ENVIRONMENTAL JUSTICE IN CANADA: AN APPLICATION TO A FIRST NATIONS' STRUGGLE TO PROTECT CARIBOU FROM COAL MINING IN NORTHEAST BRITISH COLUMBIA

by

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Abstract

In the United States of America, the field of environmental justice has become an important consideration in land use planning and natural resource management decisions regarding the protection of minorities. Within Canada, however, the field of environmental justice is not part of the legislative or policy regime used in environmental decision making. The focus of this study was to incorporate environmental justice into a situation in Canada involving a First Nation and a land and natural resource conflict. A phenomenology study design and a content analysis of the existing data were used to develop and apply the equality framework to a recent land use conflict between West Moberly First Nations and the Provincial Government of British Columbia. The results demonstrated that environmental justice can be incorporated into a Canadian context. When applied to the land use conflict, the equality framework demonstrated that the decisions made by the government to permit a coal mining company to destroy the critical habitat of a threatened herd of caribou were tantamount to an environmental injustice for the First Nation. The study concludes by discussing the differences of environmental justice as developed America in comparison to Canada, the challenges that associated with incorporation, and potential future applications and frameworks.

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Preface: "Too close to creek"

Before I submitted a research proposal to my Thesis Committee, Dr. Annie Booth (my Thesis Supervisor) provided me with invaluable advice: work and live with a First Nation before conducting scientific research that relates to them. This advice sent me on a journey that has substantially changed the way I think and view environmental matters.

Taking heed of this advice, I spent a summer working for and living in the traditional territory of Nak'azdli First Nation. While there, an Elder taught me a lesson that I will never forget: some things cannot be measured. This is where "Too close to creek" comes from. It took me well over a month, and in addition to guidance and assistance of another community, for me to fully appreciate the breadth and holistic nature of the Elders' traditional knowledge. That lesson guides me to this day.

In similar fashion, my education continued when I started working for West Moberly First Nations nearly six years ago as their Senior Environmental Planner / Land Use Manager. It is difficult to put into words what I have learned to date, both academically and spiritually, from community members of all ages. Their cultural resolve to protect the inherent rights of the land and wildlife, in particular the threatened *Wah stzee* (caribou) within their territory, is inspirational. It is for that reason, and the advice I received from Wendy Aasen (Thesis Committee Member) in terms of selecting an example that I care about, that I decided to use the community's struggle as a focal point of my thesis. Although it was not until after I attended the trial that was heard by the British Columbia Supreme Court, where I witnessed the Crown making arguments that were less grounded in a sense of justice for both the environment and First Nations

and more so on short-term thinking and economically focused, that I made the decision to use the community's experience as a means to illustrate the application of an environmental justice framework in a Canadian context. Such an experience was profound; every British Columbian ought to be aware of what their government actually thought about people, health, and the environment. I truly hope that this thesis will provide context for some and be a voice for those, such as the members of West Moberly, that are struggling to protect the environment for future generations.

While my journey began roughly 10 years ago, what I have and continue to learn from First Nations will be with me forever. As one community taught me, 'with everything there's a beginning that leads you to an end, which is merely another beginning. That is consistent with a First Nations' way of thinking and living in a circle'.

Acronyms and Abbreviations

ABR	Aboriginal Relations Branch
AMEBC	Association for Mineral Exploration British Columbia
BC	British Columbia
BCSC	British Columbia Supreme Court
BMP	Best Management Practices
CRJ	Commission on Racial Justice
CRM	Central Rock Mountains
EPA	Environmental Protection Agency
FCC	First Coal Corporation
ILMB	Integrated Land Management Bureau
GAO	General Accounting Office
LULU	Local Unwanted Land Use
MEMPR	Ministry of Energy, Mines and Petroleum Resources
MABC	Mineral Exploration British Columbia
MOE	Ministry of Environment
MOFR	Ministry of Forests and Range
NGO	Non-Government Organization
NIABY	Not in Anyone's Backyard
NIMBY	Not in My Back Yard
NCMP	Northern Caribou Management Plan
NoW	Notice of Work
NRC	National Research Council
PCB	Polychlorinated Biphenyl
RA	Risk Assessment
RCRA	Resource Conservation and Recovery Act
RIG	Recovery Implementation Group
RRA	Resource Review Area
SARA	Species at Risk Act
SCC	Supreme Court of Canada
SDRI	Social Demographic Research Institute
TSDF	Treatment, Storage, and Disposal Facilities
WMFN	West Moberly First Nations

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I would like to thank all of the people that have discussed my research topic with me over the years, including my colleagues at the University of Northern British Columbia. This also includes the community members from West Moberly First Nations that shared their knowledge with me over the years. They were always patient when teaching me their traditions and worldview. My family is owed a special thank you as well. They provided me with the undaunted and continuous support over many years that I needed to fulfil my personal and educational aspirations.

Finally, I would like to thank my supervisor Dr. Annie Booth for her persistent encouragement in this endeavour, and my committee members, Wendy Aasen and Dr. Zoe Meletis for the patience and advice they have given me, in particular their and dedication to assist me in making my timeline to complete the requirements for my degree. In addition, I would like to thank my External Examiner, Dr. Maureen Reed, for her time and insights into this research. Without the participation of these people this endeavour would not have been successful.

Chapter One: Introduction

1.0 When Cultures Collide

Environmental justice within Canada, in particular regarding to First Nations, is poorly studied. This is a significant issue because, in northern areas throughout Canada, First Nations are confronted with problems relating to the exploitation of land and natural resource in their respective territories and the results of such development (Harring, 1998; Anderson and Bone, 2003). Ranging from the Mackenzie Valley Pipeline Inquiry in the 1970s (Berger, 1988) to the many hydroelectric dams in northern Quebec (Grim, 2001) and the competition over access to and allocations of ocean resources (Sharma, 1998), industrial operations in the territories of First Nations have been the basis of various land use conflicts with the Crown, which have led to a plethora of legal challenges.[1]

British Columbia (BC) is not immune to these issues. Not only are such problems exacerbated for many northern First Nations generally, but the recent downturn in the provincial economy (e.g. displaced forestry workers) has resulted in the BC government focusing its attention on furthering the exploitation of natural resources within its territories, in particular making available coal and mineral resources for the mining

[1] Since Europeans arrived on the shores of what is now referred to as North America, legal challenges have come to represent the relationship between the Crown (in both its federal and provincial forms) and First Nations regarding land and natural resources. The following are examples of the legal cases that have occurred over the years: *St. Catherine's Milling and Lumber Co. v. The Queen* (1888); *Guerin v. The Queen* (1984); *R. v. Nikal* (1989); *R. v. Sioui* (1990); *R. v. Horesman* (1990); *Mitchell v. Peguis Indian Band* (1990); *R. v. Sparrow* (1990); *R. v. Adams* (1996); *R. v. Badger* (1996); *R. v. Cote* (1996); *R. v. Gladstone* (1996); *R. v. Van de Peet* (1996); *Delgamuukw vs. British Columbia* (1997); *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999); *R. v. Marshall* (No.2) (1999); *R. v. Sundown* (1999); *Haida Nation v. British Columbia (Minister of Forests)* (2004); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2005); *Hupacasath First Nation v. British Columbia (Ministry of Forests)* (2006); *Tsilhqot'in Nation v. British Columbia (2007); Klahoose First Nation v. Sunshine Coast Forest District (District Manager)* (2008); *Beckman v. Little Salmon/Carmacks First Nation* (2010); *West Moberly First Nations vs. British Columbia (Chief Inspector of Mines)* (2010).

industry (Bazowski, 2008). While the mining industry is reported to have a positive effect on the provincial economy and the quality of life for British Columbians (Mining Report, 2007; Bazowski, 2008), recent reports have suggested otherwise for First Nations in northern regions of the province. For instance, in a report released by Amnesty International, the organization outlined what it believed to be human rights infractions on the part of Canada regarding the exploitation of natural resources (e.g. mining) and First Nations (CBC News, 2010). Another report, which was released by The International Human Rights Clinic at Harvard University (the "Harvard Study") in 2010, entitled "Bearing the Burden: The Effects of Mining on First Nations in British Columbia" (The International Human Rights Clinic, 2010), focused more specifically on mining and impacts on First Nations located in northern areas of British Columbia. The findings of the Harvard Study are summarized as follows:

> "Mining provides important revenue for the province... It also, however, frequently interferes with First Nations' use of their traditional lands and significantly harms the environment to which their culture is inextricably linked" (pg. 1).
>
> "The situation is particularly troublesome given that international and Canadian law require special protection for First Nations. Canada [and, by default, the provinces] is party to international human rights and environmental treaties that recognize the unique connection between indigenous peoples and the land. First Nations have the right to self-determination, which includes the right to decide how their traditional lands and resources are used. Treaty law not only enumerates these rights but also obligates Canada to ensure First Nations are able to enjoy them" (pgs. 2-3).
>
> "...constitutional standards thus provide a framework for the protection of First Nations that calls for heightened scrutiny of projects affecting these indigenous peoples and the incorporation of aboriginal rights into domestic mining law. The standards are designed to give First Nations a voice in the decision-making through consultation and an assurance that the environment with which they are linked are healthy. B.C. mining laws on their face and in

their implementation, however, fail to guarantee either" (pg. 3).

The Harvard Study was key in bringing to light the conflicts between mining activities and cultural land use activities from a First Nations' perspective, and perhaps more telling, the view of BC on such a perspective. In response to the critical analysis by the International Human Rights Clinic, The Honourable Randy Hawes (BC's Minister for the State of Mining) was reported to have outright dismissed not only the report itself but also the call from several First Nation political entities for BC to listen to the findings (The Globe and Mail, June 16, 2010). The Canadian Press reported on the views of Minister Hawes regarding not only the Harvard Study, but also mining and the cultures of First Nations:

> "'To be blunt, I think the report is hogwash,' said Mr. Hawes, questioning why Harvard doesn't look in its own backyard or concentrate elsewhere in the world where there are egregious impacts on indigenous people. Mr. Hawes called the report, released last week, a 'completely flawed document'.
>
> The minister of state for mining argued that the province is making 'great strides' with First Nations, having recently introduced revenue sharing on mining projects and major expansions. He also noted that mines provide revenue that pays for services like health and roads that benefit all British Columbians, including Aboriginal citizens.
>
> While he noted that some First Nations reject mining for a more traditional lifestyle, he also said traditional ways are linked to lower birth weights, higher birth rate deaths and lower life spans. The way to improve those outcomes is to share in the wealth and jobs that come from mining, he said.
>
> It's not the first time First Nations have called for mining reform. However, Mr. Hawes said the government is not interested in changing its more-than-100-year-old free-entry system, which also allows companies to stake tenures online." (The Globe and Mail, June 16, 2010)

The Carrier Sekani Tribal Council, which Takla Lake First Nation belongs to as

an overarching organization, expressed dissatisfaction with the conduct of Minister for the State of Mining regarding the Harvard Study and their culture. In its press release, the Vice Chief noted that the Minister's statements "are extremely ignorant and misinformed" and "make things worse" in many respects (Carrier Sekani Tribal Council, June 17, 2010). The Vice Chief concluded that the minister 'should apologize and then resign'. Similarly, the Chief of West Moberly First Nations (hereinafter referred to as "West Moberly") released a response to Minister Hawes' comments reported by The Canadian Press the previous week. It reads:

> "I'm sickened... It's very disappointing to hear a politician in our day and age espouse such ignorance towards our cultural way of life... [most disturbing] is the discriminatory attitude that underscores the comment. Canada has laws in place that protect everyone from the evil of discrimination by the government. Minister Hawes should be promoting human dignity, not fueling stereotypes that marginalize and devalue our cultures..."
>
> "The Harvard study is not flawed as Minister Hawes would have you believe. If anything, it's the tip of the iceberg. We have pictures of mining companies using a bulldozer to plough through a fish-bearing stream, coal draining into sensitive wetlands, and illegal clear-cuts. Making matters worse is that BC did not fine those companies one single dollar for breaking provincial and federal laws..."
>
> "I want to make it very clear that my community fully supports and sincerely respects Takla First Nation for their leadership in bringing to light the true nature of mining and its negative effects on northern First Nation communities. BC needs to work with First Nations, not bully and ridicule communities for offering their views." (Marketwire, June 24, 2010).

Further to his comments relating to the perceived attack by the BC government on another First Nation, the Chief of West Moberly noted the following regarding a struggle his community is currently facing regarding culture, caribou, and a proposed coal mine project in his Nation's territory:

> "I came to the realization of why it is such a personal thing with me as to why to fight for these few caribou. I see the way everyone is treating and talking about these caribou is the way they treat and talk to you [the West Moberly First Nations Council], like we don't matter. These caribou are like us, struggling for their mere survival and existence By fighting and protecting these caribou and their habitat we are fighting for ourselves" (cited in Booth and Skelton, forthcoming)

The actions of BC regarding the concerns expressed by First Nations pertaining to mining, in particular the comments of Minister Hawes that appear to underscore the problem, were considered by the Union of BC Indian Chiefs (UBCIC) to be troubling. As a result, the UBCIC wrote a letter to then-Premier Gordon Campbell calling for mining reform based upon the province's commitment to a "government to government New Relationship with First Nations in BC based on respect, recognition, and accommodation of Aboriginal Title and Rights" (Grand Chief Stewart Phillips et al , 2010) Further, the UBCIC requested then-Premier Campbell to "accept the resignation of Junior Minister Hawes" because of his promotion of "racist stereotypes about First Nations culture" To date, however, Minister Hawes remains as the Minister for the State of Mining and the overall concerns of First Nations remains substantively unaddressed

1.1 Environmental Justice and First Nations in Canada

The problems confronted by First Nations in northern British Columbia are similar to what minorities in the United States of America experienced during[2] the rise of the civil

[2] While "during" is noted, by no means is this to suggest that all of the problems confronted by the minorities in America have been adequately addressed, either procedurally or substantively The social

rights movement. By the late 1970s and early 1980s, the civil rights movement had effectively transitioned into the environmental movement, with minority communities raising concerns regarding problematic land use planning which placed the health of their communities at risk. Since this time, activists as well as scholars have demonstrated that locally unwanted land uses (LULUs) are situated in areas predominately used by low-income and minority populations more so than in areas used by non-minorities (see, e.g.: Bullard, 1993a; Bullard, 1994; Bryant, 1995; Shrader-Frechette, 1996; Rechtschaffen and Guana, 2003). Studies have also demonstrated that these groups not only shoulder a disproportionate burden of environmental hazards and risks from LULUs, but also are not provided with an equal opportunity to participate in the decision-making processes (Mutz et al., 2002). American Indian tribes, for example, are often faced with the difficult decision of logging cultural areas or sensitive wildlife habitat in order to provide economic opportunity for members (Shrader-Frechette, 1996). Such instances place the future health of their culture at risk because, according to Harris and Harper (2010), natural resources are the basis for a cultural identity and spirituality that is as much a physiological safeguard as a psychological support network for ecological knowledge. In view of this, the field of land use planning and natural resources management in America has incorporated into its decision-making processes (at the federal level) an environmental justice lens. It is used to examine a potential decision with respect to whether it will result in an environmental injustice, and if so, to remedy the situation in order to avoid an adverse outcome.

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science literature is replete with studies that strongly indicate that many environmental problems still exist for minorities in America.

Notwithstanding its origins, the concept of environmental has also been the focal point of research projects and interests at the international level (Meletis and Campbell, 2009).[3] Most notable is its application in the United Kingdom. Reed and George (2011) note that, while over half of such research is conducted in America, approximately 20% has likely occurred in European countries. They point out that in addition to its use in American and the United Kingdom, other counties (such as Canada) do in fact study such matters on an annual basis.

In comparison to America and elsewhere around the world however, environmental justice in Canada is more or less unknown and unused by decision makers in processes relating to land use planning and natural resource management. While some research has been produced over the years, as noted by Haluza-Delay et al. (2009), there is a paucity of data for the most part (also see: Draper and Mitchell, 2001; Gosine, 2003; Teelucksingh, 2007). They also point out that most of the urban-based environmental justice research, which is akin to the work done in America, centres around the southern Ontario area and to a lesser extent Vancouver, BC. This is troublesome, since First Nations as a subpopulation in Canada are at the lower end of nearly ever social, economic, and health indicator. First Nations, Haluza-Delay et al. write, are therefore "the most racially marginalized peoples" (pg. 11) in the country and

> "...are faced with systemic environmental injustice in terms of treaty and land claim processes; the situating of energy projects on or near their traditional territories; air, water, and land pollution; deplorable drinking-water quality issues... resource extraction by outsiders on unceded territories by government-sanctioned contracts...; the lack of ready and affordable access to economic development where they live; poor quality of life conditions, including access to education and health care; the failure by the Canadian

[3] Also see, as cited in Meletis and Campbell (2009), the following: Adeola, 2000; Belkhir and Adeola, 1997; Carruthers, 2008; Kuletz, 2002; McDonald, 2002; Pellow and Brulle, 2005.

> state to recognize underlying and inalienable Aboriginal title and rights; and the unwillingness of the Canadian state to right historical wrongs to First Peoples" (pg. 12).

Since the majority of environmental justice studies conducted to date are based on the melting-pot ideology of the United States, few have considered the cultural make-up and mosaic ideology unique to Canada. This is limiting, as Reed and George (2001) suggest that "environmental justice as a research theme remains at its core an American concept", creating a "disconnection between theory and practice" (pg. 4). When the rights of individuals and cultural groups in Canada are taken into account, then a significantly different context emerges from which to conceptualize environmental justice. For Canadians in general, scholars have contended that the *Constitution Act, 1982* is the most likely avenue by which substantial environmental rights will be acknowledged and protected, which is a similar approach that underpinned the beginning of the environmental justice movement in America (discussed in Chapter Two). This is based upon the belief that Canada's highest court, the Supreme Court of Canada (SCC), is more open than most courts when it comes hearing and upholding environmental values (Demarco, 2007); for example, the SCC has recognized that Canadian citizens have the "right to a safe environment" (*British Columbia v. Canadian Forest Products Ltd.*, 2004: para. 7). Thus, many have pointed specifically to the *Charter of Rights and Freedoms* (the "*Charter*"), which is contained within Canada's Constitution, in particular section 7, as the legal mechanism that likely provides an avenue to have substantive environmental rights recognized and protected (Gage, 2003; Collins and Murtha, 2010). The United Nations Human Rights Committee also suggested the use of section 7 of the *Charter* in cases involving environmental matters (Collins, 2009), as it provides all

Canadians with "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principle of fundamental justice" (Human Rights Committee, 1990: para 7).

The use of the *Charter* to obtain substantive environmental rights, however, has not been significantly tested in the courts and in that way remains ambiguous to a large extent. This includes the use of seeking redress via section 7 as well. While the courts have accepted the correlation between environmental harm and the rights secured by "everyone" under section 7 and thus permitted such arguments in court, the cases brought forward to date have resulted in decisions that have not been in the favour of the individual or community (see, e.g.: Operation Dismantle v. The Queen, 1985; *Manicom v. Oxford County*, 1985; *Energy Probe v. Canada (Attorney General)*, 1989; *Coalition for a Charter Challenge v. Metropolitan Authority,* 1993; *Locke v. Calgary*, 1993; and, *Millership v. British Columbia*, 2003). The basis for these failures varies: arguments fell outside the scope or did not satisfy the procedural elements of the section 7, with the latter two failing due to a lack of scientific evidence presented to the courts. Unfortunately, the Government of Canada has decided not to address the uncertainty that exists. Case in point, when asked to clarify the matter (Boyd, 2006) the federal government stated that it will not provide "a legal interpretation of s. 7 of the Charter of Rights and Freedoms" as such a view is subject to "solicitor-client privilege", and the "Department of Justice does not provide legal advice to the public" (Ambrose, 2006).

Collins (2009) notes that, while cases based on claims of a violation of section 7 have been unsuccessful to date and it is unlikely to be elucidated by the Government of Canada, there are other constitutional remedies available for Canadians that are

considered a minority either at the individual or group level, such as First Nations. For instance, the use of section 15 (the equality clause) is more developed in terms of addressing impacts to minorities resulting from a government decision (Hogg, 2004) and includes a structural approach to test claims of inequality (*Law*, 1999). Collins (2009) points to this constitutional provision as another possible avenue by which certain Canadian citizens may rely upon to seek redress. The use of the equality clause in environmental matters, she writes, comes into play when a government action adversely affects a minority more so than non-minorities; in cases "where government conduct results in the disproportionate exposure of a disadvantage group to environmental hazards, the s. 15 equality guarantee is violated" (pg. 43).

To date, however, the use of section 15(1) as the basis to a framework has not been applied in a Canadian setting to a land and/or natural resource problem confronted by a First Nation in the context of environmental justice. This thesis contributes to the theory and practice of environmental justice as a discipline, and more importantly to its application within a Canadian context that centres on the injustices confronted by First Nations, by addressing the fact that it is largely considered an "American concept".

1.2 Methodology

1.2.1 Research Design

The design for this qualitative research study is based upon phenomenology. This approach was chosen because it takes into account the views of people in relation to their experiences regarding a phenomenon (Creswell, 1998; Babbie, 2002), which is necessary

in the analysis of human rights in Canada (*Law*, 1999). It is also suited to the study of a concept from an interdisciplinary perspective, an important aspect when different philosophical approaches may be considered. Phenomenology also allows the experiences of the researcher in relation to the subject matter (noted in the Preface) to be described. Finally, it focuses on the description of experiences from a population of people that are collected and categorized to ensure scientific validity (Creswell, 1998). Here the focus is on the point of view held by those that experienced the phenomenon as the centre of the study (Singleton et al., 1993). In addition, the design is appropriate for a study when the research is concentrating on "how" people experience the situation (Creswell, 1998).

This thesis' design consists of an examination of the phenomenon experienced by West Moberly, specifically, a land use conflict between the First Nation and the Provincial Government of BC within the context of an environmental justice framework. Central to this conflict is the destruction of critical habitat relied upon by a threatened herd of caribou and coal mining activities planned by First Coal Corporation, which is a private company. The phenomenon experienced by the First Nation is significant from an environmental justice perspective because, as the Chief of West Moberly notes above, it represents a community-based struggle to protect not only the last 11 animals of the Burnt Pine caribou herd, but also the protection and continuation of West Moberly's distinct culture.

The decision to use a phenomenology design in the place of a 'case study design' is due to the role of the phenomenon experienced by West Moberly in the thesis. A case study design is appropriate when a researcher wishes to investigate a situation in an "in-

depth" manner whereas a phenomenology design is appropriate when capturing the "essence" of the situation is the focus of the investigation (Creswell, 1998), the latter design was used because the community's experiences were investigated as a means to illustrate the application of a Canadian-based environmental justice framework. To do so, the "essence" of the situation was required rather than an "in-depth" investigation as the experiences were not the basis of the thesis but were rather a means to illustrate the framework, and by doing so, providing an avenue to hear the voice of the community.

1.2.2 Research Goal and Questions

The goal of this thesis is to develop a framework for the use of environmental justice as a means for a First Nation in Canada, such as West Moberly, to articulate their concerns regarding the appropriateness of land use planning and natural resource management decisions in their territories. The thesis' core question is this: how can American derived environmental justice be incorporated into an environmental decision-making event in Canada? In order to address the aforementioned question the following four sub-questions are posed:

1. What is American environmental justice in relation to land and natural resources?
2. What is equality in a Canadian context for First Nations and how can environmental justice be incorporated into a framework relating to land and natural resources?
3. What are some additional applications and frameworks of an environmental justice analysis in Canada regarding land and natural resources?

The sub-questions are ordered in a sequence that guides the research methods towards addressing the research goal. The questions are also articulated in such a manner as to be exploratory, descriptive, and explanatory in their disposition. This provides additional insight into the problem and thus increases the validity of the findings (Majchrzak, 1984).

1.2.3 Methods

The methods used to develop a Canadian environmental justice framework and to determine the environmental justice of the phenomenon experienced by West Moberly are a *focused analysis* of secondary data (also referred to as existing data: see Singleton, et al., 1993) and a *content analysis* of such data.

A focused synthesis approach was used as it increases the range of sources available to collect data, including published materials, personal narratives, unpublished documents, and personal past experience of the researcher, as well as a variety of other sources (Majchrzak, 1984). The approach is practical to use given that it has been applied to previous policy research relating to the affects of natural resource exploitation on marginalized people (Burton, 1979). The method of using existing data is also appropriate when conducting an analysis of numerous sources of literature over an extended period of time (Singleton et al, 1993), some of which are derived from different fields of research that have historically not been synonymous with one another in a Canadian context. Three sources of existing data (Singleton et al, 1993) have been used in this study:

- Data archives, including academic publications;

- Legal documents, including case law and publicly available information from trials; and,
- Public and official documents, including those used for and relating to the government decision-making processes.

The focused analysis was thus used to collect and review the literature required to answer the research questions. The literature reviewed in Chapter 2 and 3 therefore serves a dual purpose. It is both a review of the literature (a conventional requirement in a thesis) and the collection of data from which the framework was developed and then applied to the illustrative example (an nonconventional approach in a thesis). These data are used to provide a structural framework to develop a theory for including environmental justice into a Canadian context. The focused analysis was also used to collect and review the secondary data pertaining to West Moberly's struggle to protect the Burnt Pine caribou herd.

A content analysis of the existing data was performed as it is an appropriate method to study the interactions between parties, in particular answering the question "what effect" did it have (Babbie, 2002). Babbie (2002) points to two means by which data may be categorized. The first is the unit of analysis. In this study, the unit of analysis is the existing data relating to environmental justice (developed in America) and equality (developed in Canada). To answer the first and second sub-questions of the thesis, "[t]hemes" and "concepts" were derived from the data (Babbie, 2002: pg. 287) and then categorized to develop the framework (Chapter Two and Chapter Three). The second means is the unit of observation. The land use conflict between West Moberly and BC regarding coal mining and caribou was used as the main unit of observation. Data was collected, analysed, and then categorized based on the structure and

requirements of the framework (Chapter Four), which is: (1) triggers and parameters; (2) perceptions and context; and, (3) nature and extent of burden.

1.3 Organization of Thesis

Chapter One, as evident from the above, introduces the thesis topic, research goal, and provides the methods that were used to address the research question. The second chapter reviews the literature regarding environmental justice in the United States of America and discusses the components that have emerged as a means to frame the disproportionate impact of activities to minorities. Chapter Three discusses the development of equality in Canada and presents an equality-based framework that enables the principles of environmental justice to be incorporated into a Canadian context. The fourth chapter includes the an application of the environmental justice analysis framework to the situation of West Moberly and its fight to protect their culture through protecting a threatened herd of caribou from a coal mine proposed within their territory. The final chapter concludes the thesis by reviewing the findings and provides additional examples of future applications and frameworks of environmental justice within a Canadian context.

Chapter Two: Environmental Justice

2.0 Introduction

The environmental justice movement is influenced by numerous fields of study. While the literature has developed considerably over the years, with its underpinnings grounded in the relationship between environmental burdens and the minority communities that shoulder them, two of the more prominent fields are human rights and environmentalism. This chapter introduces the main themes that underscores environmental justice and what separated it from modern environmentalism, and discusses several key components of an environmental justice analysis. The concluding section reviews the principles and definitions derived from the literature and introduces five frameworks that may be used to frame the disproportion impact experienced by minorities.

2.1 Environmental Justice: A New Variable for Environmentalism

Much of the environmental discourse during the late 1930s and through to the 1960s revolved around various issues such as air and water pollution, adverse effects from chemicals on birds, and the depletion of natural resources. As a result, individuals began to question the existing policies and practices that had long been regarded as the norm. With the debate growing and the agenda becoming more narrowly focused as particular issues were indentified, an example of which was the environmental management (and perhaps mismanagement) of public forests in America, a distrust for the existing system came to the surface. In the early 1970s, the modern environmental movement emerged; it contested the anthropogenic degradation of nature, with a central focus on why the interests of industry and government over all others was an acceptable modus operandi.

Its underlying goal was to shift the focus from anthropocentricism (interests of humans) to eco-centric (interests of nature), which was to be achieved through the tenets of environmental conservation and preservation (Bullard, 2000). Aspects considered to be socially valuable included the protection of recreational opportunities, wilderness, and particular species (Melosi, 1997). Underscoring the movement was the value system held by those considered to be the catalyst: namely, affluent, white males from the upper and middle classes (Lee, 1992). Through this form of protection, environmental interests of individuals were treated as homogenous in that if one person benefits from such protection then all must benefit (Rhodes, 2003).

With the development of the modern environmental movement, originally focusing on the impacts to ecological factors such as wilderness, the environs of humans were considered outside its scope (Rhodes, 2003). This restrictiveness, in particular its homogenous approach to environmental protection, was of serious concern to scholars embedded with the civil rights movement and advocates from grassroots environmental justice groups, as it overlooked the fact that "the most serious pollution problems and lack of access to natural resources fall on African-American, Native-American, and Latino" communities (Shrader-Frechette, 2002: pg. 25). As a result, environmental justice groups sent letters to environmental organizations belonging to the "Group of Ten[4]" (Melosi, 1992). These letters held the agenda of mainstream environmental groups responsible for creating the monoculture perspective of environmentalism (Getches and Pellow, 2002) that either directly or indirectly led to or supported the disproportionate impact. Bullard (2000) has attributed the disconnection of the modern environmental

[4] The Group of Ten includes: Defenders of Wildlife, Environmental Defence Fund, National Audubon Society, National Wildlife Federation, Natural Resources Defence Council, Friends of the Earth, Izaak Walton League, Sierra Club, The Wilderness Society, and the World Wide Fund for Nature.

movement from the issues and concerns confronted by minority groups to the value system that underscores the framing of environmental issues.

For many, this problem came to the fore as a result of the events in Shocco Township of Warren County, North Carolina. In 1982, citizens of this small community were faced with the siting of a polychlorinated biphenyl (PCB) storage and disposal facility in close proximity to their homes. What separated this case from other environmental conflicts at the time was not that the citizens opposed the placement of such a facility in their community. After all, nearly every community will embrace the premise of NIMBY ("not in my backyard") regardless of its demographic composition or socioeconomic status (Shrader-Frechette, 2002). Rather, in this case it was the federal government's negation of environmental laws and regulations that had been enacted to protect human health: state officials were permitted by a branch of the federal government, specifically the Environmental Protection Agency (EPA), to bury the PCBs at the depth of 7ft instead of the 50ft minimum. In the end, residents of Shocco Township were denied a voice in the decision-making process, and were compelled to accept thousands of truckloads filled with contaminated soil that not only originated elsewhere but that other communities had also refused to accept (Bullard, 1994; Shrader-Frechette, 2002) . More alarming was the fact that they had to do so with an elevated level of risk without compensation.

In the following years, numerous studies were undertaken that examined the relationship between demographic composition, socioeconomic conditions, and land use. Early case studies include investigations by the U.S. General Accounting Office (GAO). Most notable was one that demonstrated that 3 out of the 4 hazardous waste facilities

within a southern EPA region were located beside communities predominately composed of African Americans (General Accounting Office, 1983). Another example is the study conducted by Bullard (1983) regarding the location of Houston, Texas' solid waste landfills. By comparing the geographic location of landfills to the demographics of surrounding communities, he discovered that twenty-one out of the twenty-five were situated in communities consisting mostly of minorities (Bullard, 1983). Taken alone, however, the correlation of race and the siting of LULUs in these cases did not indicate environmental racism. What it established was that a disproportionate distribution did in fact exist and the distribution impacted minorities and those with low-incomes more so than affluent non-minorities.

Shortly thereafter the United Church of Christ's (UCC) Commission for Racial Justice (CRJ) released the findings of what is now regarded as one of the more prominent investigations of environmental racism. It examined the geographic distribution of hazardous waste treatment, storage, and disposal facilities (TSDFs) throughout America in relation to neighbourhoods consisting of minority groups and low-income earners through the use of zip codes. Unlike previous studies, this study demonstrated that race is the most statistically significant variable that correlated to the geographic location of LULUs across the country, with income being the second most significant variable (United Church of Christ Commission for Racial Justice, 1987). In addition, it revealed that approximately 3 out of every 5 African Americans live in a community with at least one uncontrolled hazardous sites, and that 50% of Native Americans live in communities with similar circumstances (United Church of Christ Commission for Racial Justice, 1987). Because race was the underlying factor in the siting of LULUs, the UCC

requested that the EPA expedite the clean-up efforts for those minority communities disproportionately exposed to pollution and for the President to issue an Executive Order addressing the matter (Carr, 1996).

Controversial events such as Warren County and the ensuing research findings clearly demonstrated that the underpinnings of this impetus digressed from the ethos of mainstream environmentalism. Values held by the architects of modern environmentalism were placed aside. What filled in were the social values of those environmentally victimized, namely women of colour residing in urban areas with a disproportionate amount of burdens from land use decisions, who undertook the task of framing environmental issues in light of local values in place of the usual practice of relying on outside environmental groups (Bullard, 1993a). Since many of the leaders were women that worked in the home, they had keen insight into the threats to their families' wellbeing and disenfranchisement (Krauss, 1993). As such, many of the women began to lead demonstrations against what they perceived to be an attack by industry on their environmental safe havens (Heiman, 1988) through pathways such as residential contamination, job loss, and capital intensification (Schwab, 1994; Krauss, 1993). From this perspective, the term 'environment' was redefined to include the physical aspects of a system upon which a community's well-being is dependent (Kaswan, 1997). This includes key attributes such as the place of work, areas of leisure activities, and the home (Bryant & Mohai, 1992; Bullard, 1994).

What distinguished the environmental justice movement from the existing analytical lens of environmentalism was the incorporation of human rights which was, up until that time, considered by most to be a philosophically separate movement. However

when combined, as the above discussion illustrates, the once accepted proposition that 'if one benefits all benefit' comes into question as individuals belonging to a minority group or with a low income receive a disproportionate distribution of environmental burdens than do white and/or affluent people. For this reason, according to Lein (2003), the principles of environmental justice were placed onto the agenda of policymakers and in this way put forward as a new set of considerations to be incorporated into environmental decision making processes. Today's land use planners and natural resource managers must now "confront one of the most complex and difficult issues of the century: how to care for the environment while dealing with all of the social justice concerns of the affected communities" (Collin and Harris, 1993: pg. 102) in order to ensure their decisions are socially acceptable.

2.2 From Civil Rights to Environmental Rights

As previously mentioned, most consider the decisive moment in the environmental justice movement as being in and around the time of the civil rights movement, culminating in the events that occurred at Warren County. Few (if anyone) would argue otherwise, as it would discount early cases where "race" and the "environment" intersected with one another. In the late 1960s, for example, the disposal of residential waste came to symbolize this relationship. Communities of colour were at that time questioning the placement of these LULUs due to their hazardous nature. But more importantly, it was Reverend Martin Luther King travelling to a southern state to deliver a speech in support of social issues relating to landfills and inequalities facing the mostly black workforce that conjoined these two terms; he was assassinated before delivering his

message (Bullard, 1994c). Equally important to when the movement began are the historical contexts of the underlying causes framing the situation (Greenberg and Cidon, 1997) and the system that perpetuates and/or furthers the disproportionate impact (Bullard, 1994b).

2.2.3 Race and Nature: An Overview

Race, as a western construct, has remained somewhat consistent over the years in terms of its meaning. From its roots in middle age Scottish languages where it was used to depict lineage or clan by noble families (Hannaford, 1996) to its use in the 19th Century civil rights movements in America, it continues to represent "an ordering system" based on the values of those attempting to conquer or dominate others (Smedley, 2007: pg. 26). It is used to characterize what we may or may not see, the degree to which we are empathetic, and the nature of our responses (United Church of Christ Commission for Racial Justice, 1987; Saleem, 1994). In this way, people classify not only themselves but others based on racial makeup to a certain extent.

As early as the 1400s, the underpinnings of this social phenomenon emerged with the arrival of Europeans on the western shores of what is now referred to as North America. State funded explorers descended upon the continent and the territories of its nations for nearly a century. With the endorsement of the Spanish Crown, for example, explorers such as Christopher Columbus were mandated to further imperial dominance through the use of lands and natural resources of the 'New World', a strategy that had proven to be quite profitable elsewhere (Helen Venne, 1998). Integral to the settlement of the Americas was the Eurocentric view through which not only was history written,

but which dictated the creation of legal systems and other social policies. Helen Venne (1998) writes:

> "One of the most powerful beliefs of out time concerning the world history and world geography...is the notion that European civilization – "The West – has had some unique historical advantage, some special equality of race or culture or environment or mind or spirit, which give this human community a permanent superiority over all other communities, at all time and down to the present" (pg. 1).

Throughout the years of what many Europeans believed to be the discovery of the New World, Eurocentricism underscored the manner in which matters relating to indigenous groups were handled. Williams (1990) has noted the following in this regard:

> "Europe during the Discovery era refused to recognize a meaningful legal status or rights for indigenous tribal peoples because "heathen" and "infidels" were legally presumed to lack the rational capacity necessary to assume an equal status or to exercise equal rights under the West's medievally derived colonizing law. Today, principles and rules generated from this Old World discourse of conquest are cited by the West's domestic and international courts of law to deny indigenous nations their freedom and dignity to govern themselves according to their own vision" (pg. 326).

With colonization came the ideological components of racism, in particular the sense of exclusiveness on the part of group membership that was grounded in the English understanding of a law abiding civilization (Smedley, 1993). This led to the taking of lands and resources from indigenous groups. Removing access to and allocation of natural resources from Native American groups was devastating for many, as the environment represents their source of cultural subsistence. Impacts varied from group to group not only because their exposure to colonial influences was different, but also because natural resources were not evenly distributed across the North American land-

base. Individual characteristics of any one group therefore depended on the local settings of its territory, as the landscape is as much an environmental mosaic as it is a cultural one. In this way, according to Fixico (2001: pg. 33), each group therefore has a distinct "culture area" that provides them with a relationship upon which their spirituality, philosophy, and sustenance are dependent. Local wildlife and plants provided them with not only food and medicines, but also a way to connect with what many now refer to as the Creator. To them, everything is connected. Fixico (2001: pg. 36), referencing Onondaga statesman Oren Lyons, writes: "In our Iroquois perception, all life is equal, and that includes birds, animals, things that grow, things that swim, All life is equal in our perception". For this reason, even though some animals run faster than others and one plant grows fruit whereas another does not, everything has a 'philosophically equal role in life'. As such, the natural surroundings of a particular group is the foundation to the physiological and psychological wellbeing of these groups.

