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The Law Foundation of Newfoundland and Labrador

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2015/2016 Awards

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Preface

Justin S. C. Mellor, M.A., LL.M.

Chair, Legal Research Awards Selection Committee

It is my pleasure to introduce the winning papers for the Law Foundation's Legal Research Awards. The Law Foundation is proud to sponsor these awards because legal research matters. There has always been a direct connection between legal research, judicial rule making and the practice of law. However, modern scholarship is far more ambitious. It no longer focuses on narrow legal questions or the evolution of doctrine. Modern research is interdisciplinary and engages a wide range of fields from psychology to economics. By drawing on disciplines that are external to the law, legal research has become richer, more diverse and better able to address modern social issues and illuminate problems from the past.

This year's essays reflect the ambition of modern legal scholarship. The papers engage a wide range of issues including: Aboriginal title, the impact of social influence factors on a jury, the problems of understanding police cautions, issues of compulsory jurisdiction, the regulation of campaign spending and culpability surrounding the sinking of the Titanic. This collection stands out as one of most diverse ever published by the Law Foundation.

On behalf of the Committee, I would like to extend congratulations to this year's award recipients: Christopher Lively, Cynthia Power, Claire Davis, Jenna Hawkins, Patrick Cameron, Christopher Ivancic and Alex Marshall. I would also like to thank their instructors: Dr. Brent Snook, Dr. Valerie Burton, Dr. Raymond Critch, Dr. Albert Jones, Frank O'Brien and Dr. Christopher Dunn for promoting legal research at Memorial.

Justin S.C. Mellor, M.A., LL.M.
Chair, Legal Research Awards Selection Committee

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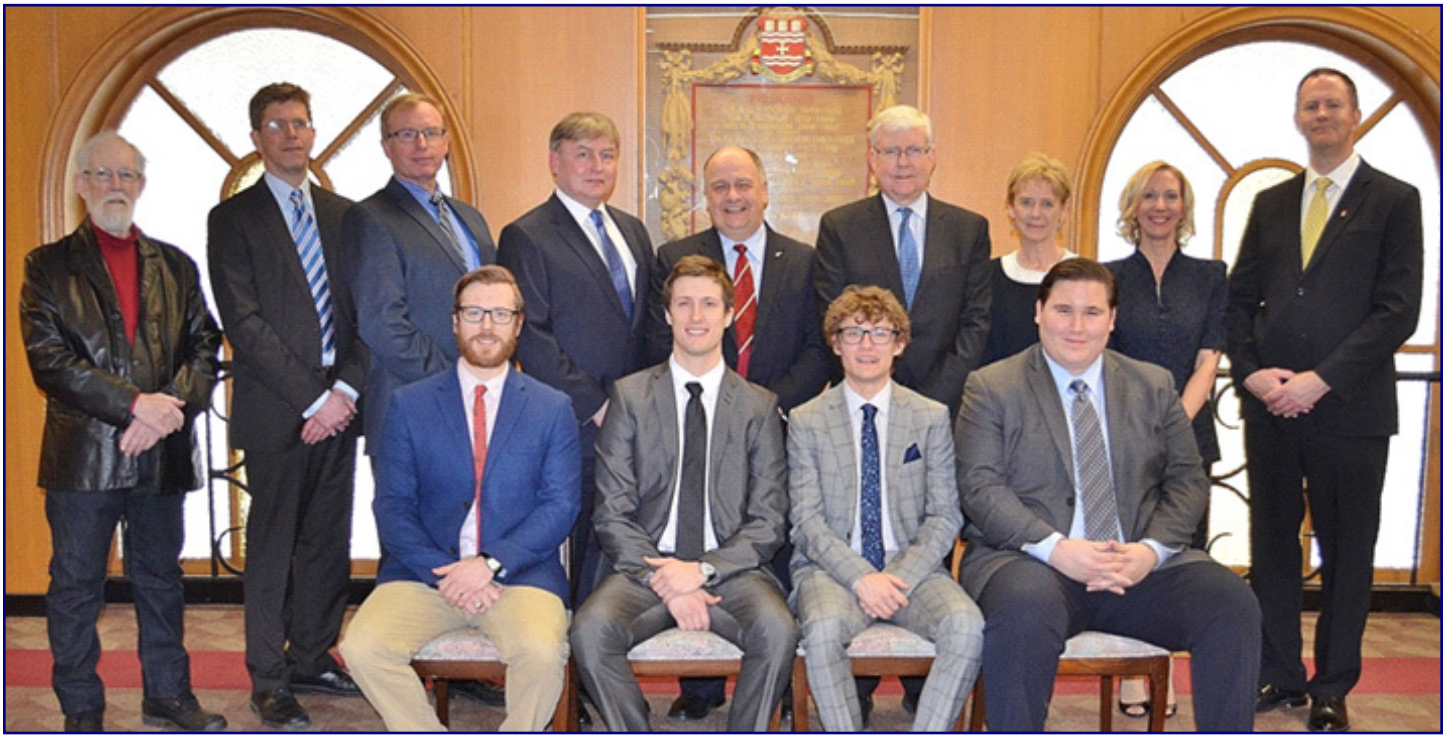
The Law Foundation, established in February, 1980, provides grants to advance public understanding of the law and access to legal services.

