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Socially Responsible Investing and Market Forces: Changing Environmental Practices and Regulations

by

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Guest Opinion

Rachel is in third year at the Faculty of Law, University of Ottawa. She was one of our summer legal research assistants.

Part Two Examples Of Environmental Degradation By Canadian And American Companies Internationally

Third world countries, generally occupying the world's tropical regions outside of Africa, are rich in mineral deposits (Earthworks and Oxfam America). Gold is especially rich in certain countries because they were not assaulted by a gold rush equal in scope to that of North America in the 1800's. Developing nations are, by definition, largely impoverished. With mineral resources in North America becoming increasingly difficult to mine, for several companies, the environment in developing countries is ideal because of the relative lack of regulation and abundance of opportunity.

Some of the world's largest environmental disasters from gold mining are located in Indonesia (Earthworks and Oxfam America, *Buyat Bay, Indonesia* (Boston: Earthworks and Oxfam America, 2004), online: <http://www.nodirtygold.org/buyat_bay_indonesia.cfm> [Earthworks and Oxfam, *Buyat Bay*]), Peru (Earthworks and Oxfam America, *Cajamarca, Peru* (Boston: Earthworks and Oxfam America, 2004), online: <http://www.nodirtygold.org/cajamarca_peru.cfm>) and Bolivia (Earthworks and Oxfam America, *Chiquitano Forest, Bolivia* (Boston: Earthworks and Oxfam America, 2004), online: <http://www.nodirtygold.org/chiquitano_forest_bolivia.cfm>). The impacts on the locals near the mines are near catastrophic. The response from the developed world can also cause serious impacts. One of the more shocking examples is how the World Bank conducted itself following a 2000 study that it commissioned on the impacts of the mining, oil and gas industries that it funds. The Extractive Industries Review (EIR) asserted that changes were required in the Bank's social and environmental criteria for lending money (World Bank

~~Group, *Shifting a Better Balance: The World Bank Group and Extractive Industries. The Final Report of the Extractive Industries Review* (Washington D.C.: The World Bank, 2004), online: <<http://www.worldbank.org/ogmc/files/finaeirmanagementresponse-execsum.pdf>>).~~ The Bank was rumoured to be uncooperative during the EIR (Friends of the Earth, *The Extractive Industries Review* (Washington D.C.: Friends of the Earth, 2002), online: <<http://www.foe.org/camps/intl/worldbank/902wbreveiw.html>>) and following its release, the Bank responded by disregarding almost all of the recommendations (Environmental Defense, *Extractive Industries Review*, (New York: Environmental Defense, 2002), online: <http://www.environmentaldefense.org/article.cfm?contentid=3667>>). Not only are companies failing to respect environmental standards abroad, creating far worse disasters than in North America, but the environmental damages are not considered grave enough to halt World Bank investment. This is because the current investing framework only acknowledges financial aspects of investing and considers actual monetary returns. Change to this framework is possible through investor and consumer advocacy.

Environmental Problems With Mining Stem From A Disconnect Between Mining Companies, The Government, Investors And Consumers In Both Canada And The

United States

The world is increasingly more globalized and yet, despite advances in communications technology, it is possible to remain extremely unaware of events that are occurring whether they are in your backyard or on the other side of an ocean. When it comes to the effects of mining, there are three likely reasons for this lack of common knowledge: 1) environmental and mining issues have been worn out and are only of interest when there is a large catastrophe, (Geoffery York, "China Coal Mine Explosion Traps 140" *The Globe and Mail* 29 November 2004, A10 (Toronto: The Globe and Mail, 2004)); 2) individuals are largely unaware of just how extensively mined resources pervade every aspect of current lifestyles; and 3) issues around mining and the environment are confusing, shrouded by large amounts of capital and generally do not make for exciting news. Since a majority of people are not aware of the specific environmental effects of mining, talks on the issue are largely left to the mining industry, provincial/state and federal governments and non-government organizations and interest groups. This disconnect between consumers, and in turn, their market power, and the mining industry means that one of the largest forces for instituting changes in

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Staff and Volunteers

We have been busy these past few months. **Lisa Ellis** continues to work with us on our Privacy Project. **Kaitlyn Hatch** is working on the Safety under the Rainbow Project. We continue to work on our joint CLERC family law for youth project and our joint project with the **Canadian Institute of Resources Law** on human rights and resource development. Two Masters of Education Students, **Megan Roach** and **Allison Leathwood**, joined us in the fall.

We are fortunate to be working with excellent volunteers for the last few months—including **Susan Blackman, Kevser Genc, Stephen Rimac, Shadi Nasser, Ariela Calin, Courtney Thompsom, Kristyn Steeves, Krishna Koul, Maricar Castillo, Gina Loitz, Maryla Ali, Sina Akbari, Patricia Gonzalez** and others. Thanks!!
 - Linda McKay-Panos

Panos

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University of Calgary
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 12:15 p.m.
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Congratulations to:

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practice is removed from the equation. Furthermore, large institutional investing organizations, such as pension plans, are also removed. The investment funds are derived from individuals who do not know how their money is truly being spent (Social Investment Forum, *Improving Environmental and Social Disclosure at the SEC* (Washington D.C.: Social Investment Forum and Coop America, 2004), online: <http://www.shareholderaction.org/campaigns/SEC_summary.cfm>).