The aftermath of the Europeans' arrival, as Falkowski (1992) points out, resulted in the first case of environmental discrimination as the colonizers expropriated Native American land through the enactment of laws that limited (and removed) their access to and allocation of natural resources. Inherent rights held by those groups since time immemorial, which included the right to use natural resources upon their territories (Churchill, 1995, 1998, and 1999), were simply overlooked. In some cases, specifically the experiences of indigenous groups within the political boundaries of what is now the United States of America, physical conflicts emerged when the colonies attempted to limit or restrict indigenous' access and allocation. Such actions were considered to be within acceptable limits of the law at that time (Smedley, 1993). This engendered an

ecocide of Native Americans that persists today as many of the reservations and the areas surrounding them are highly polluted with toxic contaminants (Grinde & Johansen, 1995). Thus the attempt of Native groups to obtain environmental justice for their cultures is inextricably related to addressing racism and colonialism (Weaver, 2001).

From the discussion above, it is apparent that the indigenous groups of North America were exploited as a result of the arrival of Europeans and the subsequent imperial colonization of the lands and natural resources. In similar fashion to their dominance of Celtic groups for example, the English reasoned that inhabitants of foreign lands that did not display the characteristics of European cultures were either savages or barbarians (Smedley, 1993). Because indigenous groups did not mirror nor practice the European worldview either in appearance or through customs, they were typically considered to be savages (Berkhofer, 1979). This classification brought the requirement of salvation on the part of Europeans which, depending on the group, took various forms of subjugation through the rule of law as defined by European ideology. Even after the abolishment of slavery and the integration of the education system, racism still exists within America. It has resulted in the country being divided racially, with one side bearing considerable inequalities (Kozol, 1991) because of discriminatory land use patterns that have forced people of colour into "...ghettos, barrios, and onto reservations" (Bullard, 1993: pg. 7).

2.2.2 An "Environmental Justice Community"

Taken together, it understandable why the terms *race* and *environment* have come to play an integral role in the enduring struggle of minority groups in America to attain what they

believe is a safe and healthy surrounding. It was not, however, until the 1980s that these terms were combined to form a challenging idiom. Reverend Benjamin Chavis, then-executive director of the UCC, first used the term "environmental racism" during the public presentation of the United Church of Christ's Commission for Racial Justice's report entitled "*Toxic Waste and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites*" (the "UCC Report") as a means to succinctly explain the current state of environmental affairs confronting minority communities in America (Lazarus, 2000). In doing so, and because it implied cause and effect, Reverend Chavis brought immediate political attention to the plight of minority groups (Foreman, 1998). He has since stated the following:

> Environmental racism is racial discrimination in environmental policy-making and enforcement of regulations and laws, the deliberate targeting of **communities of colour** for toxic waste facilities, the official sanctioning of the presence of life threatening poisons and pollutants for communities of colour, and the history of excluding people of colour from leadership of the environmental movement (Bullard, 1994c: pg. xii)

By pointing out that there are "communities of colour" that are subject to discrimination which results in negative impacts to their health and safety, Reverend Chavis furthers the view held by Kozol (1991). He suggests that communities themselves are vulnerable, which is in it self concerning. Their deterioration is serious from the perspective of the environmental justice movement, as communities are "both vital places of cultural identity, and also sources of power and meaning within the larger world" (pg. 314). Thus "environmental justice is not simply an individual experience; it

is embedded in the community" (Schlosberg and Carruthers, 2010: pg. 17). Accordingly, social interactions as represented by the term 'community' plays an integral role in a study that examines the relationship between race and land use decisions. It establishes the parameters used to identify the presence of an environmental injustice which, according to Williams (1999), "reflect[s] the nature of discrimination" (pg. 318). Thus a claim of an injustice is warranted by subpopulations that are mostly minorities (e.g. African Americans, American Indians) or belong to a lower economic class that have geographic boundaries attributable to their disposition (generally speaking, individuals and groups that are minorities). After all, the label of "environmental justice community" is applied to those that have a history of discrimination (Getches and Pellow, 2002).

What a researcher discovers depends on where the investigation is occurring (Heiman, 1996; Perlin et al, 1995). Thus having a clear definition of what constitutes the spatial boundaries of a community is necessary (Krieg, 1998; Williams, 1999). Moreover, there is a higher likelihood that similar research methodologies will generate different conclusions if there is not a consistent approach (Williams, 1999). For this reason, as Williams (1999) points out, framing the analytical unit of analysis (i.e. the community) is key to drawing conclusions. There is, however, a considerable amount of debate surrounding the manner by which a community is to be understood and its borders delineated in the field of environmental justice. For example, the use of zip codes and census tracts are generally accepted as valid methodologies, although both were initially challenged by various scholars with respect to their suitability in measuring the relationship between LULUs and communities of lower income or minority groups.

With the UCC Report being perceived by many as the decisive study of its time, critics such as the Social and Demographic Research Institute (SDRI) at the University of Massachusetts questioned the means by which the boundaries of the groups were established. Relying upon a different method, the SDRI found that race is not a factor in the determination of the siting of LULUs, as they found no statistical significance in the location of LULUs and minority groups (Anderton et al, 1994). The SDRI study went so far as to conclude that the claims of environmental racism had been overstated (Cluett, 1999) with respect to land use decisions; however, the outright dismissal of the interplay between race and the environment has not been fully supported (Wigley & Shrader-Frechette, 1996).

The UCC Report defined the community by zip codes, whereby all of the areas with LULUs were assessed against those without (Mohai, 1995). The SDRI study, on the other hand, used census tracts to establish the community, including only those tracts with LULUs falling within the Standard Metropolitan Statistical Areas (SMSA). From this, according to Mohai (1995), it becomes apparent that the UCC Report is inclusive and thus more likely to produce a representative assessment given that it takes into account all areas, whereas the SDRI study is restrictive since it eliminated tracts from the analysis regardless of whether or not they possessed LULUs. Furthering the view of Mohai (1995) is the research conducted by Been (1995) which, in similar fashion as the SDRI study, used census tracts to investigate the relationship between race and LULUs. Her study found that the SDRI findings were inaccurate largely due to the limited data used to identify the existence of LULUs. Additionally, Krieg (1999) has pointed out that

census tracts are inadequate simply because TSDFs are typically located within industrial parks where the population is next to nonexistent.

This is not to say, however, that the methodological use of zip codes is more appropriate than census tracts. Been (1995) has noted that, in comparison to zip codes, census tracts tend not to change geographically and are created by the community. But if zip codes are considered to be areas that communities do not specifically identify with and are perhaps larger than required, then census tracts represent areas that are too small (Mohai, 1995) to determine the impacts of LULUs on minorities as a whole (Cluett, 1999). Because the debate surrounding the suitability of geographic units is likely to continue, mainly due to the fact it is queried on a case-by-case basis, it is important to pay particular attention to the characteristics of a populace that one wishes to study in order to accurately define the spatial parameters of an environmental justice community.

Currently in the environmental justice literature, the population of a potential environmental justice community may be defined through several means in terms of its spatial dimensions. Williams (1999) points to several spatial units that are likely to exist. He also notes that there is likely no one way to delineate an analysis unit for a community, as there has yet to be a consensus among the scholars. There is also more than one analysis unit for a community at any given time. But as Bullard (1994d) suggests, the focus ought to be on the analysis unit including the minority group within a particular area, rather than anything else.

The first is political jurisdiction. In most instances, these units came to be prior to when most members of a community were either alive or prior to them moving into a particular area. The creation of such units has been suggested to be undemocratic, as

they are implemented with little to no input from those with little political power such as minority groups inside of its borders (Williams, 1999). Examples include states, counties, and townships (Williams, 1999: also see Bowen et al. 1996; Cutter et al. 1996; Zimmerman, 1994). What makes this unit of analysis appropriate, according to Williams (1999), is that they are typically responsible for what has or has not occurred within its area seeing as the entity is the decision maker: for example, the political entity issues permits that allows for pollution to occur and is likely responsible for monitoring in some fashion.

A second is the neighbourhood. Williams (1999) points out that using such an unit of analysis is possible as it tends to reflect social and cultural identities within populations. Establishing the connection between people and a particular land base is important, according to Bullard (1994), as it ensures that the investigation into discrimination is not ineffectual. Williams (1999) notes that they can be used to further delineate which sources of data are applicable: for example, a neighbourhood with clear boarders would allow the proper census tracts to be identified and in that way enable a researcher to mine the associated data sets.

Lastly, the third is using data as a means to refine the spatial unit. In some cases, data is assembled based on various constructs. Williams (1999) points to the system developed by (or perhaps for) the United States Postal Service: namely, zip codes. Data has been collected based on such units. These data sets were used by the UCC Report. Data has also been collected based on census tracks, which was the methodology used in the SDRI study discussed earlier. Another approach is to use the data associated with a LULU, that is, the area that will possibly experience burdens. Such an area is typically

larger than census tracts. Referred to as the 'aggregated unit', it enables a researcher to match the analysis unit with the community at the centre of the study.

In many cases, according Krieg and Faber (2004), the identification of the study area through data sets is attributable to inaccurate findings. They point out that it is more appropriate to (1) establish the geographic boundaries of a community, (2) then identify the potential hazards and their impact zones within the community's boundary, and (3) investigate what data sets are potentially available. In this way, the methodological approach for an environmental justice analysis is to be designed based on the distinct characteristics of the community rather than the preference of the researcher or the discipline. By doing so, the impacts endured by the community will be recognized in order for the investigation to be a cumulative assessment. When this approach is applied to the same communities in the SDRI study, Krieg and Faber (2004) point out that a trend of environmental racism emerges. They also suggest that an environmental justice analysis be cumulative in nature, as most studies to date merely use single indicators such as PCBs or TSDFs. In so doing, they write, such a study will be more representative of race-based discrimination in the form of a disproportionate impact as injustices vary depending on "the inclusion of multiple indicators of environmental hazards" (pg. 670).

In addition to those discussed in Williams (1999), other units of analysis exist such as the household and individual (see Mohai and Bryant, 1992; or, West et al., 1995). While less frequently used by environmental justice scholars, sub-units of analysis are likely useful to further refine the analysis in terms of scale. Such units are of use when assessing the effects of a LULU and its interaction with minorities.

Selecting a proper spatial unit is key to an environmental justice analysis, mainly because both the overall community and those within them are affected by changes to their surroundings in different ways. For example, African Americans and Latinos are typically impacted by the addition of pollution in urban areas, whereas Pacific Islands and Asian Americans that consume large quantities of fish feel the adverse effects of contamination (Getches and Pellow, 2002), both of which may be a result of 'point' or 'non-point' source pollution. Unlike other environmental justice communities, American Indians that reside on government created reservations are distinct in that they have unique rights under domestic and international laws in addition to their intricate connection to the land (Suagee, 2002), which leaves them vulnerable to supplementary impacts from activities such as those related to the natural resource industry (Getches and Pellow, 2002). Schlosberg and Carruthers (2010) point out that the adverse impacts are perceived by native communities as

> "...direct assaults not only against the people, but also against cultural practices and beliefs, and the ability of their community to reproduce those traditions. Indigenous leaders thus articulate environmental injustices as a set of conditions that remove or restrict the ability of individuals and community to function – conditions that undermine their health, destroy economic and cultural livelihoods, or present general environmental threats" (pg. 18).

They note that, "[a]s Winona LaDuke has argued, the survival of native nations is directly linked to their sustainable interaction with the land, and with the practices, ceremonies, and beliefs tied to that place" (pg. 19). When key functional elements of a community are removed, particularly in the case of indigenous groups, the ability of the community to determine its future requirements is also removed (Schlosberg and Caruthers, 2010).

2.2.3 Institutional Discrimination

For over two decades, numerous studies have concluded that the environmental quality found in many of the environmental justice communities is much less than communities consisting of white and/or affluent people. Even with credible data linking race and income to discriminatory land use patterns it is questionable whether the movement's political vigilance has substantially improved the quality of life for minority groups. Case in point: when the results from the UCC Report were replicated, results showed that people of colour living in areas with hazardous waste facilities increased from 25% in 1987 to 31% in 1993 (Goldman & Fitton, 1994; Carr, 1996). Additionally, the current level of minorities residing in close proximity to LULUs reached the highest it has been in over 40 years (Carr, 1996). Holifield (2001: pg. 84) has suggested that an increase in national attention and a focus on "geographic patterns and historical processes" associated with race has not translated into on-the-ground improvements.

Many have attributed this to the predisposition of established decision-making processes. An example of which is public policy; the processes (Bryant, 1995; Bullard, 1993b) governing the environmental decisions that are common within land use planning and natural resource management (Collin and Harris, 1993). Such policies continue to generate inconsequential results with respect to on the ground improvements (Cluett, 1999). More specifically, a decision is made to burden a community of colour with a LULU whereby another community, one that consists largely of white people, is shielded from the unwanted land use. The UCC Report posited that this situation takes place when race-based prejudice is combined with the discretionary power held by the environmental decision maker, which is a result of

> "...the intentional or unintentional use of power to isolate, separate and exploit others. This use of power is based on a belief in superior racial origin, identity or supposed racial characteristics. Racism confers certain privileges on and defends the dominant group, which in turn sustains and perpetuates racism. Both consciously and unconsciously, racism is enforced and maintained by the legal, cultural, religious, educational, economic, political, environmental and military institutions of societies. Racism is more than just a personal attitude; it is the institutionalized form of that attitude" (United Church of Christ, 1987: pg. ix-x).

Similarly, Bryant (1995) contends that institutional discrimination, within the context of environmental racism,

> ...refers to those institutional rules, regulations, and policies of government or corporate decisions that deliberately target certain communities for least desirable land uses, resulting in the disproportionate exposure of toxic and hazardous waste on communities based on prescribed biological characteristics. Environmental racism is the unequal protection against toxic and hazardous waste exposure and the systematic exclusion of people of colour from decisions affecting their communities. (Bryant, 1995: pg. 5)

Based on the above, institutional racism is considered to be a product of a specific policy being implemented and/or the individual responsible for its implementation that discriminates against the characteristics unique to a minority group. Being able to distinguish intentional from unintentional is difficult at best. This is because even when an unjust decision can be traced back to the discretionary power of a decision-maker, it may not be intentional. Race characterizes what we may or may not see, the degree to which we are empathic, and the nature of our response (United Church of Christ Commission for Racial Justice, 1987; Saleem, 1994). Thus a decision maker may or may not be aware of his or her biases; on the other hand, such a decision maker may have taken advantage of the discretionary power to intentionally cause a disproportionate

impact.

Generally, it is understood that it is unnecessary to differentiate between the two possible causes, which are referred to as the "pure-discrimination model" and the "institutional-discrimination model" (Downey, 1999). Both influence the outcome, according to Bullard (1994b), as the goals and mechanisms of a policy together with the personal biases of the decision maker readily synchronize with one another. Although the former of the models is an important element in any environmental justice analysis, Lui (2001) writes that it is the latter of the two that has largely been used throughout the movement. He furthers the point by noting that this has occurred as a result of the nature of the institutional-discrimination model, which is "broadly based; it emphasizes intentional and unintentional forms, personal and institutional forms" (pg. 12).

Finding a clear-cut example of intentional racism is problematic to unearth in today's social milieu. This is mostly because the institutional policies of private companies and governments are innocuous when read. This does not mean, however, that such policies do not further institutional racism and those responsible for their implementations are unaware of the effect(s). An example is the selection of a site for a landfill, where proponents of developing such land uses employ criteria which, on the surface, choose the potential location of sites in an unprejudiced manner; however, whether or not such criteria are in fact neutral is questionable. Cole and Foster (2000) suggest that the method used to select sites is not socially indeterminate, as environmental justice communities are much more likely to satisfy such criteria (e.g. a small population surrounding the site, a low market price for the land, and the required geological and ecological setting). They point out that when the social and historical

context is taken into account, for example the link between the low valuation of land and racial make-up of those residing on such land, it demonstrates that the purported neutrality of the criteria is in fact an erroneous assumption.

Decisions based on either model have resulted in a measurable impact to minority groups in America. They have been disproportionately exposed to toxics or hazards, resulting in "unequal protection" from such exposure (Bryant, 1995: pg. 5). For people of colour residing in urban areas this would mean impacts to the quality of land, air, and water (Bullard, 1993a). American Indians not only experience these impacts, but also the erosion of traditional knowledge, exploitation of natural resource required for subsistence, contamination of ancestors and their graves, and intrusions into traditional use areas as well as onto sacred lands (Harris and Harper, undated), which are arguably more substantive given the inherent values they represent and the unique set of rights that ensures their ability to be culturally different from mainstream society (Suagee, 2002).

Much of the disproportionate distribution of impacts relates to the dual arrangement in environmental protection that emerges in, for example, housing, employment, and education (Bullard, 1994a). Studies have continuously demonstrated that communities of colour are more likely to have LULUs such as landfills (Bullard, 1983, 1987, 1990, and 1991a) as well as toxic waste dumps (United Church of Christ Commission for Racial Justice, 1987) in their neighbourhoods. They are also more likely to be exposed to air pollution (Freeman 1972; Gianessi, Peskin, and Wolff, 1979; Wernette and Nieves 1992), and polluted water that contaminates the ecosystem and thus the resident fish they rely on for sustenance (West et al, 1990) or cultural subsistence (Bullard, 1993b: pg. 21).

Unlike white and affluent people, vulnerable individuals and groups cannot simply move to another location as a means of avoiding the perceived, potential, or anticipated risks associated with the development of a LULU within their community. An example of a barrier that such individuals are confronted with is market forces (Bullard 1993b: pg. 21). One cannot easily sell a dwelling when a LULU is planned for the neighbourhood. Even if it were possible, it remains questionable whether the return on the investment is sufficient to relocate to a healthier area that does not also contain a LULU, or an area that will not have one in the future. In the case of Native Americans this problem is amplified. They are tied to the Reservations (which are referred to as Reserves in Canada), making avoidance rather unachievable if the nature of the LULU is non-point pollution or covers a significant portion of land (Bullard, 1993a).

A key question is this: do they actually have a choice in the siting of a LULU? It is here that two equally important economic issues come into play with respect to their resistance to inequitable treatment. The first is a community's ability to contest the siting. For this to occur, a community needs to be not only well-organized but also endowed with the economic means to allocate funds to contest the siting without having to sacrifice their quality of life (Kibert, 2001). More often than not this results in a white and/or affluent community being successful in fighting off the siting whereas the struggle of a community of colour to achieve a similar result is defeated. A second issue is the current economic conditions of the community. In this instance, which usually involves a community without the economic means to fight off the siting, the decision is made to embrace the siting simply because a derivative of the risk are employment opportunities and other potential avenues for revenue generation. As a result, some have contended

that this is not an example of environmental injustice since it was the community that made the choice, not an outside entity such as a government agency or a proponent. In this sense, some have argued, the land use decision is acceptable as the community weighed the benefits and burdens and concluded that the risk is reasonable given the returns that will ensue. Others have argued that such incidents are no more than coercion. Bullard (1992) uses the term "environmental blackmail" to describe the situation faced by such communities. Underlying this position is the idea that the community only accepted the risk because of its economic situation and, under more favourable circumstances, most would not likely have sacrificed the long-term protection of its environment and thus health for gains which are only short in duration. Thus an important element to keep in mind is examining 'who wins' and 'who loses' (Bullard, 1993b).

Such a predicament, as noted in Weaver (2001), has a long history in Native American communities. In this context, discrimination within environmental decision making occurs through spatial structures which, according to Laura Pulido (2000), results in white privileges being grounded in land tenures and access to natural resources. Bullard (1993b) suggests that a central component to environmental planning is racism, surfacing in such instances in its institutional form which influences local land use decisions. Much of this focuses on participation and collaborative decision-making in environmental planning and ecosystem management of natural resources in order to ensure access is equitable (Pulido, 1996, 1998; Pena, 2003). Moreover, insufficient participation of minority groups occurs even with laws and regulations requiring public participation (Bullard, 1994). In this way, a significant portion of racism is attributable to

the under representation of minorities in government agencies and organizations (Lazarus, 1993).

Because of the lack of political power, vulnerable groups are targeted even more so when a company is entrusted with decision making power (Bullard, 1994). American Indian lands in particular are routinely inundated by companies (Angel, 1992). In the absence of capacity such as human capital, technology, and economic resources a group's vulnerability is amplified. Nearly all decision makers, according to Lazarus (1993), will favour a particular group over another depending on the path of least political resistance, although individuals making these decisions, whether they represent government or private industry, are generally unaware of the manner in which their cultural experiences influence personal attitudes towards others of a different race (Lawrence, 1987).

Returning to the "landfill" example, the impacts listed above that are predominately shouldered by minority groups are not only caused by LULUs, but are also what underscores the siting of additional LULUs in and around environmental justice communities. For instance, in the early 1980s the State of California began a search for a location to place a new landfill. Prior to entering the planning stages, the State's Waste Management Board commissioned a political consulting firm (Cerrell Associates) to ascertain which communities would tolerate, or be less likely to resist, the siting of hazardous facilities. In 1984 the firm released its report, entitled *Political Difficulties Facing Waste-to-Energy Conversion Plant Siting* (referred to as the "Cerrell Report"), which found that the deciding factor for selecting the location of a LULU is not necessarily based on pure scientific variables: political factors are equally if not more significant in the successful siting of such a facility (Cole and Foster, 2000). Moreover,

according to Heiman (1996), the siting of any unwanted land use is more likely to be ninety-nine percent politics and only one percent science.

The Cerrell Report demonstrated that most (if not all) socioeconomic groups oppose land use planning or the sitting of facilities which pose a hazard or risk to community health, and as such, will embrace the concept of NIMBY ("not in my backyard") regardless of demographic composition, size, and geographic location (Shrader-Frechette, 2002: pg. 11). But if a company were searching for a location to place a LULU, then target communities would include those that contain characteristics such as the following: a small population, located in a rural area, consist of a population of that is predominately low-income earners and/or minorities, include a majority of people with a level of education equal to or lower than high school, and have more than average industrial activity with little if any commercial activity (Cole and Foster, 2000). In all, the Cerrell Report, as referenced by Bullard (1993b), advised the State's Waste Management Board that:

> "[a]ll socioeconomic groupings tend to resent the nearby siting of major facilities, but middle to upper socioeconomic strata possess better resources to effectuate their opposition. Middle and higher socioeconomic strata neighbourhoods should not fall within one-mile and five-mile radius of the proposed site" (pg. 18).

What the Cerrell Report not only brought to light, but also confirmed, was the vulnerability of low income persons and minorities. Such individuals and groups did not and likely still do not have the ability to protect themselves in the same fashion as their counterparts. Accordingly, the best place for a proponent to propose and possibly construct a LULU, such as a landfill, in terms of facing the least amount of opposition

and the possible rejection of the proposal is in and around environmental justice communities. Bullard (1993b), in addition to Cole and Foster (2000), further point out that, as the Cerrell Report recommends, the most effective approach to having a LULU approved is to examine the socioeconomic characteristics (e.g. income levels and racial make-up) of the land surrounding the proposed site, not environmentally-based variables.

With the social sigma attached to discriminatory animus, most effects of environmental racism, as noted in the literature, are likely unintentional in that a seemingly innocuous *white paper* (e.g. law, regulation, and policy) is the cause. As such, Evans (1998) has suggested that it is more appropriate to ground the analysis in the outcome of such constructs. In this way derivative racism, the environmental inequity that has come about as a result of past discriminatory actions which underlies existing laws and regulations, is used as the basis to form our understanding of environmental injustices (Evans, 1998).

2.3 Equity and Risk Assessment

In the 1990s, the analysis of equity within land use decisions became a focal point within the field of environmental investigation (Carr, 1996). This was by and large the product of events such as Warren County and the release of findings from the GAO and UCC studies, many of which occurred early in the previous decade. Much of the focus, then, surrounded the implementation of the instruments used by the government in environmental decision making such as policies, permits, and standards.

With the focus firmly placed on America's environmental law, the National Law Journal in 1992 investigated the issue of 'enforcement' within environmental justice

communities (Lavelle and Coyle, 1992). In particular, the study examined the EPA's implementation of the *Resource Conservation and Recovery Act* (RCRA) and the *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA). By comparing the decisions regarding environmental justice communities to other communities, it found that polluters received fines which were 50% less, contaminated sites were added to the list to be cleaned-up 20% slower, reclamation and restoration activities took anywhere from 12-42% longer to initiate, and the decision to treat rather than contain the contamination was nearly 70% less likely to occur in environmental justice communities. Carr (1996: pg. 308) has noted the latter of the findings "is a classic example" of discrimination as the preferred approach under the purview of environmental law is treatment, not containment.

Of the many studies released in the 1990s (including, for example, Anderton et al., 1994; Been, 1994; Bryant and Hockman, 1994; Glickman, 1994) relating to the disproportionate impact, the one that garnered national attention was the EPA investigation into the reported disproportionate distribution of negative effects from, for example, industrial development. Due to the pressure from those who had attended the Conference on Race and the Incidence of Environmental Hazards, as well as mounting evidence, the EPA during the summer of 1990 assembled a working-group with a diverse membership in collaboration with environmental organizations and advocacy groups to address the issue (Carr, 1996). The mandate of the working-group was to focus on the following four key areas:

- Conduct investigations into whether a disproportionate burden is placed on the shoulders of minorities and low-income earners;

- Cases where a disproportionate burden exists as a result of internal policies are to be examined in order to develop methods on how to alleviate such issues;
- Guidelines that have been enacted in regard to risk assessments are to be examined in relation to minorities and income levels; and,
- The relationship with these communities is to be assessed in terms of consultation in order to ensure that the agency's mandate is achieved (EPA, 1990).

In 1992, the EPA working-group released the final report entitled *Environmental Equity: Reducing Risk for All Communities*. The study demonstrated that "clear differences between racial groups in terms of disease and death rates" did in fact exist (U.S. EPA, 1992: pg. 3; Saleem, 1994). Many of these distinct groups were also exposed to higher than average "air pollutants, hazardous waste facilities, contaminated fish and agricultural pesticides" (EPA, 1992: pg. 3). Minorities, specifically children from an African American descent, are approximately two-thirds more likely to have an increased level of lead in their blood in comparison to one-third of white children (EPA, 1992: pgs. 20-30). The extent to which environmental factors play a role in such differences was indeterminate, largely because at that time there was a paucity of data regarding environmental health and race (EPA, 1992). Based on the findings, the working-group recommended that not only should the government move towards cleaning-up the hazardous sites in an expedient fashion, but that it also create an Office of Environmental Equity within the EPA (Carr, 1996) in order to further address the issue of inequities in America.

While the release of the EPA study furthered the struggles of those environmentally victimized by placing the issue onto the national agenda, it did not come without its share of criticism from supporters of the movement. Of particular contention

was the methodological approach that the working-group relied upon to determine the distribution of environmental burdens are across social groups, specifically the mixing of the underpinnings of two terms: equity and risk assessment.

Much of the controversy surrounding the EPA report was based on the methodological approach that was used by the working-group, specifically Risk Assessment (RA), which was used to determine the present and extent of environmental burdens confronting environmental justice communities. As a method of analysis, Freedman (1998) has noted that RA is defined as the quantification of potential adverse effects on a human population from an environmental hazard. Within this context, the risk of a hazard is determined by taking into account the probability of interaction between humans and the hazard, the probable concentration of the hazard, and the biological impact to be expected from the exposure (Freedman, 1998: pg. 269); for example, the release of a chemical substance into the environment (Noble, 2006).

Two differing views have come to be synonymous with the debate relating to the use of this approach to investigate and/or prove claims of environmental injustice. The EPA considered this approach to be an objective technique that is grounded in scientific analysis (EPA, 1990; Sandweiss, 1998). Environmental justice groups, on the other hand, contended that this approach is a form of institutional discrimination (Heiman, 1996; Israel, 1995) replete with disagreements surrounding scientific validity (Kreig and Faber, 2004) that results in different outcomes. The issue is therefore the efficacy of the approach for dealing with the underlying intricacies germane to identifying, understanding, and addressing the cause(s) and effect(s) of the disproportionate impacts.

Further, and more fundamentally, by implying that risk should be distributed fairly across social groups or in some cases being placed solely on the shoulders of minorities, rather than supporting an environmental ethos such as the avoidance of risk and pollution reduction (Holifield, 2001), mainstream environmental groups did not endorse the application of equity analysis (and to a lesser extent its reliance on RA as the sole means by which to demonstrate negative effects) in decisions relating to planning and management of land use activities. Some went as far as to impugn supporters, and by default environmental justice advocates, as being disingenuous with respect to protecting the environment (Carr, 1996). Such a response, according to Williams (1999), was to be expected given that advocates of this movement have had to contend with scepticism from the beginning when they tried to demonstrate that environmentalism does not merely revolve around protecting nature from industry; but, instead, the movement should enable individual groups to conceptualize what an environment consists of and how it is to be protected. As a result of this perception, both scholars and government agencies now avoid using the term environmental equity, mostly because its goal and meaning do not contribute to the overall political implications of the movement. The EPA therefore changed the name to the Office of Environmental Justice, a term that has been considered more constructive (Foreman, 1998; Taylor, 2000) and thereby in tune with broader environmental goals indicative of federal policy.

2.4 Principles, Definitions, and Frameworks

Since its inception nearly a decade before, and with a more appropriate term representing the underlying context of the movement, environmental justice as approach was taken

into consideration by various groups more formally by the early 1990s. Those with a vested interest (in comparison to federal and state governments which, at their core, are colonial-based systems: see Williams, 1994) in furthering the application of the framework in the mainstream decision-making process were at the forefront. A primary example of this is the inaugural First National People of Colour Environmental Leadership Summit held in 1991. This summit, according to Schlosberg and Carruthers (2010), "helped shape the landmark Principles of Environmental Justice" (pg. 12). Delegates gathered to discuss matters relating to issues such as culture, lands, and interdependence. By the end of the conference a framework consisting of seventeen principles was produced (Lee, 1992; Foreman, 1998; Taylor, 2000; Schlosberg and Caruthers, 2010), which are summarized as follows:

- everyone has the right to live without "ecological destruction" and to participate as equals at all levels of decision making relating to their health, which requires their consent;
- all policies are to be unbiased and non-discriminatory and must not force people into choosing between an income and their health;
- everyone has "the fundamental right to clean air, land, water, and food" as well as "to political, economic, cultural, and environmental self-determination";
- production of toxins is to cease and producers are to be held accountable, while at the same time producing "as little waste as possible" thus ensuring the health of current and "future generations";
- native peoples' sovereignty and the right to self-determination as well as the distinct legal rights to the land and their culture must be recognized by the government;
- victims of injustices must "receive full compensation and reparation for damages"; education must be based on "diverse cultural perspectives"; and,
- if the government permits any infringement of these principles then it is in violation of international law.

Following the lead of minorities was the American federal government. On Earth Day in 1993, it announced a plan that held as its objective the achievement of environmental justice for everyone. This plan came to fruition in 1994 when President Clinton signed Executive Order 12898, instructing all federal agencies to develop strategies for "identifying and addressing... [the] disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations" (Executive Order, 1994). Environmental justice, as defined by the EPA, is:

> The fair treatment and meaningful involvement of all people regardless of race, colour, national origin, or income with respect to the development, implementation, and enforcement of environment laws, regulations, and policies. Fair treatment means that no group of people, including racial, ethnic, or socioeconomic groups should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.

While not directly contradicting the conceptualization put forward by the federal government, Bryant (1995) added that, environmental justice from a broader perspective, is an ideal that

> ...refers to those cultural norms and values, rules, regulations, behaviours, policies, and decisions to support sustainable communities where people can interact with confidence that the environment is safe, nurturing, and productive. (Bryant, 1995: pg. 6)

He further notes that the principles of environmental justice are achieved when a group of people are free to reach their full potential, which is fostered through

> ...decent paying jobs; quality schools and recreation; decent housing and adequate health care; democratic decision-making and personal empowerment; and communities free of violence, drugs, and poverty. These are communities where both cultural and biological diversity are respected and highly revered and where distributed justice prevails (Bryant, 1995: pg. 6).

Getches and Pellow (2002) further the conventional idea of what environmental justice ought to embrace, including access to and allocation of natural resources and environmental (i.e. non-urban and non-rural) features as necessary components. They also note that, with the "expanded definition, the problem might take either of these forms: (1) low-income and minority communities are disproportionately exposed to environmental risks; and (2) low-income and minority communities are less likely than other communities to benefit from natural resources access and development policies" (Mutz, et al., 2002: pg. 32).

For American Indians, however, the circumstances that forms an environmental injustice is more problematic and arguably more complex. They are confronted (as previously discussed in this chapter) with a distinct set of circumstances that separates them from other environmental justice communities. Much of the difference is centred around how "environmental law has been colonized by a perverse system of values which is antithetical to achieving environmental justice for American Indian peoples" (Williams, 1994; as referenced in Rechtschaffen and Gauna, 2003: pg. 436). O'Neil (2003) suggests that the situation is different as their views are primary based on the holistic nature and the interconnectedness of cultural aspects such as spirituality, social

interactions, and ecological attributes with environmental thought, all of which does not necessarily exist with other environmental justice communities in the same way (if at all). Further, a general element of the worldview of indigenous groups is surmised by Churchill (1999):

> "Human beings are free (indeed, encouraged) to develop their innate capabilities, but only in ways that do not infringe upon other elements – called 'relations', in the fullest dialectical sense of the word – of nature. Any activity going beyond this is considered an 'imbalance', a transgression, and is strictly prohibited. For example, engineering was and is permissible, but only insofar as it does not permanently alter the earth itself. Similarly, agriculture was widespread, but only within norms that did not supplant natural vegetation." (pg. 17)

Based on the research completed to date, Schlosberg and Carruthers (2010) note that "indigenous demands for environmental justice go beyond distributional equity to emphasize the defence and very function of indigenous communities – their ability to continue and reproduce their traditions, practices, cosmologies, and the relationship with nature that tie native peoples to their ancestral lands" (pg. 13). This calls for the environmental justice framework, according to Yamamoto and Lyman (2001), to more diligently examine the "social, political, historical, cultural, and power interactions among whites" and indigenous groups.

Regardless of the type of community, the potential avenues available to them (or an assessor analyzing the situation) are of particular interest in relation to demonstrating that an injustice has occurred, is occurring, or will occur if a specific action were to transpire. Most communities, as Yamamoto and Lyman (2001) point out, follow a general approach consisting of four main steps. The first is the focus on the causes of burdens; for example, the pollution from LULUs like industrial facilities and landfills.

Second, the location of such facilities and whether they disproportionately impact a minority group in some way. The third is that such minorities must have equal representation in the administration of environmental decisions governing the LULU. Lastly, and from a community based approach, the minority group organizes to place pressure on the entity (including, a person or group) that has the power to make decisions.

Although some (e.g., Been, 1994) have suggested that differentiating between process and outcome is a perquisite to selecting an appropriate cure, it remains questionable whether a singular focus is appropriate given the unpredictability of social institutions and their complex interactions. This uncertainty is largely due to ongoing disputes over the correlation of and the ability to differentiate between procedural and distributional injustices (Kaswan, 1997). Considering this limitation, as Greenberg and Cido (1997) note, to unearth the basis of an injustice it is not necessarily beneficial to choose between process and outcome; however, both are important as they are significant aspects that are contained within the definitions (Holifield, 2001). Instead, they suggest, that selecting (and, perhaps to some degree, developing) an analysis framework that incorporates both aspects is necessary. Based on the events and the literature to date within the field of environmental justice, Mutz *et al.* (2002) list five fundamental theoretical approaches that a community may consider when properly "defining injustices related to natural resources and the environment" (pg. 31), none of which are "mutually exclusive" from one another as "they overlap considerably" (pg. 34).

The first is *public participation.* A long history exists regarding the inclusion of individuals and groups in environmental processes and the decisions that flow from them.

Cvetkovich and Earle (1994) point to the procedural inclusion of the American public that is protected by federal laws. Examples include the mandate by the *Nation Environmental Policy Act* of 1969 for public involvement, in addition to it being a requirement in the *Comprehensive Environmental Response, Compensation, and Liability Act* (both the 1980 and 1986 versions). They further note that the extent to which the public is involved varies from participating in short-term procedures such as open-houses or participatory studies that are more long-term. Such inclusion is regarded as an essential component for "democratic governance" (Lauber and Knuth, 1999: pg. 19). In Table 1, Mutz et al (2002) provide a general overview of the framework.

Table 1: Public Participation Framework

What the Framework Requires	Underlying Assumptions	Some Questions / Problems
• Devise fair procedures that give voice to all members of a community, especially the politically powerless. • Ensure that all groups have the social capital to participate effectively.	• Fair procedures for whatever outcomes are agreed to. • Participation allows affected parties to help determine what happens in their communities and how benefits and risks are balanced.	• Is a fair process enough? • Can all parties participate fairly and effectively? • Who should be involved in the process?

(Adapted from: Mutz et al., 2002: pg. 36)

Since the involvement of the public does not include a substantive element such as formal voting on the decision (Cvetkovich and Earle, 1994; Mutz, et al, 2002), there is likely to be both dissatisfied and satisfied participants (Lawrence and Daniels, 1997). Those responsible for the environmental decision often suggest that, when all parties are somewhat dissatisfied with the decision, then the decision is more reflective of justice as they properly balanced the views of the public (Wondolleck, 1988). Lawrence and Daniels (1997) argue otherwise, as "defining success as 'equilibrated dislike' is not

indicative of the quality of resource management" (pg. 560). In such cases, they write, the focus of those that either designed or implemented the process (and perhaps both) was likely on the need to have an outcome rather than on the procedures for arriving at an appropriate decision.

While the requirement for the public to participate in environmental decision-making has a long history, the involvement of people of colour in such processes does not. As previously noted in this chapter, the inclusion of minorities in decision making processes has many shortcomings. Both a lack of inclusion at key levels in decision-making or the lack of capacity to effectively participate in such processes, are prominent examples of the challenges by which minorities are confronted with when attempting to seek justice via public participation processes. As such, the framework "does not always lead to justice" (both for the public in general and minorities in particular), as including people within the process is based on the questionable assumption that participation will result in an acceptable outcome (Cvetkovich and Earle, 1994).

The second framework is *ecological sustainability*. Mutz et al. (2002) suggest that underscoring this framework are political motives; that is, the avoidance of accurately measuring the costs of development and/or shifting the burdens of such development onto those less capable of resistance, including the lack of serious consideration for future generations. In Table 2, Mutz et al. (2002) provide a general overview of the framework.

Table 2: Ecological Sustainability Framework

What the Framework Requires	Underlying Assumptions	Some Questions / Problems
• Require pollution prevention and conservation of resources. • Reduce pollution and risks for all people. • Ensure that economic, equity, and ecological are intertwined. • Make ecological sustainability the primary value. • Use the precautionary principle in the face of uncertainty.	• The effects of environmental problems are to be eliminated rather than redistributed. • Environmental problems are dealt with directly, as ecological challenges, rather than more indirectly, as social, economic, or political problems.	• Pollution may eventually be eliminated, but what about its impacts in the interim? • Are these fairness, discrimination, and disproportionate impact issues that still need to be addressed beyond what sustainability implies? • What use of resources, especially nonrenewables like fossil fuels, is consistent with sustainability?