The Law Foundation of Newfoundland and Labrador Legal Research Awards for Students of Memorial University

The Law Foundation of Newfoundland and Labrador annually offers up to seven Legal Research Awards valued at $750. (seven hundred and fifty dollars) each to students at Memorial University. The Awards are for outstanding research papers on one or more legal issues, or topics treated in a legal context, in a 2000 level course or beyond in any discipline at the undergraduate level and in any graduate course for students at the graduate level. A first year course is not eligible, with the sole exception of *LWSO 1000: Law, Democracy and Social Justice*. Preference will be given for one of the seven awards to an undergraduate student in their first year of studies, who is currently enrolled in, or has completed, the first year introductory course *LWSO 1000* at the time their paper in this course is submitted for consideration. The papers submitted by and with endorsement of course professor or lecturer will be judged initially by the Dean, Director, or Department Head who will make a recommendation to a special selection committee comprised of appointees of Memorial University and the Law Foundation. Undergraduate students will receive a minimum of 2 (two) and graduate students will receive 1 (one) or more of the 7 (seven) Awards available annually. In the case of undergraduate students the Awards will be made by the Senate Committee on Undergraduate Scholarships, Bursaries and Awards. In the case of graduate students the Awards will be made by the Dean, School of Graduate Studies. In both cases they will act upon the recommendation of the Foundation's selection committee. An additional $750. (seven hundred and fifty dollars) will be provided annually by the Law Foundation to Queen Elizabeth II Library for the purchase of research materials and resources. Total Awards $6,000.



Pictured at luncheon presentation at R. Gushue Hall, Memorial University of 2015/2016 Twentieth Annual Legal Research Awards are:

Standing (l-r) Dr. Christopher English, LL.B., Member, Legal Research Awards Selection Committee, Justin S.C. Mellor, LL.M., Chair, Legal Research Awards Selection Committee, F. Geoffrey Aylward, Q.C., Vice-Chair, Law Foundation, and Member, Legal Research Awards Selection Committee, Daniel M. Boone, Q.C., Chair, Board of Governors, Law Foundation, Dr. Gary Kachanoski, President and Vice-Chancellor, Memorial University, The Hon. J. Derek Green, Chief Justice of Newfoundland and Labrador, The Hon. Gillian D. Butler, Justice, Supreme Court of Newfoundland and Labrador, Trial Division, The Hon. Pamela J. Goulding, Chief Judge, Provincial Court of Newfoundland and Labrador, William J. Janes, Chief of Police, Royal Newfoundland Constabulary;

Seated (l-r): Christopher Lively, Patrick Cameron, Christopher Ivancic, Alex Marshall, Awards recipients.

Law Foundation of Newfoundland and Labrador
Legal Research Awards for Students of Memorial University

2015/2016 Awards

(three semesters: Spring/Summer, Fall, 2015, Winter, 2016)

Legal Research Paper Award Winning Submissions
(The table of contents is in alphabetical order by Department, and similarly by student within Department; all five awards have equal standing)

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How Social Influence Factors Might Impact the Jury

Christopher Lively

Psychology 6402: Group Processes

When an injustice has occurred in society, the questions and concerns surrounding the injustice will be considered and assessed by various criminal justice members (e.g., police officers, lawyers, judges). In modern day, the due process of law is applied in order to evaluate the legitimacy of the evidence related to the misconduct, and to also consider all of the legal implications of the behaviour (i.e., whether consequences or punishment is required, and to what severity). Canadian courts hear many cases related to both civil and criminal conduct, and depending on the type of offence (i.e., summary vs. indictable), the defendant is sometimes given the option of the trial being heard by a judge alone, or by a jury (Pozzulo, Bennell, & Forth, 2012). However, trial by jury has not always been part of the criminal justice system.

A Brief History of Pre- Jury Justice

Historically, legal disputes were handled through much different procedures than we might be familiar with today. During the Middle Ages, for example, one approach to dealing with a dispute was to have a 'trial by wager of battle'. This method involved having the two opposing parties participate in a formal duel to the death, with the underlying assumption that God would ultimately decide whom was truly correct in the feud by letting that party survive the duel (Gordon, 2014; Vidmar & Hans, 2007). Another approach that has been documented is known as a 'trial by ordeal'. One example of this type of justice involved binding the defendant's hands and feet together, and then submerging the person into a large body of water. The conviction decision would be dictated by one of two possible outcomes: If the person sunk to the bottom of the body of water, then the decision would be that he or she is found to be innocent. In contrast, if the person floated above the water, then the decision would be that the person is guilty of the charges (Gordon, 2014; Leeson, 2012; Vidmar & Hans, 2007). These medieval approaches to serving justice were mainly built upon the religious superstitions subscribed to during that period (Leeson, 2012).

According to Delvin (1956), King Henry II and Pope Innocent III are credited for introducing and implementing the jury system to assist with judging legal deputes. The original purpose of the jury during the King's reign was to help inform him of what legal judgments to render on various disputes. Typically, these disputes were about land ownership, and the jury would be mostly comprised of landowners who were well informed about the facts pertaining around the land dispute (Delvin, 1956). In fact, some of characteristics of the modern day jury can be traced back to the time of King Henry II such as, the idea that a jury should be made up of 12 persons; the fact that the jury is instructed by the judge (i.e., the King) and has no power on its own; and that the jury is not required to give reasons for their decision (Delvin, 1956). Although 'trials by ordeal' and others similar practices likely continued even after the King's proposed changes, the introduction of having a group of evaluators (i.e., the jury) added to the justice system process was indeed an improvement on the conviction practices conducted in the Middle Ages. As we know today, juries are an intricate part of the criminal justice system.

