Gender Stereotypes in Canadian Immigration

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I. Introduction

In countries such as Canada, immigration law and policy play a significant role in determining the composition of the nation's population. As the government establishes rules and practices, it is essentially assigning relative values of different types of people to Canadian society and excluding those who fail to meet strict criteria for acceptance and status. Because of the nature of immigration, such policies have a profound impact at both national and international levels; the gate-keeping function has wide ranging social, political and economic effects on the local population as well as an influence on worldwide migration flows. In recognition of the significance of the field of immigration law, this paper seeks to analyze whether the Canadian immigration system has been adequately responsive to universal demands for gender equality and, more specifically, the elimination of discrimination against women. Of particular focus in this inquiry is the perpetuation of discrimination through stereotyping, an understudied yet pervasive problem in the battle against inequality between men and women.

This paper will explore the role of gender stereotyping and discrimination in the immigration context in Canada through a focus on the case of *Baker v. Canada*.[1] The investigation begins by presenting the facts and administrative decision at play in the case as an introduction to the elements of Canadian immigration law to be focused on throughout the paper. This is followed by an outline of Canada's international obligations under the *Convention on the Elimination of All Forms of Discrimination Against Women* [*CEDAW*],[2] and its implications

[1] *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 [*Baker*].

[2] *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. res. 34/180, 34 U.N. GAOR Supp. (No.46) at 193, U.N. Doc. A/34/46, *entered into force* Sept.3, 1981 [*CEDAW*].

for Canada's immigration legislation, including particularly the provision for humanitarian and compassionate exemptions at issue in *Baker*. The responsibilities of Canada to eliminate discrimination, however, are further interpreted as extending beyond duties with respect to gender inclusive and non-discriminatory legislation, and to involve a role for the judiciary. With a focus on *Baker,* it is recognized that this case represents a missed opportunity by the Supreme Court to expose and condemn the presence of stereotyping within the administrative immigration decision-making process. However, an innovative framework is suggested by which such deficient treatment of gender stereotypes by a judicial body in the immigration context may be corrected in accordance with obligations for positive action in the elimination of stereotypes and discrimination that hinder achievement of gender equality.

II. *Baker v. Canada*

II.I Background Facts

The case of primary focus in this paper is *Baker*, a decision of the Supreme Court of Canada issued in 1999. The case is the result of a judicial review of an administrative immigration decision involving an application by Mavis Baker, a foreign national pursuing means to gain status to remain in Canada. As background, the applicant in this case is a woman from Jamaica who arrived in Canada in 1981 and overstayed her visitor's visa until an order was issued for her deportation in 1992. During her 11 years in the country, the applicant supported herself illegally as a domestic worker before being diagnosed with paranoid schizophrenia, after which she collected welfare and received mental health treatment. Ms. Baker also has eight children, four of whom were born and remained in Jamaica, and the other four of whom were

born in Canada.[3] On the basis of these facts, Ms. Baker applied to the Minister of Citizenship and Immigration in hopes of being permitted to remain in Canada.

II.II Impugned Administrative Decision

The decision that is the subject of judicial review in *Baker* is the refusal by the Minister of Citizenship and Immigration to exempt the applicant from the requirements of the *Immigration Act* and thus allow her to gain status to remain in Canada. Authority for the Minister to exercise such discretion was outlined in section 114(2) of the *Immigration Act,* [4] which provided for the possibility of granting exemptions to the Act when warranted on the basis of humanitarian and compassionate [H&C] considerations. In guidelines for the exercise of this discretion and in practice, such considerations include, for example, the extent of an applicant's establishment in Canada and potential hardship to be encountered in the event of deportation. On the basis of Ms. Baker's application, however, the Minister's delegates refused to exercise their discretion to grant the requested exemption, [5] effectively denying her the opportunity to remain in Canada.

III. Convention on the Elimination of All Forms of Discrimination Against Women

[3] *Baker*, *supra* note 1 at para.2

[4] *Immigration Act*, R.S.C., 1985, c. I-2 at Section 114(2).

[5] *Baker*, *supra* note 1 at para.4.

III.I Canada's International Obligations

In considering the role of gender stereotypes and discrimination in the Canadian immigration system, as this paper sets out to do, it is important to understand what commitments Canada has undertaken with respect to ensuring gender equality. In the arena of international law, Canada is a party to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women; the state became a signatory to the treaty on July 17, 1980 and the convention subsequently came into force for Canada with its ratification on December 10, 1981.[6] *CEDAW* is an agreement between state parties to condemn discrimination against women and to pursue its elimination by all appropriate means in recognition of the importance of equality between men and women.[7] The commitments of Canada and other states under the treaty are characterized by both negative and positive obligations, meaning that not only must discrimination against women be prohibited, but actions must further be taken to create an environment in which such discrimination is not able to thrive.

In identifying the scope of state responsibilities and the specific actions required, *CEDAW* explicitly asserts that implementation of or changes to legislation are required within the realm of "appropriate measures" necessary to demonstrate treaty compliance.[8] This can be understood to entail a requirement on state parties to incorporate prohibitions against gender discrimination into their domestic law, if not already present therein, and to take any further legislative measures in support of ensuring its eradication. Unfortunately, this is not always a

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[6] United Nations, "CEDAW: State Parties," *Committee of Something* (28 November 2008) online: United Nations <http://www.un.org/womenwatch/daw/cedaw/states.htm>

[7] *CEDAW*, *supra* note 2 at Preamble.

