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MELDING THE COMPETING LEGAL THEORIES IN PATENT LAWS, ANTITRUST LAWS, AND THE FIRST AMENDMENT

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ABSTRACT

The Supreme Court held in Walker Process Equip. Co. v. Food Mach. & Chem. Corp. (1965) (Walker Process) that enforcement of a patent procured by fraud on the U.S. Patent and Trademark Office can violate Section 2 of the Sherman Act. However, Walker Process left open who had standing to sue and the burden of proving such a claim. Recently, appellate courts have made large sweeping rulings on these issues. The author suggests that this trend has departed from the language of Walker Process, which left open the ability of lower courts to create nuanced rulings to reflect an effective melding of the jurisprudential theories underlying patent law, antitrust law, and the First Amendment.

INTRODUCTION

Patent law complements antitrust law. The patent system seeks to "promote the progress of science" by adjusting investment-based risk (U.S. Const. art. I, § 8, cl. 8). Likewise, the antitrust laws seek to foster competition in industry. Using civil actions to enforce the patent law and antitrust laws are complicated by the First Amendment of the U.S. Constitution. Likewise, antitrust law seeks to foster competition in industry. However, using civil actions to enforce patent and antitrust laws are complicated by the First Amendment of the U.S. Constitution.

Patent Law: a Primer

An inventor may obtain a patent for "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof" (35 U.S.C. § 101). In order to do so, an inventor must apply to the U.S. Patent and Trademark Office (USPTO) and explain how to make and use the invention (35 U.S.C. § 112). A person is entitled to patent on a device, unless the device was "in public use or on sale [for] more than one year prior to the date of the application for patent," or the applicant "did not himself invent the subject matter sought to be patented" (35 U.S.C. § 102(b)). Additionally, an applicant has a "duty to disclose information material to patentability" such as prior sales, previous public uses, and other inventors (37 C.F.R. 1.56). Therefore, a patent application often contains more than just a description of the invention, since it must also contain information that could negatively affect patentability.

The Intersection of Patent Law and Antitrust Law

A patent enables the patentee to prevent others from making, using, or selling the patented device anywhere in the United States (35 U.S.C. § 271). However, there can be no monopoly until a patent is enforced. For example, through patent enforcement, competition can be removed from the marketplace by using the threat of an infringement lawsuit (35 U.S.C. § 281). Once competition has been removed, the firm with the patent is able to charge a cartel price – an artificially high price that is well above the market price of the invention. (Sexton,R. 2010).

Utilitarian Balancing Under the First Amendment

The Supreme Court recognized that the counterclaim in Walker Process Equip. Co. v. Food Mach. & Chem. Corp., (1965) (Walker Process), involved balancing conflicting interests between the Sherman Act and the First Amendment of the U.S. Constitution. The Sherman Act prevents willful acquisition or maintenance of monopoly power in a relevant market (Sherman Antitrust Act; United States v. Grinnell Corp., 1966). Simultaneously, Americans can "petition the Government for a redress of grievances" under the First Amendment (U.S. Const. amend. I). This "right to petition extends to all departments of the Government," (Cal. Motor Transp. Co. v. Trucking Unltd, 1972) and thus creates an "antitrust immunity" from liability under the Sherman Act for such petitions, including patent applications (Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 1961 (Noerr)). In Noerr, a group of rail companies lobbied the Pennsylvania State Legislature for an advertising campaign that disparaged the trucking industry in the state. The statute was vetoed, but the trucking companies claim to have suffered some losses from the debate surrounding the law and sued under the Clayton Antitrust Act (1914). The U.S. Supreme Court dismissed the case, stating that under the First Amendment, the rail lobby had the right to lobby for whatever it wanted. Therefore, Noerr (1961) created an antitrust immunity existed for activities that were protected under the First Amendment, even if those activities would otherwise incur liability under the Clayton Antitrust Act (1914).

However, the Supreme Court held that this "antitrust immunity" does not extend to petitioning considered to be "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor," (Noerr, 1961). In Cal. Motor Transp. Co. v. Trucking Unltd (1972) (Cal. Motor Transp. Co.), one group of highway carriers sought to prevent a second group of carriers from obtaining permits for operation on highways by filing "a pattern of baseless, repetitive claims…." (Cal. Motor Transport Co. 1972). This abuse of administrative and judicial processes was found to be outside of the Noerr antitrust immunity. The U.S. Supreme Court allowed an action under the Clayton Antiturst Act (1914) to proceed against the first group of highway carriers.

Harmonizing Legal Theories in the Walker Process Claim

Ritz Camera & Image, LLC v. SanDisk Corp (2012) deviated from Walker Process in that it broadly embraced the antitrust principal of providing recovery for an overcharge injury at the expense of adequately considering the social value of the property interest of the patent and the limitations imposed on sham litigation created by the First Amendment. One way to rebalance the nuance embraced by Walker Process can be found in other kinds of intellectual property civil actions that invoke antitrust law.

