Liberalism, Nation Building, and Family Regulation: The State and the Use of Family Property Law on Vancouver Island and in the United Colony / Province of British Columbia, 1862-1873

by

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B.A., University of Victoria, 1994

A Thesis Submitted in Partial Fulfillment of the
Requirements for the Degree of

MASTER OF ARTS

in the Department of History

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ABSTRACT

This thesis draws on the work of feminist, family and social reform historians, arguing that family regulation in 1860s and 1870s British Columbia developed in response to the perceived social ramifications of the developing capitalist market economy. The acquisitive individualism and concentration of wealth accompanying the market economy appeared to pose moral and economic dangers to society, threatening national demographic growth and the independent producing, property-owning class liberals believed necessary to the proper functioning of democracy. To rectify the situation legislators including Amor De Cosmos, John Robson, and Robert Beaven turned to the family. Through family protection measures (homestead exemption and married women's property laws) they attempted to mediate the competing demands of production and reproduction; and through modifications to inheritance and property laws they tried to effect a broader distribution of wealth and property in society. In the process, the patriarchal form of the family was altered, although the effect of the modifications was tempered by a continuing priorization of male rights and the liberal commitment to individual freedom of contract. The priorization of demographic concerns and their association with the family also led to an increased emphasis on the domestic responsibilities of women, which, in combination with the convergence of 'Woman's Rights' and liberalist ideologies, led to increased property

rights for married women, although these remained circumscribed by definitions of social role.

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Acknowledgements

This thesis owes its development to the aid and encouragement of many individuals. Peter Baskerville suggested investigating changes in family property law in the early 1870s and women's access to the municipal franchise. He, along with Pat Roy and Eric Sager, read an early version of a portion of this work, and their comments, suggestions, and insights were invaluable.

During the writing process Eric Sager, Peter Baskerville, Louise Clarkson, and Paula Loewen listened to ideas and offered helpful suggestions, despite my utter incapacity for verbal expression. Professor Sager's suggestions for restructuring after the first draft led to a much more readable and straightforward narrative. The flaws and shortcomings, however, are all my own.

Finally, my family and friends provided a great deal of support and entertainment in those 'non-thesis' moments (there have been far too few of them lately), especially the 'ab-fab' two weeks at Kirsten's pad in Vancouver, the '3S' dinners at Grandma's, and the evenings at the Garrick's Head.

Thank you all.

Chapter 1

Introduction

In 1986, legal historian Norma Basch observed, "[f]rom a feminist historical perspective, one central and troubling question is why male legislators gave women legal rights that had been denied them for centuries."[1] Five years later, Paulette Falcon, noting the absence of an organized feminist presence in British Columbia, argued that in passing the 1873 Married Women's Property Act, "meeting a feminist agenda was never part of the legislators' goal."[2] Falcon posited instead that legislators were concerned with establishing the presence of the family -- "the cornerstone of Victorian English-Canadian society" -- in the Province.[3] Beginning, then, from "the premise that male legislators and the judiciary acted in what they perceived to be the interests of the family,"[4] she explained their actions as derived from Victorian ideas of proper social and familial gender roles. Paternalistic Victorian legislators extended property rights to married women out of concern for their welfare, and to accord them a legal status in keeping with an emerging conception of companionate marriage.[5]

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[1] Norma Basch, "The Emerging Legal History of Women in the United States: Property, Divorce, and the Constitution," *Signs: Journal of Women in Culture and Society*, vol. 27, no. 1 (1986), p. 103.

[2] Paulette Yvonne Lynette Falcon, "'if the evil ever occurs' -- The 1873 Married Women's Property Act: Law, Property and Gender Relations in 19th Century British Columbia," University of British Columbia, M.A. thesis, 1991, p. 91.

[3] Ibid., p. 47.

[4] Ibid., pp. 11-12.

[5] Ibid., pp. 54-55.

Falcon was correct in asserting that legislators were intent on establishing the family in the Pacific colonies. But attributing the extension of married women's property rights to a desire to establish gender roles compatible with Victorian social and familial norms illustrates both an incomplete notion of causality and the limitations of examining married women's property law in isolation. This thesis widens the scope of inquiry, examining the evolution of family property law in the period from 1862 to 1873, and contends that legislative alteration of family property rights, and new gender roles, stemmed from a conflict between the emerging capitalist market economy and the priorities of liberal nation builders, which included both a concern for social reproduction and individual -- including women's -- rights.

There was no discrete body of 'family law' in the nineteenth century. Jane Ursel writes that "early laws regulating family relations were dispersed over a wide variety of property laws, estate statutes and illegitimacy and guardianship acts."[6] The focus on family property rights in this thesis stems from their centrality in determining family organization. The mid-Victorian family was patriarchal; it was, in historian Wally Seccombe's words, characterized by various, historically specific, "systems of male headship in family households."[7] Male domination of the family system was maintained

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[6] Jane Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women's Press, 1992), p. 101.

[7] Wally Seccombe, "Patriarchy Stabilized: the Construction of the Male Breadwinner Wage Norm in Nineteenth-Century Britain," *Social History*, vol. 11, no. 1 (January 1986), p. 59. According to Seccombe, "Some combination of the following five prerogatives held by husbands and fathers over their wives and children will generally be found in patriarchal family systems, with varying strengths and modes of assertion: (a) the right to represent the family group and speak in its name in the community; (b) effective

by restricting the access of women and children to subsistence resources,[8] and entrenched in the property rights accorded family members under the common law.[9] Within the family the patriarch held a virtual monopoly of all property rights. Upon marriage, writes legal historian Constance Backhouse,

> all personal property belonging to the wife, including wages, vested absolutely in her husband. Although a married woman did not lose the ownership of her property, she did forfeit her authority to manage the property or receive the rents and profits from it -- all of which flowed directly to her husband during the marriage. Married women were legally incapable of contracting, of suing, or of being sued in their own names . . .[10]

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possession of, entitlement to, and ultimate disposal rights over family property (including income) on a daily and/or intergenerational basis; (c) supervision of the labour of other family members; (d) conjugal rights of sexual access to, and exclusive possession of, one's wife in marriage (hence securing paternity); and (e) custodial rights over children, entailing ultimate authority over their upbringing."

[8] Jane Ursel writes, "The essential condition for the subordination of women within any patriarchal system is *control of women's access to the means of their livelihood*. By making women's access to subsistence contingent on entry into particular reproductive relations or by restricting their ability to be self-sufficient, women's labour, both productive and reproductive, becomes subject to comprehensive control. This control is the essence of patriarchy, its universal function and effect. The means of achieving control . . . varies according to the political and economic structure of the social system in question." Ursel, "The State and the Maintenance of Patriarchy: A Case study of Family, Labour, and Welfare Legislation in Canada," *Family, Economy and State: The Social Reproduction Process Under Capitalism*, ed. James Dickinson and Bob Russell (London: Croom Helm, 1986), p. 153. Emphasis in original.

[9] For the crucial role the law plays in establishing patriarchy, see Gerda Lerner, *The Creation of Patriarchy* (Oxford: Oxford University Press, 1986), pp. 212, 238-239. Michael Grossberg has succinctly summarized this relationship, noting that, "the [patriarchal] family is in many ways a legal creation," resting "on the twin poles of marital unity and filial dependence." Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985), pp. ix, 25.

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

[10] Constance B. Backhouse, "Married Women's Property Law in Nineteenth-Century Canada," *Law and History Review*, vol. 6, no. 2 (Fall 1988), p. 213; cf. Norma Basch, "Invisible Women: The Legal Fiction of Marital Unity in Nineteenth Century America," *Feminist Studies* 5, no. 2 (Summer 1979), p. 347.

Minor children were also exempted from the ability to control property or enter into contractual relations.[11] Since patriarchs held all common-law property rights within the family, and sole testamentary power over the intergenerational disposition of family property, wives and children looked to their husbands and fathers for the material basis of both their present and future existence.[12] Although the Court of Chancery, operating through the rules of equity, was charged in theory with preventing the worst excesses of the common-law arrangement -- by protecting minors from irresponsible parents, and by allowing wives to retain control over some property through equitable trusts, antenuptial

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[11] Grossberg, *Governing the Hearth*, p. 25; Martha Minow, "'Forming Underneath Everything That Grows:' Toward a History of Family Law," *Wisconsin Law Review* (1985), p. 829.

Australian educational historians Pavla Miller and Ian Davey allege that feminist examinations of patriarchy typically account for patriarchal hierarchy in terms of gender, while ignoring "the age dimension of patriarchal relations." Miller and Davey, "Family Formation, Schooling and the Patriarchal State," *Family, School and State in Australian History*, ed. Marjorie R. Theobald and R. J. W. Selleck (Sydney: Allen & Unwin, 1990), p. 6.

Chad Gaffield cogently underlines the necessity of differentiating along both age and gender axes within the family: ". . . studies have shown that age must be considered as an essential distinction within analyses of family history. This distinction goes beyond distinctions of divisions of labour or patterns of school attendance. Just as women can be seen as being 'at odds' with families, historians are coming to grips with the limits of viewing children as contented (or at least passive) members of cohesive family units. Within the patriarchal family, children, youth, and adults did not simply share the same interests or experience family life in undifferentiated ways. Gaffield, "Children, Schooling and Family Reproduction in Nineteenth-Century Ontario," *Canadian Historical Review*, vol. 72, no. 2 (1991), p. 59.

[12] Wives were by this period in a particularly vulnerable position. Their traditional common law right of dower--an entitlement to a life estate in one-third of the freehold lands their husbands had held at any time during marriage, should their husband predecease them -- had been abolished by an act of British Parliament in 1833. After 1833, a husband could bar his wife's dower without her consent; should he fail to do so, her dower right inhered only in those lands the husband possessed at his death. Holcombe, *Wives and Property*, pp. 21-22.

Children were also dependent upon the patriarch's goodwill. After all, with no property rights until they reached the age of majority, they had no means of accumulating their own wealth. Chad Gaffield notes that "[t]he material consequences of not respecting the familial ideology (as articulated by parental wishes) were often sufficient to encourage young adults to plan their lives as continuing members of families rather than as individuals." One would be wise also to note Gaffield's observation that "inheritance appears to have been a process stretched over many years as aging parents began giving property to their children. In this sense, wills capture only the final stage of the transmission between generations." The power of a father to bestow land, capital, or even a trade on his progeny was not so circumscribed as the symbolic finality of

and postnuptial agreements -- equitable proceedings were limited in their actual effect: courts were loathe to interfere with the common-law rights of the father; and for married women, equitable trusts did not apply to earnings. Moreover, the costs of proceeding in equity were prohibitively high; thus, most wives and children were bound rigidly to their patriarch by the common law.[13]

Beginning in the early 1860s and lasting into the early 1870s, a group of liberal reformers in Britain's pacific colonies under the nominal leadership of Amor De Cosmos and John Robson began to alter traditional common-law property relations within the family through statutory legislation.[14] Simultaneously, they began to pass family-oriented debtor protection measures. Few of the members of the 'core' liberal[15] group are

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wills might induce one to believe. The power of the patriarchal bequest was life-long. Gaffield, "Children, Schooling, and Family Reproduction," pp. 182, 184.

[13] Norma Basch, *In the Eyes of the Law: Women, Marriage and Property in Nineteenth-Century New York* (Ithaca: Cornell University Press, 1982), pp. 21, 39-40, 63, 65, 70-84 *passim*, 109-110, 131, 132; Backhouse, "Married Women's Property Law," pp. 214-215; Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women's Press, 1991), p. 201; Falcon, "'if the evil ever occurs,'" p. 18; Holcombe, *Wives and Property*, pp. 44-47.

[14] Statute law -- legal enactments constructed by legislative bodies -- was not always interpreted as authoritative in nineteenth-century courts: the judiciary often perceived it to be the transitory will of modern individuals, to be weighed lightly against the weighty and time-tested doctrines of the common law. Grossberg, *Governing the Hearth*, p. 13.

[15] Since party lines did not develop within the province until 1903, the term liberal is used as an indicator of political views, not party affiliation. However, liberalism (i.e. liberal philosophy) did exert a strong influence on many colonial and provincial politicians in British Columbia, and loose groups surrounded certain prominent individuals, including Amor De Cosmos and John Robson. Non-partisan government did not mean non-ideological government. Prior to the achievement of responsible government popularly elected members in the Vancouver Island House of Assembly and the British Columbian Legislative Council voted independently; those of given ideological persuasions may have supported one another, but information is lacking to make definite conclusions. Political organization in the early provincial period, however, has now been documented. In his analysis of responsible government in the early provincial legislature, Daniel Patrick Marshall reveals that under the 1872 McCreight government three separate groups of roughly equal size had appeared: one led by McCreight, one by Robson, and one by De Cosmos. When De Cosmos took power in 1873, these alignments shifted: De Cosmos picked his cabinet from among all three groups; Marshall's analysis of voting patterns shows that out of an assembly of twenty-three De Cosmos gained eleven solid supporters. Seven additional members, including McCreight, were loosely

particularly well remembered for their commitment to familial or social reform. Rather, liberal reformers including De Cosmos, Robson, Robert Beaven, Charles Semlin, Arthur Bunster and Cornelius Booth are most widely studied, if at all, with regard to their economic and political concerns: gaining responsible government, confederation, the transcontinental railroad, 'better terms,' and a favourable tariff. In the general historiography, these men are presented as 'nation builders.' Their long-term commitment to protecting families, modifying the property rights of married women, and reorganizing inheritance patterns is nowhere to be found in the general histories of the period. But these concerns should be integrated into the extant historiography, because traditional accounts of the era are not wrong, although they are incomplete: the early leaders of British Columbia were preoccupied with nation building and liberalism; their concerns with the family developed within that context.

In contextualizing historical trends one generally turns to the extant historiography. But in Canada, there are no comprehensive studies of family property law, although some studies of married women's property law, dower, and inheritance exist.[16] There have been no sweeping attempts to overview and analyze 'family law' of

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aligned with him. No unity existed among those in opposition. See Marshall, "Mapping the Political World of British Columbia, 1871-1883," University of Victoria, M.A. thesis, 1989, pp. 27, 30.

[16] On married women's property laws see Backhouse, "Married Women's Property Law"; Falcon, "if the evil ever occurs"; Philip Girard and Rebecca Veinott, "Married Women's Property Law in Nova Scotia, 1850-1910," *Separate Spheres: Women's Worlds in the 19th Century Maritimes*, ed. Janet Guildford and Suzanne Morton (Halifax: Acadiensis, 1994), pp. 67-91.

Dower is explored in Catherine Cavanaugh, "The Limitations of the Pioneering Partnership: The Alberta Campaign for Homestead Dower, 1909-25," *Canadian Historical Review*, vol. 74, no. 2 (1993), pp. 198-225; Lilias M. Toward, *Dower and Curtesy: A Study Paper* (Halifax: Nova Scotia Law Reform Advisory Commission, 1973); Manitoba Law Reform Commission, *Report on an Examination of 'The Dower Act'* (Winnipeg: The Commission, 1984).

the caliber of Michael Grossberg's *Governing the Hearth: Law and the Family in Nineteenth-Century America*. However, one would be wise to note that Grossberg's work is spotty with regard to the classes of subjects it treats. Steven Mintz's article-length synthesis, "Regulating the American Family," provides more comprehensive, if less detailed coverage.[17] The absence of a national attempt at synthesis in Canada (likely futile given the paucity of sources) is partially compensated for by Jane Ursel's highly theoretical comparative study of Manitoba and Ontario, *Private Lives, Public Policy: 100 years of State Intervention in the Family*, which provides a useful overview of the state-family-law interaction; unfortunately, while Ursel's theoretical insights are invaluable to this thesis, the immediate utility of her study's historical content is limited by its geographical and temporal (1884-1968) parameters. This temporal limitation seems not to be particular to Ursel. Most overview studies of Canadian social reform movements, also concerned with the societal implications of family structure and function, begin late in the century -- a confusing problem, since it is apparent to anyone studying the 1850s and 1860s that the roots of social reform began earlier than 1870 or 1880.[18] The impact

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For analyses of inheritance see Gaffield, "Children, Schooling, and Family Reproduction"; Gerard Bouchard, "Family Reproduction in New Rural Areas: Outline of a North American Model," *Canadian Historical Review*, vol. 75, no. 4 (1994), pp. 475-510.

[17] Steven Mintz, "Regulating the American Family," *Journal of Family History*, vol. 14, no. 4 (1989), pp. 387-408.

[18] See Ramsay Cook, *The Regenerators: Social Criticism in Late Victorian English Canada* (Toronto: University of Toronto Press, 1985); Neil Sutherland, *Children in English-Canadian Society: Framing the Twentieth-Century Consensus* (Toronto: University of Toronto Press, 1976); Mariana Valverde, *The Age of Light, Soap and Water: Moral Reform in English Canada, 1885-1925* (Toronto: McClelland and Stewart, 1991).

of state policy and social reform movements on the family in the pre-confederation period deserves more attention.

The lack of specific syntheses relating to state regulation of the family throughout Canada does not leave the historian in a complete historiographical wilderness. Three fields of study have informed this thesis: American legal histories of the family; studies of social reform movements; and feminist interpretations of changes in nineteenth-century family law. American overviews of family regulation suggest a solid connection between political ideology and family law, identifying shifts in the legal regulation of the family dependent on the form of political rule. Steven Mintz writes that the religiously-influenced colonies in New England developed a

> system of family law that reflected certain broad assumptions about how families were to be ordered and authority distributed, the nature of the marital bond, and the proper roles of married women and children. This body of law embodied and enforced basic religious and ideological beliefs: the hierarchical nature of familial relationships, marriage as a civil contract, an emphasis on family unity and interdependence, wifely submission to her husband's will, and children's dependent and subordinate status.[19]

This conception of the family was substantially altered by the American Revolution. According to Michael Grossberg,

> Under the sway of republican theory and culture, the home and the polity displayed some striking similarities. These included a deep aversion to unaccountable authority and unchecked governmental activism, the equation of property rights with independence, a commitment to self-government, a belief that individual virtue could prevent the abuse of power, and a tendency to posit human relations in contractual terms that

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[19] Mintz, "Regulating the American Family, pp. 388-389.

> highlighted voluntary consent, reciprocal duties, and the possibility of dissolution.[20]

These observations are crucial to understanding the ideological element of government intervention in the family; however, American social and political motivations are not specifically germane to our subject.

Studies of nineteenth-century social reform movements provide a more applicable rationale for familial reform, based on broad phenomena common to most Anglo-American areas: the development of capitalism and the individualistic liberal society.[21] According to Christopher Lasch, the advent of the liberal capitalist economy and its attendant social relations raised grave concerns over society's future. In fact, Lasch believes the modern definition of society first emerged during the tumultuous events of the early nineteenth century:

> the enormous acceleration of commercial development, the beginnings of industrialism, and the articulation of an economic theory that justified these developments in the name of progress contributed to the discovery of the social. Society became visible as such only when it began to lose its familiar shape and to change at a rate hitherto inconceivable.[22]

Drawing on the work of Raymond Williams and E. P. Thompson, Lasch notes that an emerging awareness of learned social behaviour -- 'culture' -- served "to call attention to the organic links between the organized mental life of a society and its folkways, habits,

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[20] Grossberg, *Governing the Hearth*, pp. 6-7.

[21] Grossberg also accounts for these influences ("the pressures of democratization and the marketplace values unleashed by the Revolution's egalitarian and laissez faire ideology") in his discussion of the motivational factors underlying the emergence of the republican family. *Governing the Hearth*, p. 7.

[22] Christopher Lasch, *The True and Only Heaven: Progress and its Critics* (New York: W. W. Norton, 1991), p. 134.

and patterns of work and play."[23] With knowledge of these socio-economic connections, many began to worry that the capitalist economy was changing society in new, perhaps irreversible, and certainly unpalatable ways. To halt this trend, they turned to the family.[24] For instance, Leonore Davidoff and Catherine Hall argue in *Family Fortunes* that early nineteenth century evangelical reformers developed separate spheres ideology in the hope that "separating women and children rigorously from a public sphere tainted by greed and profit would reform the debauched aristocracy, tame the labouring poor, and guarantee the moral standard of the bourgeoisie."[25] If the family could be separated from the rampant acquisitive individualism of liberal capitalism, then highly valued social obligations, the moral bonds that evangelicals believed united a Christian society, might be maintained. Of course, evangelicals were not alone in their anxiety over the rapid changes capitalism inflicted upon family and society; secular groups were also concerned with the social formation and involved themselves in attempts to protect the family as a social institution and mould it according to their own agendas.

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[23] Ibid., p. 136.

[24] Nineteenth and early twentieth century social reformers looked to the family as a means of reforming and controlling industrial society in central Canada: According to T. R. Morrison, the "family existed in a subcontractual relationship to industrial society. That is, the larger society contracted out to the family certain key functions considered necessary for the maintenance of the existing order." Neil Sutherland, in a study of children in English Canada, concurred, averring that "concerned Canadians" in the later nineteenth century "did not view the family as a sentimental end in itself, but as a means; it was the social agency that had the prime responsibility for ensuring that the whole of the next generation represented the best that Canadian society could produce." T. R. Morrison, "'Their Proper Sphere' Feminism, the Family, and Child-Centered Social Reform in Ontario, 1875-1900," *Ontario History*, vol. 68, no. 2 (June 1976), p. 72; Sutherland, *Children in English-Canadian Society*, p. 20.

