High Ross Dam: The International Joint Commission Takes a Hard Look at the Environmental Consequences of Hydroelectric Power Generation—The 1982 Supplementary Order

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Since 1917, the City of Seattle has developed the hydroelectric potential of the Skagit River to meet its power needs.\(^1\) Beginning high in the mountains of Manning Provincial Park in British Columbia,\(^2\) the Skagit River drops 1585 feet from the international boundary to Puget Sound. Only eighty miles from metropolitan Vancouver, British Columbia, the upper region of the Skagit River has become a popular recreational area.\(^3\) Its present recreational use by citizens of British Columbia conflicts with Seattle City Light’s longstanding plan to supplement its power production by enlarging the capacity of Ross Lake, an existing reservoir that straddles the international border. To accomplish this goal, the utility would

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1. Seattle City Light is the municipal lighting department for the City of Seattle, Washington. J.D. Ross, Superintendent of Seattle City Light, obtained permits from the United States Department of Agriculture on December 22, 1917 to build two dams on the Skagit River on damsites at Diablo Canyon and Ruby Creek. After Ross’ appointment as Superintendent in 1911, he worked diligently to transform the rapids of the Skagit River into electricity for Seattle. A third dam on the Skagit River, at Gorge Creek, was actually the first built. With the help of President Calvin Coolidge, who pressed a gold key at the White House sending a spark across the nation, Ross brought the first dam of the Skagit System into production on September 17, 1924. The Diablo Canyon Dam went into service in 1936. J.D. Ross never saw his vision completed. He died before Ruby Dam (now called Ross Dam), highest of the three, was completed. He was buried at the foot of Goodell Mountain (now called Ross Mountain) near the Ross Dam. A further account of J.D. Ross and Seattle City Light appears in Barich, *Our Far-Flung Correspondents: J.D. Ross’ Vision*, *The New Yorker*, Jan. 4, 1982, at 57.

Municipally-owned Seattle City Light has grown to supply a 126-square-mile service area with a 1980 census population of 634,303. Its 1981-82 winter peak load was approximately 1838 megawatts (mW). Energy demand for 1980 totalled 8,254,000 megawatt-hours (mWh). Report of the Special Advisors to the International Joint Commission, April 2, 1982, at 6 [hereinafter cited as Report of the Special Advisors] (copy on file with the *Washington Law Review*).

2. The Skagit River flows through both Skagit River Provincial Park and Manning Provincial Park in British Columbia. International Joint Commission, Environmental and Ecological Consequences in Canada of Raising Ross Lake in the Skagit Valley to Elevation 1,725 (Figure 1) (1971). A portion of the Skagit watershed on the United States side of the border is now included within the boundary of North Cascades National Park.

3. See id. at 22. This report of the International Joint Commission estimated that, barring improvements in access or further development of recreational facilities, the Skagit Valley in Canada would support approximately 25,000 “person-days” of use annually. It predicted that if the reservoir (hereinafter Ross Lake) were raised without developing the potential for intensive recreational use, the use of the valley would decrease to about 12,000 “person-days” per year. Fishing and hunting would decrease by about 75%. If improvements in access and additional recreational development were undertaken, the valley could support about 350,000 “person-days” of annual use in its present state and about 342,000 “person-days” of annual use whether or not the water level is raised. Improved access, however, would not increase fishing and hunting use whether or not the water level is raised.
raise Ross Dam 130 feet to a total height of 1725 feet above sea level. If the dam were raised, Ross Lake would flood more than 5000 acres of popular recreational land in British Columbia and generate a maximum 241 megawatts (mW) of additional capacity and 362,000 megawatt-hours (mWh) of additional energy. Controversy has clouded these plans for many years.

This Note discusses a 1982 decision by the International Joint Commission (IJC) that effectively prohibits Seattle from raising the dam. It surveys the forty-year history leading to the decision, especially noting the role of the IJC. The Note compares the 1982 decision and the procedures used by the IJC in reaching its decision, particularly its examination of

4. The initial Ross Dam proposal called for construction in four stages to an ultimate elevation of 1725 feet above sea level. The first stage, to 1365 feet, was completed in 1940. The City subsequently raised the height of the dam to elevation 1550 feet in 1947 and to elevation 1615 feet in 1949. See Statement in Reply of the Province of British Columbia to Statements in Response to the Request in the Request in the Application made by the Province of British Columbia, In the Matter of the Application of the City of Seattle for Authority to Raise the Water Level of the Skagit River Approximately 130 feet at the International Boundary Between the United States and Canada, Feb. 6, 1981, at 7-8 (hereinafter cited as Reply of the Province) (copy on file with the Washington Law Review).

5. Report of the Special Advisors, supra note 1, at 3, 11. "Capacity" refers to the maximum amount of electricity that can be generated at any given moment. "Energy" measured in mWh refers to the total annual amount of electricity available on demand. The figures used here refer to the maximum capacity and energy High Ross Dam would produce. At its present height, Ross Dam generates a maximum 275 mW of capacity, with an average production of 66 mW. Id. at 8.

6. Since 1953, the City and the Province have differed over the plans for High Ross Dam. For a brief discussion of this dispute up to 1970, see McDougall, The Development of International Law with Respect to Trans-Boundary Water Resources: Co-operation for Mutual Advantage or Continentalism's Thin Edge of the Wedge?, 9 OSGOODE HALL L.J. 261, 307-10 (1971).

Canadians were not alone in opposing City Light's plans. In addition to the dam's effect in British Columbia, the raised dam would flood two wilderness valleys in the Ross Lake National Recreation Area on the United States side of the border. American environmental groups, such as the North Cascades Conservation Council, have long opposed the High Ross Dam because of its destruction of the two valleys' virgin timber stands and recreational potential. The New York Times joined the opposition to raising Ross Dam early in 1970. N.Y. Times, Feb. 23, 1970, at 26, col. 2. Washington Governor Dan Evans also opposed raising the dam. Seattle Post-Intelligencer, Dec. 9, 1971, at 4, col. 1.

7. The International Joint Commission (IJC) has administrative, judicial, consultative and arbitral functions, all prescribed by the Treaty Relating to Boundary Waters and Questions Arising Between the United States and Canada, Jan. 11, 1909, United States-Britain, 36 Stat. 2448, T.S. No. 548 (hereinafter cited as Boundary Waters Treaty). The IJC is composed of six members, three appointed by Canada and three by the United States.


environmental concerns, with the application and operation of the “hard look” doctrine as it is used in environmental cases in the American judicial system. It suggests that applying the principles of the “hard look” doctrine is both appropriate and consistent with the IJC’s obligations under international law.

This Note recommends that the IJC continue to take a “hard look” at environmental concerns in the future, though this approach is not required by treaty. By doing so, the IJC will increase its usefulness and credibility as a forum for resolving future environmental disputes between Canada and the United States.

I. LEGAL BACKGROUND

Any hydroelectric power generation proposal involving a change in the flow of water at the Canada-United States boundary must conform to the provisions of the Boundary Waters Treaty of 1909. Designed to prevent disputes regarding the use of boundary waters, the treaty prohibits either country from building any obstruction affecting the natural flow of boundary waters without approval from the International Joint Commission. The treaty created the IJC as a permanent international organization that functions both as a court and as an agency. It has mandatory jurisdiction over cases involving obstructions that affect the natural flow of boundary waters, pursuant to Article VIII of the treaty. Its jurisdic-


10. See infra note 30.


12. Id., preliminary article. The treaty defines boundary waters as:

the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and Canada passes, including all bays, arms and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

13. Id., arts. VIII, IX, and X. Article VIII gives the IJC jurisdiction over all cases involving the use or obstruction or diversion of boundary waters. Article IX authorizes the IJC to examine and report on all matters of difference between the two parties whenever Canada or the United States so requests. Its power to render a decision upon any other matters involving the rights, obligations or interests of either or both of the parties, however, is strictly limited by article X. That article requires both parties to impose restrictions upon the scope of the decision.


15. Boundary Waters Treaty, supra note 7, art. VIII. See generally McDougall, supra note 6, at 263 (outlining the guiding principles and jurisdictional limits of the IJC).
tion may also extend to other border disputes upon the voluntary request of the parties.\textsuperscript{16}

Although the IJC's duty to protect national interests is an integral part of the treaty,\textsuperscript{17} this responsibility is traceable in part to a fundamental principle of international law: the absolute sovereignty of each nation within its own territory.\textsuperscript{18} That principle, when applied to the water rights of riparian states, is known as the Harmon Doctrine.\textsuperscript{19} Although no longer a favored doctrine in the international law of rivers,\textsuperscript{20} the Harmon Doctrine was included in Article II of the Boundary Waters Treaty.\textsuperscript{21}

The Columbia River Treaty,\textsuperscript{22} negotiated during the 1950's and 1960's, rejected the Harmon Doctrine.\textsuperscript{23} Instead, it adopted the more

\textsuperscript{16} Boundary Waters Treaty, supra note 7, arts. IX, X. See generally McDougall, supra note 6, at 263 (discussing articles IX and X of the Boundary Waters Treaty).

\textsuperscript{17} Boundary Waters Treaty, supra note 7, art. II. See generally McDougall, supra note 6, at 264-68 (discussing rationale behind article II).