(Adapted from: Mutz et al., 2002: pg. 37)

Central to this framework are the laws and policies developed and implemented by the various levels of government relating to sustainability that are typically interpreted inconsistently (Cowell and Owens, 1998), and which do not adequately account for the distribution of benefits and burdens from an environmental justice perspective (Mutz et al, 2002). In many cases, according to Martinez-Alier (2001), impacts are incorrectly incorporated in the economic valuation system. As a result, she writes, "people all over the world are seeing their basic rights compromised, losing their livelihoods, cultures and even their lives", which is by and large due to the "clash in standards of valuation when the languages of environmental justice, or indigenous territorial rights, or environmental security, are deployed against monetary valuation or environmental risks and burdens" (pg. 167). Further, Padilla (2002) suggests that there is also an international inequity when it comes to the manner in which sustainably is incorporated in the decision making

regimes, as existing "economic analysis treats future generations unfairly" (pg. 81).

The third, *distributive justice*, focuses on the distribution of LULUs or other matters that adversely impact minorities. Kaswan (2003) suggests that, at the theoretically level, this injustice is present whenever there is an disproportionate distribution of burdens. In Table 3, Mutz *et al.* (2002) provide a general overview of the framework.

Table 3: Distributive Justice Framework

What the Framework Requires	Underlying Assumptions	Some Questions / Problems
• Distribute benefits and burdens fairly or equally. • Ensure that differences benefit the least well-off. • Provide compensation for past injustices such as treaty violations • Consider environmental ethics	• Public policies should produce fair outcomes. • Policies should meet expectations of constitutional protection.	• What is fair? What is equal? Exposure to risks and access to benefits cannot be distributed equally, so how should they be shared? What obligations do we have to those who are especially dependent on natural resources and rooted in the land?

(Adapted from: Mutz et al., 2002: pg. 36)

Under this framework a significant emphasis is placed on the outcome rather than the processes that are likely the cause (in whole or part) of the potential injustice, particularly the benefits and burdens that are accrued and whether they are distributed equitably across the various social/cultural components (Kaswan, 2003). Although there is a general disagreement among the scholars as to *what* is to be adequately dispersed in society, Smith (1994) points to two explanations of the distributive paradigm. The first is material goods, that is, something that is or can be marketed to others such as natural resources. In contrast, the second focuses on items like "self respect, opportunity, power, and honour" (Young, 1990: pg. 8).

The fourth, which is the *social justice* framework, looks further than the precise siting of a LULU by considering the political, economic, market forces, and social aspects that influenced the placement of the LULU (Kaswan, 2003). Key to this are the rights of the people affected by the decision. In Table 4, Mutz *et al.* (2002) provide a general overview of the framework.

Table 4: Social Justice Framework

What the Framework Requires	Underlying Assumptions	Some Questions / Problems
• Comprehensively assess the interaction of economic, political, social, and cultural power. • Address the root causes of injustices. • Ensure the preservation of cultural diversity, especially groups with ties to the land.	• The economic, political, and social ideas, institutions, norms, incentives, and underlying assumptions that result in disproportionate risks and harms are addressed.	• With such a broad agenda, what are the priorities for legal and policy responses? • How can they be addressed in environmental and natural resource law? • What are the historical land use patterns and decisions that have contributed to injustices, and how can they be reversed?

(Adapted from: Mutz et al., 2002: pg. 37)

In contemplating the potential conflict between rights (e.g., civil rights) and interests (e.g. employing Caucasians), Rawls' contends that the "[r]ights secured by justice are not subject to political bargaining or the calculus of social interests". Similarly, Dworkin (1984: pg. 153), as referenced by Smith (1994: pg. 37), has stated that "[r]ights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole". While Rawls (1999) and Dworkin (1994) essentially believe that a right is to override an interest, decision making process in general (are designed, for the most part) to focus on the 'balancing of societal interests'. It is such balancing that is often the focus of claims of environmental injustices. Institutions and their structures that distribute access and allocation are the

focus in this framework, as "social justice is predicated primarily of the basic structure of a society" (Smith, 1994: pg. 25).

Lastly, the fifth is a *civil rights* framework. A significant amount of influence comes from the struggles brought to light during the civil right movement whereby users of the framework endeavour to remove the historic and present-day viewpoints as well as barriers that discriminate against minorities. This is accomplished through ascertaining whether a minority group has or is about to experience an adverse effect from, for example, an environmental law or the result of a decision-making process. Due to its roots, a great deal of emphasis is placed on seeking remedies through legal instruments such as the American Constitution (Mutz et al, 2002).

Bryner (2002) has pointed out that using the available components of the American Constitution is practical as they apply to all levels of governmental decision-making. The success of such mechanisms, however, largely depends upon the scope of the approach. Central to this is a non-environmental element, namely the Fourteenth Amendment (Bullard, 1994c). This Amendment provided, among other things, an Equal Protection clause which maintains that no state is permitted to "deny any person within its jurisdiction the equal protection of the laws" (Saleem, 1994: pg. 11) regardless of their race or citizenship. Evans (1998) has noted that, investigating a claim of racism (whether environmental or otherwise), will more often than not lead to an innocuous piece of legislation or a decision. Further, according to Bryner (2002) and noted by Mutz *et al.* (2002), it is important to define what discrimination is, understand how and when does it occur, and whether an available remedy simply transfers the impact to another community. In Table 5, Mutz et al (2002) provide a general overview of the framework.

Table 5: Civil Rights Framework

What the Framework Requires	Underlying Assumptions	Some Questions / Problems
• Indentify disparate impacts due to discrimination. • Devise remedies that make victims whole.	• Civil rights law provides legal tools and concepts.	• How is discrimination to be defined? • When does it occur? • What are the remedies possible? • Should low-income communities be included? Will problems just be transferred to another community?

(Adapted from: Mutz et al., 2002: pg. 36)

However, claims of an environmental injustice brought fourth under the Equal Protection Clause have not been overly successful. A plaintiff is required to demonstrate, through evidence, that there was intent to discriminate (Mutz et al., 2002). This is quite difficult to accomplish given that cases of overt racism are atypical in today's litigious society. Establishing intent is even more problematic since a considerable portion of discrimination is inadvertent due to its institutional nature (Bullard, 1994a, 1994c). The most difficult barrier to overcome is the ability of government agencies to put forward numerous scientific and economic justifications for making a decision (Faerstein, 2004).

Critics of the intent-standard approach have suggested that the Supreme Court has almost certainly disregarded their impartiality by rendering such a value-laden judgement (Lawrence, 1987). Underscoring the magnitude of this standard is the court's acceptance of unintentional discrimination as being constitutional, lessening it to nothing more than an accidental blunder of sorts (Lively & Plass, 1991). In doing so, according to Saleem (1994), this assumes that society is a colour-blind democracy that reinforces the abnormal growth of racism rather than purging the phenomena through dispensing with the likelihood that particular unintended actions cultivate and perpetuate racial suppression. Furthering the intent-standard approach is the decision from the Supreme Court in the

Village of Arlington Heights vs. Metropolitan Housing Development court case. In its decision, the court established that for an action to be considered intentional discrimination a claimant is required to provide evidence on five inquires (Kaswan, 1999): (1) Does the government decision impact one racial group more than another?; (2) Is there a pattern, clear or veiled, that emerges from the decision that was based on a law which appears to be neutral on the surface?; (3) By reviewing the chronology of the decision does it become apparent that a series of events were taken by the government in order to produce an undesirable outcome?; (4) In the process of making a decision did the government neglect to follow established procedures or substantive principles? (5) Does a discriminatory purpose emerge when the background of the legislation and its administration is reviewed? It is important to note that it is not necessary to provide evidence of intent for each of the five factors for a claim to be successful. Instead, evidence of intent to discriminate on any one of the five would meet the standard resulting in the respondent being culpable for its actions (Evans, 1998).

2.5 Conclusion

With the emergence of the civil rights movement, which had long recognized the differential treatment between minorities and their counterparts, came the basis of the environmental justice movement. It combined (with modifications) the philosophical underpinnings of human rights with the environmental ethos contained with the modern environmental movement at that time. By doing so, the fact that minorities in America have for many years borne the negative impacts from anthropogenic activities (e.g. pollution resulting higher rates of health problems) more so than white, affluent citizens,

was brought to light. Such communities were being, and likely still are, exposed to more environmental risk and are less likely to receive a benefit from land and natural resource management laws, regulations, and policies. Although minorities in general and to a lesser extent those with low-incomes have been disproportionately impacted in similar ways, the nature and extent of impacts experienced by American Indians is arguably more detrimental given the manner in which environment-based problems (e.g. pollution, access to land) affects each of their cultures.

What all environmental justice communities have in common are the means by which the system has or may discriminate against them; namely through either environmental processes or the result of the outcome, either of which may be intentional or unintentional. The key to indentifying these impacts begins with the appropriate delineation of a unit of analysis. Rather than a uniform approach to assessing impacts, an appropriate approach to establishing the unit of analysis is based on the specific circumstances of a situation. Similarly, the analysis framework should be selected based on the specific circumstances of the situation and the matter that is at the heart of the concern; for example, a concern relating involvement of a community in a process may be better addressed through a public participation framework instead of a sustainability framework.

Fundamental to the American environmental justice movement in addressing the disproportionate impact is overcoming not only the "not in blacks backyard" (NIBBY) syndrome (see: Bullard 1993a, 1994a) in land use planning decisions, but also the use of NIMBY as a default approach; merely placing the problem onto the shoulders of another community, irrespective of whether it is community living without any current LULUs, is

considered inappropriate from an environmental justice perspective. In this context, an environmental decision may considered to be just when it enables a community to delineate the land use activities within its boundaries which will enable members to live in a safe and healthy environment. The parameters of such an environment include principles such as those outlined by the First National People of Colour Environmental Leadership Summit (see, e.g.: Lee, 1992; Foreman, 1998; Taylor, 2000; Schlosberg and Caruthers, 2010) and others such as Bryant (1995).

In cases where a disproportionate impact has been identified, there are two main sources that are relied upon to address environmental injustices. The first is the Equal Protection clause in the American Constitution, although cases brought forward have not been overly successful as a community is required to demonstrate that discrimination has occurred and that it was intentional, which is commonly referred to as the intent-standard approach. The second is Executive Order 12898, which directed all federal agencies to address matters relating to environmental justice. While more operational than the Equal Protection clause, its scope is limited in the sense that it only applied to decisions within the purview of the federal government. Neither source therefore provides an overarching remedy to address concerns relating to environmental justice.

In chapter three, equality as a concept is briefly reviewed followed by the development of the concept of equality in Canada. The guarantee of equality in Canada, protected by the *Constitution Act, 1982*, is used as a basis for developing a Canadian-based environmental justice framework.

Chapter Three: Equality and its Development in Canada

3.0 Introduction

"...Canada....where equality is not only a goal but a reality..."
(Jean Chretien, 1992: pg. 13)

Minority rights in governmental decision-making have been reinforced by Canadian social institutions and systems on a variety of bases. These bases are derived from the literature on race and ethnicity regarding the protection of First Nations and their particular interests in relation to the land. This chapter discusses the concept of equality and introduces a framework to further the environmental justice of minority groups such as First Nations.

3.1 Equality as an Ideal

Few would argue that inequalities do not exist in North American and elsewhere around the world. The mere presence of inequalities between individuals and among groups within social arenas is in all likelihood as old as humanity itself. Turner (1986) has noted that "social inequality is inevitable because it is endemic to the very constitution of human society... (pg. 30) since individuals are stratified on a variety of dimensions as a consequence of the very existence of social norms and sanctions" (pg. 77). Early accounts from ancient Hindu society with its castes of people to the various stratums in imperial China some 2500 years ago, are but a few of the examples (Turner, 1986: pg. 18). More recent examples, as discussed in the previous Chapter, includes the enslavement of people from the continent of Africa during the 1600s and the treatment of indigenous groups residing in and around what is now referred to as North America.

3.1.1 Justice and Equality

Over the years much has been written regarding the differences between and among individuals in society, which has resulted in a variety of terms being used to conceptualize this phenomenon. Two of the more prominent terms that have come to the forefront in the environmental justice movement are 'justice' and 'equality'. As Smith (1994: pg. 54) notes:

> The close connection between justice and equality is manifest in both history and language. The great historic struggles for social justice have centred about some demand for equal rights: the struggles against slavery, political absolutism, economic exploitation, the disenfranchisement of the lower and middle class and the disenfranchisement of women, colonialism, [and] racial expression.

While both terms articulate a premise that recognizes the manifestation of inequality in social contexts, environmental justice literature suggests that the terms are nevertheless not synonymous with one another as they are fundamentally dissimilar. Lui (2000) points to Rawls' understanding of justice, as it is viewed by many as the most influential theory provided in recent years that is comprehensive. In *A Theory of Justice*, Rawls' notes that a "just society" is one that attempts to maximize the liberties that are fundamental to the society equally so that the liberty of one individual would not conflict with the liberty of another (Turner, 1986: pg. 43). In this sense, he viewed an injustice to be merely an inequality that does not benefit everyone (pg. 54). More specifically, Rawls' believed:

> All social values – liberty and opportunity, income and wealth and the

> bases of self-respect – are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage. (Rawls, 1999: pg. 54)

He considered that 'justice' in general did not give rise to a particular set of acceptable inequalities, but rather "only requires that everyone's position be improved" (pg. 55). In the context of Rawls' theory, the elimination of inequalities in society is therefore not a requisite of justice per se.

Rawls' is not alone in ascribing to this belief. Amartya Sen (1992) points out that the leading theories on justice relating to social interactions all contain elements of equality. In particular, Trappenburg (2000) writes that Walzer, in his book *Spheres of Justice: A Defence of Pluralism and Equality* (1983), accepts the presence of social inequality subsequent to the distribution of benefits so long as it remains within the sphere it exists. Similarly, Robert Nozick in *Anarchy, State, and Utopia* (1974) takes into account equality during the distribution of benefits. He considers the presence of inequality afterwards as justifiable provided that "its benefit to the worst-off group... is greater than (or equal to) the cost of the inequality" (pg. 211). Each of the theories, according to Smith (1994), then "share the same egalitarian plateau'... [and] each attempts to define the social, economic and political conditions under which members of a community or society will be treated as equals" (pg. 117).

By the theories focusing on a similar outcome, a salient point is revealed. That is, none of them require the elimination of the social inequalities between the haves and have-nots in order for an outcome to be considered just. This is problematical from an environmental justice perspective, as the underlying impetus since the beginning of the movement (largely considered the civil rights movement in America) focused on the

removal of social, environment, economic, and political inequalities through simultaneously changing the present distribution of benefits, not the acceptance of further inequalities.

Lui (2001) points out that a decision made under the auspices of justice could aggravate an existing inequality, but still be justifiable so long as it benefited the 'haves' less than it benefited the 'have-nots'. On the other hand, he writes, a decision based on egalitarian principles will look more closely at existing inequalities. Decision makers then ought to expend time deciding the degree to which the decision reduces or perhaps eliminates such inequalities, which includes using the following principles noted by Lui (2001): existing inequalities are avoidable and cannot be justified, so they need to be purged from society; men and women are forever equal with respect to having "intrinsic value, inherent worth, and essential nature"; for there to be justice, there must be equality; while it is unnecessary to provide a justification when one creates an equality, it most certain is necessary for creating an inequality; and, individuals deserve to be treated alike, with the exception of cases where they deserve to be treated differently because of their situation. (pg. 23)

Even though environmental justice primarily focuses protecting those belonging to minority groups, equal protection of a person's environment is not exclusive. The civil rights movement in America was not about improving the situation of one group of people while at the same time cause a second group to receive the injustice; more specifically, trading places was not the underlying purpose of the movement. As Bullard (1994) suggests, "the solution to unequal environmental protection is seen to lie in the struggle for justice for all Americans. No community, rich or poor, black or white,

should be allowed to become an ecological 'sacrifice zone'" (pg. 206). He believed that achieving environmental justice is dependent not on stopping the placement of LULUs ("locally unwanted land uses") in a location that detrimentally affects minorities, as that would likely further the NIMBY ("not in my backyard") syndrome in some respects. Rather, he considers that an environmental processes ought to be focusing on NIABY ("not in anyone's backyard"), as that would be indicative of a decision making process which held equality as its goal.

In contrast to the theories of justice, egalitarianism focuses on purging inequality from society through simultaneously changing the present distribution of benefits (Lui, 2001). Thus any distribution that does not fully remove an existing inequality, including derivative inequality, is unacceptable in the context of environmental justice. As a result, and from a strict sense, the principle of justice as represented by the Rawlsian version (and likely others as well) is not relevant in a structural context to the principle of equality (Temkin, 1986), as the "end goal" of both terms are fundamentally different (Lui, 2001: pg. 23).

3.1.2 Particulars of Equality

Historically, the concept of equality has been a focal point for Eurocentric societies. It has been ingrained into the social arrangements and institutions of most countries in some fashion or another, with scholars continuing to work on devising parameters with respect to the foundational meaning of the term. The further one attempts to apply precision to its definition, however, the more problematic it becomes. Even with most having an innate understanding of what the term means and what it may include, the further it is

explored the more it becomes apparent that the understanding moves about (Freedman, 2002) depending on the situation as well as those involved. Equality thus not only "carries a range of meaning and connotation" (Persky, 2008: pg. 455), but more importantly it is also

> "...a protean word. It is one of those political symbols – liberty and fraternity are others – into which men have poured the deepest urgings of their hearts. Every strongly held theory or conception of equality is at once a psychology, an ethic, a theory of social relations, and a vision of the good society." (Persky, 2008: pg. 455)

Such notions are seemingly limitless, and even more so since there are at least "108" notions of equality "and perhaps as many as 720", all of which are "structurally distinct interpretations" (Rae, 1981: pg. 119). Kurland (1979) goes one step further. He argues that trying to define 'equality' is akin to delineating "the shape of an amoeba" (1979: pg. 119).

While it is clear that there is no single blueprint for delineating the boarders of equality, it is not to say that the term's elusive nature is impractical by any means. To deal with the ambiguity, Westin (1990) points out that the concept has various synoptic underpinnings with respect to cases involving "persons" and their "things", namely fixed and non-fixed variables that are for the most part constant. These are: "(1) the relationship that obtains among two or more persons or things, which, (2) although distinguishable in one or more respects, (3) have nevertheless been jointly measured, (4) compared, and, (5) ascertained to be indistinguishable, (6) by reference to a relevant standard of comparison, (7) a standard which, until specified, can be represented as "X" (Westin, 1990: pg. 120). He notes that variables (1) through (6) are fixed whereas

variable (7) is not. The latter of the variables represents the scores of different circumstances that are encountered and, as a result, the myriad notions of equality.

The unfixed variable of "X" is intended to represent the unknowns of the human situation, or in other words, the diverse possibilities that may arise for any given individual. Such variances may arise at anytime and include to some extent both internalities and externalities. Understanding these variables in a given circumstances is important, according to Turner (1986), because societies "often attempt to justify and to explain social inequalities by reference to nature in suggesting that all social inequality is derived from the natural inequalities of individuals" (pg. 29). Much of the inequality is thus an outcome of an individual's "social location within the social structure" (pg. 57).

From this, it is apparent that not all people share the experience of an equal starting point. Some are born into a life that has many benefits, while others are not. Smith (1994: pg. 54) suggests that the probability of the process of conception and birth to a particular parent or parents and in some cases guardian(s), along with the location of the birth in concert with its timing, all have a significant influence on the opportunities available in life. Family affluence and its continued accumulation play a role as well (Turner, 1986: pg. 72) since it provides subsequent generations with privileges. Also influencing this is the biological intersect between the genetic contributors, which may or may not be the parent(s). Described by Smith (1994) as natural attributes that are derived from the genetic pedigree of the contributors, they are not universally dispersed evenly throughout the population and therefore endow a specific individual with a particular set of opportunities. These include traits such as "physical strength, dexterity or intelligence" (pg. 55).

An individual's characteristics are not the sole contributing factors to the generation of potential inequalities that may emerge in the future. Smith (1994) suggests that the physical location and the natural surroundings are important in terms of determining what opportunities exist and whether an individual has access. In an optimal case, an individual is born into a situation where there is "bountiful natural resources or an advanced social economic environment, with first rate schools, hospitals and... well paid jobs available" (pg. 55) over a long period of time coupled with political stability. Conversely, those borne in an area replete with civil unrest, like a war for instance, are more likely to face distinct challenges that an individual borne into the optimal case would not otherwise face. As a result, the access and opportunity afforded to an individual or group is integrally connected to the probability of factors that they have little to no control over; at best, it is a "natural lottery" (Smith, 1994: pg. 55)

An individual's characteristics and physical location represents avenues in which social inequality may arise. Smith (1994) suggests that pulling these together also demonstrates their importance in relation to the manner society considers them equal. He references Kymlicka's (1990: pg. 43-44) understanding of this:

> In deciding which particular form of equal treatment best captures the idea of treating people as equals, we do not want a logician, who is versed in the art of logical deduction. We want someone who has an understanding of what it is about humans that deserves respect and concern, and of what kind of best manifest that respect and concern. (Smith, 1994: pg. 58).

Although it is important not to generalize or perhaps confuse the meaning of 'human' when trying to discern what deserves concern and respect, as such an approach would likely carry with it an assumption that all individuals and groups are the same.

Not all differences between individuals and groups amount to an inequality between them, and in the same way different treatment does not necessarily result in inequality. As Friedrich Engels (as translated by Buzlyakov, 1973, and referenced in Smith, 1994) puts it:

> Between one country and another, one province and another and even one locality and another there will always exist a certain inequality in the conditions of life, which it will be possible to reduce to a minimum but never entirely remove. Alpine dwellers will always have different conditions of life from those people living on plains (pg. 49).

Based on the above, it is unlikely that Engels was supporting a distribution of benefits that would further degrade the quality of either dweller-type. Rather, as Smith (1994) suggests, Engels was concerned with the lifestyle of each group more so than he was with the differences in which they exercised their way of life. He adds that the environmental differences of where homes are located translate into different ways people live, an example of which is the relationship between their surroundings and the method they build houses. To Engels, according to Smith (1994), the differences in "habitats and customs as well as attitudes to food and housing" merely reflected the "differences in culture to which it is hard to take moral exception" (pg. 50).

In view of this, Turner (1986) writes that the 'sense of equality' must emerge from "the very fabric of social relations" (pg. 31). These relations, upon which a proper consideration of equality is based, is necessary to acknowledge as inequality "is endemic to the very constitution of human society", meaning that the unequal distribution of benefits is a product of the standards and norms people use in their daily social

interactions (Turner, 1986: pg. 30). The modus operandi that governs social relations, which is presumably a reflection of the fabric that underpins the society itself, is key to understand if the objectives of equality are to be applied and achieved.

3.2 Equality in Canada

Canada has an ambiguous history with respect to the literature and discussions surrounding the topic of race and racism, especially in comparison to Britain and the United States of America with which this country shares similar social values and legal traditions. In many respect, Canada has used this to embrace "[a] mythology of racelessness and stupefying innocence" when it comes to indentifying with the consequences of its legislated actions (Backhouse, 2001: pg. 14) and, in some cases, its inaction. Moreover, as Backhouse (2001) points out, unlike other countries Canada's "'colour bar' was much more muted and informal, fluctuating over time and place, depending on the proclivities of local proprietors and their white cliental" (pg. 281). Inequalities occurring in the early years of Canada went largely unnoticed by the general populace, as they were concealed through the enactment of laws according to Backhouse (2001). These laws were then used to foster "the inequality of racialized groups" (Backhouse, 2001: pg 15) such as First Nations.

The following section is divided into two key time periods that correspond with the development of equality in Canada. The first is described as the *Pre-Charter* era, as it covers the time period from 1867 (the Confederation of Canada) up and until the day the *Constitution Act, 1982* came into effect. Beginning with the enactment of the *British North American Act*, the brunt of Eurocentric ideology were shouldered by First Nations

since there was no law prohibiting such behaviour in the years that followed. Even with the official Bill of Rights coming into effect in the 1960s there was little change. The prevalent change in First Nations' struggles for equality came in the early 1980s, which is described as the *Post-Charter* era. It began with the *Constitution Act, 1982* coming into force and includes present-day matters. Unlike the years that followed Confederation, which included innumerable direct and indirect attempts by the Crown to assimilate First Nations into mainstream society, this time period has and continues to recognize the errors of past dealings and legal mandates and is gradually moving towards reconciliation.

3.2.1 Pre-Charter Era

British North America Act

In 1867, the United Kingdom passed the *British North American Act* in order to unite the colonies of the 'new world'. This Act, which has since been renamed the *Constitution Act, 1867*, created the country of Canada. As a federal state, governmental power in Canada was initially designed to be divided between the national government, as represented by Parliament in Ottawa, and the provinces as represented by their legislatures. (Greenbaum et al, 1995a: pg. 26). More recently, however, this division has been modified to some extent whereby a portion of the power has been delegated to First Nations through land claims and other legal and political means.

Since a key purpose of the *Constitution Act, 1867* was setting up a nation and the division of power in terms of legislative jurisdiction between the federal and provincial

governments, the extent to which it protected the rights of minorities was limited (Sharpe & Roach, 2005: pg. 8). Other than provisions such as 93 and 133, which protected certain language and Judeo-Christian rights, the Constitution at the time did not explicitly recognize the rights of other minorities such as First Nations. Without this protection, government officials and others were seemingly free to not only form and disseminate stereotypes and other racial ideology, but to also practice discriminatory behaviours.

An early example is the view expressed by then-Prime Minister John A. MacDonald with respect to those individuals from the orient, whom he referred to as an "alien race" that "would not and could not be expected to assimilate with our Aryan population". Such early views likely led to the "Chinese Head Tax", which at the time required immigrants from China to pay for their entry into Canada whereas other immigrants were exempt. Payment did not, however, result in unfettered access to the rights enjoyed by other Canadians. Their civil liberties were further restricted as they were not permitted, for example, to vote in federal elections.

In comparison to other historically oppressed and subjugated groups, such as the Chinese, Aboriginal peoples in Canada have arguably faced the most far-reaching abhorrent treatments since Confederation.[5] Generations of them were impacted since the arrival of Europeans. Nearly every aspect of their mode of lives has been either directly or indirectly confronted by a "goal" of the Church and the Crown to "civilize" them whereby they could be assimilated into the mainstream society (M^{c}Millian, 1995: pg. 313).

Under section 92(24) of the *Constitution Act, 1867*, the federal government has

[5] Although the treatment of First Nations prior to confederation is outside the scope of this chapter (and thesis), there is a great deal of literature that reviews such treatment.

the legislative jurisdiction to administer the affairs of Indians. In 1876, the Parliament of Canada used this power to bring into force a piece of legislation, specifically the *Indian Act*, to deal with such affairs. Since its enactment, however, the *Indian Act* has come under significant scrutiny. It has provided First Nations with a special legal status within Canada, while simultaneously depriving them of the equality that is generally offered in Canadian society to every other citizen (Berger, 1981). Moreover, the implementation of the Act has "structured inequality, poverty, and underachievement among Natives... [and] has seriously encroached upon the personal freedom, morale, and well-being of Native people" (Frideres, 1988: pg. 37).

Much of this inequality was (and perhaps still is) a derivative of the actions performed by the federal department that oversaw Indian affairs over the years. As an institution, the Department of Indian Affairs originally viewed the retention of traditions and customs by First Nations as a significant problem, and therefore made an effort to implement methods to achieve "acculturation" (Backhouse, 2001: pg. 66). Perhaps the most well-known cultural suppression under the *Indian Act* was the focus on First Nations' spiritual connectedness to the land, including their traditions and ceremonies.

Along the western shores of British Columbia, for example, First Nations prior to the arrival of Europeans were freely practicing a traditional custom referred to as the Potlatch. In general, the custom is a spiritual ceremony that often occur as a result of "births, coming-of-age events, marriages, and deaths" (Steckley and Cummins, 2001: pg. 167). While the cultural-uniqueness of ceremony makes it problematic to translate into terms easily understood by non-aboriginals, it is essentially similar in many respects to a combination "of a Christian mass, a christening, a confirmation, and the Bible, a

country's constitution and a legal contract... the ballet and an art exhibition, an old-style storyteller and a mandatory course in local history" (Steckley and Cummins, 2001: pg. 167).

Seeing the significance of the ceremony to the continuation of those First Nation cultures that practiced the tradition, the Church and the Crown identified it as a rival to their 'goal'. They believed the potlatch was "by far the most formidable of all obstacles in the way of Indians becoming Christians, or even civilized" (Steckley and Cummins, 2001: pg. 172). As such, and because of a prominent impetus from the local missionaries, Canada enacted a law in 1884 that banned the ceremony, which reads:

> Every Indian or other person who engages in or assists in celebrating the Indian festival known as the "Potlatch" or in the Indian dance known as "Tamanawas" [the Spirit Dance of the Salish] is guilty of a misdemeanour, and shall be liable to imprisonment for a term of not more than six nor less two months in any gaol or other place of confinement, and any Indian or other person who encourages, either directly or indirectly, an Indian or Indians to get up such a festival or dance, or to celebrate the same, or who shall assist in the celebration of same, is guilty of a like offense, and shall be liable to the same punishment. (Steckley and Cummins, 2001: pg. 172)

As Richardson (1994) points out, the government not only banned the Potlatch but also other major ceremonies like the Sundance in the Prairies. By 1914, he writes, the government went as far as to consider "almost any performance that an aboriginal person might like to give or attend" as inappropriate (pg. 105). He also notes that First Nations were even banned from wearing traditional clothes or performing at community events held by mainstream society, such as stampedes, unless they requested and obtained written permission from the local Indian Agent. Often when First Nations

people were caught exercising their cultural traditions and practices they were subject to prosecution, resulting in incarceration (Richardson, 1994). Making matters worse, some individuals even faced imprisonment for a period up to 30 days merely for playing pool in local establishments (pg. 106). Ensuring the efficacy of the approach was the fact such individuals and/or groups were not permitted to raise money and hire lawyers to assist in their defence against the discriminatory practices of the government (Richardson, 1993). Such laws were not repealed in Canada until 1951, which was 17 years after America had done so (Steckley and Cummins, 2001).

Key to unhindered settlement of lands by European settlers, as well as their unconstrained use of the land and its resources, was the geographic impoundment of First Nations through the creation of land reserves, which would also assist in the Crown achieving its overarching goal of assimilation. In many cases, First Nations were unilaterally told by Indian Agents to settle on specific parcels of land that were selected by the government as 'lands set aside' (Frideres, 1988). As Tobias (1977: pg. 89) writes:

> Legislation outlining the goals of the reserve system and establishing the procedure for assimilation was passed in the Legislature for Upper Canada in 1857 in "an Act to encourage the gradual civilization of the Indians in this province..." In 1869 essentially the same bill with a slight change in emphasis was passed by the Parliament of Canada entitled "an Act for the gradual enfranchisement of Indians..." Both laws were based on the assumption that the reserve was the place where the Indians could be "civilized, meaning Christianized, educated and be made a farmer.

By design, the reserve system was to be an instrument that would foster the deconstruction of the First Nations' way of life. They are comparable in many respects to the "apartheid system in South Africa", according to Richardson (1994: pg. 99). He

points out that they were intended to restrict the movement of First Nations on their territories. In Tobias' view, the reserve also focused on 'atomization' (1977: pg. 94). The attempt was to change the cultural tradition of First Nations in terms of their communal orientation into societies that valued the individual, an example of which was to have them ranching and farming isolation from the Nation (Notzke, 1994). Having First Nations people on reserves instead of dispersed on the landscape seemed to free up the land in regard to promoting the land use of Europeans, as subsequent to the creation of reserves the traditional territories underwent "massive assaults" (Notzke, 1994: pg. 175).

The control of First Nations' land use did not stop at the creation of reserves. Under the *Indian Act*, the federal government also dispensed with the custom governance structures of First Nations, with "elected officials" being substituted for chiefs and other traditional systems (Richardson, 1994: pg. 98). In addition to having their customary systems replaced with one that was Eurocentric in origin, the power of First Nations to make decisions relating to everyday affairs of their communities was revoked. The federal government retained the power to make decisions relating to land use and environmental management, in particular on lands set aside for First Nations (i.e. reserves).

Although the late 1880s saw the government attempting to train First Nations to act like local governments such as municipalities, the Indian Agents assigned to each First Nation had the power to control what the elected officials did in terms of procedures and substance (Richardson, 1994). Chief and Councils were not permitted to pass laws according to their traditions. They were instead compelled to work within the framework

dictated to them by the Indian Agent assigned to the area when developing potentials bylaws, which only included matters within the physical boundaries of the reserve. Once they drafted a bylaw, it was then sent to the Superintendent-General where it was reviewed and potentially approved (Richardson, 1994).

While more than 100 years has since passed, the approach of the federal government with respect to land governance on First Nation reserves has largely remained the same. First Nations today are not permitted to make decisions such as bylaws without the direct oversight of another government, whereas local governments that are non-First Nation (e.g. municipalities) are allowed. As such, the *Indian Act* in its contemporary form is still used to control the lives of First Nations. In particular, section 60 of the *Indian Act* reads:

> (1) The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.
> (2) The Governor in Council may at any time withdraw from a band a right conferred on the band under subsection (1).

Further, section 60 of the *Indian Act* enables a First Nation to apply for grant to address matters of interest to a particular group; however, in effect, the provision limits the scope of a leadership's authority with respect to environmental matters on reserve. They are permitted to make bylaws, but such laws must adhere to all other laws made by the Government of Canada. In addition, the scope and substance of any potential bylaws must be in accordance to section 81 of the *Indian Act*, which reads:

(1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,

(*a*) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;
(*b*) the regulation of traffic;
(*c*) the observance of law and order;
(*d*) the prevention of disorderly conduct and nuisances;
(*e*) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the regulation of their duties and the provision for fees and charges for their services;
(*f*) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works;
(*g*) the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any zone;
(*h*) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band;
(*i*) the survey and allotment of reserve lands among the members of the band and the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments and the setting apart of reserve lands for common use, if authority therefore has been granted under section 60;
(*j*) the destruction and control of noxious weeds;
(*k*) the regulation of bee-keeping and poultry raising;
(*l*) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies;
(*m*) the control or prohibition of public games, sports, races, athletic contests and other amusements;
(*n*) the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise;
(*o*) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;
(*p*) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes;
(*p*.1) the residence of band members and other persons on the reserve;
(*p*.2) to provide for the rights of spouses or common-law partners and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band;

(*p*.3) to authorize the Minister to make payments out of capital or revenue moneys to persons whose names were deleted from the Band List of the band;

(*p*.4) to bring subsection 10(3) or 64.1(2) into effect in respect of the band;

(*q*) with respect to any matter arising out of or ancillary to the exercise of powers under this section; and

(*r*) the imposition on summary conviction of a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section.

In comparison, non-aboriginal urban communities in Canada are not regulated by the either the federal or provincial governments to the same extent as the federal government oversees the lives of First Nations. Such an approach is viewed by some as a medium that produces more problems, rather than less (Notzke, 1994). Groves (1991) writes:

> In contrast to the American system of recognizing Tribes as distinct and dealing with their lands as consequential subjects for jurisdictional contest, Canadian legislation has all but ignored Indian political existence in favor of regulating with minute precision all aspects of the essentially "federal" property that reserves constitute. The *Indian Act* in this sense is more properly styled "an Act for the administration of federal reserve lands", with the Indian people connected to those lands being effectively reduced to mere adjuncts and agents for the convenient administration of those lands. The American experience has been to place tribal recognition first and deal with the territorial realities after, while the Canadian trend has been to legislate territoriality closely and leave recognition of aboriginal peoples as political entities as an afterthought. (pg. 230).

With significant power afforded to it under section 92 of the *Constitution Act, 1867* with respect to administering the affairs of First Nations, the federal government soon realized that it had an opportunity to foster the acculturation of First Nations' people through education. This was to be accomplished by opening residential schools that were

designed to 'seize of the minds and bodies' of the future generations of First Nations (Kelm, 2001: pg. 59). The schools were based on a model that comes from a similar institution in the United States of America, which held as it motto: "Kill the Indian in him and save the man" (Steckley and Cummins, 2001: pg. 190). They were therefore established as

> ...vehicles for assimilation, where students were forced to adopt the ways of the dominant society. Children were severely punished for speaking their own languages or practicing native customs. Contact with their families was discouraged. Much of their school time was spent in religious indoctrination and in vocational training, with a corresponding neglect of academic subjects. School routines were highly regimented, with strappings and beatings to enforce discipline. (M^{c}Millian, 1995: pg. 329)

Since the placement of Aboriginal children in residential schools was not compulsory under the law at that time, attendance was low. Parents clearly did not want to send their children away. Kelm (2001: pg. 60) notes that by 1919 there were "only 878" children were in such schools. She further points out that in 1920 the Government of Canada, in an attempt to increase enrolment, amended the *Indian Act* thereby making school attendance mandatory for children from First Nations. The amendment significantly influenced enrolment levels, as in the span of twelve years the number of Aboriginal children in residential schools grew to over 17,000 (Kelm, 2001: pg. 60).

The number of children in the system fluctuated throughout the year and from year to year, mostly due to the adverse effects of the schools themselves. Many died as a result of influenzas, smallpox, scarlet fever, and various other infectious diseases (Kelm, 2001: pg. 66). They also died at the hands of those entrusted to operate the institutions,

as physical abuse was common (Steckley and Cummins, 2001). In hearing the reports, the Government of Canada appointed Dr. Bryce to investigate the matter (Steckley and Cummins, 2001). He found that the living conditions were terrible, resulting in 24% of the children dying in prairie schools. Even more, he concluded, in the span of one decade approximately 69% of the children being held at File Hills School in Saskatchewan died.

Many of these schools as a result were shut down in the mid to late 1900s due to political pressure. By that time, however, the damage to the integrity of First Nations was already significant. Though the extent to which the residential schools adversely affected First Nations is likely immeasurable, that is with any degree of accuracy, the outcomes are apparent in many communities and families. McMillian (1995: pg. 330) relates the social issues that have been observed in many First Nation communities such as alcohol abuse, suicide, and family violence as being fully, or perhaps in some cases partially attributable to the following experiences of most children that survived their residential school experience: alienation from their cultures, loss of identity, barred from speaking their traditional languages, loss of parenting skills, and physical and mental abuse.

When a First Nation's person did complete a formal education in which he or she obtained a university degree, they lost their status as an Indian. For those that became a priest or a minister, in the same way as those that received a university degree and were then defined as "enfranchised", a parcel of land was provided to them as a reward (Notzke, 1994). What made this ironic in the eyes of then-Chief Joe Mathias of the Squamish First Nation, as referenced by Mathias and Yabsley (1991: pg. 39), was that the government would reward the First Nation person by giving them a small piece of their

own land if they give-up their way of life.