[25] This concise summation of Davidoff and Hall's argument is borrowed from Miller and Davey, "Family Formation," p. 13.

Among these groups were the same liberal governments who promoted individualism and capitalism, and their family protection and regulation programmes were influenced by their political ideologies, as the work of Grossberg and Mintz suggests. For an analytical framework sensitive to the political agendas behind legal regulation of the family, this study turns to feminist historians and sociologists, devoted to studying the changing arrangement of rights and responsibilities within the nineteenth-century family. The application of feminist criticism to the historiography has resulted in the proposal of two theories explaining the political aims of family regulation, and offers an interesting dialectic for further research. The first of these broad and conflicting interpretive outlines claims that liberal governments valued individualism above all else, priorized and expanded individual rights, and thereby weakened the base of patriarchal power; the second claims that patriarchy was not weakened, but transformed and appropriated by a state more interested in preserving the family's function as a nation-building institution than maintaining individual patriarchal power.

In the first scenario, liberal legislators interested in individual civil rights worked alongside feminists and slowly succeeded in removing the legal constraints women laboured under, granting them property, contractual, and finally political rights. According to American legal historian Martha Minow,

> [t]he traditional view of the legal history of family relationships described a movement from an era of patriarchal power reinforced by the state, consigning women and children to a private sphere removed from political and economic power, to an era of individual autonomy where each individual could claim and enforce legal rights before the state.[26]

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[26] Minow, "'Forming Underneath Everything That Grows,'" p. 833.

Both Minow and Mary Lyndon Shanley label certain variants of this perceived progression towards individual rights as "Whiggish," because, as Shanley indicates,

> [f]rom the traditional perspective of many legal historians, recognition of individual rights came slowly but inevitably. In this view, the achievement of women's rights has been the result of a gradual but inexorable application of liberal principles of individual freedom and welfare to an ever-broadening spectrum of the population.[27]

However, portraying the legal changes of the era as a progression towards individual rights need not *necessarily* be 'whiggish.' It can and has been portrayed as a struggle, the outcome of which was not inevitable. Often historians of this school nuance their interpretations with evidence that married women's statutes were also part of broader drives to consolidate common law and equity, regularize credit relations, and provide debtor-relief for families in volatile economies. Furthermore, they point to the actions of the judiciary, which effectively stifled the (historically inferred) intentions of the legislation, forcing legislators to draft amendments or completely redraw the legislation.[28]

The second narrative sequence posits that the statutory changes affecting the family in the nineteenth century only altered patriarchy, shifting the locus of patriarchal power to the state. With regard to the changing legal position of children, Martha Minow writes:

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

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

> The story of children's legal status . . . contrasts traditional rules imposing legal dependency on children with modern developments granting children individual legal rights. From the vantage point that treats individual independence as the important normative reference point, children -- like women -- have had to struggle with a legacy of legally imposed dependency . . . . These developments, however, did not simply mark progress on the road toward individual legal rights; they equally represented the initiation of a direct relationship between children and the state, unfiltered by parental involvement but maintaining children's special status as people deserving protection from others and themselves.[29]

Whereas Minow sees the shift from patriarchal to state protection / dependence only in terms of children, sociologist Jane Ursel believes that the same shift describes changes in the legal and social status of women in the nineteenth and twentieth centuries. Ursel documents a shift in the center of patriarchal power, from individual family heads to the state, during the transition from decentralized modes of production to a capitalist wage-labour economy. The individual patriarch's loss of control over subsistence resources, and employers' indiscriminate use of labour and neglect of reproductive priorities (procreation, socialization, and daily maintenance) in favour of maximizing surplus extraction, were destroying the traditional family structure. Therefore, the state, to protect its interest in the material and biological reproduction of the population, was forced to 'legislate patriarchy' to maintain reproductive relations and sexual / generational interdependence (and therein, social order).[30]

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[29] Minow, "'Forming Underneath Everything That Grows,'" p. 832.

[30] Ursel, "The State and the Maintenance of Patriarchy," pp. 150, 157-158, 188; Ursel, *Private Lives, Public Policy*, pp. 20-22, 38, 86-87, 122-124. In Ursel's time period 'legislating patriarchy' was accomplished through labour legislation which discriminated on the basis of age and gender, newly expanded legal rights for wives and mothers contingent upon adherence to adultery clauses, and welfare legislation providing state care for neglected future producers (children).

Studies of the changing family property relations in the nineteenth century have often paid little heed to the political context of those changes.[31] This thesis situates changes in family property relations within the context of the social, economic and political climate in the Pacific colonies. The evidence gathered for this purpose from the journals of the legislative assembly, newspaper accounts of legislative debates, examination of the statutes, and limited unpublished primary sources, suggests that both previous schools of interpretation have merit. Two powerful and antithetical movements influenced the course of family property law reform: nation building and liberalism. First, concern to protect the family developed alongside concern to protect demographic and ideological nation-building priorities from the worst excesses of the liberal capitalist market economy. And second, liberals' respect for individual rights led them to collaborate with feminists, resulting in increased political and property rights for women, but with a substantial caveat: the new rights were tempered by and formulated according to women's familial roles.

The following chapters outline the development of family property law on Vancouver Island from 1862 to 1866 and in the United Colony of British Columbia from 1867 to 1873. The temporal and geographical parameters were chosen because they encompass the period of influence of the prime mover behind much of the legislation, Amor De Cosmos, ending with the culmination of his supporters' programme in the wave

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[31] Some notable exceptions are Basch, *In the Eyes of the Law*; Girard and Veinott, "Married Women's Property Law"; and Paul Goodman, "The Emergence of Homestead Exemption in the United States: Accomodation and Resistance to the Market Revolution, 1840-1880," *Journal of American History*, vol. 80, no. 2 (September 1993), pp. 470-498.

of family law reform passed in 1873 under his premiership. Following up some of the trends outlined required examining legislation passed as late as 1879.

This thesis is structured to highlight the interaction of liberalism, nation-building, and the 'Woman's Rights' movement, and their impact on family property legislation, patriarchal family structures, and the social formation. This chapter introduces the theoretical basis -- and bias -- of the inquiry, while chapter two provides a background survey of the fundamental antagonisms within liberalism, pitting social egalitarianism and nation-building against individualistic acquisitiveness and capitalism in the Pacific colonies and throughout the Anglo-American world, with specific reference to the ameliorative role of family protection and regulation. Chapter three examines the development of family protection legislation in the 1860s (especially homestead exemption), stressing the family's role in nation-building and illustrating family protection's place within a legislative 'package' designed to promote an independent producer class structure. Chapter four continues the inquiry into liberals' concern with class. Beginning with the 1860s and moving into the 1870s, the chapter looks at inheritance and legitimacy statutes, outlining legislators' long-term concern to establish equal opportunity, or alternatively, to dismantle arbitrary privilege, in society. Chapter five delves back into family protection, and emphasizes the functional, legal, and ideological continuities connecting homestead legislation and the 1873 Married Women's Property Act. The chapter examines the debates surrounding the act, contending that the influence of the 'Woman's Rights' movement acted in concert with the state's interest in reproduction to redefine married women's social role(s). Chapter

six continues this inquiry, examining the extent of feminist sympathies in the 1873 Legislature, and the tendency of socially-defined roles to circumscribe their impact. Finally, in chapter seven, the various strands of influence on family legislation, and their limitations, are tied together.

Chapter 2

Social Progress vs. Economic Prosperity: Liberalism, Nation-Building, and the Capitalist Economy

Nation-building and liberalist priorities provide a backdrop informing family property legislation in the 1860s and 1870s. The era's leading and best-studied liberals, Amor De Cosmos and John Robson, though rarely united in their cause, were committed to the liberal ideals of individualism, equality, and progressive social and economic expansion of the colony / province. According to Robert McDonald and Keith Ralston, De Cosmos "celebrated . . . 'men of action,' moral and material progress, growing population, and expanding trade."[32] He was Robert Kelley's 'typical' Victorian, taking "a simple delight in bigness and quantity--more people, longer railroads, more coal."[33] Along with John Robson, De Cosmos promoted 'white' immigration, the development of transportation infrastructure, free enterprise, and a tariff to protect local infant industries.[34] They shared the liberal assumption that material progress -- an ever-expanding production and consumption of material goods -- was inextricably linked to demographic, social, moral and political progress.

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[32] Robert A. J. McDonald and H. Keith Ralston, "Amor De Cosmos," *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1990), vol. 12, p. 238.

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

[34] Patricia E. Roy, "John Robson," *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1990), vol. 12, pp. 916-917; McDonald and Ralston, "Amor De Cosmos," pp. 238-239; Margaret Ross, "Amor De Cosmos, a British Columbia Reformer," University of British Columbia, M.A. thesis, 1931, p. 52; Ivan Earl Matthew Antak, "John Robson: British Columbian," University of Victoria, M.A. thesis, 1972, pp. iii, 86.

For nineteenth-century liberals the apogee of all forms of progress was the nation-state. Eric Hobsbawm writes that for liberals, "the development of nations was unquestionably a phase in human evolution or progress from the small group to the larger, from family to tribe to region, to nation and, in the last instance, to the unified world of the future."[35] Nineteenth-century liberal nationalism's progressive, evolutionary, and competitive orientation unavoidably spawned 'nation-builders' like Robson and De Cosmos.[36] For, if social, economic, and political progress demanded increasingly large societies, small, uncompetitive societies and nations could not be justified. As sometime reform politician, judge, and political analyst Robert Sullivan warned Canadians in 1848:

> no country, no community, can with safety be stationary. To improve with the improving, to advance with the advancing, to keep pace with the foremost, or to sink into contempt and poverty, or what is worse, into slavery and dependence, seems to be the fate of nations.[37]

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[35] Eric J. Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality*, 2nd ed. (New York: Cambridge University Press, 1992), p. 38.

[36] In this context, the reader would be well-advised not to assume that nationalist aspersions were motivated by Darwinism. Steven Shapin and Barry Barnes suggest in "Darwin and Social Darwinism: Purity and History," *Natural Order: Historical Studies of Scientific Culture*, ed. Barry Barnes and Steven Shapin (London, 1979), that Darwin's theories were a manifestation of a wider cultural phenomenon which sought to account for natural phenomena of sociological, historical, and scientific interest "in nonanthropomorphic, secular, uniform, nonteleological, and materialist terms." The incipient competitive and progressive evolutionism of this strain of thought had a pervasive influence in Canada, perhaps best documented in relation to nationalism in Mariana Valverde's study of social, racial, and national purity, *The Age of Light, Soap, and Water.*

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

The society which failed to advance to nationhood was doomed either to subjugation by or assimilation into stronger, more vibrant, progressive societies; for the British Colonies in the Pacific Northwest, stagnancy would likely lead to incorporation into the United States.[38] To remain 'independent' adjuncts of the British Empire, the colonies had to be enlarged; they had to attract population, build infrastructure, and promote economic success.

Robson and De Cosmos believed that national wealth, growth and development would be best achieved in a free market economy. Both were opposed to the Hudson's Bay Company's monopolization of the economy and government offices. As classical or 'laissez-faire' liberals, they believed that each person's actions are motivated by rational self-interest and directed toward the pursuit of personal gain. Thus, by allowing individuals to realize their self-interest, the colony's total economic production would increase. The law was the government's primary means to create the conditions conducive to individualistic economic enterprise. In *Making Law, Order, and Authority in British Columbia, 1821-1871*, Tina Loo writes

> European British Columbians were concerned first and foremost with their economic futures -- that, after all was their raison d'être, as well as the colony's -- and with the colony's economic development, and they saw the law as a means to secure both. Their notions of the law's role in doing so and, by extension, the role of government . . . were shaped by the discourse of laissez-faire, which was ascendant in Britain at the colony's creation in 1858.[39]

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[38] For a detailed description of nationalism in this period see Hobsbawm, *Nations and Nationalism*, pp. 14-45 *passim*, esp. pp. 38-41.

[39] Tina Loo, *Making Law, Order, and Authority in British Columbia, 1821-1871* (Toronto: University of Toronto Press, 1994), p. 3.

By making the rules of exchange clear, predictable, and rational, and ensuring the security of property, legal regulation minimized risk to the individuals involved and promoted economic activity.[40] Thus Robson, in his capacity as a newspaper editor, was prominent among the large numbers of goldrush colonists, engaged in an individualistic quest for spoils, who pushed the colonial government and judiciary to establish a liberal legal system.[41]

If individualistic economic expansion was what British Columbians wanted when they demanded a liberal legal system, it was also what they got. Almost from the outset of the goldrush, rapid industrial growth and capitalist productive relations prevailed in British Columbia and on Vancouver Island. In the eastern colonies this had not been the case. There, following the fur trade, colonial economies went through distinct phases of economic development: agriculture, small-scale artisanal production, water-powered mills, and beginning in the 1850s and 1860s, factory production. But, according to John Lutz,

> British Columbia skipped these stages and large-scale factory production arrived with settlement. From the start, the manufacturing industry developed as a composite of small-scale, traditional workshops and large modern factories representing the newest forms of industrial organization.[42]

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[40] Ibid., pp. 4, 9-10, 57; See also E. L. Jones, *The European Miracle: Environments, Economies and Geopolitics in the History of Europe and Asia*, 2nd ed. (New York: Cambridge University Press, 1987), p. 85.

[41] Loo, *Making Law, Order, and Authority*, pp. 56-57, 101-103.

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

The early economic history of the Pacific colonies is usually assumed to have involved only staple extraction. But manufacturing and staple extraction developed side by side. Since the Pacific colonies lacked efficient and inexpensive infrastructural connection to manufacturing centres in the United States, central Canada, or Europe, they were forced to develop a complex, mature economy in a short period of time.[43]

Gold was the colonies' major staple export from 1858 until the 1880s. Other staple exports including canned salmon, lumber, seal pelts, and coal also developed, but more slowly. At first, supplies for goldminers were imported from San Francisco. But with little return freight (gold, the major export, was low-bulk), most shipments of supplies had to bear the costs of an empty return trip; so transport costs were high. High enough, in fact, to provide 'natural protection' from outside competitors to manufacturers producing consumer goods and industrial supplies locally. Sawmills, gristmills, breweries, bakeries, blacksmiths, clothiers, and other primary and secondary industries developed quickly. By 1860, Victoria, the regional metropole, had developed a broad array of industry, and was on a per capita basis as industrialized as Hamilton, Canada West. As new resource extraction industries developed, local manufacturing developed to serve them too, through backward, forward, and final demand linkages: local manufacturers equipped resource extraction industries, produced finished goods from their products, and satisfied workers' consumer demands.[44]

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

[44] Ibid., pp. 45, 47, 50-53, 57-58, 60, 67.

The manufacturing concerns that developed were large and highly capitalized. "Since 1860," writes John Lutz, "manufacturing has been 'big business' in British Columbia."[45] In relation to secondary industry elsewhere in Canada, factories and craftshops in British Columbia's manufacturing sector were larger on average in terms of capital investment and number of employees, and on par in terms of output. When the large manufacturing sector is combined with the presence of resource extractive industries and the relative absence of agriculture, it becomes evident that British Columbians were much more likely to be involved in wage or piece-work than their counterparts in the eastern colonies.[46] By the mid-1860s, as placer deposits became rare, even gold mining required large capital outlays. The 'easy' gold was gone, and along with it went the age of the independent free miner. Deeper subsurface deposits required shafts and cribbing, and access to river-bottom placer gold meant constructing wing-dams. Most could not afford the cost, and ended up labouring for the few who could.[47]

Such was the economy that laissez-faire liberalism produced. And although liberalism's theoretical economic equality of opportunity appealed to most Pacific northwestern liberals, the social effects of capitalistic acquisitive individualism did not. They, like republicans, clear grits, and British radical Liberals, idealized property-based democracy and economic equality for yeomen smallholders, artisans, tradesmen,

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[45] Ibid., p. 154.

[46] Ibid., p. 76.

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

merchants, and entrepreneurial businessmen.[48] The prospect of industrial monopolies, widespread wage labour, and a large landless proletariat was abhorrent to them. Capitalist productive relations divided tasks, stripping workers of their individual competency, and capitalist ownership of the means of production divested them of their economic independence: "the general uneasiness about the new economic order" among liberals and republicans, to borrow a phrase from Christopher Lasch, "found its most striking expression in the nearly universal condemnation of wage labor."[49]

Liberal and republican theorists and political leaders from Thomas Jefferson to John Bright advocated the use of legislation to stimulate the growth of a 'hardy' and 'independent' class of artisans and yeomen,[50] a class considered to possess a social and intellectual autonomy absent in the wage-earning proletariat, and essential to establishing an equalitarian, democratic society. According to Paul Goodman, yeomen and master mechanics were idealized as the social base of the republican political order in the United States. Christopher Lasch writes that "Americans took it as axiomatic, a cherished article of political faith, that freedom had to rest on the broad distribution of property

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

[49] Lasch, *The True and Only* Heaven, p. 203.

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

ownership."[51] Many English liberals, influenced by republican traditions, shared this belief: in England, it was widely held that the United States and Switzerland were 'structurally democratic' because of their widespread property ownership.[52] But the idealization of the independent producing property-owner went deeper than a concern for material independence. It was also rooted in an appraisal of character. Eugenio F. Biagini writes that John Stuart Mill "was committed to peasant proprietorship on moral and political grounds." Mill

> praised the homestead farmer as the model citizen . . . . While the factory proletarian was trained to work as part of a machine, the farmer was employed from childhood in an activity fostering independent thinking and creativity, and was free from the anguish and crushing misery that affected the factory worker. [53]

The history of generalized opposition to the division or specialization of labour, based on its detrimental effect on individual character formation, pre-dates the industrial revolution among republicans. Republicans despised professional armies and politicians, which they believed "undermined self-sufficiency and made men passive and dependent."[54] The complete, competent citizen was the well-rounded citizen; society had to be organized to promote overall individual competency: "specialization," republicans

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[51] Goodman, "Emergence of Homestead Exemption," pp. 473-474; Lasch, *The True and Only Heaven*, p. 204.

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

[53] Ibid., p. 86.

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

believed, "would undermine the social foundations of moral independence."[55] For liberals and republicans, only when the mass of people were economically, socially, and intellectually independent, could a government supported by and responsible to the populace, and regulating all equally rather than favouring the privileged few, be instituted. For the people to bear the burden of self-government meant being able to support themselves and defend their interests.

In the face of emerging capitalist productive relations, British Columbian liberals moved to establish the preconditions necessary to develop an independent producer economy and electorate.[56] Economically, they turned to the idealized agrarian past. Both Robson and De Cosmos were convinced that the foundation of colonial prosperity and democracy lay with settlement of the land and a stable agrarian economic sector. For Robson this meant discouraging speculation, and reserving arable land to the government to provide "a free homestead to every bona fide settler." De Cosmos, foreseeing "that British Columbia[n] settlement must build on a more diverse base," also advocated an economy of small-scale industrial enterprise. To this end he was decidedly anti-capitalist,

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[55] Ibid., p. 195.

[56] Opposition to wage labour in British Columbia often found a misplaced outlet in opposition to Chinese immigration. European miners and politicians suggested that defects in the Chinese racial 'character' led them to accept lower living standards and subservient social positions (as 'wage slaves') and undercut European standards. Many of the same politicians prominent in the early anti-Chinese movement, including De Cosmos, Robson, Arthur Bunster, and Robert Beaven, were also vigorous supporters of policies designed to prevent proletarianization by securing property to families. See Roy, *A White Man's Province*, pp. 3-85 *passim*, especially pp. 6, 8, 10, 42-44, 48-49, 68, 71, 75. For an examination of independent craftsmens' association of wage labour, and later as they themselves became proletarianized, low wages, with racial groups see Lawrence Glickman, "Inventing the 'American Standard of Living': Gender, Race and Working-Class Identity, 1880-1925," *Labor History*, vol. 34 (Spring-Summer 1993), pp. 221-235.

suggesting that statesmen were duty-bound to encourage the development of artisans' cooperatives to compete with capitalists.[57]

Politically, both lobbied intensively for the implementation of responsible government. Given their preference for an independent commodity producing electorate, neither seems to have advanced the cause of universal suffrage. In the 1860s, De Cosmos promoted a small property qualification to restrict the vote to industrious, socially stable individuals with a stake in the community's future. Nonetheless, all were to have a chance to improve themselves morally and economically, and to rise in the social scale. Liberals envisioned a meritocratic colony, and subscribed to Samuel Smiles' 'self-help' doctrine, contending that "it was possible for all men to improve their condition, through their own efforts and personal conduct."[58]

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

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

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

family life to promote population growth. Bachelors and married men who separated from their homes and families to earn a living in the colonies did not make for a stable, enduring population. Single men often left the Pacific colonies after a few years' sojourn. Even when they stayed, men alone did not make for a reproducing populace. And many were alone. Throughout the nineteenth century the non-aboriginal male to female ratio was 3:1. In some areas of the interior it was 10:1.[59] The Anglican Church promoted the immigration of two shiploads of female immigrants in 1862-63, but to little practical effect. By the late 1860s, the sex imbalance still concerned Lieutenant-Governor Frederick Seymour, who appointed John Robson to head a committee to devise "a system of female immigration."[60] Such efforts were commonplace in colonial settings and had a specific agenda: Micheline Dumont writes that in colonial New France, the immigration of the 'filles du roi' was encouraged because

> Women were a stabilizing element in a social unit made up primarily of bachelors. Where there were women there would eventually be houses and children -- in other words, a future; a reason for building towns and

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[59] Jean Barman, *The West Beyond the West: A History of British Columbia* (Toronto: University of Toronto Press, 1991), p. 100; Adele Perry, "'Oh I'm Just Sick of the Faces of Men': Gender Imbalance, Race, Sexuality, and Sociability in Nineteenth-Century British Columbia," *BC Studies*, nos. 105-106 (Spring / Summer 1995), pp. 36-37.