\textsuperscript{18} See generally L. Henkin, HOW NATIONS BEHAVE 18 (2d ed. 1979) (discussing internal sovereignty); 5 M. Whiteman, DIGEST OF INTERNATIONAL LAW 183-86 (1965) (discussing territorial integrity). The United States Supreme Court first enunciated this doctrine in The Schooner Exchange v. M'Faddon & Others, 11 U.S. (7 Cranch) 116 (1812).

\textsuperscript{19} This doctrine takes its name from an 1895 opinion by Attorney General Judson Harmon. The Secretary of State had inquired whether diversions by American farmers on the Upper Rio Grande were proper when they reduced the water available to Mexican farmers on the lower river where it formed the international boundary. Attorney General Harmon replied that Mexico was attempting to obtain a servitude which "makes the lower country dominant and subjects the upper country to the burden of arresting its development." The Mexican request, he concluded, was contrary to "the fundamental principle of international law which is the absolute sovereignty of every nation, as against all others, within its own territory." 21 Op. Att'y Gen. 281-82 (1895), cited in Johnson, The Columbia Basin, in THE LAW OF INTERNATIONAL DRAINAGE BASINS 184 (1967).

\textsuperscript{20} See F.J. Berber, RIVERS IN INTERNATIONAL LAW 12-40 (1959).

\textsuperscript{21} Article II of the Boundary Waters Treaty reads, in part, as follows:

Each of the High Contracting Parties reserves to itself or to the several State governments on the one side and the Dominion or Provincial governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.

\textsuperscript{22} Treaty Relating to Cooperative Development of the Columbia River Basin Water Resources, Jan. 17, 1961, United States-Canada, 2 U.S.T. 1555, T.I.A.S. No. 5638 (effective Sept. 16, 1964). Although the Columbia River Treaty does not directly affect the dispute about the Skagit, it does provide an interesting analogy. It was negotiated about 50 years after the Boundary Waters Treaty but preceded the present negotiations over the Skagit by 20 years.

flexible approach of equitable apportionment, which provides for fair sharing of water resources. To reach its 1982 decision in the High Ross Dam matter, the IJC appeared to reject the Harmon Doctrine in favor of the equitable apportionment approach taken by the two nations in writing the Columbia River Treaty.

When a proposed dam or other obstruction will raise the level of waters on either side of the border, the IJC may not approve it unless adequate provision has been made for the compensation and protection of affected parties. The Commission must carefully scrutinize the compensation arrangements made by the parties to assure that all threatened interests are protected, presumably including environmental interests. As a matter of good international practice, the IJC should also explain its decision.

The procedural approach that the IJC used to disapprove the 1967 compensation agreement between Seattle City Light and British Columbia and to reach its 1982 decision may be analogized to the approach taken by American courts that examine independent agency decisions affecting en-

24. Id. The United States Supreme Court, discussing the equitable apportionment doctrine, stated:

Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions; the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.


26. Boundary Waters Treaty, supra note 7, art. VIII, para. 7. The Treaty specifically provides:

In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

27. Id. The treaty directive contemplates a broad range of interests that may be injured and does not preclude a broad definition of injury. Since about 1970, preservation of the Skagit Valley has been considered a major British Columbian interest. See infra note 60 and accompanying text.

28. An international decision-making body "should make explicit as possible the principles of interpretation and application which influence" its decision. M. McDOUGAL, H. LASSWELL & J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 64 (1967) [hereinafter cited as McDOUGAL].
vironmental interests. In many of these cases, American courts have adopted a standard of review known as the "hard look" doctrine.29 Typically applied in appellate review of environmental lawmaking,30 the doctrine requires a court that is reviewing an agency decision to take a "hard look" at the decision to ensure that the agency developed an evidentiary record that reflects the factual basis for its decision.31 The agency must explain its reasoning in considerable detail,32 and give "adequate consideration" to the evidence and analysis submitted by the parties.33

The "hard look" doctrine is procedural, not substantive.34 The IJC's standard of review under the Boundary Waters Treaty, on the other hand, resembles a substantive standard. This standard involves assuring that "suitable and adequate" provision is made to protect injured interests on the other side of the border.35 The Treaty sets forth no procedural guidelines for the IJC.

Nonetheless, international organizations adhere to procedures that guarantee fairness and predictability in decision making.36 The practice of fact finding in international law especially helps to strengthen the parties' acceptance of the decision making process and the ultimate enforceability of its outcome.37

29. See supra note 9. Perhaps the most vivid application of the "hard look" doctrine by a reviewing court is the 132-page opinion in Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (reviewing EPA sulfur dioxide standards for coal fired power plants). The court upheld the EPA standards and wrote: "We reach our decision after interminable record searching (and considerable soul searching). We have read the record with as hard a look as mortal judges can probably give its thousands of pages." Id. at 410.

30. The "hard look" doctrine is applied particularly to judicial review of decisions by environmental agencies. Rodgers, A Hard Look at Vermont Yankee, supra note 9, at 704 (discussing in detail the rise and fall of the "hard look" doctrine up to Vermont Yankee). See Environmental Defense Fund v. Ruckleshaus, 439 F.2d 584, 598 (D.C. Cir. 1971). But see Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 549 (1978) (the "hard look" doctrine does not allow the reviewing court to "impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good").


35. See supra note 26.


37. See McDougal, supra note 28, at 267.
II. BACKGROUND OF THE CASE

Seattle first applied to the IJC for permission to raise the water level of Ross Lake to 1725 feet in 1941. At that time the City had completed construction of the first stage of Ross Dam to a height of 1365 feet. The City was aware that if it carried out its plan to increase the water level to 1725 feet, approximately 6300 acres of Canadian land would be flooded. It had therefore purchased the only two private land holdings in the Canadian reservoir zone in 1929. British Columbia removed the remaining Canadian lands that would be flooded, a 5100 acre tract, from potential development in 1930.

The IJC held only one hearing on the City’s 1941 request. British Columbian interest in the proposal was slight. This may have been due in part to the inaccessibility of the valley and in part to the Canadian preoccupation with the war effort. It probably also reflected the general lack of concern for environmental issues in 1941.

On January 27, 1942, the IJC issued its Order approving Seattle’s 1941 application to raise the water level of the reservoir. The Order required the City to “adequately compensate the Province of British Columbia, and any Canadian private interests that may be affected, for any damage caused in British Columbia as the result of any increase in the natural water levels” as a condition of approval. This is called the “first condition clause.” The Order also stated that Ross Dam could “not be raised beyond the height at which the water impounded by it would reach British Fact finding has been particularly useful in international problem solving in human rights matters. It is suggested that the protection of substantive rights depends upon fair procedures. See Franck and Fairley, Procedural Due Process in Human Rights Fact-Finding by International Agencies, 74 AM. J. INT’L LAW 308, 345 (1980).

38. Order of Approval, In the Matter of the Application of the City of Seattle for Authority to Raise the Water Level of the Skagit River Approximately 130 feet at the International Boundary Between the United States and Canada, Jan. 27, 1942, at 1 [hereinafter cited as Order of Approval] (copy on file with the Washington Law Review).


40. Id. at 3, 4.
42. Id. at 65-69. All three Vancouver newspapers ran the same Associated Press story the day after the hearing. Presumably no Canadian newspapers sent reporters to cover the event. A transcript of the hearing shows that only one provincial official attended. The Game Commissioner commented that raising Ross Lake would be bad for fishing. Id.
43. The first access road to the Canadian Skagit Valley was constructed in 1946. Reply of the Province, supra note 4, at 7.
44. Order of Approval, supra note 38.
45. Id. at 2–3.

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Ross Dam has not been raised to the 1725 elevation, despite waves of negotiations, agreements, and repudiations since 1942. In 1947, the Province passed the Skagit Valley Lands Act, authorizing Seattle to flood designated lands in British Columbia upon payment of compensation agreed upon between the City and the Lieutenant-Governor in Council. A tentative agreement that would have provided British Columbia with compensation of $255,508 was reached in 1952. That agreement was scuttled when the Social Credit Party took over the reins of the Provincial Government in 1953. Impatient, Seattle raised the water level to 1602 feet in the summer of 1953 without any agreement. That action flooded 520 acres north of the border. The City continued to try to reach a compensation agreement throughout the 1950's. In 1958, the City tried to convince the IJC that it had a right to raise the dam, using theories of contract and estoppel. It asked the IJC to order a compensation arrangement. The IJC did not agree, splitting its vote on the request three to three along national lines.

A compensation agreement was finally reached in 1967, after the Columbia River Treaty was signed. The agreement required the City to pay $34,566.21 annually for ninety-nine years as compensation to the province. Although the parties intended the agreement to satisfy the conditions of the Order of Approval, the Province began rejecting the
City's annual payment in 1972, asserting that it had thereby repudiated the agreement. The Province now takes the position that the opposition to the environmental consequences of flooding the Skagit Valley is so "overwhelming" that "no compensation could suitably or adequately protect or indemnify all the interests affected." The City was eager to proceed with its construction to raise Ross Dam. It contended that the 1942 Order of Approval, the 1967 Agreement, and a Federal Power Commission decision approving the project, constituted adequate authorization.

British Columbia brought the matter before the IJC in 1980 with a "Request in the Application." The Province argued that the 1942 Order was stale and made four alternative requests of the Commission: (1) to nullify the 1942 Order and dismiss the matter; (2) to rescind the 1942 Order and dismiss the City's Application; (3) to declare raising the water level to be contrary to the interests of the parties because "no suitable or adequate provision can be made for the protection and indemnity of interests which may be injured," and to issue an order limiting the water level of the Skagit River to the natural level at the boundary; or (4) to determine that no suitable or adequate compensation had been made pursuant to the terms of the 1942 Order. The Request also asked the Commission to declare the 1967 Agreement invalid and to direct the City to take no steps to raise the water level at the boundary. The Province later also submitted that, by agreeing to hear its Request, the IJC would have the "rare opportunity to review, in light of today's conditions and today's priorities" a decision nearly forty years old.