Support and Concern for the Modern Day Jury

By definition, a jury is a group comprised of the defendant's peers and should consist of a reasonable, and representative, cross-sample of the community (Gordon, 2014). For example, if the person on trial is a 23-year-old single mother, Latino female from a middle-class urban centre, then the jury should be representative of this person by containing other young Latino women. Furthermore, other members of the jury should be comprised of people representative of the defendant's particular urban community (e.g., young mothers, married/unmarried persons, white/blue collar workers). If, in this example, the jury consisted of all 75-year-old white men, then this jury would be an illustration of a non-representative jury.

Many commentators and researchers interested in the study of juries have suggested that employing a group of people (as compared to a single individual), to make a verdict decision is a favourable way to ensure that all aspects of the legal case have been considered. Those in favour of trial by jury suggest that as the size of a decision-making body increases, there is a greater likelihood that the majority of the group will produce a correct and fair judgment of the case facts (Ladha, 1995; Surowiecki, 2005). Others propose that a group's deliberations may also increase the chances that the evidence and arguments presented in court will be better recalled, and be given more consideration than if the matter is just reviewed by a single individual (Pritchard & Keenan, 2002). Furthermore, a having a group of randomly selected people is believed to produce diversity among the jurors by bringing a variety of personalities, experiences, and attitudes to the decision-making process (Baddeley & Parkinson, 2012).

This assortment of people on the jury is also thought to reduce any preceding biases e.g., interest, specific, generic

and/or normative prejudices (see Vidmar & Schuller, 2001) jurors may have (Baddeley & Parkinson, 2012). Moreover, diversity on a jury is thought to also lead to more thorough debate and evaluation of the facts (Kerr, MacCoun, & Kramer, 1996). Lastly, some researchers have put forth the notion that a group of the defendant's peers might be better able to evaluate the defendant than a legal professional who is unfamiliar with the defendants' community (Baddeley & Parkinson, 2012). A jury of peers is also thought to be protected against any political or elitism influences that some criminal justice members may be partial to (Cahoy & Ding, 2005). As pointed out by Gordon (2014), an American case (e.g., Duncan v. Louisiana, 1968) summarized the purpose of a jury quite well as a way of "providing an accused with the right to be tried by a jury of his peers [in order to give him] an inestimable safeguard against the corrupt or overzealous prosecutor, and against the compliant, biased, or eccentric judge" (p. 421).

Indeed, as exemplified above, there appears to be some solid logic for supporting the use of a jury within the criminal justice system; however, there are some recognize problems with laypersons making up the composition of the jury, as well. For example, most people who are summoned for jury duty have no prior experience of being on a jury, nor have extensive experience making decisions about complex issues with a group of strangers (Henningsen, Cruz, & Miller, 2000). Although the judge will assist the jury members with understanding the parameters of the law and will provide guidance on the judgment making process, the discussions, debates, deliberations, and final decision (i.e., the verdict) about the defendant's fate is ultimately in the hands of the, likely novitiate, jury members.

Beyond the lack of experience concerns, there are also elements related to group dynamics that might negatively impact the jury's deliberations. Specifically, concepts related to social influence have the power to affect an individual's (or group's) evaluation process, sometimes without the people involved even realizing it. In order to understand how these concepts could play out during the jury's decision-making process, it might be important to briefly review how jury deliberations are believed to normally occur.

According to Brewer and Williams (2005), the jury's deliberation process typically moves through three phases. First, the orientation stage generally involves electing a foreperson, reviewing the deliberation procedures, and raising any general trial issues together as a group. The second phase, and usually the longest occurring, is known as the open conflict stage. This is when the jurors discuss and debate the information and evidence presented during the trial, and also attempt to persuade each other into reaching a final unanimous verdict. After the final group verdict has been decided, the jury finishes deliberations through the finally phase known as the reconciliation stage. Simply put, this last stage involves ensuring that all members are satisfied with the final decision, and seeks to fix any hurt feelings or attacks that might have occurred during the debates and discussions (Brewer & Williams, 2005). Some research has pointed out that the chances are about 2 in 3 that jurors will disagree on the verdict, yet about 95% of juries emerge with a consensus (Kalven & Zeisel, 1966). Thus, this fact can lend support to the suggestion that social influence factors might be occurring during the jury's deliberations in order to change some of the jurors' decisions. In all likelihood, these influences and changes probably occurred during the open conflict stage.

Concepts of Social Influence

Social influence can be thought of as the change in a person's attitude, belief, or behaviour that is triggered by the words, actions, or presence of another person(s) (Bowser, 2013; Forsyth, 2009). Group dynamic researchers suggest that social influence can be broken down into two main subgroups. *Majority influence* is when the larger portion of the group places pressure onto an individual member, or small portion of the group, in order to get the minority party to change their opinion, and accept the consensus of the larger group (Forsyth, 2009). In contrast, *minority influence* is simply pressure being exerted from the opposite direction. In other words, a single member or smaller portions of the group places pressure onto the larger portion in attempt to have the majority's opinions conform to those of the minority (Forsyth, 2009). Being given the task of deciding a person's fate is a significant responsibility and should not be taken lightly; most jurors surely put forth their best effort in order to fulfill their objective duty as a juror. The reality, however, is that majority or minority influences from within the group have the potential to subjectively affect how the juror(s) will respond and behave during deliberations.