As noted above, an action for patent infringement requires 1) a valid patent and 2) an act of infringement. The antitrust claim arises when patent infringement litigation is pursued either without a valid patent or without good faith belief of an act of infringement. At a high level, this is the same kind of vexatious litigation that created a claim under the Clayton Antitrust Act (1914) in Cal. Motor Transp. Co. (1972) as an exception to Noerr immunity discussed above. More specifically, when a plaintiff files a complaint for patent infringement without a valid patent, a

Handgards claim results. Where there is no act of infringement, a Loctite claim results. Both Handgards and Loctite claims are embodiments of the sham litigation exception to Noerr immunity and are explained in more detail below.

In Handgards Inc. v. Ethicon Inc., the Ninth Circuit ruled that engaging in patent infringement litigation when the plaintiff knew that the patent at issue was invalid, was a violation of Section 2 of the Sherman Act (Handgards Inc., 1979). Today, this kind of action is widely called a Handgards claim and has been broadly construed to include a variety of intellectual property where trademarks, copyrights, and so on, were the subject of suits in bad faith. However, a Handgards claim utilizes the nuanced balancing of Walker Process and fails as a pleading matter if the patent was affirmed, or even considered close to valid, in another hearing.

This reasoning provides respect for the property right of the patent holder and espouses the idea that an established property right should be protected by society and not cast away. This prevents theft of intellectual property rights, or, infringement. For instance, in Bio-technology Gen. Corp. v. Genetech, Bio-technology General Corp. (BTG) sued Genetech for infringement of U.S. Patent No. 4,601,980, and Genetech counterclaimed with a Handgards claim based on ongoing litigation at the International Trade Commission (ITC) (BTG, 2001). The District Court dismissed the counterclaim because the ITC had issued an initial determination that the claims were valid and infringed. While this decision was not final, it was sufficient to prevent an antitrust claim from being pleaded under Rule 9(b).

The reciprocal of Handgards is Loctite, which held that Noerr immunity to a Sherman Act suit would be lost if one filed a patent infringement lawsuit knowing that no infringing act occured. In Loctite Corp. v. Ultraseal Ltd., Loctite sued Ultraseal for infringement of two patents directed to holding wood together with a substrate (Loctite Corp., 1985). Like in BTG, the parties had an ongoing action at the ITC, in addition to the Federal Circuit, where eventually Loctite would drop its infringement claims arguing it now believed them to be invalid. Ultraseal counterclaimed for with a Sherman Act claim, here with a modified Handgards claim, where Ultraseal argued that it was implausible for its substrate to be the one claimed in Loctite's patents given their chemical differences. The Court found that the chemical differences existed, but did not agree that Loctite had acted in bad faith; rather, the Court found that Loctite had done some testing and found enough similarity to make its original claim for infringement, even if that claim failed.

Both BTG and Loctite, in affirming the property rights of patent holders, demonstrate the fundamental idaea behind patent law jurisprudence – that society ought to defend property rights. This is so even if there is a deviation from an equilibrium price and enforcement of a patent that would otherwise cause a Sherman Act claim to arise. This also supports the free speech rights of patentees to assert good faith claims to defend their property without having to fight off an antitrust lawsuit every time they do so.

With the exception of DDAVP, the value of the patent as a property right was not considered in the viability of the Walker Process claim under Rule 12(b)(1). Rather, the focus was on the overcharge injury. In re Lipitor Antitrust Litig. (2013) (In re Lipitor) took a totally different approach on this matter under Rule 12(b)(6) by looking at a patent as a property right in the first instance. This antitrust litigation showed how direct purchasers pounced on patented products where the patent was enforced and then challenged. This result was theorized by SanDisk in Ritz Camera II (2012). After a patent was successfully defended in a series of court proceedings, direct purchaser drugstores Walgreens and Meijer sued Pfizer with a Walker Process claim, arguing that Pfizer's patent for its drug, Lipitor, was procured by fraud on the USPTO.

Lipitor is a drug that lowers cholesterol by inhibiting a liver enzyme. The drug was covered by a large number of heavily litigated patents, but the litigation primarily dealt with U.S. Patent Nos. 4,681,893 and 5,273,995. The patent examiner initially rejected the '995 patent as not being patentably different than the '893 patent. Pfizer appealed to the Board of Patent Appeals and Interferences, arguing that the '893 patent did not disclose preferred quantity ranges of two primary compounds in the drug, and that those quantity ranges resulted in the drug in the '995 patent being ten times more effective than the drug in the '893 patent. The Board remanded the case to the examiner to consider whether the '995 patent was obvious in view of the '893 patent (Ex parte Roth, 1993). The examiner responded by simply issuing the '995 patent. The plaintiffs claimed that Pfizer had lied in a table in the '995 patent, which contained "cherry-picked" and deceptive results.