With just mining companies and NGO's left to influence various levels of government, a change in legislation and regulation is almost impossible. Both sides carry votes and both sides arguably carry their views on ethics and monetary support. The result is that the only body able to actively legislate and regulate, the government, is pulled in too many directions. Rather than re-vamp division of powers in North America and look to fix institutions that have been in place for decades, the answer lies in increasing knowledge and broad-based consumer/investor awareness. Constitutional provisions do not influence consumers and investors in their decisions, but the capital and purchasing power of North Americans does have potential to tear into mining industry practices.

Separation of Powers Between Federal And Provincial/State Governments Makes Environmental Legislation For Mining Difficult

As previously mentioned, both Canadian and American systems of separation of powers between federal and state/provincial governments complicates environmental legislation. The environment is sometimes thought too pervasive in society to be left to one branch of government alone (Castrilli). Additionally, there are quite a few current environmental issues that were not considered a hundred years ago. Two examples are the concept of protecting endangered species and new knowledge of ecosystems where science has learned just how interconnected the environment is. Both Canada and the United States have unique legislative difficulties. Of the two, however, Canada has more federal power through a few "catch all" provisions that have been read in to the constitution.

Difficulties With Environmentally Friendly Legislation In Canada

In Canada, the division of power between federal and provincial governments is laid out in ss. 91-92 of the Constitution Act (Department of Justice Canada, *Constitution Acts 1867 to 1982* (Ottawa: MAC_critique.html). One large problem on both sides of the border is the "...increased corporate capital mobility and subsequent heightened regional competition (both domestically and internationally) for mineral investment, that has resulted in reduced leverage and weighting of environmental and social

issues" (MiningWatch Canada, *Overview of Canadian Environmental Mining Issues* (Ottawa: MiningWatch Canada, 2004), online: <http://www.miningwatch.org/emcbc/publications/public_interest.htm#Overview>). This is why investor and consumer advocacy will trump government actions to increase environmentally sound practices amongst mining companies. By controlling the assets and profits of a company, investors and consumers have more influence than the government in the short term. It takes a long time to pass laws, especially with regards to division of powers, and it takes even longer to set up meaningful industry "watch-dogs". Current market trends are supporting corporate disclosure of environmental practices and, when coupled with investor and consumer advocacy, there will be immense pressure on the mining industry to develop better technology and pay more attention to the environment. A majority of this pressure comes in the wake of corporate scandals, where disclosure of severe environmental destruction as a function of corporate liability is encouraged. This does not mean that investors and consumers cannot use this disclosure to mount campaigns for better environmental practices. Quite the opposite is true, because the need for disclosure is the same between environmental agencies and securities commissions (William Baue, "Companies Skirt Disclosure of Environmental Liabilities" *SocialFunds.com* (Burlington VT: SRI World Group Inc., 2002), online: <<http://www.socialfunds.com/news/article.cgi/article815.html>>).

Monitoring Corporate Behaviour Through Socially Responsible Investing And Consumer Advocacy Distinguishes The Environmental Impacts of Mining Practices

In analyzing the effect of market forces on mining practices, there are three aspects to "market forces" that require attention: socially responsible investing, shareholder advocacy and consumer advocacy. Briefly, socially responsible investing is the practice of investing only in companies that meet certain environmental criteria; shareholder advocacy is how corporate shareholders can use their power as investors to change corporate practices; and consumer advocacy is the effects that consumers can have on a market through how they spend their dollars at the cash register. These are different views on how economics can impact environmental practices more effectively than mainstream "environmental economics". Environmental economics purports to improve public policy by incorporating the "value of everything" in market prices. This means including environmental degradation in the price by altering actual prices of goods to include a monetary value for the

good's impact on the environment (David W. Pearce, *Economic Values and the Natural World* (Cambridge: The MIT Press, 1993) 23-30 and in general 13-53). The following will show that environmental organizations need to look towards harnessing market forces to institute changes in mining practices.