The City responded by arguing that the IJC had no jurisdiction to consider British Columbia's request. It claimed that it had relied upon the Order for many years. The City also argued that estoppel and laches precluded British Columbia from making its request "at this uncons-
ably late date," and that the Province's Request must fail on its merits if the IJC did consider it. 67

The Governments of Canada and the United States both stressed their belief that the treaty provided the IJC with continuing jurisdiction. 68 Contrary to the position taken by the City of Seattle, the United States declared that the IJC has authority "to oversee, review and, in certain extraordinary cases, to modify its Orders to assure that Commission actions conform to and satisfy the purposes of the Treaty in light of all relevant circumstances." 69 The Canadian Government agreed that orders of the IJC "should not be revoked or amended lightly, even if they may be found to be operating in a manner which may be regarded as less than ideal." 70 It stated that "reopening an Order is a serious matter which should only be undertaken in very unusual cases." 71

The two national governments differed as to whether the present case fit the class of "extraordinary" 72 or "very unusual" 73 circumstances that justify the IJC's reopening an Order or continuing its jurisdiction. The Canadian Government took the position that the IJC should take jurisdiction of the continuing dispute because attitudes toward environmental preservation had changed dramatically since the wartime years of 1941 and 1942 and "to a lesser but still significant extent" since 1967. 74 The United States disagreed, stating that "the issues raised by the Province fall far short of satisfying the minimum standard" under which the IJC may modify a forty-year-old Order. 75 It added that the treaty does not require the affected upstream nation to agree to proposed works in boundary waters or to the amount and form of protection of those interests. 76

The parties and others interested in this matter raised several other issues. These included: (1) whether the IJC followed the proper procedures in approving the 1941 application; 77 (2) whether the 1967 Agreement is

67. Id. at 2.
69. Statement by the United States, supra note 68, at 2.
70. Canadian Government Statement in Response, supra note 68, at 5.
71. Id.
73. Canadian Government Statement in Response, supra note 68, at 5.
74. Id. at 4.
75. Statement by the United States, supra note 68, at 2.
76. Id. at 5.
77. 1980 Request, supra note 63, at 5.
The North Cascades Conservation Council argued that because only three of the IJC commissioners heard evidence offered at the public hearing, other commissioners could not approve Seattle's
III. THE 1982 SUPPLEMENTARY ORDER

On April 28, 1982, the IJC issued a Supplementary Order responding to British Columbia's 1980 Request. The Commission determined that under the Boundary Waters Treaty it retained continuing jurisdiction with regard to Orders previously issued. It noted, however, that its "continuing jurisdiction does not necessarily carry with it the obligation to exercise such jurisdiction." It determined that British Columbia's Request, and the materials accompanying it, did not warrant granting any of the four types of relief requested. Nevertheless, the IJC decided that "in light of the views of the Governments of Canada and British Columbia and the Commission's responsibility under the treaty to prevent disputes, and under present circumstances" the City could not flood the valley beyond its current level. The Commission required that British Columbia compensate the City appropriately for its inability to finish the Skagit project.

The IJC relied upon an April, 1982 report of its Special Advisors to support its conclusion that "reasonable alternatives to the raising of High Ross Dam are available." In preparing this report, the Special Advisors reviewed vast amounts of information concerning the monetary and en-
ergy costs involved in increasing the height of Ross Dam in contrast to the monetary and energy costs of the alternatives. The report contained a projection of the average annual cost of electricity production from the proposed High Ross Dam. It also recommended alternative energy supplies for the City that apparently were not considered previously by either party. Although those alternatives did not promise to supply an amount of power equivalent to the projected output from the extension to the existing Ross Dam, they substantially narrowed the differences between the City's demands for and the Province's offers of replacement power.

The Special Advisors recommended that the City fund modifications of two existing hydroelectric generating facilities in British Columbia. The modified facilities would provide 462 mW of electric capacity and 178,600 mWh of electric energy. By raising Ross Lake, Seattle would gain a maximum 239.4 mW of capacity and 352,800 mWh of energy. Additional annual costs to the City for power and energy to balance the difference between Ross and the proposed alternative were estimated at $3.34 million.

The Supplementary Order created a Special Board with the responsibility to "co-ordinate, facilitate and review on a continuing basis, activities directed to achieving and implementing a negotiated, mutually acceptable agreement between the City and the Province." The Order directed Seattle to maintain the current level of the Skagit River for one year from the date of the decision. This implicitly gave the parties an April 28, 1983 deadline for agreement. While the 1982 Order appears to expire on that deadline, the IJC explicitly retained jurisdiction to "make such further Order or Orders . . . as may be necessary in the judgment of the Commission."

Overall, through the 1982 Order, the IJC established a new set of rules for the parties to use in continued negotiations. It set the stage for fresh ideas by requiring the Province to compensate the City if Seattle does not raise the dam. The Order's emphasis on preserving the Skagit Valley and still satisfying the needs of Seattle remained the basis of negotiations.

89. Id. at 21–32.
90. Id. at 3, 10–15. These calculations change depending on yearly water levels. The figures in the text are for low-water years.
91. Id. at 5.
92. Supplementary Order, supra note 8, at 2, reprinted in Appendix at 464. The Special Board is composed of technical and policy experts representing the two national governments, the Province, the City, and the IJC staff.
93. Id. at 2.
94. Id. at 3.
this Note goes to press, Seattle and British Columbia have reached the mutually acceptable agreement called for by the Supplementary Order.95

IV. ANALYSIS

The IJC's careful, analytic approach to its consideration of British Columbia's 1980 Request in the Application accomplished the same goals as the "hard look" scrutiny United States courts give to agency environmental decisions.96 The approach adopted by the IJC included an inquiry into the adequacy of the 1967 compensation arrangement, a review of the environmental impact of raising the dam, and a consideration of alternatives to raising the dam to assure that environmental concerns were given a fair hearing.

The IJC functioned here, however, neither as a court nor as an agency, but as a mediator. Although the Governments of Canada and the United States agreed that the IJC may retain jurisdiction over its previous decisions, the Commission’s decision to retain jurisdiction over this matter was not mandatory.97 The IJC acted from political necessity, not from a duty to maintain environmental quality. The Boundary Waters Treaty, written in 1909, requires little attention to environmental protection. No provision of the treaty requires the IJC to consider the environmental effects of proposed actions of either country.98 The Commission has discre-

95. Seattle and British Columbia have reached an agreement for a term of 80 years under which Seattle will not raise Ross Dam. Instead, Seattle will purchase from British Columbia an amount of power equivalent to that which would be produced by raising Ross Dam. Seattle will pay an amount equivalent to the cost of raising Ross Dam. British Columbia may generate part of that power by raising its Seven Mile Dam by 15 feet, flooding a portion of a Washington valley owned by Seattle City Light.

The precise wording of the agreement is being worked out as this Note goes to press. However, the agreement will not take effect until Canada and the United States ratify a treaty regarding this matter. Memorandum from Joseph P. Recchi, Superintendent, Seattle City Light, to City Light employees. (Apr. 14, 1983) (discussing terms of the Proposed High Ross Dam Settlement) (copy on file with the Washington Law Review).

96. See supra notes 8 & 29-33 and accompanying text.

97. See supra notes 80-82 and accompanying text. The IJC's decision whether to enforce its 1942 Order of Approval hinged on its willingness to retain jurisdiction. When it chose to retain jurisdiction, it became clear that it did not intend to enforce its earlier Order without further investigation.

98. Article.IV, paragraph 2 is the only provision of the Boundary Waters Treaty that refers to environmental factors. It reads:

It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other. This provision, however, relates only to pollution and does not touch the sort of environmental consequences that are involved in the Skagit River controversy. Article VIII, paragraph 3 establishes the following order of preference for use of boundary waters:

(1) Uses for domestic and sanitary purposes;

(2) Uses for navigation, including the service of canals for the purposes of navigation;

(3) Uses for power and for irrigation purposes.
tion under Article IX to examine and report on "other questions or matters of difference . . . along the common frontier" at the request of either party to the treaty.99

Both national governments stressed the importance of consistency and predictability of IJC decisions.100 The IJC recognized the legitimacy of these principles in its Supplementary Order by refusing to rescind, annul, or amend its 1942 Order of Approval. To further these principles, the IJC’s 1982 decision had to be consistent with its Order of forty years earlier. It found the flexibility necessary to reach its 1982 decision through two devices: the first condition clause of the 1942 Order of Approval and the application of “hard look” principles.

The 1982 Supplementary Order takes the first condition clause and turns it on its head. The clause prohibited the City from raising the water level at the boundary unless and until it reached an agreement with the Province on compensation “providing for indemnifying British Columbia and private interests in British Columbia for any injury that may be sustained by reason of the City’s operations on the Skagit River.”101 The Supplementary Order shifts the burden of compensation from Seattle to British Columbia.102 Negotiations between the parties had already shifted in that direction.103 By requiring indemnification, the IJC impliedly recognized that the Order of Approval conferred upon Seattle a property interest in raising the dam. It also recognized that the Province’s property interest as owner of the threatened lands is superior to the City’s interest in raising the dam.104

The IJC supported this conclusion with data developed by its Special

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One might ask whether recreational use, which is the primary use of the Skagit Valley, constitutes a “domestic purpose” that takes priority over power generation. The parties appear not to have asked this question.