Implied Bill of Rights

As mentioned above, and from a non-First Nations' perspective, the authority to govern the lands and all of the proceedings in Canada was determined by the *Constitution Act, 1867.* Through this Act, the power to make laws was divided between the federal and provincial governments, namely the Parliament of Canada and the provincial legislatures. Because of this division, in particular the splitting of a whole into two parts, it has been generally understood that if one level of government does not have the power then the other must. As such, when a case involving a citizen challenging an abridgment of a civil liberty espoused in the *Constitution Act, 1867* was brought forward the court ought not to focus on whether the infringement in particular was just, but rather on whether the level of government was within its jurisdiction (Hogg, 2004). While this may seem logical, it is not necessarily legal.

On more than one occasion, the courts found that neither level of government had the explicit right to curtail a specific civil right, an example of which is the *Alberta Press* (1938) case (Hogg, 2004). In that case, an attempt was made by officials to limit the speech of newspapers in situations where the paper was openly critical of government policy; the court rejected such interference as it was an illegitimate exercising of power. Since then, many have interpreted the *Alberta Press* case and subsequent cases such as *Switzman v. Elbling* (1957) to indicate that there was an "implied bill of rights" within the *Constitution Act, 1867* because the courts were seen to reject the proposition that the government in either form had unfettered power to limit civil liberties (Hogg, 2004: pg.

693).

Although the courts were reluctant to formally acknowledge and thus uphold an implied bill of rights, the concept remained an issue. Much of the debate seemed to resemble a 'sense of being' apprehension of the part of the Canadian. This was marked by an initial unwillingness to overtly recognize that the values and norms unique to the United Kingdom were adopted by the Canadian society (Hogg, 2004) by means of the *Constitution Act, 1867*. Hogg (2004: pg. 694) notes that

> [i]n the OPSEU case, his lordship for the majority quoted with evident approval the dicta in the *Alberta Press* case and *Switzman v. Elbling* case, and said that "quite apart from Charter considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them". In context, it is clear that by "basic structural imperatives" he meant the political freedoms, including freedom of expression, that were necessary to preserve "the essential structure of free parliamentary institutions".

Even with the court becoming more open to the idea that the *Constitution Act, 1867* shielded civil liberties to some extent, the theory of an implied bill of rights was not engrained in legal precedent – this may not be pertinent today given that many of the civil liberties are now entrenched in the *Charter of Rights and Freedoms*. In other words, the role of the *Constitution Act, 1867* in the relationship between the power of Canada's governments and the civil liberties of citizens remained unresolved for the time being. This is not to say, however, that the debate and the events that surrounded it for more than half a century were unproductive in any way. At the very minimum, society identified a potential gap in the institutional arrangement that makes up the democratic system as practiced in Canada. In this way, according to Hogg (2004), discussions about

whether particular injustices ought to be prohibited outright likely fostered the momentum for developing and implementing a formal bill of rights.

Bill of Rights

During the 1900s many of the world's democratic countries went through a transition with respect to civil liberties. Canada was no different. It was not immune to the changes in the global political landscape in relation to individual rights, namely those of minorities. Influenced by seminal events such as the Universal Declaration of Human Rights in 1948 by the United Nations (Hogg, 2004), the Government of Canada followed many of its counterparts by enacting a *Bill of Rights* (the "Bill") that explicitly recognized egalitarianism as a right within the country.

After it was enacted, many were hopeful that the Bill would attend to the limitations of the *Constitution Act, 1867* in terms of protecting the interests of minorities (Hogg, 2004) and, in doing so, it would put to rest the proposition that the Parliament and Legislatures have unfettered decision making authority. The Bill included various provisions for fundamental freedoms that have since become synonymous with civil rights in Canada such as freedom of religion, speech, assembly, and association. The concept of 'equality' is addressed under Part 1 of the Bill, which reads in part:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
   (b) the right of the individual to equality before the law and the protection of the law;
2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian

> Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared...

Other than the existence of some precedent in the common law, the Bill provided legal guidance in an area that was once ambiguous from a legislative perspective; however, it did not fully address the situation. According to Gibson (1990), one of its shortcomings was the narrow design. He points out that Parliament chose to limit the scope of its applicability to federal laws, which is made clear in Section 2, and in that way excluding the actions of provincial legislatures from being scrutinized. Gibson (1990) also notes that with the Bill being a statute of the Parliament of Canada, rather than an instrument contained in the Constitution, it lacks the legal force that other tools such as the now-enacted *Charter of Rights and Freedoms* possesses as a result of its entrenchment in the highest law of the land. In addition to its narrow scope, another shortcoming rested in Section 1 of the Bill (Gibson, 1990). The provision ensured equality to some extent, namely an individual was guaranteed to be equal "before the law" and to receive equal "protection of the law". As such, the "provision has been the basis of the Bill's most dramatic success to date, as well as some of its more noteworthy disappointments" (Gibson, 1990: pg. 23). The latter shortcoming is demonstrated through the development of equality through a sequence of judicial decisions.

In less than a decade after its enactment, the strength of the Bill in regard to its ability to protect the rights of minorities was tested by the SCC in *R. v. Drybones* (1969) (hereinafter referred to as *"Drybones")*. The case centred around the *Indian Act*, more specifically, a provision that prohibited those belonging to a First Nation to be intoxicated

while off reserve. This rule did not, however, apply to individuals that were not defined as an Indian. As such, the SCC struck down the provision as it placed more burdensome requirements on First Nations in comparison to the "general liquor ordinance of the Northwest Territories" that was applicable to non-aboriginals (Sharpe and Roach, 2005: pg. 278). In doing so, the SCC found that Section 1(b) of the Bill nullified a statutory provision, which was a first since its enactment (Hogg, 2004).

Another case involving a person belonging to a First Nation that challenged the legality of a federal law with respect to equality is *Canada (A.G.) v. Lavell* (1973) (hereinafter referred to as "*Lavell*"). In contrast to *Drybones*, which was regarded as a step forward for re-establishing equality for First Nations (Sharpe & Roach, 2005), the *Lavell* decision was a setback. In this instance, the SCC was asked to examine a particular provision of the *Indian Act* which, in effect, disbarred women from claiming status as Indians if they were to marry a man from outside of their race. Their children were also ineligible for status. For such women, according to Mahoney (1992: pg. 235), the consequences were significant as they were, for example: forced to leave the reserve and relinquish their current property and forgo future ownership; prohibited from taking part in matters relating to business of the Band; deprived of social amenities; barred from returning to live on the reserve unless there was a substantial reason such as divorce, severe sickness, or they become a widow; and, deprived of the opportunity to be buried with their family on reserve. The impugned provision did not, however, apply equally to men. Men defined as an Indian were able to retain their status regardless of their spouse's racial designation. They were also permitted to confer their status onto their respective wife and offspring.

While it was clear that the impugned provision treated women differently than men and that such treatment was adverse in nature, an important question remained: did the differential treatment under the *Indian Act* amount to discrimination? In its decision, the SCC concluded that differential treatment did not amount to discrimination insofar as equality was conceptualized under section 1(b) of the *Bill of Rights*. What separates the *Lavell* decision from that of *Drybones* is the court's interpretation of "equality before the law". More specifically, in *Lavell* the court stated that the

> ...fundamental distinction between the present case and that of Drybones... appears to me to be that the impugned section in the latter case could not be enforced without denying equality of treatment in the administration and enforcement of the law before the ordinary courts of the land to a racial group, whereas no such inequality of treatment between Indian men and women flows as a necessary result of the application [of this law].

The court believed that the consequences of the provision, namely the negative effects felt by women, was not considered germane to the analysis of whether a government action was discriminatory. As such, because 'equality before the law' only prohibited discrimination in the administration of the law, the patrilineal approach that underscored the particular provision of the *Indian Act* was justifiable as it was applied equally to both men and women (Hogg, 2004).

A few years later, the SCC in *Canard v, Canada (A.G.)* (1976) heard a case involving differential treatment under the *Indian Act* pertaining to the administration of the estate of a person that is legally defined as an Indian. Family members were not permitted to be the administrator of the estate. That power rested with a representative of the federal government. This rule of law only applied to those individuals defined as

Indians however, as non-Indians were permitted to appoint a family member or otherwise as the executive of their estate. In its decision, the SCC did not conclude that the impugned provision of the *Indian Act* was discriminatory even though it made a distinction based on race. In similar fashion as in the *Lavell* decision, the court did not consider the effect of the decision to be a relevant variable in the analysis.

Furthering the precedent set in *Lavell* and *Canard* cases, the SCC in *Bliss v. Canada (A.G.)* (1979) ruled against a women seeking relief against the Unemployment Insurance Act. In this case, a woman claimed that she was denied ordinary insurance benefits when her work-term was interrupted as a result of being pregnant. While the Unemployment Insurance Act did provide women with maternity leave, the benefit was restrictive as women had to be employed longer than did males (Hogg, 2004). The court did not consider the differential treatment to be discriminatory in nature. Rather, the court believed that the class of the alleged discrimination was based on pregnancy, not sex (Hogg, 2004). Within the context of the *Bill of Rights*, differential treatment based on pregnancy did not amount to discrimination as the legislation conferred a benefit rather than a right, which means the legislation could not be challenged (Sharpe and Roach, 2005). When the decision was released, it was criticized as 'pregnancy' is a physical condition that only applies to women, implicitly making it an issue relating to 'sex' (Hogg, 2004).

In *Lavell* (1973), *Canard* (1976), and *Bliss* (1970), the SCC largely focused on the concepts of 'equal before the law' and 'equal protection of the law', which was in accordance to the equality framework found in the *Bill of Rights*. This produced, according to Mahoney (1992), judicial precedent that was grounded in 'formal equality'.

He notes that the court took a limited view of the framework when determining whether discrimination occurred. Only procedural aspects of a case were relevant in an equality analysis. Matters substantive in nature were excluded. In this sense, and under the umbrella of the *Bill of Rights*, the court considered that a "judicial review on equality grounds did not extend to the substance of the law but only to the way in which it was administered" (Hogg, 2004: pg. 1087).

As Ryder et al (2004) writes, "the focus of formal equality is on the individual's situation, and on the relevance of the personal characteristic at issue to the objectives of the challenged law or policy". Using this approach is problematic, which the SCC pointed out in *Andrews v. The Law Society of B.C.* (1989). In that case, the court held that dismissing the substantive effect of a government action may result in a law or policy being justifiable if it meets its objectives, even though it discriminates against a particular minority group or individual while doing so.

Moreover, Sharpe and Roach (2005) and Hogg (2004) write that 'formal equality' is comparable to the 'similarly situated test', which is analogous to the equal protection clause of the American Constitution, namely the Fourteenth Amendment. Aristotle is largely credited for the basis to this understanding of equality. In *The Politics of Aristotle* (Book III, xii, 1282b), as translated by E. Baker and referenced by Hogg (2004), Aristotle believed that

> "...justice considers that persons who are equal should have assigned to them equal things, [and] there is no inequality when unequal's are treated in proportion to the inequality existing between them" (pg. 1087).

For years, Aristotle's perspective of equality that underscored the 'similarly situated test' was used in Canada. With many criticising its use and the detrimental affects it has on minorities, the SCC ruled in *Andrews v. Law Society of B.C.* (1989) that this approach was to a large extent inappropriate. The reason for its abandonment and the subsequent change in direction are twofold. The first relates to the difficulty of applying Aristotle's characterization of equality. Essentially it does not lend itself to being applied without a particular degree of difficulty, mostly due to its oversimplification. In addition, his concept of equality does not, according to Hogg (2004), answer questions such as 'what variations in human attributes warrants different treatment' and to what extent should a variation persist in order to be afforded consideration? Second, the SCC in *Andrews* (1989) believed that if his concept was applied in a strict sense the test could be used as a means to justify a law or policy that discriminated against minority groups, as it merely protected such individuals from "worse treatment than others who were similarly situated" (Hogg, 2004: pg. 1088).

As such, the test would likely be unsuccessful in terms of upholding the purposes of section 15. This includes, among other things, upholding the principle of ameliorating inequalities in Canadian society. This is not to say that the test is absolutely unacceptable, however; it is merely inept. Accordingly, Hogg writes, the concept of equality "cannot be applied without first working out the criteria of likeness and like treatment, and the idea of equality cannot by itself supply those criteria" (Hogg, 204: pg. 1088).

3.2.2 Post-Charter Era

As previously noted, the historical placement of First Nations within the Canadian social structure has been subordinate in nature. Much of the abhorrent treatment was likely directly or indirectly attributable to the enactment of the *Indian Act* and the outcome(s) of it being implemented such as the prohibition and restriction of their cultural practices, in particular those pertaining to and based on the use of land and natural resources. With the laws and other governmental actions being at the centre of the majority of problems, First Nations had little to no recourse during the pre-Charter time period. This was largely due to the *Constitution Act, 1867*, which was not intended to address issues surrounding equality between minorities groups such as First Nations and the European settlers. In addition, the enactment of the *Bill of Rights* in 1960 was for the most part ineffectual as it was limited in scope and was unable to examine a particular set of circumstances from a substantive equality perspective, which in some cases resulted in the discriminatory behaviour towards First Nations being permitted or even codified.

Throughout the 1970s, according to Hogg (2004), the significant shortfalls in the protection of those that were most vulnerable within the Canadian society began to surface. He notes that the government at the time believed that such matters were best addressed by means of amending Canada's Constitution. This led to a series of deliberations relating to Canada's polity and what it constituted, which brought to light "profound questions about the basic nature of the country, its values, and its ability and willingness to acknowledge equality for...disadvantaged groups" (Mahoney, 1992: pg. 229). After lengthy discussions, the majority of the Canadian provinces (9 of 10) agreed to the enactment of the *Constitution Act, 1982*, Part I of which was the *Charter of Rights*

and Freedoms (Hogg, 2004). In addition, First Nations and First Nation organizations pushed the governments to address long standing injustices and include their interests in the Constitution as well. As a result, Section 35 was added to *Constitution Act, 1982*, which recognizes and affirms the existing inherent rights of Aboriginal peoples within the borders of Canada (Hogg, 2004).

Charter of Rights and Freedoms: the Equality Provision

Canada's pre-Charter history played an integral role in framing the discussions that lead up to the development and enactment of the *Charter of Rights and Freedoms* (the "Charter"). In "Readings in the Philosophy of Constitutional Law", Bronaugh et al. (1990) writes that a provision in the Charter that explicitly dealt with 'equality' was needed in recognition of the country's distinct make-up because,

> "[w]ith the steady increase in population from the earliest days of European emigration into Canada and with the consequential growth of industry, agriculture and the vast increase in national wealth which followed, many social problems developed. The contact of the European immigrant with indigenous populations, the steady increase in immigration bringing those of neither French nor British background, and in more recent years the greatly expanded role of women in all forms of industrial, commercial and professional activity led to much inequality and many forms of discrimination (pg. 243).

These interactions, and the conflicts they produced, ended up giving rise to a number of civil liberties that have come to represent a wide range of social values, many of which have been embedded in federal statues and provincial legislation as well as being fixed in the common law (i.e. case law). When the country decided to repatriate its

Constitution on April 17, 1982, substantial amendments included, among other things, a number of these liberties being entrenched in the supreme law of the land (Milne, 1991). Most notable are the egalitarian rights derived from section 15 of the Charter, which provides as follows:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

While jurisprudence in the area of equality is in the early stages of conceptual development, it is nonetheless considered by the Right Honourable Chief Justice Beverly McLachlin to be "the Leviathan of Rights" within Canadian society (McLachlin, 2001: pg. 20). It must be taken into account whenever the Crown, in both its federal and provincial forms, is passing law, developing a policy or regulation, and using its statutory discretion within decision making processes that affect the everyday lives of Canadians (Gibson, 1990). And unlike other provisions of Canada's Constitution, the Charter limits governmental powers and actions in relation to minorities and their rights to equality (Hogg, 2004). In recognition of this limitation and the potential implications, the force of the provision coming into effect was delayed by three years in order to provide the various governments and other entities with a period of relief to evaluate the conventional modus operandi for inconsistencies with the provision and, where required, make the necessary adjustments (Hogg, 2004).

Ever since it was included in the Charter, a considerable amount of effort has gone into trying to articulate what the purpose of the equality provision is and, just as importantly, what it is not. Since 1985, however, a concise articulation of its meaning and its purpose has never been put forward by either Parliament or the courts, other than general associations within the broader philosophical principles of egalitarianism (*Andrews*, 1998; *Law*, 1999). The courts have nevertheless begun to collate what they believe to be the purpose of section 15 while in many respects prudently avoiding a delineation that results in a strict interpretation. In *Law* (1999), for example, the SCC provides several points on the purpose of section 15. These are summarized below:

- It is "...both the protection against the evil of discrimination by the state whatever form it takes... and the promotion of human dignity" (para.47);
- It is so that the Canadian society can "...take a further step in the recognition of the fundamental importance and the innate dignity of the individual, and in the recognition of the intrinsic worthiness and importance of every individual regardless of the...characteristics of the person" (para. 50);
- It is "to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of merit, capacity, or circumstance" (para. 48).
- In all, it is "to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice (para. 47) ...through ameliorating the position of those disadvantaged within the Canadian society (para. 51).

With the above in mind, and namely in recognition of the magnitude of the fundamental purpose of the equality provision for Canadian society as a whole, the SCC in *Law* (1999) stated "[n]o single word or phrase can fully describe the content and purpose of s. 15(1)" (para. 52). To do so, it is presumed, would most likely abandon the

underlying intent of achieving equality in an ever changing and multifaceted society. As suggested in the *Andrews* (1989) case and echoed in *Law* (1999) as well as subsequent cases, a flexible

> ... [approach] is preferable because it permits evolution and adaptation of equality analysis over time in order to accommodate new or different understandings of equality as well as new issues raised by varying fact situations" (*Law*, 1999: para. 15).

Based on the manner that the court has taken in relation to the manner it works with the concept of equality since the Charter became legally enforceable, the narrow understanding of equality that guided its application during the pre-Charter, specifically 'formal equality', was abandoned. Through section 15, the courts have begun to view the equality provision in terms of the substantive effect of law, regulation, policy, and discretionary decision-making on those in which the equality provision protects. As Nelson and Fleras (1995) outline:

> "With its emphasis on equal outcomes or conditions rather than opportunities, this position takes into account the unique circumstances of a person or group as a basis for entitlement. People cannot be treated alike because some groups have special needs or unique experiences. They need to be treated differently by making substantive adjustments to the social and cultural components of society" (pg. 195).

Soon after the Charter came into force the first major case made its way through the judiciary system. By 1989, the significant departure from the approach used under the *Bill of Rights* became apparent when the SCC rendered its decision in *Andrews v. Law*

Society (British Columbia). In this case, according to Sharpe and Roach (2005), the court was unified in its agreement with respect to rejecting the use of 'formal equality' and the 'similarly situated test' as the sole means in which to determine whether discrimination has occurred. They also noted that the court clarified that not all differential treatment caused by law would necessarily amount to discrimination. Instead, they write, for a legal challenge to be successful it must demonstrate (1) that the impugned law has through differential treatment denied an individual or group of one or more of the four elements of equality, and (2) that such treatment is based on one or more of the protected grounds. Further, such differential treatment is to be considered discriminatory if it amounts to

> ...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed. (*Andrews*, 1989: para. 175)

In contrast to the court's unified stand in *Andrews* (1989), which as noted above provided a clear direction forward with respect to addressing discrimination, the SCC in 1995 delivered three cases (the "Trilogy") around the same time which made public the court's division regarding to the approach to be applied when determine whether discrimination occurred; these are: *Egan v. Canada* (1995), *Miron v. Trudel* (1995), and *Thibaudeau v. Canada* (1995). The main difference of opinion among the judiciary

centred around whether the equality analysis should be grounded in a 'internal-relevance' approach or the approach outlined in the *Andrews* (1989) case.

The SCC used the internal-relevance approach in both the *Miron* (1995) and *Egan* (1995) cases. Both decisions of the court, according to Sharpe and Roach (2005), believed that discrimination does not occur when a government decision is based on the "functional values underlying the legislation" (Miron, 1995: para. 436). It remains acceptable even if a distinction is drawn between two individuals that are protected by section 15(1) (Sharpe and Roach, 2005). Thus an internal-relevance analysis is appropriately applied when it focuses on whether the distinction made by the action is based on "some objective physical or biological reality, or fundamental value (Miron, 1995: para. 446) of the legislation; in this context, legislative objectives were not considered to be discriminatory given their entrenchment in a statute (Sharpe and Roach, 1995).

For example, in *Egan* (1995) the court stated that special support ought to be given to values fundamental to the legislation which, in this case, was the protection of the definition of marriage; marriage by its very nature was heterosexual and important to society (Sharpe and Roach, 2005). As such, the majority of the court believed, it was necessary to provide that support in the form of shielding it against incommensurable values:

> Neither in its purpose or effect does the legislation constitute an infringement of the fundamental values sought to be protected by the *Charter*. None of the couples excluded from the benefits under the Act are capable of meeting the fundamental social objectives thereby sought to be promoted by Parliament. These couple undoubtedly provide mutual support for one another, and that, no doubt, is of some benefit to society. They may, it is true, occasionally

> adopt or bring up children, but this is exceptional and in no way affects the general picture, I fail to see how homosexuals differ from other excluded couples in terms of the fundamental social reasons for which Parliament has sought to favour heterosexuals who live as married couples... (*Miron*, 1995: para, 463 as referenced in Sharpe and Roach, 2005: pg. 287).

This approach was rejected by the other judges in *Miron* (1995) and *Egan* (1995). Writing for the four dissenting justices in *Miron* (1995), McLachlin J. stated the following:

> "If the basis of the distinction on an enumerated or analogous ground is clearly irrelevant to the functional values of the legislation, then the distinction will be discriminatory. However, it does not follow from a finding that a group characteristics is relevant to the legislative, that the legislator has employed that characteristic in a manner which does not perpetuate limitations, burdens and disadvantages in violation of s. 15(1). This can be ascertained only by examining the effect of the distinction in the social and economic context of the legislation and the lives of the individuals it touches (*Miron*, 1995: para, 742 as referenced in Sharpe and Roach, 2005: pg. 287-288)".

Further, writing for the dissenting Justices in *Egan* (1995), Cory J. stated that:

> "[t]he definition of "spouse" as someone of the opposite sex reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples. The appellants' relationship vividly demonstrates the error of that approach. The discriminatory impact can hardly be deemed trivial when the legislation reinforces prejudicial attitudes based on such faulty stereotypes. The effect of the impugned provision is clearly contrary to s. 15's aim of protecting human dignity... (*Egan*, 1995: para, 604 as referenced in Sharpe and Roach, 2005: pg. 288)".

Subsequent to the Trilogy, the SCC released its decision in *Law* (1999) and in doing so settled much of the ambiguity with respect to the approach to use when

determining whether a particular action amounts to discrimination. As Sharpe and Roach (2005) point out, this includes the following:

1. "Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian Society resulting in substantively differential treatment between the claimants and others?

2. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds? and,

3. Does the differential treatment discriminate by imposing a burden upon, or withholding a benefit from, the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or that otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?" (pg. 291).

Although the SCC in the *Law* case did not side with the appellant, in the decision the court held that an equality challenge under section 15 of the *Constitution Act, 1982* includes a requirement of proving discrimination based on a protected ground and substantive discrimination that breached an individual's or group's right to human dignity (Sharpe and Roach, 2005). Since its release, the above set of questions is considered as the foundation when assessing whether discrimination has occurred.

Scope of the Provision

The coverage of the equality provision of section 15(1) is an overarching one. In similar fashion as other Charter rights, its application is pursuant to section 32 of the *Constitution*

Act, 1982 in that the Charter applies to Parliament and the legislatures, including everything that falls within their authorities. Hogg (2004: pg. 1085) points out that the responsibility of ensuring all actions uphold the equality provision also falls onto those implementing the law and corresponding regulations and policies, as they draw their power from the authority of government. Actions that are therefore attributable to statutory decision-makers and other bureaucrats, including discretionary power conveyed onto them by a particular statue or legislation, are subject to obligations of section 32 of the Constitution.

Local governments such as municipalities, although not explicitly mentioned in Canada's Constitution, are likely included irrespective of the fact that they may be on the periphery of constitutional authority. Their exclusion from being a constitutionally-mentioned level of government does not, as Hogg (2004) points out, remove or lessen the efficacy of the equality provision. Section 32 follows the authority of law (Hogg, 2004) no matter how many layers of delegation exist. As such, since the legal authority of local governments to govern a specific populace within a defined spatial unit is derived from provincial legislation, such as the *Local Government Act* in British Columbia, actions on the part of municipalities and regional governments in the province are subject to the limitations of the Charter as well.

While the elimination of inequality may be fundamental to egalitarianism, the same cannot be said of the manner in which all levels of government are required by law to use the equality provision. A case in point is the proactive removal of inequality through the implementation of legislation or other legal mechanisms, which was central to R. v. S.(S.) (1990), a case that involved the *Young Offenders Act* of Ontario. In that

case, the court heard arguments that challenged the manner in which governments opted to use their discretionary power to enact legislation and other mechanisms. The claimant purported that the Provincial Government of Ontario breached section 15 as it failed to enact similar legislation as other provinces, which were designed to alleviate existing social inequalities that are a fact of life for some youth (Hogg, 2004). Building upon its decision in *Andrews* (1989) where it held that the equality provision is to apply to a law in operation, the SCC held that governments are under no obligations to take advantage of its discretionary power and implement a law because an inequality is present. Here the court drew a distinction with respect to discretionary power.

This distinction was further explained in *Rogers v. Faught* (2002). In that case, the court found that section 15(1) unquestionably applies to the actions of governments. What was made clear was that the equality provision does not apply to the inaction of government. In others words, the government is under no legal obligation per se to enact a law, policy, or regulation to ameliorate discriminatory circumstances. So caution must therefore be taken when discerning whether a discriminatory effect is the result of a government action or a pre-existing condition (*Symes v. Canada*, 1993).

Not only does the equality provision not apply to the inaction of government, but it also does not apply to private action; the obligation set out in section 32 of the Constitution is exclusively a government responsibility (Hogg, 2004). An action private in nature, namely between or among entities that are non-government such as those decisions relating to employment, are omitted because the power to make them does not flow directly from the authority of the law. For instance, people are provided the freedom to work for whomever they wish, and in the same way companies are free to hire

whomever they believe to be the most capable of accomplishing the task(s) required.

Where this becomes problematical is when a private entity, such as an employer, engages in behaviour that is discriminatory in nature. Hogg (2004) notes that though the door may be opened for a moment in terms of the potential for discrimination to occur in the workplace, in many cases it is presumably closed by the Human Rights legislation that each provincial government has enacted. In many respects, such legislation is akin to the protection afforded to an individual under the equality provision (Hogg, 2004). Further solidifying the role of human rights in the protection of people from discrimination is the fact that, as legislation enacted by a provincial government, it falls under the purview of section 32 of Canada's Constitution (*Blainey v. Ontario Hockey Association*, 1986).

When considering the fact that section 15(1) reads "every individual", the right to equality appears to be conferred onto a person rather than other entities such as an employer. Supporting this position is the enumerated grounds listed in section 15(1), namely: "race, national or ethnic origin, colour, religion, sex, age, mental or physical disability". Taken as a whole, this list is outwardly comprised of distinctly human attributes more so than any other entity such as a company or government. In addition, Gibson (1990: pgs. 53-55) has noted that the word "everyone" was purposely replaced in an early draft of the Charter by the word "individual" by a parliamentary committee so that the right would only apply to the "natural person". To be considered a 'natural person', an individual must also be living and not deceased (*Stinson Estate v. British Columbia,* 1999), which means entities that are similar to estates, such as corporations or private enterprises, are not covered. Further, according to the SCC, the Crown is not to

benefit from this section either (Hogg, 2004: pg. 755). In this way, individuals and groups belonging to one or more of the enumerated grounds have the right to equality, but companies and the like do not.

Enumerated and Analogous Grounds

Under the precept of section 15(1), an action by any level of government in Canada is to be non-discriminatory in the sense that it does not worsen or espouse a disadvantaged position. As previously noted, this does not necessarily apply to all Canadians and to specific Canadians in every situation. Thus the separation of Canadians and certain situations with the hope of making everyone equal to one another is important. A chief difficulty in this process is determining whether a person is to be considered, either individually or as a group, in a distinct position that likely places them at a disadvantage within the Canadian society. In *Andrews* (1989) and subsequent cases (e.g. *Law*, 1999; *Hodge*, 2004), the SCC has held that there are two main grounds that need to be considered when making a determination of whether an individual is covered by section 15: enumerated and analogous grounds.

Enumerated grounds are listed in section 15(1) of the *Constitution Act, 1982*. These are: "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". Sharpe and Roach (2005) note that from a historic perspective the list incorporates many areas in which society has considered, through their politics and/or legal decisions, to be at risk from discrimination, either directly or indirectly. This is likely the reason they are found in many of the human rights codes throughout the country, and are now entrenched in and therefore protected by the Constitution of

Canada. As such, these personal characteristics are not to be the basis for discriminatory treatment on the part of government (Hogg, 2004).

The enumerated list is not, however, considered to be exhaustive in terms of containing those personal characteristics that are protected under section 15(1) from discriminatory treatment. They merely "reflect the most common and probably the most socially destructive and historically practised bases of discrimination" in Canada and, most likely, around the world (*Andrews*, 1989: para. 175). And since section 15(1) reads "in particular", the extent of prohibited grounds has been regarded by the courts as an element to be broadened when appropriate (Sharpe and Roach, 2005). Although, unlike enumerated grounds, determining whether a particular circumstance is an analogous ground and in that way deserving of consideration under a section 15 analysis is less straightforward.

In the years that followed the implementation of the equality provision, several court cases found that discrimination was occurring against individuals and/or groups that were not explicitly listed in section 15(1) (Hogg, 2004). The SCC took notice that a ground may be analogous based on the susceptibility of the individual's characteristics. Personal traits that were predisposed to this included those having little to no political power, who are likely to be disregarded as their interests diverged from the mainstream in a way that "equal concern and respect" to their rights are "violated", in addition to the likelihood of "becoming a disadvantaged group on the basis of the trait" (*Law*, 1999: para. 29).

Furthering this description, Justice McLachlin writing for the majority in *Corbiere v. Canada* (1999), held that an analogous ground contains "...a personal

characteristic that is immutable or changeable only at unacceptable cost to personal identity". An example that emerged early on in the jurisprudence was 'citizenship'. The SCC court in *Andrews* (1989) and later on in *Lavoie v. Canada* (2002) found that, while 'citizenship' was not an enumerated ground in the explicit sense, it did meet the intent of section 15(1) and therefore requires protection as an analogous ground. The court based its decision on the fact that the:

> "...characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least, temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs". (*Andrews*, 1989: para. 195)

Since *Andrews* (1989), much has then been made of whether a personal characteristic is "immutable" to an individual. Hogg (2004: pg. 1104) suggests "looking at immutability" as an "inherent" characteristic, instead of it being something "acquired" in some fashion or another through the diversity of life's choices. Thus the question as to whether a characteristic is immutable, or conversely socially fluid, is dependent upon condition of the "inheritance". If it were not, then at any given time all Canadians could in theory belong to a group that is analogous. Such a broad sweeping categorization does not meet the intent nor follow the purpose of the inclusion of section 15 in the *Constitution Act, 1982*. As such, this is best understood by determining whether the characteristic was inherited in a "voluntary" or "involuntary" way (Hogg, 2004: pg. 1104). In that way, it is possible to distinguish between those that are deserving of protection in accordance with the equality provision, and those that are not.

This is not to say, however, that a personal characteristic acquired by an individual is necessarily unprotected. A decision that "...adversely impacts on a discrete and insular minority or group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making" (*Corbiere v. Canada*, 1999: para. 13).

With democracy, at least in its Canadian form, comes the right of individuals in the country to assemble based on their collective interests. An upshot of this is the variability of a group's composition, although the mere assembly of individuals under the pretext of a collective interest, whether political or otherwise, does not necessarily equate to being an analogous group. To deal with this ambiguity, the SCC rendered a decision in *Canada (Attorney General) v. Ward* in which it outlined three ways a protected "social group" is to be broadly categorized. These groups consist of people that:

1. retain "unchangeable characteristics" that are innate, including individuals of the same sex and/or orientation, or ethnicity;
2. willingly assemble because of a trait integral to their human dignity, including social activists; and,
3. formerly assembled in such a manner that it satisfied the requirement of the second category, whereby their previous participation is recognized as a binding part of them due to its significance.

However, the courts in general have been selective in their delineation of analogous grounds given the far-reaching implications such a consideration could produce. They have also differentiated between an analogous ground with respect to an individual or to a

group, which was central to the *Corbiere v. Canada* (1999) decision. In that case, an individual that belonged to a First Nation challenged an action of the Government of Canada, as represented by the Minister of Indian and Northern Affairs Canada, which denied members residing off-reserve the right to vote in the Nations' political elections. In its decision, the SCC found that the "Aboriginality residence" of off-reserve members was an analogous ground; however, the place of residence was not an analogous ground for non-aboriginals. In this sense, the courts have held that a distinction regarding the residence of a member of First Nations amounts to discrimination whereas a similar distinction made regarding non-aboriginals does not amount to discrimination.

Sharpe and Roach (2005) point out the court's distinction is not a case of reverse discrimination, but rather is a direction that implements the substantive elements of the purpose of section 15(1) because it makes steps towards ameliorating existing problems. They point to the contextual factors used by the SCC when determining whether the location of an individual's home or likewise the location of a collection of individuals that comprise a group. The court emphasized that usual place of residency contemplated by non-First Nations in Canada must not be considered equal to the choice of 'should I live on or off reserve' that a member of a First Nation goes through – assuming that a choice even exists for such a person (Sharpe and Roach, 2005).

"The reality of their situation is unique and complex" (Sharpe and Roach, 2005: pg. 295). As such, and in comparison to all of the individuals and groups that comprise the Canadian community, First Nations and their membership are likely the most vulnerable part of the populace to experience discrimination given their *sui generis* (unique unto their own) nature as indigenous peoples and their experiences with, for

example, colonization. Their Nations consist of individuals that at any one time may bring a claim forward based on one or more, and perhaps in rare cases, all of the enumerated grounds. This distinct position within Canada also provides a First Nation as a whole, or subdivision of the community, the ability to bring a claim forward based on an analogous ground.

Over the years various court decisions have provided a general outline by which particular grounds are protected from questionable decision-making or latent discrimination, although the extent to which the equality provision provides cover is largely determined on a case-by-case basis. Once identified by a judicial decision, the various categories within the two grounds for considering an individual or group as distinct are to be used as a marker in such a pursuit (*Corbiere v. Canada*, 1999: para. 7-11). While the court in *Andrews* (1989) held that discrimination must be based on at least one enumerated or analogous grounds, the SCC in *Law* (1999: para. 37) added that an individual or group may "articulate a claim on the basis of more than one ground" in order to demonstrate the "differential treatment". In that sense, indentifying the marker(s) of an individual or group is an important element of a section 15 analysis. As Hogg (2004) points out, markers indicate whether a particular government action is at risk of leading to discrimination and thus the potential denial of substantive equality.

Determination of the Nature and the Situation

In a constitutional context, establishing whether an action is discriminatory consists of reviewing the setting of the individual or group that have been impacted by the impugned government action. This involves a case-by-case analysis of the nature and situation of

the individual or group. The following section reviews the necessary elements in determining the nature of those affected and their situation, namely determining the comparator group, perspective of the claimant, the contextual factors, and the nature of the burden (*Law*, 1999).

The Necessity of Comparison

Equality is by its very nature a comparative concept. This means that to ascertain whether an inequality is present within society it is necessary to compare one individual to another, or group to another. Further, as Bronaugh et al (1990) write, "the conditions of which may only be attained or discerned by comparison with the conditions of others in the social and political setting in which the questions arises" (pg. 241). As such, it is necessary for the individual or group asserting an inequality to choose what or whom they ought to use as a reference point in order to demonstrate the burden imposed by a given action. In this sense, according to the Canadian courts, a claimant is required to select a 'comparator group':

> The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the Charter or omits a personal characteristic in a way that is offensive to the Charter (*Hodge v. Canada*, 2004: para. 23).

Sharpe and Roach (2005: pg. 296) further point out that a 'comparator group' is a party that is receiving the benefit (accorded to it by the impugned law) that the claimant is not. They note that such a group bears a similar resemblance to the pertinent traits of

the claimant, other than those traits that are the basis for the differential treatment. More to the point, a 'comparator group' is one which receives the benefit because of its traits whereas the 'claimant group' receives the burdens, all of which relates to the differential treatment under the impugned law.

Individual or Group Perception

The views of individuals and groups in Canadian society have been recognized as an important element of determining whether an action is discriminatory. While such views are taken into account, it is important to understand that any and all views are not necessarily held to be valid in every situation. For instance, in *Law* (1999) as referenced by Sharpe and Roach (2005), the SCC held that "the appropriate perspective is subjective-objective".

> "...subjective in so far as the right to equal treatment is an individual right, asserted by a specific claimant with particular traits and circumstances; and objective in so far as it is possible to determine whether the individual claimant's equality rights have been infringed only by considering the larger context of the legislation in question, and society's past and present treatment of the claimant and of other persons or groups with similar characteristics or circumstances (*Law*, 1999: para. 59)".

Included within the equality analysis, according to Sharpe and Roach (2005), is the consideration of "the various contextual factors which determine whether an impugned law infringes human dignity" (pg. 298). Over the years, the court has placed a significant emphasis on the role that 'human dignity' plays in the analysis of whether an action is discriminatory. As pointed out in *Law* (1999), such a term

> ...means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. (para: 53).

Unlike the approach that is used to establish whether an individual or groups belongs to an enumerated or analogous ground, which is based on their place within the broader Canadian society, the court in *Law* (1999) took the approach that whether the treatment from a government action amounts to indignity is determined at the individual or group level:

> Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law? (para: 53).

Further, the "perspective" of the individual or group that believes an action of the government to be discriminatory is important in conceptualizing impacts to human dignity (*Law*, 1999: para. 59). In most cases, establishing whether the perception of an action is appropriate or not, case law has continuously relied upon the 'reasonable person test': a standard that is based on the average person, one which has "...particular

characteristics that are not peculiar or idiosyncratic..." and represent the ordinary practices "in the community" (Dukelow, 2002: pg. 345). The SCC has, however, expressed caution in applying general legal practices to matters relating to equality, as the 'perspective' of minorities is not to be held to the same standards used in the 'reasonable person' test (*Law*, 1999). If such an approach were to be used it "could, through misapplication, serve as a vehicle for the imposition of community prejudices" (*Law*, 1999: para. 61). Thus the use of the 'reasonable person test' could either render the protection guaranteed by section 15(1) ineffectual, or perhaps place the rights of minorities at the pleasure of the majority, neither of which fulfills the underlying purpose of the provision's entrenchment in the Charter.

