' child welfare concerns and pressure from charities. The direct stimulus for the 1903 legislation appears to have been the lobbying efforts of the Society for the Protection of Children. McPhillips told the legislature that the society "had done a great deal of good, and he favored giving them every assistance by law."[24] There was cause for concern. McPhillips believed that illegitimacy was common in British Columbia, and likely

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[22] British Columbia, *Statutes*, 1901, 1 Ed. 7, chap. 18; Ursel quoted in Gölz, "Marital Breakdown," p. 326.

[23] Richard Splane, *Social Welfare in Ontario, 1791-1893: A Study of Public Welfare Administration* (Toronto: University of Toronto Press, 1965), pp. 65, 67, 219; Ursel, *Private Lives, Public Policy*, pp. 104-105; Ward, "Unwed Motherhood," p. 41; "An Act to make the remedy in cases of Seduction more effectual, and to render the Fathers of Illegitimate Children liable for their support," *Statutes of His Majesty's Province of Upper Canada*, 7 William IV, 1837, chap. 8.

[24] *Daily Times*, 17 April 1903.

understood that illegitimate children's prospects were dim.[25] In other Canadian jurisdictions, unwed mothers without some source of support, either from the father or their families,[26] often boarded their children in private maternity homes, or placed them in the care of charities and public facilities.[27] In either case, the death rates of illegitimate children were known to be horrendous. In private care homes, mothers often failed to make payments after leaving the children, and care suffered. These infant homes

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[25] "Speaking relatively," McPhillips told the Legislature, "there was a great deal of immorality along the Pacific coast." British Columbia's official illegitimacy rates as presented in the official report of births, deaths and marriages for the years 1873 to 1888, record an illegitimacy rate of one quarter of one percent, or a total of ten out of 4290 births. Unless British Columbia was extremely anomalous, this is an obvious under-recording of illegitimacy. Under-reporting likely explains much. Peter Ward writes that "Illegitimate children almost certainly constituted a disproportionately large segment of the unrecorded births because of their notably high death rates and because the shame of bastard bearing often led to concealment." British Columbia, *Sessional Papers*, 1875, p. 6-7; 1876, p. 155; 1877, p. 67; 1878, p. 73; 1879, p. 5; 1880, p. 314; 1881, p. 377; 1882, p. 237; 1883, p. 309; 1884, p. 221; 1885, p. 441; 1886, p. 291; 1887, p. 5; 1888, p. 5; 1889, p. 427; 1890, p. 117. Ward, "Unwed Motherhood," p. 36.
Peter Ward, in a survey of illegitimacy rates across British North America, reports that in Ontario between 1872 and 1899, the official rate was 1.4 percent. However, this overall average obscures a trend toward increasing reported cases of illegitimacy. Jane Ursel notes that the official illegitimacy rates in Ontario increased throughout the last quarter of the nineteenth century, from a low of .69 percent in 1874 to a high of almost 2 percent in 1900. The comparable rates for Nova Scotia from 1866 to 1875 and New Brunswick were 2.1 percent and 1.0 percent respectively. Historians of French Canada have reported urban illegitimacy rates of between 2 and 3 percent, while noting a lower rural rate, between 1.5 and 2 percent. Ward provides no explanation of this difference. Each of these figures, Ward notes, are definite minimums; there is good reason to believe that cases of illegitimacy were under-reported. He concludes that Canadian illegitimacy rates were likely no higher than 5 percent, and probably fluctuated between 2 and 4 percent. The reasons for this conclusion are unclear, especially considering concurrent illegitimacy rates in England and Wales ranged between 4 and 6 percent, and those in Scotland peaked at 9 percent in 1861. Ward, "Unwed Motherhood," p. 38; Ursel, *Private Lives, Public Policy*, p. 63.

[26] Peter Ward's data for Leeds and Grenville, Upper Canada/Ontario, 1851 and 1871, shows that a very high proportion of unwed mothers who had sworn affidavits of affiliation lived at home with their parents. About two-thirds had kept their children. This data, however, may be skewed by its reliance on affiliation affidavits. Ward, "Unwed Motherhood," p. 48.

[27] In most Canada West jurisdictions, unwed mothers and illegitimate children without means of support could take refuge in charitable or public institutions. Generally, however, this was a temporary expedient. Peter Ward's research suggests it was utilized by unemployed mothers, who were placed out in agricultural and domestic labouring positions, with their children, as soon as possible.
Splane reports that eleven institutions for the care of unmarried mothers and their children were created during the Union period. At the end of this period, seven of these institutions were still operating and receiving public grants. Such institutions continued to operate throughout the nineteenth century,

received little scrutiny until the 1880s and 1890s, when exposés revealed mortality rates of over eighty percent.[28] In public facilities, infant mortality was lessened, but still unacceptable. Between 1876 and 1900, the Toronto Infant's Home experienced a forty-five percent death rate among its 2600 admittees.[29] Given his earlier legislation regulating maternity homes, McPhillips was obviously concerned with the treatment received by illegitimate children in the care of charities and private institutions. His Support of Illegitimate Children Act aimed to aid charitable organizations in gaining financial restitution from the fathers of illegitimate children in their care.

For charities, the choice of the Ontario maintenance legislation was perfect, insofar as it allowed *anyone* furnishing provisions and necessaries to an illegitimate child to apply under the act for an order against the putative father. Yet the act had significant drawbacks, the first being that the mother had to swear an affidavit of paternity within six months of the child's birth, or no subsequent action could be taken.[30] The act was also of limited utility in that while it permitted the petitioning party to recover funds expended on child maintenance, there were no provisions permitting ongoing maintenance orders. Since no order could be made for the future maintenance of the child, the person furnishing necessaries would have to return to court repeatedly to seek recompense. This may not have deterred charities from making use of the act. However, the effort and

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although the funding was meagre. Splane, *Social Welfare in Ontario*, pp. 226-227, 232-233; Ward, "Unwed Motherhood."

[28] Ward, "Unwed Motherhood," p. 53.

[29] Ward, "Unwed Motherhood," p. 54.

[30] British Columbia, *Statutes*, 1903, 3 Ed. 7, Chap. 6.

expense of such proceedings, even in the lowest courts, would likely have hindered action by unwed mothers themselves.

The police court record books bear this assumption out. These record books contain a very brief accounting of the disposition of cases, standard entries including the names of the plaintiff and defendant, the charge, and the judgment and order. In rare cases, additional details are included, which may or may not include testimony and reasons for judgment. A survey of the Victoria, New Westminster, Trail and Quesnel Police Courts produced no cases under the 1903 illegitimate children's maintenance legislation. A subsequent search of the Vancouver County Court's plaint and procedure books turned up three cases between 1903 and 1914.[31] Only one case includes a judgment, which went against the father for $213.17. Subsequent entries in the file indicate that although the mother, Mary Ann Burke, a widow, was persistent in her efforts, she had great difficulty collecting. The case was heard in 1904. By 1908, despite numerous attempts to secure payment, the judgment was still unsatisfied. The poverty of the father, logger John Wolfe, was part of the problem. A garnishee against him apparently produced no results. A subsequent execution sale of his property produced only $39.78 after the Sheriff's expenses were deducted.[32]

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[31] British Columbia, County Court (Vancouver), Plaint and Procedure Books, BCARS, GR 1651, Reels B7317-B7329, B7330, B7332, B7334, vols. 7-35 (1903-1914). The files were fully surveyed for the vols. 7-27 (1903-1912), Reels B7317-B7329. For 1913 and the early part of 1914, every second microfilm reel was sampled in vols. 27-35 (1913-1914). The sample included all the cases on microfilm reels B7330, B7332, and 7334.

[32] British Columbia, County Court (Vancouver), Plaint and Procedure Books, GR 1651, Reel B7318, vol. 8 (1904-1905), pp. 237, 360. The other case files can be found at Ibid., Reel B7321, vol. 9 (1909), pp. 683, 700; and Ibid., Reel B7324, vol. 19 (1911), p. 336.

More common than cases under the 1903 legislation was the filing of affidavits of paternity. The Vancouver Plaint and Procedure books contain ten such affidavits between 1903 and 1914. The act required the mother to file an affidavit indicating the father's identity within six months of the child's birth in order for any subsequent prosecution to be launched. Only one of these affidavits led to a case in Vancouver. Some affidavits may have led to cases in other jurisdictions.[33] There are, however, a number of other reasons why an unwed mother might have filed an affidavit and not followed through with a suit. In his study of Ontario, Peter Ward found eighty-two affidavits of paternity in two counties, which he was not able to link to a single subsequent lawsuit. Ward speculates that women may have had several reasons for filing affidavits. Some may have considered pressing a suit and later changed their minds. Others may have filed the affidavit to keep the opportunity of a lawsuit alive, even when the possibility seemed remote. Still others may have used the public identification of the man responsible for their condition as a means of coercion, to force an informal support arrangement or marriage.[34] Yet the infrequency of actual cases under the legislation suggests that action under the statute was unlikely to pay off. Mary Ann Burke's difficulties were likely typical.

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[33] The act specified that the affidavit had to be filed with the registrar of the county court nearest the mother's place of residence. The case itself could apparently be launched in any Provincial county court. Two of the three cases found in Vancouver had no affidavit filed in the same registry. British Columbia, County Court (Vancouver), Plaint and Procedure Books, GR 1651, Reels B7317-B7330, B7332, B7334, vols. 7-35 (1903-1914); British Columbia, *Statutes*, 1903, 3 Ed. 7, Chap 6, s. 3.

[34] Ward, "Unwed Motherhood," pp. 41, 46-47.

The Deserted Wives Maintenance Act also failed to produce satisfactory results. Orders were rare and enforcement problematic. By 1911, the National Council of Women was petitioning Attorney General William Bowser to amend the DWMA to make the act more "binding on husbands."[35] The ordeal of New Westminster's Elizabeth McLaughlin provides a salient example of the obstacles facing those who attempted to utilize the legislation. Over the course of 1906 and 1907, McLaughlin made numerous attempts to control the unacceptable behaviour of her husband. Hugh McLaughlin had begun drinking to excess, apparently to the extent that his family was deprived of basic necessities. However, alcoholism was not grounds for a DWMA order; nor was simple non-support. Unless Mrs. McLaughlin was willing — and able — to leave her husband, she could not apply for relief under the DWMA. She thus chose a different route, illustrating, as do several other cases in the police court registries, that the DWMA was one piece of legislation in an arsenal of legal mechanisms available to married women to address spousal misbehaviour.

In July 1906, Elizabeth McLaughlin charged her husband under the interdiction sections of the Liquor Traffic Regulation Act, alleging that "by the excessive use of liquor," her husband "wastes his estate, and injures his health [and is] therefore a drunkard within the meaning of the act."[36] The magistrate agreed and interdicted Hugh

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[35] *British Colonist*, 21 February 1911; *Daily Times*, 12 February 1911.

[36] The charges laid under this act often indicate the nature of the situations faced by the wives and families of alcoholic men. In 1906, James Kennedy Owens of Victoria was charged by his wife Anna. The writ charged "that by excessive drinking of liquor [Owens] greatly injures his health and interrupts the peace and happiness of his family, and is a drunkard within the meaning of the 'Liquor Traffic Regulation Act.'" British Columbia, Police Court (Victoria), Record Book, BCARS, GR 605, vol. 3 (1904-1910), p. 60.

McLaughlin for twelve months. During that period, it was illegal for any person to sell McLaughlin alcohol, and a notice of the interdiction was circulated to all those with liquor licenses.[37] This was a milder form of interdiction than that provided for under Theodore Davie's 1887 Habitual Drunkards Act, which was also intended for the relief of alcoholics' families. Under the 1887 legislation, an interdict was stripped of his property rights, which were assigned to a trustee, so that the interdict could not misspend the family's income. This was a serious invasion of individual property rights, and required application to the Supreme Court. The case was to be heard by a jury, and was presumably too expensive for most working-class wives to undertake. Moreover, a husband without property rights was severely limited, and the wife, if not appointed trustee, would have had to apply through a third party for all funds. The Liquor Traffic Regulation Act interdiction was much less expensive and invasive. It was cheap to invoke and did not limit a husband in his property rights and economic relations. It only affected his ability to purchase alcohol. For these reasons, it was used much more frequently. No orders under the 1887 legislation could be located. There are hundreds of Liquor Traffic Regulation Act interdictions in the four police court registers.[38]

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[37] British Columbia, Police Court (New Westminster), Record Book, BCARS, GR 0927, vol. 2 (1906-1908), p. 14.

[38] British Columbia, Provincial Police Court (Quesnel), Record Books, BCARS, GR 0041, vols. 1-2 (1911-1925), and GR 0008, vols. 1-2 (1925-1941); British Columbia, Provincial Police Court (Trail), Record Book, BCARS, GR 1876, vol. 1 (1910-1939); Corporation of the City of Trail, Police Court, Record Books, BCARS, GR 1875, vols. 1-2 (1909-1940); British Columbia, Police Court (New Westminster), Record Book, GR 0927, vols. 1-11 (1902-35); British Columbia, Police Court (Victoria), Record Books, BCARS, GR 605. vols. 2-9 (1894-1924).

Unfortunately for Elizabeth McLaughlin, the interdiction order did not have the desired effect. Less than three months later, in October 1906, she applied under the DWMA, and received an order for eight dollars per week. To qualify, Elizabeth McLaughlin either had to have left her husband or been subject to assaults or cruelty. The circumstances surrounding the initial award are not provided, but subsequent events suggest that Hugh McLaughlin was becoming violent. In January the following year, he was arrested on a drunk and disorderly charge. Obviously, there were limits to the effectiveness of an interdiction order. In mid-February, he was charged with spousal assault. McLaughlin plead guilty, and Elizabeth McLaughlin took matters into her own hands, opting to use the courts to extricate herself from the situation. She offered to withdraw the charges if her husband agreed to sign a deed of separation.[39] Apparently Mr. McLaughlin was receptive to the offer. So too was the magistrate, who agreed to postpone final judgment until the separation papers were signed. Indeed, the magistrate had seen enough of Hugh McLaughlin. McLaughlin was ordered to deposit a $500 security with the court as a guarantee that he would keep the peace over the following two years.[40]

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[39] This may have been a common practice. The New Westminster Police Court records contain 4 other cases in which DWMA cases were withdrawn by wives after the parties entered into a separation agreement. British Columbia, Police Court (New Westminster), Record Books, BCARS, GR 0927, vol. 9 (1923-1927), pp. 213, 215; Ibid., vol. 10 (1928-1930), p. 204, 475; Ibid., vol. 11 (1930-1935), p. 208. Such agreements may have been secured at with the help of the court. In November 1908, the magistrate gave George Mooney a suspended sentence for assaulting his wife, on the condition that he enter a separation agreement with his wife. Ibid., vol. 3 (1908-1909), p. 148.

[40] British Columbia, Police Court (New Westminster), Record Book, BCARS, GR 0927, vol. 2 (1906-1908), pp. 78, 134, 155, 159.

While noting the limitations of the deserted wives legislation, Lori Chambers has argued in her study of the Ontario DWMA that the legislation helped to transform ideas surrounding marriage. After the legislation, women could begin to think of decent treatment from their husbands as a right rather than a privilege.[41] Certainly, Elizabeth McLaughlin's case provides ample evidence of a wife attempting to gain decent treatment through the DWMA. But the social transformation Chambers has theorized was slow in materializing. McLaughlin's case is important for more than its content. It was significant also for its rarity. McLaughlin's was one of only two cases heard in New Westminster and Victoria during the decade following the enactment of the legislation, and the only successful one. The unsuccessful case may provide some insight into women's hesitancy to make use of the legislation. A mother who brought her plight to the attention of the authorities could bring about undesirable consequences. The children involved in that case were removed to the care of the Children's Aid Society.

In response to the National Council of Women's 1911 petitions and representations, Attorney-General Bowser introduced a greatly amended version of the act. In the legislature, Bowser explained that the revision was required "to improve the enforcement machinery of the existing law, which practice had proven to be in some respects defective."[42] The new act established new means of securing compliance and abandoned older ones. The reformulation revealed Bowser's understanding of the DWMA as legislation for working-class families. The new DWMA dropped language permitting the

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[41] Chambers, *Married Women and the Law of Property*, p. 51.

[42] *News-Advertiser*, 26 Feb 1911.

forced seizure and sale of the husband's personalty at auction to satisfy the maintenance order. The deserter, it seems, was envisioned as a man without significant property. He was expected to be of working-class status, and the legislation established means of garnisheeing debts, including wages, owed to the husband by third parties, so that these could be collected and paid to the wife;[43] the act further stipulated that in cases of wilful and unreasonable default, the husband could be imprisoned for a term up to thirty days.[44] These new means of enforcement came at a cost. Bowser was unwilling to garnishee or incarcerate a man whose wife had her own means of support, and the legislation rendered wives with sufficient means ineligible for maintenance under the act.[45] Through this language, liability for child support became, for the moment, primarily a female obligation! A deserting father was only liable for his children's support if his wife's means were inadequate. Of course, legislators assumed that most deserted wives would not have incomes, but as Peter Baskerville's research (discussed above) indicates, they were likely incorrect in this assumption.

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[43] British Columbia, *Statutes*, 1911, 1 Geo. 5, Chap. 61, s. 10-13.

[44] The grounds establishing default for the purposes of incarceration were failure to appear before the Magistrate in obedience to a summons; disposal of any property following the date of the order for payment; and failure to prove inability to comply with the order to the Magistrate's satisfaction. While deleting the forced seizure and sale clauses, the new act did not completely dissociate the husband's assets from liability for the order. One section allowed the husband to be imprisoned if he had defaulted on his court-ordered payment and disposed of any property in the interim. In essence, unless the husband made his payments, any transfer of property by him could lead to imprisonment. See British Columbia, *Statutes*, 1911, 1 Geo. 5, Chap. 61, s. 9.

[45] British Columbia, *Statutes*, 1911, 1 Geo. 5, Chap. 61, s. 3.

The understanding of desertion as a working-class problem and the shift toward incarceration as a means of enforcement were characteristic of legislative trends in the progressive era. In the United States, the analysis of desertion was heavily influenced by middle-class charity workers familiar with desertion cases. Charity workers' analysis reflected their gender norms and experience with individual cases, and presented desertion as a problem rooted in individual failings. The 'good' man was understood to be a wage-earner and breadwinner. "Productive labour," writes historian Martha May, "served as the foundation for an ideal manhood," and men were generally judged by their attachment to the work ethic. Charitable analyses in the United States often included a composite ideal of the "self-supporting, self-respecting, able-bodied" workingman. Diligence, thrift, property ownership, sobriety, and breadwinning were intimately associated. And while breadwinning carried with it a constellation of attractive male qualities, desertion was closely associated with many forms of immorality. Prior to 1915, writes May, social welfare reformers "persistently labeled the deserter as a special type of social misfit, an unnatural and immoral man." In reports to the National Conference of Charities and Corrections, charity workers uniformly cited moral causes for desertion. Deserters were routinely characterized by charity workers as alcoholics, drug addicts, gamblers, liars, lustful, lazy or idle, or prone to transient wandering.[46]

Few seriously considered the possibility that environmental factors sometimes played a role in desertion. Although the occasional voice was heard suggesting that the real

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[46] May, "Family Desertion in the Progressive Era," pp. 43-45, 49; Tiffin, *In Whose Best Interest?*, p. 152; Teitelbaum, "Family History and Family Law," p. 1161.

cause of desertion was economic, and figures from New York City indicated that husbands were unemployed in one-quarter of all desertion cases, the moral appraisal was not undermined by such arguments or facts. In fact, the coincidence of unemployment and desertion seemed to confirm the moral appraisal. Charity investigators believed that the same character defects which led a man to desert also resulted in unemployment.[47] Charity workers' emphasis on male character failings also ignored the possibility that 'desertion' may have sometimes been the working-class equivalent of separation and divorce.[48] In the late nineteenth and early twentieth centuries, divorce proceedings were expensive and likely unattainable for the working-classes. Moreover, desertion appears to have served as a temporary expedient in difficult situations. Many men deserted more than once.[49]

The moral appraisal of desertion led to the punitive treatment of deserters in the early twentieth century, with the disciplinary approach to desertion peaking between 1910 and 1915.[50] British Columbia was closely in step with its American neighbours in adopting incarceration as a penalty for desertion. In the face of the growing wave of support for

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[47] May, "Family Desertion in the Progressive Era," p. 43

[48] Reformers often despaired of a "want of a *proper* public sentiment" regarding desertion. It may be that the many in the working class believed desertion acceptable in certain circumstances. May, "Family Desertion in the Progressive Era," p. 43-44; Tiffin, *In Whose Best Interest?*, p. 152.

[49] Tiffin, *In Whose Best Interest?*, pp. 147-148; May, "Family Desertion in the Progressive Era," p. 45. Susan Tiffin suggests that whereas a middle-class man was often bound to a given locality by his wealth, profession, or business opportunities, and was thus less likely to abscond to evade supporting his family, a working-class man may have had fewer material ties to the local area, less to sacrifice, and felt greater freedom to depart.

[50] May, "Family Desertion in the Progressive Era," pp. 43, 51. Existing laws in the United States generally made nonsupport and desertion misdemeanors. Many reformers campaigned to have the charge upgraded to a felony, and proposals were advanced suggesting that all neglect should be considered wilful and subject to criminal sanction. See Tiffin, *In Whose Best Interest?*, pp. 153, 155.

harsher criminal penalties, some reformers stressed that harsher terms of imprisonment had serious drawbacks: stiffer sentences would deter many wives from pressing charges; and imprisonment would not provide a man's dependents with means of support.[51] In light of such arguments, reformers seasoned their demands for harsher penalties with additional provisions: imprisonment, they argued, should be a remedy of last resort; ideally, courts would use suspended sentences contingent on a man's future provision for his family. If a man was imprisoned, reformers argued, he should be sentenced to hard labour, with a regular wage payment directed through charitable agencies to his wife and children.[52]

The Police Court Record books for New Westminster, Victoria, and Trail give evidence of a small initial rush to make use of the new legislation. In 1912, six DWMA cases were heard in the three courts, none of which produced useful results. Four cases were dismissed, one was withdrawn, and one case resulted in the husband's incarceration. Undoubtedly such results discouraged women from making application under the statute. In fact, in the three police courts in question, no further applications under the act would be made for another six years.[53] It would be a mistake, however, to

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[51] Tiffin, *In Whose Best Interest?*, pp. 154-155. Not all reformers were agreed on the desirability or utility of criminal punishment as a deterrent to desertion. When a uniform desertion law was created in 1910 to aid in prosecution of deserters across state lines, the questions of the classification of crime and of sentences with hard labour were left to the discretion of the individual states. Indeed, one of the greatest proponents of the felony penalty had backtracked by 1910, believing wives would be reluctant to press charges and juries reluctant to convict, if desertion were made a felony. May, "Family Desertion in the Progressive Era," pp. 50-51; Tiffin, *In Whose Best Interest?*, pp. 157-158.

[52] Tiffin, *In Whose Best Interest?*, p. 155; May, "Family Desertion in the Progressive Era," p. 50.

[53] In 1917 and 1918, three applications were made under the act.

make the blanket assumption that the dismissed cases all merited an order. The DWMA was not a separation statute: it provided only for cases in which the husband was at fault, either for desertion, neglect, or cruelty. A wife taking positive action to address her situation was walking a legal tightrope, and had to be certain all the necessary legal conditions applied to her case. *Buck* v. *Buck*, heard in the Victoria Police Court in 1912, is a case in point. There is no recorded evidence as to why Jane Buck made application for an allowance under the DWMA. The defense, however, was clear enough. Francis Buck's lawyer stated simply that there was "No ev[iden]ce of repeated assaults or other acts of cruelty to bring [the] case within the statute." Moreover, he added, the "Def[endan]t has not refused or neglected to supply [his] wife or ch[ildre]n with food clothing &c." Given these facts, the application was dismissed.[54]

Yet there were a number of reasons why legitimate complainants were unable to make use of the DWMA. Lawyers representing deserted wives soon began to identify the 1911 DWMA's shortcomings. Complaints that criminal penalties were useless in many cases, especially where the husband left the province, began to arrive in 1913. Moreover, it turned out that desertion was not limited to landless wage earners. Even the thrifty and propertied were liable to desert! One Okanagan solicitor wrote concerning a case in which the husband had absconded to the United States with another woman, leaving behind a parcel of land. A Vancouver lawyer brought two more cases of this kind to the Attorney General's attention. The act made dealing with such cases impossible. Prior to

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[54] British Columbia, Police Court (New Westminster), Record Book, BCARS, GR 0605, vol. 5 (1911-1913), pp. 42-45.

any proceeding, it required personal service of a summons upon the husband. If he was out of the country, this was impossible, and no further proceedings could be taken.[55] Both attorneys requested an amendment permitting substitutional service when personal service was impractical. Even with substitutional service, however, the act provided no useful remedies when a husband had fled the jurisdiction: neither garnishees nor criminal sanctions would produce the desired effect. The Okanagan solicitor wrote: "To give a deserted wife the remedy of getting an order from the Magistrate directing the husband to pay stated sums and in default committal [to prison], where the husband has fled the country, is merely a joke or a tragedy." He further observed that although the husband had left land in the province, the act included no provision "for attaching the property as such of the husband and in particular land." The act could be greatly improved by amending it so that "when an order is made ... and is not complied with, a Magistrate could order any asset sold, whether real or personal..." His counterpart in Vancouver made similar recommendations.[56] The government response was quick and favourable. Sections were added to the act permitting substitutional service "by letter, public advertisement, or otherwise, as may be just," and permitting execution against real and personal property to satisfy unsatisfied judgments.[57]

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[55] The Vancouver lawyer wrote: "Our experience shows that in the great majority of cases when husbands desert their wives they do not remain in the neighborhood, but either disappear altogether or depart to the United States or to other Provinces." British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2097, File 9629-12-13, pp. 4-5.

[56] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2097, File 9629-12-13, pp. 1-2, 4-5.

[57] British Columbia, *Statutes*, 1914, 4 Geo. 5, Chap. 83.

Despite the 1914 amendments, securing a conviction under the DWMA remained difficult and the remedies inadequate. Moreover, the act appeared to work inequities and tear families apart. In 1915, Vancouver's University Women's Club and the Vancouver and New Westminster Local Councils of Women petitioned the government for a number of amendments to facilitate prosecution under the act. The petitioners complained of a number of unreasonable obstacles to prosecution. The first problem with the act, they wrote, was the provision relieving the husband of liability if he could prove that the wife had her own means. This provision allowed the husbands whose wives had means to escape all financial responsibility for their children. The petitioners wanted the section struck out, and replaced with language charging both parents with equal financial responsibilities.[58]

Secondly, the women's organizations lobbied the government to remove the requirement that the husband and wife be living apart in order for a prosecution under the act. To this end, they proposed to extend the act to cover neglected wives, defined as any wife whose husband "refuses or neglects, without sufficient cause, to supply his wife and their infant children (if any) with food, clothing or other necessaries." In arguing for the inclusion of non-support within the act, the University Women's Club stressed the perceived social and economic costs occasioned by non-supporting husbands:

> desertion may be a single act, but non-support is a continuing offence. It is an offence against the public good for if a man does not support his family the burden

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[58] The petition of the University Women's Club is filed under British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2124, File 1010-12-15, p. 1-5; The Vancouver and New Westminster Local Council's of Women's petitions are at Ibid., File 1415-12-15, pp. 4-15. The University Women's Club petition states asks that "financial responsibility rest fairly on both parents," yet there were no explicit suggestions that deserting wives with means be prosecuted.

> falls upon the taxpayers at large. The lack of support demoralizes the home, forces the mother to neglect her children in the effort to gain a liv[e]lihood, in expensive necessitating the establishment of creches, orphanages, etc, and is asserted by competent authorities to be a fruitful source of juvenile delinquency.

Wives who wanted to remedy these difficulties, and 'save' their children, had two options at law: separation from their spouses in order to take action under the DWMA; or prosecution under the criminal code. To the first alternative, the petitioners were adamantly opposed. Above all, they sought to keep families together. The home, the basic unit of socialization and support, was to be maintained wherever possible. "We believe," intoned the University Women's Club,

> that every effort should be made to restore and to maintain the normal family relation. [I]f the wife must leave her husband before obtaining the benefit of the Act the chance of preserving the home is destroyed and all opportunity lost of impressing his responsibility upon a man who in some cases may be merely weak and discouraged.

Interestingly, while the women's organizations sometimes phrased male non-support as a moral failure,[59] they obviously felt that the patriarch's presence in the home, regardless

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[59] The New Westminster Local Council of Women independently petitioned Attorney General Bowser for a "Lazy Husband's Act." New Westminster's City Clerk also wrote Bowser on behalf of the Westminster Benevolent Society, a joint operation of the City and women from its various churches, consolidating and rationalizing the distribution of charity and relief. In monthly meetings, the mayor, the city clerk, and a group of female investigators discussed cases involving relief and apportioned groceries, fuel and rent. In looking into the homes of the poor, the investigators "frequently found that the father or husband is worthless..." They complained of men who "won't try to support [their families], and sometimes [left] them without anything to subsist on, returning when there are some supplies in the house furnished by the Society to help consume them." The Society did not want to be in the business of aiding 'lazy men'. Nor did it desire to assist the families of men who wasted their money on alcohol. Thus, they requested the enactment of legislation compelling men to support their families. Perhaps, the City Clerk suggested, this could be done by copying legislation from other jurisdictions allowing their wages to be paid to their wives. Other womens' organizations also implied a dim view of non-supporting husbands. The general petitions complained that "in some cases, the husband refrains from deserting, preferring to hang about the home feeding himself alone, or going off for short periods and returning, but doing nothing for the support of his family." British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2133, File 1055-12-16, pp. 25-26, 38, 45.

of his moral failings, was preferrable to his absence. Moreover, they stressed that criminal prosecution was not a practical remedy. Most wives were hesitant to prosecute their husbands for criminal non-support. Even if a wife did prosecute her husband under criminal law, she gained little for her efforts: "the advantage [of criminal prosecution] is doubtful," wrote the women's organizations, since it "branded the husband as a criminal and his imprisonment does not add to the financial advantages of the family." Since non-supporting husbands prosecuted under the criminal code could not be ordered to maintain their dependents, but only imprisoned, their families became dependent upon their neighbours and the municipal or provincial governments for relief.

The final bars to prosecution lay not in the act, but in the willingness of wives to prosecute and testify, and the availability of Magistrates conversant with the issues at hand. The petitioners believed wives' unwillingness to prosecute resulted from "fear or weakness." Accordingly, they requested two changes to the act: first, that "any reputable person contributing to [a wife's] support, including the officers of public charities" be permitted to lay charges under the act; and second, that wives be made compellable witnesses against their husbands. Under common law rules deriving from the doctrine of marital unity, spousal communications were considered privileged, and disclosure could not be compelled.[60] Making the wife a compellable witness, wrote the University

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[60] The petitioners proposed that in prosecutions under the act no "existing Statute or rule of law prohibiting the disclosure of confidential communication between husband and wife [shall] apply, and both husband and wife shall be competent and compellable witnesses to testify against each other to any and all relevant matters." American law reformers also pushed for this change in order to facilitate prosecutions. Susan Tiffin writes that "[i]n view of the fact that her evidence was crucial to the action, it was thought that the general exemption of husbands and wives from testifying against each other should be waived in this typoe of case." Tiffin, *In Whose Best Interest?*, p. 155.

Women's Club, would allow her "to escape the husband's vengeance so apt to fall upon her if he knows her testimony is voluntar[y]." The University Women's Club further requested the designation of specific Magistrates to hear desertion and non-support cases, which they believed would result in "a more sympathetic understanding [of the cases and issues involved] and better results." Practical experience and familiarity would permit better administration of the act. Moreover, centralizing authority for DWMA hearings would prevent spouses from appealing one Magistrate's order to another.[61]

In a closely related effort, the women's associations had been petitioning since 1912 for an amendment to the Married Women's Property Act removing the need to apply for a protection order for children's wages.[62] Under the protection-order system, a wife whose husband was insane, incarcerated, or guilty of neglect or desertion could obtain a court order protecting the earnings of minor children from her husband and his creditors. The order could be issued by the local County Court. It then had to be registered with the District Supreme Court in order to be valid, and could be contested by the husband or his creditors. This was an expensive, laborious undertaking and required the wife to have a knowledge of the law. The petitioners wrote,

> The women who most need such orders are poor, and often ignorant of how to proceed. Sometimes they are long distances from magistrates, and having young children are unable to make even one trip. Yet, though they may be maintaining the family on the wages of minor children[,] unless these earnings are protected the

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[61] In the interest of conciseness and clarity, I have collapsed the nearly identical petitions from 1915 and 1916 into one discussion. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2124, File 1010-12-15. p. 1-5; Ibid., File 1415-12-15, pp. 4-15; Ibid., Reel B2133, File 1055-12-16, p. 38.

[62] *News-Advertiser*, 10 February 1912.

> father may descent [sic] on the family and collect the money, or he may contract debts and his creditors do so.

To remedy these difficulties, the petitioners suggested an amendment automatically granting married women control over minor children's wages in those cases under which they were previously entitled to apply for the order.[63]

Concern for the maintenance of family members also spread to take in relatives outside the nuclear family. Along with proposed amendments to the DWMA, the three bodies proposed legislation to compel adults to support their "infirm and indigent" parents and siblings, both of the whole and half-blood. In subsequent proposals, they added the responsibility to support sick and destitute children.[64] The motive behind the legislation was largely the reduction of public expenditure, and indicated a belief that family members were obligated to support their relatives prior to any support by non-kin. The petitioners wrote,

> The need of legislation has long been felt by means of which grown-up children of financial ability may be made to recognize their responsibility. The City Relief department feel keenly the lack of such legislation and it is well-known that the taxpayers of this Province have supported in our public institutions the aged and sick parents of persons who were not only well-to-do but even wealthy but who for

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[63] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2124, File 1010-12-15, p. 1-5; Ibid., File 1415-12-15, pp. 4-15.

[64] The draft legislation presented by the women's organizations permitted any infirm and indigent person or reputable person contributing to his or her support, including the officers of public charities, to lay a complaint to a Justice of the Peace that they were unable to support themselves and have an adult child, brother or sister, or parent capable of contributing to their support. The Justice of the Peace could then issue a summons calling on this relative to show cause why an order should not be made. After hearing the particulars of the case, the JP was given discretion to order the near relative to pay up to five dollars weekly to the support of the complainant. The draft further specified that no existing agreement between the parties would be a bar to proceeding. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2124, File 1415-12-15, pp. 4-13; Ibid., Reel B2133, File 1055-12-16. pp. 12-13; Ibid., Reel B2140, File 1019-12-17, p. 29.

> various personal reasons refused to accept their financial responsibilities and left them to the taxpayers to take up.

The women's organizations, as usual, had done their homework. They were aware of both Poor Law and Civil Code precedents for the proposed legislation. The legislation, they assured legislators, would be "no new venture into unknown fields."[65]

The Attorney General's office favoured only two of the proposals: that making husbands and wives equally liable for the support of their children; and the amendment to the Married Women's Property Act allowing deserted wives control over their minor children's earnings without the need for a protection order. To the remainder of the proposals, the Attorney General's department was opposed.[66] The DWMA was amended, making the husband of a deserted wife with sufficient means to support herself and her children responsible for one-half of the children's upkeep.[67] The MWPA was also amended, removing the need for a protection order for children's wages.[68]

The actions taken by the Conservative government in 1915 did not satisfy women's organizations. Over the winter of 1915-1916, the Laws Committee of the University

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[65] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2133, File 1055-12-16, pp. 11, 38. For precedents, see W. Walton Garrett, "Filial Responsibility Laws," *Journal of Family Law*, vol. 18 (1979-80), pp. 793-795; James G. Snell, "Filial Responsibility Laws in Canada: An Historical Study," *Canadian Journal on Aging/La Revue canadienne du vieillissement*, vol. 9, no. 3 (1990), pp. 269-270.

[66] In the margins of the petitions, an unknown individual in the Attorney General's office wrote handwritten annotations, indicating simply 'Yes' or 'No' beside each proposal. See British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2124, File 1010-12-15, p. 1-5; Ibid., File 1415-12-15, pp. 4-15.

[67] British Columbia, *Statutes*, 1915, 5 Geo. 5, Chap. 67.

[68] British Columbia, *Statutes*, 1915, 5 Geo. 5, Chap. 41.

Women's Club spearheaded a petition drive, marshaling the support of the labour movement, municipal governments, and Women's Institutes across the Province.[69] Support for both the DWMA and the Relatives' Maintenance Act (RMA) spread rapidly. Through her contacts with Helena Gutteridge, Helen Gregory MacGill was able to gain the unanimous endorsement of the Vancouver Trades and Labour Council for the proposed amendments to the DWMA and the RMA.[70] The City of Vancouver was also onside. Vancouver's municipal council had been lobbying the province to have its charter amended regarding relief responsibilities, and supported the maintenance amendments enthusiastically. City Relief workers would be able to launch DWMA and RMA proceedings in order to take the destitute off the relief rolls and reduce expenditure.[71] This interest was also shared by other municipalities and charitable organizations.[72]

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[69] The Women's Institutes petition is at British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2133, File 1055-12-16, p. 47. Endorsement by the TLC and Vancouver City Council is found in Ibid., pp. 1-2.

[70] Correspondence of the TLC to the UWC is at British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2133, File 1055-12-16, pp. 7, 38; Ibid., Reel B2140, File 1724-12-17, p. 6.

[71] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2133, File 1055-12-16, pp. 1-2, 8-9, 23, 38, and Reel B2140, File 1724-12-17, p. 7.

[72] These included the South Vancouver Municipal Council, Vancouver's Social Service Council, and the Westminister Benevolent Society, a joint municipal-charitable organization in New Westminster. The South Vancouver Municipal Council, after hearing of the University Women's Club's drive for DWMA reform, suggested a further amendment concerning the locale in which the complaint could be lodged. As it stood, the act required a wife to lay her complaint before the Magistrate in the jurisdiction in which her husband resided. For a destitute wife whose husband had removed to elsewhere in the Province, scraping together the funds to travel to some distant location was near to impossible. Paying the travelling expenses of any necessary witnesses might also be necessary. Therefore, the South Vancouver Relief Committee wrote both Helen MacGill and their M.L.A. requesting that the DWMA be amended to permit wives to lay their complaints in their own district. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2140, File 1724-12-17. p. 5; Ibid., Reel B2133, File 1055-12-16, pp. 25-26; Ibid, File 1055-12-16, pp. 35-37.

Along with the proposals and petitions, Helen Gregory MacGill enclosed drafts of the proposed DWMA amendments and the RMA.[73] The entire file was forwarded by Attorney General Bowser to Legislative Council Avard V. Pineo for his opinion in the early Spring of 1916. Pineo, who was often quite conservative and unfavourable to "tinkering" with legislation unnecessarily, generally favoured the proposals. For Pineo, the matter was one of familial versus municipal responsibility. With respect to the DWMA, he was not in favour of allowing husbands to shirk their obligations. Husbands were breadwinners, and always responsible for their family's upkeep; adding neglect or non-support provisions to the act was perfectly reasonable. He could, he wrote, "see no reason why the husband should not be held liable for the support of his wife and children at all times when they are living with him, and also when they are living apart from him by reason of his desertion or improper conduct." Nor could he see any reason why the close adult relatives of a sick and destitute person should not be compelled to support their kin.

With these ends in mind, Pineo favoured enabling prosecution by amending the DWMA to allow wives to prosecute in their own localities. He also supported the idea of allowing municipal councils and other organizations charged with poor relief under the law to enforce the liabilities of husbands and near relatives. For Pineo, allowing legally-obligated third parties to prosecute husbands and near relatives was a matter of balancing

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[73] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2133, File 1055-12-16, p. 14. A second, revised version of this draft was presented to the Attorney General's department to incorporate the South Vancouver Municipal Council's proposal that a woman be able to launch the suit in her own locality. Ibid., p. 20.

rights with responsibilities: "Under section 496 of the Municipal Act," he wrote, "the duty of making suitable provision for its poor and destitute is imposed on the municipality." Thus, it was only just that "power of proceeding against the husband [or other near relative] ... should be reposed in the same body which is under obligation to provide for her care as a pauper." But this was as far as Pineo was willing to go with respect to third party prosecution. The University Women's Club had asked that any reputable person contributing to the support of a deserted wife or sick and destitute person be permitted to lodge the complaint. With respect to the DWMA, Pineo believed the proposal inadvisable in light of the request to make spouses compellable witnesses. He objected that if the power to prosecute was opened to third parties generally,

> any meddlesome person might by making a small contribution to the support of the wife become a self-constituted guardian of her rights in this particular, involving the very questionable power of bringing an unwilling wife into Court and making her disclose communication between herself and her husband which otherwise might be privileged.