As the lives of the '893 patent and the '995 patent were winding down, Ranbaxy, on August 19, 2002, filed an Abbreviated New Drug Application (ANDA) to market generic Lipitor. Ranbaxy then asserted that the generic Lipitor did not infringe the '893 patent or the '995 patent, and that neither patent was valid at all. Infringement litigation proceeded for the next two years, with the District Court subsequently finding the '893 and '995 patents valid, enforceable, and infringed (Pfizer, Inc. v. Ranbaxy Labs. Ltd., 2005). Relevantly, Ranbaxy raised the "cherry-picked" data allegation, and it was rejected by the District Court. Similar proceedings between Ranbaxy and Pfizer were instituted in Canada, Australia, and at the USPTO (Ranbaxy Australia Pty Ltd. v. Warner-Lambert Comp., 2006; Pfizer Canada Inc. v. Novopharm Ltd., 2006). These proceedings went on until April 2008, when Ranbaxy and Pfizer entered into a settlement agreement, which the plaintiffs characterized as a reverse payment agreement.

A reverse payment agreement is where the patentee offers to pay an alleged infringer not to produce the patented product until the patent's term expires (FTC v. Actavis, 2013). These agreements only violate antitrust laws when their effect is an unreasonable restraint of trade (FTC v. Actavis, 2013). Here, Mejer and Walgreens alleged that Ranbaxy agreed to settle its claims with Pfizer and that Pfizer agreed to waive its outstanding judgments against Ranbaxy. This cleared the way for the Ranbaxy product to enter the market the day the '893 patent expired. Other competitors could only enter the market if they could show they were not infringing on Pfizer's numerous other patents for Lipitor. It is on these facts that the direct purchaser plaintiffs based their Walker Process claim.

Judge Sheridan began his analysis in Lipitor (2013) by noting that the direct purchasers did have standing because they alleged they suffered a overcharge injury. Here, he distinguished Remeron (2005) and Carrot Components (1986) by applying the overcharge injury rule in Ritz Camera II (2012). Judge Sheridan concluded however, that the Walker Process claims would still be dismissed for a failure to allege claims that plausibly showed an antitrust violation. A Walker Process claim requires:

> (1) the patent at issue was procured by knowing or willful fraud on the USPTO; (2) the defendant was aware of the fraud when enforcing the patent; (3) there is independent evidence of a clear intent to deceive the examiner; (4) there is unambiguous evidence of reliance, i.e., that the patent would not have issued but for the misrepresentation or omission; and (5) the necessary additional elements of an underlying violation of the antitrust laws are present (Nobelpharma AB v. Implant Innov., Inc., 2008).

With regard to the first four elements, the claim could not plausibly be argued because these same arguments for invalidity had already been tried, and had already failed in a plethora of courts around the world. That is, since the property right had been firmly established, it could not be taken away. This is a reciprocal of the rule in DDAVP (2009). In DDAVP (2009), the patents' proven prior invalidity grounded the antitrust claim. In Lipitor (2013), the patents' proven validity foiled the antitrust claim. Pleading an antitrust claim based on the fraud exception to Noerr immunity fails as a pleading matter under the First Amendment when any prior proceeding has indicated that either 1) the intellectual property is valid, or 2) there is a reason to believe infringement has occurred.

This failure is because the fraud exception to Noerr immunity claims "sound in fraud," and must be pleaded with particularity under Rule 9(b) (In re DDAVP, 2009). This requires explaining both the circumstances and the results of the fraud. Where the pleaded facts indicate that the outcome was not fraudulent, that is, a valid patent issued or there was an act of infringement, then the claim fails in the first instance because there was no fraudulent outcome.

Judge Sheridan embraced the nuance that Walker Process allowed while weighing the competing concerns of antitrust law, patent law and the First Amendment. The vindication of Pfizer's patents' in three proceedings reaffirmed the property right and foreclosed the retailer's challenge under Walker Process as a pleading matter. This represents the same kind of jurisprudential balancing that created workable rules in BTG and Ultraseal.

CONCLUSION

Walker Process represents an opening for lower courts to balance three areas of law with very different jurisprudential underpinnings. The best way to balance patent law, antitrust law and the First Amendment is with a nuanced approach to forming rules. These nuances can permit plaintiffs who have suffered antitrust injuries to recover damages, while at the same time dismissing claims where the patent in question has been affirmed in another proceeding. This approach enables litigants to have their day in court while preventing vexatious litigation at the onset.

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37 C.F.R. 1.56.

HEALTH CARE IN CANADA TO EVERCOME INCOME INEQUALITY

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ABSTRACT

Income inequality has increased over the last years between the richer and the poorer, but in many countries, government transfers and social programs play an important role in reducing income inequality. In this paper, we will study health care financing in Canada as a social transfer to fight inequities. Our progressive tax rate system makes that the rich pay for the poor. Canadian families with the lowest income will pay an average total tax bill of $2,148 (16%) and an average health care insurance of $523. On the other side of the spectrum, the 10 percent of Canadian families with an average income of $278,012 will pay an average total tax bill $152,869 (55%) and health care insurance of $37,239. In addition, the Government of Canada provides significant support to provincial and territorial governments with transfers that enables less prosperous provincial governments to provide their residents with public services to support social programs, thus reducing inequities and subsidizing social programs that some Canadians could not afford, thus reducing inequities.