[8] *Ibid.* at Article 2(a).

straightforward task, as even the existence of legislation that may appear on its face to be in accordance with *CEDAW* obligations must be subjected to further and in-depth scrutiny. According to Article 5(a) of the Convention, states are required to pursue not only legislative measures, but also the modification of social and cultural patterns in their societies for the elimination of prejudices based on conceptions of superiority or inferiority between the sexes and stereotyped gender roles.[9] As interpreted by Rikki Holtmaat in her work on Article 5(a) of *CEDAW*, this involves a duty on states to track down and eliminate gender stereotypes that serve as the basis of laws or public policy, even when not explicitly evident.[10] Furthermore, when uncovered stereotypes in law and decision-making processes are found to constitute discrimination, acts are thus warranted and arguably required to minimize their harmful effects on equality. Recognizing and understanding Canada's commitment to such obligations under *CEDAW* in this comprehensive way provides a framework by which to evaluate the country's immigration system and determine whether, at both legislative and practical levels, it is in compliance with its international commitments.

III.II Framework for Analyzing Canada's CEDAW Compliance

The nature of the Canadian immigration system, comprised of legal rules, policy guidelines and highly individualized administrative decisions, presents a complex challenge for the review for compliance with international law obligations such as those under *CEDAW*. However, the Canadian case of *Little Sisters Book and Art Emporium v. Canada*[11] provides useful

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[9] Ibid. at Article 5(a).

[10] Rikki Holtmaat, *Towards Different Law and Public Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination* (The Hague: Reed Business Information, 2004) at 77.

[11] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* [2000] 2 S.C.R. 1120 [*Little Sisters*].

insight into potential approaches to such an analysis. The case suggests methods to determine compliance with the *Canadian Charter of Rights and Freedoms* that may be applicable in the development of a framework under *CEDAW*. The judgement of Iacobucci J. for the minority in the case espouses a need to analyze legislation for compliance on the basis of an assumption that the legislature is required to incorporate within it a reasonable effort to ensure respect for constitutional rights.[12] In accordance with this approach as opposed to that of the majority, the *possibility* of applying the legislation in a non-discriminatory manner is ultimately insufficient to protect legislation from a finding of non-compliance. This form of review of legislation is arguably compatible with the requirements of *CEDAW* which not only requires prohibitions on discrimination but also positive measures in support of its elimination. What compliments the review of legislation, however, is further analysis of particular decisions made under it and the prevalence of examples of systematic discrimination taking place in practice, as supported by the majority judgement in *Little Sisters*.[13] Such grassroots investigation is further advocated for in *CEDAW* as it requires state parties not only to take legislative action to eliminate discrimination against women, but also other measures that go to upsetting social and cultural patterns of prejudice and inequality. In honour of a thorough analysis of the Canadian immigration system's *CEDAW* compliance, both legislation and decision-making will be analyzed in the course of this inquiry.

IV. Canada's Immigration System

[12] *Ibid*.

[13] *Ibid*.

IV.I Immigration and Refugee Protection Act

Immigration in Canada is currently governed by the *Immigration and Refugee Protection Act*.[14] This legislation has since replaced the *Immigration Act* that represented the statutory authority applicable at the time of *Baker*, though the issues to be discussed below are similarly applicable to both the former and current Acts, unless otherwise distinguished. *IRPA* has specifically been identified as being "tough" on immigration, even by the Minister of Citizenship and Immigration at the early stages of its proposal.[15] The Act has also been criticized by groups such as the Canadian Feminist Alliance for International Action [CFAIA] and the National Association of Women and the Law [NAWAL]. Such critiques have focused on the government's failure to employ a gendered analysis in the process of drafting the legislation[16] and to incorporate into the law a human rights framework with explicit reference to Canada's obligations under international law, such as those prescribed by *CEDAW*.[17] A report submitted to the United Nations Committee on the Elimination of Discrimination Against Women on the occasion of the Committee's review of Canada' fifth report in 2003 went as far as to submit that *IRPA* represents a violation of CEDAW on the grounds of not adequately taking into account the context of women's circumstances in its policies and procedures.[18]

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[14] *Immigration and Refugee Protection Act,* S.C. 2001, c.27 [*IRPA*].

[15] Canadian Feminist Alliance for International Action, *Canada's Failure to Act: Women's Inequality Deepens* (Submission to the United Nations Committee on the Elimination of Discrimination Against Women on the Occasion of the Committee's Review of Canada's 5th Report, January 2003) at 52 [*CFAIA*].

[16] *Ibid*.

[17] *Ibid*.; National Association of Women and the Law, *Brief on the Proposed Immigration and Refugee Protection Act (Bill C-11)* (Submission to the Standing Committee on Citizenship and Immigration, April 2001) at 6 [*NAWAL*].

[18] CFAIA, *ibid*.

Arguments put forth by such advocacy organizations illustrate that discrimination exists throughout *IRPA*. For example, discrimination is arguably evident in the legislation's requirements for economic migration, which favour subgroups of skilled workers, investors, entrepreneurs and self-employed persons. The result of such categorizations is to indirectly disadvantage women in comparison to men in their ability to qualify as economic migrants, because it does not recognize or accommodate for the social barriers that continue to restrict women's access to economic opportunities.[19] As a result, women must attempt to overcome significant challenges associated with prescriptive gender roles in order to fit into these categories and to convince decision-makers that they conform to the rigid standards that have been set. In addition, the sub-program within the economic migration category under *IRPA* for live-in caregivers also clearly represents a gendered and racialized inequality of treatment. It essentially legitimizes policies, such as the granting of only temporary immigration status and the requirement that caregivers live within their employers' homes, that promote exploitation of the primarily female applicants under this program.[20] Canada's commitment to *CEDAW* provides substantial argumentative material to advocate for legislative changes to *IRPA* with the goal of eradicating gender stereotypes as the basis for immigration policies and curtailing the perpetuation of discrimination against women in such contexts.