Within both of these subgroups are multiple sources of group influence. Each source can lead an individual to conform to what is perceived to be normal, as dictated to the group. The first source is known as *informational influence*. Forsyth (2009) defines this source as the "interpersonal processes that promote change by challenging the correctness of group members' beliefs or appropriateness of their behaviour directly or indirectly" (p. 196). In other words, information that one receives, or believes they are receiving, from other group members could lead an individual to change their opinion or viewpoint on the issue being considered. Informational influence is believed to work largely based on the principles of social comparison theory (e.g., Festinger, 1954). This may be best illustrated by considering the point of view(s) of a jury member(s) when conducting a poll of each juror's individual verdict. This notion is known as the straw man poll, and is used in order to see what direction the jury is leaning toward in their collective decision (Forsyth, 2009).

Consider the example that an original straw man poll might have suggested that the jury stood at a 7-5 vote in favour of a not-guilty verdict. After some deliberations and then taking a new poll, it might now be revealed that the jury currently stands at a 10-2 vote in favour of not-guilty. Informational influence can be illustrated in two different ways through this example. Firstly, the deliberations might have persuaded three jury members into changing their votes, because another juror's expressed view on the evidence introduced some new information or concepts that the three jurors had not considered before. Thus, this newly introduced information has impacted their personal viewpoints and influenced these three jurors to change their vote. Secondly, the new poll itself might now become a source of informational influence for the other remaining two jurors in favour of the guilty verdict. Given that the majority of the group now appears to be in favour of a not-guilty verdict, combined with the fact that three others have changed their votes, this might suggest to the two remaining jurors that the other ten jury members are aware of something that they are not privy to. This new 10-2 poll now acts as a reference point for the two remaining jurors, and may now influence them to revisit their motivations around their choice of a guilty verdict. If a third poll was later taken and resulted in a 12-0 vote in favour of not-guilty, then observers might conclude that a form of informational influence was a possible driving force that led to the change in verdict.

Normative influence is a second source type and is described by Forsyth (2009) as the "personal and interpersonal processes that cause[s] individuals to feel, think, and act in ways that are consistent with social norms, standards and conventions" (p.198) of the group. In other words, individual members can observe the group's norms and will strive to act in ways that are consistent with those norms. When one realizes that they are feeling, thinking, or acting in contrast to the group, this realization may leave the individual feeling isolated socially, and at odds with their own criteria of normality (Forsyth, 2009). Using the same example illustrated above for informational influence, the poll that resulted in a 10-2 vote might now suggestthat the groups' norm is believing that the defendant is an innocent person. Thus, the two lone jurors might now feel somewhat anomalous relative to the rest of the group, and will need to revisit their viewpoints to deal with any tension (e.g., cognitive dissonance; Festinger, 1957) they may feel from being the only two that do not fit in with the groups' norms.

Finally, the last source is *interpersonal influence* and is described by Forsyth (2009) as the "social influence that results from other group members selectively encouraging conformity and discouraging, or even punishing, nonconformity" (p. 200). In other words, the out-group minority member(s) becomes the specific target(s) of the in-group majority members, and this focus has the potential to turn negative. Interpersonal influence tends to be applied when informational or normative influences have failed to change the opinion of the dissenter(s) to align with the group's collective opinion. As a result, the group will begin to focus the bulk of their attention on the dissenting individual(s) in order to bring the rebel's opinion into agreement with the group or until the group decides that this individual will not abandon their opposition (Forsyth, 2009). Continuing with our polling example, we might observe interpersonal influence occurring if the 10 jurors who voted not-guilty started to attack or reject the two jurors who voted for a guilty verdict. In fact, a very similar scenario being described here played out in a study on communication conducted by Schachter (1951).

In his study, Schachter (as cited in Forsyth, 2009) set up discussion groups wherein participants would gather to talk about various important topics of interest. Among the participants were three confederates, and each had a specific role to play in the study: the 'mode' confederate would consistently agree with the majority of the group; the 'slider' confederate would initially disagree with the majority, but eventuallyagree with the majority of the group as the conversation went on; lastly, the 'deviant' would always differ from the majority. Schachter (1951) measured the communication rate between the group and each confederate, and found that the highest rates of communication occurred between the group and the deviant (as compared to the group communication rates with both the slider, and the mode, separately). Indeed, some groups were even observed to reject the deviant completely when this confederate would not change their disagreeing viewpoint. The findings in Schachter's (1951) study suggest that interpersonal influences might be a tactic used by groups who are involved in crucial discussions, such as juries, in attempt to change the opinions of any dissenters in order to match the collective viewpoint.

Additional Empirical Examples related to Social Influence

In addition to Schachter's (1951) study, aspects of both majority and minority influences and their sources (i.e., informational, normative, and interpersonal) have been empirically observed in some classical research studies. Asch's (1951) famous line study investigated how a majority group could cause an individual to conform to the pressures of the group. The study involved bringing participants into the lab to make comparative judgments about a series of lines displayed on a screen. Each participant was put into a group with other people; however, these 'others' were all confederates in the study. Unknown to the actual participants, the confederates were previously instructed by the experimenter to state the wrong answer on each trial. When an obviously wrong answer given by members of the group, Asch (1951) wanted to know whether the participants would join the group in their incorrect choice, or if the participants would maintain their own obviously correct choice. Indeed, results of the study found that 32% of participants con-

formed to the social pressures of the group, and changed their decision to be in line with what the other group members had stated. It might be postulated that the participants from the Asch (1951) study relied on some informational and/or normative influences interpreted from the group.