INTRODUCTION

The Conference Board of Canada is concerned that income inequality in Canada has increased over the past 20 years. As per the Conference Board report, income inequality in Canada has increased over the past 20 years. Since 1990, the richest group of Canadians has increased its share of total national income, while the poorest and middle-income groups has lost share.

The same phenomena is happening also in the United States. As example, it has been reported by the Economist magazine that the democratisation of living standards has masked a dramatic concentration on incomes over the past 30 years, on a scale that matches, or even exceeds, the first Golden Age. Including capital gains, the share of national income going to the richest 1% of Americans has doubled since 1980, from 10% to 20%, roughly where it was a century ago. Even more striking, the share going to the top 0,01% some 16,000 families with an average income of $24M, has quadrupled, from just over 1% to 5%. This is a bigger slice of the national pie than the top .01% received 100 years ago (The Economist, 2012).

So why is income inequality now in the media spotlight? The Economist article on income inequality suggests this lack of attention in the years before the financial crisis was because ¨Asset bubbles and cheap credit eased life for everyone. Financiers were growing fabulously wealthy in the early 2000s, but others could also borrow even more against the value of their homes (The Economist, 2012).

This paper will try to investigate the concept of income inequality in Canada and, as such, will address the following two objectives: firstly, to show that the income inequality has increased over the last years between the richer and the poorer, and secondly, what are the measures used in Canada in order to diminish income inequality between the richer and the poorer.

TAXPAYERS SHARE OF INCOME AND TAXES IN CANADA

An analysis of the most recent Statistics Canada survey on market, total and aftertax income by economic family type shows that on general, Canada's richest 20% of families takes over 50% of all income. However, the tax system in Canada tries to share wealth between tax payers by imposing a graduated tax rate system, with higher tax rates for a higher level of income. We will see later in this paper that the tax system tries to overcome income inequities with government transfers and social programs.

Studies on wealth shows similar results. Moving up the income spectrum and the wealth gap is even greater. The Canadian Centre for Policy Alternatives (CCPA) reported that over a 13 year period, there has seen a pronounced increase in wealth in Canada, but that wealth has flowed into the hands of a concentrated few. Almost 70% of all Canadian wealth belongs to Canada's wealthiest 20%. Moreover, for every new dollar of real wealth generated in Canada since 1999, 66 cents of that dollar has gone to the wealthiest 20% of families. For every new dollar in real wealth generated in Canada since 1999, the upper middle class captured 23 cents, while the bottom 60% of families had to settle for the last dime.

As reported in the CCPA document, the level of wealth inequality in Canada has reached such extremes that in 2012, according to figures derived for Canadian Business magazine, the 86 wealthiest Canadian-resident individuals (and families) held the same amount of wealth as the poorest 11.4 million Canadians combines (Canadian Business magazine, 2012; Canadian Centre for Policy Alternatives, 2014).

However, money income is only a partial measure of social welfare. It refers only to private resources, and takes no account of the benefits derived from public expenditures, such as those on education and health care (Atkinson, 2003).

MEASURES TO DIMINISH THE INCOME INEQUALITY

A study by the Conference Board of Canada shows that personal income taxes and government transfers (such as social assistance, unemployment insurance, old age security, and child benefits) play an important role in reducing income inequality. Reduction of income inequality can be seen by comparing two Gini coefficients: one calculated using income before taxes and transfers, and the second using income after taxes and transfers.

HEALTH CARE IN CANADA

The World Trade Organisation Constitution enshrines the highest attainable standard of health as a fundamental right of every human being and includes access to timely, acceptable, and affordable health care of appropriate quality. The right to health means that States must generate conditions in which everyone can be as healthy as possible (World Trade Organization, 2013). First we will visit statistics on health expenditures at the international level and at the end we will shift to Canada's position on income distribution and health care.

For the last 13 years, the OECD have been updating the information on health expenditures according to concepts presented in the OECD manual *A System of Health Accounts* (SHA). In 2011, the United States had the highest ratio of total health expenditures to GDP, at 17.7% while Canada was at 11.2% in 5th position. Also, the United States had the highest health expenditure per individual, at US$8,508, and Canada, with spending of US$4,522 per person was among the six countries with the highest per capita spending on health.

OECD compile also the total health expenditure by source of financing, Public and Private share for the same countries. On one side, expenditures by the public sector represented more than 80% of total health expenditures in Netherlands, Denmark, Norway, and some European countries. The country with the lowest public-sector share was Mexico at 47.3%, followed by the United States at 47.8%. The share of total health expenditure funded by the public sector was 70.4% in Canada. The OECD public health expenditure average was 73.3%, and 26.6% for the private share.