[60] Barman, *The West Beyond the West*, p. 90; Antak, "John Robson: British Columbian," p. 69. The importation of 'white' Anglo-Saxon women is indicative of the close connection in the nineteenth-century psyche between 'race' and 'nation'. Eric Hobsbawm writes that nineteenth-century nationalists used "both as virtual synonyms, generalizing equally wildly about 'racial'/'national' character, as was then the fashion." In British Columbia, Adele Perry contends that white women were considered crucial to nation-building because "they would raise the moral tone of the white, male-dominated society, quell the rapid development of a mixed-blood community, and ensure that British law, mores, and economic development flourished." However, antipathy towards mixed-blood marriages may not have been hegemonic. Discussion of the Legitimacy Act (below, Chapter 4) seems to indicate that opinion regarding inter-racial marriages was mixed, and dependent on historically specific contexts. See Hobsbawm, *Nations and Nationalism*, p. 108; Perry, "Sick of the Faces of Men," p. 34.

> schools and writing laws; a motivation for clearing land, for growing crops and for establishing farms.[61]

The reproducing family and a permanent and progressing society were seen as interdependent. Thus, promoters of the family on Vancouver Island and in British Columbia shared the goals of any nation-building colonial administration: persuading those who made fortunes in the colony to stay and marry; and attracting single women and entire families to immigrate. And while these goals appealed to specific aspects of the nationalist liberal agenda, most notably the ideology of progress -- families meant population growth and the retention of capital within the colony, to be reinvested in the economy as patriarchs tried to secure a future for their progeny -- they were not unique to liberals.

Neither was the idea of using the family to stabilize society. Edward Gibbon Wakefield, designer of the conservative, paternalistic and hierarchical system of colonization implemented on Vancouver Island under Hudson's Bay Company rule,[62] wrote that women were "moral" agents in a new society, citing "[a]ll the evils which in colonization have so often sprung from a disproportion of the sexes."[63] But the stabilization of society assumed a new urgency in the age of liberal capitalism, because acquisitive individualism seemed to pose novel dangers to the social structure. Many

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

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

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

liberals believed that laissez-faire individualism threatened the existence of social and familial ties. If everyone was pursuing his (or her) own rational self-interest, what would prevent competition from escalating to the point where self-gratifying desire and instinctual self-preservation over-ruled altruism, morality, and social cooperation? There were few answers. Certainly, separate spheres ideology and the liberal preoccupation with public education presented means of protecting and influencing the character of future generations in their formative years, and instilling the proper virtues in them. But what of the multitudes of single men in the colony, immersed in the 'public' world of competitive business? Liberals hoped that by encouraging family life they could tame otherwise unregulated desire. The "obligation to support a wife and children," writes Christopher Lasch, "would discipline possessive individualism and transform the potential gambler, speculator, dandy, or confidence man into a conscientious provider."[64] Acquisitive individualism would be turned toward social reproduction, and in the process, eradicate the evils of the bachelor populace.

The family liberals envisioned was also manifestly inspired by the producer ideology: it was to be economically and politically independent. To prevent capitalism's volatile and impersonal productive relations from undermining reproductive priorities, and to inhibit the process of proletarianization, legislators attempted to provide families with a stable property base. They introduced legislation providing means to exempt a portion of the independent producer's real and personal property from debt liability to

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

protect him and his family from the ravages of debt and destitution. Exemption legislation, however, was not solely a reaction *against* the free market economy. It was also intended to *promote* economic activity by encouraging individual patriarchs to participate in the economy by reducing the personal and familial risks involved. Moreover, liberal legislators also attempted to encourage the growth of the independent producing class over the long term. They altered the laws of succession to encourage social equality by eliminating the tendency of inheritance laws to reproduce class privilege across generations. By abolishing primogeniture, and by allowing illegitimate children to inherit, liberals hoped to put more of the population on an equal footing with regard to property. As will become evident, liberal legislation was inspired, sometimes quite overtly, by the more egalitarian and individualistic aspects of liberal social ideology.

The new social role of the family (bulwark against capitalism) effected significant changes in its internal organization and power structures. The ideological segregation of the domestic and market spheres, and the increased emphasis placed upon the family's function of morally and demographically reproducing the population, led to increased social responsibilities for married women. Recognition of these new responsibilities resulted in new legal rights, and a corresponding weakening of patriarchy. At the same time, patriarchy was being attacked on a second front. The primary premises of liberalism -- individualism and equality -- were ideals intellectually compatible with the emerging and anti-patriarchal 'Woman's Rights' movement. As Lee Holcombe has written, in demanding reform of their legal position, "feminists of the nineteenth century

were fortunately not battling adverse elements. Rather, they were identifying themselves with some of the most important intellectual themes of the period." Liberals identified with the 'Woman's Rights' cause because both movements assigned supremacy to "life, liberty, and property -- and they condemned all social institutions that infringed upon those [individual] rights."[65] Thus, some liberals began to question the legitimacy of traditional family structures. Others, however, steadfastly maintained that the domestic and public spheres were suited to different varieties of social organization, and based this position on an assumption of masculine supremacy: for these liberals, the public sphere was fraternal; the private sphere was undoubtedly patriarchal. Their differing conceptions of the scope and applicability of egalitarian individualism caused deep ideological rifts among liberals; and the conflicting interplay of the ideologies informing public and private spheres, pitting patriarchal domination against egalitarian individualism, are apparent in the ensuing legislation. Women's political and property rights were at once expanded, and yet the resistance of social conservatives meant that these new rights remained constrained by women's social role, as defined by their marital status. In the process, the family was reinforced *and* began to feel the initial effects of the liberal individualism which would ultimately render it a much looser form of social organization.

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

Chapter 3

The Twin Goals of Family Protection:

Social Reproduction and Producerism, 1862-1867

In 1862, the Pacific colonies' economies were generally good, but volatile. Merchants' and manufacturers' fortunes fluctuated with the mining economy in the mainland colony as they became caught up in the web of commercial credit necessary to get supplies quickly into the interior. When the diggings failed, or supplies were lost or damaged in transport, businessmen and their creditors suffered serious repercussions, as did miners. The nature of the early mining industry meant that the population was highly transient. Those who came to reap the harvests of the Fraser and Cariboo gold rushes moved on just as quickly when the prospects faltered, as they often did. Miners who failed to earn a decent living, much less a fortune, moved to new areas or left the colonies. And those in debt, both merchants and miners, scrambled across Puget Sound to avoid imprisonment -- a notorious practice known as "skedaddling." In the wake of this economic instability, writes Constance Backhouse, Vancouver Island was undoubtedly left "with a large number of abandoned wives and children."[66]

The common law doctrine of marital unity, as has been previously illustrated, granted a husband complete control of his wife's property and earnings upon marriage. This state of property relations caused enormous difficulties for a woman whose husband

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

mismanaged or misspent the family earnings; or who abandoned her, leaving her in a state of legal limbo, since her property rights could only be restored by the termination of the marriage. And access to divorce was severely restricted.[67] Therefore, to remedy the plight of the abandoned wife, ameliorate the conditions of broken families, and reduce the costs of public charity, David Babington Ring introduced "An Act to protect the Property of a Wife deserted by her Husband" in the Vancouver Island Legislature in 1862.

The initial clauses of Ring's bill protected a deserted wife's property and earnings from seizure by her husband or his creditors.[68] When the House of Assembly examined the bill, George Hunter Cary objected, protesting that a husband and wife might feign a desertion in order to protect property from creditors. To remedy this possibility, he moved an amendment that the state should examine the circumstances of a desertion before issuing a 'protection-order'; that is, a deserted woman should only secure rights to property acquired after a court had ensured that her claim was genuine. Ring countered that requiring a court order might render the bill inoperative in actual cases of desertion. Cary's amendment, he argued, would allow the husband to "return at any time before the order was made and claim the property of the wife."[69] Nonetheless, the act's effect on

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[67] Backhouse, in *Petticoats and Prejudice*, p. 189, writes that British Columbian courts did not claim the right to grant divorces under the British Matrimonial Causes Act until 1877. Prior to this, then, divorce would only have been available through an act of the British, and later Canadian, Parliament.

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

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

debtor-creditor relations concerned Ring's fellow legislators. They adopted the amendment, compelling deserted wives to apply to a Justice or Magistrate for a protection-order.[70] In the process, the state assumed the role of 'patron,' dispensing protection to 'deserving' abandoned wives, and by implication, their children, on a case by case basis.[71]

The second aspect of Ring's act provided a deserted woman who had obtained a protection-order with *femme sole* status, defined as independence "in all respects with regard to property and contracts, wrongs and injuries, and suing and being sued . . ."[72] Following from Constance Backhouse's assertion that the bill was part of a wave of protective legislation designed "to provide temporary relief for families in crisis," Paulette Falcon contends that Ring was attempting to "protect existing families" on

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[70] British Columbia, *Laws of British Columbia*, pp. 54-55.

[71] Paulette Falcon's analysis illustrates how the bill's wording informed judicial consideration of protection orders and reinforced patriarchal priorities. Married women were compelled to provide evidence that desertions were "without reasonable cause." As Falcon notes, "what constituted reasonable cause is unclear," and one can only surmise that the intended subtext was that women of unchaste or immoral character -- that is, women who were not themselves dedicated to patriarchy -- were not entitled to the law's protection; nor were children in their custody. The state was only interested in protecting virtuous women when husbands abandoned their patriarchal obligations. It was not promoting patriarchal family breakups, but dealing with the consequences. Concern over the morality of destitute women was also evident in a provision of the act stipulating that only property gained by a woman's "own lawful industry" would be safeguarded. Falcon theorizes that the intention of this provision was to encourage women to "earn a 'respectable' living" rather than take up an illegal occupation or become entirely dependent on public charity. "The colonies," she writes, "could only benefit by alleviating some of the social problems associated with women's poverty." Falcon, "'if the evil ever occurs,'" pp. 25, 28-29; British Columbia, *Laws of British Columbia,* p. 54.

Falcon's analysis suggests that the wording of the bill reflected purely local priorities. This was not the case. The patriarchal phrasing was directly reproduced from the British Matrimonial Causes Act. Nonetheless, the clauses of the act were examined in committee, and one would suspect that if local legislators disagreed with the act's patriarchal biases, they would have altered its wording. See Holcombe, *Wives and Property*, p. 239.

[72] British Columbia, *Laws of British Columbia*, p. 55 [Clause 4].

Vancouver Island by "safeguarding women in their capacities as wives and mothers when men neglected their familial duties."[73] The act's provisions permitted certain women, thrust outside the boundaries of 'normal' family relations through no 'fault' of their own, to assume provisional 'head of household' status. Abandoned wives were allowed at the state's discretion to have independence in financial relations.

The harsh penalty for interfering in the court-ordered property rights of deserted wives indicates the firmness of the Legislature's resolve in providing them the economic independence necessary to raise their families: a delinquent husband or his creditors wrongfully seizing a wife's protected property could be sued for the restoration of that property plus a sum equal to twice its value.[74] Moreover, on Vancouver Island, legislators recognized the need for a quick response: under British law, a protection-order could not be issued within two years of a desertion; Vancouver Island required no waiting period, and a deserted wife could quickly gain financial independence.[75] But the legislation also valued the patriarch's role in the family highly, and allowed the husband (or his creditors, likely a provision to prevent fraud) to apply independently to have the protection-order rescinded. Hence, the married woman's financial (and thus in a large

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[73] Falcon, "'if the evil ever occurs,'" p. 15. According to Backhouse, "none of the 'first wave' statutes heralded an acceptance of the right of married women to financial autonomy. As conceived of by the legislators and applied by the judges, they were meant to provide emergency relief where the head of the family absconded or became incapacitated from serving as the manager of family property. The statutes embodied an attempt to make the broken family a more efficient economic unit, and to preserve the community from the need to provide public support for abandoned women and their children." "Married Women's Property Law," p. 221.

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

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

measure, personal) independence was out of her hands, subordinated to the state's reproductive interest in the family.

By late 1864, Vancouver Island was experiencing the full volatility of the capitalist economy. The Pacific colonies' resource-driven economy slowed dramatically. November brought the failure of Macdonald's bank, and in the spring of 1865, few miners arrived from California. Others were leaving. For all purposes, the 'rush' was over. Overstocked merchants and overproducing manufacturers failed regularly, and 'skedaddling' hit new heights. By the end of 1866, the two colonies, which had piled up enormous debts creating infrastructure, were united in an attempt to reduce expenses.[76] But as Jean Barman notes, "the creation of the united colony tacitly acknowledged another reality" as well: "the slowness with which a settler society was emerging. Gold alone was insufficient to ensure [colonial] survival over the long term. The overwhelming majority of miners moved in and out of the Pacific Northwest with great rapidity."[77] The extreme individualism and volatility of the Pacific colonies' resource-based laissez-faire economy was not conducive to settled family life.

Family protection legislation emerged as a means of creating a permanent settler society on Vancouver Island. Legislators intended to protect intact families and retain them within the colony. Notably, the chief proponents of family security legislation were

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[76] Ormsby, *British Columbia: A History*, pp. 212-213; Barman, *The West Beyond the West*, pp. 81-82, 90-91.

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

those legislators most closely associated with 'nation-building' in the established historiography: businessman bachelor Amor De Cosmos, noted for his speculative enterprises and nation-building politics, made the first two attempts to pass family protection legislation in the form of homestead exemption; John Robson initiated the next. De Cosmos, as has been noted, associated national success and progress with population growth, industrial and agricultural development, and an independent producer-dominated class structure. Thus, he justified homestead exemption in terms of attracting and retaining immigrants, promoting their independence, and guaranteeing their productive participation in the economy by ensuring their material security.

In proposing homestead legislation De Cosmos referred to American precedents and American competition for immigrants: he indicated that a $5000 real property homestead exemption was available to settlers in California, Oregon, and Washington Territory.[78] If Vancouver Island desired to attract and retain immigrant *families*, he asserted, it would have to "offer similar advantages" or "people would leave it for these growing States, where they could safely invest their means for their wives and families, and provide for them against misfortune or want."[79] Toward this end, he proposed a measure which would protect $5000 in real property (including both rural landholdings

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[78] This was not entirely true. California did have a $5,000 exemption; but Oregon's exemption was $1000, and Washington Territory's was $500 in 1860, although by 1883 it had increased to $1000. See Goodman, "Emergence of Homestead Exemption," pp. 471, 472; Joseph W. McKnight traces the origins of homestead exemption legislation to a fusion of Castilian civil law and Anglo-American debtor-exemption laws in the Republic of Texas, in "Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle," *Southwestern Historical Quarterly*, vol. 86 (January 1983), pp. 369-399.

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

and town lots), and a comprehensive array of personal property, including books, household furnishings, and the professional tools, implements, and instruments of various professionals, tradesmen, miners, farmers, and carters, from seizure by creditors.[80] In addition, in a clause indicating a new emphasis on the central role of the wife / mother in the home, the homestead could not be abandoned, conveyed or mortgaged by a married man without consent of his wife.[81]

When it was alleged that the size of the exemption was too large, De Cosmos offered two replies.[82] First, he referred to the precedents of British equity practices: "As it now is," he asserted, "according to British Law, a man in business with $20,000 could buy a post-nuptial contract[,] give his wife $10,000 out of his capital, and the creditors could not touch it."[83] Attempting to establish his authority in the matter, De Cosmos declared: "He had good legal advice as to the matter of postnuptial contracts, and knew that his statement of law was correct."[84] Second, he believed that his opponents misconceived of the nature of the bill, if they thought it was intended to protect labourers. He had no intention of encouraging the development of a labouring class. The

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[80] Ibid.

[81] This is based on assumption. These details of the 1864-65 bill are not available. But a version of the 1865-66 bill printed in the Victoria *Chronicle*, 13 December 1865, contained the wife's consent clause, and since the act was based on American precedent, wherein the consent clause had been a standard feature since homestead acts were introduced in Texas in 1839, it seems reasonable that De Cosmos would not have varied in this aspect of the legislation in 1864-65. See Cavanaugh, "Limitations of the Pioneering Partnership," p. 214.

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

[83] *Chronicle*, 25 April 1865.

[84] Ibid.

exemption, De Cosmos said, was intended to promote economic activity by attracting the propertied and industrious immigrant. Therefore, he asserted, if the amount of the exemption was reduced, they might just as well abandon the measure. He informed the House,

> The bill was not so much for laborers as for men of capital, men who were carrying on the country. Suppose a young man made $10,000 in the Cariboo and wanted to get married here, he knew that if he left his wife and home behind him in this Colony, when he returned from being unfortunate in the Cariboo or elsewhere that he might lose all his property, while if he settled across the [Puget] Sound he would be protected. If they want the country to secure settlers *and* capital they would pass the bill.[85]

The Assembly agreed and the measure passed through the House; but the Legislative Council allowed the bill to lapse, apparently fearful that it would interfere in debtor-creditor relations.[86]

Many tories and some liberals were concerned that in their attempts to protect the family, legislators were undermining social and economic order. Tories, who dominated the upper house, saw society as bound by horizontal and vertical obligations

> extend[ing] between and among individuals regardless of their power and status. The interdependence among the various parts meant that individual actions had consequences for all, and that for the well-being of the social whole, the power and actions of some had to be curtailed.[87]

For tories, protecting families and businessmen from their creditors allowed debtors to become independent of their social obligations, and thus destabilized the hierarchical foundations of a functional society. Debtor protection was a problem for some liberals

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[85] Ibid. Emphasis added.

[86] Ibid., 30 May 1865.

[87] Loo, *Making Law, Order, and Authority*, p. 102.

too, since it reduced the overall security of property in the economy -- one of the key prerequisites for high rates of economic exchange and development, and hence progress.[88] For these objectors, the ability of creditors to seize property and imprison debtors was crucial to the operation of the economy and society. If merchants and tradesmen could not extend credit to their customers without some means of forcibly retrieving payment, they would simply cease to extend credit, and economic, and hence, social growth, would be curtailed.

De Cosmos, however, was undeterred by these arguments: he reintroduced the bill in the next session, restating his principle points, and indicating the strong role of the family in building the nation. Again he pointed out that homestead acts, far from being fraudulent, were similar in function to equitable trusts: "[P]roperty" he said, "can now be settled by the husband in the hands of trustees for the benefit of the wife as well as by what are called post nuptial contracts."[89] The bill would stem the outmigration caused by poor economic conditions by providing "protection to the wife and children" when the husband "was unsteady or unfortunate."[90] Significantly, it would protect a certain class "of *honest, industrious, and in many cases moral households* from having their households ruthlessly taken from over their heads, and thus turned in perhaps a penniless

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[88] E. L. Jones, *The European Miracle*, p. 85. The editor of the *Chronicle* warned his readers to carefully examine the possible "consequences flowing from weakening the security of property in this Colony" through the imposition of the homestead bill. See the 16 December 1865 *Chronicle*.

[89] *British Colonist*, 2 December 1865.

[90] Ibid.

condition into the streets."[91] The government would be discouraging development if it allowed desirable families to be destroyed by economic volatility and misfortune incurred through honest economic activity. And, De Cosmos noted, the homestead measure would encourage population retention, economic growth, and social stability through another channel: it "would be an inducement . . . for single men to marry and settle in the colony."[92]

Many in the colony were determined that the bill should extend its protection only to families. The family as a stable social structure was to be encouraged. No incentives to remain outside the family should be extended to bachelors or spinsters. For instance, in the 1865-66 House of Assembly debates, Dr. James Dickson of Victoria District became agitated when he realized that homestead exemption might be utilized by persons without families: "He had thought that it was intended only to apply to married men, and was struck with it being a good movement, but now he found it was for young men too. Now if this was to be the way, why they might find every one taking advantage of the law."[93] The editor of the *Victoria Chronicle* agreed, arguing that De Cosmos' bill was flawed because

> it extends . . . provisions to men who are not heads of families. We believe that whatever claims the heads of families, as husbands, fathers, brothers, or sons, with those dependent on them residing in Vancouver Island, may have on the extra protection of special laws, the sportive bachelors may be left to the general protection of ordinary laws. Surely they are as capable of taking care of their means as a similar number of spinsters.[94]

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[91] Ibid. Emphasis added.