99. Boundary Waters Treaty, supra note 7, art. IX.
101. Order of Approval, supra note 38, at 3.
102. Supplementary Order, supra note 8, at 2, reprinted in Appendix at 464.
103. In a series of letters and meetings between the City and the Province from 1977 to 1980, the parties discussed several alternatives whereby the Province would sell power to the City to offset the power lost if the City did not exercise its option to raise the water level of Ross Lake. The letters are included in Reply of the Province, supra note 4, Appendix at 22–23. See also Report of the Special Advisors, supra note 1, at 36–48 (discussion of alternatives considered in course of negotiations, including raising Seven Mile Dam on the Pend d’Oreille River in B.C., supply of power to Seattle from the B.C. hydro system, and addition of a fifth generating unit at Mica Creek in the upper Columbia basin).
104. Seattle’s interest in land owned by British Columbia may be compared to an easement or servitude. However, British Columbia’s interest as owner of the lands prevails. The notion that another nation may have an easement or servitude in the lands of another was put forth and rejected in the Attorney General’s Opinion that enunciated the Harmon Doctrine. See supra note 19.
High Ross Dam

Advisors, that suggested alternatives to flooding the Skagit Valley,\textsuperscript{105} and with its earlier study, which examined the environmental and ecological consequences of raising the water level.\textsuperscript{106} These two studies enabled the IJC to take a hard look at the environmental issues raised by Canada, British Columbia, and the other concerned parties.\textsuperscript{107} The studies also forced the parties to take a hard look at the alternatives before them.

The "hard look" doctrine developed in the United States as one of the courts' responses to the increasingly complex technological questions coming before them.\textsuperscript{108} Most importantly, it calls for—and results in—reasoned decision making.\textsuperscript{109} Careful and considered analysis is particularly critical in decision making in the international arena because there, more than in municipal law, observance depends upon consensus.\textsuperscript{110} The "hard look" doctrine encompasses many of the same duties as those the IJC must perform, but refers to them in light of the division of responsibilities between the courts and administrative agencies. Judge Leventhal, one of the foremost exponents of the doctrine, described the role of "hard look" as follows:

The court must give "scrutiny" to the facts to see whether the Department acted within the reasonable range of its authority, and must go further to see whether there was an abuse of discretion. "To make this finding the Court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."\textsuperscript{111}

In the Ross Dam matter, the IJC needed reasoned decision making, not from an administrative agency, but from the two parties who had been at odds for more than three decades. The two reports provided the parties and the IJC with a clear view of the issues. The anticipated energy needs

\textsuperscript{105} Report of the Special Advisors, supra note 1. The alternatives are mentioned supra in text accompanying notes 87–90 and in note 103.

\textsuperscript{106} International Joint Commission, Environmental and Ecological Consequences in Canada of Raising Ross Lake in the Skagit Valley to Elevation 1,725 (1971). This study is discussed supra at note 3.

\textsuperscript{107} The IJC permitted the North Cascades Conservation Council and the Skagit River Cooperative Tribes to file briefs in which they detailed their opposition to raising the dam. See supra notes 61 & 78.


Professor Rodgers, a basketball aficionado, claims that the "hard look" doctrine "is as important to the judicial review of technological decisionmaking by administrators as the slam dunk is to professional basketball." Rodgers, A Hard Look at Vermont Yankee, supra note 9, at 705.

\textsuperscript{109} See Rodgers, A Hard Look at Vermont Yankee, supra note 9, at 705.

\textsuperscript{110} See L. HENKIN, supra note 18, at 25-26.

\textsuperscript{111} Leventhal, supra note 9, at 513 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).
of Seattle and the recent surge of Canadian environmentalism have forced the resolution of this matter. Although the IJC has a long history of involvement in environmental pollution matters, and extensive experience in land-use matters, the Ross Dam controversy appears to have forced the IJC to choose for the first time between the preservation of a rural recreational area and the development of a new power source for a city.

The dilemma between urban and rural uses for a popular river valley is not new. In a broad sense, the Ross Dam debate may be compared to the controversy over the flooding of the Hetch Hetchy Valley earlier this century. Both projects stemmed from the same sort of city-building vision, and both were intended to be cheap sources of public power.

112. Report of the Special Advisors, supra note 1, at 3, 6–7. The City currently buys 291 mW of power and projects a need for an additional 1000 mW by 2002.

Interestingly, a recent report to the City questions the energy need for raising Ross Dam and concludes that Seattle’s power needs can be met through the year 2010 solely through implementing vigorous conservation measures. Alternative Resources Citizens Advisory Committee, Report to the City of Seattle, Washington, June 1, 1982 (copy on file with the Washington Law Review).


114. The first reference to the provision on pollution in Article IV of the Boundary Waters Treaty was made in Docket No. 4 of the IJC, filed August 2, 1912. This provision was also considered in the Trail Smelter Investigation (IJC Dock. No. 25) (1928) where the IJC helped determine compensation for property damage due to smelter fumes from Canada drifting across the border into Washington. See L. Bloomfield & G. Fitzgerald, supra note 7, at 76–79, 137–38. See generally Bilder, Controlling Great Lakes Pollution: A Study in United States-Canadian Environmental Cooperation, 70 Mich. L. Rev. 469, 489, 491 (1972) (discussing IJC treatment of United States-Canadian pollution problems, from a 1912 request under article IX of the treaty to a 1971 proposal for a Great Lakes Water Quality Agreement that would broadly expand the IJC’s authority over the Great Lakes); Bourne, International Law and the Pollution of International Rivers and Lakes, 6 U.B.C. L. Rev 115 (contrasting the International Law Association’s 1966 Helsinki Rules with practices of United States courts and actions of the IJC); Note, The International Joint Commission (United States-Canada) and the International Boundary and Water Commission (United States-Mexico): Potential for Environmental Control Along the Boundaries, 6 N.Y.U. J. Int’l L. & Pol. 499 (1973) (concluding that the outcomes of environmental disputes between the United States and its northern and southern neighbors are determined by political realities rather than the legal authority of either the International Joint Commission or the International Boundary and Water Commission).


116. See T. A. Simmons, supra note 41, at 92–93.

The Hetch Hetchy Valley is 20 miles north of Yosemite National Park in California. In 1963, Secretary of Interior Udall described the controversy over that valley:

[In the Hetch Hetchy Valley.] officials of the growing city of San Francisco, searching for a new
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The similarity ends there. The yesteryear city-building visions of J.D. Ross today conflict with the desire of many to preserve a beautiful valley in the Cascade Range whose advocates are citizens of two nations and two metropolitan areas. Although the IJC may have conferred limited rights to generate electric power on Seattle City Light in its 1942 Order, international law is generally more concerned with reaching acceptable solutions than with protecting legal rights. The City of Seattle’s goal is not to flood a popular recreational valley, but to generate firm power supplies to meet future peak loads. The negotiations, with the goal of consensus, have resulted in a solution satisfactory to all parties.

V. CONCLUSION

The dispute over Ross Dam is finally over. Resolution of this dispute occurred because the IJC required the parties to consider all interests as they strove to reach a lasting agreement.

Current political circumstances and the nature of the IJC as a permanent international organization forced the Commission to reevaluate its 1942 Order of Approval. As an international organization with no police power, the IJC seeks not to impose decisions that it cannot enforce but

The wide waters of the reservoir would obliterate a sublime valley for all time, but the city needed hydro power and an assured water supply and the resource-development conservationists found themselves in a fierce contest with the conservers of the parks.


117. See T. A. Simmons, supra note 41, at 92–93.

118. Hetch Hetchy Dam, spearheaded by public power advocates, came under the control of a private utility that profitably sold its power for over 40 years. W. RODGERS, CORPORATE COUNTRY 196 (1973).

119. The death-knell of the Hetch Hetchy Valley was sounded by a report of an advisory board of Army engineers which said that, of the various sources of water available to San Francisco, a Hetch Hetchy dam would be the cheapest to build and would generate the most electric power. S. UDALL, supra note 116, at 133.

The Special Advisors similarly found that High Ross Dam would be cheaper to build than the other alternatives that they considered. As this Note argues, however, the IJC’s consideration of environmental impacts has forced Seattle City Light to pursue more costly alternatives.

120. See Barich, supra note 1, at 57.

121. The late Justice William O. Douglas noted the conflict between past and present values:

Hydroelectric dams were once the fad; and they went up with little regard for environmental consequences. Seattle City Light built Ross Dam on the Skagit some forty years ago and it was highly acclaimed. The demand now exceeds the supply and Seattle wants to raise Ross Dam. But the State of Washington is up in arms. So is Canada where the Skagit River rises. Ross Dam, like TVA, is a form of socialism. But whether a dam is a part of a socialist or a free enterprise regime, the environmental impact is the same; and as people we are now insisting on making environmental standards our important guidelines.


122. See supra note 95.
rather to help the parties reach an agreement that they will choose to keep. Its purpose, according to the Boundary Waters Treaty, is to prevent disputes over the use of boundary waters.\textsuperscript{123} With that purpose in mind, the IJC directed its Special Advisors, and the parties, to find a solution that satisfies the energy needs of Seattle and the environmental priorities of Canada.