Canadians do not know the cost of health care. This occurs partly because Canadians do not incur direct expenses for their use of health care, and partly because Canadian cannot readily determine the value of their contribution to public health care insurance. One reason why Canadians don't know the true cost of health care is because the physician and hospital services that are covered by the tax-funded health care insurance are free at the point of use. This situation leads many people to grossly underestimate the true cost of health care. When people speak of «free» health care in Canada, they are entirely ignoring the substantial taxpayer-funded cost of the system.

In his book, on the health system, Jeffrey Simpson (2012) call that the Health care is straining provincial budgets across Canada. It now takes up 42 to 45 percent of provincial program spending, and the share is growing. Health-care costs have been rising faster than those of any other government program, faster than government revenues, faster than the economy. Before the end of this decade, health care will likely consume more than half the budget of every province.

Another major concern is that health expenditures increases as peoples gets older, and it is increasing exponentially. As a consequence of the population shift and baby boomers turning 65, there is a consequence that an aging population will lead to greater demands for health care services and acceleration in the growth of health spending.

WHO PAYS FOR HEALTH CARE

As we have said previously, if health care is free, somebody got to pay somewhere. In their July 2014 Research Bulletin, the Fraser Institute try to compute the price of Public Health Care Insurance in Canada by family type and by income group. Canadians are not billed directly when they receive health care, and they do not pay a dedicated health tax either. Instead, health care expenses are paid from general revenue which make it hard to compute the real cost of health care.

According to the Fraser Institute, the Canadian families with the lowest income (decile 1) will pay an average total tax bill of $2,148 (16%) and an average health care insurance of $523. On the other side of the spectrum, the 10 percent of Canadian families with an average cash income of $278,012 will pay an average total tax bill $152,869 (55%) and health care insurance of $37,239 (table 1).

The rich pay for the poor, and taxation is used as an instrument of attaining certain objectives as a mean of redistribution of wealth and thereby reducing inequities.

Table 1
Average income and total tax bill in each decile, 2014 in Canada (preliminary estimates)

Decile*	Average Cash Income ($)	Average Total Tax Bill ($)	Tax Rate	Health Care Insurance ($)
1	13,447	2,148	16.0%	523
2	27,532	5,206	18.9%	1,268
3	37,673	10,129	26.9%	2,467
4	46,774	16,359	35.0%	3,985
5	57,818	22,667	39.2%	5,522
6	70,886	29,766	42.0%	7,251
7	86,235	37,487	43.5%	9,132
8	107,012	47,285	44.2%	11,519
9	137,525	63,382	46.1%	15,440
10	278,012	152,869	55.0%	37,239

Note: *Deciles group families from lowest to highest incomes with each group containing ten percent of all families. The first decile, for example, represents the ten percent of families with the lowest incomes.
Source: The Fraser Institute's Canadian Tax Simulator, 2014.

MAJOR FEDERAL TRANSFERS

The Government of Canada provides significant financial support to provincial and territorial governments on an ongoing basis to assist them in the provision of programs and services. There are four main transfer programs: the Canada Health Transfer (CHT), the Canada Social Transfer (CST), Equalization and Territorial Formula Financing (TFF).

Table 2 present major transfers as Federal support to the Provinces and Territories. For the year 2013-2014. The first column present the Canada Health Transfer to each Province and Territory, such transfer based on a per capita to provide a universal coverage for medically necessary hospital and physicians services in all provinces and territories. The second column is for the Canada Social Transfer to each Province and Territory. The third column, Equalization, is an unconditional transfers for less prosperous provinces and territories to provide their residents with public services comparable across Canada at a reasonable level of taxation. We can observe that six provinces like Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Ontario and Saskatchewan received Equalization payments, and three provinces such as Saskatchewan, Alberta and British Columbia do not received any. Some would say that the richer provinces subsidize the poorer provinces and involves wealthy provinces making payments to poor provinces and the money the provinces receive through equalization can be spent in any way the provincial government desires. The payments help guarantee "reasonably comparable levels" of health care, education and welfare in all the provinces, fighting inequities and providing social programs to the underserved groups. Such transfers are so important that they represents up to 33% of the provincial Budgets in PEI, and Nova Scotia, and 32% for New Brunswick (see last column of table 2).