Contextual Factors

Whether the human dignity of an individual or group has been violated by an action of the government is dependent upon a review of the contextual factors, all of which are based on the particulars of the person and the circumstances surrounding the action. In *Law* (1999), the court noted that 'contextual factors' ought to remain as an "open" concept in order to avoid a restrictive approach so that an individual or group is not unduly constrained from establishing the impacts to their human dignity. Based on the case law to date, Sharpe & Roach (2005: pg. 292) point out that there are four criteria that comprise such an assessment at this time.

The first is whether a pre-existing disadvantage is present. In *Law* (1999), the court stated that a challenge to a government action is most likely to be successful in cases where an individual or group has encountered to some degree a "disadvantage,

vulnerability, stereotyping, or prejudice" (para. 63) prior to the impugned action. Since those in such a situation are typically not granted equality in terms of respect and consideration due to their trait(s) and/or condition(s), and in some cases a mixture of both, a government decision may not treat them justly. For this reason, according to the court in *Law* (1999: para. 63), it is reasonable to deduce that additional differential treatment will not eliminate inequality but rather will propagate thoughts and behaviours that facilitate the unfair treatment of minorities, in that way the negative effects will be more intense.

Furthering its point, the courts in Canada have expanded on the role of pre-existing disadvantages in society and emphasized its significance in determining whether an action violates section 15(1) of the Constitution. An example of this is when a stereotype is present but not taken into consideration by the government. In such a case, the decision likely "reflects and reinforces existing inaccurate understandings of the merits, capabilities, and worth of a particular person or group within Canadian society, resulting in further stigmatization of the person or the members of the group or otherwise in their unfair treatment" (*Law*, 1999: para. 64). For the action to avoid causing an effect that infringes upon the right of minorities to equality, it must therefore not carry on or support a perception that someone "is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society" (*Law*, 1999: para. 64). This is to occur "whether or not it involves a demonstration that the provision or other state action corroborates or exacerbates prejudicial stereotype" (*Law*, 1999: para. 64), which essentially implies that a cumulative approach is likely necessary or perhaps warranted.

While determining the presence of a pre-existing disadvantage is integral to

establishing an infringement, it is not a compulsory requirement (*Law*, 1999: para. 65). Similarly, a member of a group is not required to base a challenge on their membership in a historical disadvantaged group, as an individual may bring forward a case based on personal traits.

The second contextual factor is the link between the enumerated or analogous ground(s) and the characteristics and/or circumstances of the individual or group, which is fundamental to understanding the differential treatment. Grounds that have previously demonstrated this connection are disability, sex, and age (case law includes *Eaton* (1997), *Eldridge* (1997), *Weatherall* (1993), *Brooks* (1989)). They require differential treatment in a particular circumstance as a result of their personal characteristics.

As previously mentioned, laws passed by the Parliament of Canada and provincial legislatures must take into account the characteristics unique to each minority at the individual and group level. A notable difficulty in accomplishing this task is Canada's multicultural composition. The requirement necessitates a method that ensures their "actual needs, capacity, or circumstances" will be considered respectfully whereby their value as citizens of Canada is not going to result in "a negative effect on human dignity" (*Law*, 1999: para. 70). Whether a law effectively accomplishes this is dependent upon the perspective of the individual or group it affects. Thus the determination of "negative effect" is contingent upon the perspective(s) of an individual or group, specifically the manner in which an impugned law does not take into consideration their circumstances (*Law*, 1999). Then to be justifiable, an action on the part of government cannot achieve "a valid social purpose" on the one hand while at the same time resulting in a violation of an individual or a group's rights under section 15(1) on the other (*Law*, 1999: para. 70).

The focus must always remain upon the central question of whether, viewed from the perspective of the claimant, does the differential treatment negatively impact their human dignity?

A third contextual factor is the 'ameliorative purpose or effect' of a government action. In *Eaton* (1997) as referenced by *Law* (1999), the court stated that "the purpose of s. 15(1) of the Charter is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society" (*Law*, 1999: para. 72). Accordingly, a law, regulation, or policy, et cetera that has a purpose to be ameliorative is by and large intended (at least in theory) to redistribute or provide access to an individual or group that did not otherwise have such a benefit. To be ameliorative is not necessarily inclusive, as it focuses on those that belong to an enumerated and/or analogous ground and thus are disadvantaged from a historical perspective.

Even though such laws or policies make a distinction based on enumerated and/or analogous ground, they are not discriminatory per se. So long as the action in question has as it purpose to improve the conditions of the most disadvantaged group, which may include some or all of the disadvantaged groups, it would likely satisfy the requirements of being ameliorative (*Law*, 1999). In contrast, if the purposes or effects of an ameliorative action were to exclude members that are historically disadvantaged whereby its focus was on improving the situation of individuals or groups that were not protected by section 15(1), it would then most likely be considered discriminatory in nature (*Law*, 1999).

Lastly, the 'nature of the interest affected' is the fourth contextual factor. To fully understand and thus appreciate the concerns expressed by a claimant according to the court, it is necessary to comprehend the interest that is negatively impacted by the impugned action (*Law*, 1999). In this sense, the court in *Egan* (1995: para. 63-64) and as referenced in *Law* (1999) notes: "[i]f all other things are equal, the more severe and localized the... consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the Charter" (para. 74). Whether the distinction restricts access to "institutions" or "full membership in Canadian society" or does not recognize a group, are all important to discern when determining the presence of inequality (*Law*, 1999).

Nature and Extent of the Burden

Once the context of the situation has been established in a *purposeful* sense, it is then necessary to examine the 'nature and extent of the burden' which the impugned action has placed upon the shoulders of those protected from discrimination under section 15(1). Individuals and groups must take into consideration three elements when demonstrating a burden.

The first is data. Although not required, an individual or group would be best served in an equality analysis if supporting information, such as social scientific data, was submitted to demonstrate the violation of their dignity (*Law*, 1999: para. 77). Courts may also take "judicial notice" or "logical reasoning" when an impugned law breaches the purpose(s) of section 15. For instance, an argument can be made that it is reasonable for a court that is hearing a case involving a woman that belongs to a First Nation to take

judicial notice of the place such women are in within Canadian society. They are confronted with additional discrimination in comparison to men of aboriginal ancestry, in addition to what they are already confronted with because they are a member of a First Nation in the first place, according to Evelyn Webster's presentation to the Royal Commission on Aboriginal Peoples:

> As aboriginal women, we face discrimination and racism because we are Aboriginal and because we are women. We lack access to jobs, to support, to training programs, and to positions of influence and authority... All across Canada, Aboriginal women are involved in the struggles for equal rights. (Green, 2000: pg. 332).

As is the case for many of the statistical categories used in Canada to measure social problems, those focusing on women demonstrate that approximately eight out of ten women that live in aboriginal communities experience violence in their homes, which is double the rate that is experienced by women living in non- aboriginal communities (Green, 2000: 334). The statistics are as follows: 91% of women had personal experiences with family violence; 75% grew up as targets of family violence; 46% indentified alcohol as a factor in violence; 29% experience violence without the alcohol factor; 70% suffered violence at the hands of relatives; 50% were currently single; 75% lived on monthly incomes of less than $1,000; 50% were supporting children (Green, 2000: pg. 334). Since such statistics are undisputed, as First Nations are more often than not confronted by conditions that are unlike the rest of Canada, the court in *Law* (1999) held that it may take under consideration facts that may underscore a claim of discrimination; however, the court expressed caution so as to not create additional

stereotypes with such facts.

Second, an individual or group that is challenging a government action is required to prove that discrimination occurred, but not that the action itself was intended to be discriminatory. More specifically, in *Law* (1999) the court stated that a claimant is not required to demonstrate that the "legislation was consciously premised upon prejudicial stereotype, or the legislature purposely failed to take into account the social disadvantage of an individual or group in enacting the legislation" (para. 80; also see *Miron*, 1995). Instead, the claimant is required to establish one of the following: the purpose of the legislation infringes section 15, or (2) the effect of the legislation infringes section 15. In either case, the onus to establish one or the other is "satisfied by showing only a discriminatory effect" and then for the government to justify the infringement (*Law*, 1999: para. 80-81).

Lastly, an individual or group should not focus on showing more than one aspect of discrimination, that is, demonstrating that they belong to more than one protected ground and that the action discriminates against all of them (*Law*, 1999). This is because, according to *Law* (1999), in a case that involves a law that makes a formal distinction then the equality analysis will focus on whether it "discriminates in a sense which interferes with the claimant's dignity". But if the law does not make a formal distinction, and the individual or group belongs to one or more enumerated or analogous ground, which is likely the case for many members of a First Nation, then it may be advantageous to include the scope of the discrimination or perhaps select a particular ground that is more straightforward and well-known in order to demonstrate the burden.

3.3. Conclusion

The philosophy of equality has long held that discrimination is unjust. While the same cannot be said of equality and its historical implementation within Canada, the repatriation of the country's Constitution in 1982, in particular the inclusion of the *Charter of Rights and Freedoms* and its equality clause, marked a new course for the treatment of minorities in the coming years. Both the philosophy and legal reality of equality within contemporary Canadian jurisprudence now share a common principle: decisions ought to remedy inequality, not support or worsen existing situations.

For minorities that have been historically subjugated or those that have experienced more recent discrimination, the guarantee of equality (section 15 of the *Constitution Act, 1982*) is a right that is paramount over most other rights and interests. The same applies to First Nations and their memberships. When used, the equality clause provides an analytical framework that is capable of bring forward a specific plight experienced by a First Nation. The objectives of the framework are for a claimant to demonstrate: (1) section 15 applies to the situation because the claimant is (or ought to be) considered a member of a protected ground; (2) the government action in question draws a distinction which is based on a claimant's personal characteristics and that the distinction fails to take into account their disadvantaged position within the Canadian society that has resulted in substantively different outcomes in comparison to others; and, (3) the effects of the government action results in a burden, or a restriction to a benefit, or it furthers the idea(s) that the claimant is less capable and/or worthy of recognition.

Key to addressing the objectives and thus using equality provision effectively, however, is largely dependent on inputting the appropriate information in order to

demonstrate that an injustice has in fact occurred. As such, in chapter four an example of a First Nation's situation is used to illustrate the application of the equality framework in the context of environmental justice. The example is based on a First Nation's struggle in northeast British Columbia to protect a threatened caribou herd and their culture from a coal mine.

Chapter Four: Application of the Canadian EJ Framework

4.1 Introduction

This chapter presents a Canadian-based framework for assessing the environmental justice of a decision made by a level of government in Canada. To demonstrate the application of the framework, an example of a conflict between the Provincial Government of BC and West Moberly is reviewed. Subjecting the action of the BC government to the framework allows for the determination of whether the government's decision to approve coal mining activities in the critical habitat of a threatened herd of caribou amounts to an environmental injustice for the culture of West Moberly.

4.2 Overview of an Environmental Justice Framework for Canada

In this section, the literature on environmental justice (developed in the United States of America) and the provision of equality (developed in Canada) are combined in order to construct a Canadian-based environmental justice framework. In what follows, an equality framework for determining whether a particular set of circumstances amounts to an environmental injustice is presented. The framework consists of four main components: namely, principles, situational factors, perceptions and contextual factors, and the nature and extent of the burden. Each of the components is reviewed in more detail below.

4.2.1 Principles

Based on the principles developed by the First National People of Colour Environmental Leadership Summit (Lee, 1992; Foreman, 1998; Taylor, 2000; Schlosberg and Caruthers,

2010), coupled with those outlined by the Canadian judiciary in relation to the equality provision in the Canadian Constitution (*Law v. Canada*, 1999; Sharpe and Roach, 2005), it is possible to derive six fundamental principles of an equality framework for the application of environmental justice in Canada to issues and problems confronted by an individual or group. These are:

- promote human dignity;
- ensure substantive rights to the environment for humans;
- uphold meaningful exercising of inherent cultural rights;
- prevent actions that limit freedoms or create burdens;
- ameliorate disadvantage(s) or compensate for damage(s); and,
- protect against intentional and unintentional discrimination.

These principles can be used to determine whether a particular set of circumstances arising as a result of a government action amounts to an environmental injustice for an individual or group[6] in Canada that is considered protected.

4.2.2 Triggers and Parameters

An important element of the equality framework is determining whether it applies in a particular case. To do so, there are three components that must be satisfied in order to adequately trigger an equality analysis and to set the parameters by which the analysis

[6] For greater clarity, the term "community" is used interchangeably with the term "group" in this thesis The term "community" is used in the context of an "environmental justice community", which is akin to a "group" of individuals that have similar and immutable characteristics protected by section 15(1) of the *Constitution Act, 1982* For example, either term in the context of environmental justice may be used to describe a First Nation in Canada

will occur. First, a community must be considered protected under section 15 of the Canadian Constitution from discriminatory actions by a government in Canada; the framework is not triggered without such a designation. While an individual community may be considered protected under more than one enumerated or analogous grounds in some cases, it is important to select the most apt ground in terms of demonstrating an action is discriminatory. In addition, the ground that is chosen should be reflective of the 'cultural area' used to frame the discrimination against the community (Fixico, 2001). The second is to identify a government action that has created, worsened, or espoused the disadvantaged position of the community; the framework is not triggered without an action. Legislation, regulation, policy, or any decision (including, discretional power) used by a level of government in Canada to make a decision is considered an action covered by the equality framework. A third is the selection of a comparator group. The proper identification of a group will, comparatively speaking, illustrate the discrimination endured from the impugned action. The comparator group is therefore a separate entity with similar, pertinent characteristics that is shielded from the burden, or receives a benefit, or is respected as being capable and worthy of continued existence (*Law v. Canada*, 1999; Sharpe and Roach, 2005).

4.2.3 Perceptions and Context

The foundation to the equality framework consists of two main components with respect to determining whether the differential treatment arising from the government action (in purpose and/or effect) demeans the human dignity of a community, and in that way, is

discriminatory. These are: the perceptions and the contextual factors that underscore the situation.

The perceptions of the community are based on whether it believes their human dignity has been negatively impacted as a result of the government action. Their perceptions are divided into two categories: (1) there are *subjective perceptions*, which are considered those that one may associate with the impugned government action and the community's pertinent characteristics; and (2) there are *objective perceptions*, which shed light on the larger context of the impugned government action, including the past and present treatment of the community in comparison to the comparator group. Within this context, the perception of the community regarding the impact to their human dignity is integral. Emphasis is placed on whether the community's physical or psychological integrity is negatively affected by their needs, capacities, or merits not being met, which has the result of marginalization or devaluation.

Establishing the context of the situation is integral as it is used to substantiate both the subjective and objective perceptions of a community. It is accomplished by providing information relating to the following four components. First, determine whether there is a *pre-existing disadvantage.* While not a compulsory requirement pre se, including such information is beneficial as it assists in demonstrating that there are pre-existing conditions that have placed a burden upon the shoulders of a community; however, such burdens ought to be relevant to the impugned government action and the pertinent characteristics. Second, determine the *link between the protected ground and the personal characteristics*. This assists in the correlation of the community's human dignity to the differential treatment. Third, determine whether an *ameliorative purpose*

or effect is present. This involves demonstrating that the impugned government action does not prevent a situation from getting worse or making the situation better in some way. Fourth, determine the *nature of the interest affected.* This involves demonstrating the sensitivity of the impact through, for example, showing how severe and local the burden is for a community. The more fundamental the characteristic being impacted is to the community, the greater the likelihood the case is considered discriminatory (Sharpe and Roach, 2005).

4.2.4 Nature and Extent of Burden

Key to demonstrating that the impugned government action discriminates against a community is articulating the 'nature and extent of the burden'. This is accomplished two ways. The first, which is not a requirement per se but valuable nonetheless, is to provide data (from, e.g., the social and natural sciences) that shows how the action violates the community's human dignity. The second involves demonstrating that the action discriminates against a community in either purpose and/or effect. While proving discrimination is necessary in general, establishing that it was part of a government plan in particular is not a requirement; that is, a government action may be defined as discriminatory irrespective of whether the purpose and/or effect were intentional or unintentional. (*Law v. Canada,* 1999)

4.3 Illustrative Example: Culture, Caribou, and Coal Mining

The circumstances of a recent land use conflict between the Crown and a First Nation, namely the Provincial Government of BC and West Moberly, will now be subjected to the framework to illustrate the application of environmental justice in a Canadian context. At the heart of the conflict is a threatened heard of caribou and its *critical habitat*[7]. The government of BC wishes to use the land for the development of a coal mine (that will destroy the critical habitat) in order to generate revenue via royalties paid to the Crown. West Moberly wishes to use the land for the preservation of ecological integrity (that will protect the critical habitat) to ensure the survival of the caribou for future cultural use.

4.3.1 Triggers and Parameters

This section determines whether the illustrative example of West Moberly's struggle to protect a herd of caribou from mining activities is an appropriate case for the application of an equality-based environmental justice analysis. In establishing this, as previously noted, the particular circumstances must include a community (or members) considered protected by the Canadian Constitution, a government action that is the basis of the potential discrimination, and an identifiable comparator group that will assist in the illustration of the negative effects placed upon the shoulders of the community as a result of the differential treatment.

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[7] The term "critical habitat" originates from a federal law, specifically the *Species at Risk Act* While the Government of Canada uses the term with respect to species at risk in Canada and the habitat needed to ensure their survival, it is not used by the Provincial Government of BC at all Instead of "critical habitat", BC has decided to uses the term "core habitat" or "high quality habitat" From an ecological perspective, both of the terms used by BC more or less have the same meaning as the term used by Canada. The official reason BC uses its term rather than Canada's is unknown, the former (which is legally defined) significantly and explicitly restricts impacts to a land base that is defined as "critical habitat", whereas the latter (which is not legally defined) does not

West Moberly First Nations

The community of West Moberly is located in northeast British Columbia; according to West Moberly (WMFN Petition, 2009), the Government of Canada refers to the community as a "Band" in accordance to the *Indian Act* (1985).[8] Since members of a Band are legally defined as "Indians" under the *Indian Act* (1985), community members of West Moberly (individual level) are protected from discrimination as they are considered to fall under an enumerated ground, such as "race". Further protection under section 15 is also likely due to a First Nation's unique situation in Canada. For example, in the context of the *Indian Act* (1985) a First Nation is defined as a "band", which means "a body of Indians". The community is also considered to be "'aboriginal peoples of Canada' within the meaning of section 35 of the *Constitution Act, 1982*" (Affidavit #1 of Chief Roland Willson. 2009: para. 2). Since the term "body" implies union, which means an assemblage of people, and West Moberly is legally considered a "band" (Petition, 2009: pg. 19) that consists of a collection of individuals that are the descendants of the same distinct cultural group called the Mountain Dunne-za (WMFN Initial Submissions, 2009), it is possible to consider the members of West Moberly as a group with similar and "immutable characteristics", making the community (group level) an analogous ground which is protected by section 15(1).

[8] As the term "Band" comes from the *Indian Act*, which does not allow for non-Indians to be registered on a First Nation's Band List, there is likely a difference between how the federal government defines an Indian and the approach used by a community. It is very likely that some (if not all) First Nation communities may consider (for a variety of reasons) other individuals to be members of their Nation, irrespective of the Eurocentric view of the Government of Canada with respect to defining members

As a *sui generis* (unique unto their own) group, the community of West Moberly has a distinct "cultural area". While the land base that comprises the area in which they are legally permitted to exercise their rights is the boundary of Treaty No. 8, the Nation's preferred area to exercise their inherent[9] cultural rights is approximately the Peace River Sub-Basin in British Columbia, which is referred to as their "preferred Treaty Territory" (WMFN Initial Submissions, 2009). This area is culturally significant as it provides the community with subsistence, both physical and spiritual. Their *mode of life* includes the exercising of rights such as hunting, fishing, trapping, and gathering, along with the necessary incidental rights like, for example, the construction of cabins to trap and the conservation of the environment in order for it to be capable of meaningfully sustaining their interconnectedness with the land as they have done since time immemorial (WMFN Initial Submission, 2009).

British Columbia's Actions

The dispute between the Provincial Government of BC and West Moberly is based on statutory decisions, namely the approval of FCC's Advance Exploration Program and its Bulk Sample Application that were issued by the Ministry of Energy, Mines and Petroleum (MEMPR), and the decision by the BC Cabinet regarding the basis of the caribou protection and augmentation plan (the "Plan") subsequently developed. Take

[9] The term "inherent" is used to represent that the rights of First Nation cultures in general, and West Moberly in particular, are not "contingent" upon the pleasure of the Crown That is, the rights of First Nations are based on the fact that they are sovereign states that enjoyed rights prior to the arrival and settlement of Europeans in what is now referred to as Canada, their rights exist irrespective of the opinion of the Crown (in both its federal and provincial forms) and cannot be extinguished without consent of a First Nation (see, e g Asch, 1984)

together, these decisions form the basis of the impugned government action. These decisions (collectively, the "BC's Action") are summarized are below.

Statutory Decisions

On September 9, 2009, the Chief Inspector of Mines for BC sent a letter to West Moberly which stated that MEMPR approved permits for FCC to carry out the Advanced Exploration Program and Bulk Sample Application.[10] While BC's decision does not provide an analysis with respect to the impacts to the culture of West Moberly if the mining activities were to proceed, or vice versa, it does provide the conclusions in the form of four 'accommodation measures' that apply to both Crown Authorizations (Hoffman, 2009).

The first was the development and implementation of the Caribou Mitigation and Management Plan (CMMP) by FCC. The mitigation proposed within the CMMP, according to the Aboriginal Relations Branch (ARB) of MEMPR, will "avoid or limit effects... to ensure that mining activities do not have a significant impact on the Burnt Caribou Herd" (Aboriginal Relations Branch, 2009b: pg. 3). While the Crown noted that West Moberly expressed concerns that they did not have the capacity to provide substantive technical input into the review and modification of the CMMP, it does not comment on whether that inability was addressed. Additionally, the ABR includes West Moberly's concern that, based on the comments from the caribou experts from MOFR and MOE, the First Nation believed that the "Project would have significant and possible

[10] Pursuant to section 10 of *Mines Act*, the statutory decision makers approved "173 drill holes and 5 trenches" for the Advanced Exploration Program and the removal of "50,000 tonnes" of coal for the Bulk Sample Application (WMFN Petition, 2009: pg 8).

irreparable harm" to the herd. There is no indication whether the ABR addressed this concern. The ABR points to the Burnt-Pine Caribou Task Force, which is to be convened by FCC as part of the CMMP as a process to further monitor the situation with the caribou and the mine, which includes FCC assisting "in the recovery of the population". The second accommodation measure was the amendment to the Bulk Sample Permit, namely the reduction of the program from 100,000 tonnes to 50,000 tonnes. By doing so, and based on the premise of attempting to reduce the impact to the caribou, the ARB suggested that the reduction will likely result in 50% less waste rock and traffic (Aboriginal Relations Branch, 2009b: pg. 4). The third accommodation measure relates to the closure of a road, which was built along the windswept ridges of the critical habitat of the Burnt Pine caribou herd. Based on discussions with the Ministry of Forests and Range (MOFR) and MOE, FCC agreed to close what has been referred to as the 'Spine Road' in recognition of the importance of windswept ridges as productive caribou habitat. Lastly, the fourth accommodation measure was the change of FCC's mining technique, a new system that replaced the open-pit design that was contemplated in the initial stages of planning that occurred back in 2006.

BC Cabinet Decision

On June 18, 2010, the BC government sent a letter to West Moberly that outlined its decision relating to caribou and Treaty rights. The letter noted that BC had chosen "Option 1", as described in the Planning Team Report (the "PT Report"), to form the basis of a plan (the "Plan") "to protect and augment the Burnt Pine caribou herd" (Perrins, 2010b: pg. 1). Under the Plan, BC notes that several "new measures" where to

be undertaken. First, the province was going to identify "Resource Review Area" (RRA) as a means to limit impacts to critical habitat. Inside of these areas there would be no new development for up to five years, with a possibility of a time extension. Second, a predator management program was going to be implemented, which will cull the wolves in and around the Burnt Pine caribou range. Third, "a boarder Northern Caribou Management Plan" (NCMP) that covers the remaining herds (i.e. Graham, Moberly, Scott, Kennedy Siding, Quintette, and Narraway herds) was to be developed and implemented in the future. Fourth, the areas of the Burnt Pine caribou's core habitat that fall outside of the RRAs that are (or likely will be) tenured would be subject to Best Management Practices (BMP). (pg. 1)

Impugned Decisions

West Moberly did not agree with the statutory decisions made by BC; therefore, the First Nation initiated legal proceedings by filing two petitions to the Supreme Court of British Columbia (SCBC). These put the statutory decision makers and the BC Cabinet "on notice" that the community was asking the judiciary to review the decisions (i.e. BC's Action). In the 2009 Petition, the First Nation contended that the decision-makers from MEMPR and the Ministry of Forests and Range (MOFR) breached their legal obligations under the *Constitution Act, 1982*, namely protecting the community's right to harvest caribou under Treaty No. 8 for cultural purposes, by approving the Bulk Sample and Advanced Exploration Program under the *Mines Act* and the Occupation License to Cut (OLTC) under the *Forestry Act* and the *Coal Act* (WMFN Petition, 2009). In the 2010 Petition, West Moberly contended that BC "has not put in place a reasonable, active

program for the protection and augmentation of the Burnt Pine caribou... as required... [by] the British Columbia Supreme Court" (WMFN Petition, 2010: pg. 4), which is needed in order for community members to harvest caribou in accordance with their traditional seasonal round (*West Moberly v. British Columbia (Chief Inspector of Mines)*, 2010).

The Provincial Government of BC: A Comparator

Treaty No. 8 provides the parties, namely the Crown and First Nations, with a framework for land use planning and natural resource management that is grounded in peace and friendship, enabling both to coexist in the future. The parties therefore share in the benefits associated with the signing and implementation of Treaty No. 8, and in addition, logically share in the burdens that may occur as well. As a beneficiary of Treaty No. 8, the characteristics of Provincial Government of BC are assured so long as they do not unjustly create burdens for First Nations, such as West Moberly.

Based on BC's Action, the government of BC has created a benefit for itself in terms of increasing its economic development by zoning the land as industrial use, rather than as "critical habitat". This shields the mining industry (as well as other industrial users like oil & gas) from restrictions, which, in turn, provides BC with benefits that shield its interests; for example: social components, such as BC's economy, health care, social security, education, employment, and quality of life are likely enhanced. These are protected as a result of the most notable benefit: the monetary gain from industrial development. By allowing anthropogenic activities to continue, the approached used by BC "has the least impact on tenure holders and economic values" as it does not require

expropriation, which means the risk to BC having to compensate existing tenure holders (e.g. coal, oil and gas, forestry, and wind) is mitigated. Loss of revenue is also alleviated. Thus, the loss of potential monies is removed and the collection of potential revenue from resource development is assured. With such benefits, the Provincial Government is able to continue its mode of life without having to assume any of the significant burdens that transpire as a result of the impugned decisions. BC's approach to land and natural resource use is thus protected.

4.3.2 Perceptions and Context

This section provides the background information necessary to determine if BC's Action negatively impacted the human dignity of West Moberly. As previously noted, the focus here is on the perceptions of the community in terms of whether their needs, capacities, or merits have been met without being marginalised or devalued in some fashion by BC's Action. These perceptions are then supported by the context of the situation, specifically whether the community has a pre-existing disadvantage, the presence of a link between the community's characteristics and BC's Action, the presence or absence of an ameliorative purpose or effect of BC's Action that is positive for the community, and the nature of the community's interested.

A Community's Perception

In June 2009, West Moberly presented their views to BC regarding mining activity in the critical habitat of the Burnt Pine Caribou Herd by submitting a document entitled "I Want

to Eat Caribou Before I Die: Initial Submissions for the Proposed Mining Activity at First Coal Corporation's Goodrich Property" (hereinafter referred to as the "WMFN Initial Submissions"). The WMFN Initial Submissions detail how the loss of caribou from the landscape has negatively impacted their culture (i.e. mode of life) in many ways. Based on the data presented, observable physical effects would include not having the ability to harvest the species for a source of food or being able to use them for manufactured goods like art and clothing. Less noticeable, but equally significant impacts from a cultural perspective, include losses of immaterial elements of their mode of life. In the words of one community member:

> "I have talked to a lot of young people from our Reserve that would like to hunt caribou, but can't because the caribou populations are too low. Because we have not been hunting caribou for the last 35 years or so, stories about hunting, eating, or making things with caribou are not told as often as they once were. A crucial part of our culture will soon slip away unless we are able to recover caribou populations to healthy levels" (Desjarlais, 2009: pg. 9).

Similarly, and seeing that the species is of such significance to their culture, West Moberly noted that the impacts to their culture are both philosophical and spiritual.

> "There are only a few caribou left in the Burnt Pine herd. But the government wants to allow mining exploration in their core winter habitat. If this is how we treat the habitat of the caribou, how will we treat the habitat of the other animals our people want to hunt?
>
> Based on what the Elders have taught me, I believe that destroying the habitat of animals upsets the balance that the Creator has put in place. We need this habitat as much as the animals do because our way of life depends on it and on the health and survival of the animals. I have taught it to my children. I can't imagine what would become of my grandsons if by the time they grow old enough to go out in the bush, there are no animals left to hunt"

(Desjarlais, 2009: pg. 9-10).

> "I pray to God that the caribou will multiply so that we can once again sustainably hunt them, as our people have done for generations" (Desjarlais, 2009: pg. 9).

Impacts from the extirpation of caribou from the landscape are not necessarily constrained by locale or the particulars of the species with respect to it role in the mode of life. Secondary impacts, which are considered to be those that arise as result of the direct impact (i.e. loss of caribou), also arise (Noble, 2006). These include, for example, the redirection of community needs to other large ungulates.

> "The loss of the caribou has impacted the way we hunt other species. We are now much more dependent on moose. Since the Elders said we can't hunt caribou anymore [traditional law], they told us to start hunting for yearlings of moose in the springtime. Moose numbers vary from year to year, but there aren't enough moose for us to sustainably harvest so that we have enough meat to be stored through the winter until spring. So, the loss of caribou puts a new pressure on moose, because now we are harvesting more moose" (Desjarlais, 2009: pg. 8).

Different Values, Different Land Uses

To avoid causing additional impacts to the caribou and their culture, West Moberly believed that mining is able to continue within its territory but not in the location of FCC's activities as planned: "there is tons of coal in the Peace Region that could be used...First Coal could go [there]...they are not going to go out of business. This spot is wrong" (WMFN Initial Submissions, 2009: pg. 48). When the option of moving the project was turned down by the Proponent, a decision that was presumably supported by MEMPR as the Crown did not voice any opposition or concern to FCC's position

(WMFN Initial Submissions, 2009), the direction of the Crown was challenged by West Moberly.

> What is the priority? To us the obvious priority is improving the herd – increasing it. Help them recover back to healthy populations so we can start harvesting some animals maybe – years to come. I just think that they are prioritizing money right now" (WMFN Initial Submissions, 2009: pg. 48).

As West Moberly is a beneficiary of Treaty No. 8, the First Nation believed that the Crown was in breach of their constitutional rights. In the Treaty, according to the Initial Submissions (also see the Commissioners Report), the First Nation was promised that they would be able to hunt, fish, trap, and gather as though they never entered into the agreement with the Crown and that there would be no "forced interference". But with all of the impacts that have occurred since the time the community's ancestors accepted annuities under Treaty No. 8, the First Nation has questioned the efficacy of the Crown's "solemn promises" to them: "Our people have lived up to the agreement, Canada and BC have not lived up to any of the terms except creating reserves and paying us our five dollars a year...[w]e have hunting restrictions...we have not been able to hunt caribou..." (Initial Submissions, 2009: pg. 50). With the significant decline in caribou, and based on the resulting cultural impacts, West Moberly believed that the mining activity proposed by the Proponent should be rejected by MEMPR and a recovery plan should be developed and implemented; anything less, the First Nation believed, was a violation of their rights under Treaty No. 8.

A Canadian Perception

The community of West Moberly is not alone in being concerned for caribou and the habitat of the species, including the matter of the encroachment of anthropogenic activities that adversely effect recovery potential. Citizens of Canada have also recognized the dire state of affairs for caribou, in addition to the precarious situations of many other species throughout the country, and those concerns resulted in the enactment of the *Species at Risk Act* (SARA) in 2004.

Under SARA, caribou are legally defined as "Threatened", which means the species "is likely to become endangered if nothing is done to reverse the factors leading to its extirpation or extinction" (SARA, 2002: s.2). A key element of reversing such factors, according to West Moberly, is the protection of the habitat necessary for the species to survive; the government of BC's caribou expert has also stated that the destruction of critical habitat and the goal of recovery planning are incompatible (Initial Submissions, 2009). Critical habitat is defined as:

> "...the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species.

Building on the intent of SARA, Canada and BC signed an agreement to protect the species that are at risk within the province: the Canada-British Columbia Agreement on Species at Risk (the "Agreement"). In section 2 of the Agreement, as West Moberly points out (WMFN Initial Submissions, 2009: pg. 70), the governments agreed to the following:

- "the protection and recovery of a species at risk 'will be informed by the best available science'" (SARA, section 2.4) "and 'will take into account...the traditional knowledge of aboriginal people'" (SARA, section 2.6).

- "'If there are serious threats or irreversible damage to a species at risk, cost effective early actions will be taken to prevent the further reduction or loss of the species and to facilitate the protection and recovery efforts'" (SARA, section 2.7); and,

- Canada and BC "'will endeavour to develop recovery strategies and action plans that meet timelines and other requirements set in federal and provincial legislation'" (SARA, section 11.1), "including the provision 'for the protection of' the 'critical habitat' of species at risk" (SARA, section 12.2).

Included in the Agreement, specifically Appendix A, is an Accord that both Canada and BC signed. Through this Accord, Canada and BC agreed to protecting species from becoming extinct as a results of anthropogenic activities. Further, the governments agreed to the following:

> "ii) the conservation of species at risk is a key component of the Canadian Biodiversity Strategy, which aims to conserve biological diversity in Canada;
> iii) governments have a leadership role in providing sound information and appropriate measures for the conservation and protection of species at risk, and the effective involvement of all Canadians is essential;
> iv) species conservation initiatives will be met through complementary federal and provincial/territorial legislation, regulations, policies, and programs;
> v) stewardship activities contributing to the conservation of species should be supported as an integral element in preventing species from becoming at risk; and
> vi) lack of full scientific certainty must not be used as a reason to delay measures to avoid or minimize threats to species at risk."

In addition, Canada and BC agreed to the following:

iii) establish complementary legislation and programs that provide for effective protection of species at risk throughout Canada, and that will:

c. legally designate species as threatened or endangered;
d. provide immediate legal protection for threatened or endangered species;
e. provide protection for the habitat of threatened or endangered species;
f. provide for the development of recovery plans within one year for endangered species and two years for threatened species that address the identified threats to the species and its habitat;
i. implement recovery plans in a timely fashion;
m. encourage citizens to participate in conservation and protection actions;
n. recognize, foster and support effective and long term stewardship by resource users and managers, landowners, and other citizens; and
o. provide for effective enforcement.

For species that are defined as being "Threatened", such as caribou, Canada and BC committed to developing and implementing a recovery strategy by June 5, 2007 (SARA, 2002: s. 42). However, according to the Initial Submissions (2009), neither Canada nor BC has fulfilled this requirement for any of the herds within West Moberly's preferred Treaty Territory. Making matters worse is that BC initiated a planning process in 2003 that most likely would have satisfied such a requirement; however, the process was cancelled by the government:

> "This Recovery Implementation Group (RIG) met informally once during the spring of 2003. Shortly thereafter most caribou RIGs were temporarily suspended pending direction from the provincial Species at Risk Coordination Office (SARCO). The herds that will be addressed by this RIG include: Moberly, Burnt Pine, Kennedy Siding, Quintette, Graham, Belcourt, and Narraway." (RICBC, 2009; also see Initial Submissions, 2009: pg. 71)

In June 2009, both Canada and BC acknowledged that they were in violation of SARA by approximately 2 years (Initial Submissions, 2009: pg. 72). Even though the development and implementation of the recovery was past due, BC reaffirmed its position that it was not planning on reinitiating the process upon West Moberly's request: "...there are no current plans to develop or implement recovery planning for those caribou herds in the south Peace Region..." (pg. 72). West Moberly found the cancellation of the planning process to be problematic in terms of the protection of cultural practices protected by Treaty No. 8: "[g]iven the state of affairs with respect to caribou herd populations, we consider the suspension itself to be unreasonable and unacceptable on the part of British Columbia" (pg. 71). In his decision, Justice Williamson concurred with West Moberly and appeared to place an emphasis on the underlying intent of SARA. He concluded that:

> "...a balancing of the treaty rights of Native peoples with the rights of the public generally, including the development of resources for the benefit of the community as a whole, is not achieved if caribou herds in the affected territories are extirpated" (West Moberly, 2010: para. 53).

Traditional Law: A Conservation Measure

Caribou within West Moberly's preferred Treaty Territory have been at risk since the late 1960s and early 1970s. After the construction of the W.A.C. Bennett hydroelectric dam and the subsequent flooding of the Williston Reservoir, which took up approximately 1,780 km^2 of land (Tetra Tech 2002, p. i) and habitat, community Elders foresaw the long-term impacts to the species and the oncoming impact of European settlement

(WMFN Initial Submissions, 2009). This resulted in the community implementing conservation measures as a precautionary approach. More specifically, a traditional law was passed by the First Nation's Elders that banned the harvesting of caribou by community hunters. The passing of the law was in direct response to the existing and foreseeable impacts caused by the impoundment of water from the dam, which destroyed not only habitat but also ecological features such as migration corridors. In the WMFN Initial Submission (2009), the community recounted the impacts that they witnessed when the land was flooded:

> "WAC Bennett Dam was constructed. The Peace River Valley coming through the Rocky mountains. And with all that debris floating on the reservoir it made it difficult for them to cross. Great herds drown because they could walk out onto the log jams on top of floating degree and jump into the water to follow their natural migration route, through the Peace Valley and they couldn't get out on the other side. Who knows how many drown. Lots of them did.
>
> Same thing happened with the caribou trying to move north across the Williston Reservoir and eventually small groups, isolated groups were left on the south side. After a few years they didn't try crossing anymore. And even to this day, and we are talking about the '70s here and that was 30 years ago, even to this day there is still a lot of debris floating on the reservoir. I don't think it has as much danger as it used to – when the flooding first occurred." (pg. 32)
>
> "...[the dam] killed lots of them [i.e. caribou] we took them out this side of the mountain. Mount Clearwater. The animals were just trying to go across. Right in those sticks, those sticks are flowing. They got stuck. We took them out of there. We saved a few of them. If we tried to save all of them we would be there 24 hours a day." (pg. 31)
>
> "As far as we know, the migration across the Williston Reservoir doesn't occur anymore. It left these isolated groups south of the reservoir along the trench." (pg. 32)

Elders were especially concerned. They recall the "sea of caribou" that once

existed in their territory. The WMFN Initial Submissions (2009) recounted the views of one Elder, who expressed his and his family's distress over the situation:

> "...[the Elder's] teachings once included the traditional ecological knowledge of Wah stzee [caribou] and its use for medicinal purposes, ceremony, clothing, and other uses such as tools, art, and food. But that was before significant impacts such as the dams and roads were built without due consideration for the species and our Nation's Treaty rights. Today he watches an ever fragile habitat being destroyed and fragmented day-by-day. Coupled with an already overwhelmingly low population, his worries continue to deepen. The animal that was once so integral to his mode of life and his ancestors is on the verge of becoming extirpated from the territory – in other words, extinct from the homeland of Mountain Dunne-za. Most bothersome, however, is that all of this is occurring within one generation" (pg. 40).