Progress has been slow.\textsuperscript{124} The very structure of the IJC, however, dictated that the final decision be acceptable to all the parties, or at least that they must feel that they have received a fair opportunity to argue their positions. By examining the evidence presenting alternatives and making recommendations,\textsuperscript{125} the IJC has adopted a "hard look" approach that best protects environmental interests. With new ground rules, independent data, and a deadline set by the IJC,\textsuperscript{126} resolution of this dispute finally has been achieved. In addition, the IJC has shown its ability to solve substantial disputes between the United States and Canada that may arise in the future.

\textit{Paul Marshall Parker}

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\textsuperscript{123} Boundary Waters Treaty, Preamble, \textit{supra} note 7, at 2448.

\textsuperscript{124} The application of "hard look" principles has often been criticized for creating costly delay. Judge Leventhal responded to that charge:

One is left with the feeling that if judicial review of regulatory decisions is worthwhile, it is worth the delay attendant on a careful and reasoned consideration by the reviewing court. The fact that our system of checks and balances involves delay does not mean that it is inefficient. By ensuring fairness and consistency, in a broad sense, with congressional priorities, the corrective mechanism may enhance the efficiency of resource allocations on a larger scale.

Leventhal, \textit{supra} note 9, at 543. By analogy, the same defense can be made for "hard look" principles at the initial decision-making level.

\textsuperscript{125} The IJC's approach is similar to that provided for in the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–47 (1970), which requires a reviewing agency to consider alternatives to a proposed action. \textit{Id.} § 4332(C)(iii). \textit{See, e.g.,} Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971) (affirming the National Environmental Policy Act's directive in § 102 that agencies explore all factors, consult with other agencies, and discuss and explain their conclusions), \textit{cert. denied}, 407 U.S. 926 (1972). \textit{See also} W. Rodgers. \textit{Environmental Law} 725–38 (1977) (analyzing the impact of § 102(2)(c) of the National Environmental Policy Act, which requires an agency to explore, then to show and tell).

\textsuperscript{126} Supplementary Order, \textit{supra} note 8, at 2, \textit{reprinted} in \textit{Appendix} at 464.
APPENDIX

The 1982 Supplementary Order is reprinted below:

WHEREAS the Commission is committed to the provision of the Boundary Waters Treaty calling for the prevention of disputes along the common boundary;

WHEREAS the parties have not, since the Commission's Minute of October 9, 1981, engaged in direct negotiation on the question of an alternative to the High Ross Dam;

WHEREAS a negotiated solution to this matter requires an immediate total commitment, by both parties, to the process of negotiation;

WHEREAS the Report of the Special Advisors to the Commission dated April 2, 1982 demonstrates that reasonable alternatives to the raising of High Ross Dam are available;

WHEREAS the Commission cannot pursue further action unless the Governments of the United States and Canada are willing to formally support and be full participants in the process of settling the matter;

WHEREAS the formal participation of Governments is imperative if there is to be any degree of certainty that a negotiated solution will be effected;

WHEREAS the participation of the Governments of the United States and Canada is required in order to facilitate both the planning and completion of domestic regulatory and legislative actions and bilateral arrangements that will be required to implement any negotiated settlement. These actions might include but would not necessarily be limited to: National Energy Board of Canada licensing; Washington State revenue bond legislation; transmission arrangements with U.S. and Canadian utilities, and adjustments related to the Columbia River Treaty;

WHEREAS the Commission determines that the Boundary Waters Treaty of 1909 confers on it continuing jurisdiction in respect of Orders made by it, but that this continuing jurisdiction does not necessarily carry with it the obligation to exercise such jurisdiction;

WHEREAS the Commission has reviewed the Request in the application of the Province of British Columbia dated August 14, 1980;

WHEREAS the Commission has reviewed and considered all arguments and materials filed pursuant to the British Columbia Request in the application;

THEREFORE the Commission is of the view that the British Columbia Request in the application and all arguments and materials presented pursuant to that Request do not constitute sufficient grounds to persuade it to exercise its jurisdiction as requested therein, and accordingly declines to grant the relief sought.
Notwithstanding the Commission's decision above on the Province's Request, the Commission also decides that in light of the views of the Governments of Canada and British Columbia and the Commission's responsibility under the Treaty to prevent disputes, and under present circumstances, the Canadian Skagit Valley should not be flooded beyond its current level provided that appropriate compensation in the form of money, energy or any other means is made to the City for the loss of a valuable and reliable source of electric power which would result if the Ross Dam project is not completed.

THEREFORE the Commission, after careful consideration and in the exercise of its continuing jurisdiction over the matter, decides to take the following extraordinary action:

(a) Seattle is hereby ordered to maintain the level of the Skagit River at the International Boundary at or below elevation 1602.5' for a period of one year from the date of this Order.
(b) The Commission will appoint a Special Board of two members of the Commission, who shall serve as Co-Chairmen, and two non-governmental experts. The Commission will invite the Government of the United States, the Government of Canada, the City of Seattle, and the Province of British Columbia to each nominate a representative to be a member of the Board. This Board will co-ordinate, facilitate and review on a continuing basis, activities directed to achieving and implementing a negotiated, mutually acceptable agreement between the City and the Province and to provide status reports regarding such progress to the Commission every four months.

The Commission retains jurisdiction over the subject matter of the 1942 Order of Approval, and may make such further Order or Orders relating thereto as may be necessary in the judgment of the Commission.

When Bruce MacLean, his wife, and another couple attended a Seattle SuperSonics basketball game on "Ladies' Night," MacLean and his male companion requested tickets at the same discounted price paid by the women. When the ticket attendant refused, MacLean paid full price for the two men's tickets and half price for the women's tickets. The game was being played at the Seattle Coliseum, a facility leased by the City of Seattle to the Sonics' owner, First Northwest Industries of America, Inc. (FNI).

MacLean subsequently sued FNI, alleging that the "Ladies' Night" pricing scheme violated both the Washington Law Against Discrimination and the Washington equal rights amendment (ERA). In MacLean v. First Northwest Industries of America, Inc., the Washington Supreme Court, in a 5-4 plurality decision, held that the "Ladies' Night" pricing practice did not violate the Law Against Discrimination. The court refused to examine the ERA question.

This Note considers the court's disposition of both claims. It demonstrates that the Law Against Discrimination should not have been applied in this case. It proposes that when state action is present "Ladies' Night" promotions violate the ERA and are proper subjects for ERA review. The Note suggests the court impliedly created an exception to the ERA that allows courts to ignore it if, in their judgment, the case is not the "serious" type the voters anticipated would be resolved under an ERA. It concludes that, although MacLean appears contrary to prior broad applications of Washington's ERA, its authority is limited because its application of the Law Against Discrimination is incorrect and its refusal to consider the ERA conflicts with the language of the amendment.

2. Wash. Const. art. 31, § 1.
4. Two justices joined Justice Rosellini's plurality opinion, two concurred in the result only, without writing any opinion. Two justices joined Justice Utter's dissent and Justice Dolliver dissented separately.
5. 96 Wn. 2d at 345, 635 P.2d at 686.
6. Id. at 348, 635 P.2d at 688.
7. See infra notes 101–05 and accompanying text.
I. LEGAL BACKGROUND

As prospects fade for the passage of a federal equal rights amendment, proponents of equal rights increasingly look to state law and state courts for their enforcement. In Washington, these rights are primarily determined by the Law Against Discrimination and the state equal rights amendment.

A. The Law Against Discrimination

Washington's Law Against Discrimination is designed to allow persons to exercise their constitutionally guaranteed civil rights free from discrimination. The first version of the law was passed in 1949 as the "Law Against Discrimination in Employment." It prohibited employment discrimination on the basis of "race, creed, color or national origin." 10

8. The proposed federal equal rights amendment stated:
Sec. 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
Proposed Amendment to the Constitution of the United States, H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972). The amendment also contained provisions authorizing congressional enforcement and stating that it would take effect two years after ratification.


9. This is part of the more general trend of litigants using state constitutions to secure and protect civil liberties. See generally Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. BALT. L. REV. 379 (1980) (suggesting that, in resolving constitutional questions, a state court should look to its own constitution before turning to the federal constitution); Collins, Reliance on State Constitutions — Away from a Reactionary Approach, 9 HASTINGS CONST. L.Q. 1 (1981) (examining the current rediscovery of state constitutions as independent bases for civil liberties decisions); Developments in the Law — The Interpretation of State Constitutional Rights, 95 HARV L. REV. 1324 (1982) (surveying the application of state constitutions to such fields as criminal procedure, expression, privacy, and economic regulation).

10. WASH. REV. CODE § 49.60.010 (1981) provides:
This chapter shall be known as the "law against discrimination". It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

11. 1949 Wash. Laws ch. 183 (codified as amended at WASH. REV. CODE ch. 49.60 (1981)).
gin," and contained a section mandating liberal construction of its provisions.

The scope of the statute has since been expanded. For example, in 1957 the Law was amended to add housing and places of public resort to the places where discrimination is unlawful. Amendments prohibiting discrimination on the basis of sex, marital status, and handicap were added to selected sections of the Law in 1973.

The statute currently contains a general statement of purpose and a declaration of civil rights, as well as specific definitions of unfair practices. Most sections of the statute prohibit discrimination on the basis of sex. One important section, however, makes no reference to sexual discrimination: the section on public accommodations.