For very similar reasons, Pineo wrote, the right to launch RMA proceedings should be restricted to individuals requiring support and the municipalities responsible for their upkeep.[74] Despite Pineo's generally favourable evaluations, Bowser took no action.

Given the government's pecuniary interest in compelling support and ridding itself of relief costs, the slow pace of maintenance law reform seems inexplicable. After all, organized women were agitating for reforms advantageous to the government. The slow pace of reform, in fact, did not derive from government's hostility to the proposals. It

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[74] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2133, File 1055-12-16, p. 28.

resulted from political considerations. The feminists pushing reform were not solely non-threatening maternal feminists, although what has been termed maternal feminism figured prominently in their mindset and demands. Many of British Columbia's organized women were motivated by equal-rights feminism as well. In fact, their drive for legal reform began with agitation for dower and guardianship rights in 1910. Over the following five years, women's legal concerns broadened to include maintenance legislation.[75] It was the common source and bundling of these demands which frustrated the rate of reform. Maintenance laws were understood as part of the overall feminist drive for reform, a controversial movement to which the Conservative government was wary of giving the appearance of approval. Given the source of the demands, Conservative legislators were circumspect in their actions, and careful to maintain the appearance of distance.

Political agitation for dower and guardianship rights commenced in 1910. That year, the University Women's Club invited a lawyer to speak on the legal status of women in British Columbia. Upon learning that married women had no dower rights and no guardianship rights in British Columbia, a joint legal committee was formed with the Local Council of Women to investigate women's legal status and lobby for reform. Presentations to the provincial government commenced shortly afterward.[76] The Pioneer Political Equality League, dedicated to the achievement of women's suffrage,

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[75] Tammy Adilman, "Evlyn Farris and the University Women's Club," *In Her Own Right*, pp. 155, 159-160.

[76] Adilman, "Evlyn Farris," p. 155.

made its appearance around the same time.[77] The pressure created by these groups appears to have had the desired effect. On the final day of the 1910 session, a Vancouver M.L.A. named MacGowan introduced a measure to re-establish the widow's right to one-third dower.[78]

In the legislature, MacGowan declared that the existing state of the law was "a relic of barbarism, since it gave the wife no dower in the estate of her husband."[79] All civilized societies, MacGowan admonished his brethren, had recognized women's rights. Dower had been established by the Magna Carta and was a "primal right" of women under English law. However, British Columbia's so-called Dower Act actually abolished women's interest in family property. As it stood, rather than providing wives with an indefeasible claim to a life-estate in one-third of their husbands' lands, a woman's only right in her husband's land materialized after his death, provided he had not encumbered or disposed of the property.[80] True dower acts existed in other Canadian provinces, and

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[77] Diane Crossley, "The B.C. Liberal Party and Women's Reforms, 1916-1928," *In Her Own Right*, p. 231.

[78] *Province*, 11 March 1910; *British Colonist*, 11 March 1910.

[79] *News-Advertiser*, 12 March 1910.

[80] Intestacy rights for married women had improved slightly since the 1870s. In 1896 the legislature commissioned a revision of the statutes and appointed Chief Justice Theodore Davie to perform the task. Davie took the opportunity to clarify certain ambiguities by inserting a provision in the Inheritance Act declaring that dower rights continued to exist. To further clarify the situation, Davie included a statute outlining English Dower rights as they existed at the colony's inception in 1858. Harry Dallas Helmcken, active in the prohibition and women's suffrage causes, questioned Davie's authority to make these changes, and legislators were given time to examine the revision. When approval was granted, there were further alterations, granting the spouses of intestates without children the right to one-half of the real estate absolutely. If there were children, an intestate's spouse was entitled to one-third for life. For the first time, no distinction was made between the rights of husbands and wives. The changes granted widows without children greater inheritance rights. Prior to the legislation, the widow of an intestate was entitled to one-third of his realty (provided her dower was not barred by deed) for life, whether she had children or not. After the legislation, she was entitled to one-half of his real property absolutely if their were no children. The authorship of these changes is uncertain, but Helmcken is a likely candidate. In

MacGowan appealed to legislators' "sense of justice" calling on them to make "fair provision for our wives, our mothers and our sisters."[81] He noted the common objection that in requiring a wife's acknowledgement of every transfer or agreement, dower would inhibit real estate transactions, but he had made provision in the bill to remedy this defect. Under the terms of the proposal, a husband could secure power of attorney from his wife, and with it the ability to give consent on her behalf. MacGowan believed that if a man was "the right kind of husband he would have no difficulty in securing such a power, and if he were not the right kind it was as well that he should not have it." Yet MacGowan faced a hostile audience. Amidst the laughter of the Legislature, Conservative Ernest Miller of Grand Forks moved to adjourn the debate, and his motion carried. Since it was the last day of the session, the debate would not be resumed.[82]

It appeared quite strange then, that in the very next session, Attorney-General Bowser introduced a dower bill of his own. Bowser took care to emphasize that the bill was not a government measure, but rather an expression of his own personal views and conclusions regarding dower. Bowser referred to MacGowan's dower bill of the previous session, admitting that "[h]e had not been in accord with that gentleman then, but his own views

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1901 he pressed unsuccessfully for additional improvements to married women's inheritance rights. At that time, a second legislator suggested re-instating mandatory dower rights. The suggestion was dismissed preremptorily. British Columbia, Attorney General, Correspondence, BCARS, Reel B2284, File D-71-1, p. 5; *Daily World*, 4 February 1896; *Daily Times*, 4 February 1896; British Columbia, *Statutes*, 1898, 61 Vict., no. 40; *British Colonist*, 26 April 1901; *Daily Times*, 26 April 1901.

[81] *British Colonist*, 11 March 1910.

[82] *Daily Times*, 10 March 1910; *British Colonist*, 11 March 1910; *Province*, 11 March 1910; *News-Advertiser*, 12 March 1910.

had changed of late..."[83] That change resulted from petitions by the National Council of Women.[84] Not surprisingly, Bowser's new-found commitment to dower was a political dodge. In moving the second reading of the bill, Bowser stressed to the Legislature that his own views "were not necessarily shared by his colleagues," and encouraged them to "express themselves upon [the] principle[s] and contents of [the] bill and vote in accordance with their own opinions."[85] Summoning all his mental powers, the editor of the *Province* was able to read between the lines: "The bill is in no sense a government measure," he wrote. "It is submitted for everyone to take a crack at."[86] If Bowser's encouragement to legislators to criticize and defeat the legislation were not revealing enough, the bill exposed the Attorney General's unease with dower's effects. Although he informed the legislators that dower rights in British Columbia were so easily defeated as to be nullified for all practical purposes, he did not propose a full restoration of dower as it had existed prior to 1833. Rather, Bowser's proposal was to amend the present dower act to prevent a husband from barring his wife's dower upon purchasing property or by his will. He proposed, he told the Legislature, "to strike out the power under which a husband might now insert the special clause [when purchasing real estate] providing for the non-application of general dower rights." He also intended to revoke the husband's

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[83] *British Colonist*, 24 February 1911; *News-Advertiser*, 26 February 1911.

[84] *Daily Times*, 21 February 1911; *British Colonist*, 21 February 1911; *News-Advertiser*, 22 February 1911.

[85] *British Colonist*, 24 February 1911; *News-Advertiser*, 26 February 1911.

[86] *Province*, 24 February 1911.

power to "extinguish the right of the wife to enjoy her dower interest" in his will.[87] Yet Bowser's strategy, as the *Province*'s editor noted, left "untouched the present law which allows a husband during his lifetime to deal with real estate without regard to dower." A man could still sell his property during his lifetime, and his wife's dower right would be extinguished; at his death, his wife would be entitled to dower only out of the lands remaining in his possession.

This was a substantially lesser form of dower right than had existed in England prior to 1833, and which still existed in other Canadian provinces. Under those dower laws, which were presumably what the women's organizations had desired, a wife's rights in family property were considerably stronger. Her inchoate right to dower affected every piece of land her husband had owned *at any time during the marriage*. If her husband wanted to sell, her consent was required; if she refused to consent, her inchoate dower right remained, and could be claimed from the purchaser upon the death of her husband. Since purchasers were aware of this potential problem, the wife's consent was required for all land transactions by married men. In theory, this gave a woman a great deal of control over family property and her inheritance. She had to be consulted. If her consent was not necessary, as in Bowser's bill, her husband could sell property at will, divesting the family of its assets and his wife of her dower. As Mr. MacGowan commented during the brief debate on the measure, the law was "all right ... as far as it goes, but it doesn't

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[87] The text of this section appeared in the Victoria *Times* issue of 26 January 1912. The bill substituted for section 8 of the Dower Act, "By his will a testator shall have no power to deprive his widow of dower, but a widow may by deed or instrument in writing elect to take any devise or bequest, made to her for her benefit by her husband in his will, in lieu of all claims to dower."

go far enough. It should give the wife what Magna Charta gives her. It should give her an interest in the estate during her husband's life. It should necessitate her signing every document in connection with the transfer of land."

Attorney-General Bowser explained that he was not in favour of restoring dower entirely because "with the general dealings in properties and the rapid advance in prices generally, such action would have a tendency to too greatly disturb business conditions." In other words, full restoration of dower rights would undermine speculation in property. If there was any doubt as to his meaning, Bowser clarified it further. "[M]aking ... the wife a necessary party in all realty transactions," he emphasized, "would ... destroy the quickness of movement in real estate dealings, which in the present times was of so great importance." For those who were not convinced by economic arguments, the Attorney General added that requiring the wife's consent for land transfers would result in marital friction. His explanation that the "wife might disapprove of the bargain contemplated by the husband or regard the question of price in a different manner, and refusing to sign, bring about domestic discord," would not have appealed to the women agitating for dower rights. But it likely struck a chord with the male electorate, especially in the business community.[88] In fact, one Vancouver man wrote Bowser each year from 1912 to 1914, concerned that the government might be preparing to pass legislation which would "prevent a husband from disposing of his property without the consent of his wife." Each year, Bowser assured him that he need not worry.[89]

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[88] *British Colonist*, 24 February 1911; *Province*, 24 November 1911; *News-Advertiser*, 26 February 1911.

[89] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2083, File 453-12-12, pp. 1-2; Ibid., Reel B2096, File 1006-12-13, pp. 1-2; Ibid., Reel 2110, File 636-12-14, p. 1.

Bowser's limited version of dower passed second reading, eighteen votes to fifteen. Yet the Attorney General had never intended the measure to become law. He purposefully introduced it too late in the session to pass through all the necessary stages. It was, as the *Colonist* explained, "*known to be foredoomed from* [its] *introduction* ... the members being fully aware that time would not permit its progress to completion."[90] Bowser revealed his true feelings on dower a year later. When Liberal Harlan Brewster asked the Attorney General whether it was his intention to reintroduce the measure, Bowser replied that there had been such opposition in the house that he did not intend to do so. Dower was, he advised Brewster, "a measure which worked very radical changes in the disposition of family estates, [and] it did not appear to him wise to bring it forward again under present circumstances." Bowser, of course, was re-writing history. No strenuous opposition to his dower bill had materialized because the legislators were aware there was not enough time remaining in the session to pass it. When Parker Williams brought out the journals of the legislature to show that the bill had passed second reading, Bowser balked, informing the Legislature that he no longer supported the idea of restoring dower rights to any extent.[91]

To some degree, the Attorney General was losing touch with a growing political constituency. He was not losing his political savvy, however. Within two weeks, the government received renewed calls for dower from the British Columbia Federation of

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[90] *British Colonist*, 1, 2 March 1911. Emphasis in original. See also *Province*, 1 March 1911; *News-Advertiser*, 2 March 1911.

[91] *Province*, 26 January 1912; *News-Advertiser*, 27 January 1912.

Labour, the University Women's Club and the Vancouver and New Westminster Local Councils of Women. The Local Councils of Women also made their first overtures for guardianship rights for married women.[92] On the subject of dower reform, Bowser—in an incredible about-face—promised that he would "take the matter into careful consideration."[93] His position was a stalling tactic: an election was in the offing, and

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[92] The delegation asked that wives be granted equal rights with their husbands concerning the marriage of children under the age of fifteen. Second, they wished to discuss the matter of custody in the event of desertion. Sometime in 1912 Bowser was also petitioned by Evelyn Farris on behalf of the University Women's Club, who wrote informally of her concerns regarding men's ability to will their children away from their wives. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2084, File 1783-12-12, pp. 1-2; *Province*, 26, 27 January 1912; *British Colonist*, 2 February 1912; *News-Advertiser*, 6 February 1912.

At the beginning of the twentieth century, guardianship in British Columbia was governed by English law as it existed in 1858. While England had amended and reformulated these laws after 1858, British Columbia's remained unaltered. Guardianship law in British Columbia was governed by the common law, as altered by a 1660 English statute which took ultimate authority and control over the education, religion, management, and domicile of minor children from the Crown and vested these powers in the father as his 'natural' right. He also gained the power to dispose of custody of children by will. Yet these rights were not absolute. They continued to be interpreted through the common law, which treated guardianship and custody as it approached other legal relationships: as a balance of rights and responsibilities. In what Michael Grossberg has termed a "medieval equation of legal rights with property ownership," the courts employed a property-based standard of parental fitness. Custody was dependent upon the obligation to support. The law assumed that the best interests of children were served by securing the father's natural position as guardian. Children were "assets in which fathers had a vested right," cast in a dependent and subordinate position. In exchange for maintenance, protection, moral supervision, and education, fathers gained rights to their children's association, services and earnings. The right to association carried with it the right to apprentice the child, or to send it to live with relatives or another family. The mother need not be consulted. Married women, in fact, enjoyed no equitable or common law claim to the custody of their children. They were entitled, as Blackstone phrased it, to "no power but only reverence and respect." This lack of power over children was part and parcel of "the general legal impotence of married women." Since married women held few property and contractual rights as *femes covert*, they had no legal means of supporting their children. Given their legal debilities, the logic of the legal system followed through by laying few obligations toward their children upon mothers. MacGill, *My Mother the Judge*, p. 120; Grossberg, "Who Gets the Child?" 238; Grossberg, *Governing the Hearth*, 235; Tiffin, *In Whose Best Interest?*, 142; Mason, *From Father's Property to Children's Rights*, pp. 13-14.

[93] The women also petitioned to have the intestacy laws amended so that a wife without children would receive her husband's estate in its entirety. Where there were children, the organizations proposed that wives receive the first $1000 absolutely; and of the residue, if any, one-third of the personalty absolutely and one-third of the realty for life. In a request which appears to include reference to the wife's share in cases where the husband wrote a will, they asked that "In all cases the widow may elect to take either dower or the distributive share in the estate of the Deceased husband." *News-Advertiser*, 6, 10 February 1912. Written petitions to the Attorney General embodying the subject matter discussed at the interview

Bowser was eager to avoid unnecessary confrontation. In January 1913, after the Conservative government's re-election, the Attorney-General reverted to his true colours, informing the University Women's Club "that he very seriously doubted whether there were to be any changes made in the Conservative policy concerning the laws affecting women and children."[94] If organized women were not alienated from the Conservative party by these remarks, they soon would be. Within weeks, Premier McBride rather brusquely dismissed a women's delegation presenting a suffrage petition signed by over ten thousand women.[95]

Yet Bowser was gradually becoming aware that women's issues would have to be handled much more carefully in the future: his party was being divided. By 1913, dower had become a topic of discussion and concern among grassroots Conservatives, and many were sympathetic. In the summer of 1913, Bowser received a letter inquiring about the current state of the dower law from the Ward Five Conservative Club in Vancouver. Ward Five had been asked by another Conservative Club to endorse a resolution supporting amendments to the dower act. Since no one seemed informed as to the present state of the law, Bowser's correspondent had postponed discussion of the topic for a month to secure information. Yet the writer was quite concerned. "Quite a number of the members," he wrote, "were ready to endorse [the] resolution and I might state seem to have tender feelings toward the Suffragettes." Indeed, one had gone "so far as to move

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can be found at British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2096, File 93-12-13, pp. 172, 178, 181-183.

[94] Adilman, "Evlyn Farris," pp. 155, 159.

[95] Ormsby, *British Columbia*, p. 367.

that the Suffragettes be invited to attend our next regular meeting and address the Club." The motion was "voted down cold," but the writer wondered what steps he should take. He was, he told Bowser, worried about the political power of the women's movement: "Personally I don't know what to think of this Suffragette business anyway I am afraid they will be a big factor in the next Election and it appears to me as if the Grits figure on the Suffragettes being the Horse they will try to ride to victory on."[96] Bowser's reply was less than satisfying. He wrote that the details of inheritance law were too complicated for laymen to understand, provided a brief summary of the law, and suggested that the association drop the matter.[97]

Yet Bowser's correspondent had touched on an important theme. Female activists were increasingly linking their unsatisfactory legal status with their inability to vote. In 1914, labour activist Helena Gutteridge told a meeting in North Vancouver that women's suffrage was made a necessity by the inadequacy of "man-made laws." Those with the right to vote and sit in the Legislature, she said, "secure legislation for themselves while the interests of those not represented are not taken into consideration. This was the case with the woman."[98] Her example of the problem singled out the inheritance laws in particular. In the case of a man who died intestate, the widow was left in a very awkward position. First, the administration laws required that intestate estates be left undistributed

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[96] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2097, File 6884-12-13, pp. 1-3.

[97] Ibid., pp. 7-8.

[98] Vancouver *Sun*, 26 February 1914.

for a period of one year. Thus, the wife could "not touch a cent of the estate no matter how extensive until after an eternity of time [was] consumed in administering it."[99] The difficulties involved in administration were not the only problems facing widows. As Gutteridge told her audience, the distribution of intestate estates was also far from satisfactory. A widow with children received only a life-estate in one-third of the realty with the balance going to the children. If there were no children, the widow received half and the next of kin the other half. Failing next of kin, Gutteridge declared, "the wife who has helped her husband build up the estate gets only a half, and, as one widow declared, 'Mr. Bowser got the other half.'"[100] Like Amor De Cosmos half a century earlier, Gutteridge held the belief that the unpaid labour of family members should be rewarded through inheritance. They had, after all, played a crucial role in amassing the property in question.[101]

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[99] Gutteridge was not alone in this observation. Over the next few years, the Attorney-General's department received a number of letters requesting that the waiting period for small estates be dropped, and advocating a less costly method of administrating small estates. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel 2124, File 6643-12-15, pp. 1-2; Ibid., Reel B2140. File 3234-12-17, pp. 1-2; Ibid., File 5103-9-17, pp.1-2; Ibid., File 5698-9-17, p. 1; Ibid., Reel B2149, File 373-9-18, pp. 1, 3; Ibid., Reel B2150. File 1841-12-18.

[100] Vancouver *Sun*, 26 February 1914. If a man died with a widow and no other next of kin, the widow was entitled to one-half of the property, while the remainder escheated to the Crown. A case of this kind had occurred in 1910. That year, a Vancouver man drowned in the Capilano River. His sole property was the small house in which he and his wife lived. As their were no other heirs, half the house escheated to the Crown. His wife petitioned the Lieutenant-Governor-in-Council, who granted an Order-in-Council waiving the Crown's interest. See British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2225, File A-5-4, p. 22, 25.

[101] As the Manitoba law reform commission stated, one of the fundamental questions in spousal inheritance law "is the entitlement of the surviving spouse to an equal participation in the economic gains or property acquired by the parties during the subsistence of the marriage." Manitoba Law Reform Commission, *Report on "The Testator's Family Maintenance Act"*, p. 2.

Gutteridge was not alone in her frustration. A few days prior to her speech, Premier McBride received a letter from a woman in his constituency, who mistakenly understood that a dower bill was before the legislature. The woman wrote that the current state of the law had resulted in a great injustice to one of her friends. As she described the situation, the

> husband died suddenly without a will. his [sic] family seven in number came in and took about all so that she had to leave her nice comfortable house and go out in the world to work. She was a good true wife and she is only one of the hundreds in our fair Province that has fared thus.

The writer believed McBride was "a kind and thoughtful husband" and that if he understood how wives in British Columbia were treated, he would remedy the situation at once. As matters stood, British Columbian wives faced "injustice and disgrace." "The border States laugh at us," she wrote, "and tell us we are treated like squaws." McBride forwarded the letter to Bowser.[102]

Pressure was also mounting on the government to revise the guardianship laws. In 1913, the University Women's Club and the Pioneer Political Equality League made concrete proposals to the Attorney-General's office, asking for an amendment to the Infants Act automatically granting guardianship to the mother when the father was overseas, insane, or deceased. Helen Gregory MacGill also wrote Bowser in her capacity as Convener of the UWC's Committee on Better Laws for Women and Children, requesting changes in guardianship laws. In her letter, MacGill outlined the guardianship

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[102] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2097, File 9629-12-13, p. 7.

laws of Alberta, Saskatchewan and New Brunswick. MacGill explained that these laws were better than those in force in British Columbia; she believed the same was true of the 1886 English legislation. However, MacGill wrote, despite their favourable aspects, none of these laws would satisfy the demands of the University Women's Club: "We want exactly the same rights and priveleges [sic] regarding the child as is given the father neither more nor less." Interestingly, this early petition by MacGill makes no appeal to maternal instinct, as is supposed characteristic of maternal feminists in the progressive era. Hers is purely an equal-rights argument, perhaps reflecting MacGill's exposure to equal rights ideas through her mother. The University Women's Club also sent the Attorney General draft legislation endorsed by the Vancouver and New Westminster Local Councils of Women. The legislation proposed that in the absence of misconduct, both parents should have equal rights to the custody, control and earnings of legitimate children. In the case of one spouse's death, the other would assume all guardianship rights. Neither parent could will guardianship away from the other; however, the survivor was permitted to assign guardianship upon his or her death by deed or will.[103]

In response to the delegations and petitions of women's organizations, Attorney General Bowser introduced legislation to amend British Columbia's guardianship laws in the Spring of 1913. Bowser informed the legislature of the many suggestions and petitions he had received from organized women; yet the reservations he expressed foreshadowed the limitations of the legislation which would follow, and revealed

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[103] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2096, File 93-12-13, pp. 117, 175, 175, 181-183; Ibid., Reel B2097, File 9910-12-13.

Bowser's desire to keep up the appearance of distance between organized women and the government. "While it had not been possible to accede to all of [the demands]," Bowser explained, "the legislation before the house went a long way in the direction sought ... and he believed the bill would meet with the approval, not only of the women of the province, but of the men." He continued, in phrases marked by the ideals of the cult of motherhood, that the act gave "the mother, who perhaps has the most natural affection for the child, the rights over her children which she thought she should have, but which she has not had under the law in the past."[104] Bowser's bill did significantly alter married women's guardianship rights in British Columbia. It did not go nearly as far as organized women had hoped, and would not come close to satisfying their demands.

The 1913 statute created a succession of guardianship rights, first to the father, then the mother, and finally to the Province's Official Guardian. Despite the continued subordination of maternal rights, the statutory recognition of the mother's guardianship rights was a major change, given that mothers previously held no legal right to guardianship at all. The father retained the power to appoint a guardian to act jointly with the mother at his death. If no guardian was appointed, the mother assumed sole guardianship, although the courts could appoint the Province's Official Guardian to act jointly with her. Thus married women's guardianship rights existed subject to patriarchal prerogative, judicial discretion, and bureaucratic intervention. Married women also gained limited rights to appoint a guardian by will, although these rights were subject to

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[104] *Province*, 20 February 1913.

patriarchal prerogative and judicial discretion as well. In general, a father would retain sole guardianship rights at the death of the mother. However, a mother could nominate a provisional guardian. This nominee's appointment would only take effect if the father was judged unfit by the courts to exercise sole guardianship rights. The nominee would be granted sole or joint guardianship with the father at the presiding judge's discretion.[105] As Bowser explained, his chief concern in formulating this section was ensuring "that no injustice might be done a father who was perfectly fitted to undertake the trust, but who might have incurred the severe displeasure of his wife before her death."[106] The Attorney General apparently gave no consideration to mothers in the same position. Finally, the act recognized the existence of marital discord and disputes over child custody, permitting mothers to petition for access to or custody of their children. Awards would be made at the court's discretion; and maternal custody awards could include provisions for the father's access.[107]

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[105] The wife's nominee would also become guardian upon the death of both parents, acting jointly with the father's nominee, if any. British Columbia, *Statutes*, 1913, 3 Geo. 5, Chap. 31. Elsie MacGill writes that the 1913 amendment advanced British Columbia's law to equivalency with the English law of 1886. This was a step forward, but hardly up to date with the ideas of 1913. MacGill, *My Mother the Judge*, pp. 136-137.

[106] *Province*, 20 February 1913.

[107] British Columbia, *Statutes*, 1913, 3 Geo. 5, Chap. 31. This brought British Columbia's legislation into a close parallel with Ontario's legislation as of 1888. Ontario's first guardianship statute in 1827 included no provisions for the appointment of mothers, although Splane writes that it was common practice in Canada for mothers to assume the role, whether remarried or not. An 1855 statute recognized and extended the 'tender years' doctrine, allowing mothers to have the care and custody of children to the age of twelve. Fathers remained under the obligation to support. In 1877, these guardianship rights were extended further, permitting mothers to be named guardians of their children for the duration of their minority; the courts also received the power to name a mother guardian of her children contrary to the provisions of the father's will. In 1887, mothers were given the power to name guardians by will in the event of both parents' deaths, and in 1888, they gained the right to name a co-guardian to act with the father after their death, if the court was convinced of the father's unfitness to act alone. Splane, *Social Welfare in Ontario*, pp. 217-218, 222-223, 255; Ursel, *Private Lives, Public Policy*, p. 104.

The following year, the Attorney General expanded the guardianship rights of married women slightly further, allowing mothers to assume guardianship of their children in cases where the father had taken up permanent residence outside the Province or was legally adjudged mentally incompetent.[108] Women's organizations continued to press for change. In early 1915, the University Women's Club and the Vancouver and New Westminster Local Councils of Women petitioned local M.L.A. H. H. Watson and the Attorney General to extend the right to name a provisional guardian to mothers under the age of twenty-one. Under the 1913 legislation, a minor father could name a guardian by will; a minor mother could not. As the University Women's Club pointed out, since the father was generally the elder of the two parents, minority was more likely to occur in the case of mothers. They believed this was a minor and accidental omission, which could easily be rectified.[109] Bowser took no action.

While women's organizations were not happy with Bowser's guardianship reforms, some individuals were even more displeased. A letter to the Attorney General's office reveals that not everyone espoused the moral virtues of motherhood. 'Prospector,' who wrote from Alaska, cautioned the Attorney General that "The tin-pan clamour for woman's rights, woman's suffrage and woman's what-not that fills the whole civilized world today does not release a man from the moral obligations of masculinity." 'Prospector's' beliefs about women reveal that for him, the moral demands placed on

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[108] *Sun*, 21 February 1914; *Daily Times*, 21 February 1914; *Province*, 25 February 1914.

[109] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2124, File 1010-12-15, pp. 1-5; Ibid., File 1319-12-15, pp. 1-2; Ibid., File 1415-12-15, pp. 4-13.

men were heavy indeed. Morality was by definition a masculine trait. "The eternal feminine," he wrote, evoking images of Eve, "is a non-moral being." The cult of motherhood was a modern ruse. "The semblance of moral worth, character &c. which [a woman] possesses is imposed upon her by the dominance of masculine ideals. A 'good' woman is a woman under good masculine influence." An emancipated woman was a species of horror fitly described in biblical terms and permitted only out of misdirection and ignorance; by their very existence, emancipated women revealed masculine failure: "Emancipated woman is an abomination that is apparently tolerated because it is not understood," he wrote. "This whole woman movement with its absurd superficialities seems to be a symptom of something lacking in the masculinity of the age." The net effect of increased rights for women would likely be "a decrease in the number of good mothers and good offspring." Given this assessment of the female character, extending guardianship rights to mothers was unthinkable. 'Prospector' contended that "[t]here are profound reasons why women should not have the exclusive care of children after the dawn of consciousness," although he did not think fit to elaborate. Nevertheless, he expressed great concern for children reared by their mothers, especially boys. "I will prophecy," he concluded, "that any change in the law that gives woman the control of her children beyond 5, 6 or 7 years of age will be found poor public policy."[110]

Considered along with Bowser's correspondence from Vancouver's Ward Five Conservative Club, 'Prospector's' polemical letter reveals the deep divisions with which

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[110] 'Prospector' is a pseudonym created to maintain the correspondent's anonymity, in accordance with the terms of British Columbia's privacy legislation. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2097, File 11998-12-13, pp. 1-2.

the Conservative leadership had to contend in addressing women's rights issues. Their supporters spanned a broad spectrum, ranging from those who actively supported women's rights to those who opposed them absolutely. Retaining the support of Conservatives with such diametrically opposing views required adroit political manoeuvering. Hence Bowser's slow accommodation of organized women's demands, conceding reform on certain issues, while always giving the appearance of reluctant and skeptical consent. The schism over women's rights within the Conservative ranks came to a head in 1915, when Conservative dissidents Price Ellison and H.F. Foster broke with party discipline and introduced a women's suffrage bill. Bowser was shaken by the bill, yet managed to keep his composure. With great political shrewdness, he agreed to put women's suffrage and the closely related prohibition issue to referenda at the 1916 election.[111] In doing so, Bowser managed to avoid taking a clear stand on the issues and alienating either extreme. He would not, however, be able to save his party's sinking fortunes.

While Conservatives faced great division over women's aims, their Liberal opponents were united. In 1912, the Liberal Party adopted women's suffrage as part of their election platform.[112] Ties between the Liberals and female reformers strengthened over the following four years. Liberal leader Harlan Brewster sought to bring together a broad reform coalition, including prohibitionists, women's suffrage supporters, labour, and

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[111] Ormsby, *British Columbia*, p. 386; MacGill, *My Mother the Judge*, pp. 148-149.

[112] Crossley, "The B.C. Liberal Party," p. 232.

farmers. During the years leading up to the 1916 election, Brewster announced his intention to support votes for women and legal reform, including equal guardianship status for married women.[113] In response, Evelyn Farris, Mary Ellen Smith, and Helen Gregory MacGill participated in the founding of the Women's Liberal Association in 1915.[114] For some of these women, association with the Liberal Party might be understood as a case of family politics: Farris and Smith's husbands ran as Liberals in the 1916 provincial election.[115] Yet founding a women's branch of a political party was unprecedented in British Columbia. It was not standard behaviour for political wives. Moreover, for Helen Gregory MacGill, a lifetime Conservative, the decision was momentous.[116]

Meanwhile, the Conservative party was in disarray. McBride resigned for health reasons in 1915, and Bowser had taken over the Premiership. The faltering economy, rising provincial debt, and charges of corruption, incompetence, and reckless extravagance in railway bond guarantees alienated Conservative supporters.[117] To offset

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[113] MacGill, *My Mother the Judge*, pp. 149-150; Adilman, "Evlyn Farris," pp. 161-162.

[114] Crossley, "The B.C. Liberal Party," p. 232.

[115] Adilman, "Evlyn Farris," p. 163.

[116] MacGill, *My Mother the Judge*, pp. 104, 149-150.

[117] The provincial debt exceeded $10 million; in addition, the public became aware that the province had guaranteed $80 million in railway bonds. Criticism over the government's bond guarantees to the Canadian Northern and close relations with the Mackenzie and Mann syndicate was especially savage, given that the company's credit was exhausted and the government had extended the time permitted for constructing the line. It appeared the government was more concerned with interests of the company than those of the public. The publication of a pamphlet entitled *The Crisis in British Columbia* by the Minsterial Union of British Columbia in 1915 added fuel to such charges. Ghost-written by accountant and statistician Moses B. Cotworth, *The Crisis in British Columbia* outlined the government's partisan allocation of timber licenses and public lands to giant syndicates, personal friends, and political supporters, using statistical tables to support its charges. Ormsby, *British Columbia*, pp. 369, 384-387.

the economic slowdown and rising unemployment, the Conservatives accelerated construction of the Pacific Great Eastern and successfully pressed Great Britain for war contracts. The combination of PGE construction, munitions, lumber and salmon contracts, and the contracting effect of military enlistments on the labour force, produced a decline in unemployment.[118] Bowser hoped the slight economic upturn would aid his cause.[119] Yet he was not content to sit passively with McBride's policies. In 1916, he introduced measures calculated to stimulate economic growth and win over farmers, labour and veterans groups.[120]

Bowser was not the leader to reverse the Conservative decline in popularity. Within the Conservative party, Bowser was considered impersonal, arrogant, and condescending. Even those Conservatives who understood and appreciated his organizational abilities held little attachment for the man they called "the little czar."[121] Outside the party, he had alienated labour by sending in the militia during the coal miners' strike of 1912-

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[118] The Conservatives sought to reduce unemployment over the short term by speeding up construction on the Pacific Great Eastern Railroad. Of course, this policy was a double-edged sword. While enhanced construction would employ seven thousand men, it involved further bond guarantees. McBride also travelled to London on a successful mission to secure war orders; with his work and the efforts of federal Special Trades Commissioner H.R. MacMillan, sizeable lumber and salmon contracts were obtained. Ormsby, *British Columbia*, pp. 385-386, 388-389, 393.

[119] Ormsby, *British Columbia*, p. 393.

[120] Margaret Ormsby writes that Bowser's "insight into present economic needs was much greater than that of his predecessor." The package had an element of vision and far-sightedness. Bowser promised legislation to develop ports, shipbuilding, and mining; he proposed to create a separate department of agriculture and offered over one million dollars in aid to farmers under an agricultural credits act; for labour there was a workmen's compensation board; and he was already focussed on post-war reconstruction, designing a policy to provide land for returned soldiers. Ormsby, *British Columbia*, pp. 391, 392.

[121] Ormsby, *British Columbia*, p. 391.

1914, and infuriated social reformers by stifling legislative change.[122] The suffrage and prohibition plebiscites did nothing to increase his popularity. Leaders of the women's movement opposed the idea of extending the franchise by plebiscite, noting that if the franchise could be extended by plebiscite, it could likely be revoked by referendum as well. Old-time conservatives were outraged by the very idea of direct democracy, a radical solution which left government decisions in the hands of 'the mob.' Many also believed that should prohibition pass, government would be obligated to compensate businesses involved in the liquor trade.[123]

The end of the Conservative reign in British Columbia was foreshadowed in the Spring of 1916, when the two men Bowser had selected to fill vacant cabinet positions went down in defeat to Liberals Harlan Brewster and M.A. Macdonald.[124] The general election was held in September of 1916, and the Liberals won a landslide victory, with the women's suffrage and prohibition referendums passing. Allegations of irregularities surrounded the overseas soldiers' vote; moreover, the overseas officials were slow in returning the results. An investigatory commission was appointed to look into these matters. But before the controversy was resolved, the Liberals passed legislation granting women the vote.[125] The enfranchisement legislation was an indication of Brewster's

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[122] Ormsby, *British Columbia*, p. 367.

[123] Ormsby, *British Columbia*, p. 393.

[124] Ormsby, *British Columbia*, p. 392

[125] Michael H. Cramer, "Public and Political: Documents of the Women's Suffrage Campaign in British Columbia, 1871-1917: The View from Victoria," *In Her Own Right*, pp. 93-94; Ormsby, *British Columbia*, pp. 394-395.

sympathy with the women's movement. It was also a precursor of Liberals' commitment to reform legislation.[126]

[126] Jean Barman has suggested that the Liberals relationship with reformers was mercenary, merely a ploy to gain the labour and female vote. While this appears to be correct, it obscures the work of Liberal members committed to supporting the reform movement. The Liberal party represented a broad coalition of interests. Premier Harlan Brewster and Attorneys General M.A. Macdonald, J.W. deB. Farris, and A.M. Manson, were strong supporters of equal rights for women and legal reform on behalf of women and children. Brewster, however, was Premier for only slightly over a year. After his death in early 1918, John Oliver took over as Premier. Oliver was much more concerned with industrial and agricultural development than social reform and women's issues. During the long period of Oliver's tenure, it was Farris and Manson who maintained a close relationship with women reformers and pushed reform measures in a caucus much less congenial to reform. Barman, *The West Beyond the West*, p. 203; Crossley, "The B.C. Liberal Party," pp. 235-237, 242; Ormsby, *British Columbia*, pp. 399, 412.

CHAPTER TEN:

LIBERALISM, CHILD PROTECTION, AND WOMEN'S EQUALITY

This chapter explores the close relationship between the organized women's movement and government after the Liberal assumption of power in 1916. The relationship is documented in correspondence between Liberal leaders and women's organizations relating to the drive for equal guardianship legislation. The discussion then turns to women's agitation for stronger maintenance legislation in the late 1910s, documenting the retarding effects of a public backlash against maintenance legislation in 1917. Reform slowed after the controversy, and government became more circumspect in its relations with organized women. Yet the Liberals remained intent on retaining the support of women as a constituency, and reform of deserted wives' and illegitimate children's laws followed. So too did a Parents' Maintenance Act. These rationale for these reforms is elaborated with reference to the enactment of mothers' pensions, and subsequent concerns over public expenditure. The final section of the discussion explores the limits of liberal receptivity to women's objectives. Through an examination of women's repeated failures to secure a joint interest in family property, and the ultimate attainment of testator's family maintenance legislation, the discussion casts light on both the power of the child-centered nation-building discourse, and its limitations in achieving equal rights for women. The discussion concludes with a discussion of the nature of

organized women's nation-building efforts, and the broad appeal and practical efficacy of nation-building discourses.

With the Liberal victory in 1916 came signs of a much closer relationship between women's organizations and the government. In December, Attorney General Macdonald wrote Evelyn Farris asking for suggestions with regard to new guardianship legislation. The choice of Farris was natural, given her close connections with several organizations, the University Women's Club and the Women's Liberal Association in particular. Macdonald asked that she establish communication with the various interested women's organizations and attempt to secure a general consensus on the principles of the legislation. This would ease the task of drafting the legislation, and include interested "non-party women."[1] The Liberals obviously hoped to appeal to women as a broad non-partisan constituency, and saw the passage of legislation securing maternal rights as essential to the task.

The response came in January 1917 from an extensive coalition of Vancouver women's organizations, backed by 30 Women's Institutes from across the Province.[2] The apologetics accompanying the legislative proposals made appeal to both equal rights and

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[1] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2133, File 5163-12-16, p. 2.

[2] These were identified as the University Women's Club, the Local Council of Women, the Women's Central Conservative Association, the Women's Liberal Association, the Women's Forum (municipal ratepayers), the Voters' Educational League, the B.C. Equal Franchise Association, the B.C. Pioneer Political Equality Association, the Women's Educational Club (a teachers' association). British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2140, File 1019-12-17, pp. 24-27. For the Women's Institute petitions, see Ibid., File 1055-12-17, pp. 4-32; Ibid., File 1019-12-17. pp. 1-2, 36.

innate gender differences. In their opening, the petitioners referred to "the present unjust disabilities under which British Columbian mothers suffer." They immediately made appeal to 'natural' rights and 'natural' law. It seemed "incredible," they wrote, that mothers in British Columbia "should be denied what appears to us so natural a right—the right of the mother to share equally with the father the guardianship of their minor children..." An equal guardianship law "would be but an act of justice founded on a human and inherent right, a right so bound up with motherhood that its legal recognition must appeal to all fair-minded and just men."

British Columbia's organized women were not, however, claiming a superior parental status to their husbands. In a separate petition the Vancouver Local Council of Women succinctly stated, "There is no paramount parent in fact[;] why should there be in law."[3] Moreover, they did not rest their arguments solely on the 'natural' capacities of motherhood. They also called for equal rights for women, an argument which reveals the manifold perspectives of the petitioning groups. After referring to the limited amendments passed in the preceding years, they called for a completely new law, "placing both father and mother on an equality." Yet they also assured the Attorney General that the equality they were seeking was not an equality of privileges alone. "We are not seeking for any right greater than that of the father," they wrote, "nor priveleges [sic] without responsibility." What they desired was complete equality, with all its "privileges, duties and responsibilities." In a final entreaty, the petitioners appealed to the

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[3] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2140, File 1019-12-17, pp. 31-32.