[92] Ibid.

[93] *Chronicle*, 25 April 1865.

Those contributing to societal growth and productivity by raising families should be rewarded with special protection; those shirking this important social obligation, the 'sportive' bachelor and his spinster counterpart, were not entitled to the same benefits. Moreover, the editor argued, in a barb directed toward De Cosmos, responsibility for family protection should not be left in the hands of the many bachelors in the House of Assembly.[95] Nor should it be entrusted to wives. Family protection was the domain of responsible, married, and propertied statesmen, with an established interest in both the nation and the family.[96] He wrote, "this bill really defeats its own purpose by allowing a homestead to be alienated unreservedly on the consent of the wife of the owner."[97] A wife, he believed, could generally be persuaded to join her husband in an investment no

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[94] Ibid., 13 December 1865.

[95] Ibid.: "We are inclined to believe that if any class in the House, or out of it, need watching, it is that very great shoal of loose fish, the bachelors. It benedicts the Upper House will do well to confine the bill to 'heads of families.'"

[96] The *Chronicle*'s editor advocated highly interventionist, paternalistic state protection for families to encourage immigration: he wrote, "The same desire which is so strikingly characteristic in the individual man, to promote his own personal interest and the comfort and happiness of those who look to him for protection, should also mark the actions of those to whom is delegated the task of providing for the necessities of the State, and maturing measures such as will have a tendency to develop its resources, promote its general prosperity, and secure for the people whom they represent the greatest possible happiness. What a man is to his family, a people's representatives should be to those they represent. They are the parents of the State, and as it is a duty incumbent on a parent to provide for the wants of his family, so it is a duty equally incumbent upon those who are charged with the affairs of State to see that the interests of their constituents receive proper care and attention at their hands . . . . It should be the study of our Legislature to adopt such measures as will induce those who have and are about to immigrate from the older and more populated countries of Europe, to turn their attention to these shores . . . . we desire to see the most liberal inducements hold out [sic] to immigrants in reference to the terms upon which homesteads can be obtained [and] should likewise be pleased to see a law placed upon the statute-books of the Colony guaranteeing to every man an interest in such homesteads so secured as to be beyond the reach of legal alienation for debt . . ." *Chronicle*, 28 February 1865.

[97] Ibid., 13 December 1865.

matter how hazardous: "She has either to consent to his proposal or submit to his ill-will; and naturally the chances are largely in favor of her consent."[98] Thus, he concluded that no homestead should be permitted to be mortgaged, sold, or otherwise alienated unless another was selected and registered to replace it, or the parties filed a binding declaration of their intention to leave the Colony.[99]

In the Legislative Council De Cosmos' 1865-66 bill, like its predecessor, faced stiff opposition. Councilor Donald Fraser approved of it only insofar as it applied to 'heads of families,' although he conceived of that category broadly. He therefore introduced a replacement bill limiting homestead exemption privileges to "married men, whose wives shall be living when filing record of title to homestead, to widowers and widows, unmarried men and women, who have the care and charge of certain needy relatives."[100] Debtor-creditor relations still concerned many councilors as well, and Fraser alleged that fraud had plagued the operation of the California homestead exemption act.[101] Chief Justice Joseph Needham, conveniently illustrating the analogies often made between family and polity, revealed a tory-ite understanding of the family. Referring to the wife's consent clause and foreshadowing debates over the Married Women's Property Act, Needham asserted that the bill would undermine the organic structure of the family by diminishing familial interdependence: It would, he said, enable

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[98] Ibid.

[99] Ibid.

[100] *British Colonist*, 19 January 1866; *Chronicle*, 5 February 1866.

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

"the wife and children . . . to feel independent of the husband and father [and] would be of a most pernicious character."[102]

To the bill's defense came Attorney-General Thomas Lett Wood. He accurately summed up the rationale behind the measure, and noted surprise at the councilors' objections: he "thought the principle of the bill was admitted, that the wife and family should be protected in the general [economic] crash." Wood answered the charges of critics in a forthright manner. Regarding the possibility of fraud, he countered, "that when a man gave reasonable public notice that he reserved certain property from all liability his creditors could have no reasonable cause of complaint." To justify this claim he appealed to equitable precedents and business practice: "In England the law was virtually in existence as far as married men were concerned[. Husbands] could either by ante nuptial or pre-nuptial [sic] contracts settle property upon their wives, and the courts would always protect them as much as possible." Moreover, he could not see "why a man should not limit his liability as joint stock companies did, and the public be told beforehand that [he] reserved £500 out of his property . . ."[103] Families were forced to subsist under the conditions of liberal capitalism; thus, utilizing the system's protections should not be construed as fraud.

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[102] Ibid., 6 February 1866.

[103] Ibid., 19 January, 6 February 1866.

The business community joined Wood in promoting the measure, hoping that a homestead law would encourage economic and population growth.[104] The Victoria Chamber of Commerce petitioned the Legislative Council, claiming

> that the passage of a properly devised Homestead Law, wherein the value of the property exempted from seizure would be limited to a moderate amount, say not exceeding $2500, would be beneficial to the colony, tending, as they believe it would, to attract population to the country and retain it while here.
>
> Your petitioners, therefore, pray that your honorable body may be pleased to pass a Homestead Law, so framed that whilst protecting the interests of families, for which it is intended, it would at the same time guard the public against fraud.[105]

Many businessmen, it must be remembered, were debtors as well as creditors, and had families of their own. De Cosmos' bill likely appealed to their sensibilities, since it would allow them to enter business ventures without risk to their dependents. Moreover, by protecting immigrants, homestead exemption would retain their clientele within the colony.

The addition of the business community's support may have tipped the balance. De Cosmos' bill passed through the Legislative Council, with a number of amendments derived from Fraser's bill.[106] Real property to a value of $2500 and personal property to a value of $150 were exempted from seizure; and to protect the interests of creditors

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[104] Apparently this was not unusual. Paul Goodman writes that "much of the support for homestead exemption . . . came from elements deeply involved in market relations." "Emergence of Homestead Exemption," p. 478.

[105] *British Colonist*, 19 May 1866.

[106] Ibid; James E. Hendrickson, ed., *Journals of the Colonial Legislatures of the Colonies of Vancouver Island and British Columbia, 1851-1871*, 5 vols. (Victoria: Provincial Archives of British Columbia, 1980), vol. 3, pp. 594-595.

against fraud, no debts acquired prior to the exemption were protected.[107] After an exemption was registered, legislators assumed creditors would not lend on the security of property which they could not seize. Despite reductions from the $5000 real property exemption and the litany of occupational and household necessities listed in De Cosmos' original draft, the act was generous in comparison with other jurisdictions. Only five of thirty-eight American states with homestead legislation in this period had larger real property provisions.[108]

Interestingly, homestead protection was not automatic; it had to be applied for by the owner of the property, in most cases the husband.[109] Thus patriarchal prerogatives were not injured. A husband who wished to use his house and property for collateral in business could do so, if he did not register. Even more importantly, by not registering he could reserve to himself that option for the future, since he would not need his wife's consent to sell or mortgage the property. Notably, the influence of the bachelors in the House of Assembly, deplored by the *Victoria Chronicle*'s editor, seems to have made itself felt: protection was not limited to 'heads of families.' Bachelors were eligible for homestead exemption; and the bill also ensured the right of women property owners to homestead exemption privileges.[110]

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[107] See Vancouver Island, Laws, Statutes, etc., 1866, 30 Vict., no. 6, clauses II, IV, and IX, and attached schedule, forms 2 and 3. Toronto: Micromedia, 1977.

[108] These were California, Idaho, Arizona, Montana, and Nevada. Texas would raise its exemption from $2000 to $5000 in 1870. Goodman, "Emergence of Homestead Exemption," pp. 472, 477.

[109] Vancouver Island, Laws, Statutes, etc., 1866, 30 Vict., no. 6.

[110] Ibid.: "XV: And for the interpretation of this Act, whenever in this Act in describing or referring to any Person or Party, Matter or Thing, any word importing the Masculine Gender or singular number is

In subsequent years, the act's provisions were substantially modified. In 1867, John Robson introduced homestead exemption to the newly created United Colony of British Columbia (which now included Vancouver Island), with basically the same goals advanced in previous years: protecting families from creditors and encouraging permanent settlement of the colony. But the promoters added a new twist to their justifications: they claimed the measure would "raise the moral standard of debtors" and prove "a real advantage to creditors, in leaving a man the means of retrieving his position and paying his creditors at a later period."[111] Robson also added a new clause allowing a widow to hold the homestead following the death of her husband, for the duration of her children's minority, or as long as she remained unmarried; this alteration made the measure the first example of 'homestead dower' passed in Canada, albeit reflecting patriarchal and state interests, since it appears to have restricted the wife's interest in the homestead to the period in which she was raising her children.[112] Robson's act also

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used, the same shall be understood to include and shall be applicable to several Persons and Parties as well as one Person or Party, and Females as well as Males, and several Matters and Things as well as one Matter or Thing unless it be otherwise provided or there be something in the Subject or Context repugnant to such Construction."

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

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

The 1868 Ontario Act "to secure Free Grants and Homesteads to actual Settlers on Public Lands," exempted free grant homesteads from liability for debt for twenty years. It also required the wife's consent to convey the property. In 1868 and 1869, three separate attempts were made to pass universally applicable homestead exemption bills (which could be invoked on purchased lands) on the American model in Ontario. At least one bill, Sir Henry Smith's, contained a clause preventing conveyance without the wife's consent, and provided that "the exemption should continue during the lifetime of the party in whose favour it was

reflected his patriarchal bias in another way, omitting the clause making its terms gender neutral, and likely preventing independent women from registering homesteads.[113] Since homestead exemption was explicitly offered as family protection, restricting registration to males encouraged retention of the patriarchal family as the norm. As has been mentioned, during the debates others had suggested restricting the measure to 'heads of households,' but included women within that category. For Robson, the only legitimate head of household was male.

The deserted wife protection and homestead exemption acts indicate an increasing identification of the family's interests with the wife. Ring's act acknowledged that women in broken families were often maintaining themselves and their children by

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created, *and of his wife, and until his youngest child reached the age of 21 years* [emphasis added]." Thus it was also an example of homestead dower, since it provided for the wife after the husband's death.

The 1869 bill was promoted with reasons identical to those used in Vancouver Island and British Columbia: "1. It will aid us in securing a increase in population, as well as give to this population a greater degree of permanence. 2. Help to decrease pauperism and immorality. 3. Stimulate industry and thrift, and secure a greater respect for the rights of families. 4. Encourage the promotion of trade on a more healthy basis." The bill's originator also indicated that the state was directly responsible for the protection of children: "we are, in a sense, under obligation to minor members of families in this matter, just as much as heads of families themselves are under obligation to those members. This Legislature is bound to see that these are protected in their rights of property . . . . It stands between them and oppression . . . and preserves for them, and to them, the property, the labour, the wages of their parents, that these shall not be unlawfully taken away. If then, in the matter of property, civil rights and education [they] are afforded protection--protection such as forbids any one wrongfully to trench on those--shall we not equally shield them, as far as may be, from the results of the folly, as well as the imprudence of their parents[?]"

The attempts of Ontario Reformers to achieve homestead exemption legislation were stifled, however. The John Sandfield Macdonald government consistently objected that the bills opened up avenues for fraud, lacked popular demand, and were untested in the British colonies (Ontarians were unaware of the Vancouver Island and British Columbian precedents). See Toronto *Globe* 23, 28 January, 1, 6 February, 1, 4 December 1868, 3 December 1869. And Ontario, *Statutes of the Province of Ontario*, 1868, 30 & 31 Vict., cap. 8.

In the Prairies an 1884 territorial ordinance protected the family home against seizure for debt. But it did not provide a woman with any control over the disposition of family real property, nor did it give her an interest in that property should her husband die. A campaign for homestead dower in the prairie provinces began in the early years of the twentieth century, culminating in acts in Saskatchewan in 1915, Alberta in 1917, and Manitoba in 1918. Cavanaugh, "Limitations of the Pioneering Partnership," pp. 214-215.

[113] British Columbia, *Laws of British* Columbia, pp. 226-231.

their own efforts; the homestead exemption act, reflecting the influence of separate spheres ideology, implied that wives could be entrusted with the responsibility of defending domestic interests: a 'good' wife would ensure that the home was not unnecessarily risked as credit security against familial needs. Moreover, if a husband predeceased his wife, she could under the terms of the act retain the homestead to look after the children. But, rather than overestimating the scope of these new familial responsibilities for women, it would be wise to again stress their limitations. All familial authority ultimately vested in the husband, since he had to invoke homestead protection; and, in the case of the protection-order for deserted wives, the husband could apply to have his wife's independent financial status removed. The wife remained subject to the will of her husband and the state. But the emerging recognition of wives' increasing responsibilities would begin to gain them corresponding rights in 1873 in the Married Women's Property Act.

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Liberals saw the family as a means to achieve their nation-building goals in two ways. First, the family was to play a key role in the nation's material expansion through its function of biologically and socially reproducing the population. But capitalism threatened the family's existence. According to Paul Goodman, "The market revolution placed women and families at high risk. In a boom and bust economy husbands often failed, sometimes through no fault of their own, and thereby plunged their families into

destitution."[114] Both the homestead and deserted wife protection acts were intended to insulate women and children from the volatility of the economy. The 1862 act provided wives in broken families with provisional property rights: an emergency status bestowed upon them to protect the state's interest in reproduction. The 'broken' family had to be enabled to continue to function and raise children. The homestead act, by reserving a portion of the family's property beyond the reach of creditors was also intended to protect the family in economic emergencies: as legislators noted, it was to protect wives and children, but with the distinction that it provided protection to 'intact' families, securing to them a subsistence base to be utilized during recessions, depressions, and personal setbacks.

Second, securing family property provided a means for liberals to achieve their ideological vision of the nation. Homestead exemption bills were one piece of a legislative 'package' designed to protect the independent producer and his family in the economy: legislators introduced bills to provide homestead exemption, abolish imprisonment for debt, and establish mechanics' lien laws together.[115] The 'package'

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[114] Goodman, "Emergence of Homestead Exemption," p. 487.

[115] In 1864-65 De Cosmos introduced the homestead exemption bill and the mechanics' lien law. George Dennes introduced the bill to abolish imprisonment for debt (interestingly, Dennes may have been in financial difficulty himself. In 1866, he went bankrupt). All three measures were defeated and were reintroduced in the following session by the same two members. This time imprisonment for debt was abolished and the homestead exemption established. In 1867, when John Robson introduced homestead exemption for assimilation into the laws of the united Colony of British Columbia, he also brought forth a mechanics lien bill, which was rejected. Liberals in Ontario advocated the three measures as well, but were less successful in doing so. In 1868-69, an Ontario M.P.P. named Trow introduced homestead exemption and mechanics lien bills together. Both were defeated. And in 1871, Edward Blake introduced a bill to abolish imprisonment for debt, which was given the three months hoist. Margaret Ross, "Amor DeCosmos," pp. 62-63; Hendrickson, ed., *Journals of the Colonial Legislatures*, pp. 592-595; Ontario, *Journals of the Legislative Assembly of the Province of Ontario*, 1st Parliament, 2d session, 1868-69, p. 53, and 1st Parliament, 4th session, 1870-71, pp. 37, 63-64.

was tendered to protect the independent producer and his family from the most severe consequences of debt, secure their income, and initiate large-scale property-based democracy. Using legislation to achieve a form of social engineering was not a new idea, especially in the colonial context. Liberals were simply attempting to reverse the results of the British Colonial Office's plan to implement the Wakefieldian system with its vision of a rigidly hierarchical social structure.[116]

By abolishing imprisonment for debt, legislators ensured that independent producers and entrepreneurs would not be risking their freedom or their family's source of subsistence in market activity. By the 1860s, the exigencies of earning a living through the market economy often necessitated taking the risk of securing credit. Tina Loo writes that "As it became more common, indebtedness shed some of its association with moral failure -- among the commercial classes, at least -- and was viewed instead as a consequence of respectable economic activity."[117] Debtors were perceived as honest, industrious individuals whose plans had failed. Certainly they and their families should not be penalized for attempting to achieve economic security. In fact, in defending George Dennes' 1865-66 bill to abolish imprisonment for debt, assemblyman Leonard McClure editorialized in the *British Colonist* that "of all men it is well known the enterprising are most liable to reverses," and suggested that protecting them from imprisonment would stimulate the economy and the growth of the colony. According to

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

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

McClure, the only type of settler attracted to a colony with harsh debtor laws was "[t]he sluggish or ignorant man . . . [who] keeps his dollars, as it were, hidden in the ground, and for all the benefits which he confers on the country, might as well be a chimpanzee." If legislators wanted to attract enterprising, progressive immigrants, they would have to keep pace with their "progressive neighbors" to the south and abstain from imprisoning debtors.[118]

They would also have to protect the small producer's family, if they wanted long-term settlement. So legislators not only protected independent producers from penalties for market activity, but tried to secure their furniture, their homes and the tools necessary to their occupations. De Cosmos' original draft of the homestead exemption bill, it will be remembered, included not only the small real and personal property exemptions in the legislation as passed. It was, he said, intended to protect the man of means, and covered a comprehensive array of personal property, including the occupational tools and implements of many independent commodity producers, tradesmen, and professionals. Although tempered by the Legislative Council, the House of Assembly's aims were clear: homestead exemption was intended to encourage the immigration of enterprising independent producers, and retain them over the long term by offering occupational and familial protection.

Concern to protect the earning abilities of the independent producing breadwinner also led to the third piece of legislation in the package, the mechanics' lien law, intended to secure his source of income. As Leonard McClure explained in the *British Colonist*, a

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[118] *British Colonist*, 7 December 1865.

lien law would "afford the necessary security to that class of working men, whose labors more than any other, conduce to the 'building up' of the colony."[119] Between 1860 and 1879, eight mechanics' lien bills were introduced to the legislatures of Vancouver Island and British Columbia. Prior to passage of the 1879 bill, the measures were rejected because legislators found the wording vague, confusing, or cumbersome, feared the legislation would lead to massive litigation, or opposed the lien being attached to land titles, which would hinder land transfers.[120] Local politicians often declared that mechanics' lien laws were intended to protect the "hard earned labor" of the "honest and poor man."[121] But they were not intended solely, or even primarily, to aid the "workingman" or labourer. No mechanism was provided for wage-earning tradesmen to recover unpaid wages from their employers. Liens, rather, were to attach directly to the property under development or repair. Mechanics' lien laws marked an attempt to secure the incomes of *independent artisans* and *contractors.* If the contractor was not paid for his labour and materials, he would be able to place a lien on the improved property, and sell it at auction after a preset period, to recover his fees and expenses from the proceeds.[122]

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[119] Ibid., 4 March 1865.

[120] *Daily Standard*, 3 April 1872, 13 May 1876, 22 March 1877, 18 February 1879;

[121] Ibid., 10 May 1876; *British Colonist*, 10 May 1876.

[122] British Columbia, *Statutes of the Province of British Columbia*, 1879, 42 Vict., ch. 24.

The existence of the legislative 'package' reveals a fundamental paradox in the liberal nation-building programme. Liberals wanted to protect the family and the independent producing class from destitution, while at the same time maintaining the economy responsible for their difficulties. The free market economy was linked in the liberal psyche to economic opportunity and national growth. But it was also volatile, tending toward excesses and extremes. Through homestead exemption and related measures, reformers believed they could shield the patriarchal family from economic misfortune. In fact, they believed that they could simultaneously facilitate national economic growth *and* protect the family, thereby stimulating natural population growth, and attracting and retaining immigrants. By providing a certain level of material security for the economic agent and his family, homestead exemption would minimize the risks of market activity, and encourage the growth of independent enterprise.[123] The individual could freely pursue economic goals without compromising his family's future. And in addition to reconciling the imperatives of production and reproduction, providing bachelors and families with a stable property base had another goal: proponents of the homestead exemption acts intended to encourage the growth of the broad property-owning producer class they believed so crucial to the proper functioning of democracy. Since it protected up to $2500 in real property from forced seizure or sale, the homestead act ensured that many possessing enough property to qualify for the franchise could not

[123] See Goodman, "Emergence of Homestead Exemption," p. 475.

have that property seized, once registered.[124] Similarly democratic aims were evident in liberal inheritance legislation.

[124] The franchise on Vancouver Island was restricted to British subjects owning twenty acres freehold or more until 1870. After 1870, the vote was extended to British subjects owning land over the value $250 in clear title; or having lease or rental expenditures over $40 per annum; or board and lodging expenditures of $200 annually; or a pre-emption claim of over 100 acres; or those in possession of a free miner's license with a registered claim. By 1876, manhood suffrage was granted, excepting aboriginals and Chinese. *Laws of British Columbia*, pp. 536-537; Mackie, "Colonization of Vancouver Island," p. 25; Barman, *The West Beyond the West*, p. 101.