IV.II Humanitarian and Compassionate Exemptions

Beyond the more general failings identified with respect to *IRPA* and its inadequacy in upholding principles of equality between the sexes, of particular interest to this inquiry for its

[19] *Ibid*.

[20] CFAIA, *supra* note 15 at 53.

central importance in the *Baker* case is section 25(1) of *IRPA* (the current version of section 114(2) of the *Immigration Act*). This section of Canada's immigration legislation allows the Minister of Citizenship and Immigration to exempt foreign nationals from particular requirements set out in the Act in accordance with humanitarian and compassionate considerations.[21] This provision, on its face, provides opportunities for the consideration of sympathetic factors and for enhanced immigrant protection; however, it can also be seen to pose potential problems in its application. The provision in question grants broad-based discretion to the Minister to consider a wide array of circumstances about a given applicant, including an explicit focus on the best interests of any children who may be affected by the decision being made (a requirement incorporated into the new legislation following the Supreme Court ruling in *Baker)*. Beyond these general descriptions, however, the discretionary power granted under the provision remains vague and without obvious limitations. Such an absence of defined criteria to be considered in H&C decisions may, by some, be prized for its openness to situations and circumstances that may not have entered the minds of the legislative drafters and also for the flexibility it offers to the Minister in doling out the privileges of immigration status in Canada. However, in contrast, such an open-ended provision may easily be seen as leading to potentially arbitrary decisions.[22] Belief in the benefits of this system of H&C exemptions is dependent upon the faith one has in the officers charged with making such decisions. The analysis below demonstrates that greater legislative guidance is needed in order to prevent the infiltration of stereotypes into H&C decision-making, as the current system provides a breeding ground for their proliferation.

[21] *IRPA*, *supra* note 14 at section 25(1).

[22] NAWAL*, supra* note 17 at 20.

The important exemptions available on H&C grounds under *IRPA* are particularly susceptible to the development and entrenchment of stereotypes throughout the course of the decision-making processes. The American Psychological Association [APA] provided an amicus curiae brief for submission to the Supreme Court of the United States in the matter of the case of *Price Waterhouse v. Ann B. Hopkins*[23] that outlines significant factors, from a psychological perspective, that promote stereotyping in social contexts.[24] Though the brief deals with employment settings in light of the issues in *Price Waterhouse*, similar factors may also be relevant with respect to immigration systems in order to better understand the situational basis for stereotype propagation. One factor identified for consideration by the APA with respect to decision-making situations is the ambiguity of criteria used in making evaluations.[25] When applied to the facts at issue in the *Baker* case and the applicable provision of *IRPA*, it is clear that an application made on humanitarian and compassionate grounds allows for the exercise of a loosely-defined discretion by the decision-maker. As was the case with the employment decision at issue in *Price Waterhouse*, such vaguely prescribed criteria for consideration leaves room for the infiltration of stereotypes into the decision-making process, particularly in the absence of strict guidelines to ensure their exclusion.

A second circumstance identified by the APA as being supportive of stereotype generation is when there is a paucity of information available to the evaluators.[26] When applied

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[23] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) [*Price Waterhouse*].

[24] American Psychological Association, "In the Supreme Court of the United States: *Price Waterhouse v. Ann B. Hopkins*. Amicus Curiae Brief for the American Psychological Association," (1991) 46 American Psychologist 1061 at 1061 [*APA Brief*].

[25] *Ibid*. at 1067.

[26] *Ibid*.

to the H&C decisions, it must be noted that the nature of the evidence before the decision-maker is substantially within the control of the applicant. However, a scarcity of information may be understood to result in particular instances because the quality of submissions of fact and law by the applicant is dependent upon his or her own capacity to gather evidence and articulate written arguments, or to obtain legal counsel. This fact makes it highly possible that the case before the decision-maker is not complete or convincing based purely on technical challenges of submission. In addition, the decisions in the majority of H&C cases are made without the immigration officer ever meeting the individual whom the outcome will affect due to the fact that an applicant has no general right to an oral hearing in the H&C context.[27]. Such an impersonal process is troublesome when considering that issues of the applicant's credibility are consistently being weighed and considered in the exercise of humanitarian and compassionate discretion. With such hurdles to the presentation of a comprehensive case, it is arguable that stereotypes may, inadvertently or not, be relied upon by decision-makers to fill any voids of information when making H&C determinations.

Finally, the APA attributed a propensity to develop stereotypes based on the rarity of the stereotypical individual at issue in a particular decision.[28] In the employment context for which the amicus curiae was prepared, the issue was one of a woman being considered for a position as a partner in a large accounting firm in which a very small proportion of women had ever reached such a level. The issue in many H&C decisions, on the other hand, is the complete opposite, as there are many similarities between typical applicants for immigration status on

[27] *Baker*, *supra* note 1 at para.34.

[28] APA Brief, *supra* note 24 at 1067.

humanitarian and compassionate grounds. However, this does not necessarily mean that stereotypes are less likely in this immigration situation than in the *Price Waterhouse* employment context, for it may be argued that a large portion of similarly situated applicants may itself create an incentive for the development of stereotypes. With such a large case load, a less individualized analysis based on stereotypical assumptions would be one method by which the decision-making body may ‘cut corners’ and facilitate more efficient decision-making, consistent with descriptions of the motivations of stereotyping for purposes of simplicity and organization.[29] In this way, this final APA factor may be understood more expansively, as mass numbers of similar individuals may also promote stereotyping within a given institution for reasons that go beyond those attributed to one’s rarity in a given situation.