Attorney General's sense of progress, calling the existing legislation "the lingering remains of medieval prejudice," a defacement of the statute books unsuited to sit alongside "the just laws of a modern and enlightened Province."[4]

With regard to the provisions of the measure, the petitioners did not provide a detailed draft, as they had on past occasions, but rather set out a series of guiding principles. A husband and wife living together should have "equal powers, rights and duties in respect of the custody and control and of the services and earnings and of the management of the property of their ... unmarried minor children..." In cases of separation, the spouse with actual physical custody should retain all rights pending a court adjudication, in which neither parent should enjoy a presumption of paramount rights.[5] The Vancouver Local Council of Women's petition exhibited the influence of the 'best interests of the child' doctrine in British Columbia: in custody disputes, according to the Local Council, "[t]he welfare of the children must always be superior to any mere legal rights of parents or either of them." Guardianship and custody should be determined by parental fitness alone; they were simply asking that the father not be presumed more fit from the outset. If one parent was unfit, he or she should lose guardianship status. If neither was unfit, they should enjoy joint guardianship and custody.[6] At the death of one spouse, the other was to succeed to guardianship; the deceased spouse could name a co-guardian by will, who would enjoy all the powers of guardianship except control over the minors' services

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[4] Ibid., pp. 24-27.

[5] Ibid.

[6] Ibid., pp. 31-32.

and earnings. Finally, the petitioners called for both parents to be equally liable for the support of their minor children.[7] Interestingly, the petitioners seem to have equated guardianship rights with support obligations. In 1873, married women were given property rights without liability for their children's support. At that time, opponents had claimed the absence of liability for familial support was unjust. Yet women in 1873 had no legal rights as parents. If they were to be granted these parental rights, women themselves were willing to ask for the obligations.

On the basis of these suggestions, a draft bill was drawn up and circulated widely among interested women's organizations for their suggestions. No significant alterations were suggested.[8] This is hardly surprising. The act was tailored exactly to meet the suggestions offered by these organizations, right down to the phrasing.[9] In introducing

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[7] Ibid., pp. 24-27.

[8] Ibid., pp. 4-14, 47-48. Helen Gregory MacGill of the University Women's Club suggested one minor change: that section three, which granted guardians all the powers of guardians in England under 12 Car. 2, chap. 24 and 49 & 50 Vict., chap. 27, s. 4, include the text of the acts and sections thereof invoked. The Attorney General's staff thought this unnecessary.Ibid., pp. 15-18, 22-23.

[9] The bill made the parents equal guardians, removing "[a]ll disabilities of married women with respect to the guardianship of their minor children..." Under its terms, husbands and wives living together were the "joint guardians of their minor children with equal powers, rights, and duties in respect thereto, and there shall be no paramount right to either in connection therewith." Both the father and mother were empowered to appoint guardians by will. The surviving parent, regardless of sex, was to assume sole guardianship, unless the other spouse had named a guardian, who would exercise joint guardianship with the survivor. Subsequent remarriage was to have no effect upon guardianship status, and the disabilities of minor parents were to be equal. Both parents were also equally liable for their children's support.

Should the parents separate voluntarily, they were permitted to arrange guardianship of the children by written agreement. In the absence of such an arrangement, or if either party wished the arrangement terminated, either party could apply for adjudication by the court. Pending judgment, the parties were to maintain the status quo: the parent with actual custody and control to retain that custody and control until the court made its decision. In determining guardianship, the court was instructed to consider several factors: the conduct of the parents, the welfare of the children, and the wishes of both parents. In cases of divorce or judicial separation, a parent guilty of misconduct leading to the decree was deemed automatically unfit. The court also retained the power to remove any guardian and appoint another. Provisions were also included for the apprenticing of children. Appointment of guardians and indentures

the measure in the legislature, Premier Brewster cited the strong lobbying of the women's organizations and his long-term commitment to women's issues and women's equality. Brewster told the legislature that he had often stood in the legislature and "taken the platform" in the fight to remedy women's disabilities under the law. He had great difficulties with fathers' legal monopoly over the "management, training and education" of children, when "[t]he care of the little ones, their education, their upbringing, their moral training, the fitting of them for the battle with the world are matters which are largely left in the hands of the mothers." In the ordinary course of things, Brewster continued, the father "goes out as the bread-winner and pays little attention to the rearing and training of his children." Yet despite his lack of involvement in their upbringing, the father had final authority over the children. This was a legitimate grievance, and he moved the bill to redress such an injustice. Moreover, he said, he thought the bill would encourage "better teamwork in the homes of the people of British Columbia."

Brewster's speech also anticipated and addressed possible criticism of the measure. While some might claim that the bill would extend rights to neglectful mothers, Brewster countered with a claim that it was "common experience" that fathers neglected their children more often. In response to those who believed that guardianship rights should be contingent upon providing financial support, Brewster took issue with the concept of that male wage-earners were the sole breadwinners in a family. He argued that he had never been able to understand

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for boys over fourteen and girls over twelve required the child's consent. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2140, File 1019-12-17, pp. 15-18.

> why the father should be considered as the sole bread-winner. (Hear, hear.) In the true home there is team-work. While the father does, it is true, go out to earn the means of support, we should not lose sight of the fact for one moment that the mother at home is doing probably a greater percentage of work than the father, and therefore she is just as much a bread-winner as he is.

Such statements were purely mercenary, more calculated to exploit a new and potentially valuable constituency than to assuage doubts. They certainly would not have won over opponents. With his political grandstanding complete, Brewster tendered more effective arguments for dealing with actual critics.

Brewster tried to head off conservative fears that the legislation might introduce social instability and disorder by emphasizing the obligations created by the act, and stressing the mediating role of a sagacious judiciary. He turned from the argument that homemaking was equal to breadwinning, stating that in addition to its equal guardianship provisions, the act imposed new support liabilities on married women; he also abandoned equal rights arguments, stressing that the legislation would protect the best interests of the child. Firstly, he noted that the act was part and parcel of granting women full citizenship in the Province. Along with these rights they would have to accept equal responsibilities. With the right to guardianship came the obligation to support. This was a conservative argument, appealing to the longstanding common-law equation of rights and responsibilities. Brewster also appealed to conservative faith in the wisdom and gravity of the judiciary, noting that wherever issues of guardianship became contentious, the Liberals had made "ample provision ... that the interests of the children will be the first consideration." Such decisions were left in the hands of the courts, where the judges

would have the discretion "to deal with each case as it arises" and render judgment based on the individual merits of the case.[10]

If Brewster feared a wave of criticism, he must have been pleasantly surprised. The bill was warmly received in the press, and passed through committee without controversy. As the editors of the *Colonist* had predicted at its introduction, there was "little or no difference of opinion" on the issue.[11] While the Conservatives had not seen fit to bring forth such legislation themselves, they had been slowly moving in the direction of greater equality in guardianship legislation, and the advent of the female electorate seems to have removed any incentive to oppose the measure. The *Colonist* praised the bill as a recognition of "woman as a factor in human progress" and called it a definite "step forward."[12] The editors of Vancouver's *Sun* traced the origins of the old guardianship law to feudal England. The guardianship laws, like so many others, had resulted from the desire to maintain patriarchal control over landed estates. As a result, women had been debarred from their 'natural' rights to guardianship and unfairly branded as irresponsible. However, with the admission of women to the suffrage and the right to sit in the legislature, "the perpetuation of the old state of things [would] no longer [be] possible." The editors praised the women who had "contended so earnestly and intelligently" for the legislation. They saw it as only "the beginning ... of a great

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[10] *Daily Times*, 12 April 1917.

[11] *British Colonist*, 12 April 1917; *Daily Times*, 20 April 1917; *Province*, 20, 29 April 1917.

[12] *British Colonist*, 12 April 1917.

programme of reform in domestic legislation" which would be implemented by the Liberal government.[13]

Indeed, the women's organizations clearly had the government's ear. The guardianship petitions had been accompanied by renewed calls for relatives' maintenance legislation,[14] and the government responded with a sick and destitute relatives' maintenance bill almost identical to that drafted by the University Women's Club.[15] Shortly after introducing the bill, Attorney General Macdonald wrote several women's organizations asking for their comments and suggestions on the bill, noting that there was still time to make amendments.[16] The Women's Liberal Association responded with a protest against the obligation to support siblings, and taking special exception to the obligation to support half-blood relatives. Such obligations, they wrote, were too "far reaching and would cause ... much hardship."[17] The University Women's Club agreed. Better Laws Committee Convener Helen MacGill returned a copy of the bill with the provisions regarding siblings and half-blood relatives crossed out.[18]

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[13] *Sun*, 29 March 1917.

[14] Petitions from 30 Women's Institutes and the Revelstoke Women's Forum arrived in 1917.

[15] One alteration took heed of Pineo's suggestion, limiting the right to launch the claim to the destitute individual or the municipality charged with his or her support. Another provided for private hearings at the discretion of the court, to protect the privacy of the families involved. Several sections were also added providing machinery for enforcing orders through the seizure and sale of the debtor's goods and chattels. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2140, File 1019-12-17, p. 19.

[16] Ibid., pp. 4-14.

[17] Ibid., p. 47.

[18] Ibid., pp. 19-23. The Victoria and Vancouver Island Local Council of Women also protested the obligation to support half-blood relatives. Ibid., Reel B2197, File L-323-56, pp. 8-9.

These objections turned out to be the tip of the iceberg. While Vancouver's press, women's organizations and labour movement generally supported the measure,[19] sentiment in Victoria was quite the opposite. Vancouver's Trades and Labour Council (TLC), had lent its support to the petition drive; the Victoria TLC was equally if not more adamant in its opposition to the bill. Members of the Victoria TLC's legislative committee informed Attorney General Macdonald of their objections in a meeting on 25 April. Delegate John Day evinced a rather bourgeois perspective, arguing that the legislation "would rob men and women of their incentive for thrift, as persons could come on their prosperous relatives. This in the end would increase pauperism. Thrifty persons would be the prey of spendthrift relatives."[20] In a letter to the Victoria *Colonist* three days later Day further expounded upon his position:

> The bill is so far reaching in its effect[—]which is disastrous[—]that no man or woman will be safe from an unscrupulous or spendthrift relative. The act does not in any way protect the individual who, by thrift or care aims to make provision for old age or infirmities or who wishful to bring up a family in respectability, so arranges his bank account.... The sins of the fathers will surely fall upon the children for the state will be relieved of all responsibility and the individuals will bear the burdens.
>
> The many causes of want and disease are not the fault of the individuals, yet the innocent victims of conditions over which they have no control will find that their nursery will be added to.[21]

In closing his comments at the meeting, Day suggested the Attorney General consider other poor laws. Other delegates were not as concerned with the rights of the wealthy, or

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[19] *Province*, 30 March 1917; *News-Advertiser*, 22 April 1917.

[20] *British Colonist*, 26 April 1917.

[21] Ibid., 28 April 1917.

the ascent to respectability. They were worried that despite the Attorney-General's assurances that the bill would only impact the well-to-do, it would in practice force the less affluent to support their poor relations. "Magistrates," they believed, "would have difficulty in classifying persons" by wealth, and "workingmen would be the greatest sufferers."[22] Day took up this criticism in his letter, arguing, "[i]t is quite easy to say a magistrate will be careful and not penalize those who cannot afford it, but I fail to see where the line can be drawn."[23] In proposing a solution, the labour body pushed for greater government activism. They asked "that the State protect those who through no fault of their own were unable to earn a living, as it would be unfair to penalize the relatives." Delegate Simonds put the matter more bluntly. Through the relatives maintenance act, Simonds declared, "the state would be shelving its responsibility off on the individual."[24]

Other labour bodies quickly joined the protest, evincing similar beliefs in the state's obligation to provide social insurance. The Michel local of the United Mine Workers of America wrote the Attorney-General opposing the measure.[25] The South Wellington Local Miners' Union also wrote the Attorney General, arguing, "it is the function of the State to feed, clothe & shelter all the people under its jurisdiction & the [relatives'

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[22] Ibid., 26 April 1917.

[23] Ibid., 28 April 1917.

[24] Ibid., 26 April 1917.

[25] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2197, File L-323-56, p. 12.

maintenance] bill is an attempt to place the responsibilities of the state on the shoulders of the individual."[26] The South Vancouver Women's Forum concurred.[27] The Victoria Board of Trade was concerned too. Like the workingmen, they believed it unjust to make the individual liable for the upkeep of persons beyond his control. The Board wrote the Attorney General's office, asking that a new clause be inserted in the bill permitting persons to restrain their relatives "whenever it may appear that by their manner of living or trading their is a risk of their becoming a charge in case of sickness or destitution."[28] By this point, the Attorney General was clearly on the defensive. At the conclusion of his meeting with the Victoria TLC, Macdonald assured the delegates that "he had been given a new view of the situation," and that the TLC would be consulted before any further action was taken.[29] Once the letters began to arrive, he abandoned the measure entirely. Macdonald moved hastily to dissociate himself from the bill, emphasizing that it had only been presented to the legislators "for the purpose of discussion and consideration" at the request of "various Women's Organizations." He assured his petitioners that the bill was unlikely to be pressed any further "as it has, I feel, objectionable features."[30] When writing to Helen MacGill, Macdonald was more circumspect: "I may say," he wrote "that

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[26] Ibid., p. 20.

[27] The South Vancouver Woman's Forum wrote, "after due deliberation of the several clauses of this Bill," this organization will "go on record as being opposed to said Bill; as it places what we consider the duty of the state upon the individual." British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2197, File L-323-56, p. 5.

[28] Ibid., p. 15.

[29] *British Colonist*, 26 April 1917.

[30] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2197, File L-323-56, p. 7, 11, 14.

[the Relatives Maintenance bill] has met with considerable opposition, even in a restricted form, and I do not think it would be advisable to proceed with it this Session."[31]

From Macdonald's comments it is evident that the government wanted to continue cultivating good relations with women's organizations. Yet the relatives' maintenance bill fiasco introduced a new tentativeness and caution to the Liberal government's willingness to press reform. The most direct effects concerned the DWMA amendments proposed by women's organizations prior to the election. After the RMA debacle the Liberals balked on pressing DWMA reform. It was not that the Liberals opposed the amendments, but that the time was inopportune to press maintenance legislation. Despite governmental inaction, the women's organizations ceased petitioning. In private, the Liberal government must have assured women's organizations that amendments were on the way.[32] Those amendments came in the form of a major DWMA overhaul in 1919, in which the women's organizations received nearly everything for which they had agitated. Much of the new language in the act was derived word-for-word from the UWC's draft amendments. The scope of the act was broadened, adding destitution as a ground for

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[31] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2140, File 1019-12-17, pp. 22-23.

[32] Certainly, the Liberals were favourable to the proposed amendments, despite their inaction. Police Court Magistrate T. F. Johnson of South Vancouver brought the matter of amending the DWMA up with Liberal M.L.A. Gerry McGeer in 1917. Johnson brought up several of the issues previously raised by the University Women's Club and other organizations. He asked that the act be amended to allow the complaint to be laid in the wife's locality; to eliminate the necessity of living apart; and to eliminate the need to prove that a husband's assaults were repeated. McGeer responded favourably. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2140, File 1724-12-17, pp. 3-4.

complaint.[33] Henceforth, married women no longer had to separate from their husbands to prosecute them for maintenance. The act also included several changes to facilitate prosecution. It eased prosecution in rural areas[34] and allowed municipalities liable for the support of the wife to lay complaint against the husband.[35] To aid municipal prosecutions, the spouses were deemed "competent and compellable" witnesses against one another.[36] The mechanisms for setting and varying maintenance awards were also made much more flexible and sensitive to the needs of dependents: the fixed maximum award was eliminated, and judges were granted new powers to vary orders according to children's needs.[37] This heightened emphasis on children's needs was nowhere more evident than in the re-introduction of a clause allowing a maintenance order to be rescinded upon evidence of a wife's adultery.[38] In such cases, the act provided for a

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[33] A woman was deemed destitute when "in necessitous circumstances because of her husband's refusal or neglect, without sufficient cause, to supply her and their infant children (if any) with food, clothing, or other necessaries." British Columbia, *Statutes*, 1919, 9 Geo. 5, Chap. 19, s. 2.

[34] The act permitted the initial complaint to be heard and the summons issued by a single Justice of the Peace rather than two sitting together.British Columbia, *Statutes*, 1919, 9 Geo. 5, Chap. 19, s. 18.

[35] The complaint could be laid whether the municipality had actually provided support or not. British Columbia, *Statutes*, 1919, 9 Geo. 5, Chap. 19, s. 3.

[36] British Columbia, *Statutes*, 1919, 9 Geo. 5, Chap. 19, s. 21.

[37] Previous DWMA statutes permitted variance of orders only when the means of the parents changed. British Columbia, *Statutes*, 1901, 1 Ed. 7, chap 18, s. 4, and 1911, 1 Geo. 5, Chap. 61, s. 6; British Columbia, *Statutes*, 1919, 9 Geo. 5, Chap. 19, s. 3, 5.

[38] The 1903 DWMA allowed orders to be rescinded on evidence of a wife's adultery. The 1911 act dropped this provision. In 1917, a Vancouver lawyer wrote the Attorney General's office regarding a case in which his client had received a maintenance order and subsequently committed adultery. The magistrate presiding over the case ruled that since there was no explicit provision allowing for orders to be invalidated due to adultery in the statute, he could not do so. The solicitor remarked that while he believed his client innocent of the charges, he thought that forcing a husband to contribute to the maintenance of an adulterous wife was 'absurd'. In fact, a woman could take up prostitution and her husband would still be forced to support her! A clause should be introduced to allow for variance of the

separate maintenance order on behalf of the children.[39] Finally, the enforcement provisions of the act were buttressed, allowing garnishees, execution against lands and personalty, and imprisonment for up to three months, with or without hard labour.[40]

No public debate accompanied the 1919 revisions to the DWMA. The origins of the proposals are clear enough; yet the timing of the government's renewed interest demands explanation. This timing, and much of the thought surrounding fatherless families, can be explained with reference to the mothers' pension movement. In 1918, numerous reform, professional, child welfare, labour and patriotic organizations coalesced in support of government pensions to indigent mothers.[41] Undoubtedly the great number of deaths occasioned by World War I played a role in creating the demand for mothers' pensions, and in making them acceptable. Yet support for mothers' pensions in British Columbia pre-dated the war, dating back at least as early as 1911, and formed part of the emerging

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order in such cases. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2140, File 3332-12-17, pp. 1-3.

[39] British Columbia, *Statutes*, 1919, 9 Geo. 5, Chap. 19, s. 6.

[40] The act permitted the recovery of unsatisfied amounts of money by the means provided in the Summary Convictions Act, which included the option to seize and sell the debtors personalty, or impose a prison sentence of up to three months, with or without hard labour. If a sale of personalty was directed and was insufficient to meet the unpaid amount, the husband could also be imprisoned. Furthermore, the section permitting execution against lands was strengthened, extending execution against lands to amounts less than $100; and that permitting garnishees against third parties retained. British Columbia, *Statutes*, 1919, 9 Geo. 5, Chap. 19. The relevant provisions of the Summary Convictions Act can be found in the *Revised Statutes of British Columbia*, 1924, Chap. 245, s. 52. These provisions were passed in 1909 and 1915.

[41] Megan Davies, "'Services Rendered, Rearing Children for the State': Mothers' Pensions in British Columbia, 1919-1931," *Not Just Pin Money*, pp. 250, 256. Petitions began to arrive at the Attorney General's office with some frequency. The files contain petitions from Vancouver's Social Service League, the Provincial Council of Women, Vancouver Council of Women, Vancouver and New Westminster Women's Christian Temperance Unions, Vancouver New Era League, and various parent-teacher associations. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2150, File 361-12-18, p. 1; Ibid., File 771-12-18. pp. 1-2, 7-8, 29, 35, 37, 40-43.

support for social insurance measures revealed during the RMA debates.[42] A speech given by Dr. Belle H. Wilson to the University Women's Club in 1911 reveals much of the thought behind the idea of public support for single mothers.

Wilson's speech, entitled "The Economic Condition of Women Workers" was Marxist in perspective and found the cause of women's oppression in "economic dependence on the oppressor." Capitalists, Wilson contended, were "keenly alive to the industrial situation, and knowing that women are more tractable and patient than men, use them as a cudgel to beat refractory workmen into line." Women were paid lower wages than men and used as a means of undermining male militancy. In Vancouver, Wilson noted, conditions for women were not as bad as in other areas. Yet for many women workers, the situation was difficult indeed, most pressingly so in the case of widows and their children, who were "wholly at the mercy of a pitiless public." For these mothers, the burden of supporting children was immense, and voluntary charity was unable to meet the need. "In some instances," Wilson admitted, "charity comes to the rescue and tides over a pressing need, but charity, while commendable, is spasmodic, and to many a nature repellent." It was of the utmost importance to address the poverty of widowed mothers and their children; failure to do so could have disastrous consequences in the future.

The idea of mothers' pensions, writes historian Megan Davies, meshed well with the progressive concern "to create a healthy, productive and morally pure society."[43] Like

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[42] British Columbia, *Sessional Papers*, 1921, v. 2, p. Y23.

[43] Davies, "Mothers' Pensions," p. 250.

many of her contemporaries, Dr. Wilson believed the socialization of children crucial to creating an improved society in the future. "The most precious wealth of any country," Wilson declared, "is its children and a mother's noble work is to nurture them." Indeed, the progressives, with their environmentalist perspective, saw child nurture as being of the utmost importance. Home-life was the key to the creation of good citizens. Failure to aid widowed mothers in this task would lead to widespread health and social problems. But Wilson did not rest her case on an appeal to altruism or social progress. She left no doubt that the social costs of ignoring impoverished children would be borne financially. "[I]t costs more to lose [the children] than to save them," she told her audience. "Police, criminal courts, jails, reformatories, penitentiaries, detectives, jailers, sheriffs and wardens cost more than public nurseries, public playgrounds, good food and wholesome surroundings." The solution would be to provide a monthly payment to widows for the maintenance of themselves and their children. Mother's pensions would be more rational and dependable than charity. With a pension, a mother could keep her children at home and attend to their socialization. This constant moral female influence, Wilson argued, would mean, "in many instances[,] the difference between good, efficient citizens and half-starved slum children..."[44]

The earliest petition in the Attorney General's files for a mothers' pension came from Justice of the Peace Frank Richards in 1912. Richards informed Attorney General Bowser that a widow's pension had been enacted in New Zealand earlier in the year. His

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[44] *Province*, 27 February 1911.

reasons for pressing the matter were similar to Dr. Wilson's. "Children born in the Province are undoubtedly a great assett [sic] for the country," Richards wrote. "[T]he better children are nourished and trained, the better it will be for the future of the Province." Richards also added a new rationale for promoting widow's pensions: he believed that widow's pensions would aid the province in competing for immigrants. British Columbia's competitors, he warned, were moving rapidly into the provision of state insurance, including old age and widow's pensions. Immigration to one of the leading jurisdictions, Australia, was increasing, while Canada had seen a slight decline in recent years. He advised Bowser, "[t]he more advantages we can offer to the world, the more easily shall we be able to induce people to emigrate to British Columbia," and suggested creating a fund from a small portion of natural resource revenue to bankroll a widow's pension program.[45]

When the agitation for mothers' pensions peaked in the late 1910s, the concerns remained the same, as did the supporting arguments. In the words of G.A. Wismer, who wrote on behalf of the Social Service League,

> It is claimed by the Social Service League and others who are identified with them in this matter that, putting aside all together [sic] the disastrous results which in many cases ensue from fatherless children being dealt with under the present institutional system, the proposed Pension Bill will be a distinct success from an economic stand point; even if the results were to add to the burdens of the Province to some extent, it seems to me that the results which would be achieved would be so beneficial as to amply repay any increased expenditure.[46]

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[45] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2084, File 7307-12-12, pp. 1-2.

[46] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2150, File 771-12-18, pp. 1-2.

The Liberal government was sympathetic to the cause. Yet they remained cautious after the failure of the relatives' maintenance bill: after 1917, the government was much more apt to feel out public opinion before introducing reform measures. Premier Oliver declined to act unilaterally, and added mothers' pensions to the investigatory mandate of a Health Insurance Commission holding hearings on maternity benefits and public nursing.[47] Ostensibly the Commission was empowered to investigate the matter and make proposals; in reality, Liberal leaders sought to gauge public sentiment. The Liberals also took the opportunity to make long sought after changes to the DWMA. These amendments would serve to satisfy the mothers' pensions advocates in the interim: the government could claim to be taking action on behalf of some indigent wives and children. Yet the timing of the DWMA amendments, coming at the height of Mothers' Pension agitation, also suggests that Liberals expected the passage of the Mothers' Pensions, and understood that stronger deserted wives' legislation would have valuable pre-emptive effects, minimizing the number of deserted wives eligible for pension benefits.

The Commission hearings indicated broad public support for mothers' pensions. In their 1920 report, the commissioners recommended the introduction of a mothers' pension scheme for the province. As Davies has indicated, the commission report reveals great concern over the economic stability of working-class families;[48] more specifically, the commissioners were concerned with the instability and fragility of the male-

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[47] Elizabeth Norcross, "Mary Ellen Smith: The Right Woman in the Right Place at the Right Time," *Not Just Pin Money*, p. 361; Davies, "Mothers' Pensions," pp. 249, 256.

[48] Davies, "Mothers' Pensions," pp. 256-257.

breadwinner/female-homemaker family structure, and saw mothers' pensions as a means of buttressing families in crisis. The commissioners viewed children as the property of the state, and child-raising as a service to the government. "The mother, while engaged in rearing small children," they asserted, "is considered to be rendering an important service to the State, but the living provided her is dependent on the length of life of her husband, his character or health." The results of the breadwinner's absence could be disastrous. "Should he die or be sent to prison or become totally incapacitated," the report continued, "the mother's living is ended, save and so far as he has been able to provide for the future needs of his family."[49] For most working-class men, this was an impossibility. According to the commissioners, "with the cost of living as high as it is, the average wage earner cannot from his income make adequate provision, in the event of incapacity, to guarantee the maintenance of his home and the education of his children." In such cases, the state was to step in and assume the father's role as breadwinner. Even a living but incapacitated father was really no father at all. Should he be unable to fulfill the role of breadwinner, the father was not merely replaced as the provider of material support. The report stated that in such cases, he "must necessarily leave [his children's] upbringing and education to the mercy of the state."[50]

As a result of organized lobbying pressure and the recommendations of the Health Insurance Commission, a mothers' pension was introduced in 1920 by Dr. J.D. MacLean, who held the dual portfolios of Minister of Education and Provincial Secretary in the

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[49] British Columbia, *Sessional Papers*, 1920, vol. 2, p. T3.

[50] British Columbia, *Sessional Papers*, 1920, vol. 2, p. T6.

Liberal government. MacLean asserted that the bill's main objective was to provide a "suitable home life" to children in families where the breadwinner was absent or incapacitated.[51] Both MacLean and Mary Ellen Smith, who spoke at length on the bill, stressed that a mother without the financial support of a breadwinning male faced difficult choices: she could place the children up for adoption; she could find work to support herself and send the children to an institution; or she could keep them at home and fight starvation.[52]

No further comments were made in the legislature about adoption. Presumably, it was considered a useful option, if it was available. Of course, adoption was not a realistic means of dealing with the vast majority of children. Nor did it appeal to the reformers' sense of the 'natural' bond between mother and child. Neither was institutionalization considered a favourable option. In the progressive era, institutionalization had fallen into disfavor as a means of housing and socializing children. To begin with, it was expensive.[53] Moreover, claimed Dr. MacLean, it simply did not have the desired effect. "[T]he consensus among social workers," he informed his colleagues, is "that the hitherto accepted institutional method of caring for neglected and dependent children is not desirable."[54] In this opinion, MacLean had the backing of the health insurance

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[51] *Daily Times*, 9 April 1920.

[52] *Daily Times*, 9 April 1920; *British Colonist*, 10 April 1920.

[53] See J.W. Cowper's comments in the *British Colonist*, 10 April 1920; British Columbia, *Sessional Papers*, 1920, vol. 2, p. T3.

[54] *British Colonist*, 10 April 1920.

commissioners. Their report claimed that institutions were uniformly understaffed, and the children did not receive the individual care and attention "so essential to the development of thought and character." Institutions were "bleak" and "barren," the buildings in undesirable locations, and the environment afforded "little inspiration to an impressionable child." The result of this lack of stimulation was an "'institutionalized product' lacking normal training, without individuality, and quite unprepared for the tasks and trial which lie before him." There were physical dangers as well, according to the commission report. Children in institutions lacked proper medical attention, which lead to the spread of disease in the facilities.[55]

The final option available to mothers in "fatherless families" was no better. The mother who attempted to keep her children and support them herself, Mary Ellen Smith told the legislature, faced "the horror of the double job." The diction here is important. Mothers who attempted to take on both the masculine and feminine roles, who tried to both support and nurture their children, were participating in a "horror." The word suggests unnaturalness, akin to the abominations and anathemas of the Old Testament. According to Smith, a woman could not be both a breadwinner and mother: "It could not be supposed," she argued, "that the mother could preserve the natural associations between herself and her children ... if she were required to enter the open labour market."[56] Motherhood was a full-time job, which would be neglected by a working woman. When women tried to hold the double job, history had shown the results to be

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[55] British Columbia, *Sessional Papers*, vol. 2, p. T4.

[56] *Daily Times*, 10 April 1920.

disastrous. The double job, Smith contended, led to pauperism, sweated labour, and as she ominously warned, "resort to doubtful methods of gaining a livelihood."[57]

But while there was some concern about the morality and welfare of the mothers, greater emphasis was placed on the results for children. Attempts by single mothers to work and raise children, according to supporters of the mothers' pension movement, had adverse effects on the children. There was simply no way, Smith told the legislature, that a woman could provide "food, clothing and shelter and at the same time care for her children's physical, mental and moral welfare."[58] Dr. MacLean buttressed this position with reference statistical data and expert theories, which showed that failure to provide an "adequate homelife [in] the country [was] detrimental to the state as a whole." "Too much could not be made of the fact," said the doctor, "that the necessity of the mother to go out to work had a very serious effect upon infant mortality." Experience in other jurisdictions indicated that a mothers' pension would reduce infant deaths. In New Zealand, a mothers' pension had been put in place and the result was an infant mortality rate reduced to just half that of Ontario.[59] The dangers were not only physical. They were also social and moral. When mothers went to work, children's education was neglected. MacLean minced no words regarding the effects. When "[s]chool attendance dropped off," he warned, "delinquency was the inevitable sequel, with an increasing number of

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[57] *British Colonist*, 10 April 1920.

[58] *British Colonist*, 10 April 1920.

[59] *Daily Times*, 9 April 1920; *British Colonist*, 10 April 1920.

children appearing in the juvenile courts."[60] Such opinions were typical. Belief that mother-headed families experienced higher than normal levels of infant mortality and juvenile delinquency was also widespread in Ontario.[61]

There was an element of self-interest in progressives' anxiety. Their concern was not for the children of single mothers alone. As the commissioners advised, unless the legislature chose to make the province "a good place for the children of our hapless sister, it will not be a good place for our own children."[62] This was not the only broad social benefit. Vancouver M.L.A. J. S. Cowper was interested in placing British Columbia in the van of social reform, but he also attempted to win converts by emphasizing the financial savings to be had from the mothers' pension act. The act was "a measure not alone of humanity but of common-sense and economic reform," Cowper told the legislature. The reduction of juvenile delinquency would have a beneficial economic impact, he said, and pointed to "the large amounts which the Province is paying for the maintenance of its boys' and girls' industrial homes ... had a mothers' pension system been in force much of that cost would have been eliminated."[63]

The solution recommended by the Commission on Health Insurance to the problem of fatherless families was that the government should provide financial assistance to mothers of one or more children. To this end, the commissioners recommended a pension

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[60] *Daily Times*, 9 April 1920.

[61] Chunn, *From Punishment to Doing Good*, p. 50.

[62] British Columbia, *Sessional Papers*, 1920, vol. 2, p. T6.

[63] *British Colonist*, 10 April 1920.

of $42.50 be paid to a mother with one child, with another $7.50 to be paid for each additional child under the age of sixteen.[64] Reformers' belief in the strong influence of environment on child health and socialization combined with their belief in the 'natural' capacity of mothers for child nurture to lead them to see the mother-filled home as the ideal environment for child-rearing. As Dr. MacLean stressed, it was vital for the Province "to preserve the natural association of the mother and her child. Unless that could be brought about he was apprehensive for the future citizenship of British Columbia."[65] In the same vein, the commission had written that "[t]he necessity for home preservation is imperative not only for the welfare of the child but in the interest of the State."[66]

If fatherless children could be reached early enough, the commissioners were optimistic: "These children, if they receive proper home care and education, will make the useful citizens of to-morrow," they wrote.[67] Proper home care and education involved a mother's sympathy and moral influence. Without the sympathy "which only a mother can give," wrote the commissioners, children "grow up lacking an understanding of human nature."[68] Mothers' moral influence was crucial. The commissioners wrote that a child who had experienced "the benefit of a mother's love and teachings will later

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[64] Ibid., 23 March 1920.

[65] *Daily Times*, 9 April 1920. See also *British Colonist*, 10 April 1920.

[66] British Columbia, *Sessional Papers*, 1920, vol. 2, p. T3.

[67] Ibid., p. T6.

[68] Ibid., p. T4.

on weather the storms of temptation and false ideals much better than one who has been [so] deprived."[69] Given the religious background of many reformers and the revolutionary tenor of the times, the reference to 'false ideals' may have been to either atheism or bolshevism. Both the commissioners and Mary Ellen Smith expressed the view that the act would have beneficial moral effects on single mothers as well. As Smith put it, "History tells us that [with mothers' pensions] fewer mothers go to the bad because of overwork and under nourishment [sic]."[70]

Reformers had little doubt about the government's place in the matter. For J. S. Cowper, the state's parental rights and obligations were stronger than those of the natural parent. The state would be making maintenance payments to its "orphan citizens," he told the legislature, in "recognition of its right and position as an *over-parent*."[71] According to Cowper, there were "numerous causes ... whereby the tie between the child and its parent might be severed, but the tie between the child and the state was inescapable."[72] Mary Ellen Smith used a different, though no less violent diction: Smith asserted the state's ownership over children, noting its interest in preserving "the life of the greatest asset Canada owns today—her children."[73] Like any natural resource, progressive reformers wanted children to be protected and conserved by the state. Even

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[69] Ibid.

[70] *British Colonist*, 10 April 1920; British Columbia, *Sessional Papers*, 1920, vol. 2, p. T5.

[71] *British Colonist*, 10 April 1920. Emphasis added.

[72] *Daily Times*, 9 April 1920.

[73] *British Colonist*, 10 April 1920.

more, they looked forward to the future utilization of the resource. Cowper laid great stress upon "the state's responsibility in the conservation and development of the youth of the land." The state's 'greatness' depended on it. In a paper presented to the Provincial Council of Women, entitled "The Conservation of Child Life," Mrs. R. S. Day told her audience, "We frequently hear that no country can afford to neglect its material resources, but may I say with far greater emphasis, that no country can afford to neglect its maternal resources." A small initial outlay in support of child-nurture, Day emphasized, would pay dividends in future "national greatness".[74]

Since this was work on behalf of the state, mothers' pensions were not considered charity. Mary Ellen Smith told the legislature, "We are simply hiring and paying [the mother] for attending to a responsible job for which she is beholden to no one." This was a partial truth. The government did propose to pay mothers for their services. But far from being "beholden to no one," a mother accepting a pension also invited government scrutiny. The mother was an employee of the government, and the government felt entitled to inspect her performance. The Commissioners saw the relationship in contractual terms:

> Payments made by the State toward securing home-life for the child are made for value received in the form of services rendered by the mother in rearing her children for the State. The mother becomes the State's agent for the purpose of rearing and educating the children, and she receives assistance on their behalf for that purpose.[75]

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[74] Local Council of Women of Victoria, British Columbia, Originals, 1894-1979, BCARS, MS 2818, Box 2, File 9, mimeograph report of paper read by Mrs. R.S. Day at the Third Provincial Conference of the Local Council of B.C, pp. 24-28.

[75] British Columbia, *Sessional Papers*, 1920, vol. 2, p. T3.

Jane Ursel quotes material from both the Manitoba and Ontario Mothers' Allowance Commissions, instructing bureaucrats to "investigate carefully the fitness of the applicant for her position," and to satisfy themselves that "the services rendered for that salary are accomplishing what was intended."[76] As Davies writes with reference to the British Columbia act, "a woman receiving a pension was also accepting that the state had the right to judge her abilities as a mother and a homemaker."[77]

Experience of such intrusive investigation lay in the future. For the moment, no one seems to have considered it a vital concern. In any case, for progressive reformers, a little intrusion into the lives of recipients was considered a small price to pay for their policy of preventative measures implemented by expert administrators, and the accompanying vision of a reformed, idyllic future.[78] The parties were agreed upon the measure, and the Conservatives launched no opposition. William Bowser promised his party's undivided support, and stressed in the legislature that the Conservatives had "gone on record" at their previous party convention, "as unambiguously favoring the inauguration of a system of pensions for deserving mothers."[79] In fact, Bowser tried to claim credit for the measure. "One month after that convention," he told the legislature, "the Government awoke to the urgency of the situation and a commission was appointed to feel out public

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[76] Ursel, *Private Lives, Public Policy*, pp. 158-159.

[77] Davies, "Mothers' Pensions," pp. 259-260.

[78] Ibid., p. 251.

[79] *Daily Times*, 9 April 1920.

opinion." Fortunately for all concerned, Bowser's personal integrity and concern for public welfare came before any thought of political gain. Magnanimously, he explained to the public that he was "leaving political issues and any thought of credit aside, [since] the legislation is good and should receive the unanimous support of the House."[80] Newspaper editorials universally praised the bill.[81] The public was apparently so uniform in its support that the Health Insurance Commissioners could claim that "No witness anywhere appeared before the Commission in opposition to the principle of mothers' pensions.[82] Perhaps the absence of opposition can be attributed to the general knowledge that mothers' pensions were in force throughout the United States, New Zealand and in several Canadian and Australian jurisdictions.[83] As Mary Ellen Smith put it, mothers' pensions "were no new thing."[84]

The Commission did, however, report several criticisms raised at a Conference on Social Insurance held in Washington, D.C. in 1916. The conference attendees had feared that the pensions would tend to 'pauperize' recipients: that is, they would lose their work ethic and become permanently dependent on the taxpayer. The Washington conference was also concerned that the legislation would relieve relatives of their moral obligation at taxpayers' expense. Some expressed concerns that aid would corrupt the holders of

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[80] Ibid.

[81] *Sun*, 6 April 1920; *Daily Times*, 10, 17 April 1920; *Province*, 12 April 1920.

[82] British Columbia, *Sessional Papers*, 1920, vol. 2, p. T6.

[83] *Daily Times*, 9 April 1920; *Daily World*, 9 April 1920; *British Colonist*, 10 April 1920.

[84] *British Colonist*, 10 April 1920.

public office and could be more efficiently and vigilantly administered by private charities. Finally, there were calls for a broader system to provide aid to all indigent mothers. Presumably, this was a reference to the tendency of mothers' pension legislation to exclude deserted wives and unmarried mothers from benefits.[85] In the legislature, only one of these concerns was answered. Dr. MacLean referred to concerns that the legislation would kill the mother's desire "to get ahead," but felt these criticisms unwarranted in view of the small amount of the pension.[86]

The Conservative opposition, being in favour of the measure, offered no objections. Within the Liberal camp, however, there appears to have been some dissension. Prominent Liberals had grave concerns about eligibility and expenditure. The bill permitted application for mothers' pension benefits from mothers of children under sixteen years of age who were widowed or deserted; whose husbands were inmates in penal institutions or mental asylums; or whose husbands were unable to support their families due to accident or sickness. A discretionary clause further authorized the Superintendent of Neglected Children to permit applications from "[a]ny other person whose case," in his opinion, was "a proper one for assistance under the provisions of this Act."[87] In this respect, British Columbia's act was quite broad. Ontario's Act did not allow such discretion.[88] Nor did it permit application from deserted wives until a 1921

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[85] British Columbia, *Sessional Papers*, 1920, vol. 2, p. T4.

[86] *British Colonist*, 10 April 1920.

[87] British Columbia, *Statutes*, 1920, Chap. 61.

[88] Chunn, *From Punishment to Doing* Good, p. 50.

amendment.[89] Yet the British Columbia bill was not as specific in its terms of eligibility as some would have liked. The Public Health Commission had recommended applying the measure to unmarried mothers.[90] During the hearings, the Chairman had asked, "why not apply [the act] to unmarried mothers — why should her child be deprived of her love and care [sic] ...?"[91] Numerous organizations presenting their views before the commission were asking the same questions, and advocated extending eligibility to unmarried mothers.[92] But the bill did not specifically include them.