Socially Responsible Investing Influences Corporate Behaviour

Socially responsible investing (SRI) looks to both the investment's impact on society and the investor's financial needs (Social Investment Forum, *Introduction to Socially Responsible Investing*, (Washington D.C.: Social Investment Forum & Co-op America, 2002), online: Online Guide to SRI: Introduction <<http://www.socialinvest.org/areas/sriguide/>>). Traditionally, only financial returns have been considered when making investments because the financial outcomes of the investment were all that was seen as important. Socially responsible investing consists of "...investment decisions or activities conducted with the deliberate application of an investor's moral, ethical, social and/or environmental values" (Investor Responsibility Research Center, Resources: Glossary, (Washington D.C.: Investor Responsibility Research Center, Inc., 2005), online: <<http://www.irrc.org/resources/glossary.htm>>). Investors in three ways can carry out SRI: positive and negative screening, community investment, and shareholder advocacy (Social Investment Organization: The Canadian Association for Socially Responsible Investment, Screening, (Toronto: Social Investment Organization, 2004), online: <<http://www.socialinvestment.ca/screening.htm>>). In terms of environmental criteria, positive screening involves purposely seeking out companies to invest in based on their environmental practices. Negative screening would involve purposely not investing in companies that fail to meet a certain level of environmental practices. Community investing is not a practical tool for change in this sense because it involves investing alternatively—using volunteer resources to pick funds, and does not apply as much to large-scale institutional investing (Social Investment Organization: The Canadian Association for Socially Responsible Investment, *Community Investment Background*, (Toronto: Social Investment Organization, 2004), online: <<http://www.socialinvestment.ca/comminvestment.htm>>). Furthermore, by avoiding mainstream investing altogether, the effect of using capital to alter corporate

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policies is not as forceful and potentially completely null. Shareholder advocacy is touched upon in the next section. By screening for environmentally sound funds, individuals can shift the market.

Shareholder Advocacy Also Influences Corporate Behaviour

Shareholder advocacy is very influential because it usually involves the actions of large institutional investors, such as pension funds, which can manage millions or billions of dollars in investment capital. Since these funds will usually own larger numbers of shares than an individual, their ability to control corporate directives through creating proposals for the company on its practices, directly communicating with the company or divesting is fairly powerful (Social Investment Organization: The Canadian Association for Socially Responsible Investment, *Shareholder Background*, (Toronto: Social Investment Organization, 2004), online: <<http://www.socialinvestment.ca/shareholderbackground.htm>>). Shareholders have power in numbers and their influence in Company Boardrooms through resolutions can be highly effective. For example, Devon Energy, when faced with a shareholder resolution on reporting environmental practices by Domini Social Investments, agreed to report its environmental practices on its website when the resolution was withdrawn (Domini Social Investments, *Current Work* (Providence: Domini Social Investments, 2004), online: <<http://www.domini.com/shareholder-advocacy/Current-Wo/>>) “(S)tudies conducted to date indicate a positive correlation with respect to shareholder engagement on traditional corporate governance matters” (Gil Yaron, *Canadian Institutional Shareholder Activism* (Vancouver: SHARE, 2002), online: Canadian Institutional Shareholder Activism” <http://www.share.ca/files/pdfs/02_02_11_final2.pdf at 13). Discussions between Domini, Merrill Lynch and a host of other NGO’s is currently helping Merrill Lynch to put an adequate environmental screening system in place so that it does not fund environmentally detrimental projects in the future (Domini Social Investments, *Shareholder Advocacy* (Providence: Domini Social Investments, 2004), online: <http://www.domini.com/Media-Center/Social-Impact/shareholder_advocacy.doc_cvt.htm>). Just last year, Citigroup, the world’s largest bank, adopted significant environmental standards after a long campaign by the Rainforest Action Network (Rainforest Action Network, *The Global Finance Campaign* (San Francisco: Rainforest Action Network, 2004), online: Campaign <http://www.ran.org/ran_campaigns/global_finance/>). These standards are monumental in that they are working to reconcile the economy and investing with

the environment. Since various groups have already been able to influence change in corporate practices, on both investment and industrial levels, organizations can surely do the same with regards to mining practices and shareholder advocacy.

Consumer Advocacy Is Perhaps The Most Important Method Of Changing Environmental Practices But It Requires Extensive Knowledge Of Products And A Range Of Alternatives

Products are successful because they either fill a void in an existing market, are competitive in an established market, or are able to create a new need in an emerging market. In each of these scenarios, the success results from people choosing to buy that specific product over another with, in the words of Adam Smith, the scarce resources that they as a consumer have. If there is no market, not enough people are willing to buy the good, then the company producing it will have to rethink producing that good. For this reason the people who buy things, virtually every individual in the developed world, constitute the largest market force possible. Campaigns by NGO’s have proven successful in the forestry/timber industry. A campaign headed by the Forest Stewardship Council (FSC) was responsible for encouraging several major US corporations that do business across North America to change their timber buying practices (Neil Gunningham and Darren Sinclair, *Voluntary Approaches to Environmental Protection* (Sydney: Australian National University) online: <<http://www.natural-resources.org/minerals/docs/oecd/Voluntary%20Approaches%20to%20Environmental%20Protection%20%20Lessons%20from%20the%20Mining%20and%20Forestry%20Sectors.pdf>> at 13). In Canada, a group called Markets Initiative has had success in encouraging printers and publishers to use products that do not incorporate wood from old growth forests (Markets Initiative, *Who We Are* (Vancouver: Markets Initiative, 2004), online: <<http://www.oldgrowthfree.com/who.html>>). The Rainforest Action Network is also conducting market campaigns to get citizens and consumers involved and aware of environmental practices (Rainforest Action Network, *Action* (San Francisco: Rainforest Action Network, 2004), online: <<http://action.ran.org/action/>>).