This section prohibits discrimination in admission to places of "public resort, accommodation, assemblage, or amusement," and specifically prohibits "the requiring of any person to pay a larger sum than the uniform rate charged other persons." "Sex" is also omitted from the statute's definition of the phrase "full enjoyment." "Full enjoyment" is a concept that is in-

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12. 1949 Wash. Laws ch. 183, § 1 (codified as amended at WASH. REV. CODE § 49.60.010 (1981)).
14. 1957 Wash. Laws ch. 37 (codified as amended in scattered sections of WASH. REV. CODE ch. 49.60 (1981)).
15. 1973 Wash. Laws ch. 141 (codified as amended in scattered sections of WASH. REV. CODE ch. 49.60 (1981)).
16. Id.
19. See, e.g., WASH. REV. CODE §§ 49.60.180, .215 (1981). The statute also creates a state agency with powers to enforce its provisions. Id. § 49.60.050.
20. See, e.g., id. § 49.60.175 (discrimination on the basis of sex prohibited in credit transactions); id. § 49.60.190 (labor unions forbidden to discriminate on the basis of sex).
21. The public accommodations section provides:

   It shall be an unfair practice for any person or his agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, or the requiring of any person to pay a larger sum than the uniform rates charged other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, the presence of any sensory, mental, or physical handicap, or the use of a trained dog guide by a blind or deaf person. . . .

Id. § 49.60.215.
22. Id. See supra note 21 (text of statute).
24. WASH. REV. CODE § 49.60.040 (1981) provides:

   "Full enjoyment of" includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission
corporated in the statute’s declaration of civil rights. It guarantees the right to purchase goods and services at public places free from acts directly or indirectly causing one to be treated as not “welcome, accepted, desired, or solicited.”

B. The Equal Rights Amendment

In 1972, Washington’s constitution was amended to include a provision guaranteeing equality of legal rights and responsibilities regardless of sex. Of the seventeen states that have incorporated equal rights provisions into their constitutions, Washington has been one of the most inconsistent on giving broad effect to its provisions. This is primarily due to the stringent standard of review set forth in Darrin v. Gould, where the supreme court struck down an athletic association rule forbidding girls to play on all-male high school football teams. Because Washington had previously adopted a “strict scrutiny” standard for evaluating classifications based on sex before the ERA went into effect, the court determined that an even more exacting test was appropriate after its passage:

25. WASH REV CODE § 49.60.030 (1981) provides:
   (1) The right to be free from discrimination because of race, creed, color, or with any sensory, mental, or physical handicap or a blind or deaf person using a trained dog guide, to be treated as not welcome, accepted, desired, or solicited.

26. 1972 Wash. Laws H.J.R. No. 61 (approved Nov. 7, 1972) (codified at WASH CONST art. 31, § 1). Washington’s equal rights amendment reads as follows: “Equality of rights and responsibilities under the law shall not be denied or abridged on account of sex.”

27. ALASKA CONST art. 1, § 3; COLO. CONST art. 2, § 29; CONN CONST art. 1, § 20; HAW CONST art. 1, § 4; ILL. CONST art. 1, § 18; LA. CONST. art. 1, § 12; MD CONST art. 46; MASS CONST § 2, art. 1; MONT CONST art. 2, § 4; N.H. CONST Part First, art. 2; N.M. CONST art. 2, § 18; PA CONST art. 1, § 28; TEX. CONST art. 1, § 3a; UTAH CONST art. 4, § 1; VA CONST art. 1, § 11; WASH CONST art. 31, § 1; WYO. CONST art. 1, § 3.


30. In Hanson v. Hutt, 83 Wn. 2d 195, 517 P.2d 599 (1973), the Washington Supreme Court noted the movement of the United States Supreme Court and other state courts toward heightened review of legislative discrimination on the basis of sex. The court observed that four United States Supreme Court Justices advocated making sex a suspect classification subject to strict scrutiny in Frontiero v. Richardson, 411 U.S. 677 (1973), and that California had declared sex a suspect classifi-
Presumably the people in adopting Const. art. 31 intended to do more than repeat what was already contained in the otherwise governing constitutional provisions, federal and state, by which discrimination based on sex was permissible under the rational relationship and strict scrutiny tests. Had such a limited purpose been intended, there would have been no necessity to resort to the broad, sweeping, mandatory language of the Equal Rights Amendment.\(^{31}\)

The *Darrin* standard appeared absolute: "[U]nder our ERA discrimination on account of sex is forbidden."\(^{32}\)

Washington courts have recognized, however, that the stringent test applied in *Darrin* is limited by several exceptions. The first exception, which allows distinctions based on physical differences between the sexes, was announced in *Seattle v. Buchanan*.\(^{33}\) In *Buchanan*, the court upheld a Seattle ordinance banning public exposure of female breasts as "lewd conduct." It held that the ERA does not prohibit sex-based classifications that are based on actual physical differences between the sexes and bear a reasonable relationship to a legitimate legislative purpose.\(^{34}\) The court stated that "the obvious purpose of the ordinance [is] to protect the public morals and its concern for the privacy of intimate functions."\(^{35}\) It concluded that the ordinance was reasonably related to that purpose.\(^{36}\)

The second exception permits classifications based on sex if they are intended to eliminate discrimination or to actively promote equality. This exception arose in *Marchioro v. Chaney*,\(^{37}\) a case decided the same year as *Buchanan*. In *Marchioro*, several Washington Democrats challenged a statute establishing the composition of the party's state committee.\(^{38}\) This statute requires the party to choose committee chair and vice chairpersons...
of opposite sexes, and to choose one male and one female representative from each county.\textsuperscript{39} The court concluded that "while there is certainly a classification, there is equality of treatment and this is sufficient to meet the requirements of the equal rights amendment."\textsuperscript{40} More importantly, it noted that the unique language of Washington's ERA mandated equality of responsibility as well as of rights, and stated that this language authorized the state to require equal representation of men and women to eliminate existing discrimination. The court found that "equality of responsibility" required each sex to conduct equally the business of the state's major political parties.\textsuperscript{41} It stated that the statutory classification was allowable under Darrin, because Darrin did not forbid all classifications based on sex. Rather, the court must inquire whether "in the language of the amendment, Has equality been denied or abridged on account of sex?"\textsuperscript{42} If the answer to this question is "no," the ERA has been satisfied.

In addition to these two exceptions, a court may approve sex-based classifications by finding that the classification does not result in different treatment for men and women. This approach was taken by the court of appeals in Singer v. Hara,\textsuperscript{43} a case predating Darrin. In Singer, the court considered whether Washington's prohibition of same-sex marriages violated the ERA. The court adopted the state's position the there was no difference of treatment because both male and female couples were denied marriage licenses.\textsuperscript{44} The court concluded, therefore, that there was no discrimination and that the prohibition was constitutional.\textsuperscript{45}

When these cases are viewed together, the following observations may be made about the ERA before MacLean. Darrin announced an extremely stringent standard of scrutiny that appeared to forbid virtually all classifications by sex. Buchanan and Marchioro demonstrated that this standard is flexible, within limits. Buchanan establishes that classifications based on physical differences between the sexes are acceptable; Marchioro approves classifications intended to promote equality of the sexes. Although Singer predates Darrin, it indicates that regardless of the degree of scrutiny involved, some classifications are permissible because they do not cause unequal treatment of the sexes.

\textsuperscript{40} 90 Wn. 2d at 307, 582 P.2d at 492.
\textsuperscript{41} Id. at 307-08, 582 P.2d at 493.
\textsuperscript{42} Id. at 305, 582 P.2d at 491.
\textsuperscript{44} Id. at 260, 522 P.2d at 1195.
\textsuperscript{45} Id. The facts of Singer may indicate a type of discrimination that has been characterized as "sex plus." This involves classifying persons on the basis of sex plus another seemingly neutral characteristic. The United States Supreme Court has declared that this type of discrimination in employment violates the Civil Rights Act. See Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).
II. THE MACLEAN COURT'S REASONING

MacLean's original complaint alleged only that "Ladies' Night" violated the Law Against Discrimination. Both damages and an injunction were sought as relief. The trial court granted summary judgment against MacLean on the ground that the practice was outside the intended scope of the statute.\(^4\)\(^6\) A motion to amend the complaint to include a claim under Washington's ERA was denied. The court of appeals considered the constitutional issue, and reversed the trial court based upon its finding that "Ladies' Night" did indeed violate the ERA.\(^4\)\(^7\)

The Washington Supreme Court rejected MacLean's claims because it determined that selling discount tickets to women did not constitute unlawful discrimination against men and did not harm MacLean.\(^4\)\(^8\) Because there was no discrimination, the court concluded that MacLean was not entitled to relief under the Law Against Discrimination. Further, the court determined that the trial court properly exercised its discretion when it refused to allow the addition of a claim under the state ERA.\(^4\)\(^9\)

Justice Rosellini, in his plurality opinion,\(^5\)\(^0\) listed several reasons for finding that MacLean had not suffered unlawful discrimination. First, he noted that the pricing policy did not reflect any intent to discriminate against men, because men received discounts if they fell into other favored classes, such as senior citizens or military personnel.\(^5\)\(^1\) He also recognized that "Ladies' Night" was only one of several programs designed to attract women. He concluded that if "Ladies' Night" meets its objective of attracting more women, everyone benefits because "the greater the attendance, the lower the rates that can be charged those who pay the regular price."\(^5\)\(^2\)

Second, he stated that MacLean failed to prove any damage resulting from the "Ladies' Night" promotion.\(^5\)\(^3\) Indeed, Justice Rosellini found the opposite to be the case. Because the money used to purchase the four tickets was community property, MacLean benefitted from the opportunity to pay a reduced price for the women's tickets.\(^5\)\(^4\) He stated that the failure to prove damages precluded MacLean from prevailing in a suit.