IV.III Legislative Reform for CEDAW Compliance

As a result of the prevalence of stereotypes in *IRPA* and specifically within H&C decision-making, it is clear that compliance with *CEDAW* requires that actions be taken to prevent the discrimination against women that such prejudices are prone to cause. This may entail alterations to the immigration legislation itself, to create a system of H&C decision-making that is less prone to stereotyping, as suggested by NAWAL in their recommendation that what constitutes H&C grounds be more thoroughly defined.[30] In addition, an article by Lorne Sossin suggests a transformative change to administrative decision-making in general: namely, the adoption of an intimate approach to enhance the individualized and interdependent nature of

[29] Zanita Fenton, “Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence,” (1998-1999) 8 Columbia Journal of Gender & Law 2 at 14 [*Fenton*].

[30] NAWAL, *supra* note 17 at 21.

administrative relationships.[31] This would arguably help to address the problems of stereotypes and prejudices infiltrating considerations of H&C applications and support a more responsive and respectful approach to deciding individual cases on their merits. Though these suggestions for reform provide some guidance for change and improvement from the basis of immigration legislation itself, there remain challenges to eradicating gender stereotyping and discrimination through such means.

Demand for change at the legislative level may not represent the most effective way to eliminate stereotyping and discrimination in the immigration context as a result of practical and systemic challenges. One particular hurdle is that Canada has no national machinery for monitoring compliance with its treaty obligations, a problem that has been identified by the United Nations Committee on Economic, Social and Cultural Rights (associated with the International Covenant on Economic, Social and Cultural Rights) and the Human Rights Committee (treaty body of the International Covenant on Civil and Political Rights).[32] This means that there is no clear avenue at the domestic level by which to pursue a challenge to the content of *IRPA* itself under *CEDAW*. Previous activities of interest groups have involved attempts to present such objections in the international forum in connection with Canada's reporting requirements to the *CEDAW* Committee;[33] however, there remain limits to this avenue of redress when Canada fails to be bound by Committee recommendations.

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[31] Lorne Sossin, "An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law," (2001-2002) 27 Queen's L.J. 809 at 843.

[32] CFAIA, *supra* note 15 at 12.

[33] See CFAIA, *supra* note 15.

There are also further practical challenges to consider. It has been recognized that Canadian women seeking to ensure government compliance with the provisions of *CEDAW* struggle against extensive obstacles attributed to the absence of adequate domestic human rights machinery to competently address such ingrained and persistent problems of systemic discrimination.[34] This broader ineffectiveness is such that it has perpetuated the pervasiveness of women's inequality under the law in Canada, despite weighty claims and fledgling initiatives to correct domestic inadequacies. In recognition of these challenges, it may be more beneficial and effective to pursue further and complimentary ways to address the prevalence of stereotyping in the immigration system. One such approach that this paper seeks to explore and advocate for in the coming section is discussed in relation to the Supreme Court of Canada's judgement in *Baker* and based on an assertion that the court *should* and *could* have done more to effectively deter gender-based stereotyping and discrimination in Canada's immigration system.

V. Canada's Judicial Role in Overseeing Immigration Decision-Making

V.I Baker Ruling by the Supreme Court of Canada

Upon judicial review and subsequent appeals, the Supreme Court in *Baker* overturned the original decision of the immigration officer rejecting Mavis Baker's H&C application. The

[34] CFAIA, *supra* note 15 at 13.

grounds for such a ruling consisted of a finding that the discretion granted under s.114 if the *Immigration Act* had been exercised unreasonably, in that the decision-maker failed to adequately consider the interests of the applicant's children, a requirement emphasized in the International Covenant on the Rights of the Child to which Canada is a party.[35] In addition, the impugned administrative decision was acknowledged to give rise to a reasonable apprehension of bias, as, in the opinion of the court, a well-informed member of the community would perceive bias when reading the reasons for the decision[36] in Ms. Baker's case.[37] An excerpt from what was determined to constitute the reasons of the immigration officer is included below (including typographical emphasis):

> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this kind of generosity...[38]

The form and content of these notes led the Supreme Court to find that the decision-maker in Ms. Baker's case did not demonstrate an objective and open-minded view of the evidence before him, but rather a willingness to ignore certain factors and draw conclusions based on circumstances in a way that was not necessarily free from stereotypes.[39] It is significant to note, however, that there was no outright acknowledgement by the Supreme Court of the presence

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[35] *Baker*, *supra* note 1 at para.73.

[36] Ibid. (The Junior Immigration Officer's informal notes were accepted by the court as representing reasons for the decision at para.44).

[37] *Ibid*. at para.48.

[38] *Ibid*. at para.5.

[39] *Ibid*. at para.48.

or influence of stereotyping in the decision itself, particularly gender stereotyping, which represents an omission to be further expounded below.

V.II Role of Judicial Review of Administrative Decision-Making

The prevailing approaches employed by the judiciary in the realm of administrative law judicial review only indirectly allow the court to address stereotyping. It can be seen that the role of the court is not to conduct a *de novo* assessment of the merits of the case at hand, but rather to perform an arm's length review of the process engaged in and outcome reached by the administrative decision-maker. In the immigration context, such a review must arguably be in-depth and comprehensive in order to fulfill obligations to eradicate stereotyping and discrimination against women, and also to truly counteract their detrimental effects on the realization of gender equality.