Moscovici and a colleague (1969), on the other hand, felt like Asch (1951) did not consider the option that minority influences can also occur in groups. In their study, Moscovici and Zavalloni (1969) conducted a similar procedure to Asch (1951), but in reverse. Six participants were brought into the lab to judge the colors of various green and blue slides; however, two of these members were confederates for the experimenter. Similar to Asch's (1951) study, the confederates gave wrong answers about the color of the slides (e.g., stating the slide was blue when it was clearly green) and answered consistently (i.e., stating green as the answer 100% of the time) or inconsistently (i.e., sometimes stating blue or sometimes stating green as the answer) on the trials. Similar to Asch's (1951) logic, Moscovici and Zavalloni (1969) wanted to know if the incorrect statements of the minority group (i.e., the two confederates) would influence the majority (i.e., the actual participants). Although much less than those observed in the Asch (1951) study, the results indicated that the minority group did indeed have an effect on the majority group (about 9% of the time), but only when the minority group was consistent in their wrong responses.

Social Responses to Social Influence

Whether consciously aware or not of the various type of influences that might be used in the group setting, researcher also points out that several different social responses might be exhibited by group members undergoing influence pressures. The fact that some of the participants in the above classic studies abandoned their initial judgments, while others maintained their opinions, goes to show that a variety of responses can occur to social influences. According to Forsyth (2009), there are five different types of social responses that might be observed in decision-making groups – and accordingly, could occur during a jury's deliberations.

To illustrate, let's again consider another mock jury example. Let's assume that prior to the jury commencing deliberations, juror #12 has formed his or her verdict decision about each of the charges against the defendant. After some discussion with the other jury members, juror #12 may find him- or herself in a minority position (e.g., finds the defendant guilty on the first charge) relative to the rest of the group (e.g., all others find defendant not-guilty on the first charge). In order to move the deliberations forward to discuss the additional charges, juror #12 may decide to change their outward decision position in order appease the groups' majority view; however, juror #12 still privately believes that the defendant should be found guilty for the first charge. In this mock example, juror #12 has displayed *compliance* towards the group. Although it would appear that this juror publicly agrees with the group he or she is truly in disagreement privately (Forsyth, 2009).

Let's now consider another social response, and assume that during the discussions some other group members presented a solid alternative explanation as to why a not-guilty verdict should be rendered for the first change. For liberty sake, let's assume that juror #12 had not considered this alternative explanation when forming his or her original verdict decision. If this new information leads juror #12 to abandon his or her original decision and change their opinion to match with that of the group, then this type of social response is known as *conversion*. Indeed, a genuine change of opinion shows that juror #12 agrees with group both publicly and privately (Forsyth, 2009). Of course, these two mock examples are assuming that all of the other jurors have been in agreement together the first charge's verdict since the onset of discussions.

To illustrate the third social response, let's take the perspective of juror #5 (i.e., someone who is in opposition to juror #12's opinions), and assume that this juror is part of the majority group with respect to the verdict decision on the first charge (i.e., he or she has consistently sided with a not-guilty verdict for the first charge). By maintaining agreement on the verdict decision both before and after any jury discussions, juror #5 is displaying the social response of *congruence* within the group. In other words, juror #5 is agreeing with the verdict decision both publicly and privately in a strict sense (Forsyth, 2009).

Using the above mock examples, we have so far seen illustrations for three forms of social responses (e.g., compliance, conversion, and congruence). In all of these response cases, the outcome of each response is agreement with the rest of the group. But what if a juror's final response is in disagreement with the group? Indeed, Forsyth (2009) explains that there are two additional social responses that fit with the latter category.

The first of the dissenting responses is known as *independence*. In this case, the person who chooses to be independent relative to the group may be expressing opinions or judgments that are consistent with their own personal standards. To refer back to the above mock example, perhaps juror #12 made their initial guilty decision due to their own personal convictions, and will now maintain this attitude throughout the whole deliberating process. In effect, an independent disagrees with the group both publicly and privately (Forsyth, 2009). Regardless of what the group says, suggests, or uses to persuade an independent, this person will remain in disagreement with the group at all stages of the deliberations. In the social setting of the jury, an indepen-

dent response type might lead to a hung jury. In fact, 6% of criminal juries result in a jury unable to reach a unanimous decision (Waters & Hans, 2009).

The final of the five social responses, and second of the dissenting types, is referred to as *anticonformity*. This response can be thought of as simply going against anything that the group recommends. Recall the 'deviant' confederate from the Schachter (1951) study; this confederate would be an example of anticonformity occurring in a group setting. One of the reasons that a juror might take this position during the deliberation process is to ensure that all alternative explanations have beencontemplated. In a jury situation, perhaps taking a counter conformity approach is a fail-safe way to ensure all of the evidence is fully and thoroughly considered. In fact, an example of this can be seen from the hero in Reginald Rose's play, *Twelve Angry Men* i.e., the character, 'Juror #8' (Rose & Sergel, 1958). In the play, Juror #8 takes an anticonformist approach relative to the rest of the jury members in order to exhaustively consider other alternative explanations of the crime being considered. As the audience learns toward the end of the play, Juror #8 displayed disagreement with the group publicly, but privately agreed with the group's guilty verdict (Rose & Sergel, 1958). As the play concludes, we see that Juror #8's anticonformity stance was enough for the remaining 11 jurors to thoroughly re-evaluate their verdict decisions and conclude that the defendant was not-guilty. This play also provides many examples of interpersonal influence taking place during the many heated arguments displayed between jury members. Although the play is a fictional work, aspects of the characters might be similar to actual real-life jury members.