\(^{46}\) 96 Wn. 2d at 340, 635 P.2d at 684.
\(^{48}\) 96 Wn. 2d at 341, 635 P.2d at 684.
\(^{49}\) Id.
\(^{50}\) See supra note 4.
\(^{51}\) 96 Wn. 2d at 341, 635 P.2d at 684.
\(^{52}\) Id. at 342, 635 P.2d at 685. Among the other attractions offered to women were Seattle Symphony performances, women's fashion shows, gifts and souvenirs, and women's hoop shooting.
\(^{53}\) Id.
\(^{54}\) Id. at 342-43, 635 P.2d at 685.
brought under the Law Against Discrimination because the statute "contemplates that forbidden discrimination be damaging in its effect."55

Third, Justice Rosellini found that MacLean did not suffer any discrimination because he was not denied the "full enjoyment" of the Coliseum as defined by the statute.56 Justice Rosellini first considered RCW § 49.60.030(1)(b), which establishes as a civil right the right to be free of discrimination in the full enjoyment of places of public assemblage and amusement. He recognized that the statute's definition of "full enjoyment" does not prohibit discrimination on the basis of sex. He reasoned, however, that because the general language of RCW § 49.60.030 does include such a prohibition, the omission in the "full enjoyment" definition was inadvertent.57 He therefore read "sex" into the definition of "full enjoyment." Justice Rosellini concluded that although the statute applied, it had not been violated, because MacLean was not made to feel "unwelcome, unaccepted, undesired, or unsolicited," as is necessary to constitute a denial of "full enjoyment."58 He acknowledged that the language of the statute is not exclusive and that certain instances of discrimination that do not make a person feel unwanted may nonetheless violate the statute. He concluded, however, that these instances must be accompanied by demonstrable damage. Because the court had previously determined that MacLean suffered no monetary damage by the rejection of his request for a discounted ticket, he suffered no compensable injury under the statute.59

Addressing the issue of whether MacLean should have been allowed to amend his complaint to request relief under Washington's ERA, the court stated that:

[CR 15] provides that leave [to amend] shall be freely given 'when justice so requires.' Since the respondent suffered no damage but rather derived a benefit from the sale of tickets at reduced prices, the trial court was amply warranted in finding that justice would not be served by allowing an amendment of the pleadings... 60

The court rejected MacLean's contention that he incurred damage beyond the mere pecuniary loss of $5.00. It reasserted that, on the contrary, he benefitted from "Ladies' Night," and that because he was not harmed in any way, "the trial court was amply warranted in finding that justice would not be served by allowing an amendment of the pleadings to allege

55. Id. at 344, 635 P.2d at 686.
56. Id.
57. Id. at 343, 635 P.2d at 685.
58. Id. at 344, 635 P.2d at 686.
59. Id.
60. Id. at 345, 635 P.2d at 686.
not different facts but a different legal theory of recovery." MacLean alleged that he and all members of society are harmed by the perpetuation of stereotypes about women caused by promotions such as "Ladies' Night." The court stated that these concerns were not at issue in the case because they did not indicate any harm to the male plaintiff. Therefore MacLean was not entitled to amend his complaint on those grounds.

Justice Rosellini stated that MacLean could not challenge the constitutionality of "Ladies' Night" because he had not made the necessary showing that he was prejudiced by the practice. He also stated that MacLean's complaint was "sterile" and that applying the ERA to the case would undermine the serious purposes of the amendment.

Justice Utter's dissent stressed the importance of RCW § 49.60.215, which delineates unfair practices of places of public resort, accommodation, assemblage and amusement. He read "sex" into this section of the statute, as Justice Rosellini read it into the definition of full enjoyment. The unfair practices section explicitly prohibits discriminatory price differentials. Considering this section, and also recognizing that "gender discrimination can be per se injurious," he concluded that granting summary judgment was inappropriate because it deprived MacLean of an opportunity to prove damages.

Justice Dolliver's dissent followed the approach of the court of appeals and declared "Ladies' Night" a violation of the ERA. He found the disparate pricing practice clearly discriminatory and stated that the City of Seattle's leasing of the Coliseum to FNI was sufficient state action to bring the practice under the ERA. He emphasized that the plaintiff had requested an injunction as well as damages, and that this request had received insufficient attention in the plurality opinion, which focused solely on monetary damages.
III. ANALYSIS

Rules of statutory construction and legislative policy indicate that Justice Rosellini should not have read "sex" into the full enjoyment section of the Law Against Discrimination. Moreover, Justice Rosellini's application of the statute was unduly conservative in light of prior case law. Rather than applying the Law Against Discrimination, Justice Rosellini should have asked whether "Ladies' Night" pricing schemes violate the state ERA when they involve state action. This inquiry would lead to the conclusion that, where state action is present, "Ladies' Nights" are impermissible in Washington.

A. The Court's Application of the Law Against Discrimination

Neither the public accommodations section of the Law Against Discrimination nor its definition of "full enjoyment" contain any mention of sexual discrimination. Therefore the MacLean court was wrong to read "sex" into the full enjoyment section of the Law Against Discrimination. Washington has long followed the rule of statutory construction that: "[t]he court will not read into a statute matters which are not there nor modify a statute by construction." That is precisely what the court did in MacLean. Its construction caused a major alteration in the content of an otherwise unambiguous statute. Settled principles of statutory construction indicate that courts should not materially alter a statute without compelling justification.

There are plausible reasons why the legislature might have chosen to omit "sex" from the definition of full enjoyment. "Ladies' Nights" are popular attractions at taverns and restaurants. Perhaps the legislature did not wish to declare that all these promotions violate the Law Against Discrimination, and, for that reason, omitted "sex" from the statute's defini-

75. See supra notes 20–24 and accompanying text.
76. King County v. City of Seattle, 70 Wn. 2d 988, 991, 425 P.2d 887, 889 (1967).
77. 2A SUTHERLAND STATUTORY CONSTRUCTION § 55.03 (C. Sands 4th ed. 1973). Justice Utter's dissent, as printed in the official Advance Sheets, called Justice Rosellini's addition of "sex" to RCW § 49.60.030 "a flagrant effort by this court to substitute its preference in place of an absence of legislative direction in a purely legislative area." 96 Wn. 2d at 349 (Official Advance Sheets). This language was deleted from the final version, presumably because Justice Utter realized that it was inconsistent with the bulk of his analysis, which focused on the public accommodations section into which he, himself, read "sex."
78. One commentator noted that although "sex and marital status are excluded from the coverage of the public accommodations section," discrimination in this area might also fall under another category, such as credit transactions, where relief would be available. This indicates the author's perception that the omission was purposeful and would be enforced by the courts. Comment, RCW 49.60: A Discriminating Look, 13 Gonz. L. Rev. 190, 221 (1977).
tion of "full enjoyment."

Even if the court properly read "sex" into the Law Against Discrimination, its ultimate outcome was incorrect. As Justice Utter noted in dissent, if "sex" is read into the full enjoyment section of the Law Against Discrimination, it should also be read into the public accommodations section. The language of this section is broader than that of the full enjoyment definition. It is a blanket prohibition of discriminatory pricing policies in places of public accommodation. This section appears to be the most pertinent section of the Law Against Discrimination for resolving this case. Yet the court did not apply it, apparently because the language of the public accommodations section was inconsistent with the court's analysis under the full enjoyment section of the statute.

In addition to applying the wrong section of the Law Against Discrimination, the court also disregarded precedent urging a liberal interpretation of the statute. The court's conclusion that there was no discrimination because MacLean was not made to feel unwelcome conflicts with a liberal trend in case law. In cases of employment discrimination based on sex, handicap, and marital status, the court has consistently emphasized

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80. 96 Wn. 2d at 349, 635 P.2d at 688.
82. WASH. REV. CODE § 49.60.030 (1981). See supra note 24 (text of statute).
83. In Davis v. Department of Labor and Industries, 94 Wn. 2d 119, 615 P.2d 1279 (1980), the Washington Supreme Court considered the appropriate standard of proof in establishing a party's right to back pay on account of past sex discrimination. The court noted the broad remedial nature of RCW § 49.60.030(2), and determined that once the complainant establishes a prima facie case of discrimination on the part of his or her employer, the burden of proof shifts to the employer to put forth clear and convincing evidence that the complainant would have received the same treatment irrespective of the discrimination. The court rejected the less stringent "preponderance of the evidence" standard because it believed it would not adequately effectuate the statute's purpose of eradicating discrimination. Id. at 124–27, 615 P.2d at 1282–84.
84. In Rose v. Hanna Mining Co., 94 Wn. 2d 307, 616 P.2d 1229 (1980), the court again took the opportunity to focus discussion of the statute on the need to construe it in a manner consistent with its stated purpose of eliminating discrimination. The plaintiff had been denied a job solely because he was an epileptic, despite evidence that the condition was controlled by medication. The employer contended that freedom from epilepsy was a bona fide occupational qualification (BFOQ) for laborers at the smelter in question. Establishment of any particular trait as a BFOQ means that it is acceptable for an employer to discriminate on the basis of that trait, even if such discrimination would otherwise be unlawful. The court, recognizing that improper use of BFOQs might undermine anti-discrimination laws, stated "the bona fide occupational qualifications must be narrowly drafted to describe the very minimum required." Id. at 312, 616 P.2d at 1232.
85. In Washington Water Power Co. v. Washington State Human Rights Comm'n, 91 Wn. 2d 62, 586 P.2d 1149 (1978), the challenged practice was an "anti-nepotism" policy where the employer refused to hire the spouse of an employee. When two employees married, the couple had the option of deciding who would continue working, and the other was terminated. The Commission
the statute's remedial nature. The statute's definition of full enjoyment, forbidding places of public accommodation to treat certain persons as "not welcome, accepted, desired, or solicited," does not present an exclusive listing of discriminatory activity. As Justice Utter pointed out, "R.C.W. 49.60.030 uses the phrase 'include, but not be limited to'—a phrase that is inconsistent with such a reading. [The word 'include'] . . . is not intended to be a limitation on [the statute's] scope, but rather to illustrate possible applications."86