The temporary loss of caribou (as noted above) has greatly troubled the community. Their submissions provided insight into the basis for the traditional law restricting caribou hunting, which was implemented around 40 years ago in an attempt to avoid a significant cultural impact. In addition, the views frame the rationale of the First Nation with respect to why it has launched legal proceedings against BC in order to compel the government to protect the species for future generations.

First Nations and Treaty Rights

With respect to First Nations and environmental/cultural matters, the link between the protected ground and their personal characteristics is typically conjoined by their rights and interests that are recognized and affirmed by section 35 of the Constitution of Canada. These rights protect their cultures, as it is unconstitutional (i.e. illegal) to extinguish such rights (Hogg, 2004). Within Canada, many of these rights have been

further recognized and defined through treaties (e.g. the historic numbered treaties), modern day land claims (e.g. *Nisga'a Final Agreement Act*, 2000), and other mechanisms such as agreements and case law (Isaac, 2004).

In the case of West Moberly, as previously mentioned, the First Nation has been part of Treaty No. 8 (a historic treaty) since accepting annuities in 1914. Although the text of Treaty No. 8 lists various rights, such as the protection of the First Nation's "usual vocation of hunting, trapping, and fishing" (see: Treaty No. 8, 1899), the community points out that understanding the substance of such rights requires the incorporation of the 'oral promises' in the framing of what such rights mean, notwithstanding the fact that they (oral promises) are rights in and of themselves (WMFN Initial Submissions, 2009). Such promises were made by the Treaty Commissioner during the negotiations of Treaty No. 8 (*R. v. Badger*, 1996). Over the years, the importance of these promises have been the focus of several court cases and decisions rendered by the SCC, in addition to the lower courts.

In *R. v Marshall* (1999), for example, the SCC stated that "it would be 'unconscionable for the Crown to ignore the oral terms' of a Treaty" (WMFN Oral Argument, 2010: pg. 7; *Marshall,* 1999: para. 12). As such, West Moberly believed that the 'oral promises' made by the Commissioner during the treaty negotiations, some of which are in his report (entitled "The Commissioner's Report") while others are contained within affidavits of those that were a witness to the negotiations, are integral to protecting their rights and, most importantly, their culture. In particular, they point to the following promises: "that the same means of earning a livelihood would continue after the treaty as existed before it; that the Indians would be as free to hunt and fish after the

treaty as they would have been had they not entered into it; that the treaty would not lead to any forced interference with their mode of life" (WMFN Petition, 2009: pg. 11).

The oral promises, coupled with the main intent of the Treaty No. 8, which was the preservations of the mode of life for participating First Nations (WMFN Oral Argument, 2010: pg. 8; *R. v. Horseman*, 1990), provides significant insight into how land and resources ought to be managed. In this sense, West Moberly believed that the court had recognized that their right to harvest species via hunting and trapping under Treaty No. 8 as it was intended to protect the "continuity in traditional patterns of activity and occupation" (WMFN Petition, 2009: pg. 11). This included species such as caribou because, as West Moberly states, they used caribou in a variety of ways before entering into Treaty with the Crown; it formed a vital part of their culture (WMFN Petition, 2009: pg. 12).

In the WMFN Initial Submissions (2009), West Moberly provided decision-makers with substantial data with respect to caribou in their territory (discussed in more detail below). Given the functional role of caribou within the Mountain Dunne-za mode of life, the community contends that the species is integral to the continuation of their culture as promised by Treaty No. 8, and as such, the Crown has a legal obligation to ensure that there is a harvestable surplus available. Not all species, according to West Moberly, play such a significant role in the culture; therefore, their rights to other such species would clearly be different from those relating to ungulates like caribou (WMFN Oral Argument, 2010: para. 19).

Within the context of the *Sparrow* decision, the Crown has a legal responsibility to prioritize the use of land and natural resources amongst potential users. In general, the

order is as follows: (1) conservation of ecosystems and species; (2) First Nations use, including commercial; (3) non-First Nation private (e.g. industry) uses; and, (4) member of the public (non-First Nation) users (WMFN Oral Argument, 2010: pg. 20; *R. v. Sparrow*, 1990). Further, Justice Vickers in the *Tsilhqot'in* decision recognized that the right "to hunt and trap over an area means wildlife and habitat must be managed to ensure a continuation of those rights" (para. 1291). In effect, this means that the Crown must manage the caribou habitat (land) and caribou (natural resource) for the use of First Nations, such as West Moberly, prior to the use of a non-First Nation company like FCC.

While Treaty No. 8 did anticipate a smaller landscape in which to exercise rights, First Nations such as West Moberly did not consider that the acceptance of benefits from the Treaty would "seriously prejudice or eradicate existing harvesting practices" (WMFN Oral Argument, 2010: pg. 22). In that way, to give the priority of using land and resources to FCC without ensuring that the community's priority meaningfully existed, West Moberly contended that BC's Action contradicted the *Tsilhqot'in* decision (para. 1293-1294) as it relates to the interpretation of Treaty No. 8 and thus it constituted "an unjustifiable infringement" of their rights (WMFN Oral Argument, 2010: pg. 22).

Justice Williamson's Decision

On March 19, 2010, Justice Williamson of the SCBC released his Reasons for Judgement for the landmark court case *West Moberly First Nations vs. British Columbia (Chief Inspector of Mines)* (hereinafter referred to as "West Moberly (2010)"). This case confirmed the established rights of West Moberly, in particular the practices associated with their traditional seasonal round and thus the harvesting of caribou.

In the Reasons for Judgement, Justice Williamson provided a succinct overview of the "Background Facts" of the evidence presented during the hearing. In particular, he noted the following evidence as facts: (1) West Moberly's "harvesting practices included a traditional seasonal round" that includes the area of FCC's operations (para. 16); (2) "caribou were a source of food, and that caribou hide, bone, and antlers were important to the manufacturing of a number of items for both cultural and practical reasons" (para. 17); (3) due to the decline in the caribou population because of anthropogenic activities such as the W.A.C. and Peace Canyon hydroelectric dams, the community's "right to carry on their traditional harvesting practice has been diminished" (para. 18); and (4) the caribou in and around FCC's "operations has been decimated... to a population of 11" and have thus been listed as "threatened" pursuant to SARA (para. 18).

Since the case at bar revolved around the exercising of rights pursuant to Treaty No. 8, including the rights of both West Moberly and the Crown (which in this case was BC), Justice Williamson in his decision reviewed the Treaty itself and some of the relevant legal precedent. He pointed out that BC cannot, as it did during the process that preceded the decisions for the impugned permits, rely solely on the "rights as expressed in the written Treaty"; rather, the 'oral promises' (many of which have been included in the Commissioner's Report) made by representatives of the Crown must be taken into account (para. 28) whenever a Crown is contemplating impacting land and natural resources within the boundaries of the Treaty. To do anything less would contradict legal precedent developed over the years by the SCC through various judgements.

Generally speaking, reading the Commissioner's Report along side Treaty No. 8 is key in such instances as it provides a background to the accounts of when the Treaty was

signed and subsequent adherences. In particular, Justice Williamson references *R. v. Badger* (1996) to elucidate the rights WMFN has as a beneficiary of Treaty No. 8:

> 55. Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little settlement in the area. The Commissioners, cited in Daniel, at p. 81, indicated that "it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap." The promise that this livelihood would not be affected was repeated to all the bands who signed the Treaty. Although it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians' hunting rights. For example, one commissioner, cited in René Furmoleau, O.M.I., As Long As This Land Shall Last, at p. 90, stated:
>
> > We are just making peace between Whites and Indians - for them to treat each other well. And we do not want to change your hunting. If Whites should prospect, stake claims, that will not harm anyone.
>
> 56. Commissioner Laird told the Indians that the promises made to them were to be similar to those made with other Indians who had agreed to a treaty. Accordingly, it is significant that the earlier promises also contemplated a limited interference with Indians' hunting and fishing practices.

Further, as Justice Williamson points out, signatory First Nations to Treaty No. 8 within British Columbia, or beneficiaries as is the case for West Moberly, have the constitutional right to hunt throughout their traditional lands (para. 62). The exercising of such rights must have an important effect upon the First Nation, however. By this, it seems, the quintessential exercising of such rights (e.g. harvesting ungulates via hunting) must reflect the culture of a First Nation for it to have meaning; to view it otherwise would likely rendered the Treaty as a collection of hollow rights and promises. As such, according to Justice Williamson, Treaty No. 8 must be viewed in the context of protecting the traditional practices, such as hunting, so that the First Nation is able to meaningfully exercise such rights (para. 15) and for their cultures to continue to exist in

the present and future. To further emphasize this point, he references *Mikisew Cree First Nation v. Canada* (2005), which held that:

> "[t]he "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response". (para. 48).

Based on the rights included in the written Treaty and the 'oral promises' noted in the Commissioner's Report, Justice Williamson found that West Moberly has the right to "exercise meaningfully traditional hunting practices" (para. 15), which includes hunting "caribou in the traditional seasonal round in the territory affected" by FCC's mining activities (para. 63). In doing so, he rejected BC's position that the community did not have the *right to hunt caribou* (different from the *specific right to caribou*) within its territory.

Using the geographic proximity approach to understanding impacts to a First Nation culture within Treaty No. 8 that was developed in *Mikisew* (2005), Justice Williamson rejected BC's argument that the affects from FCC's operations on caribou and West Moberly's harvesting rights are negligible. He held that it is unacceptable to "say 'hunt elsewhere'" (para. 62). Further, and even if it were acceptable to tell a First Nations to hunt elsewhere, community members are not able to do so as all of the caribou with their territory are legally defined as "threatened" under SARA, making it impossible to exercise their right anywhere in their territory as they did prior to entering into the

Treaty in 1914.

Lastly, BC contended that it had meaningfully consulted West Moberly and reasonably accommodated their rights, which includes the Crown's responsibility to balance the interests of all parties such as West Moberly, other First Nations, and the general public which includes FCC (para. 73). Justice Williamson, however, disagreed. He was "not satisfied" that BC had meaningfully consulted given the situation. Nor did he believe that BC "reasonably accommodated" the community's "concerns about their traditional seasonal round of hunting caribou for food, for cultural reasons, and for the manufacture of practical items" (para. 75).

In conclusion, Justice Williamson held that "...a balancing of the treaty rights of Native peoples with the rights of the public generally, including the development of resources for the benefit of the community as a whole, is not achieved if caribou herds in the affected territories are extirpated" (para. 53). Further, he concluded that the "...treaty protected right is the right to hunt caribou in the traditional seasonal round in the territory affected by the" operations of FCC (para. 63). Since there was no recovery plan for the Burnt Pine caribou herd and West Moberly was unable to hunt caribou because of their lower population, he believed that a reasonable accommodation measure of the Crown is to develop and implement a plan that accommodates the community's right. Without such a plan in place, he accepted West Moberly's accommodation measure that it proposed during the consultation process, which MEMPR had rejected based on its opinion that such a measure was outside of the scope of consultation and accommodation. Such an approach to reconciliation, that limits the scope of the process regarding addressing concerns raised by a First Nation, was also rejected by Justice Williamson.

He noted that:

> "the honour of the Crown is not satisfied if the Crown delegates its responsibilities to officials who respond to First Nation's concerns by saying the necessary assessment of proposed 'taking up of areas subject to treaty rights is beyond the scope of their authority" (para. 55).

In the Order that was entered on June 10, 2010, the court presided over by Justice Williamson declared that the Crown, as represented by MEMPR and MOFR, "failed to consult adequately and meaningfully and failed to accommodate reasonably the Petitioners' hunting rights provided by Treaty No. 8 with respect to the Bulk Sample and amendments and Advanced Exploration amendments to mining permit CX-9-022 and with respect to the Occupant Licenses to Cut L48261 and L48269". Based on that finding, the court ordered the Advanced Exploration Program to be "stayed" and the OLTC to be "suspended for 90 days" from the date the Reasons for Judgement were released, which was from March 19, 2010 to June 19, 2010. Within this timeframe, the court ordered that BC and West Moberly were to "proceed expeditiously to put in place a reasonable, active plan for the protection and augmentation of the Burnt Pine caribou herd, taking into account the views of...[WMFN] as well as reports of British Columbia's wildlife ecologists and biologists Dr. Dale Seip and Pierre Johnstone".

Effects of BC's Action

This section reviews BC's Action to determine whether West Moberly's disadvantaged position (discussed above) is negatively or positively influenced. To do so under an equality-based environmental justice analysis in Canada, as previously noted, an action of

a level of government must not (in purpose and/or effect) create, worsen or support the disadvantaged position of a community protected by the Canadian Constitution, with an ameliorative effect being the most appropriate result.

Burnt Pine Caribou Herd

The first effect of BC's Action are the ecological burdens on the Burnt Pine caribou herd, which has been described by BC's lead caribou expert as "critically endangered" at present due to the "threats" and its extremely low population (WMFN Initial Submissions, 2009: pg. 57)

Over the years, scientists working for provincial government agencies (namely MOE and MOFR) had expressed serious concerns with mining activities in the critical habitat of the Burnt Pine caribou herd. Beginning as early as 2006, MOE sent a letter to MEMPR in regard to FCC's proposed Bulk Sample application. It reads: "[w]e recommend that no work should be done within the UWR [ungulate winter range] and WHA [wildlife habitat area] areas". Additional letters were sent from MOE to MEMPR outlining the adverse effects pertaining to coal mining activities, such as:

> ...[MOE]... "would not recommend approval be granted for... [the] Notice of Work and Reclamation Program due to the significant wildlife and ecosystem values" detailed in the letter which included Mt. Stephenson providing critical winter range habitat; that the proposed activities would pose a significant threat to caribou populations as the activities would result in the destruction of terrestrial lichens, increase physical disturbance to wintering caribou and create possible displacement of caribou from critical winter range" (WMFN Initial Submissions, 2009: pg. 61).

In order to be clear on the environmental management practices required to protect

the threatened caribou herds in the Peace Region, MOE put forward the Best Management Plans that industrial activities needed to follow regarding potential operations in and around the critical habitat. These are: "[d]o not reduce the terrestrial lichen ground cover; [d]o not reduce the arboreal lichen; [d]o not create disturbances which will disturb caribou or displace caribou from the area; [d]o not create improved predator or human access" (WMFN Initial Submissions, 2009: pg. 65). Further, the document containing the BMPs states: "The core winter ranges are a very limited habitat and support high caribou densities. Any activities which degrade this limited habitat, or displace caribou from the area, pose a significant risk to the caribou population" (WMFN Initial Submissions, 2009: pg. 65). For activities (industrial or otherwise) to be considered sustainable from the perspective of caribou management, they must adhere to the BMPs. The mining activities contained within BC's Action, however, did not follow the BMPs; the activities reduced terrestrial and arboreal lichen, in addition to disturbing/displacing caribou and creating access for predators (Initial Submissions, 2009).

While MOFR was not asked to comment on the coal licenses and the previous mining activities in the same fashion as MOE, MEMPR asked MOFR's to provided comments on FCC's draft mitigation plan (i.e. CMMP) for its proposed mining activity in the critical habitat of the Burnt Pine caribou herd. MOFR's comments are summarized in the WMFN Initial Submission (2009):

> "The Mt. Stephenson block [which includes FCC's proposed mining activities] provides about 2/3 of the habitat value to the herd.
>
> That impact could occur on up to 69% of the core winter habitat on the

> Central South Property, which as discussed in point ii) above, is the most important part of the Burnt Pine caribou winter range.
>
> The mitigation plan does an excellent job of attempting to reduce the environmental impacts of bulk sampling and exploration program on caribou. However, the program will still destroy or compromise substantial amounts of core winter and summer habitat for a small Threatened caribou herd. It will also compromise previous management actions by the Ministry of Forests and Range to protect habitat for this caribou herd.
>
> If the government intends to conserve and recover the Burnt Pine caribou herd, habitat conditions need to be maintained or improved. Allowing additional habitat destruction is incompatible with efforts to recover the population (emphasis added)" (WMFN Oral Argument, 2010: pg. 34; see also: *WMFN vs. Chief Inspector of Mines*, 2010: para. 52).

Overall, BC's scientists from MOE and MOFR recommended that MEMPR not approve any mining activities in the critical habitat (i.e. the UWR or the WHAs) (WMFN Oral Argument, 2010: pg. 33). To do otherwise, the scientists believed, would result in significant adverse impacts to the caribou (pg. 33) and would thus be contrary to SARA.

The scientific opinion on the Plan was similar to previous comments, mostly because the outcome of the Plan did not significantly change the degree to which anthropogenic activities in the critical habitat impacted caribou. The likelihood of the Plan being successful was seriously questioned by the government scientists, as it was in contrast to the report they put forward which called for the protection of all critical habitat (KT Report, 2010). For instance, the scientist from MOFR stated that the contents of the Plan relating to the management intent and habitat protection were "misleading and technically impossible" (Seip, 2010). The Plan, therefore, was unlikely to "reverse the factors leading to its extirpation or extinction" (SARA, 2002: s.2) as it was not based on the "best available science" and did not "take into account...the

traditional knowledge of aboriginal people'" (SARA, section 2.6), as it allowed the "threats" from anthropogenic activities (e.g. mining, oil & gas, and wind energy) to continue.

Cultural Rights

A second effect of BC's Decision is the burden placed on the shoulders of West Moberly and its members. As currently designed, the future use of caribou by community members in their traditional seasonal round will be negligible at best. This is primarily based on the fact that a *harvestable surplus* is not expect, meaning "[t]here is likely no opportunity for a sustainable harvest" of caribou from the Burnt Pine herd (PT Report, 2010: pg. 64). Although if all of the management techniques were successful and the caribou moved to other (albeit undesirable) areas set aside for them, which is questionable given the stochasticity of the environment, then there is a slight possibility that West Moberly (and/or First Nations with rights pursuant to Treaty No.8) could harvest a total of 1-2 bulls on an annual basis (PT Report, 2010).

As noted earlier, the loss of caribou from the traditional seasonal round has lasted for nearly forty years. The potential permanent loss of the species is something that troubles the community greatly, as noted in their Initial Submissions (2009):

> "A long time ago, once in a while they go to the mountains to kill caribou and they use them, Old Elders like my grandmother, my grandma, my grandpa, my dad. That's what the Elders, my Dad used to say, "If we can't go to the mountains, us guys, you guys will never go".
>
> I, myself, would one day like to hunt caribou. I haven't been able to hunt caribou. I never even had a chance to hunt caribou... My Dad, my Grandfather, my great grandfathers, they used to take me hunting but they

never took me to the mountains. They talked about it. They talked about hunting caribou. They talked about hunting sheep and goats.

There are a lot of young people from this reserve that would actually like to go hunting caribou but they can't. The numbers are not there for it to be a sustainable harvest to utilize them again. Like we traditionally did...

In the past there were a lot of caribou in our area but because of the dam, I've heard that the migration routes have been severed so that the caribou didn't come over as much. But stories from my grandparents, they used to hunt caribou all the time ...I don't remember eating caribou growing up. I have heard stories of our people going into the Twin Sisters area and hunting caribou up there and from being involved with our Nation... the Twin Sister's area and the Pine Pass, I know there are herds of caribou up there. Some of the herds are pretty depleted but we never heard very much about caribou after the dams came in. And I just remember my Grandmother saying, and my Uncle Max saying the caribou just aren't around anymore. I haven't eaten caribou but I know they have. [My son] is just getting into hunting now and he really enjoys it. He got his first moose last year so he is pretty excited... I wouldn't mind taking him hunting caribou, see what the difference is. I have had elk, moose meat, and deer meat. I really like it and I would like to try caribou... I want to be able to eat caribou before I die. I want my kids to be able to have that option.

Just listening to the stories from my Grandma and my Uncle Max, they trapped out all summer to different areas. And they travelled there so they could gather winter food. So they could get a variety of it. They knew where to go to get the moose, to get the bear that they harvested for the fat. They ...said there were herds and herds, thousands of caribou up in the mountains. So, they had caribou in their diet, they had elk, they had bear, [and] they had marmots, so... Hopefully it will be there still. We can keep it. Grow it. Make it better.

I've never been caribou hunting. When we were younger we used to [go] hunting with my Grandma and Grandpa quite a bit. But never caribou and I think a lot of it had to do with there not being as many. By the time I was old enough the dam had already been in for 15 years. So I've seen pictures of caribou and I've heard lots about them from Elders that remember the 'sea of caribou'. Last year I started learning to do a hide and dry meat... I am learning a lot of traditional ways but there is a huge disconnect between my generation and my Grandma's generation. But what I am finding is my generation want to know. We are starting to come back. We want to know who we are. We want to know where we are from. Proud. And all these things they are all part of it. It is all a part of our identity. It is all connected. If we are coming back and there is not land to come back

to, how will we ever know our culture?.

> I think if there was no land left you would see a culture lost. Gone. And it is happening slowly. A death by a thousand cuts. I think we are facing a lot of different things. We are struggling to save the land, we are struggling to save our children, I believe a lot of our children are lost because they don't know who they are." (WMFN Initial Submissions, 2009: pg. 40)

Throughout their submissions to BC, the community told of a dire future for their culture if the current rate of development and the resulting ecological effects continue at what they consider an unsustainable level. Their Initial Submissions (2009) recounts the possible consequence:

> "What many of our Elders do not understand is why the government is allowing this to occur. A common fear the Elders share is this: an inevitable end to the current path is the spiritual dismemberment of caribou. This could occur two ways: the animal does not comeback before the Elders and others are gone, which means the knowledge that has been accumulated since time immemorial is likely to be lost forever, or the caribou becomes extinct from our homeland" (WMFN Initial Submissions, 2009: pg. 40).

Caribou in the Mode of Life

The impetus behind West Moberly's desire to have the species recovered was culturally based. The species is of significance in many respects, but not just as a source of food as was often the focus of BC (Aboriginal Relations Branch, 2009a):

> "[caribou]...meat and marrow provided a valued source of nutrition. In addition, caribou hide, bone, and antler were important for the manufacture of items. Hide was used for articles of clothing, as tipi covers, for storage bags, and as babiche for tying and lacing objects. Antler bone was used in the preparation of hides and as the raw material for arrows, ice chisels, and for

the manufacture of other objects" (WMFN Oral Argument, 2010: pg. 15).

Elements of caribou played an important role in the medicine used by the Mountain Dunne-za to cure or assistance in the treatment of various ailments and diseases. For instance, a current Elder at West Moberly remembers this:

> I remember one time when a hunting party went out to find a caribou because my Grandma Martha was sick. She had cancer of the oesophagus. She wanted to use the caribou to make traditional medicine to heal herself. So, the hunting party went out [and] killed a caribou and brought her the hide.
>
> There is a layer of tissue just underneath the hair on a caribou hide. This tissue was sometimes scraped off and eaten as a traditional medicine. This is probably why Grandma Martha wanted the hunters to bring her a caribou hide. (WMFN Oral Arguments, 2010: pg. 16).

The role of caribou is found in many areas of their mode of life. They were believed to be significant in terms of culture and spirituality:

> "...caribou myths and stories taught and reinforced appropriate norms, beliefs and codes of conduct. Individual members of the Mountain Dunne-za actively sought caribou as a powerful spirit helper, whom, if respected in prescribed ways, was believed to aid a hunter throughout his life" (WMFN Oral Arguments, 2010: pg. 16).

Like all animals and components of the environment in the Peace Region, caribou formed an important part of the connection between the Mountain Dunne-za and nature. In the words of an Elder from West Moberly:

"Our people are closely connected to the land and animals. We think of 'the

> bush' as our playground. So are the hills and mountains. We have a special relationship with the animals. We protect them. We don't just do this because we want to eat them. We see them like people. The moose, the grizzly, the caribou: they are all our friends. When a hunter kills an animal, they will often say a prayer or give an offering, because that animal gave up its life to feed us" (WMFN Oral Arguments, 2010: pg. 16-17).

Caribou therefore were interwoven into the culture of the Mountain Dunne-za. The role of the species was multifaceted. While the community members have not physically used the species for nearly 40 years due to self-imposed conservations measures, it is clear that the species remains important. To some degree, BC acknowledged the role of caribou (and perhaps the species' importance) to West Moberly. Under a heading "WMFN's Cultural Connection to the Caribou" within a document generated by BC, the ABR writes:

> "MEMPR recognizes… [t]he early accounts of higher populations of caribou; [t]he seasonal round as a mixture of activities that took place in a variety of locations through the various seasons based on knowledge of animal populations, their behaviour and fluctuating abundance and scarcity; the use of caribou [by WMFN] for: Sustenance, Clothing, Tents, Bags, Moccasins, Gloves, Tunics, Trousers etc., tools; That caribou were mentioned in place names, myths and spiritual records…"

4.3.3 Nature and Extent of Burden

This section reviews the "nature and extent of the burden" placed onto the shoulders of West Moberly by BC' Action. To do so, as previously noted, it is useful to provide additional information that shows the nature and extent of the burden, along with demonstrating that BC's Action (in purpose and/or effect) discriminates against the community of West Moberly.

Supporting Data

There are several sources of additional data, both from the social and natural sciences, which supports the position of West Moberly. This includes a threats assessment conducted by government scientists, advanced notice provided to MEMPR in relation to the state of affairs of caribou, and a recovery plan to address the needs of the caribou and likely the needs of West Moberly to some extent. These are discussed in more detail below.

Threats to Caribou

As noted earlier, caribou in the territory of West Moberly are defined under SARA as a "Threatened" species, which means if nothing is done to revere the factors that have caused the problem there is a likelihood that the species will become "Endangered" and then "Extinct". This has resulted in the community refraining from hunting caribou within its territory for over 40 years in an attempt to conserve the species for future generations.

Factors that have led to caribou becoming a threatened species are primarily anthropogenic. These have been detailed by the government scientists (KT Report, 2010) in a "threats assessment", which demonstrated that the greatest threat to caribou herds and their habitat in the CRM is industrial development, in particular mining and oil & gas activities and to a lesser extent windfarms, forestry, and land uses associated with human

settlement. Activities such as these in critical habitat is adverse as "it destroys arboreal and terrestrial lichen, may displace caribou from foraging areas, and increase the risk of predation by improving habitat for other prey species... or increase access for predators" (see, for example: Rettie and Messier, 1988; McLoughlin et al., 2003; and, Courtois et al., 2007) (PT Report, 2010: pg. 30). Not only do activities that physically alter the habitat cause direct impacts, but they and other non-physically altering activities (e.g. hiking, snowmobiling) also result in indirect adverse consequences. The latter may, when 'excessive' or in close proximity, "displace caribou" and therefore negate the protection of habitat from physically altering activities (PT Report, 2010: pg. 31).

What is noticeable in the KT approach is the large focus on addressing matters relating to wolves and their connection in terms of impacting caribou and in regard to their modified behaviour due to the changing ecosystem. This is primarily the result of research demonstrating that wolves are likely the most significant threat to caribou (see, for example: Farnell and McDonald, 1988; Seip, 1992; Boertje et al., 1996; and, Hayes et al., 2003) in comparison to other species such as bears and golden eagles, and in that way they are the largest non-anthropogenic obstacle to their recovery (PT Report, 2010: pg. 32). Problems associated with increased wolf populations and their contact with caribou, according to the PT Report (2010), has been linked to the anthropogenic activities and the resulting habitat change; early seral habitats increase alternative prey species and, for example, linear corridors that increase access of wolves to caribou (see, for example: James and Stuart-Smith, 2000; James et al., 2004; and, Kuzyk et al., 2004).

Land Use Conflict: Identified Early, but Disregarded

In BC, the regulatory process in relation to exploring for coal begins with a proponent applying for a Coal Licenses from the government. Applications made by a proponent are then sent to First Nations in order for the Crown to meet its legal obligations in relation to consultation and accommodation (WMFN Initial Submissions, 2009).

During the latter part of 2004, the Titles Branch of MEMPR sent a letter to West Moberly regarding the potential issuance of a Coal License to FCC in the critical habitat of the Burnt Pine caribou. In response, the First Nation expressed its concern relating to wildlife within its territory that is protected by the *Species at Risk Act* (SARA). Specifically, the community asked: "[h]ow has this question been addressed?" Nearly one year later, the First Nation responded to a second referral pertaining to the potential issuance of another Coal License, which would further increase the area of likely development, where it asked a similar question: "are there any issues related to *Species at Risk Act* and '[h]ow has this question been addressed" by MEMPR? Not only did MEMPR not answer the community's questions, but the government agency also failed to respond to the letters in their entirety. (WMFN Initial Submissions, 2009: pg. 60) What appeared to be unknown to West Moberly at the time is that MOE was also expressing concerns in relation to other government agencies allowing anthropogenic activities, such as mining, in the area. Based on the scientific opinion of MOE, BC "established several Wildlife Habitat Areas ("WHA") and Ungulate Winter Ranges ("UWR") by Ministerial Orders", two of which (i.e. "WHA 9-055 and UWR U-9-002") cover significant portions of the area that FCC has and likely wishes to continue to carry

out mining activities (WMFN Initial Submissions, 2009: pg. 60). These Orders were passed as a means to protect the critical habitat of the caribou.

Irrespective of the concerns expressed by West Moberly and the steps MOE has taken with respect having the area protected due its sensitivity regarding caribou, MEMPR approved the applications made by FCC for Coal Licenses. Based on the lack of response from MEMPR, there is no record (including none produced by BC in court; see: West Moberly, 2010) of MEMPR making an attempt to incorporate conditions into the Coal Licenses with the purpose of taking into account (including, for example, the mitigation or avoidance of adverse impacts) the concerns expressed by the First Nation and MOE. As such, it seems that MEMPR proceeded to issue the Coal Licenses without addressing the concerns or, conversely, did not find it necessary to provide the First Nation or MOE with a rationale as to why such concerns did not need to be addressed. With approved Coal Licenses in-hand, FCC was then permitted under the *Coal Act* to apply for a Notice of Work (NoW) to carry out mining activities within the tenured area and, if required, apply for amendments to the NoW to account for additional works required to develop the coal resources within the project area (Ministry of Forests, Mines and Lands, 2011).

Recovery: A Protection and Augmentation Plan

In order to fulfil the court Order, BC was responsible for developing and implementing a plan that protects and augments the Burnt Pine caribou herd so that community members of West Moberly are able to harvest caribou within their traditional seasonal round. Since the effects of BC's Action (noted above) negatively affects both the caribou and the

harvesting ability of West Moberly, the government of BC did not fulfil the Order issued by Justice Williamson (WMFN Petition, 2010). A planning approach that would have protected and augmented the caribou and thus adhered to the court Order, according to West Moberly, was the adoption of the Knowledge Team Report (the "KT Report"), which is a planning approach developed by government scientists (PT Report, 2010); this approach was referred to as Option 4 in the PT Report (see Appendix Two for a summary of the four different options).

The KT Report, entitled the "Recovery and Augmentation Plan for Woodland Caribou (*Rangifer tarandus caribou*) in the Central Rocky Mountains of British Columbia", included the available scientific and traditional knowledge in the possession of the parties in relation to the protection and augmentation of the Burnt Pine caribou herd by April 30, 2010 (PT Report, 2010: pg. 19). The KT Report was designed to fulfil the court Order regarding providing the ecological knowledge to protect and augment the caribou so that West Moberly was able to exercise their Treaty right to harvest the species in accordance to its traditional seasonal round. The KT structured the report around two main objectives, each containing subsections referred to as "Habitat Protection" and "Population Management", both of which operationalize the objectives (see Appendix Two for a more in-depth review of the Planning Options, objectives, and subsections).

The recovery of caribou, which is the first objective of the KT Report, involves increasing "the caribou population in the Burnt Pine range to >50 animals, and maintain existing caribou populations in the Graham, Kennedy Siding, Moberly, Narraway, Quintette, and Scott herd ranges for a total of approximately 1,000 caribou" (PT Report,

2010: pg. 27). To achieve this objective, the KT stated that Habitat Protection is key, requiring that "no destruction of core alpine/subalpine habitat for all herds" occur. Additionally, the KT pointed out that the following are necessary requirements in order to be successful: the impacts from industrial development (rate and patterns) in lower evaluations (including, for example, "Matrix Habitats") need to be managed, non-industrial activities that "displace or disturb" caribou from core habitats need to be managed, and access to core habitat is not to be created or improved that significantly assists predator access into such areas. For Population Management, it is necessary to "manage predation to increase the Burnt Pine herd and to "prevent" the populations of the other herds (listed above) from declining. (PT Report, 2010: pg. 27)

The second objective is augmentation, which requires increasing "the total caribou population in the Burnt Pine, Graham, Kennedy Siding, Moberly, Narraway, Quintette, and Scott herds ranges over time to approximately 3,000 caribou to provide an annual sustainable harvest of 60-90 caribou for First Nations". For this Objective to be achieved, according to the KT, there can be "no destruction of high quality alpine/subalpine habitat for all of the herds". The 'additional' Habitat Protection requirements, which have been noted above, are the same for achieving the Augmentation Objective as they are for the Recovery Objective. This Objective also requires predator management for all of the herds. (PT Report, 2010: pg. 27).

In its report, the KT believed that the situation of the Burnt Pine caribou herd was in dire straits. Its population has dropped from the "sea of caribou" (Initial Submissions, 2010) to roughly 165 animals prior to mining activities (PT Report, 2010), with a current population level that is between 9 and 19 animals (which translates into an estimated

population of 11 caribou). As such, according to the KT Report, the Herd is "very vulnerable to extirpation" (PT Report, 2010: pg. 28). Further, in the expert opinion of BC's caribou expert, the Herd is "critically endangered" (Initial Submissions, 2009: pg. 57). For those reasons, the population of the Herd needs to be increased to a level that is not only ecological viable in terms of the size of the range and its potential carrying capacity, but a level that is also capable of sustaining pressures from hunting by West Moberly and likely other First Nations as well.

Based on a calculation of caribou densities and the various land-bases of other herds, which was compared to the ecological characteristics of the Burnt Pine herd, an increase from a population approximately 11 to 50 animals was considered by the KT as reasonable population level to have as a goal (PT Report, 2010: pg. 28). It was estimated that to reach the population goal of 50 caribou it would take 20-30 years; with such a small population, the potential for a harvestable surplus would be analogous from a temporally perspective. In that way, a population of 50 caribou may provide a limited surplus of 2-3% per year, although this would be heavily dependent "on the sex ratio in the harvest" and would be restricted to harvesting bulls (PT Report, 2010: pg. 28).

After taking into account the fact that caribou of the Central Rocky Mountains (CRM) move about the landscape, which means the potential future population of 50 caribou may travel to join neighbouring herds, for example the Kennedy Siding caribou may move to the area used by the Moberly herd, or vice versa, the KT recommended that a biological approach be used in that the recovery and augmentation objectives be viewed from an ecological perspective (PT Report, 2010: pgs 24-46). This would include increasing the population levels of all herds in the CRM (PT Report, 2010: pg. 28), as

shown below.

Table 6: Population Levels of the Caribou Herds in the Central Rocky Mountains

Name of Caribou Herds	*Current Population Level*	*Potential Population Level*
Narraway*	200	600
Quintette	180	540
Kennedy Siding	100	300
Moberly	100	300
Scott	60	180
Graham	300	900
Burnt Pine**	50	150
Current Total	990	
Potential Total		2,970

(Note: * includes the Bearhole and Redwillow groups; ** "Current Population" estimate is subsequent to recovery efforts at the herd level)

The KT recommended that "[n]o industrial should occur within core caribou habitat in the alpine and subalpine" (PT Report, 2010: pg. 30). Moreover, with the goal of increasing the herds from approximately 990 to 2,970 animals, additional habitat protection would be required. And since the amount of known core habitat that has been mapped would be a limiting factor in an increase in population, the protection of high quality habitat is therefore necessary (PT Report, 2010: pg. 30). Similarly, the KT recommended that "[n]o industrial activities should occur within high quality habitat in the alpine and subalpine".[11] In contrast to the requirements for the core and high quality habitats, all of which protects caribou and caribou habitat from further development, the recommendation from the KT regarding the lower elevation habitat is for the

[11] With respect to the habitat in the low elevations, such as those relied upon by the Narraway herd (including the Bearhole and Redwillow groups), "some level of industrial activity and human activity is tolerable so long as it is not excessive" (see Sorenson et al, 2008) (PT Report, 2010 pg 30)

development of a management plan "that limits cumulative impacts of all industrial activities below a sustainable threshold for caribou persistence" (PT Report, 2010: pg. 31).

For Population Management, the KT developed a list of recommendations that focus on matters such as predator control (i.e. culling wolves), alternative prey (e.g. moose) management, and the management of forest habitat within "the natural range of variability" (PT Report, 2010: pg. 33). While there was recognition on the part of the KT that the state of affairs for the Herd in particular, and the herds in the CRM in general, is serious and thus requires predator control in some fashion or another, its recommendation was not put forward without limitations attached. The KT Report qualifies the reliance on such a management tool:

> "Use of population management practices such as predator control should be used to supplement the benefits of habitat protection, not as a substitute. Failure to adequately protect caribou habitat will make efforts to directly manage caribou populations more challenging and possibly futile. If habitat is adequately protected, the need for direct actions such as predator reduction will be reduced in scale, scope and duration. Use of predator management in the absence of adequate habitat protection is unacceptable to the West Moberly First Nation[s], and would likely also be opposed by various non-governmental organizations and the public" (PT Report, 2010: pg. 7).

While the Habitat Protection and Population Management requirements that are necessary to recover and augment the CRM caribou herds result in restrictions that apply to anthropogenic land uses in the region, which are new and thus may be objectionable to such users, they are based on the existing scientific literature. That literature demonstrates that the herds in the CRM (which are listed above) are either "stable or

declining" (see: Seip and Jones, 2008; and, Culling and Culling, 2009), meaning it is possible that they may "regress to a state of imminent extirpation if limiting factors are not reversed" (see: Thomas and Gray, 2002) (PT Report, 2010: pg. 29). Key to reversing this trend is the protection of their habitat, as the KT points out that "[a]ny further destruction of their habitat would be incompatible with caribou recovery". Thus, allowing further destruction of critical habitat would "likely lead to additional population declines" whereas its protection will achieve the Recovery Objective and stabilize the populations (PT Report, 2010: pg. 29).