In the legislature, Mary Ellen Smith drew attention to the absence of "specific provision ... for the unmarried mother."[93] She presumed, she told the legislature, that unmarried mothers would be permitted to apply under the discretionary clause when "the circumstances warranted assistance."[94] Smith condemned "the unconscious attitude of the ultra-pious, whose continued worship of an effete code labelled the fallen sister as a creature different from themselves."[95] "The practice in the past," she continued, "has been to brand a mother who has not gone through a marriage ceremony as a different creature to ourselves and to brand the child of such a mother for all time." Such attitudes

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[89] Ibid.

[90] British Columbia, *Sessional Papers*, 1920, vol. 2, p. T8.

[91] Davies, "Mothers Pensions," p. 258.

[92] These were the Women's Christian Temperance Union, the Graduate Nurses' Association of British Columbia, the One Big Union, various organized labour groups from Victoria, the Salvation Army, the New Era League, and the Vancouver Women's Forum. Davies, "Mothers' Pensions," p. 258.

[93] *Daily Times*, 10 April 1920.

[94] *Daily World*, 10 April 1920.

[95] *Daily Times*, 10 April 1920.

were outdated, and contradicted the "so-called" Christian injunction to refrain from judgment.[96] As can be seen, Smith made reference to the relativity of religious and cultural prescriptions regarding the parents of illegitimate children. For her, such social constructions were historical and arbitrary. It was hardly necessary to sustain them. With regard to the children, she minced no words. Her position is typical of the emerging view of illegitimacy. A child born out of wedlock was no different from any other. "We hail it from the housetops and point the finger of scorn at what is called the illegitimate child," she declared to the house.

> Mr. Speaker, there are no illegitimate children. It may be that according to our laws and ceremonies people will contend that there are illegitimate parents, but in God's name do not let us brand the child. Give him or her a square deal and a fighting chance in the human race for a position and education which any ambitious child will secure.[97]

If British Columbians could overcome their moral concerns regarding the parents and look after the children, a better future would result. For those who continued to have qualms, other members assured the legislature that it was not immoral to give unwed mothers the money to raise their children. J. S. Cowper explained, the pension "was not a reward to the mother ... but a maintenance payment by the state for its orphan citizens."[98] The relationship was established between the child and the state. The mother was merely the state's employee in carrying out the state's parental obligations.

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[96] *British Colonist*, 10 April 1920.

[97] Ibid.

[98] *Daily World*, 10 April 1920.

The sole other concern over the mothers' pension bill was raised by Premier John Oliver. Oliver, known for his commitment to fiscal restraint, reminded the legislature and the public that "it would be well to remember that there were costs entailed; someone had to pay the bill."[99] While aware of the measure's popularity, Oliver was concerned about the costs involved. His concerns were not, as in more recent times, with the anticipated expansion of costs under the specific program in question. Social welfare legislation was a new venture for the Province, and the government exhibited a naiveté stemming from its inexperience. The Health Commission had estimated from the experience of American and Canadian jurisdictions with similar laws, that the program would affect approximately 240 families, involving a total expenditure of $155,000.[100] In the legislature, Dr. MacLean freely quoted the committee's estimates as facts. MacLean confidently informed the members that some 235 widows and 652 children would be beneficiaries under the act.[101] Oliver did not question these figures. He was simply worried that the necessary taxation might occasion a public backlash against the Liberal party. He told the members of the legislature "that while there could be no doubt about the great benefits to be extended under the Mothers' Pensions system," they should be certain "to impress upon the minds of their constituents that if they desired such beneficial legislation they must be prepared to put up the money for carrying it into

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[99] *Daily Times*, 9 April 1920.

[100] British Columbia, *Sessional Papers*, 1920, vol. 2, p. T6.

[101] *Daily Times*, 9 April 1920.

operation."[102] This concern with public expenditure and taxation would have significant ramifications in the years to come.

Mary Ellen Smith's comments during the Mothers' Pension debate were indicative of great concern for the welfare of illegitimate children. This was not a new development. Since the mid-nineteenth century, some British Columbians had favoured bettering the legal condition of illegitimate children. It was only after the turn of the century, however, in the context of new environmental theories of child nurture and social progress, that such concerns began to bear fruit. The concern to provide illegitimate children with an upbringing equivalent to that of their legitimate peers is perhaps most evident in the smooth passage of legislation legitimating children whose parents subsequently married in 1919. This was same legislation reserved by Lieutenant-Governor Trutch in 1872 and 1873. Yet it passed quietly in 1919. There was no great commotion over the legislation; there were no long editorials pro and con; there were no worries about the social

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[102] *Daily Times*, 10 April 1920. Oliver struck a chord which resonated with the editors of the Vancouver *Sun*. Expanding upon Oliver's theme, the editors advised, "The cost of government administration is rising steadily. For the most part governments are powerless to check the rise. They represent the public and are subservient to the public will. So long as the people, acting under the influence of an awakening social conscience, demand that the state shall intervene to remedy or remove social evils, the need for revenue will grow. If the state institutions mulitplying so fast around us are useful and beneficent, the community as a whole gains by the public expenditures involved. It gains in efficiency, in happiness, in prosperity or in prospective savings resulting from the elimination of the worst types of citizens. But it is obviously unfair to charge governments with waste and extravagance when the bill comes to be presented to the taxpayer. If people demand these public activities they must be prepared to pay for them without grumbling or recrimination." *Sun*, 15 April 1920.

consequences of illegitimate inheritance; and there were no letters to the Lieutenant Governor respecting the bill's constitutionality.[103]

Increasing concern over illegitimate children's condition was a continent-wide phenomenon. At child welfare conferences and among the newly developing social

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[103] The legislation arose in response to two local cases. In 1919, a letter arrived at Farris's office from Vancouver lawyer Israel Rubinowitz. Rubinowitz represented a couple who had taken out a marriage license in 1913, in the mistaken belief that the license constituted a civil marriage and no further ceremony, religious or secular, was necessary. They had lived together since that time and had two children. Rubinowitz wondered if the Legislature might pass legislation retroactive to 1913 to remedy this and any other similar cases, should they exist. He understood that the couple in question could petition for a private bill affecting their situation alone, but since they were in relatively humble circumstances, they could not afford to do so. It was "only fair, particularly to the woman," Rubinowitz wrote, "that every effort should be made to make the marriage valid and to make the children legitimate." The Attorney General's office replied that it knew of no other means to remedy the situation except the aforementioned private bill. This was not an answer which would have satisfied Rubinowitz, or his impoverished clients.

A few weeks later, an article appeared in the *Sun*, in which an anonymous Vancouver Barrister explained that many people in British Columbia had left the Registry Office with a marriage license "under the impression they had gone through a civil contract of marriage: that there was no need to supplement it by taking the vows before a clergyman. The oath they had sworn that the information contained on the docume[n]ts was true seemed to be the all important words binding them as man and wife, and they have gone away in ignorance that all they had secured was the authority to go elsewhere and marry." The unnamed barrister revealed that he knew of a poor couple who had made such a mistake right in Vancouver! Apparently, the only remedy in Canada was a private act of parliament. Yet there were legislative alternatives. In the more enlightened continental countries, the parents' subsequent marriage would legitimize their children.

The article had the desired effect. A young man wrote the Attorney General's office explaining that he too had mistakenly assumed his marriage license constituted a civil ceremony, and he requesting instructions on securing a private act of parliament. By 1919, he had begun the expensive process of having his marriage retroactively validated by private act; yet, with more than one case at hand, the government decided to effect a general remedy. Attorney-General Farris introduced an amendment to the Marriage Act providing that marriage by parents would render their previously-born children legitimate. The act was virtually identical to the 1872-1873 legislation. Like the earlier disallowed legislation, it was retroactive, providing for the legitimation of children whose parents had married subsequent to their birth but prior to the passing of the act. Like the earlier acts too, it included a clause providing that it would not "affect any right, title, or interest in any property which has vested in any person prior to the enactment of this section." This clause was intended to prevent the legitimation of such children from retroactively dispossessing other heirs. The only concern was voiced by Bowser, who understood that the legislation would directly affect a pending case — the case involving the private bill. Legislating on a subject of current concern gives the appearance of partiality; thus, legislatures generally tend to avoid doing so. In this instance, the problem was eventually resolved by having the private bill withdrawn and the associated expenses refunded. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2148, File 2638-5-18, pp. 4-5, 7, 13-15; *Sun*, 24 June 1918; *Daily Times*, 25 February 1919; British Columbia, *Statutes*, 1872, 35 Vict., no. 37; Ibid., 1873, 36 Vict., no. 43; Ibid., 1919, 9 Geo. 5, Chap. 52, s. 5. British Columbia, *Statutes*, 1919, 9 Geo. 5, Chap. 52, s. 5.

sciences, concern for illegitimate children formed an increasingly important item on the agenda.[104] Pathbreaking studies in the 1910s in the United States and Ontario revealed that existing laws to protect and provision illegitimate children were ineffective. In the United States, studies showed that inadequate public relief and an inability to gain support from putative fathers meant that many unwed mothers were forced to give up their children.[105] As a result, illegitimate children occasioned disproportionate levels of public expenditure and faced elevated infant mortality rates.[106] Subsequent American studies showed that illegitimate children were not only in trouble — they represented a sizable proportion of the population. In 1915, a United States Children's Bureau survey found that 1.8 percent of all live births were illegitimate.[107] Muckraking investigations in the press popularized illegitimate children's plight, describing their mistreatment and

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[104] Mason, *From Father's Property to Children's Rights*, p. 97.

[105] Dorothy Chunn writes that social service organizations in Ontario "had produced 'scientific' studies of the social and legal aspects of the illegitimacy problem that supported the conclusion that inadequate laws made it easy for the putative father to escape responsibility." A 1914 study of illegitimate children in Boston found that over sixty percent of all illegitimate children would become wards of public agencies within their first year of life. Another study in Boston that same year revealed that only thirteen percent of "identifiable fathers" were prosecuted for support, and only seven percent were ordered to make payments. A 1914 study of Chicago showed that these results were far from anomalous. There, sixty percent of illegitimate children received public relief within their first year of life. One third of all illegitimates in Chicago would die before their first birthday as a result of abandonment or other forms of neglect. Chunn, *From Punishment to Doing* Good, p. 49; Mason, *From Father's Property to Children's Rights*, pp. 99-100; Grossberg, *Governing the Hearth*, p. 229.

[106] Children's institutions and agencies revealed that illegitimates formed a disproportionate portion of their admissions, and represented a major public burden. Attention to infant mortality was increasing throughout North America after the turn of the century. Precise figures on the death rates of illegitimates were not available, but the Massachusetts Society for the Prevention of Cruelty to Children estimated that illegitimate children died at rates approximately three times those of legitimate children. Ursel, *Private Lives, Public Policy*, p. 64; Tiffin, *In Whose Best Interest?*, p. 171.

[107] Grossberg, *Governing the Hearth*, p. 229.

sale in lurid detail, and bringing evidence of much higher death rates among illegitimates to public notice.[108]

Reformers, faced with the evidence of a lower quality of life for illegitimate children, began to focus on the difficulties posed for illegitimate children by the stigma of illegitimacy. Reform groups pressured state legislatures to eradicate legal discrimination against the children of unmarried parents. In order to have equal life chances, reformers tried to secure for illegitimate children the same legal rights as legitimate children, so that they might enjoy equal care and protection.[109] The most visionary called for the abandonment of the legal concept of illegitimacy altogether. In addition to rights to paternal maintenance, some reformers pushed for the right of illegitimate children to inherit from their fathers and take their names.[110] The movement gained momentum steadily; by 1917, the condition of illegitimate children was a regular issue in political debate.[111] In that year, new legal approaches to illegitimacy were pioneered in North Dakota and Minnesota.[112] Minnesota's legislation pioneered the bureaucratic approach to illegitimacy in North America, requiring public servants to launch maintenance proceedings on the child's behalf. Few other states, however, changed their illegitimacy legislation prior to the 1920s.

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[108] Ibid.

[109] Ibid.; Tiffin, *In Whose Best Interest?*, pp. 166, 172-3, 175.

[110] Mason, *From Father's Property to Children's Rights*, p. 97.

[111] Tiffin, *In Whose Best Interest?*, p. 173.

[112] Mason, *From Father's Property to Children's Rights*, pp. 97, 99, Grossberg, *Governing the Hearth*, p. 232, Tiffin, *In Whose Best Interest?*, pp. 180-181.

In many jurisdictions, change was inhibited by those who believed that discriminatory laws reinforced the legal family.[113] The reality was that those pressing for illegitimacy reform were an advanced set. In the 1920s, attitudes toward illegitimacy were mixed at best. Older ideas that children inherited or were tainted by the sins of their parents were slowly becoming discredited. Progressive reformers stressed that the children of unmarried parents were in no way inferior to their peers born in wedlock. In fact, because of social workers' studies, which revealed environmental factors leading to unwed pregnancies, even the public image of unwed mothers was rehabilitated.[114] Yet the sympathetic analysis should not be overstressed; it was beginning to move beyond progressive circles; but it was not yet commonplace. Because of the heterogeneity of social mores, most unmarried mothers in the progressive era, American historian Susan Tiffin stresses, "were still ostracized and humiliated, while their children often carried the stigma of illegitimacy with them for the rest of their lives." The impassioned attempts

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[113] Even among reform constituencies, many believed that legal recognition of the rights of illegitimate children would remove the impetus for legal marriages and destabilize the legally sanctioned family. Progressive attempts to better the lot of the illegitimate, writes Susan Tiffin, were "diluted and circumscribed by the general public's sensitivity to the fate of the family unit." Yet support for illegitimates' rights was high in prominent circles. In 1915, the *Columbia Law Review* argued that discrimination against illegitimate children did not promote the formation of legal families or even discourage extra-marital unions. Punishment of the children would not have any noticeable effect. The solution, rather, was to punish the parents and hold them to strict account. Tiffin, *In Whose Best Interest?*, p. 166; Grossberg, *Governing the Hearth*, p. 230.

[114] Susan Tiffin writes that while some unmarried mothers were still believed to be 'vicious' or 'immoral', social workers emphasized that most of the mothers they came into contact with "were found to be average people whose main problems were abnormal family backgrounds, lack of training, ignorance, and the absence of recreation facilities." Tiffin, *In Whose Best Interest?*, p. 172

of progressive reformers to change minds should be evidence enough that there remained many minds to be changed.[115]

Public attitudes began to change more rapidly around 1920, as studies documenting the detrimental effects of illegitimacy proliferated.[116] That year, conferences on illegitimacy were held in Chicago and New York, and included Canadian representatives.[117] A broader consensus was developing that existing laws were inadequate and legal reform necessary. The Social Service Council of Ontario was in the van of this movement, pressing the newly-elected United Farmers government for legislative reform. "The difficult question" for reformers, writes Tiffin, "was how far reforms could go without injuring the status of the family or arousing the hostility and antagonism of legislatures and the general public."[118] Fears over the fate of legal families, desire to punish sexual transgressors, and concern for the maintenance requirements of illegitimate children combined to channel reform of the law along specific lines. Radical changes were eschewed: illegitimate children were given no rights

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[115] Mason, *From Father's Property to Children's Rights*, p. 96; Tiffin, *In Whose Best Interest?*, pp. 167, 172; Grossberg, *Governing the Hearth*, p. 230.

[116] The Federal Children's Bureau released a three-volume report entitled *Illegitimacy as a Child Welfare Problem* in 1920. The report included statistics on illegitimacy from across the United States, the results of earlier studies, and the provisions of various American and foreign illegitimacy laws. One of the most influential entries in *Illegitimacy as a Child Welfare Problem* was its inclusion of Norway's 1915 statute, which established the illegitimate child's right to inherit from the father and take his name, and improved maintenance provisions and procedures. Of great significance, Norway pioneered a bureacratic approach to illegitimacy, obligating public servants to institute paternity hearings in every case. In 1921, the Chicago Juvenile Protective Association released a study of illegitimacy, indicating that unwed mothers were largely under the age of 21, working class, and in need of support. Tiffin, *In Whose Best Interest?*, pp. 168, 174; Grossberg, *Governing the Hearth*, p. 230.

[117] Tiffin, *In Whose Best Interest?*, p. 175.

[118] Ibid.

to enter their fathers' legal families. Rather, reformers moved to strengthen what they saw as the second-best viable alternative: the mother-child family. While holding the heterosexual family as the ideal, progressive reformers, writes Tiffin, "came to believe that it was possible to approximate the family unit by keeping mothers and babies together."[119] Taking care not to greatly offend conservative sensibilities, reformers took a gradualist approach, modifying existing maintenance laws to make them more sensitive to children's needs, more effective, and render the proceedings more humane; they also established lines of inheritance between unwed mothers and their children.[120] Ontario passed legislation based on Minnesota's bureaucratic model in 1920; Manitoba followed suit in 1922.[121]

In the midst of the international wave of reform, British Columbia Attorney General A. M. Manson took action. In November 1922, Manson introduced two bills intended to further extend the legal maintenance obligations of parents and children. The first was the Children of Unmarried Parents Act (CUPA), designed to compel support from the fathers of illegitimate children; the second, the Parents' Maintenance Act (PMA), compelled adult children to support their indigent parents.[122] British Columbians were certainly aware of contemporary legislative trends. The Victoria *Times* reported that the

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[119] Ibid., pp. 166, 171.

[120] Ibid., pp. 175-178, 182; Grossberg, *Governing the Hearth*, pp. 229-230, 232-233; Mason, *From Father's Property to Children's Rights*, p. 98.

[121] Ursel, *Private Lives, Public Policy*, p. 153.

[122] *British Colonist*, 1 November 1922; *Province*, 1 November 1922.

CUPA was "similar to measures being introduced by legislatures all over this continent." The bill was based on Ontario precedent and followed the lines of the bureaucratic models which preceded it in Canada, the United States, and Europe. Under the proposed legislation, the *Times* reported, the Superintendent of Neglected Children, an officer previously created by the Infants Act, was "charged with seeing that no child born out of wedlock is neglected." Manson explained that the mother, her relatives, the medical professionals attending to the birth, or anyone acting in the mother's interests could apply to the courts for an order requiring the putative father to support the mother and child. As in other jurisdictions, the time for making application was limited. Application had to be made within one year of the child's birth, or within a year of the putative father's return to the Province, should he flee during the pregnancy. Maintenance orders were to include the mother's "reasonable" medical and maintenance expenses during the three months preceding the birth of the child, as well as a weekly sum for the child's maintenance until the age of sixteen. In making the award, the magistrate was to consider the father's means, and could compel the mother to contribute as well. He was also to consider the child's needs, defined broadly as a "reasonable standard of living." In essence, the measure, like many of its contemporaries, accorded judges a great degree of independence and latitude in making awards. Finally, Manson attempted to assure the legislators that designing women would not be permitted to blackmail innocent men under the act. The mother's testimony was not sufficient to establish paternity, but must be corroborated; and any decision could be appealed.[123]

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[123] *Daily Times*, 7 November 1922.

Manson's bill provoked strenuous opposition. In committee, opposition Conservatives alleged that the bill gave better protection to illegitimate children than to those born in wedlock. Given the revamped non-support provisions in the 1919 DWMA, the objection makes little sense. Yet Manson did not contradict the allegations. Rather, in sympathy with the feeling of reformers, he stressed the hardships faced by illegitimate children: "The [illegitimate] child," Manson said, "starts out with a handicap that is not his by right.... I have really more sympathy with the child that starts out in this way than I have with the ordinary child." Perhaps this was straining a point for political purposes, but Manson was underlining the difficulties faced by children of unwed parents, and the necessary legal remedies. Changing course, opposition leader William Bowser argued that the bill was unfair to unwed mothers! "[I]t seemed to be going a little too far," he said, "to give the doctor, nurse or mortician handling any such case the right to bring the mother into court..." Bowser, in a statement revealing the continuing moral stigma attached to illegitimacy, opined that it should be left to the mother to decide "whether her status and that of her child should be made public"; in no case should it be the prerogative of others to expose the mother to public scrutiny simply because "their bills were unpaid." Such provisions went "beyond the spirit of the act," Bowser argued, "which is for the maintenance of the mother and child." When Manson retorted that if "these people are out of pocket, should not the father pay?" Bowser countered that the act "simply makes the court a system for collecting fees for doctors and nurses and others,

even where the mother is able and willing to maintain the child herself." Manson responded that he was open to discussion on some of the objections.[124]

When the debate was resumed a few days later, it appeared that the tide was turning against the measure. Prominent Liberal and former Attorney General J. W. deB. Farris, husband of University Women's Club founder Evelyn Farris, who might have been expected to support such social legislation, supported the Conservatives in their criticism. When Bowser resumed his criticism, restating concerns over the rights of unjustly accused men and the ability of medical professionals to bring suit, Farris supported the call for amendments. Likely, Farris did not object to the principle of the bill, but rather to the legal mechanisms provided. Bowser had called for complaints under the act to be sworn to protect the rights of the innocent. He also believed the allegations of medical professionals as to paternity should require corroboration, as did those of the mother.[125]

Other members were less concerned about the legal details. Liberal M. B. Jackson believed the bill was morally dangerous. "Women of loose morals are the ones who are going to invoke this act," Jackson told the legislature. The act rewarded immorality, "putting a premium on looseness." Manson, undoubtedly surprised to be facing criticism from within Liberal ranks, appealed to male chivalry. He explained that "[t]he primary object of the bill is for the protection of innocent girls led astray by some scoundrel on promise of marriage." Yet moralistic appeals to male chivalry were risky. Jackson turned Manson's remarks around, replying that while he had "every sympathy for this class," the

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[124] *Daily Times*, 15 November 1922; *Sun*, 15 November 1922.

[125] *Daily Times*, 18 November 1922; *British Colonist*, 18 November 1922.

legislation was "extremely dangerous." The men of the legislature had to be careful to whom they extended their chivalry. The bill granted the same rights to the dissolute as the moral: "the same protection," Jackson stressed, "was afforded the prostitute as given to the mother who was an innocent victim." Moreover, Jackson alleged that the bill would victimize the legal families of immoral men. It would

> put the wife and children of a scoundrel who seduced an innocent girl at a disadvantage as compared with the so-called illegitimate child and its mother because of the fact that their support would be fixed by the court while the legitimate children and their mother might have to go without their daily bread.

Conservative Joshua Hinchcliffe brought the matter full circle, reviving earlier concerns that women who made false accusations could be compensated under the bill. Hinchcliffe was concerned for the rights of men: "in many cases the reputation of a man was held by a woman in her hands and care should be taken to see that certain women were not afforded any additional incentives."[126]

At this point, Manson, obviously exasperated with the direction and tone of the criticism, retorted that "[t]he person this bill is meant to give attention to is the miserable scoundrel who seduces a girl and a child results." The legislators were misdirected in focussing on the possibility of questionable use of the act. Rather, they should be most concerned with the needs of the children. In response to concerns that dissolute women might benefit from the law, Manson quoted Mary Ellen Smith to the effect that children should not be punished for their parents' misdeeds. "[T]here is no such thing as an illegitimate child," Manson thundered, "as the child is not illegitimate, but the parents."

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[126] *Daily Times*, 18 November 1922; *British Colonist*, 18 November 1922.

Regardless of the moral character of the parents, the child should be supported. Any penalty should not interfere with an award on the child's behalf, but should affect the parents alone. Perhaps to assuage fears over moral delinquency or perhaps to address concerns over the fate of legal families, Manson emphasized the courts' discretion to consider "the standing of the parents" to prevent unfair awards. In this respect, the newspaper account is ambiguous. It is not clear whether Manson was referring to the financial or social standing of the parents. He continued, even if an unfair award were made, an appeal process was established in the bill, so that judgments could be corrected. In a final effort to convince his peers to endorse the legislation, Manson referred to precedent, noting that the bill was already law in several Canadian jurisdictions.[127] Yet the legislators were not swayed. Labour member Tom Uphill of Fernie, who had initially supported the measure, argued that precedent was no reason to pass legislation, and urged caution in considering the bill. "The fact that they have such laws in other provinces is not criterion," said Uphill. "They have all kinds of crazy laws in other provinces. Why, every province that the Attorney-General mentioned has got prohibition." Faced with this criticism, Manson adjourned the debate, asking for members to submit suggestions for amendment.[128]

Sentiment outside the legislature mirrored the mixed opinions within. Matters were confused by the concurrent enactment of a separate Legitimacy Act, designed to remedy

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[127] *Daily Times*, 18 November 1922.

[128] Ibid.; *British Colonist*, 18 November 1922.

unintended defects in the 1919 legitimation by subsequent marriage legislation.[129] Though legitimation machinery already existed, it was unknown to some, who believed the Legitimacy Act a new legislative venture. Their confusion was beneficial, drawing out opinions which might not otherwise have come to light. Adelaide Marshall of Ladysmith wrote to the Vancouver *Sun*, protesting the Legitimacy Act. Marshall believed that although the Attorney General's intentions were good, the legislation was unfair to moral women and legitimate children. Moreover, there should be no encouragement or incentive in the law to illegitimacy, since illegitimate children would "eventually fill [the] jails." The best way to address illegitimacy, wrote Marshall, was not to grant illegitimate children new rights, but to take punitive and proscriptive measures. Men, if raised in a proper atmosphere, with good mothers and sisters, should know better than to father children out of wedlock. For those who did not, the most effective remedy would be nine months imprisonment with "lashes at intervals." For married men who fathered illegitimate children, the punishment should be even heavier. With regard to unwed mothers, Marshall took a contradictory stance. She blamed the mothers of such girls for failing to warn them properly. Yet she also wrote that by the age of sixteen, girls should instinctually know how to behave. Since girls were not properly educated or attentive to their instincts, steps should be taken to control their behaviour. Punishment after the fact

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[129] There was only one change in the legislation, and it was not intended to protect illegitimates, but the interests of other heirs. The previous legislation had left a loophole. It had protected the interests of other heirs which existed "prior to the passing of the Act." It did not protect any rights coming into existence after the act was passed. Thus, any kin who gained inheritance rights after the passing of the act were not protected from the effects of subsequent legitimation. They could lose their inheritance. Thus, the new legislation added the provision that it would not affect inheritance rights existing prior to the marriage of the illegitimate child's parents. British Columbia, *Statutes*, 1922, 13 Geo. 5, Chap. 43.

was unnecessary for girls. The unwed mother, Marshall wrote, "if she cares at all really suffers a lifetime..." Rather, she called for legislation "to prevent girls and women wearing very short skirts and silk stockings. Why, even men have their legs covered, yet women openly display theirs, and have to be in style. No wonder the men lose their senses."[130]

Marshall's letter drew fire from both the *Sun*'s editorial staff and readership. The paper's editor was appalled. Marshall's claim that a bill to encourage the parents of illegitimate children to marry was unfair to moral women and legitimate children was incomprehensible. The editor wrote "Does it decrease the virtue of moral women, or decrease the legitimacy of legitimate children to make more women virtuous or more children legitimate?" He found it "startling to believe that an illegitimate child should, through his parents' sins, be penalized and compelled to bear the mark of inferiority through his life."[131] A week later, a *Sun* correspondent picked up this theme. Mrs. Gilbert called for the application of Christian precepts, and encouraged women involved in social and economic reform to continue in their "herculean" struggle. Like Mary Ellen Smith, she believed that punishment of illegitimate children would have no beneficial effect on social morality: "[t]o stigmatize an innocent child with the mark of illegitimacy will not, in any degree, raise the moral standard of moral women, nor will it insure them, or their children, against loss of virtue in the future." Moreover, in a remarkably courageous revelation of changing social attitudes, she emphasized that sexual behaviour

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[130] *Sun*, 26 November 1922.

[131] Ibid.

was not the sole measure of womanly morality and virtue. "Morality," she wrote, "includes the mind as well as the body, and virtue embraces far more than just bodily chastity."[132] The overall tenor of the letter implied a call for compassion, forgiveness, and assistance, rather than personal judgment and punishment.

Editorials and letters specifically addressing the Children of Unmarried Parents Act also reveal mixed opinions and unease. Writers were generally supportive, and felt the benefits would outweigh the drawbacks; yet some expressed reservations, fearing the broad social effects of illegitimacy reform. The Vancouver *Sun*'s editors were effusive in their endorsation, calling the CUPA the most necessary piece of social legislation tendered over the past twenty years. The measure, the editors wrote, was a copy of the Ontario legislation, which was in turn based on 1915 Norway's law. In that country, they alleged, the measure had been a great success, reducing illegitimacy by fifty percent over its seven years of operation. The reason for this improvement, the editors surmised, was the bill's tendency to curb male immorality: they wrote, "Foolish young men, decadent old men and cheap-John men of all ages who make up the numbers of illegitimate fathers, have taught themselves more self-control since it has been necessary for them to pay for their pleasure."[133] A letter-writer to the Victoria *Times* agreed. While 'A.H.' believed that M. B. Jackson may have been correct in his assertion that the law would benefit women of loose morals, this writer, like the *Sun*'s editors, saw the strength of the legislation in its regulation of male behaviour. For 'A.H.,' proper masculine behaviour

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[132] Ibid., 4 December 1922.

[133] Ibid., 19 November 1922.

was a racial/national trait, which a functioning civilized society depended upon. "[S]omething must be done," 'A.H.' wrote, "to make a man shoulder the responsibility in these cases. A white man would never leave a woman or girl to face the music alone. And it is about time that such scoundrels were brought to account."[134] The editors of the Victoria *Times* also praised the legislation. Illegitimate children and their mothers were previously ostracized and the fathers held unaccountable. Correcting these "grotesque conditions," the editors wrote, was indicative of the great progressiveness of the legislation of the period. The editors, like 'A.H.,' revealed that their over-riding concern was with the measure's broad social effects. They too saw society as malleable, and believed civilization to be fragile. Their concern over the fragility of society led them to write that the measure was pushing progress to its useful limits. While holding the fathers of illegitimate children to financial account was just and necessary, they wrote "[t]he artificiality of the social fabric precludes a more general countenance ... in cases of illegitimacy."[135] Further legislative approval of illegitimacy threatened the family, and hence society.

Manson's Parents' Maintenance Act faced opposition as well, although the criticism was more muted, and limited to the details of the measure rather than the principles involved. A letter which arrived shortly after the measure was announced urged a slight modification to the measure. The writer prodded the Attorney General to give children who contributed to their parents' maintenance under the act a charge on the parents'

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[134] *Daily Times*, 29 November 1922.

[135] *Daily Times*, 8 November 1922.

estate ahead of the claims of other heirs. The Attorney General replied that the suggestion would receive consideration.[136] In the legislature, M.L.A. Sam Guthrie of working-class Newcastle argued that sons whose incomes were only sufficient to support their own families should be exempt from the legislation. Opposition leader William Bowser took the chivalrous approach. Bowser was vehemently opposed to applying the measure to female descendants. For Bowser, support was a male characteristic. Industrious single girls, he told the legislature, should not be deprived of their earnings simply because their parents were improvident. He referred to sections of the bill permitting imprisonment in case of default, and declared, "The Attorney-General is going to fill our jails with young girls who are unable to keep their fathers or mothers." The bill was also unfair to the husbands of married women. "Never before this has there been a law that a man had to take care of his mother-in-law," Bowser contended. "Just because a man married a wife he should not have to support her whole family." Through the bill in question, he said, an order could be made against a married woman without property. Yet the magistrate had the power to jail her if she did not support her parents. In practice, her husband would have to pay, and perhaps to support his wife's parents as well as his own. "It is all right to have social legislation," said the opposition leader, "but we don't want freak legislation." "We can well leave it to the natural affection of sons and daughters to see that their parents are not suffering," Bowser concluded. "Strike out the word daughter."[137]

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[136] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2197, File L-323-56, pp. 31-33.

[137] *British Colonist*, 14 November 1922; *Daily Times*, 14 November 1922; *Sun*, 14 November 1922.

Attorney-General Manson responded that the law was required only for the occasional case: "This bill arises out of the necessity once in a while of making ungrateful children do what they should do." The law was in force in Ontario, where it had, the Attorney General claimed, a pronounced deterrent effect. In that province, many recalcitrant children had voluntarily begun to support their parents. Moreover, there were pressing cases of necessity within British Columbia. He referred to a "particularly disgraceful" case in Victoria in which two sons with means had refused to support their 81-year-old mother. Other cases existed as well.[138] With reference to Bowser's specific complaints, Manson drew on the safeguards in the legislation, and made a paradoxical appeal to both equal rights for women and stereotypical gender differences. The legislation would not force men to support their wives' parents, Manson explained. A magistrate was only empowered to compel a daughter to contribute to her parents' upkeep out of her own

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[138] Within a week, two more cases were brought to the Attorney General's attention. One involved a woman whose three adult step-sons were refusing to support her. The man who brought this case to the Attorney General's attention had also written five years earlier, at the time of the relatives maintenance bill! At that time, he had described how she had raised two of the step-sons from infancy and the third from the age of four. She still had a twelve year old son dependent upon her, but the step-sons, all in the army, refused to help her out. Unfortunately, the Attorney General's department replied, the bill would not include step-sons. By the time of the 1922 letter, the youngest son was over sixteen, so she was no longer eligible for a mothers' pension.

The second case was reported by the provincial police, and reveals the miserable circumstances of some elderly during the period. In this instance, a rural constable reported to his superiors "that there is an old man ... who is starving here; he has four grown sons and they turned him out of their house some time ago. At present he is liviing in an old shed. I went to look at it and called in [the] Medical Officer of Health. He stated that he should be removed at once as it is not a fit place to live in. Will you kindly instruct me what course to take in this matter?" Such cases may have been rare. It is impossible to know. They were nonetheless crucial to those involved, and, as the case of the woman with the step-sons indicates, they could persist over the long term. Her case also provides us with another insight. Compelling elder children to support widows with children under sixteen could relieve the burden placed on the mothers' pension system. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B 2197, File L-323-56, pp. 3, 10, 34-35, 42-43.

means; he could not force her to draw on her husband's wealth.[139] In making this claim, Manson implied that the courts would make inquiry into the means and assets of married women. In response to Bowser's call to strike out the obligations of daughters under the bill, Manson cited the contemporary trend toward granting women more equal rights. "[W]omen to-day," he reminded the opposition, "are practically on a parity with men," and thanks to recent changes in inheritance law, "are more on a parity now as regards property in wills."[140] Given their desire for equal rights, Manson advised that "he believed the women of the country would favor being placed on the same footing as the men."[141] Implicit in this statement is the idea equal rights should be complemented with equal responsibilities, and that such an equation was well understood. But Manson did not rely on ideas of justice and equity alone. He also appealed to contemporary gender beliefs to strengthen his position: the women to whom the measure would apply would be the rare exceptions, Manson assured the legislature, as "woman's chief characteristic is regard and love for parents."[142]

Outside the legislature, opinions were divided. The City of Vancouver was certainly aware of the legislation's progress and ready to implement its provisions. Relief Officer George D. Ireland informed Councilors that his department had the necessary family records on file, and any additional necessary information could be gathered with few

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[139] *Daily Times*, 14 November 1922.

[140] Ibid.

[141] *British Colonist*, 14 November 1922.

[142] *Daily Times*, 14 November 1922.

delays. The Mayor tried to allay the fears of his constituents, and perhaps dispel apprehensions of excessive governmental intervention in family relationships. "I do not think the city has any desire to be harsh with children of such aged charges of the city," he said, "but there are a number of [persons] deliberately evading responsibilities in this regard."[143] In this regard, he may have spoken for a public constituency. 'A.H.', who also took an interest in the CUPA legislation, wrote supporting compelled contributions: "I regret to say that I came from a family who had slackers amongst them when appealed to in that respect. And the pity of it was that the ones who could best make a contribution, were the meanest." Moreover, 'A.H.' had little sympathy with Bowser's fear that men might be forced to support their mothers-in-law. "As to sons-in-law having to contribute," wrote 'A.H.', "I think that any man who is mean enough to see his wife's parents in want, is not worthy to have a wife."[144] As with illegitimate children, 'A.H.' believed that familial support was a basic masculine obligation. Others were not convinced that the legislation was necessary. 'Subscriber' wrote, somewhat cryptically, that the bill was unnecessary, "as children were compelled to contribute anyway." The means of this compulsion was not explained. Subscriber shared Bowser's concerns regarding the support of in-laws, and expressed concern that it might "interfere with the marriage of our young people." Moreover, 'Subscriber' worried that the law was a

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[143] *Province*, 14 November 1922.

[144] *Daily Times*, 25 November 1922.

government ploy to avoid dealing with the call for old-age pensions.[145] 'Subscriber', like many others of the era, shared and contributed to the belief that 'the state' should support individuals in need.

Almost a month later, both bills were passed without comment.[146] The finalized versions bore few marks of revision, suggesting that party discipline rather than any substantial compromise was the key to their passage. The CUPA put the Superintendent of Neglected Children in the place of the absent patriarch, as protector of the child's interests. He was given the right to apply for guardianship,[147] and discretion to "take such proceedings and do all such things as are permitted or required under this Act as may seem to him advisable in the interest of the child." If the putative father admitted paternity, an informal support agreement might be arranged, either by the mother or the Superintendent.[148] If he denied paternity, the Superintendent, the mother, or a court-appointed next friend or guardian of the child could apply for an order of affiliation and

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[145] *Sun*, 16 November 1922. There are two letters signed 'Subscriber' in this issue. These may or may not have come from separate individuals. Both expressed concern that the law would deter young couples from marrying.

[146] The Parents' Maintenance Bill was given third reading without discussion on 11 December 1922. The Children of Unmarried Parents' bill was re-committed on 13 December 1922 and passed third reading on 14 December 1922. British Columbia, *Journals*, 15th Parliament, 3d session, 1922, pp. 176, 184, 201, 207, 213.

[147] The superintendent could apply for guardianship either solely or jointly with the mother; the mother was permitted under the terms of the legislation to apply to the superintendent for "advice and protection in any matter connected with the child or the birth of the child" and the Superintendent was authorized to act on her behalf. British Columbia, *Statutes*, 1922, 13 Geo. 5, Chap. 9, s. 5 and 6.

[148] If the putative father admitted paternity, the Superintendant could negotiate an out of court agreement with the putative father for the child's maintenance. Such agreements were not a bar to subsequent prosecution. Nor were support agreements between the mother and putative father. Should the putative father breach an out of court agreement with the Superintendent, the latter was authorized to apply to the Magistrate for a support order. The out-of-court agreement was to be sufficient proof of paternity. British Columbia, *Statutes*, 1922, 13 Geo. 5, Chap. 9, s. 23.

maintenance.[149] The time limit for action was narrow. An affiliation order generally had to be made within one year of the child's birth.[150]

The CUPA reflected frustrations with earlier maintenance legislation, and was better designed to facilitate prosecution, conviction, and enforcement. While the putative father had to be summoned personally, and there were no provisions for substitutional service, court proceedings could be undertaken without his compliance. To protect the parties involved from public embarrassment, and encourage prosecution, all suits were to be heard in private.[151] The burden of proof required to establish paternity was left to the discretion of the magistrate, with the sole exception being that if the mother brought the suit, her evidence had to be corroborated by a third party.[152] Upon a finding of paternity, the magistrate was empowered to award the mother pregnancy-related medical and maintenance expenses,[153] and order payment of weekly maintenance for the child until

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[149] Ibid., s. 7. No explicit provision was made permitting medical or mortuary personnel to apply, likely in response to criticism in the legislature. However, they could make claims under a section retained from the 1903 legislation, permitting those who had furnished necessaries to a child born out of wedlock to sue the putative father. The sections permitting such suits were grafted out of the old act, and still required the mother to have made a sworn affidavit of paternity within six months of the child's birth. Ibid., s. 24-26.

[150] Ibid., s. 8. However, if the putative father was absent from the province at the expiry of the one-year period, application could be made within one year subsequent to his return; in addition, a subsection provided that an application could be made within one year of "after the doing of any act on the part of the putative father which affords evidence of acknowledgement of paternity."

[151] Ibid., s. 17.

[152] Ibid., s. 14.