Recently, mining companies have taken on voluntary standards of conduct in both Canada and the United States to improve their image and support their products; in other words to attract more investment and sell more. (International Council on Mining and Metals, *Global Mining Initiative* (London: International Council on Mining and Metals, 2004), online: <<http://www.icmm.com/gmi>

[php](#)>). While noble, and perhaps undertaken for reasons of actual environmental concern, these standards are only voluntary. There is no real and meaningful system to enforce their goals for more environmentally sustainable mining. Consumer advocacy, however, is in a situation to hold mining companies accountable and even these voluntary associations. New forestry certifications came out of campaigns targeting consumers and similar campaigns for mining, such as the No Dirty Gold campaign, have potential because through raising buyer awareness it can shift product purchases and corporate policies. Gold mining is excellent for such market campaigns because of the reasons listed above: the market is almost entirely driven by non-necessary products (the majority of gold is used for jewellery), the environmental impacts are extremely egregious, and gold mining is found in several countries around the world.

Targeting Market Forces Vis-à-vis Corporate Environmental Practices Is A Robust Way To Encourage Safer Mining Practices Around The Globe

The discussion has already addressed why international and other treaties and unilateral government action, on the part of Canada and the United States, are incapable of fully revamping the laws and regulations around mining. It has also been argued that market forces, by way of investors and consumers are the best way to target a change in environmental practices. Using market forces is the most effectual way to currently target environmental issues. Encouraging companies to change their bottom line and use and develop technologies that are safer for the environment will create a long-lasting trend in the industry. To date, companies in some sectors have adopted a more complex understanding of environmental impact because of public expectations. The end result is that there is greater motivation to develop new environmentally sound technologies (David Monsma and John Buckley, “Non-Financial Corporate Performance: The Material Edges of Social and Environmental Disclosure” (2004) 11 University of Baltimore Journal of Environmental Law 151) and the trend needs to continue. Using consumer and investor advocacy will encourage a “race to not be at the bottom”. Companies will not want to be the worst in the industry even though there is no real internal benefit to being at the top. This is already evidenced by statements from the McDonald Gold Project in Montana ([http://](#)

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Pornography, Expression and Equality

by Carlee Campbell

Carlee is currently completing the final year of her Bachelor of Commerce degree in International Business at the University of Calgary. Upon graduation, she aspires to attend law school with the intent of eventually practicing International Trade/Human Rights Law.

Introduction

There are few words in the English language whose simple utterance has the ability to give pause to a room full of people, yet the word 'pornography' has this precise power. Experiment for yourself. In the midst of any given conversation on sexuality, morality, individuality or some such related subject, mention the topic of sexually explicit matter and you will likely be greeted with hesitant silence.

Uncomfortable dismissal using legal, moralist, paternalistic or equality-based arguments will probably follow. After all, the common pornographic subject materials of masturbation, infidelity, anal penetration and orgies are, at the very least, disturbing. The majority does not wish to interrupt conversations over afternoon coffee or evening cocktails with the shame of such sex, or worse, the perversions of pornography. Discomfort will undoubtedly turn to revulsion if the subject of sexual intercourse is coupled with "crime, horror, cruelty or violence," at which point such obscenity becomes illegal according to the *Criminal Code of Canada*.

This perceived discomfort of the majority with the extremes of sexuality, also known as the *Community Standard of Tolerance Test*, is the standard the courts use to determine whether a given material is criminal. This was the standard applied in the 1992 Supreme Court of Canada case, *R. v. Butler*, which supposedly resulted in the egalitarianism of the sexes triumphing over the freedom of expression. However, this 'majority rules' approach to the case, coupled with a glaringly

obvious lack of evidence, resulted in an erroneous and detrimental outcome for the equality, expression and privacy rights of both sexes. Moreover, in accordance with John Stuart Mill's "harm principle", the only viable justification for limiting the freedoms of any reasonable, mature individual is to prevent harm to others in society. (Mill, *On Liberty* 1859, at 327) Therefore, both the outcome of *R. v. Butler* and section 163 of the *Criminal Code* should be outside the scope of governmental regulation, because such a limitation cannot be "demonstrably justified in a free and democratic society." (*Charter*, s. 1)

Legislative and Judicial History of Pornography

Despite the above assertion, the Canadian government has quite an extensive history of criminalizing pornography, frequently under the guise of obscenity. The 1868 English case, *R. v. Hicklin*, defined obscenity as material that has a tendency "to deprave or corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." In section 179 of the *Criminal Code* of 1892, the government made illegal the public sale of "any obscene book, or other printed or written matter, or any picture, photograph, model or other object, tending to corrupt morals." In 1949, section 179 (then 207) was broadened to include a greater array of materials, such as crime comics, as well as criminalizing the mere possession of such matter. Notably, however, the overt moral justification for the legislation was removed during the revision, although the ambiguity was not. Terms lacking precise definitions, such as "indecent", "obscene" and "disgusting," remained and were consequently subject to varied interpretations.