Nature of the Burden

The nature of the burden placed onto the shoulders of West Moberly can be characterized by the approach taken by the BC government, both in terms of its underlying purpose and the effect arising as a result. These are discussed in more detail below.

Concerns and Solutions: Minimized and Offloaded

The concerns of West Moberly with respect to caribou and the recovery of the species within its preferred Treaty Territory was, for the most part, minimized and/or offloaded by BC onto future processes (without a guarantee of substance) that may or may not have occurred.

While the BC government took the concerns of West Moberly into account, the question that remained is whether their concerns were taken seriously by BC; the Crown is legally required to take the concerns of First Nations "seriously" and "demonstrably

incorporate" them into the decision (*Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999). On the surface, as noted above, BC acknowledged the cultural role and specific use of caribou. For instance, the ARB also stated the following:

> MEMPR recognizes the time, effort and expense that the WMFN put into researching and preparing this comprehensive document. The personal accounts of past and current members in Part II are especially informative and meaningful. The considerable effort put into the interviews and recording of WMFN's relationship to the caribou is acknowledged and appreciated." (Aboriginal Relations Branch, 2009a: pg. 10).

In addition to recognizing the cultural element of caribou, the ARB also took notice of the population levels of the species within the preferred Treaty Territory of West Moberly. For instance, the ARB noted that the population of caribou in the nine herds within the First Nations' preferred Treaty Territory amounts to roughly 1,599 caribou. What BC did subsequent to listening to and commenting on the concerns expressed by West Moberly regarding their culture and caribou, however, is more revealing.

First, and based on the fact that the population of the Burnt Pine herd amounts to O.69% of the overall population in the preferred Treaty Territory, the ARB concluded that "the opportunity for WMFN to hunt and trap caribou in their traditional territory will not be significantly reduced" by the effects of the Statutory Decisions (Aboriginal Relations Branch, 2009a). This comment is troubling for at least two reasons as it uses percentages (albeit incorrectly) to minimize the impact to West Moberly. For one, not only does it seem to acknowledge that the further loss of caribou as a result of industrial development is likely, but that such loss is acceptable as well. By accepting such an outcome, BC has negated the underlying premise of SARA that it agreed to uphold; that

is, improving the situation of species that are "Threatened" so that they do not become "Endangered" by reversing the factors, not increasing the overall efficacy of the factors. (see: the Species at Risk Act, 2002). Moreover, the ARB states that the Burnt Pine caribou herd may inevitably be extirpated irrespective of whether mining activities, such as those proposed by FCC, occur in the critical habitat (Aboriginal Relations Branch, 2009a: pg. 15). The ARB's position that the extirpation of the Burnt Pine herd is inevitable, however, is based on an incorrect interpretation of MOE's views. While MOE did state that there is a possibility of the herd succumbing to the threats it faces thus leading to it becoming extinct, it was based on the assumption that a recovery plan would not be developed and implemented by the Crown (Johnstone, 2009).

Another reason ARB's comment minimized the impact is that it implies that West Moberly is able to meaningfully exercise its inherent cultural right to harvest caribou in accordance with its traditional season round somewhere else. In doing so, the ARB references West Moberly's Initial Submissions (2009): "For our Treaty right to hunt caribou to 'have real value and meaning, it must be possible to exercise it somewhere in our traditional territory'" (Aboriginal Relations Branch, 2009a: pg. 14). The ARB does not mention or discuss whether West Moberly is able to actually hunt the other caribou populations which it refers to – all of the caribou herds in the preferred Treaty Territory of the First Nation are defined as "Threatened" by SARA (Initial Submissions, 2009). BC is aware of the legal designation of caribou, a fact that was made clear by Justice Williamson's decision (*West Moberly*, 2010). Further, even if West Moberly was able to harvest caribou other than in the range of the Burnt Pine, the Crown cannot simply tell a First Nation (including, West Moberly) to hunt elsewhere (*Relentless Energy*

Corporation v. Davis, 2004), a position upheld by Justice Williamson (*West Moberly*, 2010).

Second, West Moberly also brought up the matter of cumulative impacts to caribou over the years, most notably from the construction of the W.A.C. Bennett and Peace Canyon hydroelectric dams and the subsequent flooding of the land resulting in the creation of the Williston and Dinosaur reservoirs (Aboriginal Relations Branch, 2009a: pg. 14). Such anthropogenic activities were said to cause a decline in caribou populations and the fragmentation of caribou habitat. MOE also raised similar scientific concerns; in its words: "the cumulative effects of any incremental increase to habitat alienation have not been analyzed to fully appreciate potential impacts". In response, the ARB stated that "it is beyond the scope of the review". Further, the ARB pointed to potential, forthcoming processes within the agreements that may be signed by both the Province of BC and West Moberly as a more suitable avenue to have the concern of cumulative effects addressed (Aboriginal Relations Branch, 2009a) if they were to occur in the future.

As previously discussed, a particular concern of West Moberly was the fact there was no recovery plan for not only the Burnt Pine caribou herd, but also the nine herds within their territory, which it highlighted in the WMFN Initial Submissions (2009) as a significant shortcoming in the protection of Treaty rights. The ARB recognized the lack of planning surrounding the recovery of caribou in the Peace Region. In similar fashion, the ARB also pointed to the potential processes that have yet to be developed and implemented as a means to address WMFN's concern that a recovery plan is required (Aboriginal Relations Branch, 2009a: pgs. 15-16). The ARB did not commit to including

a recovery plan as an accommodation, but rather committed to being involved in such processes (Aboriginal Relations Branch, 2009a: pg. 16).

Breach of Government-to-Government Relationship

Prior to the developing a protection and augmentation plan for the Burnt Pine caribou herd, BC and West Moberly agreed to a terms of reference (TOR) for the planning process. While the TOR stated that the process would be government-to-government, BC entered into discussions with FCC without including or informing West Moberly of its decision. When the First Nation was informed that BC was working with the proponent behind closed doors, the Nation requested that all communications and information that was exchanged between the two parties be provided to the them. In response, ILMB sent data and information that included an email that was quite troubling. It read:

> "The impact on caribou is not clear. For clarity, the province is not proposing..." Option 3 (and most likely not Option 4, which was added later, as it is more restrictive than Option 3), "but seriously examining" Options 1 and 2. "Until we get more information, we don't know which option best addresses the Treaty rights in the area". Since the draft PT Report "hasn't been reviewed by West Moberly yet, we want to keep the distribution of this limited. I would ask if you could: Give any early feedback on the document; anticipated questions, issues, risks." (Kriese, 2010)

The above email was sent from the Regional Director of the North for the First Nations Initiative with the ILMB to FCC's Director of Environment regarding the planning process and BC's intentions. It provides a glimpse into the *behind the scenes* intention of BC with respect to working with the First Nation in good faith to meaningfully uphold their Treaty rights. That is, not only did it revealed BC had no

intention to working with the Nation in good faith, which it was required to do under the TOR, but that BC also had no intention of serious considering the impacts from mining activities on the culture of West Moberly and protecting their Treaty rights given that the province approved the mining activities regardless of such impacts, which was required by law.

Bias Reviews

Additional information that ILMB sent West Moberly included, among other things, data and a letter sent from FCC to BC relating to caribou and letters from non-government organizations (NGO) with pro-mining interests, in particular the Mining Association of British Columbia (MABC) and the Association for Mineral Exploration British Columbia (AMEBC). In the letter FCC sent to the Assistant Deputy Chief Inspector of Mines, the company states that Option 1 (as it is in the PT Report dated June 8, 2010) is its preferred option as it "will balance socio-economic needs with responsible resource development, and sound management for caribou protection and recovery". The response from the Assistant Deputy Chief Inspector of Mines, subsequent to FCC's presentation to BC in which the company expressed it views and preferred planning option, was one of satisfaction: in the words of the Crown, " it was nice to hear a can do instead of cannot do option" (Howe, 2010). Similarly, the letters from MABC and AMEBC were also supportive of the wishes of FCC and the continuation of mining in the UWRs and WHAs; more specifically, the continuance of mining activities throughout the *critical habitat* of the Burnt Pine caribou herd without the implementation of measures that would restrict such activities (MABC, 2010; AMEBC, 2010).

With respect to BC seeking third party reviewers for the PT Report and its options, there was no indication that environmental NGOs such as the Canadian Parks and Wilderness Society or the David Suzuki Foundation were involved in such discussions. The one-sided approach used by BC was raised as a concern by West Moberly prior to the PT Report being sent to the BC Cabinet. The concern was not, however, addressed as BC did not attempt to seek the opinion of any environmental NGOs at any time. Notwithstanding the exclusion of environmental NGOs, BC did share a draft copy of the PT Report with other Treaty 8 First Nations. Their views were similar to one another. None of the First Nations supported Option 1, 2, or 3, but they did endorse Option 4 as the plan that best protected their harvesting rights.[12] (PT Report, 2010)

BC Cabinet Decision

On June 18, 2010, the BC Cabinet released its decision regarding which option it selected with respect to the protection and augmentation plan for the Burnt Pine caribou herd. The decision was communicated to West Moberly via a letter from ILMB. In the letter, the Crown representative explains the reasons *why* BC decided on Option 1 over the other three options (pg. 1). Option 1, the representative writes, is the basis for the Burnt Pine Herd Protection and Augmentation Plan (the "Plan") that fulfills BC's legal

[12] The BC Cabinet had four options of the recovery and augmentation plan Option 1 and 2 allowed the First Coal Corporation to proceed with the development of a coal mine in critical habitat, while mitigation measures such as the culling of all wolves in the area and the temporary protection of other, less suitable habitat was to be protected Option 3 and 4 were very similar in nature Neither allowed the mining activities to continue, as they called for the protection of critical habitat and some predator management to dovetail the protection measures The primary difference between these options is that Option 3 applies to the range of the Burnt Pine caribou herd and Option 4 applies to all of the herds in the CRM (See Appendix Two for a more detailed summary of the four different options)

obligations under the court's Order. BC expects that the Plan "will lead to an increase in the population size of the Burnt Pine herd", but concedes that the increase will occur as a result of predator management and other initiatives (pgs. 1-2). While BC acknowledges that Option 1 will not increase the population of the Herd to the levels Option 3 and 4, it states that the population will be further increased by the future development and implementation of a more comprehensive NCMP for the remaining caribou herds in the Peace Region (pgs. 1-4).

In the letter, BC clearly noted that it recognizes that West Moberly disagreed with the option that was selected for the Plan (WMFN's preference was Option 3 or 4), but is confident that its decision adequately takes into consideration the views of the First Nation and the ecologist and biologist of MOFR and MOE as order by the court. In particular, the letter pointed out that the Plan included the First Nation by allowing it to participate in the KT and the PT and opportunities to provide comments, resulting in some revisions and inclusions of information in both documents, all of which was also provided to the BC Cabinet. It also stated that the PT took into account scientific and traditional knowledge along with economic factors when it developed the option that now is the basis for the Plan. Consequently, as stated in the letter, BC believes "that the Plan reasonably balances West Moberly's concerns with the potential impact of the exploration permits on its treaty right to hunt, with other societal interests" (pg. 4). Selecting one of the First Nation's options, according to BC, would not have resulted in a balance since it would have resulted in the tenure holders having to cease their activities. "In the Province's view, this Plan strikes an effective balance between accommodating West Moberly's Treaty rights as it protects and increases the size of the Burnt Pine

herd..." (pg. 3).

In terms of what industrial proponents are permitted to do on the land, the Plan allows FCC mining activities to proceed, in addition to allowing other companies in the natural resource sector (e.g. windfarms and the oil & gas industry) to 'advance their projects' in one area of the herd's range. Further, the Plan commits BC in terms of deferring future tenure proposals in the "untenured areas" should they be applied for by a proponent, specifically within another area of the herd's range, which starts immediately but is only guaranteed to be in place for five years after which the RRAs will be reviewed in terms of their effectiveness (pg. 3).

While the letter states that the Plan is an accommodation of West Moberly's rights "as it protects and increases" (pg. 3) the particular herd of caribou, there is no mention as to the number of caribou community members are permitted to hunt or whether they are permitted to harvest any caribou at all. In short, the letter and thus the Plan is silent on the matter of the First Nation's ability to exercise its rights to harvest caribou in accordance to its seasonal round, which was the basis for the petition and what underscored the Reasons for Judgement rendered by Justice Williamson.

4.4 Discussion

This section analyses the conflict between BC and West Moberly regarding BC's Action that zoned land for mining activities rather than critical habitat for caribou. Application of the framework presented in section 4.2 to the conflict outlined in section 4.3 provides a means to determine whether the particulars of the circumstance are tantamount to an environmental injustice against West Moberly.

4.4.1 West Moberly and the Framework

The Canadian-based framework for assessing the environmental justice of a decision made by a level of government applies to the case of West Moberly; namely, the community's move to protect the last 11 caribou of the Burnt Pine herd and their cultural right to harvest caribou in accordance to their traditional seasonal round against coal mining activities. The First Nation is a Band of Indians that has a distinct (*sui generis*) set of cultural characteristics relating to caribou (including the habitat of the species, as it is where medicines from terrestrial lichen are derived) that are immutable from its members, making it a protected group in Canada and thus an environmental justice community under the framework. The community is confronted by decisions made by the BC government (i.e. BC's Action) that worsen their current situation, as the herd of caribou will be significantly affected by coal mining activities and cultural rights will be further eroded. With the community experiencing burdens (e.g. the loss of cultural customs and practices) from the decisions, BC is an appropriate comparator group as it experiences benefits (e.g. revenue generation) and removes its burdens (e.g. compensation paid to tenure holders) at the expense of the community.

4.4.2 Respect for Human Dignity

Similar to Canadian jurisprudence, environmental justice advocates and scholars note that the impact to a community needs to be considered from the perspective of the minority

group, not the viewpoint of the majority. In this case, albeit not explicitly, West Moberly did express many concerns (on numerous occasions) that point to a failure of BC to respect their human dignity from the Mountain Dunne-za perspective.

The first, and likely the most contentious, was BC's disregard (in substantive terms) of the role caribou play in the culture of West Moberly. Caribou is clearly one of the species that actively maintains the connection between the Nation and their land. The species is interwoven throughout the Mountain Dunne-za culture. Although the community clearly identified the significance of the species to BC, the government disagreed in many respects. Underscoring BC's Action was the view that the rights assured to West Moberly under Treaty No. 8 were "global" in nature, rather than culture-specific. In other words, BC believed that the community had a right to hunt whatever they could find within their territory; therefore, if "rats and crows" (WMFN Oral Argument, 2010) were the only species remaining the right to hunt would not only exist, but would be meaningful as well. The First Nation was clearly upset, mainly because such a view degraded their culture and their interconnectedness to the land and the animals found throughout their territory as inconsequential. It also dismissed the First Nations' perception of their role as stewards of the land, and in addition, the inherent right of caribou to fulfil its role in maintaining the balance put in place by the "Creator".

West Moberly believed their need and capacities, which are grounded in the protection and augmentation of caribou in order for the future generations to practice traditions and customs that maintain the integrity of the culture, were not valued in the same manner as the needs of BC. In particular, the community stated that BC was "prioritizing money" through unsustainable development rather than the recovery of

caribou and the protection of their cultural rights. The First Nation pointed out that it was not opposed to mining done sustainably within their territory, mainly because such activities are not necessarily incompatible with the recovery of caribou. But it was against unsustainable development, that is, industrial activities that irreparably harm the environment which future generations are culturally dependent upon. Accordingly, the First Nation made attempts to resolve the matter by suggesting that such activities merely need to occur in areas that are not critical to the survival of the species; there was no reciprocation by BC. Instead, BC focused on the particular needs of FCC to continue with its development plans in its tenured area, an approach that placed a higher value on the potential of generating royalties than First Nations' use of the land for cultural purposes, including the inherent right of the caribou to survive. With the emphasis on using land for industrial purposes to increase provincial revenue, rather than on the cultural use of land to maintain a lifestyle, the merits of BC's values have been promoted over those of West Moberly.

4.4.3 Process over Substance

Section 35 of the *Constitution Act, 1982*, Treaty No. 8, and subsequent court cases confirmed that West Moberly has distinct cultural rights to the environment, including both procedural and substantive rights to the land and natural resources within their territory. While the First Nation was engaged procedurally (i.e. consultation), albeit poorly, BC failed to address the substantive rights of the community.

In the beginning, the actions of BC were questionable and the bases for the decisions were narrowly conceived. Initial letters from both the First Nation and other

governmental agencies (e.g. MOE) expressing the concerns relating to species at risk, in particular caribou, were disregarded by MEMPR. Not only were conditions to mitigate the impacts to caribou or the provision of compensation for First Nations not included in the early government decisions, but also the dire state of affairs of caribou and the adverse impacts to the community were not explicitly contemplated by MEMPR. By the time supplementary amendments to the existing permit were submitted, which was the centre of BC's Action, both the First Nation and MOE (including MOFR this time) voiced serious concerns with the proposed amendments to the permit. In this instance, MEMPR provided an opportunity to the parties to voice their concerns; however, this opportunity was short in duration. MEMPR ended the discussions once all of the positions of the parties were assembled, leaving the parties without an avenue to substantively discuss the associated benefits and burdens. BC then informed the First Nation of the benefits that the government had created for them in the form of accommodation measures; however, none of the measures addressed the impacts to their culture.

BC took the position that no First Nation within its political boundaries, including West Moberly, has a right to a specific species. Aside from whether such a line of logic is appropriate in other situations, it was not the contention of West Moberly that the community had a right to the specific species, but rather had a right to harvest species in accordance to their traditional seasonal round, which includes caribou. Grounded in the promises of Treaty No. 8, the community believes that it has a right to carry out its cultural practices and customs and that no "forced interference" would occur; the court agreed. In his findings, Justice Williamson concluded that the Crown had violated the

procedural rights of the community (process of consulting meaningfully) and substantive rights (outcome of accommodating the rights), and in doing so, ordered the Crown to address the matter (*West Moberly First Nations vs. British Columbia (Chief Inspector of Mines)*, 2010). BC again failed to do this by not implementing an appropriate protection and augmentation plan.

4.4.4 Inherent Cultural Rights

With the direction from court to ensure that West Moberly was able to meaningfully exercise their traditional practices and customs, BC had an obligation to develop and implement a land use plan that would recover the caribou population to a level capable of producing a "harvestable surplus" for cultural purposes. Despite such direction, BC failed to approve a plan that was designed to address the direction it was provided.

There were two additional options that, if used as the basis for the plan, would have likely produced outcomes in tune with the direction espoused by the court and based on the First Nation's Treaty rights as protected by the Canadian Constitution. The main difference between the Option 3 and Option 4 (in comparison to Option 1, which was selected by BC) is the protection of critical habitat in its entirety from anthropogenic activities that physically destroys the land. Option 3 applied specifically to the Burnt Pine caribou herd and would, if implemented effectively and if the caribou responded as expected, likely increase the population of the herd from 11 to approximately 50 animals. This would have resulted in a harvestable surplus of 2-3 animals on an annual basis. Option 4 differed only in the scope of application, as it included all seven herds in the CRM. If the expected outcome occurred (i.e. a population level of roughly 3,000 and a

2%-3% harvest rate), the plan would result in a harvestable surplus of 60-90 animals on an annual basis.

While there is always a risk in land use planning involving species at risk, mostly due to the stochastic nature of the environment and the effectiveness of human interventions, Option 3 and Option 4 do provide the greatest likelihood of an annual opportunity for the First Nation to harvest caribou. The community noted that, although the harvest rates would be "modest", the fact that their cultural practices would be able to recommence and hopefully continue into the future to some degree would have been a more positive outcome.

4.4.5 Distribution of Benefits and Burdens

In contrast to the position taken by the BC government, the outcome of the decisions was not balanced in terms of the distribution of benefits and burdens. The decisions provided benefits to both FCC and BC. The interests of FCC, which is a private company that is not afforded protection under the equality provision, were shielded from burdens at the same time as it received the benefit of proceeding with its activities as originally proposed. BC also protected its interests. By allowing FCC's activities to continue and not protecting the critical habitat of the Burnt Pine caribou herd, it did not receive any significant burdens. This approach, by BC's own admission, meant that it would continue to receive benefits (i.e. revenue) from resource development, and in addition, it would not have to compensate tenure holders by having to retract exploration/investigatory rights from the various industrial sectors. West Moberly, however, did not receive any benefits from the decision. Rather, the community's burden

of not being able to harvest caribou for over 40 years in accordance to its traditional seasonal round would continue; a burden that could have been avoided. The burden borne by West Moberly will likely worsen, mainly because there is a greater likelihood of caribou disappearing from their territory and thus their seasonal round, which is a violation of their freedoms promised under Treaty No. 8. The distribution of benefits and burdens was therefore disproportionate, as the "status quo" approach to land use (PT Report, 2010) was maintained by the decisions whereby FCC and BC received the benefits and the First Nation was required to shoulder the burdens resulting from such decisions.

4.4.6 Ameliorative Nature of Action

To "ameliorate the position" of West Moberly, BC's Action should have improved the existing disadvantage of the community, which was the community's inability to harvest caribou in accordance to its traditional seasonal round for approximately 40 years due to low populations numbers caused by Eurocentric values and the corresponding land uses. Based on the science and the court, an ameliorative decision would include the following: (1) restrictions on industrial development, (2) protection of critical habitat, and (3) an increase in the population capable of sustaining a harvestable surplus to facilitate the meaningfully exercising of the traditional seasonal round. Depending on the time interval between plan implementation and it taking effect, and perhaps the efficacy of the plan, the matter of compensation should be at minimum part of the discussion.

The decision by the BC Cabinet, namely the selection of Option 1 as the basis for the recovery plan, fails to be ameliorative. The plan allows the continuation of industrial

development in the critical habitat of caribou, in particular within areas that support two-thirds of the habitat value. Such an approach contradicts the direction provided in SARA for the reason that it does not "reverse the factors leading" to caribou soon becoming extinct. Allowing the mining activities to continue, in additional to allowing other industrial development to occur, means that the critical habitat has not been adequately protected; the area that supports two-thirds of the habitat value will be rendered ineffective either due to destruction (direct impact) or alienation (indirect impact). Without the ability to harvest any caribou in accordance to their traditional seasonal round, the situation of West Moberly has not been improved. Additionally, the Crown did not offer compensation to West Moberly for the lost of its cultural right to harvest caribou, which is promised by Treaty No. 8 and protected by the *Constitution Act, 1982.*

4.4.7 A Discriminatory Animus

Establishing that a discriminatory decision was intentional is problematic, as the literature on environmental justice notes. Most (and possibly all) laws and regulations that were explicitly discriminatory have since been repealed. This is not to say, however, that intentional discrimination does not still occur. Government officials may still use innocuous pieces of legislation, in addition to the instruments that operationalize them, in a discriminatory manner. Such is the case for West Moberly. BC demonstrated a particular level of disregard to likely adverse effects caused by its decisions that, in the end, bear a considerable resemblance to a discriminatory action against the culture of the First Nation that was intentional in nature.

After the court informed BC that West Moberly had a cultural right (under Treaty No. 8, which was protected by the *Constitution Act, 1982*) to harvest caribou in accordance to its traditional seasonal round, and then *ordered* the Crown to develop and implement a recovery plan that facilitates the meaningful exercising of that cultural practice by protecting and augmenting the Burnt Pine caribou herd, the government cannot purport to be unaware of its legal obligations to both the species and the culture of the First Nation. Also in front of BC was the direction of a federal law, namely SARA and the Agreement that it signed along with Canada, to reverse the factors (anthropocentric activities) that were adversely impacting caribou and caribou habitat. In addition, BC was aware of the likely adverse impacts to the Burnt Pine caribou herd (based on the scientific data collected by its own scientists) and the culture of the community (WMFN Initial Submissions) if FCC's mining activities were to proceed. Irrespective of all of this information and direction, however, BC approved the mining activities of FCC.

While BC's Action suggests a general disregard for the needs of caribou and the culture, the underlying objective of BC in particular demonstrated that the government had no intention of fulfilling the court order and thus upholding the cultural rights of West Moberly. BC's aim was to instead advance industrial development as it was "not proposing" planning options that restricted such land uses. This was to occur regardless of the negative impacts to caribou and the First Nation. Although BC did note that it is unsure of the cultural impacts, it still was only "seriously examining" planning options that resulted in significant adverse effects to caribou and, by default, the community. The intent of BC was therefore not to ameliorate existing burdens or to address future burdens

caused by past industrial developments, but rather was to allow them to exist and most likely worsen.

4.5 Conclusion

Overall, the decisions by BC failed to uphold the principles of environmental justice. The decisions, which allowed the development of coal mining activities to continue, resulted in significant impacts to caribou as it destroyed the species' critical habitat that it needed to survive. Taken together with the cumulative impacts to the species, the anthropogenic factors leading to their extinction were worsened by these decisions. There were also corresponding impacts to the culture of West Moberly. This placed the health and safety of their culture in serious jeopardy, a feeling expressed by community members but dismissed by BC. Further, BC approved anthropogenic activities that were in contrast to federal law, namely the SARA that requires the government to reserve the factors leading to the potential extinction of caribou. Such an approach is quite similar to what the people of Shocco Township in North Carolina experienced, which is considered to be the seminal event of the environmental justice movement, as environmental standards were negated in that case as well.

In most cases, it is difficult to determine whether discrimination on the part of government was unintentional or intentional, as noted in the extant environmental justice literature. The data presented in this case, however, reveals a considerable level of intolerance on the part of the BC government towards the culture of West Moberly that suggests the discrimination was intentional. BC knowingly rejected valid options that would have reversed the facts leading to the extinction of caribou and instead opted for a

decision that was not based on scientific or traditional knowledge. Moreover, and perhaps most importantly, BC made these decisions behind closed doors with full knowledge of the significant impacts to West Moberly's culture.

Chapter Five: Conclusions and Recommendations

5.0 Conclusions and Recommendations

This study has shown that the principles of environmental justice in relation to land and natural resources, which was the first question of this thesis, is a multifaceted field that includes every aspect of the lives of those at risk, in particular First Nations and their reliance on the environment as the basis to their cultures. Under the umbrella of environmental justice, as Mitchell (2004) writes, individuals and groups are afforded rights that can be separated into two categories. The first is substantive rights, which "relates to the right to safe air, water, and soil, and to safety from noxious wastes and other pollution as well as access to and use of natural resources and the environment, especially with regard to traditional rights" (2004: pgs. 562-563). The second, he notes, are procedural rights that relate "to complete and accurate information, fair hearings, and meaningful participation in decision and policy making" (2004: pg. 563).

This study has also shown that environmental justice may be incorporated into a Canadian context through an equality-based framework, which was the second question of this thesis. Both the principles of environmental justice (American-based) and the purposes of equality (Canadian-based) were similar. They included procedural and substantive elements that coincided with one another in many respects. This had application to the case of an environmental injustice involving a First Nation. It also showed that the framework is a constructive tool for a First Nation. Either as a collective or as an individual, the tool may be used by a First Nation in order to articulate their concerns relating to a land and/or natural resource conflict with another level of government in Canada occurring in their territory.

Subjecting the decision made by the BC government (to allow a company to destroy the critical habitat of a threatened caribou herd) to the equality-based framework demonstrated that the process and outcome resulted in an environmental injustice. The BC government refused to meaningfully acknowledge the cultural rights of West Moberly regarding caribou as well as the inherent rights of the species itself. It allowed the existence of an inequality experienced by the community to continue unabated, which is a failure of a fundamental component of equality. The government also made the situation worse by disproportionately distributing the benefits and burdens; the First Nation community was compelled to shoulder the burdens while the coal mining company (i.e. FCC) and the BC government received a maximum benefit with no burden. Making matters worse is the effort that was exhibited on behalf of the provincial government to camouflage the adverse nature of its actions, particularly the *fait accompli* process of decision making, all of which amounts to an egregious case of environmental racism.

In achieving the goal of this thesis, namely the incorporation of environmental justice principles into a Canadian context for First Nations to potentially use as a means to articulate injustices within their territories, instances of similarities and differences between the application of environmental justice in America and Canada emerged. These are important to note in order to further the development of environmental justice as a field of study in Canada. The differences are discussed separately.

The first is the *rule of law*. Unlike in America, where environmental justice is part of the federal legal system, there is no statue, regulation, or policy in Canada that directly or indirectly incorporates environmental justice (both procedurally and

substantively) into environmental decision-making processes. This contradicts the position of the former Minister of Environment for the Government of Canada who stated in June 2006 that the substance of an international agreement that includes environmental justice (i.e. Aarhus Convention: *Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*) is addressed through Canada's existing laws, making the need for Canada to ratify the agreement unnecessary. Further, when asked to clarify whether such matters were to be included under the *Charter of Rights and Freedoms* (the "*Charter*") in Canada's Constitution, or elsewhere in Canadian law, the former Minister declined to further elucidate her position (Ambrose, 2006).

The second is *scope and approach.* As noted above, grounding an environmental justice framework in a country's constitution is likely the most appropriate manner by which to protect the rights of minorities. This was the approach used during the civil rights movement in America and is, according to Canadian scholars, the most likely overarching legal mechanism capable of achieving justice for minorities in Canada as it applies to all levels of government. Using Canada's Constitution, specifically the *Charter*, as the basis for environmental justice has therefore an important benefit. In comparison to the environmental justice approach used in America, which includes in its scope the actions that are within the purview of the federal government but excludes the actions of the individual state governments, such a framework, grounded in Canada's *Charter,* would apply equally to all levels of government including federal (including the Government of Canada and First Nation governments) and provincial governments as well as local governments (e.g. municipalities).

The underlying approaches are also different in the context of the method used to determine whether an inequality exists. In America the approach regarding equality is formalistic, that is, it uses abstract and formal rules to analyze equality and discrimination in relation to environmental decisions. On the other hand, Canada uses a purposive, contextual approach when examining whether the right of an individual or group to equality was discriminated against. Perhaps the most significant difference in the approaches is the weight given to whether a particular action on the part of a government agency is the result of unintentional or intentional discrimination. Under the framework in America, an individual or group must demonstrate that the decision was not only discriminatory in effect, but that such discrimination was intentional as well. This requires substantiation, meaning that an individual or group is required to produce, for example, a declaration or documentation that shows the intent of the government. Proving intent, as the environmental justice literature notes, is exceedingly problematical and a considerable barrier in achieving environmental justice via an equality-based framework in America. Such a barrier does not, however, exist in Canada; discrimination is unacceptable irrespective of whether it was the result of an intentional or an unintentional action by government. While the *intent* of a government action would likely factor into the decision rendered by a court in some fashion, as intentional discrimination is more egregious from a moral perspective, an individual or group in Canada simply needs to focus in general on demonstrating that the purpose and/or effect of the decision amounted to discrimination.

The third is *ideological underpinnings.* While not explicitly noted in environmental justice research, a melting-pot ideology underscores much (if not all) of

such studies done in America. It is premised on people with diverse social and cultural backgrounds fusing together to create a new collective. In application, an environmental justice community that experiences an injustice will then strive to achieve the level of security that non-minority communities have in terms of the benefit due to their social and/or income status. Equality in this sense is based on the ideal that all communities have the right to, for example, the same type of environmental protection. In Canada, however, the ideology that underscores environmental decisions is different, with a focus on maintaining a mosaic society that entails a cultural group maintaining its distinctiveness while being part of the larger society. This is significant with respect to First Nations, as their distinctiveness is explicitly protected by section 35(1) of the *Constitution Act, 1982*. Such rights exist to protect their cultures, including the customs and traditions in relation to the land and natural resources within their respective territories. In application, therefore, a First Nation has a right to an environmental setting that is based on their values, not the values held by others. The implications of this are significant, as was demonstrated in the land use conflict of between West Moberly and BC, which represent two different and opposing views of an environmental outcome. Unlike the environmental values of mainstream society, however, the environments of First Nations (like West Moberly) are protected due to the interconnection between the culture and the surrounding land and natural resources.

This is not to say, however, that Canada accepts everyone and everyone's culture without any problems emerging. While Canada strives (in theory) to be a heterogeneous and tolerant society, the fact is that (in implementation) the "social and cultural environment [of minorities] is defined as deficient in comparison to mainstream values"

(Nelson and Fleras, 1995: pg. 174). The fight by First Nations to protect the land and natural resources within their territories and the many court cases that have occurred over the years, a trend that is not likely to end soon under the current approach used by the Crown (in both its federal and provincial forms) to work with First Nations, demonstrates that Canada remains in the process of trying to achieve equality for all its citizens.

In addition, this study revealed that the theory and practice of using environmental justice in a Canadian context must be further developed in order for it to effectively identify, assess, and remedy situations tantamount to an injustice for minorities in the country. Taking this into consideration, and based upon this study, six challenges to incorporating environmental justice into an equality-based framework have been identified at this time.

The first, *initial, stages of development*, is based on the fact that environmental justice (as a distinct field of study in land use planning and natural resource management) is beginning to emerge in Canada. While its theoretical underpinnings are similar in many respects to the American approach, differences exist in regard to its use in a Canadian setting and they have not been adequately studied to date. This is not to say, however, that the environmental injustices faced by minorities in Canada have not been studied by scholars or have been brought to light activists and supporters. For example, the works contained in Haluza-Delay et al. (2009) demonstrate that environmental injustices are not only present in Canada, but are also the focus of scholarly endeavours. Missing from this work, however, is a focus on those matters of particular importance to First Nations. There is little doubt that housing, employment, and healthy water and clean air are of concern to such communities, which are similar to non-First Nation

communities while at the same time are different in context. The urban/rural injustices (conventional EJ) faced by First Nations are centred on the reserve system and the administration of their jurisdiction by INAC (an agency of the Government of Canada). Less conventional are the problems such communities face with respect to land and natural resources. But there is likely a larger focus for First Nations, in particular those in remote and/or northern communities, which is access to and allocation of land and natural resources.

The second is the *information requirements* of the equality framework, which places a considerable onus on a First Nation to articulate information that is likely private and personal to the individual or Nation as a whole. Their cultural ways of communicating may not be able to provide data in the format that the framework requires for analysis. For instance, there is a possibility that some cultural values cannot be easily (if at all) translated into English terms and/or adequately conveyed substantively. In addition, some information may not be suitable for the framework; for example, the information may be in oral form and, for cultural reasons, is not to be transferred (i.e. recorded and transcribed) into a written form. The development of a more culturally suitable framework, which is recommended below, is one possible avenue to address this challenge.

Third, the *structure and repetition* of the framework is a challenge. This study relied significantly on the approach to assess inequality in government decisions that was developed in *Law* (1999) as the basis for the Canadian-based environmental justice framework. While it is appropriate for assessing inequality relating to matters such as employment and health care, a strict application to an environmental issue involving a

First Nation reduces the overall efficacy of the approach. Overlaps surface due to the holistic nature of First Nations, an example of which is their knowledge and the manner in which a community disseminates their values associated with land and natural resources. Also, the structure (in conjunction with the *information requirements*) is problematic as it places an onus onto a First Nation to collect and articulate a rather larger amount of data. Seeing as First Nations, as well as other minority groups, have a general lack of financial capacity to adequately participate in decision-making processes, the additional requirement of satisfying the structure of the framework with information may prove to be difficult to overcome.

The fourth, which is *Eurocentric values versus Indigenous values*, is of particular importance. As some environmental justice research conducted in America has revealed, the existing environmental laws are in many ways an extension of "colonial systems" that are "perverse" when applied to minorities and their environments. Given the significant differences between mainstream society in Canada and the cultures of First Nations, caution needs to be taken when applying the principles of environmental justice to First Nations. Collecting primary data from First Nation communities to develop a grounded theory is suggested in order to build upon, or modify, the current understanding of the discipline from a First Nations' perspective. This recommendation is similar to suggestions put forward by Reed and George (2011) regarding indigenous methodologies and the need to address the fact that much of the discipline is based on the "American concept" of environmental justice.

Fifth, and perhaps most fundamental to need to incorporate environmental justice into a Canadian context involving First Nations, is the challenge of identifying and

properly taking into account the *sui generis nature of First Nations*. It is of vital important to recognize that all First Nations are *sui generis* (i.e. unique unto their own). It is also important to note that, while it is rather straightforward to recognize this variable, understanding it in the context of research design, methods and subject matter can prove to be quite challenging for non-members (i.e. those not belonging to the Nation). Each culture has its own "cultural area" where their distinct set of traditions, customs, and practices have been and continue to be exercised by their relations (kinship). The process of researching a phenomenon and its analysis needs to be adopted accordingly. That is, an approach used with one First Nation to examine a particular situation is not necessarily appropriate to use when working with another First Nation. There might be a number of reasons for this to occur: for example, one community may not be comfortable with an investigation into environmental racism whereas such a study may be acceptable in another community. Further, a case of environmental injustice for one First Nation community may not necessarily constitute an injustice in another. Since each culture is different, it is safe to assume that the processes and outcomes thereof may be different as well. Methods and analysis techniques ought to be developed on a case-by-case basis in conjunction with a First Nation (i.e. a community-based research design).

Lastly, the *section 1 override* of Canada's Constitution creates a serious challenge. By grounding a Canadian-based environmental justice framework in section 15(1) of the Constitution, and from a legal perspective, there is a possibility that the government may be in the position to justify the discrimination in some cases. Unfortunately, for First Nations, it is not possible to rely on section 35(1) of the

Constitution, as it does not completely protect them against the government acting in a discriminatory fashion; a government may justify an infringement to a First Nation culture in some cases. This is regarded as a significant (albeit inherent) limitation of the equality framework to achieve environmental justice for minorities; however, it is more or less unavoidable under the current legal regime in Canada.

There is a strong likelihood that the field of environmental justice may be incorporated into many avenues within the Canadian system. It most certainly has the potential to be of significant assistance to minorities, particularly as a tool in their struggle to attain justice. Based on this study, and to address the third question of this thesis, the following examples of two potential future applications and two potential future frameworks are reviewed and recommendations are made.

The first application is *defining community units*. An important element in any environmental justice research is establishing the study area. Such an area must be representative of the population at the centre of the investigation. As previously discussed, establishing analysis units regarding a community is both problematic and dependent on the circumstances of the investigation, in addition to the characteristics of the particular community (see: Williams, 1999). When taken in a Canadian context with a First Nation, the challenge becomes delineating an appropriate study area within which to apply an environmental justice framework. Keeping in mind the *sui generis* nature of First Nations, and the fact that First Nations tend not to compartmentalize culture and land in the same fashion (if at all) as non-First Nations, the selection of a study area is not only culture dependant but also issue dependant. There are likely several perspectives that a First Nation must consider in determining a study area: synoptic view (e.g.

relations with surrounding Nations, its respective traditional/treaty territory), land-based (e.g. family use areas, traplines), resource-based (e.g. plant gathering sites, campsites), and sacred/spiritual-based (e.g. wildlife, spiritual site/location).