In the Supreme Court's analysis in *Baker*, the administrative law principles of reasonableness and impartiality are employed and create the basis for remitting the impugned immigration decision for reconsideration. Though the court did make the effort to mention that immigration decisions require "a recognition of diversity, an understanding of others, and an openness to difference,"[40] they fell short of acknowledging the obvious failure of the immigration officers in Ms. Baker's case to show such respect and objectivity due to their clear reliance on gender and other stereotypes. As such, the method of review employed in the case implicitly allows for the perpetuation rather than elimination of stereotyping in the immigration system because it fails to fully expose the operative stereotypes that were clearly engaged and

[40] *Baker*, *supra* note 1 at para.47.

to officially condemn their presence. To illustrate this, the finding in *Baker* of an unreasonable exercise of discretion fails to acknowledge the problematic reliance of the immigration officer on gender stereotypes; they neither condemn the presence of prejudicial assumptions as the consideration of irrelevant factors, nor expose stereotypes as a further reason for holding that there was an abuse of discretion. And more profoundly, the test for reasonable apprehension of bias is inherently limited by the fact that it avoids direct recognition and condemnation of such bias in favour of a diplomatic deferral to the 'reasonable observer.' As a result, this approach effectively allows for the continued reliance on gender-based stereotypes in immigration decision-making, as long as their presence is less explicitly evident and potentially hidden among what would constitute valid and *apparently* unbiased rationale. In *Baker,* the court is not sending a message that stereotyping is prohibited, but rather that the immigration officer may reasonably rely on stereotypical assumptions and simply must not *appear*, from the perspective of a reasonable observer, to be anything but impartial.

It is clear that the administrative law frameworks of reasonableness and impartiality limit the potential impact that judges could have by more openly exposing the presence of prejudice in the reasoning of lower-level decision-makers. Outright denunciation and prohibition of the reliance on stereotypes and the existence of discrimination relates to the broader strategy employed under *CEDAW* itself as an essentially unenforceable contract between states. To realize any effects, the Covenant provides for a process of 'naming' of violations and, in so doing, 'shaming' of State parties that have not upheld their commitments.[41] The desired end of such an approach is to create pressure on state

[41] Holtmaat*, supra* note 10 at 78.

governments and to compel them to institute changes in order to comply with the treaty obligations. A similar rationale can be applied to the eradication of gender stereotyping itself at the domestic level if influential institutions, like the judiciary, are prepared to take the lead in denouncing such prejudice at the appropriate opportunities. It is only in a clear articulation of disapproval and an understanding of the ingrained role of the operative stereotypes being challenged that the motivation for change will follow. The judiciary in *Baker* was presented with such an opportunity to fulfill its role in eradicating prejudice and discrimination, but failed to take such a principled stance. The question of inquiry in this paper, in response to the court's omissions, involves an exploration of the obligations for Canada to do more in order to defend against pervasive gender stereotyping that perpetuates discrimination against women, particularly women within the immigration system like Mavis Baker.

V.III Extension of Canada's Obligation to Eradicate Stereotyping to the Judicial Level

In accordance with state duties under *CEDAW* to eradicate discrimination against women, the judiciary in the *Baker* case arguably had an obligation to address stereotyping more comprehensively than it did in order to effectively denounce and prohibit the reliance on stereotyping in immigration decision-making. According to Article 2(a) of *CEDAW*, the state must "take all appropriate measures" to achieve the ends outlined in the provisions of the Covenant.[42] These measures are not limited to legislative reforms, but extend to other positive actions in support of eliminating discrimination against women. According to a further analysis of Article 5(a) of *CEDAW* dealing specifically with stereotypes, "state parties have a duty to intervene in those social relations and institutions in which negative stereotyped images and

[42] CEDAW*, supra* note 2 at Article 2(a).

views about women are expressed and/or used."[43] As is evidenced on the facts of *Baker*, gender stereotypes have permeated the realm of immigration law in its everyday practice. States, as a result, have not only an obligation to ensure that the content and underlying assumptions of their legislation is free of gender prejudice, but also that the administrative institutions charged with immigration responsibilities do not perpetuate discrimination. The authority to ward off discrimination against women in immigration practice falls squarely with the courts through their role as judicial reviewers of administrative acts.

In addition and as a compliment to Canada's responsibility under international law, further justification for the obligation being placed on a country's judiciary to take measures to eliminate the use of stereotypes can be found in the ground-breaking case of *R. v. Ewanchuk*.[44] In the reasons of the Supreme Court judgement in this case, Justice L'Heureux-Dube articulates the duty of judges to denounce stereotypical language in the context of sexual assault jurisprudence because of the myths that they perpetuate, but also because they are inconsistent with the application of the law.[45] Further, in her article entitled "Beyond the Myths: Equality, Impartiality, and Justice," L'Heureux-Dube J. elaborates on the incompatibility of stereotypes and the legal method:

> By definition, myths and stereotypes divorce the law from contemporary knowledge because they have more to do with fiction and generalization than with reality. They are irrational, non-scientific narratives used by human beings

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[43] Holtmaat, *supra* note 10 at 76.

[44] *R. v. Ewanchuk,* [1999] 1 S.C.R. 330 [*Ewanchuk*].

[45] *Ibid.* at para.95.