Ten years later, the government remedied the situation and enacted what is currently known as section 163 of the *Criminal Code*, which more

clearly outlines what is to be deemed obscene by the courts. According to the current provision, "any publication a dominant characteristic of which is the undue exploitation of sex or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence shall be deemed to be obscene." Defining obscenity effectively discarded the *Hicklin* test, which was largely rooted in judicial as well as moral subjectivity, and replaced it with an arguably more objective standard. As section 163(8) was now to be the exclusive measure of obscenity, the court developed a series of intertwined tests to determine whether the definition was satisfied.

The first of these was the *Community Standard of Tolerance* test, developed by the Supreme Court of Canada in *R v. Brodie* (1962). In essence, the court is called upon to weigh the nature of the obscenity against the contemporary mores of what is decent and what is not. In applying this standard in *R v. Towne Hall Cinemas* (1985), Chief Justice Dickson clarified:

It is a standard of tolerance, not taste, that is relevant. What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it.

Although the courts concede that Canadians will likely tolerate varying levels of graphic or offensive materials, it is asserted that accounting for the whole of society will balance the extreme views on any given issue.

Nevertheless, the courts must regard any materials that fail the *Degradation or Dehumanization* test, by exploiting sex in the manner outlined in section

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-continued from page 5 163(8), as failing the corresponding *Community Standards of Tolerance* test. However, judicial interpretation evidenced itself in several subsequent decisions, such as *R. v. Wagner* (1985) in which the judge determined that violence need not be present for the test to be answered in the affirmative. In *R. v. Ramsingh* (1984), Justice Ferg concurred that materials can also be deemed obscene if women, and sometimes men, are “exploited... humiliated and treated only as an object of male domination sexually.” He argued that the consent of individuals participating in the filming or viewing of such materials is not sufficient to override the degrading and objectifying aspect inherent within pornography.

However, in attempting to balance freedom of expression against gender equality, the court included the *Internal Necessities* test. This test has also been dubbed the “artistic defense” because, as articulated by Justice Judson in *R v. Brodie*, it:

[h]as been interpreted to assess whether the exploitation of sex has a justifiable role in advancing the plot or the theme, and in considering the work as a whole, does not merely represent dirt for dirt’s sake, but has a legitimate role when measured by the internal necessities of the work itself.

Hence, the courts at least made a *prima facie* attempt to legitimize expression when they choose to deem it artistic or significant enough to merit public access in some capacity.

The overarching justification for each of these tests, and the *Criminal Code* provision itself, is that pornography causes direct harm to both individuals and society as a whole. “Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or what is perhaps debatable, the reverse” (*Towne Cinema*, 1985). The detrimental effects of pornography are also claimed to manifest in negative portrayals of women and subsequent violence towards them, as a result of desensitization. Hence, when the public perceives the risks associated with

pornography to increase, their tolerance for the materials will correspondingly decrease. Yet, the courts did recognize that legitimate artistic expression could be hampered by public disgruntlement over a given work. Therefore, when determining the weight of the given tests, the courts have determined that since “artistic expression rests at the heart of freedom of expression values and (consequently) any doubt in this regard must be resolved in favor of freedom of expression” (*Towne Cinema*, 1985).

R v. Butler

On February 27, 1992, the Supreme Court of Canada heard the *Butler* Case, which was an appeal from the Manitoba Court of Appeal. The accused owned an adult store that rented and sold “hard core” pornographic videos and paraphernalia. Both the movies and the “sex toys” were *prima facie* deemed to contravene the law, as they promoted violence and cruelty. Moreover, the videotapes depicted lack of consent, thereby appearing to endorse criminal activity. Consequentially, Donald Victor Butler was charged with numerous counts of selling, possessing and distributing obscene material under section 163 of the *Criminal Code*.

The trial judge, however, had found that it was only possible to convict Butler on the charges relating to eight videotapes that explicitly demonstrated violence and cruelty. The multiple remaining charges were dismissed. The decision was appealed and the majority of the Court of Appeal determined that Butler was in fact guilty of *all* counts of obscenity that he had been charged with under section 163(8). The dominating rationale of the appellate judges was that the pornographic materials were not covered by the *Charter* protection for freedom of expression. Instead, they asserted that “hard core” adult videos and paraphernalia constitute “purely physical activity and involve the undue exploitation of sex and the degradation of human equality” (*Butler*, 1992).

The decision was appealed yet again. The Justices of the Supreme Court of Canada concluded that the Manitoba Court of Appeal had erred in its conclusion that pornographic materials fell outside the scope of the *Charter*. The Supreme Court asserted that:

Section 163 of the Code seeks to prohibit certain types of expressive activity and thereby infringes section 2(b) of the Charter. ... Activities cannot be prohibited from the scope of a guaranteed freedom on the basis of the content or meaning being conveyed. (*Butler*, 1992)

The courts then applied the aforementioned tests and concluded that the materials provided by Butler failed the *Community Standard of Tolerance* test, as the nature of the materials forced the court to answer the *Degradation/Dehumanization* test in the affirmative. Moreover, the Supreme Court concluded that harm done to gender equality was sufficient to override the virtually non-existent artistic/political merit of the pornographic materials in question. As a result, section 163 of the *Criminal Code* was saved by section 1 of the *Charter* as “a reasonable limit demonstrably justified in a free and democratic society,” the effect of which is proportional to the harm the provision is attempting to prevent.