Chapter 4

Inheritance and Legitimacy: Social Reproduction, Equality, and Class Structure, 1864-1877

The Legislature's interest in providing for the family through inheritance, demonstrated in the 1867 homestead act modification allowing widows to retain the homestead -- the means of their children's and their own subsistence -- was not new. It had been a concern for some time. Amor De Cosmos equated property with prosperity and security, and viewed property law as a crucial element in defending the interests of the family over both the short and the long term. Thus, while promoting family protection through homestead exemption legislation in the period 1864-66, he was also advocating reform of Vancouver Island's real property inheritance laws. In doing so, De Cosmos was attempting to effect a redistribution of wealth within the family, and simultaneously attacking the foundations of hierarchical class structures. Other liberals would join him in that endeavour. Social conservatives, however, viewed inheritance law as central to the maintenance of entrenched social and familial structures, and vigorously opposed reform. The battle over inheritance rights shows that for De Cosmos, his allies, and his opponents, familial and social structures were consciously and closely linked.

When the colony of Vancouver Island was created the descent of undevised real property was determined by primogeniture: if a man died intestate, all of his real estate passed to his eldest son. De Cosmos proposed instead to divide the real property of intestates equally among their lineal descendants, making further provision for the

property to succeed to the parents, or collateral relatives (should the parents be deceased) if the intestate had no lineal descendants.[125] No records remain of the Assembly's debates on his 1864-65 bill; the Legislative Council, however, rejected the measure amidst allegations by Colonial Secretary Henry Wakeford that "the cutting up of real property into small portions was decidedly ruinous to families."[126] On the motion of Attorney-General Thomas Lett Wood, the bill was given the six months' hoist.[127] De Cosmos reintroduced the measure the following year, but to the same result.[128]

Incensed by Wakeford's statements and livid with the Council's handling of the matter, *British Colonist* editor Leonard McClure asserted in 1865 that it was the present state of the law that injured the family: "[W]ho," McClure queried, "could see anything but injustice in an order of things that disinherited the whole family for the sake of an individual member?"[129] The law had its priorities reversed,

> giving to probably the only [family] member that could do without it the property which should afford the sustenance for the young and helpless. If any distinctions were to be made in families at all, justice would point out the youngest rather than the eldest, the girl rather than the boy, the weak rather than the strong as marks of special favor.[130]

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[125] I have found no record of the 1864-65 bill, but have based my interpretation of it on the 1866 bill and the 1872 act, which contained these provisions. See *British Colonist*, 9 Jan 1866; British Columbia, *Statutes*, 1872, 35 Vict., no. 29.

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

[127] Ibid.

[128] Ibid., 22 June 1866.

[129] Ibid., 10 June 1865.

[130] Ibid.

McClure argued that the colony's real property inheritance laws were outdated, morally unjust, and inconsistent with the descent of personal property, which was divided equally amongst lineal descendants. Moreover, he stressed, with no means to inherit, and few public, naval or military positions to absorb them, dependent younger sons on Vancouver Island faced difficult prospects.[131]

For several years, legislators made no further attempts to introduce inheritance legislation. But De Cosmos had not abandoned the idea. In 1871 in an editorial decrying the law of primogeniture, he claimed that "every province in British America and every State in the American Union where it once prevailed have abolished it." De Cosmos called primogeniture a "barbarous," "feudal" custom, which "enrich[ed] one son . . . and [left] the others paupers." He believed it a "natural presumption that a parent has no more preference for one child more than another; and that he would divide his property equally between them [in a] case [where] he made his will." And he assured readers that abolishing primogeniture would not prevent testators from distributing their property as they wished; but it would "relieve the state from being a party to the distribution of an intestate's estate in such a way as to violate every notion of common justice and humanity."[132]

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[131] Ibid.

[132] *Daily Standard*, 3 June 1871. De Cosmos was incorrect in his claim that all other jurisdictions had abolished primogeniture. There was a trend toward abolishing primogeniture in the United States, beginning in Virginia in 1785. But in British America, at least Ontario had not: In 1877 Eyre Lloyd wrote, "In Upper Canada (now called the province of Ontario) the statute 3 and 4 William IV.c.106 (Inheritance Law Amendment Act), has been adopted by a local act of the legislature of that province, and in all respects the descent of and the power of disposition over property is the same as in England. The Wills Act, 1873, of this province fixes twenty-one as the age for making a will." Grossberg, *Governing the Hearth*, pp. 211-212; Eyre Lloyd, *The Succession Laws of Christian Countries, with Special Reference to the Law of Primogeniture as it Exists in England* (London: Stevens and Haynes, Law Publishers, 1877), p. 37.

Others agreed. In the following legislative session Yale representative Charles Semlin introduced a bill entitled "An Act to alter and amend the course of descent of Real Estate."[133] Semlin's bill passed without objection or amendment, and earned him kudos in the local press.[134] Quite evidently, the major obstacle to passing the bill had not been public opinion (the popularly elected Vancouver Island House of Assembly had approved the measure both times in the 1860s), but the class interest of a wealthy, landed, and conservative elite. Only the appointed members of the Legislative Council were opposed to ending the practice of primogeniture, a practice intended to concentrate extensive land holdings in a single family line, thus reinforcing the Tory values of class and aristocratic privilege. When Henry Wakeford alleged that abolishing primogeniture was "decidedly ruinous to families," he was referring to the concentrated wealth of certain families, and the hierarchical vision of society it inspired; he was not referring to families in general. And his social vision was obviously not shared by local liberals. John Robson wrote that primogeniture was "the key-stone, so to speak, of England's blue-blooded aristocracy," responsible for "that huge class monopoly of land, wealth, power, and position which has for centuries stood with its iron heel upon the pleb[e]ian neck."[135] Angry reformers accused the Council members of "fancy[ing] that they are

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[133] British Columbia, *Statutes*, 1872, 35 Vict., no. 29. The short title was "The Inheritance Act, 1872."

[134] *British Colonist*, 3, 6, 7 April 1872; *Daily Standard*, 6 April 1872.

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

really lords, and in duty bound to protect the interests of territorial aristocracy."[136] Social and economic equality could never be realized if property ownership rested on privilege.[137]

In the debate over inheritance, reformers describing the property distribution they desired both in family and society spoke of 'equality,' 'justice' and 'humanity.' They even foreshadowed an increased concern over illegitimacy, showing that they recognized the social and economic difficulties facing children (and adults) in the province born of common-law and 'country' marriages.[138] The changes engendered by the Inheritance Act were significant: intestate estates no longer passed automatically to the eldest son. Instead, they passed equally to lineal descendants without age or gender preference; if none existed, then to the father; if he was deceased, or the intestate's estate came from his mother, then to the mother; and if no mother, to the collateral relatives (male and female siblings and their descendants). The systematic preference of an intestate's father over his mother was the sole but significant example of gender discrimination. In general, however, the bill was based on broad ideals of inclusiveness and equality: further provisions stipulated that half- and whole-blood relatives were to inherit equally, and that

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[136] Ibid., 10 June 1865.

[137] In England, popular Liberal John Bright engaged in lengthy campaigns to create a yeomanry: he advocated abolishing primogeniture and entail, and at the same time lobbied the state to provide cheap credit to facilitate the sale of the lands of absentee landlords to their tenants. Vincent, *Formation of the Liberal Party*, p. 181.

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

descendants begotten but unborn at the time of the intestate's death were entitled to inherit.

Spousal inheritance was not addressed in the Inheritance Act. For most men, a spousal inheritance clause was unnecessary, since they already held the rights to 'family' property. But married women's interest in communally-held family property was less secure. Under the 1833 English Dower Act, a widow was entitled to one-third of the real property her husband possessed at his death, should he die intestate. However, if her husband made a will, her dower right was abrogated, and he could distribute his property as he wished.[139] The new protection offered by homestead dower was no more certain. In British Columbia, homestead dower was not automatic; it was dependent upon homestead registration, which was the prerogative of the property-owner, usually the husband.

The absence of obligatory inheritance provisions for widows did not go unnoticed. In both 1872 and 1873, Arthur Bunster proposed bills to legislate mandatory dower. His 1872 bill was a short document, containing only two clauses: the first provided a wife with an inalienable dower right in one-third of the property her husband had held during her coverture; the second stipulated that the husband could not mortgage, dispose, or otherwise alienate his real property without the consent of his wife; and that

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[139] Legislators believed rates of intestacy in British Columbia were high. If this was so, most widows would retained their dower right in British Columbia. During debates on the Married Women's Property Act's life insurance provisions, John Robson noted that he "looked upon it as a notorious fact that not one out of ten men died, with a will as to the disposition of his property." *British Colonist*, 15 January 1873. On the English Dower Act, see Holcombe, *Wives and Property*, pp. 21-22.

every instrument of conveyance must specify whether the wife was releasing her dower claim.[140] Notably, Bunster's measure recognized the wife's right to an interest in communally-generated family property, a recognition which would not occur in some Canadian provinces until the late 1970s.[141] His rationale for introducing mandatory dower was two-fold: first, to protect wives from "heartless, drunken husbands, who, as the law stands, have it in their power to sell them out of house and home";[142] and second, to protect families from economic difficulties. Bunster informed the legislature that

> A merchant became unfortunate in his business and the creditors swept away everything; but the wife's interest in the real estate must be untouched. The family roof-tree was sacred. Thus good and valuable citizens would be kept in the country, because with this bill they would be able to redeem themselves.[143]

Bunster's observations reveal two perceptions crucial to this thesis: the association of the wife's interests with those of the family; and the identification of family protection with the national interest. These were insights which inspired homestead exemption and the Married Women's Property Act. But in this case legislators were uninterested. Bunster's attempts to establish legislative dower failed.

In both 1872 and 1873, his chief opponent was George Walkem.[144] In 1872, Walkem explained that

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[140] *Daily Standard*, 9 April 1872. In 1873, Bunster presented no bill. Rather, he asked Attorney-General George Anthony Walkem to frame a Dower Bill. Walkem refused, directing Bunster to the legislature's law clerk. See the *British Colonist*, 22 January 1873.

[141] Cavanaugh, "Limitations of the Pioneering Partnership," p. 225.

[142] *Daily Standard*, 10 April 1872.

[143] *British Colonist*, 22 January 1873.

[144] *Daily Standard*, 9, 10 April 1872; *British Colonist*, 22 January 1873.

> in 1833 the English nation found it was expedient to do away with the question of dower. There has been a struggle in Upper Canada to do away with it; it is extinct in Lower. Here we have the Homestead law to provide for such cases as is proposed to be provided in the Dower Bill.[145]

Although not expressly mentioned in the newspaper accounts of Walkem's speech, he was concerned about the effects of a dower act on land transfers.[146]

England and Quebec had a pressing reason for abolishing the type of dower rights Bunster was attempting to establish: they were not necessarily abrogated by land transfer; that is, the land could be conveyed without barring dower. Thus, a person could acquire a piece of land and lose one-third (or in Quebec one-half) of it years later.[147] This obviously acted as a hindrance to the free disposition of land, a necessity in a settler society with a speculative economy.[148] Homestead dower in British Columbia was similar, but not identical: the wife gained a limited dower right in the homestead, and could prevent conveyance or mortgaging of the property; but if she consented to

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

[146] Walkem was extremely interested in facilitating land transfers: in the 1873-74 session he would introduce two bills dedicated to that end, both of which became law. These acts were "An Act to facilitate the Conveyance of Real Property," and "An Act to facilitate the Granting of Certain Leases." See British Columbia, *Journals*, 1st Parliament, 3d session, 1873-74, pp. 10, 55.

[147] England's 1833 Dower Act automatically barred dower rights upon land transfer. A wife's dower right inhered only in those lands the husband possessed at his death. Holcombe, *Wives and Property*, pp. 21-22; Cavanaugh, "Limitations of the Pioneering Partnership," p. 203-4; Bradbury, "Surviving as a Widow in 19th-Century Montreal," *Urban History Review / Revue d'histoire urbaine*, vol. 17 (February 1989), p. 149.

[148] Other settler societies with speculative economies also attempted to remove the constraints dower posed for speculation. In 1868 Ontario passed an act preventing the recovery of dower from wild (unimproved) lands--lands heavily invested in by speculators. See Toronto *Globe*, 11, 27 November 1868. Manitoba and the Northwest Territories also abolished dower in 1885-86, ostensibly in an attempt to encourage settlement by facilitating the transfer of land, but likely also to generate investment opportunities in land speculation. Ursel, *Private Lives, Public Policy*, p. 103; Cavanaugh, "Limitations of the Pioneering Partnership," p. 211.

conveyance and the property changed hands, her 'dower' right was unconditionally abrogated. There was no possibility of residual homestead dower claims encumbering land titles. The compulsory aspect of Bunster's dower bill also generated opposition. Its protection was automatic, imperiling patriarchal and laissez-faire liberal prerogatives. The homestead act, on the other hand, left implementation at the discretion of the husband.[149]

The circumscription of widow's inheritance rights, then, was not solely motivated by concern over land transfers. It was also premised on the belief that the patriarch should possess ultimate authority within the family. This contention is supported by the debate surrounding the 1873 Wives and Children's Assurance Bill, intended to extend the benefits of the newly-emerging life insurance industry to British Columbian families. The bill followed Ontario precedent,[150] and proposed to allow a man to purchase life insurance with his wife and children as beneficiaries; in addition, it specified that any such policy was to be paid directly to the family, exempt from the claims of creditors.[151] The sole objection to the measure concerned the distribution of the benefits. John Foster McCreight insisted that the bill be amended, since

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[149] British Columbians were quite aware of the motivations behind abolishing dower: Charles McKeivers Smith noted in the *Daily Standard* that "[t]he principle objection urged against the law of dower is, that it would sometimes put men to inconvenience who might want to sell or mortgage their real estate, if their wives refused to give their consent--that it would have a tendency to cramp men in their business arrangements, if they had to depend on the consent of their wives before they could realize money on the security of their estates in case they felt disposed to go into business speculations." *Daily Standard*, 11 April 1872.

[150] Canada, *Statutes of the Province of Canada*, 1865, 29 Vict., cap. 17. It was also preceded by a similar act passed in New York in 1840. Basch, "Invisible Women," p. 356.

[151] British Columbia, *Statutes*, 1873, 36 Vict., no. 26.

> he did not think it advisable that a widow (in the event of the death of her husband without a will) should be allowed to have full access to the total amount of his insurance policy; one-tenth of it might be intended for her alone, whilst the remaining nine-tenths were for the benefit of her children alone. This bill would place it all in her hands, and who could say what she might do with it? There was nothing to provide for the safety of the children in the matter.[152]

Therefore, he moved that where no apportionment was specified in an insurance policy, its proceeds should be divided equally among the man's dependents.[153] John Robson supported the amendment. He believed "that if the clause passed as it stood it would simply be holding out an encouragement to widows to make hasty marriages, probably enticing them also to a dishonest distribution of their children's property." Although T. Basil Humphreys vigorously dissented, arguing that not one widow in ten had so little kindness as to "hastily marry a second time and make away with her children's property and leave them beggars on the world," Premier De Cosmos decided that little harm could be done in supporting the measure, and the amendment carried.[154]

It might be argued that McCreight's obviously paternalistic amendment should be viewed as well-founded precautionary measure guarding the welfare of children. However, the decision to amend the act also illustrates a lack of confidence in and mistrust of women. No similar constraints developed with regard to the husband's exercise of parental power. Socially conservative legislators feared the devolution of

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[152] *Daily Standard*, 15 Jan 1873. Note that the Wives and Children's Assurance bill was amended during the committal of the Married Women's Property bill because the two bills were interdependent. The MWPA contained clauses on insurance and the Wives and Children's Assurance bill stipulated that it was to be read as part of the MWPA. British Columbia, *Statutes*, 1873, 36 Vict., no. 26.

[153] British Columbia, *Statutes*, 1873, 36 Vict., no. 26.

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

power within the family and justified their stance with the assertion that women were incapable of making rational and compassionate decisions regarding the welfare of their children (a belief reflected in McCreight's successful move to eliminate married women's custodial rights from the MWPA).[155] George Walkem most precisely asserted this conviction:

> there was no doubt that upon the occasion of a second marriage, the latest family would certainly be the favorites with the parents; the stepchildren would be ignored, and the mother gradually drawn away from her first offspring to that of the second husband, who would always be with her to *guide, advise, and request.*[156]

Thus, while the Legislature under the De Cosmos administration was extending the property rights of married women (see Chapter 5 below), it was paradoxically maintaining restrictive inheritance rights for widows, a development spearheaded by social conservatives and underlining the contention that conservative support for family property law reform often arose from a concern for family protection and nation-building, and not 'Woman's Rights.' The insurance of intestates was apportioned specifically for the maintenance of the children, to ensure that they received it.

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[155] British Columbia, *Statutes*, 1873, 36 Vict., no. 26. A further clause in the bill was intended to protect the children of a man's previous marriages, with the implication that his widow might not provide for them. If the insurance policy stated "that the insurance is for the benefit of the wife and children generally, without specifying their names, then the word 'children' shall be held to mean all the children of the person whose life is insured, living at the time of his death, or whether by any other marriage or not."

The first draft of the MWPA gave the widows of intestate men absolute and uncontested guardianship over their children. J. F. McCreight successfully gained enough support to have this clause removed. See *British Colonist*, 15 January 1873.

[156] *Daily Standard*, 15 Jan 1873. Emphasis added.

The liberal desire to broaden the distribution of property throughout society demonstrated in Charles Semlin's 1872 Inheritance Act was not limited solely to the 'legitimate,' legal family. The same Legislature which had acted to improve the economic position of younger and female legitimate children through the Inheritance Act also moved to extend the social and economic advantages of inheritance to illegitimate children. This concern also dated back to the descent of real property debates of the mid 1860s, during which Committee Chairman Dr. James Trimble noted Scottish precedents for allowing illegitimate children whose parents subsequently married to inherit; and Dr. J. S. Helmcken opined that at the very least "[i]f there [we]re no legitimate children an illegitimate one should be allowed to inherit. It isn't the child's fault."[157] But no provisions were made for illegitimate children. Radical changes might have deterred the already hostile Legislative Council from giving the Descent of Real Property Bill due consideration.

By 1872, however, the situation had changed: a central-Canadian lawsuit underscored the disadvantaged position of illegitimate children, and the appointed Legislative Council had been dissolved. Thus, in the same session that saw Charles Semlin reintroduce the Descent of Real Property Bill, Robert Beaven suggested legitimating children born out of wedlock whose parents had subsequently married, or would do so before July first of that year.[158] The bill's principle was enshrined in

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

[158] Ibid., 26 March 1872.

continental European law, and had been adopted by several American States.[159] But it was invoked to address local concerns. Beaven observed that

> In early times it was impossible for white parents to get married to Indian women[;] consequently it was a great hardship to the children of such connections. According to Indian law they were legal marriages. In Ontario a law-suit had arisen in a like case and it was decided in favor of the first child as by Indian law the parents were legally married.[160]

The case Beaven referred to was Connolly v. Woolrich.[161] The Ontario court had ruled that since aboriginal law was in force at the time of the 'country' marriage of William and Susanne Connolly, the marriage was valid, and nullified his subsequent marriage to a European wife; therefore, the children of the first marriage were legitimate, and entitled to inherit.[162] Beaven's act did not, however, uphold aboriginal marriages as unconditionally valid. Rather, couples married under aboriginal law could retroactively validate their marriages and legitimate their children by remarrying under Canadian law. The act gave the same opportunities to common-law families.

The measure ran into harsh opposition in the Legislature. Premier McCreight feared the bill would retroactively disinherit legitimate children. To address this problem, John Robson inserted an amendment specifying that existing wills would not be affected.

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[159] Jenny Teichman, *Illegitimacy: An Examination of Bastardy* (Ithaca, New York: Cornell University Press, 1982), p. 35; Grossberg, *Governing the Hearth*, p. 204.

[160] *British Colonist*, 26 March 1872. In 1873, Beaven made specific reference to an apparently local incident: "In Heffly's case," he said, "the children suffered through the death of their father because no such law as this was in force, notwithstanding he was anxious to have them righted shortly before his death." See *British Colonist*, 23 January 1873.

[161] More in depth discussions of Connolly v. Woolrich took place during the Legislature's second attempt to pass the legitimacy bill in 1873. See the 23 Jan 1873 *British Colonist*.

[162] Backhouse, *Petticoats and Prejudice*, pp. 9-22.

Several other members argued that the bill was *ultra vires*: that is, that the province had no constitutional jurisdiction over marriage and divorce. Although these constitutional objections appeared strong, the bill passed. Supporters were adamant that it was needed. Robson stressed the bill's links to class formation, arguing that although the bill touched on the *ultra vires* matters of marriage and divorce, its real bearing was upon "'property' and 'civil rights.'"[163] Illegitimate descendants were being denied the social advantages of property inheritance. William Smithe suggested putting the bill into force permanently. Although his amendment to that end was defeated, it prompted the legislature to extend the bill's operation for an extra year.[164] On third reading, despite Premier McCreight's motion to hoist, the bill passed.[165] It was not, however, destined to become law.