> to explain what they do not fully understand. They are, therefore, incompatible with the truth-seeking function of the legal system.[46]

This articulation of the obligation on judges to expose and condemn stereotypes reinforces and informs the content of the same responsibility set down at the international level in *CEDAW*. This also provides grounds for the assertion of the responsibility of judicial actors to criticize the practice of stereotyping, even in the absence of a state's ratification of *CEDAW* and the obligations it imposes from an international law perspective.

VI. Judicial Methodology for Discharging the Obligation to Eradicate Discrimination

The following section of this paper proposes a comprehensive methodology by which gender stereotypes may be effectively exposed and condemned by the judiciary, and it is applied to the facts of *Baker* to demonstrate the true nature of the discrimination at work in the case.

VI.I Identify Operative Stereotypes

In contrast to the cursory acknowledgement of the possible presence of stereotyping in *Baker*, a robust approach to truly addressing the problem necessarily involves a process of identifying the operative stereotypes being applied in the administrative decision-making in order to understand their role and implications. Such an approach was adopted in the landmark Supreme Court of Canada decision of Justice L'Heureux-Dube in *Ewanchuk*. In her analysis, L'Heureux-Dube drew out suspect language that appeared to be tainted by gender stereotypes from the judgement of Justice McClung of the Court of Appeal. These included a description, for

[46] The Honourable Madame Justice Claire L'Heureux-Dube, "Beyond the Myths: Equality, Impartiality, and Justice" (2001) 10(1) Journal of Social Distress and the Homeless 87 at 89.

example, that the complainant in a sexual assault had not presented herself to the accused "in a bonnet and crinolines."[47] Justice L'Heureux-Dube then exposed the rationale behind such comments in asserting that they had been made on the basis of prejudicial assumptions about the complainant and that they were a reflection of inappropriate gender stereotypes forming the basis of Justice McClung's reasoning and decision in the case.[48]

Taking cues from *Ewanchuk*, it becomes clear that the Supreme Court in *Baker* was compelled to identify the stereotypes permeating the notes of the immigration officer under scrutiny in the case. Descriptive stereotypes engaged in the decision include those that relate to sex roles and sexuality and can be seen from the language and emphasis used in the immigration officer's reasons. As an illustration, the subject of the decision, Ms. Baker, was judged to be an undesirable immigrant to Canada because she was presumed to be a lifelong drain on Canada's social welfare system.[49] It is apparent that this characterization in Ms. Baker's case was based on her status as a single mother with eight children, a black woman from a developing country, as well a person with a mental health condition. The notes of the decision-maker, however, failed to demonstrate consideration of the evidence provided on behalf of Ms. Baker, such as a letter from her psychiatrist, outlining that nothing precluded her from returning to life as a productive and self-sufficient member of society. By rejecting a truly individualized analysis in favour of reliance on stereotypical assumptions, the decision-maker fell into a characterization of Ms. Baker as what Hope Lewis has referred to as a "welfare

[47] *Ewanchuk, supra* note 44 at para.88.

[48] *Ibid.* at para.89.

[49] *Baker, supra* note 1 at para.5.

queen."[50] The infiltration of such gender, racial and mental health prejudices in immigration determinations is unpalatable, and has influenced NAWAL's recommendation that financial self-sufficiency not be included as a requirement when considering H&C applications.[51] As a result of the prominence of such economic considerations in immigration decisions, however, Ms. Baker was summarily considered unfavourably due to her characterization as fulfilling a gender role associated with irresponsibility and dependency.

What further makes the descriptive stereotypes in this case complicated is their compound nature, involving more than isolated judgements based on sex and sexuality, but others that are interrelated with racial and mental health prejudices. An article by Zanita Fenton elucidates one component of this phenomenon by recognizing the existence of racialized gender stereotypes. As a black woman, Ms. Baker is characterized by the immigration decision-maker on the basis of her race and her gender and, as described by Fenton, these compounded stereotypes are infused with sexual meaning.[52] This is evident in *Baker*, as the immigration officer clearly focuses on Ms. Baker's eight children, by emphasizing it consistently and with capital letters, in an attempt to implicate her as irresponsible and promiscuous, or as Fenton would say, a "bad girl."[53] Mental health stereotypes also closely connect to the gender prejudices at play in Ms. Baker's case. Their compounded effects further reinforce beliefs in the applicant's incapacity and dependency, as she is portrayed as being unable to take care of herself and her family.

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[50] Hope Lewis, "Universal Mother: Transnational Migration and the Human Rights of Black Women in the Americas" (2001) 5 J. Gender Race and Just. 202 at 213 [*Lewis*].

[51] NAWAL, *supra* note 17 at 21.

[52] *Ibid.* at 18.

[53] *Ibid*. at 21.

In addition to the descriptive stereotypes at work in the immigration decision in question, Ms. Baker was further subjected to sets of established prescriptive stereotypes that result in comparing her to artificial standards of what constitutes a desirable immigrant. In the administrative immigration decision being impugned in *Baker*, it is clear that the officer measures Ms. Baker against policy benchmarks suggesting that immigrants *should* be self-sufficient and members of traditional nuclear families. These standards are grounded in stereotypical conceptions of what it takes to be 'like us' (or some idea of the ideal citizen) and highlight characteristics that make a person different. Connected to these differences, however, is a further negative connotation that what is different is 'bad.' As outlined by Fenton, Ms. Baker is distinguished from being a "good girl," one conceived as being chaste and truthful, as such a description is not necessarily seen to be consistent with the fact that the applicant has eight children and has lived illegally in Canada for 11 years. The repercussions of not 'fitting in' or living up to such requirements of 'goodness' are grave, as they preclude Ms. Baker from being recognized as a victim,[54] somehow implicating her in her own failure to measure up and her resultant lack of immigration status. Such a requirement of victimhood is one that is recognized as being associated with all types of human rights abuses, and conformity to a particular version of 'victim' is necessary in order to be worthy of concern.[55] According to an analysis of the *Baker* case, the administrative decision denying Ms. Baker's application was alternatively seen to render her to a 'sub human' status.[56] As is clear from the immigration officer's notes, Ms. Baker's failure to conform ultimately the prescriptive categories of desirable

[54] *Ibid.* at 21-22.