When the gavel dropped at the close of *R. v. Butler*, gender equality had triumphed. Feminists were ecstatic that their rhetoric prevailed throughout the rendering of the Supreme Court of Canada decision. However, the case has also been heralded as a victory for society at large, as it “addresses the ultimate community harm: the harm caused to equality by expression which makes degradation, humiliation, victimization and violence in human relationships appear normal and acceptable.” (Christopher N. Kendall, “Gay Male Pornography After Little Sisters Book and Art Emporium: A Call for Gay Male Cooperation in the Struggle for Sex Equality” (1997) 12 *Wisconsin Women’s L.J.* 21 at 31). The pornographic materials were weighed against the standards of the community and the sexually explicit was found wanting in virtually every aspect.

Within this test, however, the fundamental flaws in the judicial reasoning of the *Butler* case are

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 exposed. The *Community Standards of Tolerance* test contains several inherent contradictions that make its consistent application impossible. The court calls upon the public to be "serve as an arbiter in determining what amounts to an undue exploitation of sex" (Brodie, 1963). They must fulfill this function because if such pornographic materials were permitted, they would be susceptible to the nefarious influence of the sexually explicit. In essence, the court is encouraging debate in order to censure expression. As counter-intuitive as this is, it gets worse. In both *Keegstra* and *Butler*, the court asserts that one must regulate expression precisely because it is not evident that "rationality will overcome all falsehoods in the unregulated marketplace of ideas" (Keegstra, 1990). Therefore, the Supreme Court calls upon the public they have deemed irrational to make a rational interpretation of the definition of obscene in section 163 of the *Criminal Code*.

This process of examination becomes stranger still when it is discovered that no actual evidence of the public's opinion is required. Nowhere in *Butler* does the judge refer to statistics or submissions that indicate what the widespread opinions on pornography are. However, one can infer from the list of interveners in the *Butler* case, including various civil liberties and women's rights groups, that the court heard the extreme views that the *Community Standards of Tolerance* test is designed to guard against. Even if the courts had endeavored to discern the opinion of the majority, it is unclear how this would be objectively determined when presented with such a wide array of personal viewpoints on the subject. Hence, one must realize that this test is little more than "judicial subjectivity and value judgments dressed up in the objective garb of community standards" (Richard Moon, "R. v. Butler: The Limits of the Supreme Court's Feminist Re-Interpretation of s. 163" (1993) 25 Ottawa L. Rev. 361 at 370 [Moon]).

However, even if value judgments of the justices are involved, the courts surreptitiously deny that this examination is conducted with the purpose of imposing a universal

standard of morality upon society. In *R. v. Irwin Troy Ltd.*, Justice Wright asserted:

Legislation that seeks to proscribe a fundamental freedom must have as its objective a more precise purpose than simply to control the morals of society...the aim must be directed more specifically to objectives such as equality concerns... otherwise the basic freedoms in the Charter will be subject to restrictions that arise from very personal and subjective opinions of right and wrong.

A superficial examination of *Butler* would undoubtedly lead one to conclude that the purported safeguarding of equality satisfies the above requirement. However, Justice Sopinka expressly rejects this premise, instead asserting that the government has "the right to legislate on the basis of some fundamental conception of morality" (*Butler*, 1992).

More importantly, however, the court can only be the guardian of equality if an actual harm can be shown to exist. The court openly admits in *Butler* that it is exceedingly difficult, if not impossible, to demonstrate causation in the case of sexually explicit materials. In other words, there is no concrete evidence to prove that exposure to such "hard core" pornography is detrimental to individuals' attitudes, or that it results in violent crime, particularly against women. As Justice Wilson stated:

The most that can be said...is that the public has concluded that exposure to material which degrades the human dimensions of life...(likely) contributes to a process of moral desensitization (and) must be harmful in some way (*Towne Cinema*, 1985).

This statement does not exactly contain the certainty one would assume necessary to prove that a harm was committed beyond a reasonable doubt, the required standard in criminal cases. Moreover, the court recognizes that well-respected investigations into the matter, such as those that resulted in the *Fraser Report*, failed to find the

type of relationship the court needs to support its argument stemming from equality. Yet "as long as it is possible to speculate that sexually explicit materials cause some negative implication for gender equality, Mr. Justice Sopinka's standard of proportionality will be met" (Jamie Cameron, "Abstract Principle v. Contextual Conceptions of Harm: A Comment on Butler" (1991-1992) 37 McGill L.J. 1135 at 1151).