[153] Such an award could include the mother's maintenance and medical care expenses for three months preceding and for such expenses following the birth of the child as the magistrate might find related to the birth of the child. Determination of post-birth expenses was to be made with qualified medical advice. The putative father was also liable for the burial expenses of the mother if her death resulted from complications of pregnancy; and the child if it died prior to the issuance of an affiliation order. Ibid., s. 9.

sixteen years of age. The maintenance order should ensure the child a reasonable standard of living, and the magistrate was instructed to be "governed in his findings by a consideration of the probable standard of living the child would have enjoyed if he had been born to his parents in lawful wedlock."[154] Finally, the act included new enforcement provisions. The Superintendent of Neglected Children was charged with ensuring compliance with support orders, and the magistrate had an arsenal of tools at his disposal, derived from and exceeding those provided in the 1919 DWMA. These included security bonds, garnishees, execution against lands and personalty, and imprisonment, with or without hard labour.[155]

The PMA was similar in detail. Under its terms, a dependent parent, the municipality charged with his or her support, or the Attorney General could apply to a magistrate for an order compelling the children to provide support, to a maximum of twenty dollars weekly each. This maximum award was significantly higher than in Ontario, where the maximum was twenty dollars monthly.[156] The sole precondition for application was that the children must have been applied to for aid, and refused or neglected to comply with the request. Dependency was defined for the purposes of the act as an inability to maintain oneself due to age, disease, or infirmity. In determining the amount of the

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[154] He was directed in this respect to consider the means of the putative father, and also had the power to require the mother to contribute to the child's support. An order could be subsequently altered upon proof that the means of either parent or the needs of the child had changed. Ibid., s. 9-11

[155] Orders could also be collected from the putative father's estate after his death. Ibid., s. 12, 13, 20, 21. For the Summary Convictions Act see the *Revised Statutes of British Columbia*, 1924, Chap. 245, s. 52.

[156] Snell, "Filial Responsibility Laws in Canada," p. 270.

award, if any, the magistrate was instructed to consider the needs of the parent and the means of the child or children; a further clause specified that the order could be varied subsequently if either changed. However, the act provided no standard of needs or means; such matters were left to judicial discretion[157], to be decided on a case-by-case basis or established by judicial precedent. Enforcement machinery was provided for through the Summary Convictions Act, allowing the seizure and sale of personalty and imprisonment for up to three months; additional sections provided for execution against lands.[158]

The government's interest in the two measures involved more than ideological considerations. The origins of the legislation reveal that they were introduced to address financial concerns. In June 1922, Manson wrote Legislative Counsel Pineo respecting the possibility of enacting parents' maintenance legislation. From time to time, Manson wrote, complaints had reached him of cases "where children utterly neglect to maintain their aged parents." Cases of this kind, Manson believed, were rare.[159] But, he continued,

> in view of the fact that we have a 'Mothers' Pensions Act' upon which some members of the public try to unload the care of all their relatives if they possibly can, and in view of the fact that there are cases of children who have the means but

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[157] Ibid., p. 271.

[158] British Columbia, *Statutes*, 13 Geo. 5, 1922, Chap. 57. Ontario also permitted enforcement through the Summary Convictions Act, as did British Columbia's DWMA and CUPA legislation. Similar legislation was passed in Alberta in 1922 and Saskatchewan in 1923. By 1958, it existed in every Canadian jurisdiction. Only the territorial legislation provided for recognition of support in kind in lieu of money, although, as the British Columbia cases will show, such support was recognized in determining contribution amounts amongst various children. Snell, "Filial Responsibility Laws in Canada," pp. 270-271.

[159] Indeed, the correspondence files reveal only one such complaint, but the District of Saanich in October of the previous year. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B 2140, File 1724-12-17, p. 9; Ibid., Reel B2197, File L-323-56, p. 28.

> not the inclination to support their aged parents, I think that we should consider the passing of legislation to compel maintenance of parents by children.[160]

Manson's comments imply a sense of abstract reciprocity, revealing the government's growing concern over the rising costs of mothers' pensions, and a desire to displace support costs onto family members wherever possible. The Parents' Maintenance legislation would relieve municipal governments of the burden of supporting the elderly.

In passing the Mothers' Pension legislation, the government had placed great faith in expert cost estimates. It soon became clear that these estimates were incorrect. Costs were spiraling out of control. By early 1921, the legislature was called on to provide $400,000 for mothers' pensions, an amount far in excess of the original $150,000 annual expenditure estimate. When questioned on the matter, Attorney-General Farris speculated that overly-compassionate and generous volunteer mothers' pensions boards were interpreting the act too liberally. Following the session, Farris promised, steps would be taken to reduce the number of recipients.[161] By the year's end, changes had indeed been made. Farris amended the act to limit eligibility to those families domiciled within the province at the time of the husband's death, desertion or incapacitation. He also placed the act under Workers' Compensation Board supervision, and outlined explicit

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[160] Pineo responded with a detailed memorandum outlining laws compelling the support of relatives in other Canadian jurisdictions. Ontario's Parents Maintenance Act, passed the previous year, he wrote, dealt with the subject matter referred to by Manson, and Pineo believed it well-suited to those purposes. However, if Manson wished to extend the liability for support to relatives other than children, Pineo suggested he might look at Macdonald's 1917 bill. He enclosed a copy of the draft, but cautioned Manson that although he had searched the newspapers, he could not be certain why the measure had failed, whether from lack of interest or opposition. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B 2197, File L-323-56, pp. 30, 39, 40.

[161] *Province*, 31 March 1921.

accounting procedures.[162] Although at least 500 persons were removed from the rolls within eight months, the overall effects were negligible. In late 1921, the government was called on to provide another $500,000 in funding for mothers' pensions.[163] On the very day Manson introduced the PMA and CUPA, the government released figures indicating that 771 mothers and 1978 children remained on the rolls. A total nearing one million dollars had been expended in just over two years![164] Both the CUPA and the PMA were intended to help reduce government expenditure. The CUPA's means of doing so were evident, removing unwed mothers from the mothers' pension roles wherever possible. The PMA, on the other hand, was enacted on general principle: if the government was supporting families, family members should be forced to support one another wherever possible.

After the Liberals took office in 1916, they speedily enacted a series of measures to address organized women's concerns, including women's suffrage, prohibition, guardianship and maintenance laws. Yet women's demand for an interest in jointly-accumulated family property was left unaddressed. Petitions for a dower law began arriving at the Premier and Attorney General's Offices in 1917. At that time, Attorney-General Macdonald was encouraging, but informed the petitioners that given the great

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[162] British Columbia, *Statutes*, 1921 [First Session], 12 Geo. 5, Chap. 43; Ibid., 1921 [Second Session], 12 Geo. 5, Chap. 35.

[163] *Daily Times*, 29 November 1921; *Province*, 29 November 1921.

[164] *Province*, 1 November 1922.

amount of legislation currently in the Legislature, dower would have to wait.[165] In 1918, new proposals arrived from the Cranbrook Women's Institute, calling for fixed statutory shares to govern the estates of will-writers.[166] Yet the Cranbrook women sought more than the right to succeed to family property at their husband's death. They also wanted a share in controlling that property while the husband was alive. To this end, the Cranbrook Women's Institute advocated the introduction of mandatory homestead dower provisions, preventing a husband from selling the family residence, whether on a farm or in an urban area, without his wife's consent.[167]

The proposals represented a thoughtful attempt to overcome two of the key objections to dower: that requiring the wife's consent would slow land transactions and raised the possibility of residual dower claims encumbering titles. In combination, the two pieces of legislation would give married women the right to veto any sale or mortgaging of the home property and a fixed share of all the family property under the statutory share legislation upon her husband's death; importantly, a woman could protect her interest in the family's residential property, but if she consented, her rights in the piece of

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[165] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2140, File 1019-12-17, pp. 1-3; Ibid., Reel B2150, File 1990-12-18, pp. 2-3.

[166] The petitioners made clear that their recommendations were "drawn up with the view of preventing a man leaving his family by will destitute or minus any share in his estate." If a married will-writer of either sex died leaving issue, one-third of their estate was to pass to the surviving spouse, and one-third to the children. If there were no children, the surviving spouse would receive one-half. Any surplus could be disposed of by will. There were also special provisions to deal with small estates. Should the estate be valued at less than $2000, the wife would take a life-estate in the entirety, to pass to the children at her death. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2150, File 104-12-18, p. 4-5.

[167] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2150, File 104-12-18, p. 4-5.

residential property in question terminated; moreover, when dealing with properties other than the family home, a man could conduct transactions without his wife's consent. This would free the vast majority of speculative properties from any dower constraint. Unfortunately, the bureaucrats who conveyed and received the proposals confused the details, and concluded they were unworkable.[168] The Attorney General responded that he was favourably disposed to making changes, and would consult with the Women's Institutes and other women's organizations prior to doing so.[169] However, by 1918, organized women were becoming frustrated with the government's inaction. In July, when the Provincial Advisory Board of the Women's Institutes met, they demanded a concrete opinion on the proposed amendments from Deputy Attorney General Johnson.[170] Married women's property rights were becoming a point of friction between the Liberal executive and the women's constituency they had so vigorously courted.

In the face of this pressure, Liberal back-bencher A.M. Manson took action, introducing amendments to the inheritance act which improved wives' rights in cases of intestacy.[171] The measure passed, but by 1919, intestacy reform would hardly satisfy

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[168] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2150, File 3760-12-18, p. 2, 4, 5.

[169] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2150, File 104-12-18, p. 2-3.

[170] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2150, File 3760-12-18, p. 1.

[171] If there were no children, the wife was to receive the entire estate rather than one-half. Conversely, if there was no wife, the children were to receive all. Only in cases where an intestate left no wife and children would the next of kin be entitled to a share in the estate. The Liberals also responded to certain additional demands of women's organizations. The 1919 amendment provided that mothers and fathers would share equally in inheritances from children. Previously, the mother could only inherit from children if the father was dead, or the inheritance had come to the child from the mother. Equal inheritance rights to children's estates were demanded by the University Women's Club and the New Westminster and

organized women's demands. Nor would it satisfy their friends within the Liberal Party. Later in the 1919 session, North Okanagan Liberal Dr. K.C. Macdonald introduced a motion, seconded by former Attorney-General M.A. Macdonald, calling on the government to introduce a dower bill by the next session of the Legislature.[172] The motion carried unanimously. Yet Mary Ellen Smith's remarks warned that organized women were not bound inexorably to the Liberal Party. She informed the Legislature that "the women of the country would be delighted to see such a measure enacted, whether by the present or any government."[173] Although the Liberals had done much to earn women's support, continued legislation would be necessary to maintain that support.

By November 1919, the Provincial Council of Women, under the guidance of Helen Gregory MacGill, pressed the matter even further, moving beyond dower to what amounted to a call for community property rights. Dower rights to family property, which fully materialized only at the husband's death, were no longer satisfactory. Under the new proposals, all property accumulated during the marriage was to be considered the joint property of both spouses, with each enjoying full rights to one-half of the property. During marriage, neither spouse could part with more than one-half of the joint assets. At the death of one spouse, the other was to retain his or her half, with the residue passing

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Vancouver Local Councils of Women as far back as 1913. Finally, the amending legislation included provisions intended to reduce the costs of distributing small estates composed entirely of less than $250 worth of personalty. *Province*, 27 February 1919; *Daily Times*, 12, 14 March 1919; British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2096, File 93-12-13, pp. 172, 175, 177-178, 181-183; British Columbia, *Statutes*, 1872, 35 Vict., no. 29; Ibid., 1919, 9 Geo. 5, Chap. 1.

[172] British Columbia, *Journals*, 14th Parliament, 3d session, 1919, p. 245.

[173] *British Colonist*, 25 March 1919.

by will or the intestacy laws. Finally, if half of the joint estate was insufficient for the maintenance of the surviving spouse, the court was permitted to increase the spousal share.[174] This final provision embodied the germ of an idea MacGill would eventually press to fruition. Yet through 1919 and into 1920, it remained uncertain whether the Liberals would honour the pledge to introduce dower legislation. Once again, organized women showed they were not slaves to the Liberal party, but saw the party as a means to an end. Late in the 1920 session, the women's organizations secured the support of North Vancouver Soldier's Party M.L.A. George S. Hanes to remind the House of its promise to introduce dower rights by the end of the session. With only three or four days believed to be remaining in the session, Hanes introduced a resolution calling for the immediate introduction of dower.[175] There was little time to act.

In fact, the Liberals had not forgotten their pledge. Dower presented thorny issues. Following the Macdonald resolution in 1919, Legislative Council Avard V. Pineo took the initiative, providing Premier Oliver with an unsolicited summary of Canadian dower

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[174] The proposals were:
1. That all property, real or personal, belonging to either spouse before marriage, be a separate estate with all that it implies.
2. All property acquired after marriage to be the joint estate which neither spouse may absolutely will away or give away or alienate more than half.
3. During the lifetime of both spouses to be administered by whichever spouse is transacting the business of the family.
4. At the death of either spouse the survivor suceed [sic] absolutely to half the joint estate, the other half to descend as the Inheritance Act at present provides.
5. If half the joint estate be not sufficient for the surviving spouse, the court to have the right to increase the amount given.
Source: British Columbia Provincial Council of Women, Originals, BCARS, MS 1961, Box 6, File 13, Scrapbook [clipped from the *Western Women's Weekly*, 1 November 1919].

[175] *Daily Times*, 14 April 1920; *British Colonist*, 14 April 1920.

laws. Pineo's memorandum revealed that wives in every other common-law province enjoyed better rights in family property than married women in British Columbia.[176] Upon receiving Pineo's memorandum, Oliver consulted with the Cabinet, which recommended legislation on the Ontario model. Pineo was instructed to prepare the legislation, with the further proviso that husbands should enjoy equivalent rights in their wives' lands.[177] Yet Pineo's bill would never become law. A wily saboteur, intimate with the women's movement, stood in the way.

Since 1917, University Women's Club founder Evelyn Farris's husband had occupied the position of Attorney General. J. W. deB. Farris was considered a great friend of the women's movement, and regularly collaborated with Helen Gregory MacGill in drafting legislative proposals.[178] When Pineo's draft dower legislation was ready, Farris instructed him to submit it to the Provincial Registrar General of Titles for suggestions to ease dower administration in the Land Registry Office and Courts.[179] Farris, a highly respected attorney, would have had little difficulty anticipating the response. The

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[176] In Ontario, Nova Scotia and New Brunswick, dower continued to exist in its common-law form; a wife's dower could not be barred without her consent. Wives in the prairie provinces also enjoyed better protection than those in British Columbia. In those provinces, compulsory homestead laws existed: wives enjoyed the right to a life estate in the family's residence and adjoining land (a maximum of 1 acre in urban areas and 320 acres in rural areas); such properties could not be encumbered or disposed of by the husband without his wife's consent. In Manitoba, the wife was also entitled to her dower out of any additional lands, after all debts were satisfied. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2160, File D-68-1, pp. 2-4.

[177] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2150, File 336-12-18, p. 6.

[178] Crossley, "The B.C. Liberal Party," pp. 235-6; MacGill, *My Mother the Judge*, pp. 155-156

[179] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2150, File 336-12-18, p. 5.

Registrar General cautioned against the decision to revive dower rights. Dower, he wrote, conflicted with the Province's Torrens system of land registration and would introduce uncertainty into the registration of titles. The originator of the Torrens system had intended "to bring about absolute certainty in title to land," and the Chief Registrar believe that any law "in derogation of his purpose should be scrutinized with very great care where his system of Land Registration is in vogue. The institution of dower as contemplated in this Act will undoubtedly tend to make uncertain the tenure of land."[180] This was the same criticism leveled against dower since the 1870s, and the concerns were the same as those held by Walkem and Bowser. Under Ontario's dower law, a widow who had not consented to a transfer could claim her dower right from subsequent purchasers.

Apparently, the Liberal government was no more prepared to introduce such uncertainty to land titles than were the Conservatives. Nor were they willing to hinder the free exchange of clear title necessary to land speculation. As Frances McConkey, prominent in the women's movement, later explained:

> When it came to formulating and introducing a bill giving a married woman some claim on her husband's property we struck a snag. The province was booming and the ownership of houses and lands was changing overnight. The members of the House balked at the prospect of having to obtain a wife's consent for a transfer of property.[181]

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[180] Ibid., pp. 10-15.

[181] Crossley, "The B.C. Liberal Party," p. 246.

Faced with the government's unwillingness to pass dower legislation, Helen Gregory MacGill met with Attorney-General Farris to try to come up with an acceptable alternative. They found it in the Testator's Family Maintenance Act.[182]

Farris himself introduced the bill. It was based on New Zealand precedent, permitting a testator's wife, husband, or children to apply to the Supreme Court for a redistribution of the estate.[183] If in the opinion of the Judge, the testator had failed to make "adequate provision for the proper maintenance and support" of the wife, husband, child or children, he was empowered to order such provision out of the estate as he thought "adequate, just, and equitable in the circumstances." Payment could be made by installments or in a lump sum. Beyond these broad discretionary powers, the Court was advised that it could refuse to make an order in favour of any person because of character or conduct, and could consider the interests of third parties interested in the estate.[184]

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[182] Ibid.

[183] New Zealanders had developed the legislation to deal with similar concerns. Calls for dower began in 1895. In 1896, Sir Robert Stout proposed statutory shares of one-third each for widows and children, and one-half if survived by only a wife or child. Faced with stiff resistance from those opposed to interfering with the right to will property, Stout returned the following year with a measure which would allocate fourths to the widow and children. Still he was rebuffed. In 1898, a new measure was proposed, which imposed no necessary limits on the right to write a will, but allowed the courts the discretion to make provision out of a man's estate for his family. This measure, the original Testator's Family Provision bill, was also rejected. Two years later, the idea re-emerged. The member sponsoring the bill declared that it was not his intention to constrain the right to make a will, but to morally supervise will-writers. Before a man disposed of his property, he argued, he should first make provision for those dependent on him. If this was not persuasive enough, he asked the Legislators to ask themselves a question: "was the State to be liable for the support of the wife and children or was the estate to be liable." Although some worried that the measure would benefit disobedient children, and others held that guidelines should be provided for the Courts in establishing the shares, the measure passed without significant revision. Amighetti, *The Law of Dependants' Relief*, pp. 6-10.

[184] British Columbia, *Statutes*, 1920, 10 Geo. 5, chap. 94. These third parties would presumably include creditors as well as others named in the will as beneficiaries.

In introducing the measure, Farris made reference to Hanes' dower motion. British Columbia's existing dower act, he told the legislature, was "a sort of camouflage dower." It was a dower act in name only, and actually operated to restrain dower rights. Yet Dower had drawbacks, the Attorney General said. The Province's women's organizations had told him that one-third of the husband's estate would be insufficient to meet the needs of widows and children.[185] This was true. When dealing with small estates, one-third would hardly suffice. The discretion permitted by the new measure would resolve this problem, allowing the Judge to award the wife a greater portion of the estate. Moreover, this measure had the additional benefit of equal rights for the sexes: it applied equally to both wives and husbands.[186] Yet Farris assured the Legislature that the bill "was not the last word as to what the government was prepared to do in protecting the interests of the women and children."[187] "It was not even an attempt at a Dower Act," he continued, "but presaged a measure of that kind."[188] The government, he advised his colleagues, was preparing dower amendments to the Land Registry Act for the following session, and Farris implied that these amendments would grant widows an even stronger claim upon their husband's estates.[189] Of course, who would doubt his word? He was,

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[185] *British Colonist*, 16 April 1920.

[186] Ibid.

[187] *Daily World*, 16 April 1920.

[188] *Daily Times*, 16 April 1920.

[189] *British Colonist*, 16 April 1920.

after all, the husband of Evelyn Farris, founder of the University Women's Club, which had sought a dower act for so many years!

Those who spoke to the measure in the Legislature were in favour, but thought it insufficient to address women's needs. Delta Conservative F.J.A. MacKenzie believed the measure inadequate and seriously flawed. "The net effect of the bill," he said, "would be to give the widow the right to plunge into a lawsuit." Since the measure did not provide widows with a fixed statutory share, MacKenzie believed it would lead to extensive litigation. He looked forward, he told his fellow members, "to supporting more adequate legislation at next year's session.[190] Mary Ellen Smith was also ambivalent in her support. She had "nothing but commendation for the Government in introducing such a measure." She assured the Legislature that "the women of the Province would be glad it had been introduced." Yet in her praise for the government, Smith left no doubt that she believed the bill a temporary expedient. "This was blazing the trail for a dower act for next session," she said, "a measure which the women of the Province were eagerly awaiting."[191]

Editorial opinion on the Testator's Family Maintenance Act (TFMA) was mixed. The Vancouver *World* took a neutral stance, noting the measure had been previously enacted in New Zealand and Alberta, and would partially satisfy demands for dower.[192]

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[190] *Daily World*, 16 April 1920; *British Colonist*, 16 April 1920.

[191] *British Colonist*, 16 April 1920; *Daily Times*, 16 April 1920.

[192] Alberta had passed a similar act in 1910, under the terms of which a widow who received less than her intestacy share in her husband's will could apply to the Supreme Court for redistribution. Ontario would pass a TFMA on the New Zealand model in 1929. Several other provinces followed suit after World War II. Amighetti, *The Law of Dependants' Relief*, pp. 17-19.

Moreover, the editor of the *World* told his readers, the bill differed "from the dower law that some members have in contemplation, as it does not encumber the owner of realty in disposing of it during his lifetime."[193] Yet this feature was a flaw as well as an asset. In the legislature, it was suggested that "the husband could defeat the object of the bill by giving away his property before death..." Attorney-General Farris adroitly side-stepped the criticism, arguing "that any man mean enough to consider such a step would be so mean and selfish that he would hold on to his property until he died."[194] In truth, while the measure maintained the certainty of titles, it offered only limited protection to wives and children. The dower law's requirement for the husband to secure his wife's consent for the sale or mortgage of land was one of its greatest protective features. Without the consent requirement, a man could defeat any protection offered the wife and children by disposing of his property during his lifetime.[195]

In a pair of editorials, the Victoria *Colonist* was highly critical of the act, and yet somewhat equivocal in the final appraisal. The *Colonist* deemed the measure "slipshod legislation." The editors approved of the principle of protecting wives and children; they further approved of the measure's potential for reducing mothers' pension expenditures; they disapproved, however, of placing the onus of decision upon the courts. In other countries where similar legislation was in place, they wrote, the laws stated the

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[193] *Daily World*, 15 April 1920.

[194] *British Colonist*, 16 April 1920.

[195] Macdonald, *Fraud on the Widow's Share*, p. 297.

proportion of the estate to be given to the wife and children. Apparently unaware of the precedents for the measure, the editors scathingly rebuked the government for evading its responsibilities. In failing to set fixed portions, the government had demonstrated "an entire lack of vision" and "lack of courage."[196] The costs resulting from this absence of vision would be high. Putting these cases before the courts would entail substantial legal costs, especially since any decision could be appealed. In the legal wrangling which would follow, estates would be "stripped bare" and legacies squandered. The law would benefit lawyers more than the wives and children for which it was intended.[197]

Yet it was precisely the discretionary aspects of the bill which most appealed to its supporters. In the United States, many states had responded to the same situation by enacting what have been termed "statutory shares." Under these laws, a widow or widower unsatisfied with their spouse's will could elect to claim a prescribed amount of the spouse's real and personal estate, often set at the equivalent of intestacy. The significant difference between the statutory share and dower was that the statutory share did not give the wife rights in the property during her husband's lifetime. There was no need to gain spousal consent in land dealings, and no possibility of encumbered titles.[198] Yet the judicial discretion permitted by the TFMA could provide wives and children with advantages that a fixed share could not. Helen Gregory MacGill had high praise for the measure, writing that the TFMA belonged "to that new fine school of law-making that is

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[196] In New Zealand, critics had also argued that guidelines for distribution should be provided to the Courts. Amighetti, *The Law of Dependants' Relief*. p. 10.

[197] *British Colonist*, 16, 17 April 1920.

[198] Macdonald, *Fraud on the Widow's Share*, p. 3.

content to enunciate an equitable principle, leaving cases to be decided on their merits."[199] There were good reasons for her praise. The flexibility of the legislation contributed to its strength. Unlike dower laws and statutory shares, the TFMA permitted consideration of need. Dower and statutory shares are rigid and unchangeable. Under the TFMA, distributions could be modified proportionally upward in cases of small estates, well beyond the highest dower provision.[200] Conversely, in cases where the widow has means, or has been transferred property during her lifetime, judges need not necessarily change the testator's will. Equally importantly, the TFMA provided for children. No dower law or statutory share protects the independent interests of children in the testator's estate.[201] Finally, in an economy where greater amounts of wealth are held as personalty, only the TFMA or statutory shares permitted the redistribution of personal property. Dower, developed at a time when most wealth was held as land, applies solely to real estate. In both Alberta and Ontario, lawmakers pointed out the deficiencies of dower laws and commended TFMA-type legislation for making stocks, bonds and other personal property liable for widows' and childrens' support.[202] In attending to need, to children, and to personalty, the TFMA offered the greatest overall flexibility. Yet by failing to provide wives with a means of vetoing property transfers, it provided little security.

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[199] Amighetti, *The Law of Dependants' Relief*, pp. 15-16.

[200] Macdonald, *Fraud on the Widow's Share*, pp. 63, 290-291.

[201] Sussman et al., *The Family and Inheritance*, p. 26.

[202] Amighetti, *The Law of Dependants' Relief*, pp. 17-18.

The *Colonist*'s editors also raised a second major strand of criticism often leveled at Testator's Family Maintenance Acts. They felt the legislation infringed upon civil liberties to an unacceptable extent. Demonstrating a dissatisfaction with the increasing government regulation characteristic of the progressive era, the editors wrote that the bill was "another blow at individual freedom of action." They were aware that in civil law jurisdictions the husband's right to dispose of his property was restricted. Yet in France, where such restrictions were in place, eminent legal authorities were critical of the restriction such laws placed on individual liberty. Citing one of these scholars, the editors warned "un peuple n'est pas libre, s'il n'a pas le droit de tester, et la liberte du testament est la plus grande preuve de la liberte civile."[203] Nonetheless, despite these cautionary criticisms, the editors felt that in this instance, to protect wives and children, some restriction of individual freedom might be necessary.[204]

While the TFMA was significant step forward, it should not be forgotten that Farris had assured the Legislature that it was a temporary expedient. Greater spousal property rights were imminent. Some new form of dower was being formulated. At least, that was the promise, and it was one which women's organizations eagerly awaited. Women wanted a recognized interest in family property, which they could assert and protect. Over the next few years, however, no dower act arrived. None was coming. No matter how they twisted the concept, true dower rights would hamper property transactions, and

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[203] Freely translated, "a people is not free, if they do not have the right of testation, and the freedom to make a will is the greatest proof of civil liberty."

[204] *British Colonist*, 16 April 1920.

the Liberals were unwilling to hinder the economy. In 1923 George Hanes, now sitting as an Independent Liberal, called the government to account again. He admonished the legislature, pointing out that British Columbia was the only province in Canada without a dower act. A dower bill had been promised in the 1916 Liberal Party platform, and the promise had been renewed by resolution in 1919. Yet no action had been taken. Hanes then proposed an alternative solution to the government's dilemma: he called for a community property act which would give wives a fifty-percent interest in family property. Hanes' resolution, based on Helen Gregory MacGill's 1919 proposals, stipulated that all property acquired after marriage become the joint property of both spouses. This joint estate was to be administered "by the spouse transacting the business of the family," and neither spouse was to be permitted to dispose of more than one-half of this property without the other's written consent.[205] If the government was unwilling to give women a fifty-percent interest in familial property, Hanes "suggested that the house consider how far in that direction it was willing to go."[206]

Hanes' statements in the legislature indicate a desire to secure rights for women and a simultaneous discomfort with women's equality. He downplayed the egalitarian aspects of the proposal, and yet at the same time told the legislature that he wanted to ensure that wives had a secure share in the family's property, one not subject to the vagaries of judicial discretion:

> what he sought was not so much an equal division as an enactment that would give a married woman a fixed share of the property of the husband, such a law having

[205] *British Colonist*, 22 November 1923.

[206] *Sun*, 22 November 1923.

> already been enacted in the majority of the provinces. At the present time widows whose claims have been neglected by a departed husband can go before a judge to establish their rights, but the proposed legislation would give her rights without question. A husband would not have power to dispose of more than fifty per cent. of his property without the consent of the wife.[207]

Attorney-General Manson quickly adjourned the discussion before members could express their views.[208] When Hanes tried to resume discussion of the resolution, Premier Oliver opposed on the grounds that a private member could not dictate the terms of legislation to the government by resolution. "There was nothing in Mr. Hanes' proposal," he said, "that could not be covered in a private member's bill." If Hanes wanted a community property measure, he should introduce it. The government was not interested in doing so.[209]

Interestingly, the idea of community property drew fire in the press not from men, but from a woman unhappy with the idea of losing control over her separate property! A letter from 'A Working Woman' to the Victoria *Times* was critical of the proposal. "[A]t first sight," she wrote, the proposal "appears to benefit married women by entitling them to a legal half-share in their husband's property." For women without property or earnings, such a measure would indeed secure substantial legal rights. Yet, 'A Working Woman' was not unaware of the irony of securing women rights in their husband's property "which they have had for some time, according to the marriage ceremony." She

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[207] *Province*, 22 November 1923.

[208] Ibid.

[209] Following Oliver's comments, Manson again moved adjournment of the debate, so that the procedural correctness of the resolution could be examined. Ultimately, the resolution was ruled out of order. *Province*, 28, 30 November 1923.

was also quite aware that these rights would have to be enforced through recourse to the courts, which would be costly, and offered married women little more in terms of emergency access to property than they already enjoyed. In an apparent reference to either the DWMA or Divorce legislation, 'A Working Woman' wrote that if her husband did not "hand over to her a reasonable share of his own accord," a woman could already take action in the courts to make her husband share his assets.

For married women earning their own income and obtaining assets, whom 'A Working Woman' believed were the vast majority, the proposition would result in a loss of rights! The measure would deprive women "of legal possession of their own earnings and certain other property, rights they fought for and won at tremendous cost not so very long ago." Although her history was flawed, her analysis was correct. As well as establishing a wife's claim in her husband's property, a community property bill would re-establish a husband's claim in his wife's earnings and property acquired separately after marriage. 'A Working Woman' further objected to the administration of the joint estate by "the spouse transacting the business of the family." Since husbands most often represented the family, the result of such a law would be the return of a legal situation in which the wife's wages went directly into her husband's hands. This would be an intolerable reverse. "Any married woman with [an] independent business or profession," she wrote,

> or any woman whose husband is away for the greater part of the year, as is so often the case in this country, or any woman who supplements the family exchequer in various little ways such as knitting woollies, making gloves, etc., has only to think over this bill [sic] for five minutes to see 'where she gets off at' in regard to it.

Joint property, 'A Working Woman' warned, would have drastic social consequences, tearing apart the social fabric, leaving no class untouched. A community property law would increase marital discord and result in an increased number of separations and divorces; it would "work hardship on many of the very best, poorest and most hardworking of married women"; and it would discourage women with capital from investing in or emigrating to the Province.[210] Ironically, these were largely the same consequences foreseen by the critics of *separate property* in 1873!

After revealing the negative effects of the legislation for women, 'A Working Woman' moved on to expose what she believed were its unspoken intentions: the legislation was intended, she informed the *Times*' audience, for the benefit of creditors. It was intended to patch the hole created by the MWPAs, although she did not seem to perceive that this was a hole which the MWPA's originators had intended. The community property law, she wrote, was intended to "benefit the very large army of creditors out here defrauded by wary men who put their property into the names of wife and daughter without relinquishing control of it." The writer had no quarrel with bringing such property within the reach of creditors. Unlike the drafters of the 1873 legislation, she did not support protection of family property from creditors. Nor did she support community property as a means of rectifying the problem. "Surely," she wrote, "the Government could find

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[210] 'A Working Woman' wrote, "Since I read this news, every woman I have met has spoken of the retrograde measure with indignation and dismay; and one, at least, with a considerably amount of capital at this moment awaiting investment, is returning it at once as she can sell out her present investments, leaving an excellent husband to choose between keeping his own capital out here or joining her with it elsewhere. And he will certainly join her." *Daily Times*, 28 November 1923.

some other way of forcing a debtor to disgorge for the benefit of his creditors than this very thin piece of camouflage called so engagingly 'privileges for women!'"[211]

With his community property resolution killed, George Hanes chose not to introduce a private member's bill. The government's position was clear enough. In the following years, support for changes in married women's property and inheritance rights appears to have waned.[212] Through the 1920s, the only changes in these areas originated outside the women's movement and involved intestacy. In 1924, Attorney-General Manson introduced an amendment to the Administration Act (into which the Inheritance Act had been consolidated) which prevented husbands and wives who had committed uncondoned adultery from sharing in the intestate estates of their spouses.[213] The sole

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[211] *Daily Times*, 28 November 1923.

[212] In 1924, the Renfrew Local Council of Women petitioned for wives to be guaranteed the equivalent of their intestacy share in cases where their husbands wrote wills. After this the Attorney General's files are devoid of petitions until the 1930s, when the Women's Institutes of the Peace River Block began to petition for the right to prevent their husbands from disposing of the family residence. By this point, however, agitation for women's rights was no longer mainstream politics. A bureacratic memorandum on the petitions depicted the petitioners as radical and out of step with the majority of women in the Province. "Apparently the women of the Peace River Block are somewhat agitated over women's rights, dowry [sic], support, privileges, etc. The matter comes up at their institute meetings from time to time and at one Institute Conference which I attended in the Peace River Block five years ago it occurred to me that Peace River wives in general do not have the same high opinion of their husbands and men folk generally as in other parts of the Province." This analysis, like most broad generalizations, was off the mark. Peace River women were more familiar with the homestead laws of Alberta and Saskatchewan, and had taken up the petition drive in response to specific cases of injustice. British Columbia, Provincial Council of Women, Originals, BCARS, MS 1961, Box 1, File 1 (Minute Book, 1919-1927), p. 104; British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2284, File D-71-2, Opinions, pp. 2-3; Ibid., File A-5-2, 1935, General, pp. 42-44; Ibid., 1936, General, pp. 24-25.

[213] *Province*, 10 December 1924. The legal definition of 'condone' refers simply to a re-establishment of the marital relationship. For a spouse to 'condone' a behaviour only requires resuming the marriage relationship.

recorded demand for the legislation came from Legislative Counsel Pineo.[214] However, the Councils of Women and other women's organizations, most notably the WCTU, were strongly committed to the establishment of equal moral standards for husbands and wives, and this legislation accorded with those demands.[215] It was brought even closer into line with these demands when Victoria's H. Despard Twigg successfully pressed for the measure to be extended to cover those who deserted their spouses.[216] The opposition Conservatives had been contacted and agreed not to oppose the amendments.[217] The only opposition which did emerge revealed continuing hostility to interference with male property rights. In the mistaken belief that the act applied to wills, one member hotly protested that the bill "would take away a man's right to dispose of his proeprty [sic] as he desired."[218]

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[214] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2172, File A-4-14, Legislation, pp. 25-27.

[215] See the Council of Women report in the *British Colonist*, 19 March 1919.

[216] *Province*, 10 December 1924; *Daily Times*, 11 December 1924; British Columbia, *Statutes*, 1924, 15 Geo. 5, Chap. 1. This legislation was quickly supplanted by the 1925 Uniform Intestacy amendments, under which adultery was only a bar to inheritance if accompanied by desertion; moreover, the Supreme Court ruled that the adulterous spouse had to be "living in adtulery at the time of [the intestate's] death." This decision was affirmed upon appeal to the Judicial Committee of the Privy Council. See *Burns* v. *Burns*, *British Columbia Reports*, vol. 52 (1937), pp. 4-8, and *Western Weekly Reports*, 1938, no. 3, pp. 477-480; British Columbia, *Statutes*, 1925, 16 Geo. 5, Chap. 2, s. 127.
Two other applications were heard in which a spouse who had divorced an intestate tried to make claims upon that intestate's estates on the grounds that their foreign divorces were invalid. In both cases, the court ruled that since the spouse had instituted the proceedings in the foreign jurisdiction, they had submitted themselves to that foreign jurisdiction, and could not subsequently question that jurisdiction. Neither suit was successful. See *In Re Graham Estate. Nolan* v. *Graham et al.*, *British Columbia Reports*, vol. 52 (1937), pp. 481-486; and *Carter* v. *Patrick*, *British Columbia Reports*, vol. 49 (1935), pp. 411-412.

[217] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2172, File A-4-14, Legislation, pp. 24, 28.

[218] *Province*, 10 December 1924.

Complete revision of the intestacy laws came in 1925 as a result of a drive by business and legal organizations to eradicate "needless and irritating diversities" in provincial law. This drive culminated in the creation of the Conference of Commissioners on the Uniformity of Legislation in Canada.[219] The 1925 amendments to the Administration Act were adopted verbatim from the Uniform Inheritance Act drafted by the Conference.[220] Surprisingly, while the Victoria *Times* labelled the changes radical, and Attorney-General Manson countered that they were "non-contentious," little controversy erupted.[221] Victoria's H. Despard Twigg brought forth the only objections, and these revolved around the quick passage of the legislation and the lack of opportunity for public scrutiny in the interior.[222] Given the content of the measure, the silence was inexplicable.

Widows' inheritance rights were altered considerably. Under Manson's 1919 legislation, widows without children inherited their husbands' entire real estate and half the personalty[223]; the new legislation granted them all of the real and personal estate up to the value of $20,000, after debts and expenses; The residue in excess of $20,000 was

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[219] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2077, File 7053-12-11, pp. 1-2; Ibid., File 7090-12-11, pp. 2-3; Ibid., Reel B2097, File 9235-12-13, pp. 4; Ibid., Reel B2150, File 1239-12-18, pp. 4, 17-18, 20.

[220] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2225, File A-5-4, 1928, p. 16.

[221] *Daily Times*, 24 November 1925; Victoria *Colonist*, 25 November 1925.

[222] *British Colonist*, 26 November 1925.

[223] The Attorney General's correspondence includes the case of a Vancouver widow whose husband died in April 1925, prior to the uniform intestacy provisions taking effect. Her husband's estate was valued at $13,721.65. Of this, she received all of the realty, valued at $11,721.45, and half of the personalty. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2284, File A-5-2, 1927 [further cataloging details suppressed in accordance with British Columbia's privacy legislation].

to be split between the widow and next of kin.[224] While it was strange enough that changes in widows' inheritance rights should go so generally unnoticed, a much more dramatic change also slipped silently through the legislature. The act extended inheritance rights to illegitimate children, recognizing the unwed mother-child relationship in British Columbia's inheritance law for the first time. Under the Uniform Inheritance Act, an illegitimate child could inherit from and through his or her mother.[225] The act also established inverse lines of succession, from child to mother: that is, if the child died without a spouse or offspring, his or her property would pass to the mother, or through her to her other children in equal shares.[226]

While the Uniform Inheritance Act was formulated outside the province, it would be a mistake to view it as an imposition on British Columbia. Much of the legislation which engendered controversy in British Columbia was copied from other jurisdictions. By 1925, an era had ended. The silence surrounding the Uniform Inheritance Act stems, in

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[224] British Columbia, *Statutes*, 1925, 16 Geo. 5, Chap. 2.

[225] If the mother predeceased her illegitimate child, the child could inherit through her any property which she would have received.

[226] Should the mother be deceased leaving other offspring, the illegitimate child's property would pass to the mother's other children in equal shares, or to their descendants. British Columbia, *Statutes*, 1925, 16 Geo. 5, Chap 2. In its provisions for inheritance by and from illegitimates, the legislation followed American trends. By 1886, 39 states and territories had granted illegitimate children inheritance rights in their mothers' estates. By 1930, this number had risen to 49. The American states divided equally over the question of whether illegitimate children should be able to inherit through their mothers (from the mother's kin, if she was deceased). Grossberg, *Governing the Hearth*, p. 224.

In 1927, the sharp-eyed Official Administrator discovered an inconsistency in the legislation which might have benefited illegitimate children: an intestate's legitimate grand-nieces and grand-nephews were not entitled to an inheritance; however, the *illegitimate* children of a testator's niece could inherit, if their mother *and* the grandparent related to the testator by blood were both dead. Although this was likely the first inequity ever to favour illegitimate children, the legislature wasted no time in eradicating it, hastily amending the legislation to prevent the atrocity. See British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2225, File A-5-5 (1927), pp. 37-38.

part, from the fact that women's organizations had become less politically active, a national trend noted by many authors.[227] Yet organized women's political inactivity only explains the absence of strong reaction to the changes in married women's intestacy rights. It does not explain the absence of reaction to the illegitimacy provisions. While organized women were quieter by the mid-1920s, their earlier activity had changed the political landscape dramatically. Aiding illegitimate children was no longer the controversial topic it had once been, and this silence speaks volumes.