Concluding Thoughts

Findings from many of the previously mentioned classical studies (e.g., Asch, 1951; Moscovici & Zavalloni, 1969; Schachter, 1951) suggest huge implications for the jury setting. In the case of majority influence, a lone juror who feels strongly about an opposing and unpopular viewpoint might become undone and succumb to the social pressures of the group, thus changing their viewpoint and leading to a verdict decision that they do not agree with. Similarly, if a minority group is consistent with presenting their argument to the group, the unpopular view can emerge as the final decision of the jury as a whole (e.g., *Twelve Angry Men*). As illustrated by the 'deviant', having a difference of opinion relative to the rest of the group can lead to negative reactions and complete rejection of the individual.

Social influence factors play out in many different group settings, and affect people in their decision-making processes. The jury is social setting where group social influences can have a great impact on a defendant's life. Knowing and understanding how group dynamic concepts work, and more importantly, applying them in the jury setting can lead one to protecting themselves from influences that might not allow the completion of a full due diligence legal process. Jury members may make the realization that being in a minority position might actually lend to deeper considerations given to the issues at hand. After all, if you were the person on trial, then you would likely want there to be many views considered rather than just whatever the majority thinks. Of course, dissenting from the group is not usually a popular position to find yourself in, but when a jury's decision has the power to hugely impact the defendant's life (for better or for worse), jury members would do the defendant and themselves justice by noting and learning how social influences might impact them in the group setting. As Rose's play (Rose &Sergel, 1958) indicates, without an anticonformist on the jury, the group might have rendered an incorrect verdict to the fictional defendant. In real life, this wrong decision-making can have dire effects on a person and potentially send an innocent defendant to prison. In fact, a recent study reports that juries have been found to render a wrong verdict in 1 of every 8 cases (Spencer, 2007). Awareness of social influence factors will not necessarily correct any wrong doings by juries, but having an understanding the dynamics related to group processes might lead to some additional insight. Perhaps a simple suggestion that could protect juries from falling victim to social influences is to have the judge speak about the impact of social influence during the instructions given to the jury. The purpose of the criminal justice system is to render just that: justice. Group dynamics and social influences might be able to play a role in insuring that true justice for all is fully exercised. ■

References

Asch, S. E. (1951). Effects of group pressure upon the modification and distortion of judgment. In H. Guetzkow (ed.) *Groups, leadership and men*. Pittsburgh, PA: Carnegie Press.

Baddeley, M., & Parkinson, S. (2012). Group decision-making: An economic analysis of social influence and individual difference in experimental juries. *The Journal of Socio-Economics*, 14, 558-573.doi: 10.1016/j.socec.2012.04.023.

Brewer, N., & Williams, K. D. (2005). *Psychology and law: An empirical perspective*. New York, NY: Guilford Press.

Bowser, A. S. (2013). To conform or not to conform: An examination of the effects of mock jury deliberation on individual jurors. *(Unpublished Master's Thesis)*. East Tennessee State University, Johnson City, TN. Retrieved from: http://dc.etsu.edu/etd/1164.

Cahoy, D. R., & Ding, M. (2005). Using experimental economics to peek into the black box of jury behavior: A proposal for jury research reform. *Southern California Interdisciplinary Law Journal*, 14, 31-66.

Delvin, P. (1956). *Trial by jury*. London, UK: Stevens & Sons Limited.

Duncan v. Louisana. (1968). 391 U.S. 145-156.

Festinger, L. (1954). A theory of social comparison processes. *Human Relations*, 7, 117–140.doi: 10.1177/001872675400700202.

Festinger, L. (1957). *A theory of cognitive dissonance*. Stanford, CA: Stanford University Press.

Forsyth, D. R. (2009). *Group dynamics* (5th Ed.). Belmont, CA: Wadsworth.

Gordon, S. (2014). All together now: Using principles of group dynamics to train better jurors. *Indiana Law Review*, 48, 415-459.

Henningsen, D. D., Cruz, M. G., & Miller, M. L. (2000). Role of social loafing in predeliberation decision making. *Group Dynamics: Theory, Research, & Practice, 4*, 168-175.doi: 10.1037/1089-2699.4.2.168.

Innocence Project (2016). *Home – The Innocence Project*. Retrieved from http://www.innocenceproject.org.

Kalven, H., Jr., & Zeisel, H. (1966). *The American jury*. Chicago, IL: University of Chicago Press.

Kerr, N. L., MacCoun, R. J., & Kramer, G. P. (1996). Bias in judgment: Comparing individuals and groups. *Psychological Review, 103*, 687-713.doi: 10.1037/0033-295X.103.4.687.

Ladha, K. K. (1995). Information pooling through majority-rule voting: Condorcet's jury theorem with correlated votes. *Journal of Economic Behavior and Organization, 26*, 353-372.doi: 10.1016/0167-2681(94)00068-P.