Evaluation of R. v. Butler

Given this substantial lack of evidence, the court is left with precisely the type of moral decision that was forbidden in *R. v. Irwin Troy Ltd.* However, this does not seem to pose a problem for Justice Sopinka, as he cites "the right of the state to legislate to protect its moral fiber and well-being has been long-recognized, with roots deep in history" (*R. v. Great West News Ltd.*, 1970). This fact is indisputable. However, the examination of past moralistic legislation is detrimental to Sopinka's arguments. It was fear of moral harm that segregated so-called "negro savages" from proper, white society and mentally or physically disabled children from the "normal" school system. Though these examples are not based on freedom of expression, they do represent the marginalization of a given minority's rights based on the socially accepted mores of the majority. Pornography and the corresponding freedom of expression rights are now in the same situation. Therefore, "the law does not seek to prevent harm to women. It seeks to prevent material that the community considers harmful and therefore it not prepared to tolerate... But...this could change," just as it did in the aforementioned cases (Moon, at 369). When this occurs, society will be left facing yet another glaring example of its ignorance and tendency to suppress that which it fears.

It is precisely such circumstances that Mill addresses in his essay "*On Liberty*". He argues that each person is endowed with the fundamental and

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inalienable entitlement to self-protection, thereby enabling them to restrict the liberty of those who would seek to violate this right. However, in so far as their pursuit of self-fulfillment does not cause harm to another, their actions should not be restricted. Therefore, none of the legal, paternalistic, or moralist principles so common in modern laws are justifiable. The aforementioned are only permitted to be a means of persuading an individual to act in a manner one believes best. Moreover, Mill wholly exempts any indirect harm from prosecution, which is the most pornography could legitimately be argued to cause. An act having no instantaneously assignable consequences for a particular individual or group, despite causing inconvenience or negative feelings, should not be punishable at law.

Prior to the anti-pornography debates, "a woman's body, a woman's right" was the slogan of feminists everywhere in which "every peaceful choice a woman makes with her own body must be accorded full legal protection, if not respect" (Wendy McElroy, "A Feminist Overview of Pornography, Ending in a Defense Thereof" web site: www.zetetics.com/mac/freeinquiry.htm [McElroy]). They, too, appeared to agree with Mill that the liberties of individual conscience, expression, tastes, pursuits and association must be left to each person to regulate, as individuals can far better prescribe what is best for, and morally acceptable to them, than can the state. However, now it appears that many feminists wish to put limits on the very freedoms they have endeavored to gain. It is apparently inconceivable that a woman would wish to participate in pornography in any capacity. Instead they argue that "a male controlled society has made it impossible for women to consent... (yet) radical feminists still declare that 'no means no.' But on some sexual matters, saying 'yes' apparently means nothing" (McElroy).

However, discounting the Supreme Court decision reached in the *Butler* case is not simply about permitting the distasteful, or even

the disgusting, simply because a perverted minority enjoys indulging in pornography. One must recognize that every man and woman "has the right to define what is degrading and liberating for (him/her) self." It also necessitates recognizing the potential gains from sexually explicit materials, no matter how obscene. Wendy McElroy, in her essay *A Feminist Defense of Pornography*, asserts three convincing reasons to permit the distribution of pornography:

- 1) It gives a panoramic view of the world's sexual possibilities...
- 2) It allows women to safely experience sexual alternative and satisfy a healthy sexual curiosity...
- 3) It offers the emotional information that comes only from experiencing something either directly or vicariously." (McElroy)

In essence, it allows women to experience the sexual freedom they have sought for centuries in whatever manner they choose.

Conclusion

Given the advantages of allowing sexually explicit materials, one must realize that it is not the portrayal of sex in pornography, but attitudes of sexism that degrade women (McElroy). Given that the court has ascribed to the public what is acceptable and unacceptable to them, these same people should be accorded the freedom to exercise such discretion in their personal lives. In fact, exposing people to the extremes of any form of expression allows them to more fully clarify their personal position on a given issue. In contrast, preventing them from this exercise, should they choose to engage in it, simply incites the baser desire to investigate the forbidden. Most importantly, however, there is a depressing irony to the feminist anti-pornography arguments. As stated by McElroy:

It has been state regulation, not free speech, that has oppressed women... It was 18th century law, not pornography that defined women as chattel. 19th century laws allowed men to commit wayward women

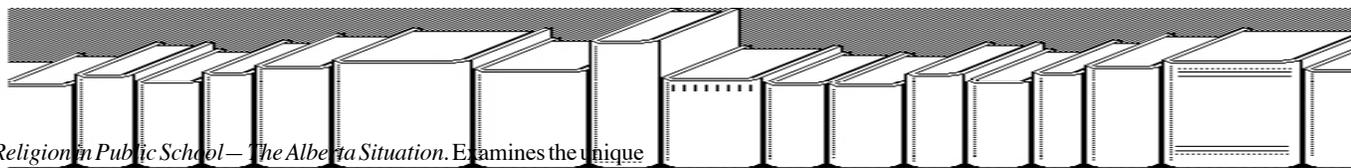
to insane asylums, to claim their wives earnings and beat them up with impunity. Now 20th century anti-porn may define what sexual choices are acceptable for women to make (McElroy).