McCreight, in his capacity as Attorney-General wrote to Lieutenant-Governor Joseph Trutch, advising him to withhold assent from the bill so its constitutionality might be examined by the federal government. He asserted that power over marriage and divorce was granted to the federal Parliament under the BNA.[166] Furthermore, he wrote, English law prevented the governments of colonies and dominions from legislating in a

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[163] *British Colonist*, 26 March 1872. Robson made the same argument in the 1873 session. See the *Daily Standard*, 23 January 1873.

[164] See *Daily Standard*, 26, 28 March 1872; *British Colonist*, 26, 28 March 1872.

[165] *British Colonist*, 3 April 1872.

[166] An area complicated, as McCreight acknowledged, by the authority granted to the provinces under section 92, over "the solemnization of marriage"; McCreight believed this provision was intended to allow only for regional variation in the rites of marriage. The province could legislate with regard to the form of the marriage ceremony, but not outside those boundaries. Certainly, he wrote, the province could not make the effect of marriage retrospective, by legitimating children born prior to marriage. See "Draft Report on 'Legitimacy Act, 1872," British Columbia Archives and Records Services, Attorney-General, GR 1459, Box 1, File 11.

manner "which is 'repugnant to the settled principles and policy' of the law of England." And English law specifically stated

> 'a bastard child whose putative father was English at its birth could not be legitimated by the father afterwards acquiring a foreign domicile and marrying the mother in a country by the Law of which a subsequent marriage would have legitimated the child.'[167]

For any British Columbian resident who was also a British Subject, the law would be void. McCreight's objections reached a receptive audience, and Trutch decided to reserve his assent from the bill.[168]

Robert Beaven did not take the rejection passively. He reintroduced the bill in the next session. In Committee, George Walkem, now Attorney-General under De Cosmos, moved that the measure be given the six months' hoist: he thought it absurd to pass legislation which had already been reserved. McCreight agreed. M.P.P.s Smith, Humphreys, and Barnston countered that the principle involved in the bill was a good one.[169] A third viewpoint, articulated by Beaven and John Robson, was that the bill should be passed as a protest against the Lieutenant-Governor's interference in the process of government. The legislature's independence in determining the content of legislation should not be constrained.[170] Walkem's hoist attempt was defeated 17-6, and

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[167] Ibid.

[168] British Columbia, *Statutes*, 1872, 35 Vict., no. 37.

[169] According to Robert Smith, "those who opposed [the bill] wished to visit the sins of the parents upon their children. No matter where the child came from -- be it black or white -- the father ought to have the opportunity of doing the 'correct thing' towards it." *British Colonist*, 23 January 1873.

[170] *Daily Standard*, 23 January 1873.

the bill again passed.[171] The *Daily Standard*, while noting the grounds upon which the bill was opposed, applauded the decision to pass it. Amor De Cosmos expressed relief that most of the legislators were not lawyers, but "men of practical ideas, whose minds have not been [so] cramped . . . by precedent . . . as to be incapable of giving expression to an original idea or taking a single step beyond that old beaten track marked out for them by Coke, Blackstone & Co."[172] He characterized the measure as one of "justice and equity," intended to remedy an unfortunate situation.

De Cosmos demonstrated an informed understanding of family labour: disqualifying the children of common law and 'country' marriages from inheritance was manifestly unfair, he wrote, since the "parents are in a measure indebted to their [children's] labours and exertions for the wealth they have accumulated, and yet . . . [the children] might be turned loose upon the world without a dollar."[173] De Cosmos' commentary reveals two interesting opinions: first, he viewed inheritance as a fair share of labour expended in youth; and second, he was worried about individuals being left without that inheritance: they were at a social and economic disadvantage compared to those born legitimate, and his imagery ('turned loose upon the world') suggests that non-inheriting individuals were less attached to the social system. Such people might form a dangerous underclass. The bill was intended to remedy this situation.

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[171] British Columbia, *Journals*, 1st Parliament, 2d session, 1872-73, pp. 37-38; British Columbia, *Statutes*, 1873, 36 Vict., no. 43.

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

[173] *Daily Standard*, 24 Jan 1873.

It was certainly not intended to be construed as an affront to morality: "the object of the Bill," De Cosmos wrote,

> is not to encourage the practice of adultery, but rather to cure the evil by holding out an inducement to persons living together unlawfully to avail themselves of its provisions, and by getting married within the period specified in the Act thereby legitimize their offspring and secure to them all the advantages they would have possessed had they been born in lawful wedlock.[174]

This observation, also made in the legislature in 1872 by then Provincial Secretary Alexander Rocke Robertson, M.P.P. for Esquimalt, indicates that the bill was intended not only to 'legitimate' the children of country marriages, but also the marriages themselves. Robertson made no distinction between common law and aboriginal marriage. He believed the act would be a benefit to the nation, holding out to unwed couples "a very strong inducement to discontinue living in a state of things at once disgraceful to themselves, discreditable to the country, and pernicious in its general effect."[175] The national morality was at stake. But the Dominion government was not worried about the national morality or the economic difficulties of common law and 'country' marriage families. They were concerned about the division of constitutional powers, and the bill was again reserved.[176]

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[174] Ibid.

[175] Ibid., 26 March 1872.

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

The defeats of 1872 and 1873 ended legislators' attempts to legitimate 'irregular' families. But concern over the social and financial difficulties created by unsanctioned marriage did not disappear. In 1877 Premier Andrew Charles Elliott introduced the "Destitute Orphans Act."[177] The Premier explained that his intention was to relieve the public of the burden of supporting 'concubines' and illegitimate orphans: "unfortunately," he said, "we know that men have died leaving their offspring without support and wholly dependent on the public. Those men have died rich and their riches have been claimed by relatives, the woman getting nothing for the children."[178] In the bill's preamble, Elliott disclosed an apprehension that under impoverished circumstances, "children are exposed to physical and moral deterioration, to the further injury of the community."[179] The *Mainland Guardian* agreed. It reported that the present state of the law engendered "pauperism, and vice, its sure result."[180] This was actually a very modern attitude. Later, social reformers mistook effect for cause, believing that vice led to poverty; thus, instead of moving to remedy economic conditions, they attempted to alter the moral habits of the poor.[181] However, despite these progressive attitudes, social concerns remained subordinated to ideological and economic prerogatives. When Cariboo M.P.P. Captain John Evans moved to extend the bill to men who had left a will,

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[177] The long name of the bill was "An Act for providing, in certain cases, for the distribution of the estates of persons dying intestate and leaving property in the Province." British Columbia, *Statutes*, 1877, 40 Vict., no. 28.

[178] *British Colonist*, 16 March 1877.

[179] British Columbia, *Statutes*, 1877, 40 Vict., no. 28.

[180] *Mainland Guardian*, 10 March 1877.

[181] Valverde, *The Age of Light, Soap and Water*, p. 20.

Elliott, revealing a laissez-faire disdain for tampering with the individual's freedom of contract, replied that he "did not think affairs were bad enough to warrant it."[182]

In its final form the bill contained a number of restrictions, and relied heavily upon judicial discretion. It accorded primacy to the legitimate family: if the intestate also left a widow and / or legitimate children, they or their representatives were to be notified and should "have an opportunity of being heard" before distribution of the estate was made. Furthermore, the act constructed the common-law family in narrow, patriarchal terms: eligibility under the act was restricted to 'concubines' protected or supported by the intestate and those children reputed to be his and maintained or protected by him within twelve months of his decease. If the patriarch chose not to support his dependents, neither would the state. But if the court did determine them eligible, the 'concubine' and / or illegitimate children could each be awarded (in a manner consistent with their previous level of maintenance) up to a maximum of $500 or ten per cent of the estate, whichever sum was larger.[183]

As can be seen, the Legitimacy and Destitute Orphans Acts were not solely concerned with the needs of children. The problems of common-law and 'country' wives were also a subject of concern. This contradicts Paulette Falcon's findings. Falcon contended that British Columbian legislators, despite the many mixed marriages in the province, and apparently unaware of the attention given mixed marriages by the

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[182] *British Colonist*, 16 March 1877.

[183] British Columbia, *Statutes*, 1877, 40 Vict., no. 28.

Canadian judiciary, "included no provisions for common law native wives in the 1873 [married women's property] statute. Thus the issue of what constituted a common law wife's separate real or personal property might become a particularly contentious issue."[184] This is misleading. The evidence shows that through his reserved 1872 and 1873 Legitimacy Acts, Married Women's Property Act originator Robert Beaven tried to redress the absence of legal rights and responsibilities in common law and 'country' marriages, and that he was aware of central-Canadian cases; in fact, both Beaven's legislation and his comments in the Legislature indicate that he believed (somewhat paradoxically) that 'country' marriages were 'valid,' but in need of state sanction to gain full rights; thus, he was unwilling to provide equivalent property rights to common-law wives and illegitimate children if they remained such; but he was attempting to create a means of legitimating the common-law family and endowing its members with equal legal rights. Beaven wanted to use the legitimation of their children to encourage common law couples themselves to become 'legitimated' by the state, brought within the compass of the law, and tied to the established social system. But he was prevented from doing so.

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[184] Falcon, "'if the evil ever occurs,'" pp. 72, 94.

Anthropologist Jack Goody has written that "transmission *mortis causa* is not only the means by which the reproduction of the social system is carried out . . . it is also the way in which interpersonal relationships are structured."[185] Hence, historians must consider the impact of inheritance legislation on both the social formation and the family. Within the family, De Cosmos and Smithe attempted to alter the descent of real property to provide equal opportunity for all of a man's descendants regardless of gender or age. Robert Beaven tried without success to extend this inclusivity, by providing a means for illegitimate children to be legitimated and inherit on an equal footing with other descendants. Of course, all of the legislation respected laissez-faire priorities and the pre-eminence of patriarchal rights: the equal inheritance provisions of the Inheritance Act, as well as those of the Wives and Children's Assurance Act, only affected intestate estates and could be over-ridden simply by making a will. So too could the Destitute Orphans Act. As Amor De Cosmos noted, the law would "not prevent a person so disposed from bequeathing his property as he [might] think proper; either by cutting one son off with a shilling and give [sic] the balance of his estate to another or otherwise."[186] Openly forcing individuals to take specific economic actions was never part of the liberal program. The measures were above all intended to be symbolic and normative. Prior to the Inheritance Act, for example, the norm -- that is, the default position if one failed to make a will -- left the entire estate to the eldest son. After the act, the norm included

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[185] Jack Goody, Introduction to *Family and Inheritance: Rural Society in Western Europe, 1200-1800*, ed. Jack Goody, Joan Thirsk, E. P. Thompson (Cambridge: Cambridge University Press, 1976), p. 1.

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

provision for all children. Legislators intended to influence testators by suggesting that an equitable distribution was approved, even desired, by society. Liberals believed strongly in the state's powers of moral suasion: hence De Cosmos' anxiety, voiced in the *Daily Standard*, that by sanctioning primogeniture the state was "a party to the distribution of an intestate's estate in such a way as to violate every notion of common justice and humanity."[187] The liberal aversion to restricting the rights of testators also affected married women's dower right. Certainly, compulsory dower was opposed because of the Province's interest in unencumbered land titles. But widows' interests were also deemed less important than a married man's ability to freely determine the disposition of his estate. Even when provided for in the legislation -- as in the Wives and Childrens' Assurance and the Destitute Orphans acts -- widows were relegated to subordinate, dependent roles in the family, on a plane of equality with their children; the patriarch, his rights, and his freedoms, were elevated above all other familial interests.

Jack Goody writes that "[t]he inheritance system of any society . . . . is part of the wider process whereby property relations are reproduced over time."[188] Within this context the reader would be well-advised to note E. P. Thompson's observation that in the inheritance of real property, what is being inherited is not the land itself, but "a place within a complex gradation of coincident use-rights" and the "functions and roles" attached to that place.[189] Simply put, property ownership is basic to class, and

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[187] Ibid.

[188] Goody, Introduction to *Family and Inheritance*, p. 1.

[189] E. P. Thompson, "The Grid of Inheritance: A Comment," *Family and Inheritance*, p. 328.

inheritance provides a means of reproducing or restructuring class relations. In restructuring inheritance, both amongst 'legitimate' heirs and by including illegitimate descendants, liberal reformers in British Columbia were attempting to reorganize society on a more egalitarian basis: they wanted to create a society with widespread access to subsistence resources (land or other 'property'), and hence, in which individuals would gain a social and political independence impossible under systems which concentrated land ownership in a limited class.

Liberals' commitment to equal opportunity for an independent producer class, or alternatively, their hatred of privilege and aristocracy, manifested itself in inheritance law reform. In fact, since the descent of real property bills were introduced concurrently with homestead exemption, mechanic's lien, and imprisonment for debt bills, they might be viewed as part of the 'package.' In the debates over inheritance law, liberals specifically compared the structure of family and society and indicated a causal relationship. The structure of inheritance within the family, legislators asserted, had a definite impact on social class structures. Primogeniture, they claimed, led to the concentration of wealth in specific family lines and, ultimately, to the creation of an unequal and self-perpetuating class society. Those with wealth, monopoly, and privilege were able to retain power within their families, to the detriment of those outside the bounds of the privileged class. To liberals, who believed above all in meritocracy -- that the 'natural leaders' of society should rise out of all classes -- primogeniture symbolized everything that was wrong with the old order, most specifically the arbitrary assignment of power and wealth.

Primogeniture and privilege prevented individuals from realizing their potential and thus retarded progress and national development.

Socio-political motivations were not limited to the Inheritance Act. The same motivations prompted Beaven's Legitimacy act, designed to prevent the formation of a non-inheriting underclass. But full extension of the inheritance system to 'illegitimate' descendants and 'irregular' families was thwarted. So concerns about the development of an underclass were addressed through the Destitute Orphans act, a stop-gap measure motivated as much by concern over government expenditure and social morality as the rights of the individual. Over the long term, the social possibilities for all of the legislation, whether practicable or not, suffered from the same affliction as the familial possibilities: the legislation was not compulsory, and individual patriarchs bequeathed family property as they wished.

Chapter 5

Family Protection Revisited: Property Law and the New Family

British Columbia's economy continued to stagnate through the late 1860s. Politically, stagnation led to union with Canada in 1871. The Dominion government assumed the new province's debt, and provided it with generous subsidies, but the economic situation remained perilously unstable. With the beginning of the North America-wide recession in 1873, legislators' worked frantically to create the conditions necessary to reinject life into the economy: they pressured the federal government to begin work on the railway and dry-dock promised in the terms of union, attempted to encourage agricultural growth with various land policies, and argued interminably over tariff protection for domestic industries.[190]

In 1873, as De Cosmos took over the premiership from McCreight, the declining economy provoked further changes to the homestead exemption act. During the session, Chief Commissioner of Lands and Works Robert Beaven tabled figures indicating that provincial settlement was occurring at very slow rate.[191] Arthur Bunster responded with a bill "to exempt certain property from forced seizure or Sale." Bunster proposed to extend

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

[191] Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: University of British Columbia Press, 1974), p. 24.

homestead exemption to farmers, tradesmen, and draymen (carters), without the need or option to apply or register. The bill's extremely generous and vague provisions aroused criticism: opponents argued it would prevent 'beneficiaries' from gaining credit, since their property could not be accepted by creditors as security.[192] Bunster countered that the measure would promote immigration, but the Legislature rejected it 16-6 on the grounds that it would slow the economy.[193] Nonetheless, legislators were concerned about the rate of settlement. A second bill, increasing the homestead act's personal property exemption to $500, passed through the Legislature.[194] In addition, the Land Act was amended to provide free land grants with automatic homestead exemption protection to settlers. Equal rights to pre-empt crown lands were also extended to women.[195] This legislation, reinforcing and extending the operation of the homestead act, was passed

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[192] *Daily Standard*, 8 February 1873: "The following are the provisions of a bill before our legislature. 'The team of horses, harness, plough, two cows, and ten pigs, the property of any farmer, at the option of such farmer. The tools and stock in trade to the amount of five hundred dollars, and household furniture to the amount of three hundred dollars, the property of any tradesman, at the option of such tradesman. The household furniture to the amount of three hundred dollars[,] the property of any drayman, at the option of such drayman, and his dray, horse, and harness' shall be exempt from seizure." For criticism of the bill see the *British Colonist* and *Daily Standard* issues of 18 February 1873.

[193] *British Colonist*, 18 February 1873; *Daily Standard*, 18 February 1873.

[194] *British Colonist*, 20 February 1873; *Daily Standard*, 20 February 1873.

[195] See "An Ordinance to amend and consolidate the Laws affecting Crown Lands in British Columbia," 1870, in *Laws of British Columbia*, pp. 492-503, wherein the right to pre-empt public lands was restricted to male British Subjects over the age of 18. The 1873 amending act extended this right to females over 18. British Columbia, *Statutes*, 1873, 36 Vict., no. 1.

In extending pre-emption rights to free lands to single women, British Columbia was a definite, if short-lived Canadian front-runner (the Walkem administration revoked single women's pre-emption rights in 1874). Women on the prairies began a campaign for equal homesteading rights in 1909. Federal authorities, who maintained control over Crown Lands were not sympathetic, however. By the time the prairie provinces gained control of their public lands in 1930, most free grant lands had already been settled. Saskatchewan and Manitoba revoked homesteading privileges altogether. Alberta legislated to allow any 'person' over the age of eighteen to homestead, and a few women were able to pre-empt lands, for the most part in the Peace River District. See Cavanaugh, "Limitations of the Pioneering Partnership," pp. 199-200.

under the same government which passed the Married Women's Property Act, a government widely accused of trying to destroy the family.

British Columbia's 1873 Married Women's Property Act (MWPA) was a duplicate of the 1872 Ontario act of the same name (with the exception of a single clause regulating the purchase of life insurance), and statutorily established an equivalent to the married woman's separate estate in equity.[196] Neither act, despite assertions to the contrary, was modeled on the 1870 English legislation.[197] Ontario Attorney-General Adam Crooks professed to have drafted the measure prior to seeing the English act,[198] and the evidence appears to bear out his claim. Although in its final form, the Ontario act did borrow some English clauses, it was more comprehensive and concise, better

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[196] In Ontario an 1859 act extended the basic principles of the equitable separate estate into statute law. Backhouse, "Married Women's Property Law," p. 223.

[197] Backhouse asserts that both acts were derived from the British statute. Her article is also misleading in its analysis of judicial decisions, implying that justices should have allowed married women to convey real property when the legislatures had not intended this. In 1873, an Ontarian M.P.P., James Bethune, proposed legislation "for the purpose of enabling married women to convey their estates in the same manner as before marriage without the concurrence of their husbands." Bethune stated that he "proposed merely to remedy a slip in the bill of last session." Attorney-General Adam Crooks replied that the drafters of the 1872 Ontario Married Women's Property Act "did not intend to provide any machinery for the conveyance of property by married women . . ." The legislature, which was at the time examining *four* separate bills to provide for the conveyance of married women's separate estates (a sure sign that the 1872 act contained no such provisions), eventually passed conveyance legislation which provided for the conveyance of a married woman's property *only with the consent of her husband*, or with a judge's dispensation if the husband's whereabouts was unknown, he was imprisoned, or incapacitated. Not until 1884 in Ontario and 1887 in British Columbia would married women gain an unrestricted right to convey real property. See Backhouse, "Married Women's Property Law," pp. 231, 236, 250; Toronto *Globe*, 23 January 1873; Ontario, *Statutes*, 1873, 36 Vict., cap. 18.

[198] Upon second reading of the Ontario Married Women's Property Act, Crooks asserted that he "had framed this bill while on the other [opposition] side of the House, and had since examined the Act passed in relation to this subject in the Imperial Parliament, in 1870, and he found a number of clauses identical in their scope with those of this Bill. He was prepared to introduce into this bill a clause to enable a married woman to sue for wages, and also one to protect creditors from fraud on the part of the husband [clauses 6 and 11 of the English Act]." Toronto *Globe*, 24 January 1872.

organized, and provided married women substantially greater rights to real property. The act proposed to allow a woman to hold separately real estate she possessed at the time of marriage, and to acquire additional real property in her own name. Her property, the earnings derived from it, and from any labour she might undertake, were to be free from her husband's control or debts, as were the assets she was newly empowered to invest in corporate stock and savings banks. In addition, she could contract, sue, or be sued in matters regarding her separate property.[199] The sole but substantial restriction of her control over her 'separate estate' was the inability to convey real estate.