In the nineteenth century, nation-building was clearly a middle-class male endeavour. By the early part of the twentieth century, organized women had gained an increasing influence over conceptions of the national interest and the state's legitimate regulatory functions. Organized women pressed a very different national programme, borne of progressive environmentalism and their particular priorities and aspirations. Where nineteenth-century reformers had developed a nation-building vision based first on an idealized masculinity, and later on a more hierarchical corporatism with trickle-down apologetics, twentieth-century women's organizations centered their idealized vision on children and child-nurture. If children were properly nurtured and socialized, the argument went, society would be improved. Of course, organized women's goals were no more disinterested than those of middle-class males in the previous century: improvement was defined in terms of bourgeois norms. It is of great importance,

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[227] Weiss, "Women and Reform in British Columbia," p. 284.

however, that these programmes were rationalized on grounds which gave them a semblance of disinterestedness. As Philip Abrams observed, state formation is a project of "politically-organized subjection," attempting to render legitimate the unsupportable domination of one group over another.

Organized women's vision was both self-interested, self-reflective, and coercive. The focus on child welfare entailed elements of altruism, upon which organized women and their progressive male counterparts capitalized. Yet through their emphasis on child nurture, organized women sought to emphasize the contribution of the nurturer as well as the plight of the child. They laid great emphasis on the importance of supporting and maintaining the 'natural' mother-child bond. This was both an assertion of the importance and indispensability of women's domestic labour, and a claim to social respect. Yet the programme went far beyond a desire for social respect. The progressives' programme took the logic of the state's interest in children's upbringing to extremes, alternatively asserting the state's ownership and parentage of children. Children were declared a national resource, and 'the state' held an interest in their development. As J. S. Cowper explained, the state was the child's "over-parent" with indissoluble rights over its upbringing, rights which ultimately included the right to judge parental fitness and compel 'proper' parental behaviour. Through this diction, those speaking in the name of 'the state' asserted ultimate rights over children's upbringing.

Through their legislation, organized women asserted control over various aspects of social life. This was a substantial reversal of power relations. In the nineteenth century, male legislators had regulated women according to their reproductive role, assigning

them rights based on distinct legal-reproductive classifications. In the early twentieth century, the tables were turned: men were legally regulated through fragmented gender classifications based predominantly on their reproductive and support roles. Men were defined as deserting, neglectful, or non-supporting husbands, as putative fathers, and as liable descendants, and regulated according to those roles. These seemingly natural, obvious, and neutral categorizations rationalized the coercive regulation of men. Through the various pieces of maintenance legislation, male obligation to support dependent kin was entrenched in the law.

It was not surprising that organized women were able to gain the support of middle-class men in their endeavour. The programme was intended to popularize and normalize middle-class child-rearing standards; in conjunction with environmentalist beliefs, comfortable and familiar bourgeois standards were understood as the means to achieve national success. Indeed, the progressive programme seemed to posit those standards as an end in themselves. The final object was the creation of a (healthy) bourgeois nation. The programme was also appealing to middle-class men because its regulatory agenda affected the working classes much more than the middle classes; the broad intent was to bring working-class child-rearing practices into correspondence with those of the regulators. By virtue of their progressive orientation, many middle-class men were untroubled by the more intrusive aspects of regulation. Of course, because of their wealth, social position, and occupational stability, professional and propertied men knew they would only rarely feel the direct, intrusive effects of regulation.

Yet support for legislation entrenching male obligation crossed class lines. Nation-building discourses were broadly held and persuasive. Men of all classes put up little resistance to the extension of obligation with respect to wives and children. Even the coercive powers created by the Children of Unmarried Parents Act were contested only on the ground that they might encourage immorality; despite the controversial nature of the subject, the child's need for provision was considered paramount. This emphasis on the importance of proper child-nurture to national progress was so pervasive and persuasive that legislators were willing to commit substantial tax-funds to child-rearing through the mothers' pension legislation; the general public, the bearers of the tax burden, were equally enthused. The appropriation and invocation of 'the best interests of the child' was indeed the unanswerable argument of the day.

The power of the progressive, child-centered nation-building discourse is perhaps best illustrated through an examination of those measures which were unsuccessful: the Relatives' Maintenance and Dower Acts. When coercive legislation could not be justified on nation-building grounds, it faced stiff opposition, especially from those most likely to be regulated. Upon the introduction of the Relatives' Maintenance Act, labour representatives launched a forceful attack on the measure, arguing that the extension of individual obligation beyond the nuclear family was unjust. Even organized women were divided over the extension of obligations for non-child-rearing purposes; the dower acts faced similar obstacles. Fixed shares for wives were associated with a women's rights agenda; they were not wed to child-rearing goals. Proponents of the legislation could not take recourse to nation-building appeals, and neither measure gained support. The RMA

was withdrawn,[228] and the dower proposals supplanted by the Testator's Family Maintenance Act, which made provision for the wife and children determined according to maintenance needs rather than individual rights..

Yet the powerful hold of state discourses on the collective psyche is not fully encapsulated by its sway over the legislative agenda. It is also revealed in the nature of the alternatives proposed. Opponents never contested the basic premises of statist arguments. They contributed to the construction of the state as a social fact. Those bourgeois who stressed dower's restraint on land transactions employed statist arguments, objecting that restricting the free disposition of land would disrupt the national economy. The appeal to collective needs represented an almost reflexive, unselfconscious attempt to obscure their own interest in facilitating land transfers. Even labour leaders contesting the relatives maintenance act resorted to statist rhetoric. Labour leaders invoked a different vision of the state, holding the state responsible for the maintenance of the sick and the poor. The language of some suggests this vision was rooted in socialist ideologies. While socialism, like progressivism, makes its appeal on the basis of utilitarian altruism, it is unarguably self-interested, a vision of a state-system which purports to accord dignity, respect, power, and material advantages to working-class individuals. Labour leaders, of course, were not uniformly socialist in their outlook. Yet they were uniformly statist. Some supported greater state welfare programs because of their bourgeois ambitions. As John Day explained, the burden of supporting kin would

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[228] The reader will note that the similar Parents' Maintenance legislation, passed in 1922, was not the product of popular agitation. It faced similar opposition and was pressed through by party discipline.

impede the collective labour ascent to respectability. The great power of 'state' discourses is most evident, then, in the broad reluctance to think in other terms. Opponents did not debate the existence of this fictive community and its fictive needs: they believed in and contributed to it.

CHAPTER ELEVEN:

THE IMPACT OF PROGRESSIVE MAINTENANCE LEGISLATION

Over the three years between 1919 and 1922, British Columbia had substantially strengthened its existing maintenance legislation and added entirely new elements. In the DWMA, CUPA, PMA and TFMA, the Province had dramatically increased the scope of legal maintenance obligations between family members. The following chapter examines the reception of progressive maintenance legislation in the police courts, using both qualitative and quantitative techniques. The use of bureaucratic reports and correspondence permits an intriguing investigation of behaviour outside the courts, allowing an assessment of the statutory effectiveness which accounts for cases not determined by the courts. In combination, the police court record books and bureaucratic records also permit a discussion of problems with the enforcement of court-ordered maintenance payments. Discussion of the TFMA is reserved for a separate chapter, as it involves the use of different types of sources and produced an analysis of a very different character.

The 1919 DWMA incorporated an array of amendments to facilitate the prosecution of deserting and non-supporting husbands. One set of amendments made it much simpler for a wife to prosecute a moving husband, a significant consideration, since desertion

often involved relocation by the husband.[1] Under the new legislation, then, a husband could be prosecuted in absentia with relative ease.[2] Of course, the utility of doing so might be questionable. The 1919 legislation also facilitated the prosecution of non-supporting husbands. Under earlier versions of the legislation, a married woman had to leave her husband to prosecute him for willful non-support. The new legislation added destitution as a legal ground for application: a wife was deemed destitute if her husband failed to supply necessities without sufficient cause; she no longer had to live apart from her husband to apply.

Despite the new legal tools, the 1919 DWMA did not produce a rush to prosecute akin to that which followed the 1911 legislation. A survey of four police courts revealed only

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[1] A husband who could not be found, or moved outside Provincial boundaries could not be prosecuted. But the earlier legislation compounded the problem, requiring that the application be made in the jurisdiction in which the husband resided. While this was convenient for the legal professionals serving the summons and enforcing the order, it meant that a deserted wife had to pursue her husband around the province, travelling to the court in his area in order to prosecute. The 1919 legislation remedied this defect, permitting the application to be made in the jurisdiction where the desertion took place. The 1919 legislation also retained the 1914 amendment permitting substitutional service of summonses: if prompt personal service of the summons upon the husband could not be effected, notification of the hearing could be given through the mail or by advertisement. Under the 1901 legislation a married woman could make her application before any magistrate or two Justices of the Peace. British Columbia, *Statutes*, 1901, 1 Ed. 7, Chap. 18, s. 2 (1); British Columbia, *Statutes*, 1911, 1 Geo. 5, Chap. 61, s. 2 (2). British Columbia, *Statutes*, 1919, 9 Geo. 5, Chap. 19, s. 2, 3 (3).

[2] The extremes to which a married woman might have to go to prosecute her husband were most fully illustrated in *Gagen* v. *Gagen* (1934). The case involved a summons mailed by North Vancouver Police Magistrate R. A. Sargent to Harry Gagen in New Zealand. When Gagen applied to have the DWMA proceedings halted on the grounds that he was outside the Magistrate's jurisdiction, the Court of Appeal unanimously ruled against him. Since the act of desertion took place within the Magistrate's jurisdiction, he had jurisdiction to issue the summons; moreover, Justice Macdonald added, the legislation clearly contemplated removal of the husband beyond Provincial jurisdiction in many of its clauses, and made explicit provision for substitutional service in such cases. *British Columbia Reports*, vol. 48 (1934), pp. 481-492. In an appeal to the Supreme Court of Canada, the Court ruled against the appellant husband, holding that since the desertion took place within the Province, there was no question of jurisdiction. The Court added that had the desertion taken place outside the province, the magistrate would have had no jurisdiction. *British Columbia Reports*, vol. 49 (1934), p. 102.

four cases heard under the legislation through 1924. Only one of these cases resulted in a maintenance order. The years following 1924 present a stark contrast. While the act was not modified, the volume of cases was much higher. Between 1925 and 1941, sixty-seven cases were heard in the New Westminster, Trail and Quesnel police courts. Even more startling is the change in judicial disposition of the cases. Compared to the 1906-1924 period, when only thirteen percent of all DWMA cases resulted in maintenance orders, the comparable figure for 1925-1941 was almost sixty-nine percent. In contrast to the earlier period as well, only nine percent of all cases were dismissed, although another nine percent were withdrawn.[3] These trends are consistent with those found in the administration of the Ontario's maintenance legislation. While Annalee Golz reports a twenty-five percent success rate for DWMA claims in the 1888-1920 era, Dorothy Chunn's data from the Toronto Family Court from 1920 to 1940 show a general increase in both the number of maintenance cases heard and the amount of monies collected under maintenance orders.[4]

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[3] Outcomes of DWMA applications in New Westminster, Trail, and Quesnel Police Courts, 1925-1941:

Monetary Orders	46
Entered Separation Agreement	4
Out-of-Court Settlements	1
Dismissed by Magistrate	6
Withdrawn by Wife	6
Incomplete Files	4
Total Files	67

Sources: British Columbia, Provincial Police Court (Quesnel), Record Book, BCARS, GR 0041, vols. 1-2 (1911-1925), and GR 0008, vols. 1-2 (1925-1941); British Columbia. Provincial Police Court (Trail), Record Book, BCARS, GR 1876, vol. 1 (1910-1939); Corporation of the City of Trail, Police Court, Record Book, BCARS, GR 1875, vols. 1-2 (1909-1940); British Columbia, Police Court (New Westminster), Record Book, BCARS, GR 0927, vols. 1-11 (1902-1935).

[4] Annalee E. Golz, "'If a Man's Wife Does Not Obey Him, What Can He Do?' Marital Breakdown and Wife Abuse in Late Nineteenth-Century and Early Twentieth-Century Ontario," *Law, Society, and the*

The increasing use of British Columbia's statute followed a Supreme Court of British Columbia decision relating to the statute's destitution language. The necessary context to this decision is *Smiley* v. *Smiley*, heard in Vancouver County Court in 1922. The Smileys entered into a separation agreement in 1921, which was ill-advised on the part of Mrs. Smiley, since it made no provision for her support. She later petitioned for a judicial separation and alimony, but her application was dismissed. The grounds for dismissal were not explained. Following the dismissal of her alimony claim, Mrs. Smiley applied for and was granted maintenance under the DWMA in the amount of $10 per week. Her husband appealed this order on two grounds: first, the separation agreement was in effect, and was evidence of separation by consent as opposed to desertion; and second, since a maintenance claim had been heard and dismissed by a higher court, the magistrate had no right to adjudicate on the matter. Vancouver County Court Judge Cayley agreed with the appeal on both grounds, and overturned the order. While Mrs. Smiley's attorney argued that the separation order was invalidated by a subsequent temporary reconciliation, Judge Cayley responded that he did not have the authority to set aside such an agreement; nor did the police court magistrate responsible for the DWMA order.[5] Apparently, then, the existence of a separation agreement was a bar to securing an award under the DWMA.

State: Essays in Modern Legal History, ed. Louis A Knafla and Susan W. S. Binnie (Toronto: University of Toronto Press, 1995), p. 331; Chunn, *From Punishment to Doing Good*, pp. 170, 174, 182 (Tables 1, 2, and 4). Unfortunately, the figures are not broken down, but cover cases heard and monies collected under the Deserted Wives', Children of Unmarried Parents, and Parents' Maintenance Acts collectively.

[5] *British Columbia Reports*, vol. 30 (1922), pp. 536-538.

The following year a similar case, *Brown* v. *Brown*, was heard at Nanaimo. In her complaint, Mary Brown advised the court that she was "in necessitous circumstances because of her husband's refusal or neglect without sufficient cause to supply her or their infant children with food, clothing or other necessaries." Her husband countered with a copy of a separation agreement dating back to 1915. Referring to the precedent established by *Smiley* v. *Smiley*, Magistrate Leonard Alleyne Dodd held that he had no jurisdiction to hear the case. Afterward, counsel for Mary Brown approached Dodd, and suggested that the Brown case differed from *Smiley* v. *Smiley*, in that the wife had petitioned not on grounds of desertion, but rather on the new ground that she was destitute. Dodd reconsidered his judgment, and personally presented the case for the opinion of the Supreme Court of British Columbia. Judge Murphy concurred that the legislation made a distinction between deserted and destitute wives, and that through the destitution clauses "the obligation of a husband to support his wife and children is now made absolute by our statute law." A destitute wife, then, could apply under the act regardless of a separation agreement.[6] The implications of this ruling were much broader than its immediate subject. Under the *desertion* language in the statutes, the onus was clearly upon the wife to prove that her husband was at fault. The validity of her claim had to be established clearly and carefully; moreover, her own behaviour was subject to great scrutiny, since a husband's fault was at least in part predicated on his wife's character and conduct. Judge Murphy's ruling on the *destitution* clause clearly enunciated the

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[6] *Western Weekly Reports*, 1924, no. 3, pp. 94-96.

husband's absolute obligation to support his wife and children, and placed a burden on the husband to explain his non-support. Since mutual separation no longer annulled a claim under the act, the onus on the wife to prove her husband's fault lessened dramatically.

Judge Murphy's decision made the mechanics of securing a DWMA order significantly easier for a wife. Yet Murphy went beyond technicalities, making a clear statement of legislative intent: he declared that the legislature's object in passing the legislation was to prevent a man from "shift[ing] his responsibility to the public..."[7] In *Brown* v. *Brown*, then, Murphy called on the judiciary to offset public expenditure through the enforcement of male obligation, and provided them with much broader tools to do so. The ruling suggests a link between the changing patterns in DWMA case outcomes and increasing political concern over mothers' pension expenditures. There is a certainly a correlation: when the Mothers' Pension Boards were most liberal in their distributions, there were few DWMA prosecutions; after the government tightened its purse strings, DWMA prosecutions increased, and the success ratio improved. Changing

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[7] *Western Weekly Reports*, 1924, no. 3, pp. 94-96. After Murphy's decision, the police court records indicate that there was some confusion over the circumstances in which a separation agreement could frustrate a woman's DWMA claim. In 1927, when Carl Armstrong was charged under the DWMA in the New Westminster Police Court, a separation agreement was entered into evidence to refute the charge. Nonetheless, the magistrate ordered Armstrong to pay $12.50 a week for the maintenance of his wife and children. Yet a year later, when Armstrong was brought before the magistrate for non-compliance, the application was dismissed because of the existence of the separation agreement. British Columbia, Police Court (New Westminster), Record Book, BCARS, GR 0927, vol. 9 (1923-1927), p. 454, and vol. 10 (1928-1930), p. 8.

governmental policy pressed married women toward using the DWMA, and corresponding changes in judicial policy accommodated their needs.[8]

Individual court cases provided only a fragmented picture of the value of DWMA awards: we know, for example, that Elizabeth McLaughlin received a maintenance award of $8 per week in 1906; in *Smiley* v. *Smiley* in 1922, the award was set at $10 weekly; neither case provides any indication of the number of dependents involved. In the only case in the police court registries which mentions the existence of children, *Bailey* v. *Bailey* (1926), the maintenance order was also set at $10 per week; this represented a substantial portion of Peter Bailey's monthly income of $67.70. Yet such a substantial award was not always made. In a 1925 Kootenay case brought to the attention of the Attorney General, the husband earned $80 dollars a month. He had custody of one of the children, while his wife had two. In this case, the magistrate awarded the wife $7.00 per week. While he acknowledged that the amount of the maintenance award was "a small amount for a woman to support herself and two children," he argued that the father

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[8] The 'new' judicial tendency to make awards under the act should not be read as a linear progression. In her study of alimony awards between 1837-1900, Lori Chambers found that nineteenth-century Ontario Chancellors were largely sympathetic to the plight of deserted wives, and few had their petitions for alimony denied. She writes that the Chancellors who heard alimony cases adhered to "the nineteenth-century belief that wives were the moral superiors of their husbands..." This belief that women were more moral than men, and more likely to be telling the truth, "placed the onus on the husband to disprove his wife's charges." Moreover, the chancellors generally believed that men who had left their wives "had failed in their primary duty as breadwinners." They recognized that financial support was a key ingredient in the marriage contract for wives, and were unwilling to accept men's complaints of spousal faults (aside from adultery) as justifying abuse or desertion. In essence, the Chancellors viewed alimony legislation as a means of forcing adulterous, abusive, and absconding men to fulfill the duties required by their gender roles. Because of these beliefs, the chancellors consistently and deliberately put a liberal construction on the eligibility requirements — male adultery, desertion and cruelty — in order to grant alimony to married women. The result was an incredible success rate. Seventy-six of eighty-one cases heard by the Chancellors between 1837 and 1900 resulted in alimony awards. Chambers, *Married Women and the Law of Property*, pp. 33-36, 42, 50-51.

needed the remainder of his income to support himself and the third child, and there was no reason that the wife should not work to supplement her maintenance.[9] Obviously, the argument that a mother should remain at home to care for her children, so prevalent during the mother's pension debates, had its limits.

The evidence from these cases provides a fragmented impression of the amount of awards, but no sense of general trends. Were these awards characteristic? And were they sufficient for subsistence? The police court record books provide a better understanding of the nature of awards. Of the 82 DWMA cases in the record books examined above, 48 resulted in maintenance orders. Two of these orders were somewhat anomalous: one called for the husband to contribute $1 from each day's work to his wife's maintenance; the second involved a one-time, lump-sum payment. The remaining 46 cases involved orders for the weekly or bi-weekly payment of maintenance. These orders ranged from a low of $10 per month to a high of $86.90 per month. The average award was $38.80 per month.[10] Of course, these figures reflect judicial consideration of a number of factors,

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[9] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2284, File D-67-3-1925, pp. 2-5.

[10] Distribution of DWMA Orders by Value, British Columbia, 1906-1941

Value Range (dollars)	No. in Range
10-19.99	4
20-29.99	7
30-39.99	10
40-49.99	15
50-59.99	4
60-69.99	5
70 and above	1
Total Cases	46

The mode (most common) award was $43.75 per month ($10 per week); the median award (the middle number in the entire distribution) was $40 per month. Monthly awards were calculated by multiplying weekly awards by a factor of 4.375 (the number of weeks in the average month of 30.42 days). Sources:

including the number of dependents, their needs, and the means of both husband and wife. In six cases, the number of dependents was specified, permitting a rude comparison of DWMA awards with mothers' pensions. Since mothers' pensions were believed to provide an adequate but unattractive level of support, they might be used as a base for judging the provision made under the DWMA.[11] Under the mothers' pension legislation a qualified mother would receive $42.50 per month for herself and her first child, and $7.50 for each additional child. DWMA orders in the six cases involving a wife with one child ranged between $25 and $65.18 per month. The average was $42.10, a sum very close to that provided by the mother's pension board. However, in the six cases involving a mother and two children, the awards ranged between $25 and $45 per month, and the average award was actually lower at $36.26. A single case involving a wife and three children produced an order for $65.18 per month, subsequently reduced to $43.45 per month. Another case involving a mother with five children also produced an order of $43.45 per month. Finally, two cases involving wives without children produced orders of $32.59 and 43.45 per month. What these awards show is that while need was factored into the awards, the strongest determinative factor was the limitation created by the father's income.

British Columbia, Provincial Police Court (Quesnel), Record Book, BCARS, GR 0041, vols. 1-2 (1911-1925), and GR 0008, vols. 1-2 (1925-1941); British Columbia. Provincial Police Court (Trail), Record Book, BCARS, GR 1876, vol. 1 (1910-1939); Corporation of the City of Trail, Police Court, Record Book, BCARS, GR 1875, vols. 1-2 (1909-1940); British Columbia, Police Court (New Westminster), Record Book, BCARS, GR 0927, vols. 1-11 (1902-1935); British Columbia, Police Court (Victoria), Record Book, GR 605, vols. 2-9 (1894-1924).

[11] During the mothers' pension debates, Dr. MacLean argued concerns that the legislation would kill the mother's desire "to get ahead" were unwarranted in view of the small amount of the pension. *British Colonist*, 10 April 1920.

It is important to remember that these are maintenance orders; they reveal nothing of compliance, and studies of other jurisdictions suggest that non-compliance was high. Lori Chambers found evidence of compliance with nineteenth-century alimony awards in only nine of seventy-eight cases. While many of the files were incomplete, Chambers observes that "evidence from other court proceedings suggests that nonpayment was the rule rather than the exception."[12] Annalee Golz suggests that Ontarian wives experienced similar difficulties in collecting on orders made under the 1897 DWMA.[13] Some American data sets are more complete, and these too indicate low levels of compliance. A 1905 study of 69 maintenance orders in New York found records of absolute non-compliance in 17 cases; in another 12 cases no data was entered after the award, a likely indicator that no payments were made; this left 40 cases in which payments were made, and in the majority of these cases, contributions were irregular.[14] The reality of such a low collection rate, in the words of Susan Tiffin, was that "[f]or most women with children desertion meant low-paid work, reliance on child labor, no support from their husbands and inadequate relief from private and public relief agencies."[15]

Progressive reformers were often dismayed upon learning of the ineffectiveness of the desertion statutes. Most often, they attributed failure to an absence of adequate

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[12] Chambers, *Married Women and the Law of Property*, p. 45.

[13] Gölz, "Marital Breakdown," p. 335.

[14] Tiffin, *In Whose Best Interest?*, p. 161.

[15] Ibid.

enforcement agencies.[16] One common response was to empower probation officers to collect and distribute maintenance awards. This was the remedy chosen in many American jurisdictions.[17] In Canada, pursuit of defaulting husbands was often left to wives. Ontario passed legislation in 1934 to subsidize the court costs of impoverished wives seeking to enforce maintenance orders. In practice, however, no funds were ever disbursed.[18] In British Columbia, the situation was much the same. While the Superintendent of Neglected Children was charged with aiding unwed mothers in enforcing CUPA orders, deserted and destitute wives were left to prosecute defaulting husbands alone.

British Columbia's police court record books include numerous examples of default. In twelve of the forty-six cases in which orders were made, wives had their husbands summoned to court on charges of non-compliance. This is likely a minimum figure. The records show only those wives who returned to the same magistrate for a summons against their husband. Under the 1911 and 1919 legislation, wives could apply to *any* magistrate to have the non-compliance summons issued, and may have applied for an enforcement hearing elsewhere. In addition, many wives may not have applied to enforce an order against a husband who could no longer be found. The Attorney General's correspondence includes numerous examples of husbands who fled the province to avoid

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[16] Ibid., p. 158.

[17] May, "Family Desertion in the Progressive Era," p. 52.

[18] Chunn notes that some funding was made available by private charities. Chunn, *From Punishment to Doing Good*, pp. 170-171.

compliance with DWMA orders.[19] Flight across jurisdictional boundaries was a common response and common problem in all areas which enacted deserted wives maintenance statutes.[20] Men simply disappeared to avoid payment. Owing to their power over family property, deserting husbands could plan their departure, rid themselves of their property, and leave their wives without property to seize.[21] But as Lori Chambers notes, flight was not without its consequences: "Men incurred significant social costs," she writes, "when they fled family and community to avoid payment." Of course, propertied men were less likely to flee: first, if wealthy, they had the capacity to maintain estranged wives, and often settled out of court to avoid publicity;[22] and second, they had greater material and social incentives to remain where they were. For the poor, although the costs of flight

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[19] The Attorney-General's files indicate that deserting husbands did indeed leave the jurisdiction. A 1927 correspondence is typical. The woman wrote that her husband had been gone for over two years, and she believed he was in Eastern Canada, although she had heard rumours of his recent departure to Asia. She asked for aid in securing support from her husband, and indicated her willingness "to submit to the fullest possible investigation." This woman was obviously quite aware of the moral provisions in the legislation. The demands of her situation were extreme enough that she was willing to endure the intrusion of public investigation. She was supporting herself and three children on the wages she earned from dressmaking. She informed the Attorney General that her income was unsteady, the double duty of working and caring for her children had placed her under great strain, and the family was likely to apply for public assistance in the near future. She had made numerous inquiries to the local authorities, as was common in these cases, but received no satisfaction. The Deputy Attorney General could provide none either. He responded that as the woman's husband was out of the jurisdiction, there was nothing that could be done to secure support from him. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2284, File D-67-3-1927 [further cataloguing details omitted in compliance with British Columbia's privacy legislation].

[20] Chambers, *Married Women and the Law of Property*, pp. 44-45; May, "Family Desertion in the Progressive Era," p. 49; Tiffin, *In Whose Best Interest?*, pp. 150, 154.

[21] Chambers, *Married Women and the Law of Property*, p. 35.

[22] Ibid., p. 49.

were high, they were much less so in terms of material goods and social status.[23] In British Columbia, where wage work was common, flight could be much less costly to an average husband. Changing waged positions was undoubtedly much simpler than leaving a farm or small business in which a great deal had been invested both personally and financially.

Even when a defaulting husband could be found, the Police Court Record Books and the Attorney General's files indicate it was difficult to compel payment. The most prolonged cases occurred during the depression. Between 1930 and 1933 New Westminster's Charles Peterson appeared at least three times for defaulting against a DWMA order. He was also imprisoned for six months with hard labour over the winter of 1930-1931 on the criminal charge of non-support. In 1933, he succeeded in having his wife's maintenance order reduced. Yet he continued to default on his payments. When Peterson appeared before the magistrate in late 1934, no action could be taken against him. The court record indicated that Peterson "has no means and is on relief."[24] Yet a broad array of anecdotal evidence suggests that Peterson's inability to pay may have been the exception rather than the rule. More typical was Willard Spencer. During 1932 and 1933 Spencer was summoned to New Westminster's Police Court on eight separate occasions for defaulting against his DWMA order. In October 1933, the frustrated

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[23] Susan Tiffin writes that "[w]here a wealthy man was more likely to be bound to a locality or a profession and to be unwilling to sacrifice business opportunities and prestige in order to evade family responsibilities, a poor man had greater freedom to abscond." Tiffin, *Whose Best Interest?* pp. 147-148.

[24] British Columbia, Police Court (New Westminster), Record Book, BCARS, GR 0927, vol. 10, p. 364, and vol. 11 pp. 20, 23, 229.

magistrate jailed Spencer for 30 days.[25] The police court file ends with this conviction. The case does not. In late 1935, Spencer's wife wrote the Attorney General. By that time, Spencer had moved to the interior. Mrs. Spencer had secured a DWMA order against him in his new jurisdiction, but with little result. According to his wife, Spencer owned his own business, dressed well, and had made several trips to Vancouver. Yet he refused to support her, and Mrs. Spencer was unable to support herself: she was crippled, and had been hospitalized periodically. Until the previous March, she had been living on relief, but when the relief officials discovered that her adult son was earning nine dollars a week, her relief was cut off. Her son gave her what he could, but it was not enough. She wrote, "I owe rent light grocerys [sic] & fuel & cannot keep up any longe[r] with out [sic] help. Will look for a reply very shortly, as I am almost crazy with worry."[26]

Numerous letters to the Attorney-General's office show that enforcement was a problem not only in the county courts under study, but all over the province. The women who wrote the Attorney General, like Katherine Spencer, suffered in poverty, lacking basic necessities, such as food and clothing, for themselves and their children. Some were hard-pressed to meet their rent payments or the taxes on their land. Others explained that their credit with local merchants was exhausted. For the majority, there is no way of knowing how they survived, or the exact nature of their meagre resources. But in one case a sick woman and her child survived on six dollars a month, the sum total

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[25] British Columbia, Police Court (New Westminster), Record Book, BCARS, GR 0927, vol. 11, pp. 91, 94, 96, 98, 119, 124, 139, 144, 149.

[26] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2284, File D-67-3-1935, General, pp. 77-78.

that could be extracted from her husband under the DWMA. After her husband left the Province with another woman, she began receiving ten dollars a month in municipal relief. Like Katherine Spencer, this woman had to depend on the little additional aid that her impoverished family could provide. She moved in with her parents, who were themselves in financial straits. The stress of such situations took its toll on women's health. One was treated for a nervous breakdown; another related the all-too-common complaint that her "health ha[d] been bad on account of all this worry."

The letters also reveal an unexpected profile of 'deserters.' The image of the 'deserter' is often one of a solitary man divesting himself of all obligation; the reality was often quite different. Many of the men defaulting on DWMA orders held good jobs and began new lives. Many had begun new relationships. Some were supporting new children. Others had enough money for cars. The injustice of the situation was difficult to endure for their wives. As one writer observed, "It does not seem right that I should have to struggle along on direct relief & he can earn good money & never give anything toward the childrens keep [sic]." It might be objected that this picture of deserting husbands reflects the nature of the sources, namely, wives' accounts. This is probably true to an extent. There was undoubtedly more than one Charles Peterson, struggling to make ends meet. Yet husbands were poor defenders of their own image. Two of the least flattering cases were brought to the attention of the Attorney General's office by the husbands themselves. Subsequent inquiries by that office revealed the ugly facts.[27]

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[27] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2284, File D-67-3-1925, pp. 2-6; Ibid., File D-67-3-1927, Opinions, pp. 2-4; Ibid., File D-67-3-1929, General, pp. 16-17; Ibid., File D-67-3-1932, General, pp. 23, 25; Ibid., File D-67-3-1933, General, pp. 4-7; Ibid., File D-67-

The frustrating realities of enforcing DWMA orders brought numerous amendments to the enforcement provisions. When a Trail Attorney suggested amending the act in 1929 to allow magistrates to require security bonds from husbands' to guarantee the satisfaction of orders, the Attorney General consulted Legislative Counsel A. V. Pineo and Victoria Police Court Magistrate George Jay. Both evinced great frustration with the issue. Jay wrote that "[t]he enforcement of the 'Deserted Wives' Maintenance Act'" is perhaps, the most perplexing question that Magistrates have to deal with." Enforcement was also frustrating for legislators. "From time to time," Pineo recounted, "provisions have been inserted in this Act, so that we now have enforcement of maintenance orders by execution, by registration against lands, by summary conviction, and by garnishee."

Each remedy had its limitations. Execution against real and personal property was useless against a man without property. Even worse, those with property found ways of evading forced seizure and sale. One Cariboo woman wrote that her husband was living with another woman and had "put what property he owns in her name." Taking the court action necessary to prove the actual ownership of the property might well have been beyond the means of this woman, with three children to support, a failed business, and a mounting debt at the local store. Moreover, Ontario cases suggest that execution against the conveyed property may have been futile.[28] Garnishee procedures appeared to offer

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3-1934, General, pp. 21, 25, 27; Ibid, File D-67-3-1935, General, pp. 13, 19-25; Ibid., File D-67-3-1936, General, pp. 10-21; Ibid., File D-67-3-1937, General, pp. 63, 66.

[28] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2284, File D-67-3-1931, General, pp. 21-25. Chambers cites two cases of this kind: in one, a man conveyed all his property to a son from a previous marriage; in another the husband transferred all his property to his brother and then disappeared. In the first case, "all writs of seizure, issued to enforce the payment of alimony, were unsuccessful." Chambers, *Married Women and the Law of Property*, pp. 44-45.

more effective means of securing payment from working-class husbands, but involved several practical difficulties, and were infrequently used.[29] Garnishees were only effectual if a husband was paid on the books, and held steady employment.[30] If men hid property in the names of others, there can be little doubt that some found means of hiding their wages.[31] A garnishee would be hard to implement if the husband was paid covertly or frequently changed employers. As a result, the only examples of garnishees found in the reported and unreported cases were issued against men working in large, stable organizations: two for the City of Vancouver, and a third at the Canadian National Railway.[32] A final option was incarceration. Although often considered as a last resort to deal with recalcitrant husbands, imprisonment had considerable drawbacks. As Magistrate C.H. Beevor-Potts explained to the Attorney General's office, he had considered jailing one particularly uncooperative husband, but rejected the idea, as "such

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[29] In a technical aside, the garnishee had to be made by a magitrate through the procedures provided in section 11 of the Deserted Wives Maintenance Act, 1919. If the garnishee order was made through the county courts, as in *Brown* v. *Brown* (1927), the husband was entitled to have $60 of his wages exempted prior to any payment to his wife. See *British Columbia Reports*, vol. 38 (1927), pp. 473-477.

[30] Chambers cites an Ontario case in which the husband and his father, acting in collusion, dissolved their partnership in a store. The husband took a declared wage of $30 a month, but received more off the books, and in this manner he was attempting to avoid having alimony payments awarded against him on the pretext that he did not have the money. Chambers, *Married Women and the Law of Property*, p. 43

[31] There is evidence of this in CUPA cases. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2231, File C-34-4-1932, Prosecutions, p. 8.

[32] See *British Columbia Reports*, vol. 38 (1927), pp. 473-477; Ibid., vol. 45 (1932), pp. 417-419; British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2284, File D-67-3-1937, General, pp. 2, 5.

a course was no assistance to his wife and family, [and] in addition was an expense to the country."[33]

Like its predecessors, the security bond proposal appeared to offer a solution, but had significant shortcomings. "[I]n the class of cases where security is most needed," Pineo advised the Attorney General, "it would be practically impossible to obtain any." Jay explained the objection in greater detail: while he understood the sentiment behind further amendment of the enforcement provisions of the act, his experience with the cases had revealed

> that the large number of husbands summoned under this Act are men who are under uncertain employment—working men who are engaged by the month and more frequently by the day—and to require them to furnish security that would ensure their compliance with the Order for some years to come, would be calling upon them to provide, in most cases, something quite beyond their capabilities.

If a man could not provide the security, he would be imprisoned. Hence, a magistrate requiring security from a man unable to comply was sentencing him to jail time. Jay cautioned that the legislature must guard against making the provisions of the act so severe that men would abscond to distant parts of the province or beyond to avoid compliance.[34]

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[33] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2284, File D-67-3-1933, General, p. 7.

[34] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2284, File D-67-1-1929, Legislation, p. 6. A case discussed in the Attorney General's correspondence indicates that Magistrate Jay was correct in his assessment of the effects of requiring performance bonds from men unable to provide them. In this case, the husband had left his wife and three children. The wife applied for and was granted an order under the DWMA which was set at $9 per week. Since the oldest child was from a previous marriage, no provision was made for her in the award. Apparently, at least in the eyes of this particular magistrate, deserting husbands were not responsible for stepchildren. The husband was not working regularly at the time the order was made, so the wife did not immediately press for its fulfillment. A couple of months later, she returned to court, and the magistrate ordered the husband to fulfill the terms of the order or serve four months in prison. He was also ordered to put up a bond of

While men could move freely across jurisdictional boundaries, Canada's constitutional formula circumscribed the geographic power of provincial bureaucrats, constraining their force within fixed boundaries. Extradition was not possible under the DWMA, a provincial civil statute. In order to facilitate extradition, several American states criminalized non-support in the nineteenth and twentieth centuries.[35] Canada's federal government took similar measures, and by 1913, a charge of criminal non-support was sufficient to secure the extradition of a man from other Canadian jurisdictions.[36] In practice, however, criminal charges were unsatisfactory, and the provinces sought to rationalize and broaden their power to enforce maintenance orders.

In 1931, the Mothers' Pension Board wrote to W.R. Dunwoody, Assistant Commissioner at the Vancouver Court House regarding the possibility of extraditing a husband on charges of criminal non-support. The case at hand involved a woman in receipt of a pension whose husband had been located in Alberta. If the man could be

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$1000 to guarantee future compliance. Whether he was capable of securing such a bond is difficult to establish. From his wife's letter it appears that he was without means. However, the bond could be provided by a third party, and perhaps the magistrate believed his family would provide the necessary funds. In this case, Magistrate Jay's assessment of requiring bonds from the poor was correct: the man failed to put up the bond, and left for the United States. The Deputy Attorney General replied that nothing could be done under the DWMA. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2284, File D-67-3-1927, Opinions, pp. 2-5.

[35] In the nineteenth century, a number of states had criminalized refusal to maintain minor children. These laws, however, were eclectic, varying from state to state. They were also poorly enforced. From the early 1900s onward, the National Conference of Charities in the United States pressed for desertion and non-support to be made felonies in order to facilitate extradition across state lines. By 1922, 44 states had made desertion and abandonment crimes; 43 had made non-support illegal. Tiffin, *Whose Best Interest?*, pp. 149-158.

[36] The criminal code was amended in 1869 to stipulate that if non-support endangered life, caused permanent injury to health, or resulted in death, a prison sentence of up to three years could be imposed. In 1913, the references to life endangerment, permanent injury to health and death were removed, making criminal non-support a much broader offense. Gölz, "Marital Breakdown," p. 328.

returned to the province, the Board could discontinue his wife's pension. Dunwoody expressed doubt as to the efficacy of extradition as a solution to desertion. "I have had some experience in bringing men back from Alberta," he wrote, "and it is usually the case that when the men are freed by the Court they again desert their wives." Given this experience, Dunwoody sought advice from Commissioner of Provincial Police J. H. McMullin, who in turn asked the advice of the Deputy Attorney General.[37] His response reveals the frequency of the problem, the ineffectiveness of the criminal process, and the bureaucratic antagonism toward deserted wives which developed from the tension between public expenditure and maintenance legislation:

> It is a waste of time and money bringing back these so-called deserting husbands, as no good result is obtained, the men, as Mr. Dunwoody remarks, immediately re-deserting. Only a week or so ago [a man] was brought from Kamloops at the urgent insistence of his wife, [and upon] his arrival here she withdrew the charge. If he is brought b[ack under] the provisions of the [Criminal] Code, the same result follows with the ad[ded] expense to the taxpayers if the man is imprisoned. If some of [these] women would make a greater effort to keep their husbands at home, [perhaps] you would not be bothered so much.[38]

Whether or not criminal charges were laid in this particular case is unknown. Given the previous experience of the officials involved, however, it seems unlikely.

Since extradition was expensive and ineffective, lawmakers in British Columbia and elsewhere looked for alternative solutions. Their resolve was strengthened by the desire to offset public welfare expenditures, an aspect of the problem left un addressed by criminal charges. A husband in jail made no better contribution to his family's support

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[37] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2284, File D-67-3-1931, General, pp. 11-13.