Table 4 Federal Support to Provinces and Territories for 2013-2014							
	Major Transfer						
	(millions of dollars)						
Provinces/ Territories	Canada Health Transfer	Canada Social Transfer	Equalization	Other	Total Transfer	Per Capita Allocation (dollars)	Percentage of Provincial Budget (%)
Canada	$30,283	$12,215	$16,105	$3,694	**$62,297**	$1,774	19 %
N.L.	490	183	-	-	**673**	1,277	9
P.E.I.	128	50	340	-	**518**	3,569	33
Nova Scotia	830	327	1,458	350	**2,965**	3,150	33
New Brunswick	667	263	1,513	49	**2,492**	3,296	32
Quebec	7,184	2,834	7,833	-	**17,851**	2,191	26
Ontario	11,925	4,704	3,169	-	**19,799**	1,464	17
Manitoba	1,114	440	1,792	7	**3,353**	2,653	24
Saskatchewan	977	385	-	-	**1,361**	1,230	12
Alberta	2,723	1,396	-	-	**4,119**	1,027	11
British Columbia	4,154	1,592	-	-	**5,747**	1,256	13
Yukon	31	13	-	817	**860**	23,566	73
North. Territories	27	15	-	1,070	**1,163**	26,773	72
Nunavut	34	12	-	1,273	**1,396**	39,373	83

CONCLUSION

The purpose of this paper was to study wealth distribution and inequities. Statistical data analysis shows that income inequalities are on the rise but in many countries, governments transfers such as social assistance, unemployment insurance, old age security, and social transfers for education and health programs play an important role in reducing income inequality. Health care in Canada is a good example of social transfer to fight inequities. Our progressive tax rate system makes that the rich pay for the poor. Canadian families with the lowest income will pay an average total tax bill of $2,148 (16%) and an average health care insurance of $523. On the other side of the spectrum, the 10 percent of Canadian families with an average income of $278,012 will pay an average total tax bill $152,869 (55%) and health care insurance of $37,239.

In addition, the Government of Canada provides significant support to provincial and territorial governments with transfers that enables less prosperous provincial governments to provide their residents with public services to support social programs, thus reducing inequities and subsidizing social programs that some Canadians could not afford, thus reducing inequities.

However, Canadians are still not satisfied with their health care. For Canadians, concerns revolve around wait times (equal but slow access). American expressed much more concern about financial inequalities in access to health care. These differences are as we should expect: there are different trade-offs in a Canadian model that provides universal coverage, and an American model in which access and income are linked.

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(included in the original paper are available on demand)

ECONOMIC SUSTAINABILITY: PERSPECTIVES ON THE GENUINE PROCESS INDICATOR (GPI) AND CONVENTIONAL GDP

Alexander M. Tolksdorf, University of Detroit
Gregory W. Ulferts, University of Detroit
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ABSTRACT

Traditionally, the status of an economy has been measured in terms of its real output. The most popular yardstick for this figure is gross domestic product, or GDP. GDP, however, does not take into account many more complex elements of economic welfare – only market activities are included. At the heart of furthering economic sustainability is how to effectively and accurately measure the status of the economy and what to measure in the economy. This paper seeks to investigate the advantages and disadvantages of one such well-being measure, the Genuine Process Indicator (GPI) and traditional GDP as measures of economic activity.

SOCIAL MEDIA PRIVACY RIGHTS: THE GOOD, THE BAD AND THE UGLY

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ABSTRACT

The meteoric rise of social media in recent years has radically altered the relationship between the personal and business spheres of American society. In light of the increased market presence shaped by the growing number of social media outlets, companies are recognizing the critical need to establish a solid social media presence. However, despite the benefits provided by social media, organizations and individuals alike are beginning to recognize the legal, business, and privacy risks. In response to these risks, organizations routinely monitor the social media activities of their employees. This paper will examine the costs and consequences of failing to effectively communicate expectations on acceptable social media conduct to new employees.

RELIGIOUS ORGANIZATIONS AND THE ANNUAL COMPLIANCE REPORTING EXEMPTION

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ABSTRACT

Religious organizations receive the most charitable contributions of all public charities. However, unlike other public charities, they are automatically exempt from the annual IRS compliance reporting via Form 990. This is based on the protection of religious freedom which exempted such organizations from government scrutiny. Religious organizations are becoming more complex, and are growing exponentially especially in the 'mega church' sector. Perhaps it is time to re-examine the compliance reporting exemption. The paper discusses the positions of those who support and oppose this federal exemption and concludes with the authors' viewpoint.

PAY SECRECY: LEGAL AND POLICY ISSUES

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ABSTRACT

On April 8, 2014, President Obama issued an Executive Order amending Executive Order 11246 of September 24, 1965 prohibiting federal contractors from retaliating against employees for disclosure of compensation information (Obama, 2014). Executive Order 11246 covers employees who work for service and supply contractors and construction companies covered by Office of Federal Contract Compliance Programs (OFCCP) regulations that apply to federal government contracts. The Executive Order was heralded by organizations like the National Women's Law Center as "an end to pay secrecy gag rules for employees of federal contractors" (Watson, 2014). It was characterized by others as "unnecessary" given long standing protection afforded to employees covered by the National Labor Relations Act (NLRA) (Smith, 2014). Pay secrecy has often been characterized as a "contentious" issue in many organizations and President Obama's recent executive order has rekindled the debate as to the utility of pay secrecy policies and rules in organizations. This paper examines recent legal, policy, and practice issues for employers covered by the National Labor Relations Act regarding the use of pay secrecy policies and, recommendations to reduce employer exposure to litigation.