Amor De Cosmos had been interested in extending an equivalent of the married woman's separate estate into statute law as a form of family protection for some time. When supporting homestead legislation, De Cosmos and Thomas Lett Wood referred to equitable trusts and agreements, noting that by bestowing upon his wife a certain amount of property, a man could protect it from his creditors. The Married Women's Property Act, based on the married women's equitable separate estate, provided these exact advantages. Since it omitted the 1859 Ontario act's restriction preventing a woman's husband from giving her real estate to protect it from seizure,[200] and specifically freed a married woman's separate property from the claims of her husband's creditors, the 1873 act would allow De Cosmos' proverbial "men who were carrying on the country" to transfer relatively large (in fact, unlimited) amounts of property to their wives before

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[199] Ontario, *Statutes*, 1872, 35 Vict., c. 16; British Columbia, *Statutes*, 1873, 36 Vict., no. 29. Backhouse, "Married Women's Property Law," pp. 230-231.

[200] See Canada, *Statutes*, 1859, 22 Vict., cap. 34, s. 1, and Ontario, *Statutes*, 1872, 35 Vict., c. 16, s. 1.

securing credit or undertaking business ventures, thereby protecting their homes and families from creditors and the volatile marketplace in cases of economic failure.[201] And any real property protected in this manner, since the wife could not convey it, would be doubly secure.

In the Legislature, only Cariboo M.P.P. Cornelius Booth supported the legislation's egalitarian potential, and the ideal of companionate marriage it suggested. Booth asserted that he "could not see on what ground a wife should be held in subjection and not placed on a level with her husband."[202] He continued, "Man and wife should be in the same relation to property as other partners."[203] Among those opposed, John Robson expressed the most perceptive apprehensions. He feared that the bill "proposed to establish two authorities in the same household[,] . . . savored of 'Women's Rights'" and "was calculated to revolutionize the marriage state." Moreover, Robson argued, it would open the door for married women to enter the public sphere, "encourag[ing] some wives to throw the children on the husband's hands, leave him, and go into business on their own 'hook.'"[204] For Robson, the bill was the thin edge of a pernicious wedge which

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[201] British Columbia, *Statutes*, 1873, 36 Vict., no. 29.

[202] *British Colonist*, 15 January 1873.

[203] *Daily Standard*, 15 January 1873.

[204] Ibid.; *British Colonist*, 15 January 1873. Peter Baskerville's study, "'She Has Already Hinted at "Board"' Enterprising Urban Women in British Columbia, 1863-1896," *Histoire sociale -- Social History*, vol. 26, no. 52 (November 1993), pp. 205-227, indicates that British Columbia's Married Women's Property Acts did allow married women to become entrepreneurs. However, only 30% of these belonged to the middle class (as indicated by land ownership or the presence of servants in the domestic household) and 40% did not have a husband in their household in 1891, leading Baskerville to speculate that many married women entered business by necessity rather than choice.

valued 'Woman's Rights' to the detriment of family solidarity and stability. The negative impact on society, he maintained, would be tremendous.[205]

Other legislators revived the claims of homestead exemption opponents that altering family liabilities would disrupt credit relations. Despite a clause specifying that a man could not transfer "moneys" or "investments" into his wife's name to evade his creditors, they steadfastly maintained that the bill would encourage fraud;[206] and they may have been correct, since no provisions accounted for the fraudulent transfer of real property. New Westminster M.P.P. Henry Holbrook worried that if the bill passed, extending credit to families would be impossible, "knowing their property could be, and probably would be, placed exclusively in the name of the wife."[207]

Heavy opposition from quarters hostile to both the bill's possibilities for generating fraud and its egalitarian implications forced supporters to appeal to paternalistic sensibilities. Lillooett's T. Basil Humphreys chastised Holbrook, suggesting that he had not read the bill thoroughly. Humphreys claimed that the bill "simply enabled the married woman to retain as her own property anything she had possessed previous to her marriage."[208] Although he was wrong, Humphreys was able to strengthen his position by utilizing an authoritative discourse which connected married women's property acts

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[205] British Colonist, 24 Jan 1873.

[206] The Committee debates are covered in the *British Colonist*, 15, 16 January 1873; and the *Daily Standard*, 15 Jan 1873. For the anti-fraud clause, see British Columbia, *Statutes*, 1873, 36 Vict., no. 29, s. 9.

[207] *Daily Standard*, 15 January 1873.

[208] Ibid.

with wife protection. He claimed that "the English papers" were rife with incidents of "brutality on the part of husbands" and cited "a case wherein a man had drawn his wife's money from the bank, sold her property, and then decamped." Humphreys asserted that if legislators passed the MWPA, "unjust and tyrannical men could not rob their wives of their property and hard earnings."[209]

The stories Humphreys referred to had been prominent in the English press for some time. In 1855, Barbara Leigh Smith had initiated a campaign for a married women's property law in England. Smith and her followers attempted to show that the sufferings of married women under the common law were widespread and not limited to any particular class; thus, they cited "example after example of husbands stealing property wives acquired before marriage, often by their own hard work; or husbands who had deserted their wives coming back and seizing the assets the wives had accumulated in their absence."[210] The campaign resulted in the paternalistic and protective Divorce Act, passed in 1857.[211] Later, near the end of the 1860s, British women and politicians sympathetic to their cause (mostly radical Liberals, including John Stuart Mill[212])

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

[210] Holcombe, *Wives and Property*, p. 65.

[211] The Divorce Act of 1857 gave British women who had obtained decrees of judicial separation or divorce the rights of property enjoyed by unmarried women. As noted above, it also extended those rights to wives deserted by their husbands, and was the precedent for the 1862 Vancouver Island act which provided property rights to deserted wives. See Holcombe, *Wives and Property*, pp. 103, 218; Backhouse, "Married Women's Property Law," pp. 218, 247.

[212] Mill, the foremost figure in the fight for married women's property rights (and women's suffrage) in England during the era, published *The Subjection of Women* in 1869, when the fight for the married women's property bill was at its most intense. Holcombe, *Wives and Property*, p. 113.

revived the idea that individual property rights should be extended to all married women. And the British press resumed printing lurid stories of married women suffering under the current system of property rights. Such stories resulted in massive petitions to both Houses of Parliament in 1868 and 1869,[213] and with the support of a large block of radical Liberals elected in the 1868 Liberal sweep, the Married Women's Property Act became law in England in 1870.[214] However, the resultant legislation was tempered by the House of Lords, and provided less sweeping property rights than radicals' had originally envisioned.[215]

T. Basil Humphreys was not the only British Columbian aware of the situation in England. In fact, Premier De Cosmos demonstrated a very thorough understanding of legislation passed in other jurisdictions. In the legislature, he claimed that "no liberal government could justly oppose this Bill." He believed the bill to be largely the same as the one recently passed in Ontario, and stated that "the great and well-known Stewart Mill [sic] had advocated the cause in England." Despite obvious knowledge of the egalitarian leanings of the English movement, a personal liberalism which made him sensitive to the demands of women for greater legal and political rights,[216] and the bill's potential to achieve one of his long-term goals -- protecting intact, functioning families from financial ruin -- De Cosmos stressed its value in dysfunctional families: "it brought

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[213] Ibid., p. 145.

[214] Ibid., pp. 168-169, 178.

[215] Ibid., pp. 175-76.

[216] See the *Daily Standard*, 9 June 1871.

the woman for whom the bill was intended as a safeguard, into a freer atmosphere, and prevented the worthless husband from concentrating his thoughts on the sole object of making money from the resources of his better half."[217] Either De Cosmos had been influenced by the stories in the British press, or political expediency made it necessary to appeal to the patriarchal ideals of many of the members of the legislature. An editorial in the *Daily Standard* seems to suggest the latter.

The editorial noted both the extension of women's individual rights and the paternalistic protection provided by the bill, and made appeals to both potential areas of support. De Cosmos declared that the married women's property bill was a "just measure" which reflected the "progressive" attitudes of the 1870s. He commended Robert Beaven for introducing the bill, a measure which was needed to replace outdated and archaic laws:

> Many laws, customs and usuages [sic] of a bygone age, that may have answered their purpose very well when first introduced, have outgrown their day of usefulness, and are now ill adapted to the purposes for which they were originally instituted, or to meet the requirements of the present more enlightened generation. Among these is the law which gives the husband an absolute proprietary right to the property of his wife.[218]

The problem, De Cosmos implied, was a civil rights issue, and he compared the property rights of women to those of pre-civil war Blacks in the United States:

> . . . according to the law in force in this province at the present moment, as between husband and wife in relation to property, either real or personal, it may be said of women, as Chief Justice Taney said of colored people in

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[217] Ibid., 15 January 1873.

[218] Ibid.

> the Southern States in his delivery in the celebrated Dred Scott case, 'they have no rights which their husbands are bound to respect.'[219]

But it was unlikely that conservatives who believed in the patriarchal family would be swayed by an appeal for female emancipation. So De Cosmos also appealed to their paternalism, through the now familiar argument of the English Women's Rights movement:

> It is not altogether an unusual thing for women possessing property in their own right, gained by their honest industry before marriage, to see their property squandered away by profligate husbands, whose sole object in entering into the marriage covenant would appear to have been to get possession of their wives property . . . . We need not go out of Victoria to find instances of this kind.[220]

The Married Women's Property Bill would provide women with protection from such instances of victimization, and De Cosmos' choice of diction makes his appeal to the patriarchal elements of society obvious: "it is to remedy this evil, and to throw the aegis of the law's protection around married women who have been thus unfortunate in their matrimonial connections, that Mr. Beaven has introduced the bill under consideration."[221]

Several letters in favour of the measure were printed in the *Daily Standard*.[222] Some addressed the question with 'Woman's Rights' issues as their frame of reference,

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[219] Ibid.

[220] Ibid.

[221] Ibid.

[222] The reader would be wise to regard the identity of these authors with a healthy degree of skepticism. At least one member of the legislature, Robert Beaven -- the introducer of the legislation in question -- wrote letters to the newspapers under pseudonyms to gain public support for his personal views. See Robert Beaven, "Correspondence Outward 1871-1900. Letter Book Tracings," British Columbia Archives and Records Service, E / C / B38.

objecting to the idea that married women should be subordinate to their husbands. One of these, written under the pseudonym 'Proletarius,' found the "slavish" idea of subordination "revolting to a manly mind," and suggested that "few of the sound thinkers of the day disagree with one of the greatest of their number, John Stuart Mill, that marriage should be based upon perfect equality of rights." 'Proletarius' asserted that female inequality was antithetical to the "enlightened freedom and liberalism" of the late nineteenth century and marred the newly won political independence of the Province. But even this radical partisan was willing to include a caveat, perhaps to court favour with opponents: [W]omen," he wrote, "ought to possess the same personal and individual rights, *at least as regards property*, as men."[223]

Another writer, 'Sarah Jane,' addressed the question with family protection as her main focus. She claimed that MWPA opponents "proceed upon the assumption that women are not naturally as good or honest as men . . . and that all that is necessary to excite in them the manifestation of the worst qualities, is opportunity." Opponents, she wrote, feared that if women were granted power or property, they would use it to the detriment of their husbands and families. But other jurisdictions had found differently: in Ontario and "in more than three-fourths of the American states," such laws were in already in place and were "highly beneficial." In fact, 'Sarah Jane' suggested that a combination of maternal instinct and the married women's property law just might strengthen the economic base of the family:

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[223] *Daily Standard*, 3 February 1873. Emphasis added. See also Ibid., 20 January 1873.

> After considerable observation, I will venture that in every community where such a law has existed for any length of time, ten cases can be found where women have used every cent of their separate property for the support of their husbands and families -- husbands often drunken and worthless -- to one, where their separate property has been the cause of trouble or disruption in the family, or where they have selfishly refused to allow their property to be used for their families in case of need.[224]

A third writer, 'Observer,' also supported the ideal of maternal instinct, claiming that "A woman may be lost to all sense of decency, in so far as her own conduct is concerned . . . but her natural affection for her offspring prevents her from allowing her children to want."[225] Far from urging destruction of the family foundation, these writers were advocating a new view of the family, centered around the ideal of companionate marriage, and informed by separate spheres ideology: the husband was corrupted through his involvement in the competitive, uncaring marketplace; but the compassionate, family-oriented wife could be trusted to look after the needs of the family. With the nascent emergence of the "cult of true womanhood" stressing the importance of maternal instinct and women's role in the home, they felt that putting property in the hands of wives could only strengthen the family. The protection which MWPA advocates sought for married women was protection for the wife and children from the misdeeds or misfortune of their breadwinner, whether he was abusive, drunken, absent, or simply reckless or incompetent in business.

But their opponents certainly did not see things this way. In fact, the act engendered a public and political backlash of enormous proportions. In a *British Colonist*

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[224] Ibid., 3 February 1873.

[225] Ibid., 25 January 1873.

editorial, John Robson speculated that the "Radicalism" of the bill resulted from British Columbia's recent achievement of responsible government: "Until quite recently the people of British Columbia were in a political condition scarcely better than serfdom; and it is not unnatural that there should be a disposition to make free use of their newly-gotten power, and, perhaps, incline towards the other extreme." Robson suggested that the bill disregarded "existing systems and conditions," and was "too revolutionary." It would "unnecessarily disturb the matrimonial fabric," and throw credit relations into disarray.[226] Robson was not taken in by the passionate appeals of the bill's supporters. He advocated the Wives and Children's Assurance Bill and Arthur Bunster's Dower Bill as less sweeping measures which would produce the desired effect: protecting dependents. The editorial staff, he said, did not want to be

> understood as asserting that there are not instances in which the wife should have some protection as the bill proposes. Unhappily there are cases of the kind; but we are happy to think them exceptional, and we must question the wisdom, the necessity of producing a social and commercial revolution, especially when a much more simple remedy may be applied.[227]

In tampering with the family, Robson believed legislators were jeopardizing the province's future. In the Legislature, he was joined in his opposition to the Married Women's Property Bill by William Smithe, who was concerned that the bill would not provide an equitable financial arrangement between the sexes. Smithe proposed that the measure be recommitted to consider the following amendment: "That if any married

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[226] *British Colonist*, 24 January 1873. See also the 29 January 1873 *British Colonist* editorial, which claimed that the bill aimed "at a complete revolution of the domestic relations of the country."

[227] Ibid., 24 January 1873.

woman have any separate property, she shall be liable for the support of her children and household, in an equal and proportionate degree with her husband."[228] The move to recommit was defeated, and the bill passed third reading on a division of 16-5.[229] The absence of any attempt to address Smithe's concern is particularly interesting when one considers that clauses 13 and 14 of the English Act specifically established the liability of a married woman with a separate estate for the support of her husband and children.[230] The failure to include such a clause may be further proof that the purveyors of the bill were more in tune with the emerging ideals of maternal feminism (companionate marriage, separate spheres, and female emancipation) than that of the established patriarchy: in England, radicals vigorously objected to the liability clause, arguing that a wife was entitled to support -- her maintenance was an equivalent for the services she performed in managing the household -- and that she should not legally be held responsible for the support of her children, as long as the law recognized her husband as their sole parent and guardian.[231]

The ideals of maternal feminists were not, however, as popular in the 1870s as they would be later in the century. Judging from a number of letters to the local newspapers, William Smithe voiced the concerns of a sizable constituency. One critic

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[228] *Daily Standard*, 25 January 1873.

[229] British Columbia, *Journals*, 1st Parliament, 2d session, 1872-73, p. 39. This division caused some controversy, the *British Colonist* claiming that the motion to recommit had actually passed 16-4. See *British Colonist*, 1 February 1873.

[230] Holcombe, *Wives and Property*, pp. 245-6.

[231] Ibid., p. 181.

argued that the bill bestowed upon "the wife the same rights as the husband and an entire immunity from the responsibilities attached to him as nominal head of the household."[232] As 'Sarah Jane' had perceptively noted, those who opposed the bill brought forth arguments which placed little faith in the character of women: once a woman was liberated, they claimed, she would abandon her responsibilities, and leave her husband and children in a precarious situation. Such fears arose from the realization that the Married Women's Property Bill could provide a woman with a certain degree of freedom from patriarchal authority. And many letter writers feared that freedom for women would result in serious consequences for the family and social breakdown: one wrote, "by creating two separate and distinct purses, two powers are created where only one should exist"; this, he contended, would tend "in every way to create coldness, bad feeling, jealousy and dissension in the family, where naught but love and trust should exist"; the end result of such a turn of events would be "a quick and easy divorce law" and "total disregard of the institution of marriage."[233] Another believed the act would "make the woman unwomanly" and "by its action promote bachelorhood and its concomitant evils," eventually leading to "social and commercial demoralization."[234] Like proponents of the act, opponents believed that the shape of the family, the social structure, and hence, the national destiny, were closely linked.

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[232] *Daily Standard*, 1 February 1873. Other letters voicing the same concern appeared in the 24 January 1873 *Daily Standard*; and the 29 January and 2 February 1873 issues of the *British Colonist*.

[233] *Daily Standard*, 1 February 1873.

[234] *British Colonist*, 29 January 1873.

These rhetorical flourishes should not be construed as gross exaggeration simply because they seem overly dramatic to a modern ear. The concern was real. Shortly after the bill's passage, a petition circulated in Victoria and Nanaimo calling on the Lieutenant-Governor to withhold his assent from the measure. The petition, which gained 450 signatures, claimed the bill was unnecessary, and restated many of the concerns of its opponents: the bill would interfere in domestic relations; discourage marriage; encourage fraud; and confound commercial relations; moreover, its proponents assured the Lieutenant-Governor, deserted wives were already protected under existing statutes.[235] But the petition was tainted by accusations of impropriety. Cabinet Minister W. J. Armstrong alleged that "there were names on the petition which were placed there fraudulently and corruptly." And Robert Beaven claimed that the document contained the names of only about 60 voters.[236] Despite Robson's countering contention that the petition had garnered the support of 200 voters in Victoria alone,[237] the Lieutenant-Governor decided not to act on it, likely because the British and Ontarian precedents would have made such an action difficult to justify. Smithe, however, was not yet finished. In early 1874, he introduced a bill to amend the Act, apparently to prevent fraud. But the provisions of this bill were so completely altered in committee that he withdrew it.[238]

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

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

[237] Falcon, "'if the evil ever occurs,'" p. 67.

[238] British Columbia, *Journals*, 1st Parliament, 3d session, 1873-74, pp. 5, 25, 27, 36; *British Colonist*, 23 January, 5 February 1874.

From 1862 to 1873, concern to protect reproductive priorities from the volatility of marketplace relations characterized Vancouver Island and British Columbian family property legislation. But this concern was tempered by intentions to maintain marketplace relations. Liberals did not intend to inhibit market activity. Rather, as Jane Ursel has indicated, the liberal state took on a role as mediator between the modes of material production and societal reproduction.[239] In British Columbia this led to family protection measures: first as an improvised means of redressing existing problems faced by already 'broken' families, and then as a preventative to forestall the pauperization of families. To reduce family vulnerability in the new market economy, liberal legislators tried to prevent family proletarianization by securing to them a stable property base. In doing so, they looked to American and British precedents, and found that either homestead exemption or the married woman's separate estate would suit their purposes. And they were not alone in this observation. Several American states combined married women's property laws and homestead exemption laws into a single measure, or passed both measures together. According to Paul Goodman,

> The movement for homestead exemption converged with reform of married women's property law. Both recognized that the market revolution had weakened the traditional assumption that wives and children could rely on male household heads as breadwinners. The ups and downs of the economy, failure in business, or loss of jobs made families destitute. Even husbands who entered the marriage with property, sometimes brought by the wife, could suffer sudden reversals of fortune, as did thousands in the collapse of the late 1830s.[240]

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[239] Ursel, *Private Lives, Public Policy*, pp. 5-7, 18.

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

Robert Beaven's MWPA, passed under De Cosmos' ministry, was intended to increase the family's protected property base. But in doing so it shifted familial power structures, and neglected certain patriarchal priorities: it extended its protection to wives who left their husbands, promoted companionate marriage, and extended married women's rights within the public sphere. These limited breaks with patriarchy were necessary in the new market order. But they were also more than this, having been influenced by a feminist agenda which will be discussed at length in the concluding chapter of this work.

Because of its break with patriarchy, the MWPA occasioned a split amongst liberal legislators. Up to this point, John Robson agreed with the aims of the liberal 'package': establishing the security of the independent producer family, developing representative and responsible property-based democracy, and encouraging colonial and provincial economic growth. He and De Cosmos both supported abolishing imprisonment for debt, establishing mechanics' lien laws, protecting the homestead, creating an equitable inheritance system, and lowering the property qualifications for the franchise. But they divided at their conception of family structure. While Robson held a patriarchal conception of the family as a hierarchically organized community of interests with the husband / father at its head, De Cosmos, Beaven, and others were open to the idea of the companionate family. Robson, as has been shown, was willing to extend married women's rights within their role as wives and mothers confined to the domestic 'sphere': wives could prevent disposal of a homestead to protect their families, and in so doing were acting within the proper boundaries of their role: they were defending the

requirements of the domestic sphere. Nonetheless, their ability to do so was constrained by the husband from his superior position as 'head of family' and representative in the public sphere. Only he could invoke homestead protection. Wives were not to be given legal abilities which would allow them to exceed their well-defined domestic role. So Robson opposed the MWPA, which would allow married women to enter the public sphere, participate in the economy, and possibly to compete socially and economically with their husbands. Entrance of wives into the public sphere would be tantamount to the creation of "two authorities in the same household . . . [and] was calculated to revolutionize the marriage state."[241] A wife would have control over her own earnings and investments and could act independently of her husband.