[55] Lewis*, supra* note 50 at 228.

[56] *Ibid.* at 211.

immigrants and worthy victim limits her recognition as a person deserving of compassion and the protection of Canada's acceptance.

By using descriptive and prescriptive stereotypes to categorize Ms. Baker in these ways, the immigration officer avoided the consideration of her application on its individual facts and merits, basing his opinion of her instead on characteristics typically attributed to similarly situated people. It is clear from the analysis of the decision-making process, that evidence providing details that were contrary to such prejudicial classifications were essentially discounted. It can be seen from this omission that the stereotypes and categorizations at play in the decision acted to overwhelm and curtail the significance of individualized facts presented in the application, ultimately undermining the legitimacy of humanitarian and compassionate considerations within the immigration system.

VI.II Determine the Origin and Context of the Stereotypes

The content of the stereotypes pervading the impugned administrative decision in *Baker* can be further elaborated on through the understanding of their origin and context. The importance of including analysis of the origin and context of a given situation in order to appropriately uncover prejudices is advocated by Michelle O'Sullivan in her critique of judicial approaches to divorce settlements.[57] In the analysis of the true situation of a divorcing couple, O'Sullivan directs judges to consider the past choices of the parties as made within their social context, as well as other potentially influential factors, such as the social and economic

[57] Michelle O'Sullivan, "Stereotyping and Male Identification: 'Keeping Women in their Place'" (1994) Acta Juridica 185, reprinted in Christina Murray, ed., *Gender and the New South Africa Legal Order* (Kenwyn: Juta, 1994), 185 [*O'Sullivan*].

positions and perceptions of women in society.[58] It is in taking such a broad and in-depth approach to judicial decision-making that judgements based on stereotypical assumptions may more aptly be avoided, by seeking the roots of their presence and the situations that allow them to thrive.

In considering the origin of the stereotypes in the administrative decision-making challenged in *Baker,* there may be found both general and specific foundations for the stereotypical assumptions at play. From a psychological perspective, Peter Glick and Susan T. Fiske describe the motivation behind the drawing of distinctions between groups, particularly those that elevate the status of one group above that of the other. The origin of such classifications is found in what they refer to as "the manifestation of the competitive drive to differentiate and dominate."[59] Such a basis can be seen to ground the perpetuation of patriarchal stereotypes in society, where women have traditionally been subjugated to men, as well as differentiation between a 'good' woman and a 'bad' woman in accordance with models based on the Virgin Mary in contrast to Eve.[60]

The immigration system itself, more specifically, comes with its own set of assumptions and influences that may contribute to the perpetuation of gender stereotypes. An article by Burns and Gimpel analyzes the significance of a variety of factors in creating support for

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[58] *Ibid.* at 189.

[59] Peter Glick and Susan T. Fiske, "Sexism and other 'Isms:' Interdependence, Status, and the Ambivalent Content of Stereotypes," in W.B. Swann, Jr., L.A. Gilbert and J. Langlois, eds., *Sexism and Stereotypes in Modern Society: The Gender Science of Janet Taylor Spence* (Washington D.C.: American Psychological Association, 1999), 193 at 211 [*Glick and Fiske*].

[60] O'Sullivan, *supra* note 57 at 188.

restrictive immigration policies in the United States.[61] The empirical findings presented illuminate some of the ingrained assumptions and stereotypes associated with immigrants and immigration. For example, it outlines that people who maintain negative attitudes towards welfare tend to hold more negative views about liberal immigration policies, associating particular ethnic immigrant groups with reliance on the welfare system for support.[62] This factor in the development of stereotypical and negative attitudes towards immigration can be seen for its adverse influence in the immigration officer's notes laid out in *Baker*, as they outline the likelihood that Ms. Baker would require the support of social services for the remainder of her life. Further factors were also identified in the article by Burns and Gimpel as contributing to unfavourable opinions of immigrants and immigration, including beliefs about the work ethic and intelligence of immigrant groups, as well as pessimistic outlooks with respect to the national economy, which reportedly resulted in the blaming of particular racial groups for economic downturns.[63] It becomes clear from this analysis that social and economic circumstances may inform and perpetuate the formation of stereotypes in the judgement of immigrants.

VI.III Understand the Harms of the Stereotypes

The methodology for fully exposing the presence of stereotyping culminates with the recognition and articulation of the harms that they cause in order to fully comprehend the reason for their condemnation. It is in identifying the harms of a stereotype that one may be

[61] Peter Burns and James G. Gimpel, "Economic Insecurity, Prejudicial Stereotypes, and Public Opinion on Immigration Policy," (2000) 115(2) Political Science Quarterly 201 [*Burns and Gimpel*].

[62] *Ibid.* at 13.

[63] *Ibid.* at 22 and 12.

classified as 'hostile,' rather than merely neutral.[64] The unwillingness of the Supreme Court to acknowledge the presence of such stereotypes in *Baker* was a failure to take advantage of an opportunity to uncover their influence in the immigration system and to reject their role in perpetuating discrimination against women.