[38] Ibid., p. 14.

than one outside the jurisdiction. In 1928, Ontario's Deputy Attorney General wrote his British Columbia counterpart inquiring about the possibility of provincial legislation providing for the extradition of deserting husbands on DWMA charges. Deputy Attorney General Bass replied that the provinces had no constitutional jurisdiction to pass extradition legislation. In any case, extradition on a civil plaint was unlikely to be any more effective than extradition on a criminal charges. However, Bass noted that a better solution was being formulated. The Conference on the Uniformity of Provincial Legislation had originally considered enhanced extradition powers, but chose instead to develop legislation for the reciprocal enforcement of judgments. Draft legislation was currently being prepared in consultation with several of the provinces. Reciprocal enforcement had advantages that extradition lacked, Bass wrote. It would be much more effective for Ontario, he continued, to be able to register liens, executions and garnishees against a man's property and wages in other provinces, than to bring him back to face charges, only to have him abscond again at the earliest possible opportunity.[39] Yet if the

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[39] Ibid., File D-67-1-1928, Legislation, pp. 3, 6. The actual effectiveness of reciprocal enforcement legislation cannot be ascertained with any degree of certainty from the Attorney General's corerspondence, although it appears that it was effective in jurisdiction which adopted it. In July 1932, William K. Esling, Member of Parliament for Kootenay West wrote the Attorney General about a deserted wife in his constituency. The woman's husband had deserted her three years previously, relocating to Sudbury, Ontario. He had sent money for the support of the family until May 1932, at which time he wrote that he was unable to continue the payments. Esling wanted to know if there was any means by which the Ontario authorities could compel the man to support his family. The Deputy Attorney General replied that the woman could apply for a DWMA order in British Columbia, which could then be sent to Ontario "under the arrangement for reciprocity of enforcing judgments which now applies to Ontario as well as some other provinces." However, the 1936 case of a woman whose husband had left for Saskatchewan brings the application of the reciprocal enforcement act into doubt. When she inquired at the local municipal office why the order against her husband could not be enforced, the municipal clerk responded, "it would cost too much to bring [your] husband from Sask[atchewan]." The Deputy Attorney General was no more helpful or encouraging. He wrote that it was "an impossibility, of course, to make your husband pay if he is not within the jurisdiction of the Magistrate, or if he cannot be found. Even if he returns it is likewise impossible to make him pay if he has no

reciprocal enforcement of orders appeared to offer great promise in dealing with jurisdictional flight, that promise would only be realized over the very long term. Children of Unmarried Parents Act cases reveal that the uniform legislation was adopted haltingly by other jurisdictions. Well into the 1930s, there remained several provinces in which an order made in British Columbia could not be enforced.

If the multitude of enforcement mechanisms reveal the government's frustrations in compelling maintenance, they also reveal the numerous schemes which men developed to avoid payment. A 1935 hearing offers a window on their mentality in doing so. In this case, a husband discovered hiding monies from the court requested to make a statement. He then proceeded, in the words of the magistrate hearing the case, to make "a lengthy statement which had nothing to do with the desertion of his family relating only to his desire for a divorce or separation." The magistrate responded that the statement had nothing to do with the charges at hand, and he would listen no further; he admonished the man before him,

> You must know that in this country you cannot marry bring a family into the world & just walk off at your pleasure with another woman & leave them to shift for themselves. Could you not [illegible] you could have arranged a separation with a reasonable allowance for your wife & family.

Herein lay the problem. Where a man's absolute obligation to support his family was patently evident to the magistrate, it was not as clear to the man himself, whose statement hints at a desire to sever familial ties absolutely. Though this man, like many of the other

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money." British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2284, File D-67-3-1932, General, pp. 60-61; Ibid., File D-67-3-1936, General, pp. 10-21.

men discussed in the Attorney General's correspondence, was possessed of means sufficient to satisfy the order, he sought to avoid the lingering financial obligations, and, it would seem, thought himself justified in doing so. In his mind, the obligation to support ended with the marital relationship.[40]

Administration of the 1922 Children of Unmarried Parents' Act presents a picture remarkably similar to that of the DWMA administration. The CUPA, like the DWMA, marked a substantial improvement on its predecessor. Under the 1922 legislation, a woman had a year to take action, instead of the six months permitted under the 1903 legislation. Much more importantly, the act provided for a continuing weekly or monthly maintenance order; an unwed mother no longer had to return to court repeatedly to sue the father for costs incurred in child care. As under the new DWMA, the number of cases increased substantially under the new legislation, as did the ratio of cases resulting in maintenance orders. Where cases were rare under the 1903 act, twenty-one cases were heard in New Westminster, Trail and Quesnel between 1924 and 1939. Of these cases twenty were complete, and only three failed absolutely.[41] Seventeen cases were in some measure successful: thirteen men were ordered to contribute to the support of their children, and a fourteenth agreed to an out-of-court settlement. In another case, a suspended sentence was issued. This was in the Quesnel district, where the magistrate

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[40] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2284, File D-67-3-1935, General, pp. 66.

[41] Of the three cases that failed, one was withdrawn and two dismissed.

also used suspended sentences in deserted wives cases. Perhaps in this rural area, the threat of imprisonment was more effective and more easily enforced than any monetary award. Finally, in two cases, the parties married.[42] These marriages may show the power unwed mothers gained under the legislation, or they may have resulted from judicial pressure. In the United States, judges often used putative fathers' legislation to pressure the parties to marry.[43] In any case, marriage did have some positive legal effects: the child was legitimated, and the woman gained maintenance rights under the DWMA. The value of the maintenance order was specified in nine cases, and varied between $12.50 and $35 per month. The average value of an award was $19.06.[44] Thus the average award was much lower than a comparable mother's pension award, which would have been set at $42.50 for a mother and child, and was considered to be low. The reason for the smallness of the awards is that a mother's pension was calculated to support both the mother and child; the award made under the CUPA was for the support of the child alone.[45]

The remarkable success rate of CUPA claims suggests that the judiciary was sympathetic to the plight of illegitimate children, and harboured no undue suspicion of

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[42] See British Columbia, Provincial Police Court (Quesnel), Record Book, BCARS, GR 0041, vols. 1-2 (1911-1925), and GR 0008, vols. 1-2 (1925-1941); British Columbia, Provincial Police Court (Trail), Record Book, BCARS, GR 1876, vol. 1 (1910-1939); Corporation of the City of Trail, Police Court, Record Book, BCARS, GR 1875, vols. 1-2 (1909-1940); British Columbia, Police Court (New Westminster), Record Book, BCARS, GR 0927, vols. 1-11 (1902-35).

[43] Mason, *From Father's Property to Children's Rights*, p. 26.

[44] The median award was $20.00, as was the mode. A 1905 New York study cited by Tiffin reported awards averaging between $12 and $20 monthly at a time when the average labourer's salary ranged between $48 and $52 per month. Tiffin, *In Whose Best Interest?*, p. 161.

[45] British Columbia, *Statutes*, 1922, 13 Geo. 5, Chap 9, s. 9.

unwed mothers. After all, there were no biological means of establishing paternity in the 1920s and 1930s. The act demanded that an unwed mother's allegations be corroborated by other 'material evidence,' but left the standard of paternity evidence to the discretion of the presiding magistrate.[46] Magistrates were encouraged in a liberal interpretation of the statute by the published case reports, which offered guiding principles to lower court magistrates and the lawyers who argued before them. *Rex* v. *Moore*, appealed to the Supreme Court of British Columbia in 1926, involved a child born out of wedlock to Blanche Hart on the 7th of January, 1925. Stipendiary Magistrate J. A Findlay of Vancouver found in Hart's favour, awarding her $10 weekly on the basis of the following corroborative evidence: that Hart and the accused Nelson Moore had cohabited in 1923; that Moore had been named as co-respondent in a divorce suit brought by Hart's husband; that prior to the launching of the suit, Nelson Moore had never denied being the father of the child; and that Moore had paid Blanche Hart $100 a month for the support of herself and her children, and covered their medical expenses. On appeal to the Supreme Court, Nelson Moore's attorney argued that this was insufficient corroboration. The Crown countered that Moore's support payments to Hart were sufficient corroboration and the verdict should stand. Chief Justice Hunter ruled the evidence insufficient. "There is nothing to bar the inference," the Chief Justice wrote, "that some one else was the father of the ... child. The child was born in January, 1925, and the case states that no evidence was given to shew that the pair had cohabited since 1923."[47]

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[46] Ibid., s. 14.

[47] *British Columbia Reports*, vol. 37 (1926), pp. 86-88.

The Crown appealed his decision to the British Columbia Court of Appeal, arguing that the evidence of Moore's "intimacy with the woman previously is sufficient corroboration." On this matter the Court of Appeal was divided. In his dissenting opinion, Justice McPhillips agreed with Chief Justice Hunter that the evidence was insufficient to warrant an order. McPhillips' decision cannot be written off as the product of hostility toward the principles behind the legislation. He had introduced the original 1903 illegitimate children's legislation, as well as numerous other child protection measures. McPhillips cited section fourteen of the statute, placing strong weight on the act's explicit requirement of "material evidence directed to the paternity of the child." Such evidence, he noted, was "absolutely absent here." For McPhillips, like Hunter, the only acceptable and sufficient 'material' evidence related to the timing of the sexual relationship and the birth of the child. No evidence of a relationship after 1923 had been produced, and the child was born in January 1925. "It is patent," McPhillips argued, "that without evidence of the necessary relationship as being known to have been together after 1923, there is nothing to suggest that the defendant is the father of the child." Given these facts, McPhillips concluded that there had been "an absolute failure of establishment of corroboration called for by the statute."[48] The majority decision, stated most completely by Chief Justice of Appeals Macdonald, looked to the cumulative weight of the evidence. In toto, Macdonald wrote, the evidence, and most especially Moore's payments to Hart, "establish[ed] facts which would appeal to the mind of any

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[48] *British Columbia Reports*, vol. 38, (1927), pp. 427-429.

reasonable person at once as corroboration of her statement that he is the father." What other reason could there be, asked Macdonald, for such an obviously immoral man to have made the payments? Justices Martin and Galliher agreed.[49]

Rex v. *Moore* provides a strong illustration of the discretionary nature of the evidence required to sustain a charge against a putative father, and the willingness of the judiciary to define the 'materiality' of evidence broadly. The decision of the Court of Appeal in *Dunham* v. *Bradner* eight years later confirmed the judiciary's discretionary power to weigh corroborative evidence in much stronger language. In this case, Justice Macdonald wrote that he did not believe magistrates were "precluded from making reasonable deductions from [the] appellant's general conduct.... If compelled to do so I would say that conduct is material and failure to explain where the necessity to do so arises is conduct."[50] While Chief Justice Hunter and Justice McPhillips held a narrow interpretation of 'material' evidence in *Rex* v. *Moore*, holding that it related solely to the existence of a sexual relationship at the time of conception, they were in the minority. These published decisions greatly increased the breadth of evidence which could be considered 'material' for the purposes of determining paternity. This definition was so broad that the only dismissed cases with recorded judgments were thrown out on technical defects or on substantive evidence of the mother's multiple sexual contacts during the conception period. Tellingly, despite strong evidence of multiple sexual contacts in one such case, local police were more concerned about public expenditure

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[49] Ibid., pp. 425-427.

[50] *British Columbia Reports*, vol. 48 (1934), pp. 511

than paternity. They recommended appeal, assuring the Attorney General that if an order was made, the man would make the payments. If no order was made, the correspondent warned, "the child concerned is likely to become a public charge."[51] In addition to the emerging cultural sympathy for illegitimate children, widespread concern over public expenditure undoubtedly contributed to the courts' solicitude for illegitimate children.

Both the police court records and the published cases suggest that unwed mothers had a much greater chance of securing an order against the putative father of their child under the 1922 legislation than under its 1903 precursor. However, neither source provides any indication of what proportion of unwed mothers actually brought their cases to court. Lori Chambers has observed that published case reports can provide a misleading sense of the general disposition of cases. Unpublished cases have similar weaknesses. A memorandum written by Deputy Superintendent of Neglected Children Laura Holland in 1933 reveals that the majority of cases never reached the courtroom, and serves to temper our conclusions regarding legislative efficacy. Holland wrote that in the first eight months of 1933, seventy-four new cases had come to her attention. Of these, forty-six

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[51] For reported cases dismissed on technicalities, see *Hynes* v. *Alton* (No. 2), *Western Weekly Reports*, 1929, no. 1, pp. 863-865, and *Lancaster* v. *Vaughan* (No. 2), *British Columbia Reports*, vol. 33 (1924), pp. 440-442. The Attorney General's files include correspondence on several unreported cases which were dismissed after it was 'revealed' that the mother had sexual relations with other men around the time of conception. One case involved a woman convicted of prostitution. Others are worthy of skepticism, especially where a third party testifies to sexual involvement with the mother. Apparently, this was a fairly common defense ploy, since it made it impossible to prove paternity. However, there was also great doubt about the neutrality of these 'witnesses.' Since neither man could be charged, an accused man might be able to convince a friend to testify on his behalf. Minnesotan legislators recognized this problem, and amended their law in 1917 to permit an order to be made against more than one man, thus making testifying in such cases a dangerous act. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2230, File C-34-1-1934, p. 2-3; Ibid., Reel 2231, File C-34-4-1936, Prosecutions, pp. 2-4, 6; Tiffin, *In Whose Best Interest?*, p. 178.

had been determined.[52] In fully one-half of the determined cases, no action was taken and no support secured. There were various reasons for refraining from court action. The majority of cases were not pursued because the evidence was insufficient or the time for action had expired. Another four cases were withdrawn by the mothers. The remainder of the cases were not pursued for various uncategorized reasons, such as the deportation of the father or the death of one of the parties. There is also substantial evidence that at least one northern magistrate was reluctant to pursue cases involving First Nations men.[53]

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[52] The remaining twenty-eight cases were still under investigation.

[53] There were also minor jurisdictional problems with securing payment of orders from First Nations putative fathers. Real property on an Indian Reserve could not be executed upon in satisfaction of a judgment. In 1924, Indian Agent Alfred Lomas of Duncan applied to the Attorney-General for permission to take action under the Children of Unmarried Parents Act. Lomas wrote that "conditions among the young Indians of the Agency are becoming deplorable, young men picking up with young women and living with them for a year or so and leaving them and picking up with another. The children and young mothers becoming a charge of this department [sic]. It is therefore felt that some action must be taken to put a check on the matter in the immediate future." The Deputy Attorney General responded that Lomas could initiate legal action under the statute, and need only inform the Superintendent of the situation. The response was overly simplistic. Action could be taken against a First Nations man under the CUPA. Collection involved some unusual, but not insurmountable, complications. Correspondence over the winter of 1928-29 between the Superintendent of Neglected Children, the Department of Indian Affairs, and the Attorney General's Office with regard to a case in northern British Columbia revealed that collection from aboriginal fathers was hampered by the Indian Act. The Secretary of Indian Affairs informed Superintendent Menzies that a judgment under the act would be binding upon a First Nations man, but it would be difficult to enforce the order, since property on an Indian reserve was "not subject to execution in satisfaction of a judgment." Menzies relayed this information to the local magistrate. Indian Reserve jurisdiction, however, was not the only obstacle to enforcement of the CUPA against aboriginal fathers. An equally pressing obstacle to enforcement may have been local attitudes. After hearing from Menzies and the Department of Indian Affairs, the local magistrate wrote the Deputy Attorney General. In his missive, he revealed that he was worried about the possible effects of the prosecution: "I am afraid," he wrote, that "if this question is opened up in the Courts we may never be free from proceedings of this nature..." Moreover, the magistrate pointed out the "very many difficulties in the way of enforcing an order against an Indian." He implied that because of the rampant illegitimacy in First Nations communities, and the lack of proper enforcement mechanisms, prosecuting natives under the act would create a legal quagmire. "By adjudicating on this case," he concluded, "a dangerous precedent might be established." The Deputy Attorney General informed the magistrate that while limited in his remedies against on-reserve property, he was not powerless. Any property an aboriginal man owned off-reserve was subject to execution for debt; his wages were also subject to garnishee procedures. Thus, the court would not be without its remedies. Moreover, while it was left unmentioned, imprisonment for default remained an option. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2190, File C-374-3, p. 2; Ibid., B2231, File C-34-4 (1928-1929), pp. 1-4, 7, 9.

In those cases which were pursued, private agreements were nearly as frequent as court orders. Holland's memorandum identifies nine out-of-court settlements: two were negotiated by the Superintendent's Office, and seven were private support agreements. Only fourteen of the forty-six cases — or 30 percent of all known outcomes — were decided in the courts, although the deterrent effect of the legislation undoubtedly played a role in the nine out-of-court settlements. In the fourteen cases directly decided by the courts, the success rate was similar to that in the New Westminster, Trail and Quesnel police court files: 13 of 20 cases (65 percent) in the police court record books resulted in maintenance orders, and 10 of 14 (70 percent) cases decided in the first eight months of 1933 resulted in orders. Holland's memorandum then, should serve as a cautionary piece of evidence: the court records are misleading, and the legislation was not as effective as the court records imply. Considering all court orders and out-of-court settlements, the success rate in the forty-six cases was low, about 41 percent.[54] The greater portion of illegitimate children remained unaided by the law.[55] This reality should also be borne in mind in relation to the performance of the DWMA. While the success rate in DWMA cases increased under the 1919 legislation, there is no way of knowing how many cases of desertion and non-support existed and how many were brought to court.

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[54] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2230, File C-34-1-1933, pp. 7-8.

[55] This being said, however, British Columbia's law was more effective than its American counterparts. In a survey of Boston in 1913, only 13 percent of all illegitimacy cases went to court, and only 7 percent resulted in awards. In Minnesota in 1921, paternity suits were launched in 33 percent of all cases, and awards made in 17 percent. The comparable figures for British Columbia was 30 and 22 percent. Tiffin, *In Whose Best Interest?*, pp. 170, 181. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2230, File C-34-1-1933, pp. 7-8.

British Columbia's legislature had attempted to provide substantial means for ensuring putative fathers' compliance with CUPA orders. The magistrate making the order could require the putative father to post a performance bond; if he failed to make maintenance payments, the bond would be forfeited.[56] The legislation also required the Superintendent of Neglected Children to "see that all payments directed to be made by the putative father under an affiliation order are duly made, and in default of payment to take all necessary proceedings for the enforcement of the order..."[57] Given the tools the Superintendent had at his disposal for securing compliance, a relatively high collection rate might be expected. The legislation allowed for garnishees, execution against personalty and realty, imprisonment for a term of up to three months, with or without hard labour, and collection from the putative father's estate after his death.[58] Despite these tools, however, complaints quickly surfaced that the Superintendent was not

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[56] British Columbia, *Statutes*, 1922, 13 Geo. 5, Chap. 9, s. 12. If the man could not provide the bond, he would be imprisoned. Since many men would have been too poor to provide such security, and jailing them would be of no benefit to their illegitimate children, the Superintendent generally opposed the practice. In one Thompson Valley case, an individual Justice of the Peace was authorized to hear the complaint and required $1000 in performance bonds from the putative father. He gave the man seven days to come up with the security. Apparently, the man in question found this requirement impossible to meet, and wrote to Thomas Menzies, Superintendent of Neglected Children. Menzies in turn wrote the J.P. handling the case and informed him that he should "[t]ry to secure payment without imprisonment for failure to put up bonds, very few affiliation orders now contain bond clause, failure to put up bonds and consequent imprisonment debar child from benefits [sic]." British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2231, File C-34-3-1928, p. 2.

[57] Manitoba and Ontario also charged public officials with ensuring that putative fathers complied with support orders. Ursel, *Private Lives, Public Policy*, pp. 162-164. British Columbia, *Statutes*, 1922, 13 Geo. 5, Chap. 9, s. 19.

[58] British Columbia, *Statutes*, 1922, 13 Geo. 5, Chap. 9, s. 13 and 20, 21. For the Summary Convictions Act see the *Revised Statutes of British Columbia*, 1924, Chap. 245, s. 52. Their is fragmentary evidence of enforcement by execution. The Attorney-General's files include correspondence regarding a 1933 case in which a man's car was seized to satisfy a CUPA judgment. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2231, File C-34-4-1933, Prosecutions, p. 5.

carrying out his duties. The New Era League wrote in 1924 to inform the Attorney General that the act was not producing satisfactory results. Magistrates were making inadequate orders. Moreover, even these small sums were not being paid, because the Superintendent was not enforcing payment. The situation was especially desperate in the City of Vancouver, where several cases had been neglected, producing great distress to those affected. The New Era League suggested that officers be appointed to handle the enforcement of orders in Vancouver and Victoria. Moreover, they suggested that the preferred candidates be women, whose "experience is more valuable than that of a man in the cases of women and young girls."[59]

As it turns out, no one would have been more pleased to be rid of the obligations of enforcing CUPA orders than Superintendent David Brankin. When informed of the New Era League's suggestion that other officers be appointed, Brankin responded that being relieved of the duty would be "the greatest pleasure I could have at the present moment..." He continued, "no part of my work gives me the trouble and anxiety that this does and as a matter of fact as I have previously stated to those in authority, I cannot see how any one individual can handle this Act in such a scattered Province as we have."[60] Brankin had written the Attorney-General's and Provincial Secretary's Offices on several previous occasions complaining of the difficulties of tracing delinquent fathers to enforce

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[59] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2190, File C-374-3, pp. 4, 10. Emphasis Original.

[60] Ibid., p. 7.

orders.[61] He suggested that responsibility for enforcing CUPA orders be transferred to the Superintendent of Provincial Police. His reasoning was two-fold: first, the police were more qualified for the investigatory work involved; and second, the Superintendent of Provincial Police already had officers throughout the Province. Brankin, as Superintendent of Neglected Children had no employees. Moreover, Brankin left one

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[61] His frustrations were only compounded by the tendency of legal professionals unacquainted with the legislation to draw up orders lacking enforcement provisions. According to the Summary Convictions Act, unless a penalty for default was specified in the order, there was no remedy for non-compliance. Brankin suggested that perhaps the statute could be amended to include a form order. The absence of enforcement provisions in an order could have dramatic consequences. In 1923, after becoming pregnant, Constance Marshall moved to Vancouver and applied to Police Magistrate Findlay for an affiliation order against Jack Nelson, a resident of the Okanagan. Findlay adjudged Nelson the father of Marshall's unborn child, and ordered that he make payments of five dollars weekly for Marshall's medical care. Following the birth of the child, the weekly payments were to be applied to the child's maintenance. Marshall's counsel asked that Nelson be ordered to provide security, but Magistrate Findlay refused. It had not been proven that Nelson had property, and requiring security from a man without property was tantamount to ordering his imprisonment for poverty. Nelson subsequently disappeared without making any payments. When located by the Provincial Police, he wrote that he intended to appeal the order. Yet no appeal followed, and Nelson disappeared again.

Constance Marshall then applied to an Okanagan Justice of the Peace for a warrant of execution against Nelson's property, but the Justice of the Peace objected that he had no jurisdiction in the matter. The original cause of complaint occurred in the Okanagan, but the legislation permitted Marshall to file her complaint before any Magistrate. She had chosen to do so in Vancouver. Once she had done so, the Summary Convictions Act stipulated that any subsequent warrant for default had to be issued by the original Magistrate. Her complaint would have to be made to Magistrate Findlay in Vancouver. Superintendent Brankin wrote the Attorney General, apprising him of the situation and asking for his advice. Since this was one of the first cases of default under the act, Brankin wanted to prosecute the case vigorously. He wrote, "I am of the opinion that this is a case that should be fought to a finish in order to show such men as [Nelson] that an Order of the court cannot be ignored..." The Deputy Attorney General replied that the jurisdictional concerns were valid. The application would have to be made in Vancouver. However, he advised Brankin, there was a larger problem: Magistrate Findlay's order was incomplete. It provided no description of the penalty in case of default of payment — execution against Nelson's property and/or imprisonment — as was required by the Summary Convictions Act. This omission was actually the mistake of Constance Marshall's lawyer, who drew up the order for Findlay to sign. Without an enforcement provision, the order was useless, and a new order could not be secured, since the one-year time limit for action under the statute had elapsed. Despite Marshall's lawyer's subsequent entreaties, Jack Nelson could not be forced to contribute to the support of his child. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2190, File C-374-2, p. 9; Ibid., File C-374-3, p. 37, 41-56. The names of the individuals involved in this case have been changed to protect the identity of the individuals concerned, in compliance with British Columbia's privacy legislation. For the Summary Convictions Act, see the *Revised Statutes of British Columbia*, 1924, Chap. 245, s. 52. The relevant section was passed in 1915. An example of a defective order can be found at British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2190, File C-374-1, p. 4.

obstacle to enforcement unspoken, as it was familiar to his audience. He was overworked. Brankin was already the Superintendent of the Boys' Industrial School in Port Coquitlam. The position of Superintendent of Neglected Children had been added to his existing duties.[62] The Deputy Provincial Secretary agreed with Brankin's assessment of the situation and his recommendations, and wrote the Attorney General's Office recommending that the CUPA be amended to make the Superintendent of Provincial Police responsible for enforcement.[63]

The Attorney General's office had other ideas. The act included provision for appointing municipal officers to oversee collection within municipal boundaries. The initial choice was to assign enforcement duties to probation officers, which would occasion no new expenses. The department considered assigning enforcement in Vancouver to the City's Chief Probation Officer. Whether or not this was done is unclear.[64] However, in early 1924, enforcement of CUPA orders in Victoria was assigned to Juvenile Probation Officer Jane Clayards. Apparently, the New Era League held some influence. When informing Victoria's Police Chief of Clayards' appointment, the Attorney General's Secretary revealed that since it was "not convenient for the Superintendent of Neglected Children to attend to the enforcement of [the CUPA] in cities and municipalities ... arrangements [were] being made to appoint such women

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[62] Ibid., p. 8; Ibid., File C-374-3, p. 21.

[63] Ibid., File C-374-1, p. 9; Ibid., File C-374-2-1923, p. 10-11.

[64] British Columbia, *Statutes*, 1922, 13 Geo. 5, Chap. 9, s. 2; British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2190, File C-374-3, pp. 4, 8.

Probation Officers as are most suitable for this duty."[65] The Superintendent retained responsibility for rural cases. At the same time, the department also considered appointing a dedicated Superintendent of Neglected Children with no additional duties.[66] Brankin was soon relieved of his obligation under the position. He was replaced by a dedicated Superintendent of Neglected Children.[67] By the 1930s a Deputy Superintendent of Neglected Children, Laura Holland, had become responsible for the enforcement of CUPA orders.

Even with government officials like Laura Holland acting on behalf of unwed mothers, securing compliance with orders could be difficult. Holland faced great resistance from within the Attorney-General's Office to her activities on behalf of unwed mothers. When Holland wrote the Attorney General's Office requesting advice in the case of a married Nicola Valley man who had refused to comply with an order against him, and was $415.00 in arrears, the reply was caustic: "There seems to have grown up a conviction in the minds of females who add to the population out of wedlock," wrote Deputy Attorney General O. C. Bass, "that it is the duty of the Superintendent to pursue the father of the child in the Courts and place lawyer's bills on the taxpayers while the mother sits at home." Misinterpreting the act, Bass pointed to section 7, which outlined the procedure for initial application to the magistrate, arguing that the application for enforcement "may be made by (a) the mother; (b) the guardian of the child; (c) the

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[65] Ibid., pp. 24-25.

[66] Ibid., p. 21.

[67] British Columbia, *Sessional Papers*, 1925, vol. 2, pp. 186-188.

Superintendent." The act, he continued, "does not impose a duty or obligation on the Superintendent to take the step which it is the logical as well as the legal and primary duty of the woman to take. The Superintendent is the last resort."[68] This was incorrect. While the mother was one of the three parties who could launch the case under section seven, and the Superintendent encouraged mothers to do so and pay their own legal expenses, section nineteen made the Superintendent explicitly responsible for collecting court-ordered payments and pursuing defaulters. In case his true feelings had somehow remained in doubt, Bass added that "the correct title of [the CUPA] should be the English one - Bastardy Act."[69] A month later, when Holland submitted a collector's bill for $2.40, the criticism continued: Bass wrote,

> It still interests me on what grounds the taxpayers are put to the expense of collecting money for these husbandless mothers, when the Legislature has provided the Court and the machinery for them to do it themselves. I think sooner or later the Auditor-General will disallow these payments. The Government is not a debt collecting agency for private individuals.[70]

Despite the discouragement, Holland continued to press for more effective means of collection.[71]

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[68] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2231, File C-34-4-1932, Prosecutions, pp. 11-13; British Columbia, *Statutes*, 1922, 13 Geo. 5, Chap. 9, s. 7.

[69] British Columbia, *Statutes*, 1922, 13 Geo. 5, Chap. 9, s. 19.

[70] This individual had a very low opinion of unwed mothers. In a memorandum to the Attorney General he wrote that the government should not provide legal assistance to unwed mothers simply because the fathers could afford representation. Fathers needed counsel, because of "the common practice prevailing among women of endeavouring to father a child on a man in order to shield someone else." British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2230, File C-34-1-1933, pp. 3-4; Ibid., Reel B2231, File C-34-4-1932, Prosecutions, pp. 14-15.

[71] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2230, File C-34-1-1933, pp. 7-9.

Yet no matter how much pressure was applied, the poverty of putative fathers meant that orders sometimes could not be fulfilled. A 1929 letter from Margaret Akins to the Attorney General is typical. In 1924, an order of affiliation had been made against Arthur Moore, the father of her child, requiring him to pay her $5.00 per week. By 1929, she wrote, he was "one year and seven months back in his payment to me." Moore had, she said, sold his business and moved. Payments had ceased altogether and her son was in need of medical attention and winter clothing. Akins had contacted Superintendent of Neglected Children Thomas Menzies repeatedly, but without result. Her frustration with the situation came out in her letter: "Constant worry of trying to make ends meet is getting the best of my health[.] I have tried to do my part in helping to provide for my boy." In fairness, Akins' description of the situation appears to have been somewhat misleading. Moore's sale of his business was likely a distress sale. He was far from wealthy. When questioned about the case, Superintendent Menzies responded that he was "doing everything possible in this case to collect from [Moore]; have had him before Magistrate Findlay on different occasions in an endeavor to collect from him back payments, but without success, as he is barely earning a living...." If this was true, the Superintendent's office was indeed putting great legal pressure on Moore to comply. Menzies had forwarded a cheque for $25.00 to Akins and was having Moore brought back before the Magistrate to ascertain his financial standing.[72]

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[72] The names in this case are fictionalized to protect the identities of those involved in accordance with British Columbia's privacy legislation. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2284, File D-67-3-1929, General, pp. 19, 21.

In addition to the financial obstacles to collecting, there were also vexing jurisdictional complexities. There was no way to collect if the father left the Province for the United States or other parts of Canada. Moreover, the agreement for the reciprocal enforcement of court orders, which seemed to offer such promise in DWMA and CUPA cases, was adopted slowly by other Canadian jurisdictions.[73] The mothers and children in such cases were often left destitute. In April of 1934, the Attorney General received a letter from a young Okanagan Valley woman who was living with her parents and her child in impoverished circumstances. The whole family was on relief. Perhaps hoping for a mother's pension, she asked if any government support was available for an illegitimate

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[73] The same situation faced unwed mothers who moved to British Columbia from another jurisdiction, leaving the father behind, and those who removed from the province themselves. One of the more heart-rending cases complicated by jurisdictional concerns involved the situation of a young mother, Agnes Simpson, who became pregnant in Saskatchewan during the Depression. The father sent her out to British Columbia promising that he would soon follow. Several months passed without his appearance. Simpson found a job and gave birth to the child. For a while, he sent money to help her with medical and living expenses. Then the money stopped. Soon after she became sick and had to leave her employment. After several letters, the father had written explaining that he was not going to come to British Columbia. He would, however, send $10 a month for the support of the child. Even this pittance never arrived. Was there, the young mother asked, any legal action she could take? The Deputy Attorney General replied that the British Columbia courts had no jurisdiction in the matter. Her only hope of an award would be to return to Saskatchewan and prosecute the putative father in the Courts there. The names of individuals in these cases have been fictionalized to maintain compliance with the terms of British Columbia's privacy legislation. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2230, File C-34-1-1935, pp. 16-20.

It could likewise be difficult for an unwed mother to collect if she left the Province. The Attorney General's files include correspondence on a case involving a woman who moved out of the Province. The putative father had been ordered to pay $2.50 per week maintenance in 1924, and until the mother and child left the province, he had made his payments regularly. Once they left the province, however, his compliance was irregular. By the time they returned in 1933, he was over four years behind. An interesting sidebar to this case is that when prosecuted for non-compliance, the putative father revealed that he was both willing and able to repay the backlog. However, he insisted that the money be paid directly to the Superintendent of Neglected Children and disbursed for the benefit of the child alone. The mother insisted that the whole amount should be turned over to herself, as she needed it for an operation. The Superintendent was willing to accomodate the putative father's demands, since he believed that the woman also intended to use the money to pay for her car and perhaps for the support of her husband (she had apparently married in the interim) and three other children. No recognition was given to the mother's claim on the money, having supported the child wholly on her own in the months when the father had failed to make payments. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2230, File C-34-1-1936, pp. 31-33.

child and its mother. The Attorney-General's Office advised her to apply under the CUPA. A few months later, the local magistrate wrote the Attorney General for advice in the case. The father of the child, he wrote, was believed to be destitute himself. Moreover, the man had gone to Manitoba. Deputy Attorney General Bass replied, "If the father of the child is in Manitoba," he wrote, "you are powerless." As usual Bass was less than sympathetic, and felt obliged to offer his own opinions: "The general trouble with these young females," he advised, "is that instead of being cautious at the proper time, they come along to the Government for assistance when the baby arrives. She should have watched its father before he went away."[74]

If flight gives the appearance of an easy escape for a putative father, it should not. As in Lori Chambers' DWMA cases, flight could have high personal costs. In the early 1920s, Esther Sinclair secured an affiliation order against James Bryden in the Kootenays.[75] Bryden never made a payment. According to the Provincial Police, he absconded to Vancouver for a time, living under an assumed name. He then moved to Seattle. Although Esther Sinclair applied to the Courts and received a warrant for Bryden's arrest, she was powerless so long as Bryden could not be located; and once he left the Province, he was beyond the reach of the courts. James Bryden had gotten off scot-free. Or so it seemed. Two years later, Bryden's father wrote the Attorney General. Bryden, it seems, wanted to return to the Province, but Esther Sinclair would not consent

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[74] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2230, File C-34-1-1934, pp. 7, 9-11.

[75] The names in this case have been fictionalized in compliance with the terms of British Columbia's privacy legislation.

to drop the warrant for his arrest, and James Bryden had no means of making the payments required under the order. He certainly had no means of making up the retroactive payments, for which he remained liable. Bryden's father asked the Attorney General to look into the matter. The Attorney General's office wrote to the interested parties. Esther Sinclair had since married. She was no longer destitute. Yet neither was she willing to drop the warrant. The magistrate who had handled the case wrote that "Her attitude is that she has undergone all the punishment so far, and she sees no reason why Mr. [Bryden] should be allowed to go free." The Deputy Attorney General passed this correspondence on to the Attorney General, with the comment that "Mrs. [Sinclair] is quite right in the stand she has taken. [Bryden] should be prepared to make some compromise."[76]

In contrast to the DWMA and CUPA, British Columbia's Parents' Maintenance Act was little used. A search through the New Westminster, Trail, and Quesnel Police Court Record Books over the twenty years from 1922 to 1941 turned up only 2 cases. Both were heard in Trail during the 1920s and both resulted in maintenance orders. In one case, three children were each ordered to pay $5 every two weeks. In the other, a single child was ordered to contribute $12.50 monthly to his mother's upkeep.[77] The volume of

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[76] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2230, File C-34-3-1925, pp. 2-10; Ibid., Reel B2231, File C-34-3-1927, pp. 2-6.

[77] Corporation of the City of Trail, Police Court, Record Book, BCARS, GR 1875, vol. 2 (1920-1940), pp. 60-122. Of those cases which were launched in Ontario, very few were dismissed. Of the thirty-seven cases in Carleton County, 12 resulted in formal orders, 20 in informal support agreements, and five were

cases heard under the PMA contrasts sharply with the 69 DWMA and 21 CUPA cases found in these courts over the same period. Given the apparent receptiveness of the police courts to the statute, how can the strikingly low incidence of cases in British Columbia be explained? First, it is relevant to note that British and American parents' maintenance legislation were also infrequently invoked.[78] James Snell suggests that the low incidence of cases reflects both voluntary support by families, and the advent of the means-tested Old Age Pension for those over 70 years of age in 1927.[79] However, in British Columbia, it appears the Old Age Pension Board repeatedly refused pensions to those with children capable of supporting them, advising them to apply under the PMA. Parents, however, appear to have been highly reluctant to prosecute their children.[80] Yet

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dismissed. In Ontario county, eight cases resulted in orders and two were dismissed. Snell, "Filial Responsibility Laws in Canada," p. 272

[78] According to James Snell, who surveyed the operation of the Canadian acts before focussing on two Ontario counties, parental maintenance legislation was of brief significance in Canada. In Carleton and Ontario counties, Snell found 47 cases over a forty year period. The greatest number of cases were heard during the 1930s. The sole exception to the general pattern was the state of Maine, where vigorous enforcement of the parental support statute is reported to have reduced the public cost of supporting the elderly significantly. However, as Garrett points out, "[I]t was not determined whether this was achieved by increased contributions from financially able children or by parents voluntarily reducing their standard of living in order to relieve their children of the burden of support." See Shammas et al., *Inheritance in America*, p.150; Garrett, "Filial Responsibility Laws," pp. 814, 817; David Tomson, "I am not my Father's Keeper: Families and the Elderly in Nineteenth Century England," *Law and History Review*, vol. 2, no. 2 (Fall 1984), pp. 265-286.

[79] Snell, "Filial Responsibility Laws in Canada," pp. 272-273.

[80] Like Snell, British Columbia's Deputy Attorney General believed that the Old Age Pension was a substantial factor in the statute's disuse. In 1929, the Winnipeg *Free Press* wrote the Attorney General's Office requesting a copy of British Columbia's Parents Maintenance Act, and any information on enforcement difficulties. Deputy Attorney General Bass responded that the statute was "virtually an unknown measure." Bass believed the Old Age Pension responsible: rather than using the Parents Maintenance Act, he wrote, "[e]lderly people, with sons and daughters in good positions, apply under the Old Age Pension, and cases have occurred where the parents have conveyed property to the son or daughter in order to qualify for the Old Age Pension. The latter legislation seems to afford a gateway through which the child escapes the duty of supporting the parent." Bass's analysis notwithstanding, the Old Age Pension was not available to that cohort of aged persons incapable of self-support but under the age of seventy. Moreover, correspondence in the Attorney General's files indicates that the Old Age

prosecutions could be and were launched by local municipal officials. Other factors must have also contributed to the statute's disuse.

Pension Board commonly refused pensions to persons above the age of seventy, advising them to proceed under the PMA. In 1926, a Kootenay medical doctor made inquiries about the case of a destitute elderly couple. James Ward and his wife had been left by their family to 'shift for themselves'. Ward had applied under the new Old Age Pension Act, but his application had not yet been reviewed. The doctor was apparently unaware of the PMA. "It seems too bad," he wrote, "that there isn't some law that would make a family look after their old parents, and not try to throw things on the government." The Deputy Attorney General replied that the children might be charged under the PMA. Two years later, James Ward brought a complaint against his children under the statute. Mr. Ward had been refused an Old Age Pension, although he was destitute and in his late eighties. The length of time which passed prior to his application under the PMA suggests that he took the step only as a last resort. At this point, the local magistrate wrote the Attorney General's office for instructions on how to proceed under the PMA. He was unfamiliar with the act, indicating its relative disuse. A letter written by A.W. Neill in the late 1930s suggests that James Ward's case was typical. According to Neill, "[t]he Old Age Pension Department repeatedly refuse applications for [the] old age pension saying that under the Parents' Maintenance Act of B.C. the children are liable and they tell the parents that they should go and sue their children." If elderly persons were being refused Old Age Pensions and directed to proceed under the PMA, why were there not greater numbers of prosecutions? Neill suggested that very few elderly people wanted to sue their children. Requiring the parent to launch the suit was "a most inhuman suggestion." He continued, "Take a woman who has a son and the son is married with several children, perhaps she is living with them; a great deal of her happiness in life centers in the enjoyment of her grandchildren. She is told to go a sue her son and the daughter-in-law naturally says 'She is trying to take the bread out of my children's mouths'... People will almost starve before they would sue their children under those circumstances..." Moreover, he wrote, notwithstanding the board's position, the ability of the children to contribute was often questionable. Indeed, American studies have posited that one of the major reasons for the disuse and ineffectiveness of the legislation is that the relatives of the poor are often poor themselves. Neill had already brought this fact to the attention of the Old Age Pension Board. The Board members, he informed the Attorney General, typically replied "'The child is in a position to keep his parents' or if not, 'He ought to be'..." As a solution, Neill recommended that the Old Age Pension Board should empowered to take action under the PMA. The Board could award the pensions and pursue restitution from the children under the act. This suggestion had two benefits: the security of the parent would be ensured; and a third party would be less hesitant to apply under the act. The Deputy Attorney General's response was unencouraging.