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www.spjv.com/progress.htm), which is banking on its commitment to environmental excellence in a state that has seen its share of environmental damage from gold mining. The CEO of Syncrude Canada Ltd. has also acknowledged that there is a strong business case for corporate social responsibility (http://www.mining.ca/english/speech-es/carter-cim.pdf). Since mining and mineral companies are recognizing that there is a role for responsible business practices, the door is open for consumers and investors to run with campaigns for better environmental practices.

In the above section it was shown that market forces do have power to bring about changes in environmental practices. The most important aspect of this process in changing corporate practice is that it is unifying (albeit in a somewhat notorious way) the environmental goals of the public and mining companies. Once the industry voluntarily changes its excavation methods, there is no longer a tear between the industries and their profits and concerned citizens and their votes. In theory, this would make it easier for governments to then impose tougher legislation and to increase criminal and quasi-criminal penalties for environmental offences. In a way there would no longer be a corporate "director's dilemma" (Diane Saxe, *Environmental Offences* (Aurora: Canada Law Book Inc., 1990) at 191) between public obligations to the environment and the more private obligations to shareholders. Government officials would no longer be torn between diametrically opposed positions either because both sides would support stricter laws: citizens/investors out of concern for the environment and corporations to make sure that their competition is also subject to the same standards so that they cannot sell for a more competitive price because of unsafe environmental practices.

A Large Part Of Environmental Damage In Third World Countries Is At The Hands Of First-World Mining Companies

There are frequent occurrences of small-scale mining in developing countries, where individuals and families operate their own mines, but these and the effects from them are beyond the scope of this article. In particular, the effects of small-scale mining are usually limited to the family operating the mine and therefore result in mainly health issues, not the environmental degradation that is

seen from large mining (Earthworks and Oxfam America at 25). When it comes to large-scale mining it is mostly companies domiciled in the developed world that operate the mines. Large-scale mining operations are often costly; too costly for private companies but not always too costly for their governments (Earthworks and Oxfam America at 27). If changes in mining practices can be implemented in developed countries and in companies from developed countries, those changes in practice will spill over to gold mines around the globe.

Eliminating Corporate Objections To Legislation and Regulatory Measures Can Allow For Governments To Bridge Division Of Powers and Take Environmental Action

An inherent problem in government legislation on the environment, in addition to the division of powers, is the effect of business and money on regional economies. A majority of the west formed as a result of natural resources exploitation and the west was the economic boom child of mining. This is one reason why it is hard to instigate compliance with environmental measures: there are no incentives to undertake better environmental practices than the competition when it will cost more.

Eliminating the "director's dilemma" is especially important. While a majority of mining companies is publicly traded and owned, there will inevitably be situations where the securities of a few companies are almost completely controlled by one or a few individuals who will not respond to public investor action. Consumer advocacy could still encourage change but there is always something to be said for having the lowest price in a market economy. The catch in long-term robust mining laws, then, would be to use investor and consumer advocacy at the beginning, to encourage fairly large change in practice across a range of companies, and then turn to the government to increase laws. Ideally the investor and consumer campaigns would have had an effect on enough companies that there would be fairly wide support for tougher regulations; at least enough support to counter the mining companies that would not respond to the "market forces" campaigns.

Division of powers in both Canada and the United States potentially shares one important aspect: if large portions of society and industry (in effect, a large number of voters) are in agreement, then federal and state/provincial governments will have a high incentive to work together to bridge their powers and create environmental legislation. There would be little reason to fight tougher laws. In particular, if the majority of companies has in essence agreed to environmental standards then new laws would only be effecting actual change for a small number of businesses. With the mining industry in such agreement it would also be easier to create similar laws in each state/province and avoid the vast differences that currently exist (http://www.mining.bc.ca/files/mining_and_environment/000026.html, <http://www.dnr.state.ak.us/mlw/mining/index.htm>, <http://www.deq.state.mt.us/hardrock/Index.asp>.)

Conclusion

People, as investors and consumers, hold a great deal of power in today's market. Through investing in pensions, mutual funds and purchasing an array of products, people are consuming the products of hard-rock mining. By purchasing jewellery and investing in gold mining, individuals are contributing to gross environmental degradation in North America and the world. There are large impediments to mining regulation, most of which are tied up in the division of powers of the Canadian and American governments. This means that for there to be any change in mining practices in the near future, and if mining companies are going to be encouraged to develop new technologies, investors and consumers need to be the driving forces. Canada does not have nearly the population nor economy of the United States, but if NGO's in both countries are willing to initiate campaigns on issues of investor and consumer knowledge then people in both countries will be able to make better choices. This isn't to say that every individual will automatically start petitioning his/her local mining companies and divest their securities in gold mining, but it is virtually impossible to initiate change otherwise. The successes of the FSC in the forestry industry, and moderate successes regarding mining, show that there is a supportive market force out there if it can just be contacted and rallied.

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