The demeaning nature of the stereotypes at play in the immigration decision impugned in *Baker* is clear based on an understanding of the distinctions they draw as an incarnation of an unequal power structure. In creating power differentials between categories of people, those classified as inferior are stripped of control over their own self-definition and agency in their own life choices. Such hostility in stereotyping has similarly been identified by theorists, including Zanita Fenton who recognizes that in relation to black women in America, "control over the definition of acceptable sexuality is one of the principal means of establishing power."[65] Such relegation to positions of low social status relate directly to Ms. Baker's conformity with traditional considerations of inferiority, including on the basis of her gender, race, family situation and mental health disorder.

Fenton further draws a relationship between a failure to conform to prescriptive stereotypes and the negative effects on one's ability to access social benefits and systems, in particular, the justice system. In her analysis, a woman's access to justice is contingent upon her ability to be perceived as a 'victim' according to stereotypic expectations, as such gender roles serve as a powerful means of social control.[66] This concept is further elucidated by Hope

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[64] Glick and Fiske*, supra* note 59 at 11.

[65] Fenton*, supra* note 29 at 15.

[66] *Ibid.* at 25.

Lewis who describes that stereotypical roles act as determinants of whether and how individuals will gain access to legal structures.[67] This problem is particularly severe for those who are classified as 'illegal aliens' or 'foreigners,' as the resultant effect is the maintenance of the precarious societal positions experienced by these people, without the necessary agency to access systems and procedures to regularize their immigration status.[68] It is clear that in Ms. Baker's case, the stereotypes to which she is subjected in the determination of her H&C application are detrimental to her ability to gain favour and receive the benefits of immigration status in Canada.

It is important also to address that even in the absence of the clearly harmful or 'hostile' stereotypes as are present in the case at hand, the very fact that such prejudices are permitted to permeate the immigration system creates its own problems, irrespective of the nature of the particular stereotype at play. According to Professor Sophia Moreau in her article, "The Wrongs of Unequal Treatment," stereotypes are inherently harmful. She identifies the damage that they do to the individuals they attempt to define, including through the formulation of arbitrary distinctions and the undermining of personal autonomy, even if the distinctions they draw themselves are not demeaning in nature.[69] Further comments by Zanita Fenton also support this view of inherent harms from stereotyping, as she describes them in the devaluation of their subjects and, in a more extreme theory, even as a form of violence.[70] Ultimately, the application of stereotypes minimizes the importance of individual facts and circumstances in

[67] Lewis, *supra* note 50 at 202.

[68] *Ibid.* at 202.

[69] Sophia Moreau, "The Wrongs of Unequal Treatment" (2004) 54(3) University of Toronto Law Journal 291 at 298-299.

[70] Fenton*, supra* note 29 at 11-12.

favour of generalized presumptions. As Michelle O'Sullivan describes, this process "obscures the complexity of the human condition."[71] The distorting effects of stereotypes make them completely inappropriate in the context of adjudication and decision-making. In Ms. Baker's case, her ability to have her case decided impartially on the facts presented was compromised by the prevalence of stereotypes in the process of assessing her application for immigration status. This clearly denies her agency and influence over her own fate, the damage from which is immeasurable.

VII. Conclusion

As discussed throughout the body of this paper, stereotypes pervade many different levels of the immigration system in Canada, both generally through legislation and specifically in administrative decisions like the one made in the case of Mavis Baker. The result of such stereotypes can be clearly seen to amount to discrimination against women as defined under Article 1 of *CEDAW*. To begin, what must be asked is whether the nature of the immigration system, through its laws and practices, establishes distinctions, exclusions or restrictions on the basis of gender stereotypes, either through purpose or effects.[72] It may be argued that no explicit distinctions are drawn between male and female immigrants in Canada's immigration legislation or in decisions of immigration officials; however, in-depth analysis demonstrates that the legal restrictions imposed on immigration nevertheless disproportionately exclude women. As a consequence of immigration policies and practices, women are more apt to be denied the benefit of immigration status in Canada, and thus their effect is to impair access of women to a

[71] O'Sullivan, *supra* note 57 at 187.

[72] *CEDAW*, *supra* note 2 at Article 1.

privilege that should be equally available to individuals of both genders. While legislators and administrators may attempt to justify the nature of their restrictive rules in a gender neutral manner, it is inappropriate not to recognize or account for the differential effects. The creation of categories and criteria for immigration cannot thus be justified on the grounds that discrimination is not their intention, for this would be to ignore the reality of the disproportionately negative effects they have on women.

As the preceding analysis of this paper illustrates, stereotypes continue to play a dominant role in the Canadian immigration system; however, this state of affairs must not be permitted to continue as such reliance on stereotypes clearly constitutes discrimination against women as prohibited in *CEDAW*. In attempting to address this pervasive problem, advocating for legislative reform is one method by which to demand *CEDAW* compliance. However, this paper proposes an additional means by which harmful gender stereotypes and discrimination against women may be effectively condemned by asserting a role for the judiciary, particularly in the realm of judicial review of administrative immigration determinations. Such a framework involves the explicit identification of operative stereotypes, as well as their origin and contexts, in order to understand their presence and role in immigration decision-making. Further, an acknowledgement of the harms of such generalizations is a necessary component of any such review to demonstrate the negative impacts of stereotypes, particularly when their effects disadvantage women. It is the power that comes from understanding the pervasive role of gender stereotypes that will ultimately encourage the dismantling of policies and practices that perpetuate discrimination against women, and the immigration context in Canada is an important and necessary place to start in the pursuit of gender equality.