The husband's ability to transfer money to his wife to protect it from creditors in the MWPA also offended Robson's conception of the family. In this way, *family assets* were shifted from one member to another, specifically to evade *family liabilities*. For opponents, this practice, as Philip Girard and Rebecca Veinott note in their study of married women's property law in Nova Scotia, "reeked of fraud on creditors as it did not accord with the common perception of marriage as a community."[242] Robson, and others like him, according to historian Michael Grossberg, "assumed the interests of the family to be inseparable and best represented by its patriarch."[243] The responsibilities of the

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[241] *British Colonist*, 15 January 1873.

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

[243] Grossberg, *Governing the Hearth*, p. 25.

patriarch were the responsibilities of his entire family; if the family was not a single, unified entity represented in the public world by the husband, it was not a family at all.

Proponents of the MWPA subscribed to completely different marital ideals. They believed in increasing power for wives and mothers in their roles within the family, and if necessary, in the public sphere. A mother could be counted on to look after the best interests of her children. But their reforms went beyond a simple admiration for women in the roles of wife and mother. Those who promoted the ideals of maternal feminism and companionate marriage, giving married women more power within the family, were also giving more power to women outside the domain of the family. Thus Paulette Falcon is incorrect in her assertion that in passing the Married Women's Property Act, "meeting a feminist agenda was never the legislators' goal."[244] Without a new conception of women's roles in society, allowing married women in functional marriages into the public sphere, the Married Women' Property Act could not have been passed. The act allowed married women to 'intrude' into the public sphere, and in fact provided women who chose to leave marriages with the property rights necessary to do so. It was thus, as Robson claimed, a 'radical' measure, and opposed by those with a socially conservative outlook. Radicals' association of property rights, political rights and individual liberty led them to identify with 'Woman's Rights' demands, and provided the context for many of the reforms discussed in this thesis. The following chapter examines the extent of feminist support among British Columbian legislators during the early 1870s.

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[244] Falcon, "'if the evil ever occurs,'" p. 91.

Chapter 6

A Feminist Agenda? 'Woman's Rights' and Fragmented Gender Roles in British Columbia, 1873

A few weeks after the Married Women's Property Act was passed in 1873, the government's Municipality Amendment Bill was reviewed in the Legislature. Almost immediately, Charles Semlin, member for Yale, "moved to allow females to vote." George Walkem, ever the social conservative, changed the subject, moving that the municipal franchise be restricted to British Subjects. When that debate lulled, Semlin again interjected: he urged, on the advice of Cornelius Booth, that they "strike out 'male' and insert 'person' instead . . ." John Robson objected to the motion. He referred to the petition which had been drawn up to protest the Married Women's Property Act as an indication of the unpopularity of 'Woman's Rights' issues. At this point John Barnston, W. J. Armstrong, and Robert Beaven (the latter of whom the *British Colonist*'s reporter described as in an "excited" state) sided against Robson. Armstrong and Beaven alleged that the petition carried very few voters' names, some of which were obtained without the consent of the individuals. Walkem and Robert Smith countered, ridiculing the proposal, and suggesting that women be allowed to sit as city councilors. The Legislature echoed with laughter.[245]

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

Charles Semlin put matters back on track: he stated that there was a precedent for his motion. In Ontario, Semlin said, women could vote in some matters.[246] Booth supported this assertion, and De Cosmos said the same was true in England, Italy, and other continental European countries.[247] In England, John Stuart Mill had long advocated that women were entitled to representation in Parliament on the same terms as men; and, in 1867, he proposed an amendment to the Reform Bill which would have allowed women to vote. Interestingly, his amendment was similar to that which Booth suggested to Semlin: he had moved "that the word 'man' be omitted and the word 'person' inserted in its place."[248] However, Mill's amendment was defeated. But in 1869, another British Member of Parliament, Jacob Bright, was successful in gaining single women with property the vote in municipal elections.[249] And the British influence was widespread. In Ontario, attempts were made to gain women the municipal and provincial franchise in 1868.[250]

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[246] Ontarian women could vote in elections for school trustees. Toronto *Globe*, 9 December 1868.

[247] It appears that De Cosmos' information on Italy was correct, but outdated. With Italian unification in 1860, propertied women in Lombardy and Tuscany lost control over both their property and their right to vote in local elections. Chiara Saraceno, "Women, Family, and the Law, 1750-1942," *Journal of Family History*, vol. 15, no. 4 (1990), p. 427.

[248] Sylvia Strauss, *'Traitors to the Masculine Cause': The Men's Campaigns for Women's Rights* (Westport, Connecticut: Greenwood Press, 1982), p. 175.

[249] Holcombe, *Wives and Property*, pp. 115, 212.

[250] Both proposals came from a legislator named Coyne. See the Toronto *Globe*, 3 February, 9 December 1868. Ontario gave widows and unmarried women over twenty-one years of age (with the requisite property qualifications) the right to vote on municipal by-laws in 1882. In 1884, they received the full municipal franchise, less the right to sit as municipal councilors. See Allison Prentice et al., *Canadian Women: A History* (Toronto: Harcourt Brace Jovanovich, 1988), pp. 175-76.

British Columbians had been aware of the struggle for women's suffrage for some time. In June 1871, the *Daily Standard* ran an editorial entitled "Woman's Rights in England." In it, Amor De Cosmos commented on the attempts of Jacob Bright to extend the Parliamentary franchise to women. He claimed that Disraeli had voted for Bright's 1871 proposal, and that Gladstone's only objection to the enfranchisement of 'spinsters' and widows was the rowdiness they would have to face at the polls. Once the ballot was introduced, he would withdraw this objection. "The House," Gladstone said,

> must have regard to the number of absolutely self-dependent women who are every year increasing in the great centres of population, and whose interests, especially with regard to the question of employment, do not receive the consideration that they would have if women possessed the franchise.

De Cosmos also referred to reports that two other British Cabinet members found themselves "unable to deny the justice of the demand that sex should be no disqualification for exercising the franchise, provided that all of the legal formalities have been dealt with." In large, bold print, De Cosmos proclaimed: "Who will ridicule Women's rights doctrines after the master minds of England have endorsed them?"[251]

Influences geographically closer to home were also important: in the same editorial, De Cosmos cited a Montana precedent for female enfranchisement.[252] And the American influence was about to make its presence felt in a more direct manner. Slightly over four months after De Cosmos' editorial appeared, Victoria was visited by 'Woman's

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[251] *Daily Standard*, 9 June 1871.

[252] Ibid.

Rights' activist Susan B. Anthony. For four nights, Anthony spoke on a wide variety of subjects, encompassing the right of women to social, educational, professional, and political equality.[253] To the audience's applause, she declared that "woman was prevented from filling the position in life for which God designed her because she was deprived of all political power. Give her the ballot and she would protect herself, obtain as high wages for her labor as man, and fill the highest positions of State."[254] The following evening, in a "powerful address" Anthony successfully refuted all objections to female suffrage. "With the ballot," she asserted, "a man is all things. Without it he would be as powerless as a woman. Woman could never feel self-respect or self-appreciation without the power of voting." Yet, ironically, she noted, "[w]hile the law did not recognize her right to vote it did not forget to tax her . . ."[255] At the end of her third lecture, Anthony asked if anyone in Victoria's Alhambra Hall objected to women's suffrage. The room was silent. When she called for a show of hands from those in favour, "[e]very hand was held up." Both the *British Colonist* and the *Daily Standard* offered her the highest of accolades: the *British Colonist* reporter wrote, "In every respect Miss Anthony is the best lecturer who has visited us . . ."[256]

Although the audience for Anthony's first lecture was somewhat smallish (seventy-five people according to the *Daily Standard*), it contained only "two or three

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[253] *British Colonist*, 24-27 October 1871; *Daily Standard*, 24-27 October 1871.

[254] *British Colonist*, 24 October 1871.

[255] Ibid., 25 October 1871.

[256] *Daily Standard*, 26 October 1871; *British Colonist*, 24, 26 October 1871.

ladies," and on subsequent nights it increased in size.[257] Anthony was lecturing mainly to men, and judging from their response, many of them were sympathetic. Following this rather successful impact, it should be little surprise that less than six months later, and a year prior to Semlin's amendment, T. Basil Humphreys, armed with a knowledge of the English women's rights situation and newly elected to British Columbia's first wholly-elected legislature, would propose an amendment to the 1872 Municipal Act to give women the franchise. The climate in the Province was ripe for such an event. Nonetheless, Humphreys' amendment was defeated, and the reasons for this are unclear. Certainly by 1873, when Charles Semlin's amendment was under consideration, there were some very enlightened and liberal views in the Province. De Cosmos wrote in the *Daily Standard*:

> That [men] have hitherto made the most of the powers they possessed, and that they have jealously hedged themselves round with legal enactments as a protection against the demands of the other sex for any participation in worldly matters beyond the precincts of the drawing room is undeniable . . . . [W]ith a more widespread diffusion of knowledge, and a higher grade of intellectual acquirements [amongst women], came a natural desire for an extension of the rights of women in the various walks of life. They discovered in a fair field, without favor, women were not so deficient in mental power, compared with men, as they had been taught to believe, and a knowledge of that fact inspired a spirit of self-reliance and independence, which seems to have culminated in what is commonly known as the women's rights movement.[258]

De Cosmos declared that women, in certain cases, should have the franchise: he repeated Anthony's argument that it was unfair to tax women and yet withhold the franchise from

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[257] *Daily Standard*, 24-25 October 1871; *British Colonist*, 24-27 October 1871.

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

them. "Among men," he asserted, "taxation without representation is held to be an unbearable species of despotism -- why should it be held to be any less despotic where females are concerned?"[259] Yet he felt it necessary to temper the effect of his editorial. He distanced himself from the most radical leaders of the women's rights movement, and repudiated any overt change in social roles; in doing so, he was attempting to appease the more conservative elements of society:

> All great social and political reforms, in their incipient stages, are characterized by extravagant notions and extreme views....We [the *Daily Standard*'s editorial staff] have no sympathy with that class of strong-minded females, of which Lucy Stone, Miss Anthony, and Mrs. Woodhall are the representatives; but we do think that in many respects the rights of females might be extended considerably without doing violence to anyone, or in any degree impairing that native modesty in the female character, which the other sex profess so greatly to admire . . .[260]

Supporters of Semlin's amendment may have put forth these arguments, and others like them, in the Legislature. They may also have been quite conciliatory. Unfortunately, we can never know.

What is known, however, is that there were two opposing factions, and that they were rather evenly divided. In the midst of the debate, J. F. McCreight proposed that the amendment be reformulated to allow *unmarried* women ("spinsters and widows") over twenty-one years of age to vote in municipal elections. Semlin withdrew his amendment.[261] The McCreight motion was based on the rationale, as the *Daily Standard*

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[259] Ibid.

[260] Ibid.

[261] *Daily Standard*, 12 February 1873.

expressed it, that "Where women are married the men should do the voting."[262] According to McCreight, "it might be difficult to settle disputes arising over ownership of property. So he would limit the right to unmarried women."[263] Nonetheless, even such an accommodating amendment was rejected by the conservative faction. The House was divided, and Speaker Dr. James Trimble was forced to cast the deciding vote. The motion carried.[264]

Interestingly, John Robson, while critical of Semlin's amendment, supported McCreight's reformulation of the measure. As long as the bill was not bestowing rights in the public sphere to *married* women, Robson was willing to support it. In the *British Colonist*, however, which opposed 'Woman's Rights,' Robson downplayed the amendment's importance: "The House, in a tit of liberality . . . conceded to unmarried women who are on the assessment role the right to vote at municipal elections -- a right of little importance because it will be little used."[265] Others were more upset. Less than a week later, Robert Smith moved an amendment to revoke women's access to the municipal franchise. The motion was defeated.[266] Perhaps the most surprising response to the amendment was that of T. Basil Humphreys: the vigorous supporter of the Married Women's Property Act and proponent of the 1872 municipal women's suffrage

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[262] Ibid., 13 February 1873.

[263] Ibid., 12 February 1873.

[264] Ibid., 12 February 1873.

[265] *British Colonist*, 13 February 1873.

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

amendment, voted against the McCreight amendment.[267] Two reasons may account for this action: either Humphreys was indignant that the 1873 amendment was receiving consideration when his own amendment had failed; or, possibly, he rejected the amendment because he felt it too restrictive. Even if this was the case, the amendment, put in its context, was an extremely progressive measure and made British Columbian women the first in the Dominion to be enfranchised at the municipal level.[268]

The municipal act amendment shows that almost all of the legislators believed that in the public sphere, the patriarch should represent the family's interests.[269] A small majority believed that little harm could be done by allowing unmarried women the municipal vote. The barest of minorities argued women should not have the vote at all. But there was also a small core group of 'feminists' in the legislature, favouring the extension of women's legal and political rights regardless of their social role or position in the family. These members, among whom Robert Beaven, Cornelius Booth, and Amor

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[267] Ibid., 12 February 1873.

[268] Although some French-Canadian women had once enjoyed even greater political privileges. In pre-Confederation Quebec, women with property were sometimes allowed to vote in elections for the House of Assembly. This practice ended in the early nineteenth century. See Alan Greer, *The Patriots and the People: The Rebellion of 1837 in Rural Lower Canada* (Toronto: University of Toronto Press, 1993), p. 114.

[269] The best explanation for this stance comes from Susan Moller Okin, who notes that nineteenth-century political theorists, by relegating women to the domestic sphere, were able to deprive them of full political rights. In this way, "even egalitarian theorists envisaged equality in the form of male-headed households that were equal to one another." The broad social vision of equality liberals sought for the nation did not necessarily apply outside of the public sphere. Thus, although some liberals recognized the similarity of 'Woman's Rights' advocates aims to their own and endeavoured to aid them, extending women's rights both within and beyond the private sphere, others could join with conservatives and dismiss the 'Woman's Rights' movement by claiming that it was premised on a category mistake: women were a part of the domestic or private sphere where male-headship was both necessary and natural; thus the 'Woman's Rights' movement was asking for rights which were incongruous with women's social position. Okin quoted in Basch, *In the Eyes of the Law*, p. 198.

De Cosmos were prominent, were the same members who gave the MWPA their unqualified support and orchestrated its passage. They were joined in that endeavour by other members who saw in the act an opportunity to protect families, to enable mothers to perform their tasks, or to protect battered or deserted wives.

Chapter 7

Conclusion

This thesis commenced asking why an all-male legislature in the nineteenth century would alter patriarchal rights, and presented two possible answers: an emerging liberalist concern for individual rights, and nation-builders' priorization of social reproduction and familial rights in general over those of the patriarch in particular. Family property law reform in the 1860s and 1870s developed in reaction to capitalism. The capitalist economy, originally promoted by liberals, threatened both liberal social ideals and the nation's development. Thus liberals moved to protect the family, which they believed crucial to the process of nation-building, for purposes of demographic reproduction and social stabilization. By protecting family property, legislators intended to encourage family development, population growth, and social stability through economic and social security. But liberal legislators also valued individual rights and perceived that family property law was a means to influence the social structure in terms of class formation. Liberals desired broad property-based democracy and an independent producer populace. In the face of expanding proletarianization, protecting family property and modifying inheritance rights appeared central to achieving these goals.

While both liberal concerns, nation-building and individual rights, were already influencing the form of the family in the ways described above, each took on specific implications for married women. During this period, the family's reproductive interests were increasingly associated with the wife. Since separate spheres ideology and the cult

of domesticity assumed the husband was engaged in market activities, and accorded heavy household and child-raising responsibilities to the wife, she began to receive increased rights to carry them out. At the same time, the ideological convergence of 'radical' equal rights feminism with liberal individualism led to the pursuit of new political and property rights for women both within and outside of the family. Within the family, the increasing recognition of the wife's responsibilities and, necessarily, her competence, interacted with liberal feminism and suggested the suitability of a new form of spousal relationship, often termed 'companionate marriage' by sociologists and historians.

The full anti-patriarchal potential of these developments was tempered, however, by the large number of social conservatives in the legislature, to whom liberals had to appeal for support. It was further tempered by egalitarian liberals' own belief that social reproduction depended on the prominence of the family in the colonies, and liberals' laissez-faire commitments. Married women's property rights were generally expanded only when such expansion was seen to tie in with their reproductive functions, and thus to be beneficial to the nation-building process.[270] Modification of married women's

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[270] Family property legislation in the Pacific colonies and British Columbia, then, confirms the contention of Lykke de la Cour, Cecilia Morgan, and Mariana Valverde in "Gender Regulation and State Formation in Nineteenth-Century Canada," *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada*, ed. Allan Greer and Ian Radforth (Toronto: University of Toronto Press, 1992), p. 169, that "women were . . . often regulated through socio-legal categories that fragmented gender." Women were defined by the role they played in relation to their husbands or families, and legislation dealt with them on that level: as widows, spinsters, married women, Indian 'country' wives, deserted wives, and 'concubines'. Legislation also dealt with children in terms of categories denoting their relation to their fathers: legitimate or illegitimate, whole- or half-blood, and 'destitute orphans'. And although men were also defined according to the categories of patriarchy -- they were variously termed bachelors, fathers, husbands, and 'heads of families' -- the difference was clear: although it was suggested, men were never regulated according to these

property rights began with the emergency property rights granted to deserted wives in 1862; it continued through the homestead exemption acts which gave wives -- at the option of their husbands -- power to veto the sale of family property and a dower right, both granted expressly for the purpose of protecting and raising their children; and it culminated in the MWPA, under the terms of which property reserved for the family from creditors could be registered in the wife's name; in addition, mistreated wives now had the property rights necessary to leave their husbands, and under Lord Talfourd's Act of 1839, they could also petition for custody of children under seven. The necessity of gaining the support of social conservatives through the nation-building agenda for these measures was clear: when property rights granted to wives by liberal feminists did not seem suited to their familial role as reproducers, social conservatives did away with them, as was the case when John Robson removed the gender neutrality clause from the homestead exemption act in 1867, and the Walkem government abolished women's right to acquire free land grants in 1874.

The interaction of social conservatives' priorization of the rights of men, and the liberal respect for laissez-faire principles -- liberals were loathe to tamper with the individual's freedom of contract, and thus failed to specify the obligations of testators -- meant that inheritance law reform, designed both to equalize the distribution of property amongst heirs across divisions of age, gender, and legitimacy, and to increase individual rights by reducing class disparities, was rendered ineffectual. Nothing in the Inheritance,

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categories. Legislators simply could not bring themselves to deprive bachelors, for instance, by restricting the benefits of free land grants or homestead exemption to 'heads of families'.

Destitute Orphans, and Wives and Childrens' Assurance Acts restricted the patriarch's freedom to dispose of property by will or during his lifetime. Likewise, concern for male freedom in the marketplace meant that a married woman's dower right only operated in cases of intestacy. Mandatory dower was rejected, and homestead dower subject to registration by the husband. Unlike civil law, which required the patriarch with his ultimate rights over familial property to provide for his dependents, including his wife, no obligations attached to the right to testate in British Columbia.[271]

It would appear, then, that both schools of interpretation presented in the introduction address facets of the motivation for legislative changes to family property law in the mid-Victorian era. The liberal ideals of individualism and equality were not limited to the political arena, but entered the family as well. Such ideals questioned all forms of hierarchical organization and worked toward equality amongst children and the emancipation of women. But liberals were constrained in applying their principles, both by a priorization of the rights of men which existed even among many of their own political persuasion, and by the power of their opponents. For these reasons, male authority remained supreme throughout the nineteenth century. But, in certain cases, when liberal ideals merged with the nation-building agenda -- stressing the importance of the family, and especially the wife in social reproduction -- which enjoyed widespread support amongst the socially conservative, the legislature extended married women's rights. For instance, many who did not support municipal suffrage for married women did

[271] Bouchard, "Family Reproduction in New Rural Areas," p. 484.

support expanded property rights and a new, albeit limited, autonomy for the mothers of the next generation.

To conclude, the numerous reforms in family property law in the 1860s and 1870s do not present a radical inconsistency with the established historiography of the Pacific colonies. The legislation of the period involved reconciling the fundamental antagonisms of the liberal capitalist economy with liberal national and social goals. Leading liberal politicians were concerned with 'progress' and the process of nation-building, and their family property legislation reflects their attempts to enlarge the new colony / province, and mould it according to the tenets of liberalism. But understanding these reform agendas and their influence on the family provides more than an integration of the social and familial milieus. Identifying the political influences on the family illustrates that 'the family' -- at least as it is legally defined -- does not reflect an order naturally inherent in human relations. It is a contested terrain -- a historically developed social construction.

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Liberalism, Nation Building, and Family Regulation: The State and the Use of Family Property Law on Vancouver Island and in the United Colony / Province of British Columbia, 1862-1873

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January 17, 1996