B. The Court's Rejection of the ERA

Why did the court avoid deciding MacLean under the ERA? The answer is suggested in a passage near the opinion's conclusion: "To decide important constitutional questions upon a complaint as sterile as this would be apt to erode public respect for the Equal Rights Amendment and deter rather than promote the serious goals for which it was adopted."87 Additionally, the court indicated that it did not believe that FNI would intentionally discriminate against their best customers—men.88

By considering these two factors, the "seriousness" of the complaint and the intent of the party accused of discrimination, the court improperly introduced subjective elements into what is properly an objective inquiry. The ERA requires simply "equality of rights and responsibilities" regardless of sex.89 If a practice involving state action90 results in unequal

86. 96 Wn. 2d at 350, 635 P.2d at 689.
87. Id. at 348, 635 P.2d at 688.
88. Id. at 347, 635 P.2d at 687.
89. WASH. CONST art. 31, § 1. See supra note 26.
90. Although Washington courts have always assumed that there is a state action requirement under the state ERA, it is questionable whether this is actually the case. The proposed federal ERA provided:

Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex.


In contrast Washington's ERA provides:

Equality of rights and responsibilities under the law shall not be denied or abridged on account of sex.

WASH. CONST art. 31, § 1.

Because consideration of this question is beyond the scope of this Note, it will be assumed that state action is required for an activity to fall under the ERA.

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treatment on the basis of sex, it violates this provision. The relative "seriousness" of the context in which an alleged violation occurs is immaterial, as is the intent of the party committing the violation.

In refusing to consider the ERA question, Justice Rosellini relied upon his earlier finding that there was no discrimination under the Law Against Discrimination.\footnote{91} There are two problems with this reliance. First, the finding of no discrimination was arrived at by an unduly narrow reading of the statute.\footnote{92} Second, even if the finding was correct under the statute, it did not dispose of the ERA question. The ERA does not require a finding that a person was made to feel "unwelcome" to establish a violation.\footnote{93} In \textit{Darrin},\footnote{94} for example, the court did not require that the girls feel "unwelcome" in order to bring a suit under the ERA. The mere existence of a regulation requiring different treatment of students on the basis of sex was sufficient to raise a question under the ERA. Similarly, in \textit{MacLean}, the proper issue under the ERA was not whether MacLean was made to feel "unwelcome," but whether he was denied equal treatment on the basis of his sex.

In \textit{MacLean}, the court actually diminished the integrity of the ERA by suggesting that it will be applied only when the court thinks its "serious goals" will be furthered. As Justice Dolliver stated in his dissent:

> It may be that application of the Equal Rights Amendment to the "promotional" activity of the defendant is not the sort of thing the voters had in mind when they adopted HJR 61. Then again, an equally persuasive argument could be made that ticket price differentials based on sex were indeed one of a number of activities which they hoped to end. It is idle to speculate.\footnote{95}

In effect, the plurality opinion in \textit{MacLean} creates a new, subjective exception to the ERA. Unlike the well-defined limitations set out in \textit{Buchanan},\footnote{96} \textit{Marchioro},\footnote{97} and \textit{Singer},\footnote{98} this exception is nebulous and susceptible of widely varying applications. Arguably, this type of case erodes public confidence in the judiciary, because it gives the appearance of selective enforcement of the law according to the priorities of the individuals on the bench. If the public did not intend the ERA to apply to

\begin{itemize}
\item 91. 96 Wn. 2d at 347, 635 P.2d at 688.
\item 92. \textit{See supra} notes 75–86 and accompanying text.
\item 93. WASH. CONST. art. 31, § 1. \textit{See supra} note 26.
\item 94. \textit{See supra} notes 29–32 and accompanying text.
\item 95. 96 Wn. 2d at 358, 635 P.2d 693.
\item 96. \textit{See supra} notes 33–36 and accompanying text.
\item 97. \textit{See supra} notes 37–42 and accompanying text.
\item 98. \textit{See supra} notes 43–45 and accompanying text.
\end{itemize}
"Ladies' Night" pricing schemes, the public should modify the ERA accordingly. It is inappropriate for the court to make this decision.

At first glance, the MacLean decision appears to signal conservative applications of the ERA in the future. A closer reading, however, suggests that the precedential value of the case is limited in several ways. First, as discussed earlier, the analysis in the case ignores the clear language of the amendment by incorporating the Law Against Discrimination's definition of discrimination. Future cases involving only the ERA will limit the court to the amendment's language requiring "equality of rights and responsibilities" under the law. Second, MacLean may be explained in part as a decision by the court to defer to the trial court in a matter of procedure. The trial court refused to allow an amendment to the original complaint adding a claim under the ERA. 99 While the complaint could have properly been amended had "justice so required," the trial court has wide discretion in such matters. 100

C. Proposed Resolution Under the ERA

Because the Law Against Discrimination was inapplicable, MacLean should have been decided under the ERA. The court should have first considered whether FNI was involved in "state action" sufficient to subject it to examination under the ERA. 101 If state action was found, the court should then have determined whether "Ladies' Night" pricing schemes violate the standard of review established in previous Washington cases.

The state action question depends upon the lease arrangement between the City of Seattle and FNI. In Burton v. Wilmington Parking Authority, 102 the United States Supreme Court stated that a private party's discriminatory conduct violated the equal protection clause of the fourteenth amendment because it occurred on property leased by a government body to the private party. 103 The situation in MacLean was not only similar to that in Burton, but the City of Seattle's connection to the discriminatory activity was even stronger. In Burton, the Parking Authority derived only an indirect benefit from the discriminatory practices of its tenant. 104 In MacLean, on the other hand, FNI hired city employees to

99. 96 Wn. 2d at 345, 635 P.2d at 686.
100. See In re Schnoor's Estate, 31 Wn. 2d 565, 572, 198 P.2d 184, 189 (1948) ("A pleading, once amended, cannot be further amended without leave of court, and the granting or denying thereof is addressed to the sound discretion of the trial court.").
101. See supra note 90.
103. Id. at 725-26.
104. Id. at 720. The parking authority received annual rent payments under a twenty year lease.
staff the facility, and the city derived a direct financial benefit from the sale of refreshments and merchandise to persons admitted under the discriminatory pricing scheme.\textsuperscript{105} Under \textit{Burton} and the resulting line of cases, the lease between the city and FNI constituted state action.

Once state action is established, the question becomes whether "Ladies’ Nights" violate Washington’s ERA. An examination of \textit{Darrin} and its progeny reveals that this type of practice is unacceptable under the ERA.

In \textit{Darrin}, the court stated that "under our ERA discrimination on account of sex is forbidden."\textsuperscript{106} This stringent standard clearly prohibits charging men and women different prices. The exceptions created in \textit{Buchanan} and \textit{Marchioro} do not affect this conclusion. In \textit{Buchanan}, the court allowed the distinction because it related to physical differences between the sexes.\textsuperscript{107} "Ladies’ Night" is not based upon any physical differences, but only on notions of women’s and men’s differing interests in basketball. This is precisely the type of rationale that was rejected in \textit{Darrin} as impermissible. In \textit{Marchioro}, the court allowed a distinction based on sex only because its purpose was to further equality of the sexes.\textsuperscript{108} No such motive was present in \textit{MacLean}. Indeed, FNI admitted that it charged women lower prices solely to boost its ticket sales.\textsuperscript{109} In \textit{Singer}, the classification based on sex was upheld when it did not result in different treatment for men and women.\textsuperscript{110} When a female pays $2.50 for a ticket and a male pays $5.00, it cannot be said that they are not treated differently.

\section*{IV. CONCLUSION}

In \textit{MacLean v. First Northwest Industries of America, Inc.}, the Washington Supreme Court determined that "Ladies’ Night" pricing promotions do not violate the state Law Against Discrimination. Based on this finding, the court did not consider whether they violate the state ERA. The decision not to review the case under the ERA was apparently related to the court’s perception that it was frivolous. This is unfortunate because it suggests that the ERA may be selectively applied according to the predispositions of individual judges. It effectively creates a new, subjective exception to the ERA. The case may be limited to its facts, however,
because it incorrectly applies the Law Against Discrimination and it conflicts with the clear language of the amendment. Future cases arising under the ERA should look for guidance not to MacLean, but to the words of the amendment itself, which requires "equality of rights" under the law.\footnote{Wash. Const. art. 31, §1.}

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