INTRODUCTION

President Obama's amending of Executive Order 11246 in April of 2014 continued to stoke the long running debate over the use of pay secrecy policies by organizations. The pay secrecy issue has been often characterized as "contentious" (Colella, Paetzold, Zardkoohi & Wesson, 2007) and (Gely & Bierman, 2003) and the long run nature of the debate surrounding the issue has been traced back to Matthew 20: 1 – 16 and the parable involving laborers complaining about their rate of pay (Gely & Bierman, 2003). The long debate over the utility of the issue has come from many different perspectives. In the review by Colella et.al., the authors identified "arguments" based on management, economics, psychology, and cultural perspectives. They also noted that there has been limited empirical and scholarly research on pay secrecy and "that most of what we thought we knew about pay secrecy was anecdotal" (Colella, Paetzold, Zardkoohi, and Wesson, 2007, p. 67). There does seem to be consistent survey research supporting the reported wide spread proliferation of both formal and informal pay secrecy policies in the private sector of the economy (Gely & Bierman, 2003 and Hayes & Hartmann, 2011). Hayes and Hartman reported on the Institute for Women's Policy Research/Rockefeller Survey of Economic Security in 2010 that "about half of all workers" reported "that the discussion of wage and salary information is either discouraged or prohibited and/or could lead to punishment" (Hayes & Hartmann, 2011).

Colella et.al. in their review of the literature identified negative and positive aspects associated with pay secrecy policies. On the negative side, citing limited empirical research, Colella et.al. reported that pay secrecy is generally "bad for organizations , also demonstrating lowered motivation" (Colella, Paetzold, Zardkoohi & Wesson, 2007). Another often heard negative aspect associated with pay secrecy is that it may facilitate employers' efforts to conceal discriminatory pay practices (Colella, Paetzold, Zardkoohi & Wesson, 2007); Obama, 2014).

With respect to positive aspects associated with pay secrecy, Colella et. al. identify survey efforts "asking how people feel about pay secrecy" reporting that "the majority of U.S, workers are in favor of it(Colella, Paetzold, Zardkoohi & Wesson, 2007, p. 56). They also noted that organizations are aware of the potential illegality of pay secrecy, that many organizations still utilize both formal and informal methods to promote it, and that "individual employees and many organizations find pay secrecy useful and desirable" ((Colella, Paetzold, Zardkoohi & Wesson, 2007, p. 56).

Gely and Bierman also cited survey data from a variety of sources that support the wide spread use of pay secrecy rules by a "significant number of private sector employers in the United States" (Gely & Bierman, 2003, p. 122). They also noted that pay secrecy and confidentiality rules are "quite prevalent despite the fact that they have consistently been held by both the National Labor Relations Board ("NLRB" or "Board"), and the federal courts as violations of Section 7 of the National Labor Relations Act ("NLRA" or "Act")" (Gely and Bierman, 2003, p. 123). Section 7 of the National Labor Relations Act (NLRA) applies to employers engaged in interstate commerce.

The purpose of this paper is to examine recent legal, policy, and practice issues for employers covered by the National Labor Relations Act regarding the use of pay secrecy policies, and recommendations to reduce employer exposure to litigation.

LEGAL

Pay secrecy and pay confidentiality rules ("PSC rules") that both generally prohibit employees from discussing their wages with coworkers have created legal problems for employers (Gely & Bierman, 2003). PSC rules have been found to violate Section 8(a)(1) of the NLRA. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with employees Section 7 rights to engage in protected concerted activity (Gely & Bierman, 2003). Survey data previously noted has reported the wide spread use of both of these types of policies over the years by employers either in employment manuals or through direct communication by supervisors to employees, generally early in an individual's employment with an organization.

The NLRB has long held that Section 7 "encompasses the right of employees to ascertain what wages are paid by their employer, as wages are a vital terms and condition of employment" (Jones & Carter, Inc. & Lynda A. Teare, 2012). The NLRB has also noted that "in fact, wage discussions among employees are considered to be at the core of Section 7 rights because wages 'probably the most critical element in employment,' are the 'grist on which concerted activity feeds.' (Jones & Carter, Inc. & Lynda A. Teare, 2012). In the Jones & Carter, Inc. case decision, the Administrative Law Judge (ALJ) further noted that over the years, the NLRB has consistently ruled that "an employer violates the Act when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights" (Jones & Carter, Inc. & Lynda A. Teare, (2012).

Employer's may be able to defend their PSC rules if they can establish "a legitimate business justification for the rule" (Gely and Bierman, 2003). Gely and Bierman concluded that employers "have been rather timid in advancing possible justifications for the adoption of PSC rules" and have primarily argued that "PSC rules are necessary as a way of limiting jealousies and strife among employees" (Gely and Bierman, 2003, p. 129). Gely and Bierman concluded that reviewing courts and the NLRB have "consistently rejected this argument" (Gely and Bierman, 2003).