Neill's analysis of the situation had merit. A letter to the Attorney General's office from a woman who had been left out of her husband's will confirms his contention that parents were reluctant to take their children to court. The woman in question was hesitant to take action under the TFMA, explaining, "I do not wish to go to law with my children & was wondering if there was any other way to make provision for my old age." Given the situation, the writer felt so uncomfortable in her son's home that she left. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2224, File A-5-2-1929; Ibid., Reel B2341, File P-188-1-1929, General, pp. 2-3; Ibid., File P-188-1-1926, 1928; Ibid., Reel B2341, File P-188-1-1937, General, pp. 2-5, 12 [some cataloging details have been omitted in compliance with the terms of British Columbia's privacy legislation]; Edgar-Andre Montigny, *Foisted Upon the Government?: State Responsibilities, Family Obligations, and the Care of the Dependent Aged in Late Nineteenth-Century Ontario* (Montreal: McGill-Queen's University Press, 1997) p. 84; Garrett, "Filial Responsibility Laws," pp. 814, 816-817.

Demographic and jurisdictional factors likely reduced the number of individuals with children available for prosecution. Given that British Columbia was a settler society, which had experienced increasing levels of immigration after 1885, the age profile of the population was likely skewed toward younger age brackets. The elderly are less likely to migrate, and elderly people in British Columbia undoubtedly formed a somewhat smaller proportion of the population than in longer established societies.[81] Moreover, given the gender imbalance in the population, many of the elderly would have had no children. With seventy percent of the population being male until 1911, the elderly population undoubtedly contained a disproportionate share of bachelors. These men could not use the act, since they had no legal children to prosecute. Finally, the act was a nullity if either the parents or the children lived outside the province.[82] In a transient settler society, where families were often scattered throughout different jurisdictions, these limitations would have eliminated a great number of applications.

Even where liable children were within the province, a 1934 case, *Rex* v. *Skilling*, appears to have rendered prosecution in many cases complicated and expensive. In Skilling, Judge Thompson of the Cranbrook County Court ruled that any child summoned under the act had the right to have all of his or her siblings within the Province present

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[81] Montigny, *Foisted on the Government?*, pp. 34-35.

[82] In 1935, the Attorney General's department informed a 69-year-old Vancouver man, who was ineligible for the Old Age Pension until the following year, that he could not compel his son, who lived in the United States, to contribute to his support. How he lived out the year is unknown. Likewise, when a letter arrived the following year from an Alberta woman with two children in British Columbia, she was informed that she would have to be a resident of British Columbia in order to launch proceedings. British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2341, File P-188-1-1936, pp. 2-3; Ibid., File P-188-1-1936, General, pp. 2, 3, 6, 9.

before the court at one and the same time. As the solicitor prosecuting the case on behalf of the government informed the Attorney General's Office, Thompson's ruling had important implications. In a large province with a scattered population, prosecuting several children at once would be difficult. In the Skillings' situation, there were four other liable children. Two were outside the province and exempt from prosecution. However, one resided several hundred miles away, and the correspondent believed that the local magistrate had no authority under the act to summon individuals outside his district. If this were the case, prosecution would be impossible. Even if it was possible to summon children from a distance, the process would be expensive and time-consuming. Despite the uncertainties created by the decision, the Attorney General's office decided not to appeal, and the ultimate effect of the case is unclear.[83]

Finally, compliance difficulties may have contributed to the statute's disuse. Collection troubles under the PMA mirrored those which plagued the DWMA and CUPA. In fact, the Attorney General's correspondence reveals that making and enforcing PMA orders was further complicated by the existence of multiple individual liabilities. James G. Snell writes that the letters in the Attorney General's correspondence files "do not represent in any way a full picture of the legislation in any district, much less the entire province. These are simply cases that were brought to the attention of the Attorney General's for a variety of individual reasons." Yet while cautioning the reader as to the

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[83] *Rex* v. *Skilling*, *Western Weekly Reports*, 1935, no. 1, pp. 182-189; British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2341, File P-188-1 (1934), General, pp. 19, 21. For a discussion of joint and several liability in the United States, see Garrett, "Filial Responsibility Laws," pp. 807-808, 812.

possible unrepresentativity of the sample, Snell also noted that these files "serve to confirm certain patterns found in the other two [Ontario data] sets." Given the paucity of cases launched in the Police Courts, and the lack of detail provided in the Police Court Record Books, these files may be the best source for understanding how the act functioned when invoked. [84]

First, the files reveal that magistrates were inconsistent in determining siblings' relative liability under the act. In an Okanagan case reported to the Attorney General, the children were each ordered to contribute four dollars monthly to their father's upkeep, despite having varying means, and irrespective of gender. Yet in a second case, heard in North Vancouver, the magistrate explicitly based his order on considerations of means and gender.[85] Two sons were ordered to pay $3.50 and $2.50 per week respectively. Much less was required of the daughters in financial terms: one was ordered to pay $1.00 per week, while the other two were to contribute 50¢ weekly. The Magistrate revealed that financial considerations were not the only variables he considered in making the award. "In fixing a much lower quota for the daughters to pay," he wrote,

> the Magistrate has in view not only their circumstances but also the fact that their father will depend to some extent upon his daughters for comforts for which a woman's hand can best supply, and the Magistrate relies that the daughters will readily supply those things.

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[84] Snell, "Filial Responsibility Laws in Canada," 272.

[85] W. Walton Garrett, commenting on similar legislation passed in the United States writes that "[w]here there are several children who are financially able to contribute to the parents' support, their liability is equal. This does not mean that they are obligated to pay equal amounts, but that their liability will be proportional to their excess income." Garrett, "Filial Responsibility Laws," p. 803.

In making this order, comments James Snell, Magistrate Philip was not only acting on gender prescriptions, but reinforcing them.[86] Of course, the non-financial support Philip urged from the daughters could not be legally compelled.[87]

If the orders were quite different in their disposition of individual liability, their outcomes were remarkably similar. The male children with the greatest means, and the greatest liability, refused to comply. In one case, none of the children were willing to house their father. The magistrate took the initiative, arranging long-term care in the home of a sixty-two-year-old woman. When the wealthiest of the five children refused to make payments, the Deputy Attorney General and the Solicitors for North Vancouver both informed the caretaker that if she wanted payment, she would have to apply to have the order enforced. In bizarre fashion, responsibility for looking after the eighty-two-year-old man had been shifted by both government and kin to an unrelated third party.[88] In a second case, three children agreed to contribute to their father's support and take turns housing him. The sons were wealthier than the daughter; yet the daughter took the first turn providing housing. When a local constable drove the man from his daughter's house to stay with one of his sons, the son became agitated, yelling "What are you bringing that old son of a bitch out here for? If you leave that old bastard here he will have to sleep in the barn, or any place he can find. I am not going to be bothered with

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[86] Snell, "Filial Responsibility Laws in Canada," p. 273.

[87] Ibid.

[88] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2341, File P-188-1-1925 [remainder of cataloging data omitted in compliance with British Columbia's privacy legislation]

him in my house."[89] As is common in these cases, the file ends without a satisfying resolution.

While it would be easy enough and perhaps justified to vilify the son in the latter case, children facing PMA orders could face great stress. In 1923, an Okanagan woman, Beatrice Stephens, wrote the Attorney General with regard to an order made against her husband for the support of his mother. The elder Mrs. Stephens was 61 years old. The municipality was assisting her in her own home, covering her water and light bills, and providing her with cordwood. The mayor had filed the PMA application against her son, resulting in an initial order of $15 per month, later reduced to $7 monthly on the son's application. Mr. Stephens earned wages of $4.50 per day. Yet even the reduced PMA order had to be secured by garnisheeing Stephens' wages. Beatrice Stephens undoubtedly discouraged payment to her mother-in-law: she wrote that the amount of the order was "to[o] much for me, I have 3 children age 8, 3, 1 years old [sic]," and experienced great difficulty in trying to feed and clothe her family. She also noted bitterly that although "his Ma is no invalid" she had made it clear that "she doesn't intend to go to work."[90] Beatrice Stephens' comments notwithstanding, municipalities have rarely been known to provide relief willingly to the able-bodied. Yet her letter's reliability is less important than the insight it provides into the competing demands placed on the children of

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[89] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2341, File P-188-1-1927 [remainder of cataloging data omitted in compliance with British Columbia's privacy legislation.]

[90] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2216, File P-376-1, pp. 1-3.

destitute parents. The familial conflicts could be tense; in this case, contribution had to be compelled.

Beatrice Stephens' letter has broader implications as well. Her comments add another layer to our understanding of the psychology of men who defaulted against DWMA and CUPA orders. Many of these men, as has been noted, had begun new lives. They had started new families, and taken on new obligations. Some, when confronted directly by their first families, or compelled by the courts, could be persuaded to make a contribution. Yet when out of reach, most discontinued payment. Undoubtedly, these men faced competing demands analogous to those experienced by Beatrice Stephens' husband. Such men held an income barely sufficient for one family, and faced the demands of two. Given the impossibility of making adequate provision for both, many men appear to have chosen to satisfy the most pressing and immediate demands, and place the others on the back-burner. While this was not a solution, it appeared to be their only option.

The cases heard under the various maintenance statutes reinforce our understanding of the powerful influence of statist discourses in the courts. The judiciary was sensitive to the shifting 'requirements' of state. *Brown* v. *Brown*, heard under the provisions of the DWMA, makes this responsiveness abundantly clear. Heard in 1922, when concern over mothers' pension expenditure was nearing its peak, the case established a new judicial orientation, focused on the reduction of public expenditure. Equally relevant, *Brown* v. *Brown* dramatically reduced the burden of proving eligibility in DWMA cases, making

maintenance orders much more widely available. Together, these changes would have a dramatic effect on broad trends in the disposition of DWMA cases. The CUPA saw similar changes. The judiciary was well aware of the theoretical importance of child-rearing to state interests. *Rex* v. *Moore*, heard in 1926, facilitated the prosecution of putative fathers, broadening the types of evidence required to secure a CUPA order. Again, as under the DWMA, this published decision set a precedent which influenced the broad disposition of unpublished cases, and catered to the fiscal and social interests of those speaking in the name of the state.

Yet while these observations suggest a straightforward relationship between the published and unpublished cases, and the overall effects of the legislation, Laura Holland's memorandum should serve as a strong cautionary note that matters are seldom so simple. The nature and disposition of the cases, both published and unpublished, is not a reliable guide to the range of experiences of those facing the social situations contemplated by the statutes. As Holland's report reveals, many unwed mothers' cases were never heard. For various reasons they were prevented from bringing their plight to the attention of the courts. Given this reality, we should be very aware of the limits of our knowledge with respect to DWMA and PMA cases. While letters and bureaucratic correspondence provide some limited insights, we have no sense of the range of experience outside the courtroom.

Finally, the cases provide a great deal of insight into the relationship between governments and regulated populations. Governments and the regulated had very different senses of the subject's social obligations, and the protracted enforcement

difficulties reveal the extent and severity of the divide. Government, invoking 'state needs,' argued that men's obligation to support dependents' was nearly absolute. The only caveat revolved around adultery. Of course, this position was based on a self-interested middle-class vision of the nation and its needs, and was not shared by those facing regulation. The statutes focussed on individual obligations and spoke in absolutes. The reality, however, was that many men faced multiple obligations; others were currently unemployed. Even more importantly, many men simply did not share a sense of absolute, permanent obligation: they appear to have believed that conjugal relationships should be terminable without continuing financial obligation.

Exploring the mentalités of those resisting regulation demands not only an examination of their own mindset, but that of the regulators, and the characteristics of the legislation they produced. Since the 1860s, bourgeois British Columbians had been dividing and gendering economic and domestic relations. Middle-class British Columbians subscribed to the popular separate spheres ideology: men were associated with the public sphere and the world of economic relations; women were assigned to the domestic sphere and its associated qualities. This binary opposition was perhaps best encapsulated in the homestead and MWPA legislation, which associated wives with the defense of homelife. The fact that these perceptions were inaccurate is relatively unimportant. It does not matter that businesswomen were commonplace and many men were active in moral campaigns, including prohibition and child protection. Much more important is the mental categorizing and ordering of the varieties of social relationships. The perception existed that economic and familial relations were of a different order, and

the gendering of these relationships highlighted their distinctiveness. Assigning gender to mental categories is one of the strongest and most basic means of constructing logical distinctions and oppositions. Masculine economic relationships were rational and impersonal, and quite the opposite of emotive feminine domestic relations, which were intensely personal and emotionally charged.

These gendered distinctions shaped twentieth-century legislation. Women, and feminine moral-personal ethics, were permitted to influence domestic legislation and domestic relationships. Economic legislation remained an impersonal masculine realm. The distinction was clear and rarely contested. While both male and female reformers undoubtedly desired to reconstruct the economic relationships in moral terms, any move in that direction was contested as an inappropriate incursion into masculine economic space. When women or feminine-moral regulation attempted to invade what was perceived as a masculine economic domain, male legislators felt no qualms about asserting primacy in 'their' sphere: hence J. W. deB. Farris's actions with respect to the dower act. Farris was intimately familiar with the women's movement and sympathetic with many of its aims. Yet he felt little if any doubt as to the propriety of women legislating morally on issues that were matters of broad economic importance. There are few better examples of the segregated ethics of the bourgeois middle class.

If relationships may be divided in theory and ideology, they are lived and experienced as parts of a complex whole. There can be little doubt that progressives were sustaining an economy which facilitated desertion and flight. The impersonal wage relation made relocation a relatively manageable prospect. Yet the wage relation did more than

facilitate desertion. Its impersonalism influenced the understanding of all relationships. Economic and domestic relationships differ in degree, but not in kind: all are interpersonal relationships. Each involves relations between human beings, and these cannot easily be compartmentalized into relationships of moral and amoral types. Our relationships in the workplace affect our relationships at home, and vice-versa. There is no 'moral divide' so to speak. Here we encounter the conflict at the heart of the maintenance cases. Organized women and their male supporters in British Columbia were trying to legislate morality amongst family members. Yet they held little influence over masculine economic relations, and the influence of economic amoralism could not be contained. While legislation held familial obligations to be absolute, the men being regulated seemed to have a different sense. In this context, the reader should recall Magistrate Jay's sense that "the large number of husbands summoned under this Act are men who are under uncertain employment — working men who are engaged by the month and more frequently by the day." Schooled and educated by impersonal wage relations and the systemic unemployment described by Sager and Baskerville, they held a sense that personal relationships were not binding. In fact, these men had learned, repeatedly, that when a relationship ceased serving its purpose, it ended; so too did the economic obligations, regardless of the vulnerability of the person or persons cut off from support.

CHAPTER TWELVE:

JUDICIAL RECEPTION OF THE

TESTATOR'S FAMILY MAINTENANCE ACT

In British Columbia, the TFMA produced a large volume of published cases, and a great deal of controversy. In his study of the British Columbia legislation, Leopold Amighetti makes a rather polemical argument for the assertion that redistribution of estates under the TFMA should be strictly confined to the support requirements of dependents. Any redistribution under the statute should be based on need; considerations of the justice of the distribution are not to be admitted. Amighetti buttresses this opinion with reference to cases heard under the parent New Zealand statute, and concludes with a damning indictment of British Columbia's jurisprudence.[1] The following chapter revisits issues of legislative intent and judicial construction, introducing new evidence surrounding legislative intent to the TFMA debate, and drawing attention to the distinct nature of the local legislation.

Amighetti's dependence on decisions made under subtly different New Zealand legislation renders his interpretation problematic. In New Zealand, judicial interpretation of the TFMA focussed upon the operative clause of the legislation, which requires the court to investigate whether the testator has made "adequate provision for the proper maintenance and support" of his or her dependents. In determining this point, the court

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[1] Amighetti, *The Law of Dependants' Relief*, pp. 28-29, 32.

must first decide what constitutes a proper level of support; it then examines the will to determine whether adequate provision has been made.[2] Determining the 'proper' level of support involved more than a simple ascertainment of the bare necessities. The court was permitted to consider the applicant's age, sex, social position, accustomed standard of living, health, and in the case of younger applicants, educational or training needs.[3] In making an award, the court was also directed to consider the applicant's own ability to satisfy his or her support requirements; factors considered in this regard might include the applicant's income, property, and earning capacity, as well as the benefits to be accrued from spousal income and state programs.[4] Any additional provision out of the estate directed by the court was strictly limited to making adequate provision to satisfy the proper level of maintenance. Nothing in excess of those maintenance requirements could be awarded.[5] The award could be further limited by the size of the estate and the claims of others to provision from it.[6] Given prevailing social mores, Judges were more

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[2] Anthony Dickey, *Family Provision After Death* (Sydney: The Law Book Company, 1992), pp. 102-103; R. J. Davern Wright, *Testator's Family Maintenance in Australia and New Zealand*, 3d. ed. (Sydney: The Law Book Company, 1974), p. 83. Dickey's work, although dealing specifically with Australian case law, makes a great deal of reference to New Zealand precedents.

[3] Dickey, *Family Provision After Death*, pp. 102-103; Wright, *Testator's Family Maintenance*, pp. 83, 84-85, 91; Manitoba Law Reform Commission, *Report on "The Testator's Family Maintenance Act"*, p. 11 (fn. 14).

[4] Dickey, *Family Provision After Death*, pp. 111, 114; Macdonald, *Fraud on the Widow's Share*, p. 293; Wright, *Testator's Family Maintenance*, pp. 83-84. In Australia, several decisions have specified that the TFMA cannot be invoked by the state to reduce expenditure. Ibid., pp. 110-111.

[5] Dickey, *Family Provision After Death*, p. 136.

[6] Ibid., p. 109.

likely to make provision for widows than widowers, and for younger children than adults.[7]

In New Zealand, the judiciary was unequivocal in its assertion that the courts were not empowered to make a fair or equitable distribution of the estate, no matter how unjust the terms of the will might appear. Nor was the statute to be used to compensate the applicant for services provided to the testator. The courts were not to use the TFMA to compensate children for labour provided a parent during their youth. Nor were they to give a wife a reasonable recompense for the labour she had devoted to accumulating family wealth. Once the proper level of maintenance was determined, the court was strictly limited to altering the will to the extent of making adequate provision. Under the New Zealand legislation, then, the approach was minimalist and called for the alteration of the will to the least extent possible.

According to Amighetti, British Columbian judges deviated from this sound interpretation of the TFMA. Initially, in the published cases *Re Livingston*, *Re Hall*, and *Brighten* v. *Smith*, he contends, the judiciary upheld the true intent of the statute, following New Zealand precedents and limiting redistribution to the dependent's needs. Unfortunately, writes Amighetti, none of these cases "articulated a clear [statement of] principle."[8] Then, in *Walker* v. *McDermott*, Chief Justice Morrison of the British Columbia Supreme Court rejected the established jurisprudence, and awarded a daughter,

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[7] Macdonald, *Fraud on the Widow's Share*, pp. 293-294.

[8] *In Re Livingston*, *British Columbia Reports*, vol. 31 (1922), pp. 468-471; *In Re Hall*, *British Columbia Reports*, vol. 33 (1923), pp. 241-243; *Brighten* v. *Smith*, *British Columbia Reports*, vol. 37 (1926), pp. 518-524; Amighetti, *The Law of Dependants' Relief*, pp. 30-32.

Pearl Walker, six thousand dollars from her father's twenty-five thousand dollar estate based not on need, but on equitable principle. Pearl Walker was married, her husband steadily employed, and she had not been dependent on the testator for some years. Her step-mother, who had been given the entirety of the estate in the will, had contributed substantially to its accumulation.[9] The case was appealed, and British Columbia's Court of Appeal struck down the decision, basing their judgment on the failure of the daughter to establish need. Justice Martin wrote

> [I]t clearly appears that [Chief Justice Morrison] has, with every respect, proceeded on a wrong principle in construing the Act as, in effect, one which gives a child a share of the estate as against the widow where the child has not discharged the onus upon it of proving that it is, in the true and proper sense, in need of 'maintenance and support' having regard to her walk in life and all the other circumstances of the case.

Justices Galliher and Macdonald concurred.[10] Justice McPhillips stood alone in dissent from the majority opinion. McPhillips, wrote Amighetti, interpreted the law "as requiring something more than maintenance and support, and as imposing upon the testator the obligation to make provision for a child even though that child was not in need of maintenance."[11]

From this decision, Pearl Walker appealed to the Supreme Court of Canada. The Supreme Court reversed the Court of Appeal, reinstating Chief Justice Morrison's

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[9] Chief Justice Morrison's disposition of the case is recounted in *McDermott* v. *Walker*, *British Columbia Reports*, vol. 42 (1930), pp. 184-202, *passim*. See also Amighetti, *The Law of Dependants' Relief*, pp. 32-33.

[10] *McDermott* v. *Walker*, *British Columbia Reports*, vol. 42 (1930), pp. 192-193, 202. See also Amighetti, *The Law of Dependants' Relief*, pp. 32-33.

[11] Amighetti, *The Law of Dependants' Relief*, pp. 33-34.

original award to the daughter. The majority opinion, written by Justice Duff, pronounced that the statute required not only an adequate provision, but one that was just and equitable.[12] With this decision, Amighetti argues, "the Supreme Court of Canada attributed to the Act a meaning and a function clearly beyond that defined by the early British Columbia cases *and the capabilities of the Act.*"[13] Justice Duff had "vested upon the act an interpretation under which a supportable argument could be made that a parent has an obligation to leave a portion of his estate to a child regardless of the age or the need of the child."[14] After *Walker* v. *McDermott*, Amighetti writes that judicial interpretation of the TFMA became "schizophrenic" and the purpose of the act "nebulous".[15] While judges regularly cited *Walker* v. *McDermott* to support their conclusions, their judgments were far from uniform. Two lines of decisions ensued: one group of judgments continued to insist upon the establishment of need as a precondition to any award; the second interpreted the legislation "more in terms of ethics than economics."[16] Amighetti concludes with a damning indictment of the Supreme Court's decision: "As a result" of *Walker* v. *McDermott*, he writes, "it is difficult today to state with any degree of certainty whether the Act is truly remedial 'to provide proper

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[12] *Pearl Walker* v. *Ida McDermott*, *Supreme Court Reports* (1931), pp. 94-102; Amighetti, *The Law of Dependants' Relief*, pp. 35-36.

[13] Ibid., pp. 36-37. Emphasis Added.

[14] Ibid., p. 36.

[15] Ibid., p. 28.

[16] Ibid., p. 37.

maintenance for dependents', or whether it is, as the author would argue, a diluted and whimsical form of forced heirship."[17]

Amighetti, then, held that the Supreme Court's decision undermined the true and intended application of the statute. This interpretation, however, is not supported by the evidence. Both the New Zealand and British Columbia legislation is ambiguous and poorly-phrased; neither legislature provided any standard of need, simply calling on Judges to exercise their discretion. *Walker* v. *McDermott* reveals that judges' opinions of what constituted necessitous circumstances varied greatly.[18] The point of discord involved the conditions of invocation: that is, what exactly adequate provision meant. On this point the majority judges employed a logic which held that since the testator had made no provision for his daughter, that absence of provision was *prima facie* inadequate and the act could be invoked. There was no reason to consider the applicant's need of the award, since the inadequacy of provision was proven. The judges then went on to make an award based on the statute's distinctive justice and equity language. Those who opposed this decision felt that for the act to be invoked it must first be proven that provision was required, with reference to the applicant's previous standard of living.

Even more crucially, Amighetti's insistence that the British Columbia TFMA should be interpreted according to New Zealand's case law precedents is problematic. To make such an assertion would require that the British Columbia legislation was identical to its

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[17] Ibid., p. 28.

[18] The *British Colonist* had predicted extensive litigation and appeals would result from the discretionary aspects of the legislation; unfortunately the editor's call for a statutorily fixed share for spouses and children lacked the flexibility the legislature desired, and the criticism went unaddressed. *British Colonist*, 17 April 1920.

New Zealand parent. Amighetti, comparing the statutes, argues that the operative section of the legislation "is, for all practical purposes, identical to the equivalent section in its progenitor."[19] Yet the text of the operative clauses is not identical. British Columbia's legislation differs fundamentally from New Zealand's. The New Zealand statute reads:

> Should any person die, leaving a will, and without making therein adequate provision for the proper maintenance and support of his or her wife, husband, or children, the Court may at its discretion, on applications by or on behalf of the said wife, husband or children, order that such provision *as to the said Court shall seem fit* shall be made out of the estate."[20]

The British Columbia legislation differs in the italicized part, directing that "the Court may at its discretion ... order that such provision *as the Court thinks adequate, just, and equitable in the circumstances* shall be made out of the estate."[21] The changed wording undoubtedly reflects the moral concerns contemplated by Helen Gregory MacGill in drafting the act as a temporary alternative to a dower or community property statute: the justice and equity of the distribution was important to MacGill; wives had a moral claim to family property based on gender equality and their contribution to the family fortune; and under her TFMA, the same rights and considerations were extended to children.

The variation of British Columbia's statute from its New Zealand progenitor added internal contradictions of purpose to a statute which was already discretionary. The first part of the operative section asked whether adequate provision had been made for the

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[19] Amighetti, *The Law of Dependants' Relief*, pp. 10-11.

[20] Ibid., p. 10. Emphasis added.

[21] British Columbia, *Statutes*, 1920, 10 Geo. 5, chap. 94; Amighetti, *The Law of Dependants' Relief*, p. 11.

proper maintenance and support of the husband, wife, and children. Then, if the amount was insufficient for maintenance, the statute permitted not only an award which would raise it to sufficiency, but also one which was just and equitable. The initial part of this section, then, outlining the invocation conditions, deals only with the consideration of maintenance needs; the second part admits consideration of fair division, which the first part neither anticipates or suggests. Thus, the act makes complex demands of the judiciary. For the act to be invoked at all requires judicial consideration of maintenance and need; after it has been invoked, rather than calling for a judgment based on those maintenance requirements, the statute allows an award based on equity and justice. This incongruity was overlooked by Amighetti. It was the legislation, and not the judgments which was schizophrenic.

At least one judge publicly identified the faults in the legislation and called for reform. In a 1935 decision, Justice Macdonald took issue with the Supreme Court of Canada's decision in *Walker* v. *McDermott*. Macdonald was highly critical of the award to Pearl Walker, which, he said, "permitted a married daughter, not shewn to be in need of maintenance, to share to the extent of $6000 in a comparatively small estate of $25,000 left by her father to his widow." Macdonald emphasized Ida McDermott's contribution to the estate, and noted revealingly, "It was such a will as I would (if in similar circumstances) have made without the slightest misgiving as to its propriety, *and I had felt sure it was not the intention of the legislature to permit wills of that character*

to be interfered with."[22] Yet Macdonald's statement was revealing: he had "felt sure"; he was not certain. Therefore, he called on the legislature for an amendment "to disclose the intention of Parliament beyond the possibility of misunderstanding." Given the discretionary latitude and disparity of purpose inherent in the act, misconstructions were easily made; and, as Macdonald pointed out, "as the statute now stands, with that construction put upon it there is an invitation (now frequently acted upon) to attack wills without just cause," a situation which he believed "promot[ed] domestic discord and injustice."[23]

Macdonald's call for amendment went unheeded. Over the ten years following *Walker* v. *McDermott*, Justice Robertson attempted to establish a line of published precedents closely following New Zealand case law. Robertson's decisions focussed on minimalizing interference with testatorial intention, and strictly limiting redistribution to the applicant's established maintenance needs.[24] For a time, it appeared the mass of published decisions taking the Robertson approach would set an irrevocable standard. After 1941, however, a second line of cases began to emerge, redistributing estates based on equity, almost oblivious to considerations of need. Yet while Amighetti chides the

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[22] *In Re Estate of Thomas Daniel Lewis, Deceased, British Columbia Reports*, vol. 49 (1935), pp. 390-391. Emphasis added.

[23] Ibid.

[24] See *In Re Testator's Family Maintenance Act; In Re Clegg Estate, British Columbia Reports*, vol. 47 (1933), pp. 447-449; *In Re Estate of Frederick William Morton, Deceased, British Columbia Reports*, vol. 49 (1934), pp. 172-179; *In Re Testator's Family Maintenance Act and Estate of William Pridmore, Deceased, British Columbia Reports*, vol. 50 (1935), pp. 300-302; *In Re Gouge Estate, British Columbia Reports*, vol. 52 (1938), pp. 544-547; *In Re Estate of Thomas Daniel Lewis, Deceased, British Columbia Reports*, vol. 49 (1935), pp. 386-392; *In Re Stephen Jones, Deceased, and the Testator's Family Maintenance Act* (No. 3), *British Columbia Reports*, vol. 49 (1934), pp. 216-223.

judiciary for using the act as a form of forced heirship, stressing ethics over economics, the act's author, Helen Gregory MacGill, and the women's groups she represented, would likely have applauded redistribution based on equity. MacGill would not have been happy with Justice Robertson's minimal redistributions to widows based solely on maintenance needs. After all, organized women sought an alternative to dower and community property. They sought equity, not mere maintenance. Understood in this light, the decisions derivative from *Walker* v. *McDermott*, redistributing estates along equitable lines, probably came closest to satisfying their goals.

Here again, however, the published cases do not tell the whole story. Three letters to the Attorney General suggest the TFMA was often inaccessible. Each of these letters shares a common disturbing feature: they arrived too late to permit use of the legislation. The act restricted application to within six months following probate of the will, and apparently, this could be too little time. Complicating matters further, most of the correspondents were poor, and would have had difficulty taking the required action in the Supreme Court.[25] The result was that an unknown number of wives and children were still left out of their family's estate. The case of Alice Thorpe illustrates the hardships perpetrated by the legislation's shortcomings. Mrs. Thorpe had married her husband thirty-seven years earlier. She had brought $750 and a few household goods to the marriage. Her husband held a piece of land valued at $600, and in Mrs. Thorpe's estimation, "we started nearly even." Initially, the couple scratched out a bare living. Mr.

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[25] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2224, File A-5-2-1929; Ibid., File A-5-2-1930, General, pp. 2-3; Ibid., File A-5-2-1931, General, p. 57.

Thorpe often took wage work off the homestead for months at a time; Mrs. Thorpe kept up the small farm, while raising and educating six children. For much of that time, there was no school or doctor in the region. Over their thirty-seven years of marriage, the Thorpes enjoyed a modest success. When Mr. Thorpe died in 1927, the couple had "a good house plastered throughout, and about twenty acres [of] land cleared." They also had one hundred and ten sheep, thirty-four head of cattle, and four hundred dollars in the bank. The Thorpes' marriage was an economic partnership, which had slowly and painstakingly produced material benefits. Yet when Mr. Thorpe died, he left the entire estate to the children. Mrs. Thorpe, who brought assets to the marriage, and devoted years of labour to the couple's subsistence, received nothing. Two of the sons took over the homestead. The other children had farms of their own. After some initial resistance, and Mrs. Thorpe's reluctant threat to litigate under the TFMA, the two sons promised to make restitution. Yet the restitution never materialized. Mrs. Thorpe's sons simply waited for the six months permitted for action under the statute to elapse. Mrs. Thorpe, without a claim to her own home and property, was forced to take a domestic position.[26]

The cases and the letters in the Attorney General's correspondence files reinforce two observations made earlier in this dissertation. First, we cannot understand the extent of regulatory efficacy without some understanding of events beyond the courtroom. While there was no possibility of non-compliance in TFMA cases once an order was made, the

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[26] British Columbia, Attorney General, Correspondence, BCARS, GR 1323, Reel B2224, File A-5-2-1929 [further cataloging details omitted in compliance with British Columbia's Privacy Legislation].

published cases do not reveal the possibility of non-invocation. Without looking beyond the published cases, then, we would have no sense that the law was not accessible to everyone who sought its benefit, although we might, of course, hold that intuition. The correspondence provides a window on this issue, although it provides no quanititative measure of the extent of the law's efficacy. Secondly, the TFMA cases reinforce the realization, first brought to light with respect to MWPA jurisprudence, that a solid understanding of legislative origins and intentions is necessary to evaluate the operation of legislation. How is the historian to evaluate judicial performance without an understanding of legislative intent? Moreover, the precise nature of local legislation requires close scrutiny, and its distinctive features must be elaborated. Without such attention it is difficult to properly evaluate judicial actions and regulatory efficacy.

CONCLUSION

This dissertation set out to explore changes in family members' property rights through the prism of state formation theory. The property rights of family members, we have seen, were reformulated in three distinct periods, in relation to three visions of the nation, and the national interest. The yeoman ideal, the Smithe Dynasty's vision of mutualistic hierarchy, and the progressive concern over child-rearing appear on the surface to be disparate, unrelated national visions. Yet they shared a common theme: that material development could be harnessed to moral social ends. After all, while each of these regimes supported the liberal, individualistic ideology underlying the emerging capitalist order, there was a lingering suspicion of the insatiable appetites necessary to drive capitalism, and an understandable wariness of its impersonal relationships and constraining hierarchies. Each vision of the nation acted as an apologetic for unequal, self-interested social and economic relations. Each claimed to stand on the side of social progress.

The evidence suggests that visions of the nation, and the accompanying discursive 'requirements' of 'state' serve the purpose of defining social progress. Statist discourses define progress in terms of the needs of a fictive community. By creating this new identification and its accompanying rhetoric of requisites, state discourses serve to suppress alternative identifications, both individual and communal, and the conceptions of need, interest, and utility, as well as justice and equity, associated with those identities.

Yet in making these observations, it is necessary to add that the construction of national identities and discourses was far from conspiratorial or purposive. As Benedict Anderson has suggested, the development of national identities was a mass psychological phenomenon, rooted in global exploration and the development of mass circulation print media. The result of these developments was the simultaneous discreditation of religious certainties and divinely-ordained kingship, and a corresponding loss of cosmological and historical meaning. While print-capitalism contributed to the demise of earlier certainties, it also gave rise to a new sense of community and meaning. Mass circulation periodicals, and bureaucratic pilgrimages to imperial administrative centers, slowly gave rise to a new sense of affiliation in an imagined community, the nation, based on a sense of common origin, geography, and language. Nations, then, originated as a means of making sense of the world, of giving purpose to human lives. In British Columbia, as elsewhere, the nation served as a way for people to give meaning to their existence; to supply hope and aspiration. Hence its intimate association with ideals of progress and morality, making sense and giving hope in a world which often appeared to lack those qualities.

Statist discourses invariably involve an appeal to gender. Such discourses seek to redefine identities, and gender is one of our most closely-held self-identifications. To paraphrase John Tosh, gender identities are subjective identifications, usually the most deeply experienced that men and women have. Gendered personalities are formed at early ages "in the intimate relations of family life." Tosh writes,

> What men [and women] subsequently seek to validate through recognition of their peers has been shaped in infancy and childhood in relations of nurture, desire and

> authority. It is therefore a mistake to treat masculinity [or femininity] merely as an outer garment or 'style', adjustable according to social circumstances.[1]

Equally importantly, gender is a common element in human identity which crosses all cultural, sub-cultural, regional, and ethnic boundaries. It may be, in fact, that gendered identities derive from our basic cognitive processes, stemming from the human mind's propensity to create categorizations, classifications and conceptual fabrics based on binary oppositions. Since this binary consciousness is both deeply rooted in the structure of our thought, and forms one of the few elements of continuity among populations with diverse identifications, the remoralization of gendered norms offers an effective means of surmounting those identifications, and pressing the formation of new identities.

These identities, it should be noted, are not to be relegated to the role of superstructure or epiphenomena: they do not merely arise from the base of economic relationships. Gender identities are constitutive and serve to restructure the material actions of individuals. As anthropological studies make abundantly clear, divisions of labour are based on gender; the reconstruction of gender, then, is equally a reconstruction of 'the economy.' Given this reality, we should not dismiss statist discourses as mere apologetics. While discourses of state served as apologetics, they were based on premises which were sound, effectual, and constitutive. The apologists were not constructing some elaborate mirage, intended to cover the truth while allowing the economy to continue functioning according to its own 'internal' motors. Statist discourses served to generate

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[1] Tosh, "What Should Historians do with Masculinity?" p. 194.

mass meaning and purpose, and their purveyors sought actual, if self-interested, change and/or direction of their society and economy. The power of their discourses is clear. Statist discourses underlay vast programmes of legislation, and, as we have seen, guided the judiciary in their construction of the statutes.

Despite this mass sense of purpose, however, the vision of the nation remained unaccomplished. Here is where the state formation literature is at its weakest: it conveys a sense of effective regulation. Yet the evidence compiled for this dissertation suggests the purveyors of the 'national dream(s)' lacked the omnipotence necessary to implement their programmes. Human beings are, after all, intractable creatures with individual natures and motives. Individuals are not empty, neutral vessels to be filled with national ideology. Rather, people have existing alternative identities and community affiliations which are not easily eradicated. The process of remoralization undoubtedly convinces and coerces many to think of themselves and their world in new ways. Certainly, they understand their communities and their places within those communities in ways that their ancestors did not. For some, the new vision of the nation is much more comfortable than the old, and they are easily won over; others are less easily convinced, and still others will never be converted and assimilated. One is reminded of Thomas Kuhn's description of paradigm shift in scientific fields. A portion of the older school of practitioners is converted to the new way of understanding the discipline; yet the shift is never complete until the last of the old adherents dies out. For Kuhn, the shift in identities and affiliations is a slow process of attrition. Yet the analogy is misleading for our purposes: those who are reluctant or unconvinced do not die out without a trace; they

leave an imprint on society, altering the course of history, and turning social understandings.

The social fact of pre-existing identities and affiliations means that the new national vision, no matter how persuasive, is never fully realized. The mixture of new discourses with existing understandings of self and community produces unintended consequences; so too does the overlap of successive visions of the nation and their accompanying regulatory agendas. The result is a creole effect. New ideals and apologetics cannot undo history. Older consciousnesses persist. Hence the persistence throughout the period under study of an older sense of identity based on property ownership. While legislators in the Smithe Dynasty and afterward advanced a new vision of community membership based on mutualistic hierarchy, the wage relation, and the inherent inequalities involved, there were still working-class couples who sought property-ownership, and used every means at their disposal to protect their property. The society which resulted was an amalgam of the various visions.

Accompanying this creole effect are the unintended educational effects of social and economic relationships. A statist discourse giving meaning to a specific social and economic order does not negate the educational impact of the social and economic relationships which constitute that order. In other words, people learn from their interactions, and what they learn is often both unintended and unpredictable. The results are evident in the subject matter of this dissertation. In one instance, legislators contended that the purpose of providing property rights to married women was to permit the secure possession of a competency by a family with a male head; or alternatively to

sustain the wife and children in the event of desertion or economic emergency. Yet the actual effect of providing married women with property rights was quite different, and indeed, revolutionary. Granting married women property rights schooled them in their individuality and individual rights, creating a new female identity in the process. In a second instance, legislators made efforts to buttress the wage relation, in the context of a justificatory rhetoric depicting a vision of mutualistic hierarchy. Again, the results were far from predictable: wage-earning men were both schooled in impersonal relationships and limited liabilities, and placed in a situation in which free movement and the abandonment of obligations was possible. Certainly, while the Smithe Dynasty legislators were self-interested, their interests lay in placing themselves in the upper echelons of an *orderly* hierarchy. While they were quite content with the freedom granted them through impersonal wage relations, they did not expect that impersonalism to spread and undermine social order.

These observations — the apologetic nature of statist discourses, the persistence of earlier identifications and affiliations, and the unintended educational effects of social and economic relationships — should prompt us to widen our focus in examining regulatory interactions. Legal historians often explore the interaction of regulated populations with statist ambition through court records. As has become clear in recent years, published court records alone are insufficient to explore the complexity and contours of this relationship. Some historians, most notably Lori Chambers, have identified the exceptional nature of published cases, and advocate the examination of unpublished case materials as well. Yet, as is apparent from this dissertation, the addition

of unpublished case files does not flesh out the contours of regulation. Case files, whether published or unpublished, do not provide an adequate guide to the contributions and experiences of 'the regulated' — a term used quite loosely, given their demonstrated agency. A more comprehensive approach, examining the impact of regulatory ambitions outside the courtroom, is required. While this dissertation has made use of bureaucratic correspondence, government-collected data compilations, and quantitative studies of behaviour outside the courtroom, these sources are not available in every instance; neither are they exhaustive. They serve only to point legal historians in a general direction: we will only begin to understand the complexity of regulatory interactions when we begin to look beyond the courtroom. Of course, we will never gain absolute representivity; Yet by expanding our approach to incorporate the practices and findings of political, economic, and social historians, will we begin to gain a better appreciation of the range of regulatory experience.

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