Leeson, P. T. (2012). Ordeals. *Journal of Law and Economics, 55*, 691-714.doi: 10.1086/664010.

Moscovici, S., & Zavalloni, M. (1969). The group as a polarizer of attitudes. *Journal of Personality and Social Psychology, 12*, 125-135.doi: 10.1037/h0027568.

Pozzulo, J., Bennell, C., & Forth, A. (2012). *Forensic psychology* (3rd Ed.). Toronto, ON: Pearson.

Pritchard, M. E., & Keenan, J. M. (2002). Does jury deliberation really improve jurors' memories? *Applied Cognitive Psychology*, 16, 589-604.doi: 10.1002/acp.816.

Rose, R., & Sergel, S. L. (1958). *Twelve angry men: A play in three acts*. New York, NY: The Dramatic Publishing Co.

Schachter, S. (1951). Deviation, rejection, and communication. *Journal of Abnormal and Social Psychology, 46*, 190-208.doi: 10.1037/h0062326.

Spencer, B. D. (2007). Estimating the accuracy of jury verdicts. *Journal of Empirical Legal Studies, 4*, 305–329.doi: 10.1111/j.1740-1461.2007.00090x.

Surowiecki, J. (2005). *The wisdom of the crowd: Why the many are smarter than the few*. London, UK: Abacus.

Vidmar, N., & Hans, V. P. (2007). *American juries: The verdict*. New York, NY: Prometheus Books.

Vidmar, N., & Schuller, R. A. (2001). The jury: Selecting twelve impartial peers. In R. A. Schuller & J. R. P. Ogloff (Eds.), An introduction to law and psychology: Canadian perspectives (pp. 126–156). Toronto, ON: University of Toronto Press.

Waters, N. L., & Hans, V. P. (2009). A jury of one: opinion formation, conformity, and dissent on juries. *Journal of Empirical Legal Studies, 6*, 513-540. doi: 10.1111/j.1740-1461.2009.01152x.

Condemnation, Corruption and Culpability: The Inquiries by the United States and Great Britain into the Sinking of the *RMS Titanic*

Cynthia Power

History 3806: Titanic Histories

"The Importance of being Earnest"
a satirical cartoon by David Wilson
attacking Senator William Smith's chairmanship
of the U.S. inquiry - *The Graphic (1912)*

> Without any pretension to experience or special knowledge of nautical affairs, nevertheless I am of the opinion that very few important facts which were susceptible of being known escaped our scrutiny. Energy is often more desirable than learning, and the inquisition serves a useful purpose to the State.
>
> *Senator William Alden Smith,*
> *Speech to the United States Senate Inquiry*
> *into the Sinking of the RMS Titanic, May 28, 1912.*

In presenting his Report on the sinking of the *Titanic* to the United States Senate, Senator William Smith went on the offensive. Three weeks earlier Irish cartoonist David Wilson had ventured to caricature the Senator's chairmanship of the Inquiry.[1] Wilsons's cartoon appeared in the British weekly newspaper *The Graphic* together with an article ridiculing Smith for setting "the whole world laughing by the appalling ignorance betrayed by [his] questions."[2] Senator Smith had been admitted to the bar in Michigan in 1883, had a reputation as a campaigner for safety on American railroads, and was an expert on railroad law and finance. Despite this, he was caricatured by the British press as an all-American 'pulpit-pounding' Republican seemingly determined to get his point across at any cost. In discussing the competency and comprehensiveness of the Inquiry I will show another side to the argument: Smith had justifiable grounds for his style of inquisition.

What makes this topic intriguing is the enormity of primary source information accessible in the records of both Inquiries. Examination of these records raises questions that reveal the political and judicial relationship of the early twentieth-century industrial state to its citizen population. Which country should have been in charge of investigating the *Titanic* tragedy – the United States or Great Britain? Did the United States have authority to detain British subjects for questioning? Why were the British Government and Board of Trade apprehensive about the outcome of the American Inquiry? What role did politics play in both Inquiries? Were rumors of corruption and cover-ups true? Were immigrants subject to discrimination? Who was ultimately responsible for the disaster itself? And, once the shock and grief subsided, potentially the biggest question of all arose - who was going to pay? I will further explain how these questions reveal the importance of an historical awareness of issues that come to the surface during crises and result in some uncomfortable truths emerging while other truths, no less disconcerting, remain submerged. By considering these legal complexities we may even begin to question whether the law itself has a role in subverting hierarchies.

In order to contextualize events historians look at the past through the people and issues of the time. Social and cultural constituents such as gender, class and race are studied for their contribution to understanding events. The Edwardian era (1901 – 1914) is remembered fondly in

Britain as a time of peace prior to the shattering of innocence in World War I, but also as a time when the elite was trying to solidify its power and set trends in conspicuous consumption.[3] There were major shifts in politics as British Prime Minister Herbert Asquith began to introduce significant domestic reform and lay the foundations for a welfare state. Government became much more involved in people's lives with the introduction of old age pensions and sickness and unemployment insurance.[4] For much of the nineteenth century Britain was a major world economic and military power. However, by the early twentieth century its growth rate and manufacturing output began to trail rivals Germany and the United States, the latter emerging as an immense industrial economy.