Gely and Bierman also provided a detailed review of cases where PSC rules were not contained in published documents but were orally and sometimes only informally communicated to employees. Their review included decisions from several appeals court decisions that "regardless of whether found in employment manuals or informally communicated to employees" PSC rules have been held to "inhibit employees' Section 7 rights to engage in concerted activities for mutual aid and protection" (Gely and Bierman, 2003, p. 128).

In March of 2014, the United States Court of Appeals for the Fifth Circuit issued its Flex Frac Logistics v. the NLRB decision (Flex Frac Logistics v. NLRB, 2014). The decision was on Flex Frac's appeal of an NLRB order holding that Flex Frac's employee confidentiality policy "stymied employee discussions of wages" and was an unfair labor practice in violation of Section 8(a)(1) of the NLRA (NLRB, 2014). The NLRB found that Flex Frac Logistics confidentiality policy "was facially unlawful because employees would reasonably interpret the ban on disclosing personnel information and documents to prohibit discussing their salaries and wages with coworkers or non-employees (NLRB, 2014).

The Flex Frac Logistics case is "the latest in a string of cases in which the NLRB is challenging company policies that it claims have a chilling effect" on employee Section 7 rights (Leonard, 2014). A series of cases associated with employer social media policies led to the issuance of three special reports by the NLRBs on employer policies and rules that inhibit employee Section 7 rights. The third report, issued in May of 2012, focused on policies governing the use of social media by employees. In six of the seven cases examined in the report, the NLRB found a variety of provisions that were determined to be unlawful (Smith, 2012).

RECOMMENDATIONS

Employers in all private sector workplaces, with or without unions, should be alert to the NLRB's focus on protecting employee Section 7 rights. Policies and rules, whether published or unpublished that can be reasonably construed to prohibit protected Section 7 activity, are promulgated in response to union activity, or have been applied to restrict Section 7 activity may run "afoul of the NLRA" (Gold and Lebel, 2014). With the continued escalation of NLRB efforts to enforce Section 7 of the National Labor Relations Act, all private sector employers should be engaging in proactive measures to make sure that policies and rules, whether published or not, are ready to withstand what one law firm called the NLRB's continued "interventionist trend in invalidating work rules" (Winston & Strawn, 2014). Winston & Strawn, in addition to citing the NLRB's Administrative Law Judge decision in the Hoot Winc, LLC case, detailed other "recent developments" initiated by the NLRB that are designed to "expand its influence" (Hoot Winc, LLC and Hanson, 2014) and (Winston & Strawn, 2014). Winston & Strawn described an NLRB agreement with the Occupational Safety and Health Administration (OSHA) that will allow OSHA to refer "time-barred complaints under the Occupational Safety and Health Act (OSH Act)" to the NLRB (Winston & Strawn, 2014).

While employers are wise to periodically review their policies and rules to make sure they are in compliance with new court decisions and new law, in light of the proactive approach to enforcement at the Federal level, employer efforts to maintain compliance are more important than ever. The range of policies and rules that have come under scrutiny in addition to pay secrecy policies, include confidentiality agreements, no-gossip policies, and attempts by employers to limit employee use of social media. A consistent problem for employers in regard to all of these that have come under NRLB scrutiny has been the use of overly broad wording in the construction of policies and rules that employers have created. Employers that want to draft policies and rules in these areas must start with an understanding of the basic NLRA prohibition that "employers can't maintain a rule or policy that reasonably tens to chill employees' ability to exercise their Section 7 rights" (Guiltinan, 2013). Employers are advised to remember the NLRB test utilized to determine whether a rule or policy "impermissibly chills" employee ability to exercise Section 7 rights - does the rule explicitly restrict Section 7 activity? Could it reasonably be construed to prohibit Section 7 activity; was the rule or policy developed in response to union activity; or was the rule or policy applied to restrict the exercise of Section 7 rights (Guiltinan, 2013). Employers should also remember that it is irrelevant as to whether the rule or policy that prohibits covered employees from discussing their pay has been formally or informally published. Whether it is an off the cuff remark by a supervisor or a CEO, if it could be construed by employees to not talk about any aspect of their compensation it could run afoul of the NLRA. Given the current approach of current federal regulators, if the employer's policies and or rules come under NLRB scrutiny, the chance that an NLRB ALJ or the full board will determine that it restricts employee Section 7 activity is very high. For Federal government contractors, the OFCCP is currently developing regulations to implement President Obama's amendments to Executive Order 11246 prohibiting contractors and subcontractors from retaliating against covered employees who inquire about or discuss their compensation with fellow workers. Current and potential Federal government contractors are strongly advised to be alert for their publication and to prepare accordingly.

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