The second application is *land use plans and planning processes*. In most areas in Canada, environmental decisions in general relate back to a land use plan in some fashion. Such plans, as in the case of British Columbia's Land and Resource Management Plans (LRMP), were developed prior to many of the seminal court decisions regarding the cultural rights of First Nations; for example, *Delgamuukw* (1997) validated the use of cultural data (e.g. oral histories) and *Haida Nation* (2004) confirmed that First Nations must be meaningfully included in strategic level decisions. In view of this, and given that many of the legal challenges to date are based on access to and allocation of land and natural resources, much of which is linked to the direction outlined in the LRMPs, an environmental justice analysis of land use plans is likely warranted. Such investigations are important in the protection of cultural rights held by First Nations. First Nations, such as West Moberly, are not restricted to land and natural resources within the boarders of the reserves established by the Government of Canada. Their rights extend throughout their cultural area (e.g. traditional/treaty territory). Without the inclusion (or perhaps meaningful inclusion) of culture in land use plans, there is *prima facie* information that indicates such plans may be the cause of past and ongoing land use conflicts that result in environmental injustices to First Nations.

The first potential framework is this: *consultation with First Nations*. Unlike *public participation* frameworks, consultation with First Nations is required by the common law in Canada. There is a lot of literature surrounding the field of consultation,

including case law and scholarly works. This framework would require an understanding of with whom, when, and how to consult. Capacity is also an issue that would need to be addressed, that is, funding required by a First Nation to effectively participate in the process. The consultation framework assumes that the government (e.g. federal, provincial, local) will consult with a First Nation in a timely manner and that it will be in good faith and meaningful, whereby the First Nations' cultural rights are reasonably accommodated and the honour of the Crown is upheld. There are many limitations of this framework, which is demonstrated by the number of court cases that have occurred. Most notable is that the framework is process oriented. More to the point, the outcome of process (i.e. whether the accommodation was reasonable in the circumstances) is not the focus; rather, the focus is on whether the process is adequate.

A second potential framework is *culture-based.* As previously discussed, the frameworks developed to date are questionable given their Eurocentric origins. The literature on First Nations and the adverse impacts from anthropogenic activities, such as mining and other industries harvesting natural resources, has grown substantially in recent years. First and foremost, this framework would require the approval of a First Nation; such approval may take many forms, ranging from signing consent forms to a community partnership and full involvement in the investigation. Through a community-based approach, researchers would be required identify, collect, analyse, and culturally validate findings. The culture-based framework assumes that an environmental justice lens is culturally appropriate and that it is capable of articulating the voice of the First Nation in a culturally appropriate fashion. A full appreciation of the potential limitations of this framework is difficult to discern given the paucity of data on environmental justice

in Canada; however, when more data is available, First Nations themselves would be in a better position to accurately identify the limitations. From a socio-science research perspective, a limitation would likely be the generalizability (external validity) of such frameworks; there are hundreds of First Nations in Canada each with their own unique culture, making the task of developing a single cultural-based framework difficult.

In conclusion, if environmental justice (as developed in America) is applied to situations in Canada without taking into consideration the unique circumstances of the country's polity regarding the protection of minorities, in particular the *sui generis* nature of First Nation cultures, the application will fail to uphold the principles of environmental justice. As a society, Canada has a positive legal obligation to protect the cultures of First Nations as they have a procedural right in environmental decision-making and substantive rights to carry on their cultural practices and traditions in relation to their environmental surroundings, including both material and immaterial aspects. Despite the limitations that currently existing within the literature, which is largely due to the domination of American viewpoints, this thesis takes a step in addressing the 'disconnect' noted by Reed and George (2011) and Haluza-Delay et al. (2009). The study expands the theoretical understanding and applications of environmental justice in a Canadian context by generating an equality-based framework and applying to it to the situation of West Moberly and determining that an injustice had indeed occurred and is continuing to occur.

"We care for these animals [caribou], not just because we want to eat them"

(WMFN Initial Submissions, 2009: pg. 38).

Postscript

Prior to the oral defence of my thesis on April 21, 2011 at the University of Northern British Columbia, I decided to have several members of West Moberly First Nations review my thesis. I felt that this was important given that a key element of the thesis was based on their experiences; more importantly, it is reflective of *Dane Dunne-za Wehoh* (follow the Dunne-za Peoples traditional ways) and therefore an ethical step in any research that relates to *Dane Dunne-za hananè* (the land of the Beaver People), including but not limited to matters regarding *nan* (land) *jii nank'ih maat'áh* (everything from land that the people rely on). Not surprisingly, most community reviewers where not overly enthusiastic about reading a document roughly 250 pages in length. Other than one individual, most elected to read the illustrative example (Chapter 4) and conclusion and recommendations (Chapter 5) as part of their review; in most cases, I provided an oral summary (overview) on the remaining chapters.

All of the comments that I received were very positive and supportive in nature. Several discussions ensured, most of which revolved around the concept of environmental justice and their community's struggle to protect *Dane Dunne-za hananè*, in particular their most recent battle with the government to protect the last 11 *Wah stzee* (caribou) of the Burnt Pine caribou herd.[13] Central to these discussions was my use of

[13] A few days prior to my defence date, BC's caribou expert notified the community of the results of population surveys of three *Wah stzee* herds in the South Peace. The results were devastating, as all three have significantly declined since their last counts: Moberly 191 to 35, Kennedy Siding from 90 to 45, and the Burnt Pine from 11 to 5 animals. These new data merely highlight the dire straights of *Wah stzee* in West Moberly's territory and the ongoing environmental injustice. The question is this: will the BC government take immediate steps to curtail the downward spiral or will it turn a blind-eye to the situation?

the term "environmental racism" as a way to reflect on BC's overall treatment of the community. This is not to say that there was disagreement with the conclusion – in fact, a few would have chosen more pointed language. Rather, the discussion was on the use of the term "environmental racism" instead of the term "cultural genocide".

While the term "cultural genocide" was not explicitly used in their struggle to protect *Wah stzee* or captured in related documents, such as the "I Want to Eat Caribou Before I Die: Initial Submissions for the Proposed Mining Activity at First Coal Corporation's Goodrich Property",[14] the term has been recorded by other socio-scientific research projects with the community in recent years. Most notable is the research conducted by my thesis supervisor, Dr. Annie Booth (see: Booth, A. and Skelton, N (forthcoming)). Her research pertained to environmental assessments and consultations with the following participants: Halfway River First Nation, West Moberly, and BC's Environmental Assessment Office. That research documented the feelings of the two First Nations (noted above) in relation to the excessive level of development within *hananè*, where the term "cultural genocide" was used by community members.

With respect to my thesis, the term *culture genocide* was considered to be more "identifiable" than the term *environmental racism*. Generally speaking, the former term more appropriately reflects their historic and current struggles against the Crown over land and natural resources. It also encapsulates the full spectrum of the First Nation's mode of life (e.g. health, economics, wildlife, songs, trails, spirituality, and generations to

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Perhaps more fundamentally, will the Government of Canada (in the place of BC's likely refusal to act honourably) use its statutory power under the *Species at Risk Act* to issue an emergency order to protect these herds of *Wah stzee*? Either way, the Treaty rights of West Moberly to harvest the species in accordance with its traditional seasonal round – as the community had done since time immemorial – needs to be ameliorated to reverse the environmental injustice that began over 40 years ago and continues to this day

[14] One of my committee members, Wendy Aasen, played a significant role in the generation of roughly the first half of this document with the community; the second half relates to matters of law

come) that has been and continues to be part of the community's worldview, whereas the term *environmental racism* is perceived to be, for example, restrictive and thus not representative. While this is not a finding per se, as this cultural procedure fall outside of my conventional schooling, it does potentially reveal another difference in environmental justice developed in America in comparison to Canada. When asked, a descendant of Old Man Dokkie had this to say on the matter: 'the *western concept*[15] of documenting the concerns of First Nations is viable for non-First Nations people in order for them to better understand the unique way we look at the world'.

[15] By the use of the term "western", the community member was quick to point out that their views (i.e. First Nations) are the *original* western view, because Europeans are from the East (or perhaps centre) in the context of the world.

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Appendix 1: Risk Assessment

While this debate began approximately fifteen years ago with the release of the EPA report, the use of risk assessment has nevertheless a long history in decision making. Historically, most environmental decisions relating to anthropogenic hazards from industrial development prior to the 1970s were based on the *ad hoc* processes of regulators (Morgan and Henrion, 2007). Often, their decision(s) were then problematic to justify when challenged as they did not withstand scientific scrutiny. To some degree, this changed when the underpinnings of RA (as an analytical technique in environmental decision making) were adopted by many regulators in the human health and environmental fields to set various standards (O'Neil, 2000). With public concern growing as a result of the nuclear energy industry (Morgan and Henrion, 2007), the U.S. National Research Council (NRC) moved towards standardizing the procedure for analyzing risk (National Research Council, 1983). By 1983, the NRC developed an approach to gauge the dangers to humans associated with anthropogenic hazards (National Research Council, 1983).

RA, as an approach relied upon in environmental decisions making processes, was not initially mandated by the U.S. federal government. It was not until the 1990s, with the EPA under a significant amount of pressure from environmental justice groups that were challenging the reasoning for the siting of LULUs within their neighbourhoods, did the government begin to react. Heiman (1996) contends that this 'lack of confidence' on the part of such communities, including the general public to a lesser extent, led the EPA to request the formal adoption of RA into decision making processes. Because it is

an objective technique according to the EPA, its implementation into environmental decision making would put an end to the various *emotional arguments* by those objecting to the sitting practices of LULUs, which were (in the view of minorities) scientifically unsubstantiated (Heiman, 1996).

In 1993, President Clinton issued Executive Order 12866 in relation to Regulatory Planning and Review. It requires federal regulations pertaining to the environment and human health be assessed for their benefits and costs, which includes the identification of the risk through a comparative approach (Executive Order 12866, 1993). Within this context, the EPA understands risk assessment to be a procedure that is carried out

> ...to provide the best possible scientific characterization of risks based on a rigorous analysis of available information and knowledge... [pertaining to an] environmental hazard [that] might cause harm to exposed persons and ecosystems" (EPA, 2004: pg. 2-3).

The intent of RA is to examine the potential hazards associated with various LULUs and the dangers they pose to the public. Under the framework outlined by the NRC, an assessor is able to systemically identify, collect, and analyze qualitative (Cullen and Small, 2000) and quantitative (Freedman, 1998) data. There is a focus on "the catastrophic potential associated with the risk event, scientific uncertainty, distribution of risk outcomes, and understanding and familiarity of the risk" (Noble, 2006: pg. 37). Of the uncertainties that exist, Suter (1983) points to three sources: "stochasticity" (inherent randomness of the natural environment), "ignorance" (incomplete knowledge of everything that exists in the natural environment), and "error" (human mistakes made by the assessor).

While the terms 'hazard', 'danger', and 'risk' are frequently used interchangeably in the environmental justice literature, they are nevertheless different in the context of RA methodology. In general, the hazard is the addition of something unnatural to an environment like a toxic chemical (i.e. the *cause*); the danger is the relationship between the chemical and the human (i.e. the *effect*); and, the risk is the potential for the hazard to cause the dangerous results (i.e. the *impact*) (see, for example: Gremmen and Van Den Belt, 2000; Freedman, 1998). These terms, along with the general understanding of the RA as a science, make up the four step methodology of risk assessment: (1) hazard identification, (2) dose-response, (3) exposure assessment, and (4) risk characterization (O'Neil, 2000; Israel, 1995; National Research Council, 1983).

Step one determines whether human exposure to the chemical substance is adverse (National Research Council, 1983). As a general rule, this involves the qualitative assessment of a singular chemical substance (Israel, 1995). To identify the hazard(s) an assessor: pinpoints the chemical agents that are expected to cause a hazard; verifies the level in which they exist within the environment; determines the type of toxicity (e.g. neurotoxin, carcinogen, and/or mutagen) an agent produces; and, establishes the circumstance(s) that the toxicity will appear (e.g. the "endpoint": humans develop cancer) in those that are exposed to the chemical (O'Neil, 2000). A challenge of this step is the expense of conducting comprehensive studies and the potential for interaction with and/or in combination with another singular or mixture of chemical substances (Israel, 1995).

The second is to examine the effects of a human being exposed to a chemical substance and its agents, commonly referred to as dose-response. Using the qualitative

data of step one, an assessor quantifies the range of adverse effects from various degrees of exposure in order to determine the severity (O'Neil, 2000). This is then compared to the 'threshold' of an 'endpoint' (Israel, 1995), that is, the level and degree of exposure known to result in a human developing, for example, a respiratory illness. In cases where a threshold has not been identified, an assessor tries to identify a level of exposure that likely results in an adverse effect. An assessment involving a carcinogen, however, does not use a 'threshold' approach.

The third, exposure assessment, establishes how, and the extent to which, a chemical is likely to interact with a human. This is accomplished by following the movements of both the chemical and humans in the environment. Determining whether a chemical contaminates a source (i.e. air, water, and land) and whether a contaminated source is able to enter a human pathway (i.e. ingestion, inhalation, and dermal absorption) enables an assessor to establish the intensity, frequency, and duration of the exposure (O'Neil, 2000). Since chemicals are known to impact humans differently, it is important to understand the different movements of humans and their reliance on resources in order to accurately determine the interaction. However, as Cullen and Small (2000) point out, this step is problematic and is primarily responsible for many of the errors due to the uncertainty inherent within the approach. It therefore requires a detailed understanding of the specific population that is likely to be exposed; what is adverse for a youth may not necessarily be adverse for an adult, or vice versa (O'Neil, 2000). As such, an assessor must identify not only the pathway(s) and source(s) that may result in a human being exposed, but also the occurrence(s) and degree(s) of acuteness from exposure(s). Putting together several possible scenarios in terms of channels that

someone may be exposed, the severity, and the possibility of them occurring is also beneficial (Cullen and Small, 2000) in overcoming the inherent uncertainty.

Lastly, the description of the risk(s) associated with the chemical being released into the environment refers to the compilation of information from the previous three steps. Based on the hazards of releasing the chemical and the dangers of humans being exposed, an assessor predicts the probability of adverse effects occurring. This includes an assessor "...characteriz[ing] the general state of knowledge about the risk and the overall weight of evidence concerning the nature and source of the hazard" by means of a qualitative description (Cullen and Small, 2000: pg. 2). The probability is typically represented numerically as 1:100,000 or 1:1,000,000; in some cases, it is also written as 'one-in-a-hundred-thousands' (Heiman, 1996). In the case of a carcinogen being released in to the environment, for example, the ration represents the increase in the number of human deaths due to cancer (O'Neil, 2000).

On the surface RA seems anodyne (colourless), mostly because the criteria are scientific and thus regarded as neutral, as noted by the EPA in their 1992 report, which ought to produce fair and accurate findings. Since the early years, including those that followed the NRC's standardization of the methodology and the issuance of Executive Order 12866, there has been strong opposition to the methods of this technique from the environmental justice community. Insofar as environmental justice analysis is currently understood, according to Bryant (1995), the findings of such studies do not reflect the circumstances of a particular situation appropriately. He points out that many of the studies merely compare exposure rates rather than the burdens one endures as a result of toxicological and biological exposure, or conversely, the benefits that one experiences

when shielded from being exposed. Further, a survey of environmental groups revealed that the disagreement was largely do to the following: "misuse and manipulation of risk assessment for political purposes…; poor scientific basis; political disempowerment; asking the wrong questions – emphasis on quantifying rather than reducing or eliminating risk" (Lui, 2001: pg. 86).

Accordingly, scholars have pointed out that the technique is often employed in a manner that frequently conceals inequitable outcomes, and thus is not conducive to issues relating to justice (Shrader-Frechette, 2002). What frequently goes unnoticed is the hidden assumption that all segments of society share this risk. Such an assumption is incorrect, according to Heiman (1996), who points out that, by basing an environmental decision on RA, the accurate impact(s) of the decision are hidden as risks are not borne equally across racial and social lines. As such, both environmental organizations and advocates have objected to its use by the EPA to determine whether environmental burdens are equitably distributed across social groups (Holifield, 2001). They believe it is arguable whether particular sections of society bear any risk at all, let alone share it with everyone else – an assertion that is supported by the data noted earlier in this Chapter (see the GAO and UCC studies).

Kuehn (1996) suggests that much of this relates to the following generalization in which the acceptable limits are based on: a 70 kilogram white male. He refers to this as the "reference man" approach to determining risk. This does not take into account characteristics unique to an individual or a group of such individuals. Nor does it for that matter consider the traits indicative of different cultures; for example, the type and frequency of land use activities by American Indians in comparison to non-American

Indians living in urban environments. Kuehn has stated that an individual's age, sex, and genetic background all result in a significant degree of variability. He further writes that understanding the susceptibility of a specific population can prove to be quite challenging; for example, human variation in drug metabolism can be as high as 1000-fold and anywhere from 3 to 150-fold for the metabolism of carcinogenic chemicals (Kuehn, 1996).

What makes the above noted generalization more questionable, according to Kuehn, is that it does not acknowledge that people of colour are exposed to higher levels of hazards and more frequently because of their living and working conditions. An example of this is the amount of poor air quality as a result of pollution while at work and in their residences (Robinson, 1991; Bullard and Johnson, 1997; Pellow et al, 2001). Having up-to-date demographics is required as many environmental justice communities have a higher than average population of children and young women, the level of risk is higher as those subpopulations are more susceptible to the adverse effects of chemical substances (Kuehn, 1996).

Rarely, if at all, is the actual nomenclature of a chemical substances' hazardousness fully understood. In part this is due to the 'endpoint' strategy. Scientists have also long acknowledged that some level of uncertainty already exists within this type of assessment (Suter, 1993). Most assessments, allegedly because of economic reasons according to proponents, predetermine what the assessor is looking for in terms of an adverse effect which, in effect, restricts the focus of the hazard identification step (Israel, 1995). As a result, significant data gaps have emerged with respect to synergistic effects and the potential for adverse cumulative impacts (Lui, 2001).

To handle the uncertainty and to fill in the gaps, as argued by O'Brien (2000), is the subjectivity of the company producing the risk, which is unavoidably influenced by its economic interests over those of others such as environmental justice communities or perhaps even the general public. Thus, the operationalization of a private company's self-interest may result in a narrow focus in that the hazard is examined in a vacuum and thus is not representative of the interactions within and the stochasticity of the environment. Further, as is likely the case for many scientists and other related professionals working for industry, there is an underlying fear of not producing the desired results to meet a company's plans to construct a proposed project. Relationships grounded in power and profit, according to Waiten (1981), are significant factors that have a likelihood of influencing an assessment, as there is pressure on the assessor to conclude there is a low level of risk associated with a particular activity (O'Brien, 2000).

Krieg and Faber (2004) have pointed out that environmental justice issues do not just have a single indicator or a distinct set of indicators, that is, "what constitutes a risk in one community may not constitute a risk in another community" (pg. 671). A limiting factor for many of these assessments, according to Kuehn (1996), is that they are incapable of taking into consideration multiple pathways and pre-existing hazards with respect to aggregation of risk. Kuehn's conclusion is that risk assessments fail to take into account not only the complete impact of a potential hazard being added to the environment, but it overlooks and underestimates the adverse impacts minority groups disproportionately experience as well.

The acceptable level of risk that society is to bear, which as noted earlier is typically represented numerically as being something in to the effect of 1:100,000 or

1:1,000,000, is determined at the policy level (Heiman, 1996) by politicians and bureaucrats that are removed from the situation. Since 'acceptability' is predetermined, an impacted community does not participate in the decision regarding what is an acceptable level of risk and what is not (Kuehn, 1996). Those placed at risk are thus barred from establishing the parameters of community health. This flaw, according to O'Brien (2000), "obscures and removes the fundamental right to say no to unnecessary poisoning of one's body and environment". Tal (1997) has therefore suggested that the technocratic nature of such analysis processes is visibly "immoral and undemocratic" (pg. 86).

To address this situation while at the same time acknowledging that the data required for such an assessment is case-specific, the validity of an investigation depends largely on the public's participation (Cullen and Small, 2000). In contrast to the process being exclusive by design, they suggest that it be structured in such a manner that the stakeholders and experts are included in the development of the problem definition, carrying out the study, and the analysis of the information. Furthering this approach are Sexton et al (1993), who propose a framework that is centred around environmental justice principles such as the relationship between people and their environment, including their characteristics and the influences that have or might exist in their surroundings. Three key questions guide their approach: "How do important exposure – and susceptibility – related attributes affect environmental health risks? How do class and race affect important exposure – and susceptibility – related attributes? How do class and race differentially affect environmental health?" (Sexton et al, 1993: pg. 715).

Rather than focusing on "how large the risk is", Lui (2001) suggests that the assessment address "how the risk is distributed" (pg. 89) across social groups that are divided by class or race. In addition, he adds that RAs may be more accurate through the inclusion of human behaviours: "[t]his may include an individual's daily activity patterns, change of such patterns over the lifetime, change of residence, and the extrapolation of individuals to populations using the distributions of these variables" (pg. 90). In this way, the focus of the assessment should be on the specific characteristics of the sub-population that is likely to be exposed to the hazard instead of the general traits of the large population which are not likely to come in contact with the hazard and thus not be exposed to any danger.

Although the intricacies of RA can be modified to more appropriately account for the environmental burdens placed on minorities, as the literature demonstrates, a criticism remains. Some have argued that irrespective of the potential for modifications the method is incapable of fulfilling the requirements of environmental justice. In particular, scholars and advocates have contended that the methods of RA, upon which environmental decisions are made, can be traced to a notion of justice that is utilitarian in nature (Lui, 2001: 54). Further, according to Bullard (1993a), the utilitarian perspective underpins most (if not all) decisions relating to land use activities regardless of whether RA was used a tool in the decision-making process.

Utilitarianism in general focuses on the aggregate consequences of a decision in relation to the populace as opposed to its impacts upon a particular group. In other words, a decision relating to environmental planning or management would be based on whether the good outweighs the bad in terms of the 'greatest benefit for the greatest

number' (Lui, 2001). To best serve society, Soccio (1992) notes that a 'utility' must be beneficial in "its usefulness" and "how well it performs its specific function" (pg. 395). This approach is regarded as the "principle of utility" (Soccio, 1992) which, as Howe (1990: pg. 130) points out, is where "justice" is derived.

In application, according to Bowie and Simon (1996), problems emerge as utilitarianism is flawed with respect to its application in a society that is diverse. They argue that the manner in which utilitarianism takes into account the role of a person within social processes is insufficient, and point to the critique provided by Rawls (1999) in his book "*A Theory of Justice*":

> It is customary to think of utilitarianism as individualistic, and certainly there are good reasons for this. The utilitarians were strong defenders of liberty and freedom of thought and the held that the good society is constituted by the advantages enjoyed by individuals. Yet utilitarianism is not individualistic, at least when arrived at by the more natural course of reflection, in that, by conflating all systems of desires, it applies to the society the principle which should regulate an association of men are simply an extension of the principle of choice of one man. (pg. 26).

While utilitarianism purports to be an individualist theory, as Rawls' writes, in application the perspective is not, as it overlooks personalities of the individual (Bowie and Simon, 1996). The issue that Rawls seems to be emphasizing is that utilitarianism treats society as a single person, rather than a collection of individuals and groups. As a result, the desires (or happiness) that are most prevalent with individuals in the society *bubble to the surface* and thus form the 'utility', whereas those desires that are less widespread within society, such as those found within a minority group that is being compelled to accept the risk and associated dangers from a LULU being placed in their

community, are by and large neglected; essentially, the utility as defined by the majority cancels the utility as defined by the minority (Bowie and Simon, 1996). For such reasons, as contended in much of the environmental justice literature, the theological perspective of utilitarianism contributes to the disproportionate impact shouldered by environmental justice communities as it "fail[s] to deal with the issue of equity and distributive justice" (Lui, 2001: pg. 20).

Appendix 2: Overview of Planning Team Report and Plan Options

The process for the Planning Team (PT) involved the development of two main documents. First, the PT had to develop Terms of Reference that would guided the overall process and included in some respects the process that the KT underwent. Second, the PT had to develop a final report that was presented to the government of West Moberly and the Cabinet of the Provincial Government of British Columbia (BC) for them to make a decision prior to June 19, 2010 in order to adhered to the timeframe set out by Justice Williamson in his Order.

Terms of Reference

The Terms of Reference (TOR) held, as its objective, to "develop and put in place by June 18, 2010 an active plan to protect and augment" the Herd, and to result in accommodation of WMFN's rights (Planning Team Report, 2010: pg. 19). The principles of the TOR included WMFN and BC working on a *'government-to-government'* basis. In addition, the TOR stated that the PT Report which was submitted to the governments "will": provide recommendations in terms of protecting and augmenting the Herd, including the means to achieve the objective such as management measures, legal mechanisms, and the funding required to implement the Plan; and, in the case that the governments (i.e. BC and WMFN) cannot agree on a single plan, then the difference of opinion will be documented in the PT Report (PT Report, 2010: pg. 19).

The TOR further states that, during the development of the PT Report, the PT "must take into account the following": (1) WMFN's Treaty rights to harvest caribou

within their "traditional seasonal round"; (2) the fact that the "findings" noted in the KT Report "are necessary to achieve the Population Targets indentified" in the KT; (3) "socioeconomic interests, and the interests of third parties" whereby the "potential negative and positive outcomes associated with implementation" are indentified; (4) the "ecological factors, including the relationship of the Burnt Pine to neighbouring caribou herds, the geographical scope of the Protection and Augmentation Measures"; and, (5) the "implementation factors, including the necessary legal instruments, political ratifications processes of both Parties, and the financial cost of implementation" (PT Report, 2010: pg. 20).

Planning Team Final Report

A final report of the PT (the "PT Report), entitled the "Burnt Pine Caribou Planning Team Report" and dated June 8, 2010, was submitted to the BC Cabinet in order to fulfil the TOR and the court's Order. As the governments could not agree on a single plan, the PT Report included multiple options for the BC Cabinet to consider, described as "four options for a reasonable and active plan..." (PT Report, 2010: pg. 1). Further, according to the PT Report, Option 1 and 2 were developed by Crown representatives as WMFN "believed these options will not increase the Burnt Pine herd to a level that will support a sustainable harvest" (PT Report, 2010: pg. 1); such a level was required for First Nations to exercise their right to hunt caribou in accordance to its seasonal round.

The options are divided into five sub-sections: Management Intent, Habitat Protection Measures, Caribou Population Management Measures, Implementation Requirements, and Implications. Each option and their sub-section are summarized

below in bullet form[16].

Option One: "No New Development in the Selected Core Habitats"

- Management Intent:

  This option permits "a greater level of development to occur by both existing and potential new tenure holders when compared to the other options", which includes "resource development by coal, oil and gas, and wind" in Zone B. Such industries would not be allowed in Zone A. During the development of this option, BC "considered and attempted to reasonably address": (1) protecting core habitat, (2) existing resource development tenure holders, (3) WMFN's comments, (4) information from the KT, (5) financial implications for BC, and (6) "employment and economic opportunities". (PT Report, 2010: pg. 8) omit

- Habitat Protection Measures:

  The non-industrial use of Zone A would ensure a "portion of core Burnt Pine caribou habitat is not affected by major industrial development for a minimum of five years". Zone A will be divided into Resource Review Areas (RRA). These will be reassessed with respect to "habitat condition" and the "status and trends of the population". Since industrial forestry operations are already banned from the UWRs and WHAs, the degree to which the RRAs will further restrict their activities is considered minor. (PT Report, 2010: pgs. 8-9)

  BMPs apply to Zone B and Zone C. They "would provide for the conservation of caribou habitat while still permitting industrial development to proceed where appropriate". The objectives of the BMPs include: "[r]educe surface disturbance where there is suitable forage for caribou (lichens, etc.) For example: [w]here practicable, use directional drilling for oil and gas, and limit footprints for exploration and production of coal mines; [r]educe removal of timber within core habitat; [a]void the development of ploughed or hard packed corridors in winter that facilitate predator access to winter habitat; and, [m]inimize displacement of caribou due to industrial development by implementing noise reduction techniques, managing timing of operations, etc" (PT Report, 2010: pg. 9). In addition, the PT Report states that, because there was no time to discuss the BMPs with the various industries, their application will be determined on a case-by-case basis.

  In similar fashion as Zone A, but not precisely, BC may consider placing a

[16] While the TOR required that the positive and negative effects be identified, BC did not couch the "Implications" section of the options in such a manner Instead, BC included the negative effects to the wage-based economy and some of the effects to caribou, while neglecting to do so for the effects WMFN's culture, including the traditional economy With that in mind, it is important to note that the language used in this thesis does not accurately reflect the terminology used (or lack thereof) in the PT Report

'deferral' on wind development on Mt. Stephenson. By doing so, and together with FCC's attempt at reducing its impact adjacent to the Mt. Stephenson, the hope is that the mountain will "provide some viable caribou habitat even if a mine proceeds to development" (PT Report, 2010: pg. 10).

- Caribou Population Management Measures:

  Predator management will continue until the Herd's "population has stabilized", which will be accomplished by killing wolves by "trapping or ground hunting, sterilization, and aerial hunting". The examination of several opportunities will occur, such as the reduction of other sources of prey (e.g. moose, elk, deer) through WMFN's youth hunting and trapping initiatives, monitoring habitat use and populations of species, and penning and translocation of individual caribou. In addition, a management approach to address recreational land use activities (e.g. skidoos in the alpine and subalpine areas) will need to be developed and implemented. (PT Report, 2010: pg. 10)

- Implementation Requirements:

  Additionally, more detailed planning is required regarding the Burnt Pine caribou herd (e.g. creation of RRAs) and planning for caribou throughout the Peace Region, which would include the various 'Caribou Population Management Measures' (e.g. penning, recreation management) and include the involvement of other Treaty 8 First Nations. The BMPs and there effectiveness will determine the "long term value of caribou habitat", which also need the force of legal mechanisms to ensure compliance and to allow for enforcement. Because the Plan relies largely (if not entirely) on predator management, "aerial hunting of wolves will be necessary" for a minimum of "20 years" and more if "habitat measures" do not adequately "limit primary prey and population approaches forecast maximum". (PT Report, 2010: pg. 10)

- Implications:

  This Option is the best in terms of economic benefits, according to the PT Report. It "has the least impact on tenure holders and economic values" as it does not require expropriation, which means the risk to BC having to compensate existing tenure holders (e.g. coal, oil and gas, forestry, and wind) is mitigated. Loss of revenue is also alleviated. Thus, the loss of potential monies is removed and the collection of potential revenue from resource development is assured. The only economic burden is that the Plan requires financial capacity to be implemented, including the likely development and implementation of the NCMP – a cost that applies to all of the Options.

  Ecological burdens, while not expressly stated as such in the PT Report, include "additional" destruction of "core habitat" as a result of "development activities", which is problematic for the Herd as the "winter range at risk in Zone B contains

the wintering area" that it prefers. Consequently, "there is still a risk that the Burnt Pine Herd may continue to decline." A less indentified ecological impact, and perhaps even overlook at times, is the elimination of wolves from the ecosystem, which the Plan relies heavily on well into the future. (PT Report, 2010: pg. 11)

Burdens placed onto the shoulders of First Nations, but not expressly stated as such in the PT Report, are by and large the reality that this Plan will not alleviate the threat of extinction facing the Herd, as "there is still a risk" it "may continue to decline". As such, "[t]here is likely no opportunity for sustainable First Nations harvest in the Burnt Pine area". Further, as the PT Report states, "[r]eduction of prey species such as moose, deer, elk, is of concern to Treaty 8 First Nations in the area who rely on these species." (PT Report, 2010: pg. 11)

This Option was not supported by any of the other Treaty 8 First Nations (i.e. Doig River First Nation and Saulteau First Nations) that provided comments to BC regarding the draft PT Report, with WMFN in particular being "strongly opposed" to it (PT Report, 2010: pg. 11).

Option Two: "No New Development in Selected Core Habitats, with Minimal Surface Disturbance in Remaining Core Habitats"

- Management Intent:

  In terms of intent, this Option is very similar as Option 1 as it has all of the same recommendations. It has some additional deferrals for Zone B, which aims to "further" mitigate "the impact of multiple resource development in core habitat in Zone B. (PT Report, 2010: pg. 11).

- Habitat Protection:

  In addition, this Option would defer any new proposals for tenures from oil & gas and windfarm proponents within Zone B, in that way permitting some developments (e.g. directional drilling) to occur while precluding others.

- Caribou Population Management Measures:

  These are the same as Option 1.

- Implementation Requirements:

  In comparison to Option 1, the main difference is that in this Option will include some (albeit limited) RRAs within Zone B.

- Implications:

In contrast to economic benefits that Option 1 may produce, this Option has a "greater risk of potential lost revenue" as it will "restrict certain activities of existing tenure holders" (PT Report, 2010: pg. 13).

With respect to the differences in ecological burdens of Option 1, this Option "further mitigates impact of multiple resource development in core habitat in Zone B", likely resulting in "less habitat destruction" (PT Report, 2010: pg. 13).

Burdens to First Nations are the same as noted in Option 1.

Option Three: "No New Development (Resulting in Surface Disturbance) in Core Habitats of the Burnt Pine Herd"

- Management Intent:

  Largely based on the recommendations from the KT Report, the goal of this Option is to increase the population of the Burnt Pine caribou herd from its estimated population of 11 animals to 50 animals.

- Habitat Protection Measures:

  In order to achieve the goal, this Option requires "no further surface disturbance from mining, oil and das development, forestry, or wind power" in Zone A and Zone B. To achieve this, a series of "protected areas (e.g. park, conservancy)" would need to be created. Within Zone C, which is considered the "matrix habitat", an additional planning process will determine the level and type of development that is possible while at the same time maintaining "caribou and cultural values". BMPs would be applied, with the objective of the following: "[m]inimize the creation of forage for alternative prey species for wolves (i.e. moose, deer, elk) through management of patch size distribution, vegetation management that reduces browse; and [m]inimize any new road or linear development". (PT Report, 2010: pg. 14).

- Caribou Population Management Measures:

  While the predator management techniques are similar as those for Options 1 and 2, in this Option the measures would be implemented through WMFN's youth trapping and hunting initiative, including the potential reduction of prey. Additional measures such as monitoring, penning/translocation, and winter recreation management will also occur.

- Implementation Requirements:

  Further planning would be required to develop BMPs and their legal mechanisms.

Additionally, WMFN's initiative in combination with BC's efforts would have to be developed and coordinated.

Management Measures would need to be implemented. In addition, a review of the "existing tenures to determine to determine which existing tenures would be able to advance their project". To implement the Habitat Measures for Zone A and Zone B, the parties will need to determine the "[l]egal designation of protective measures". (PT Report, 2010: pg. 14-15).

- Implications:

The legal designation of Zone A and Zone B will cause economic burdens, as there may be financial implications that apply due to the fact that BC has approved resource development tenures thought the area. Some tenures may be unaffected like the oil and gas industry as it can directionally drill. Others, such as mining and wind, may be impacted as the advancement of their project within the area requires surface disturbance. By taking such a sweeping approach, the PT Report suggests that it is "[l]ikely to create uncertainty within various industry sectors". All of this will potentially result in "lost employment and other economic opportunities" and thus will result in a "[s]ignificant risk of potential lost revenue to [the] crown". (PT Report, 2010: pg. 15)

As a result of Habitat Protection, the ecological benefit for the Burnt Pine caribou herd is that their population "could reach 50 animals in 20-30 years". While there is always a theoretical probability that the Herd's population may still decline, the "risk is greatly reduced in contrast to Option 1 and 2". (PT Report, 2010: pg. 15)

A benefit is that "[t]here is likely limited (1-2 bulls) opportunity for sustainable caribou harvest for First Nations within the Burnt Pine area." WMFN supported this Option, although it was contingent on BC guaranteeing them that the NCMP would be government-to-government and that the planning process begins prior to "the end of 2010". This Option was not, however, supported by either of the other Treaty 8 First Nations. (PT Report, 2010: pg. 15)

Option Four: "No New Development Resulting Surface Disturbance in Core and High Quality Habitats of the Caribou Herds in the Central Rocky Mountains"

- Management Intent:

Unlike the other options, this Option is the full adoption of the KT Report as the means to protect and augment the Burnt Pine caribou herd; therefore, this Option is very similar to Option 3 but involves a larger geographic scope.

The goals of this Option "are to: [i]ncrease the population of the Burnt Pine herd from 9-19 to >50; [i]ncrease the 7 caribou herds from the present estimate

population of 1,000 animals to 3,000 animals; and, [p]rovide a future sustainable First Nations harvest of 60-90 caribou". These goals would be achieved through the protection of the "core habitat for all of the herds", meaning resource development would be moved out of the alpine and subalpine areas to the "matrix habitat". (PT Report, 2010: pg. 16).

- Habitat Protection Measures:

  To protect the core habitats, which are the alpine and subalpine areas, there would be a need for the statutory creation "of a protected area (e.g. park, conservancy)". Recommendations for such a land designation to protect caribou include: "no industry activity", prohibiting vehicles that damage vegetation, "telemetry data for the Narraway, Scott, and Graham herds" will be used to map their areas, "[i]dentify potential high quality" habitat between the "Burnt Pine and the Quintette herds". (PT Report, 2010: pgs. 16)

  Low elevation caribou will be management differently, including the use of "telemetry information and local knowledge" to ensure UWRs and/or WHAs are accurate. A plan will be created for the caribou in the area that "limits cumulative impacts of all industrial activities below a sustainable threshold for caribou persistence, which is based on the science developed by Sorensen et al (2008)". (PT Report, 2010: pgs. 17)

  As resource development would continue within the matrix habitats, a set of BMPs would be used that are specific to the habitats used. That is, different BMPs would apply in habitats of the Narraway herd in comparison to the habitats of the Burnt Pine herd, which would take into account their individualist use of the land. The objective underlying such BMPs would include: "[m]inimize the creation of forage for alternative prey species for wolves (i.e. moose, deer, elk) through management of patch size distribution, vegetation management that reduces browse; and, [m]inimize any new road or linear development". (PT Report, 2010: pg. 17)

- Caribou Population Management Measures:

  These would be for the most part the same as Option 3.

- Implementation Requirements:

  These would be for the most part the same as Option 3.

- Implications:

  The possible economic burdens are mostly the same as Option 3, but with the geographic scoping being larger it is assumed that the potential impacts would be larger as well. For instance, if the core habitats were protected for the seven herds

> thereby requiring the tenures to be expropriated due to the creation of a park or conservancy, "compensation would be required in accordance with applicable statutory provisions". (PT Report, 2010: pg. 18).

The ecological benefits of this Option are similar to those of Option 3, but are applied to a larger area as the core and matrix habitats of the following herds would be protected or managed for cumulative impacts: Burnt Pine, Graham, Kennedy Siding, Moberly, Narraway, Quintette, and Scott herds. All of the Treaty 8 First Nations, including WMFN, preferred this Option over all of the other options, as it was "most consistent" with their views.