In America concerns about the rise of corporations in the latter part of the 19th century became known as Progressivism. Congress had passed the Interstate *Commerce Act of 1887* [5] and the *Sherman Antitrust Act of 1890* [6] - two important acts symbolizing a desire to limit 'unreasonable' restraints of trade by powerful corporations as well as their influence on the American political system. Many Americans lived in poverty while the 'Robber Barons'[7] held more combined wealth than the U.S. government. By the turn of the century there was increasing public criticism of their lavish lifestyles acquired mainly through the exploitation of workers. The Democratic Party Platform of 1912 stated "A private monopoly is indefensible and intolerable. We therefore favor the vigorous enforcement of the criminal as well as the civil law against trusts and trust officials, and demand the enactment of such additional legislation as may be necessary to make it impossible for a private monopoly to exist in the United States."[8]

This sets the profile of politics: 1912 was a presidential election year with Republican Theodore Roosevelt taking on William Taft for not 'busting' enough Trusts. American J. Pierpoint Morgan had investments in many large corporations – so much that he was accused of controlling high finance in the United States.[9] He was one of the wealthiest men in the world and became a major political target. Although the *Titanic* was considered a 'British' ship the fact was that she was owned by a Morgan transatlantic Trust was to the Progressives "sin enough to bring appropriate punishment by God and Congress."[10]

Titanic scholar Richard Howells calls the sinking of *Titanic* an Anglo-American event. *Titanic* was a British-registered ship, built with American money, sailed by a British crew, and patronized by prominent American citizens.[11] In an age of intense international competition it was the finest vessel two maritime powers could produce, and a vast amount of capital was invested. Giant ocean-going liners were part of the most marked social change of the era in the form of mass migration between Europe and North America. Innovations were also dramatic as the size of Atlantic liners increased tenfold and their speed twofold between 1840 and end of the century.[12] Despite the vast expansion it soon became evident that the British Board of Trade regulations under the *Merchant Shipping Act* had not been appropriately updated.

There was great expense involved in building bigger more technical vessels so the North Atlantic liner companies of the U.S., Britain and Germany signed agreements to divide the supply of passengers as protection against seasonal market fluctuations.[13] Profitable postal contracts were also available for ship operators who could deliver consistently and promptly.[14] When the *Titanic* sank the United States and Britain were additionally connected. This is perfectly encapsulated in 'Toll of the Sea'[15] which displays Britannia in ancient Roman garb and Columbia wearing stars and stripes joined in grief over the loss of *Titanic.* Notwithstanding this shared experience, they were soon embroiled in controversies and name-calling.

Immediately after receiving news of the loss of *RMS Titanic*, Senator Smith began organizing an inquiry. Senate Resolution 283[16] empowered the senatorial subcommittee to start work on April 18th as soon as the Cunard-owned *Carpathia* docked with survivors in New York. Comprised of senators from both parties, political considerations influenced the composition of the United States committee. The British Inquiry however consisted entirely of maritime experts. The objective of the U.S. inquiry into the sinking on April 15, 1912 seemed simple: to determine *how* it happened. Subpoenaed individuals included J. Bruce Ismay, Chairman of White Star Lines, all surviving ship's officers and several prominent passengers.[17] Smith wanted to collect statements while the events were still fresh, but the haste was also to prevent survivors returning to Britain before the Inquiry commenced.

The inquiry officially began at the Waldorf-Astoria Hotel in New York on April 19th and lasted six weeks. The proceedings eventually moved to Washington, D.C. where Senator Smith dominated the Inquiry and personally questioned all key witnesses. Twenty passengers were among the eighty-eight witnesses who gave evidence (including sworn affidavits.)[18] Specific areas investigated by the U.S. Inquiry included whether the *Titanic* had ignored iceberg warnings and steamed full speed ahead, whether the design and construction of the ship were adequate, whether sufficient lifeboats were aboard and the role of Ismay during the voyage.[19]

This was the biggest, most newsworthy disaster of the century and the press was anxious to profit. A dearth of information before the *Carpathia* arrived in New York had led to rumors and a vast amount of misinformation being printed. When the United States Inquiry commenced jour-

nalists not only delved into the serious matters of the daily proceedings but also sensationalized every trivial aspect. The *New York Herald* identified the nationalist elements best: "This country intends to find out why so many American lives were wasted by the incompetency of British seamen, and why women and children were sent to their deaths while so many British crew have been saved."[20] For their part the British press generally condemned Smith as an insensitive opportunist who was forcing an inquiry to gain political prestige and seize his moment on the world stage. The British government was antagonistic towards the Inquiry as well, criticizing the audacity to subpoena British subjects.[21] Joseph Conrad, a novelist, but more importantly a seafarer of many years including sixteen in the British Merchant Marine, summarized the British point of view in *Some Reflections on the Titanic 1912*:

> … [W]hy an officer of the British merchant service should answer the questions of any king, emperor, autocrat, or senator of any foreign power (as to an event in which a British ship alone was concerned, and which did not even take place in the territorial waters of that power) passes my understanding. The only authority he is bound to answer is the Board of Trade.[22]

The Board of Trade was founded in 1621 and retained broad responsibility for the country's economic life as a whole. It drafted new legislation on such matters as patents, factories and labour and was in control of merchant shipping, mines, agriculture and transport. The British Government eventually conceded that the U.S. Inquiry did have the right to question British citizens and that this would not encroach on its own investigation. Yet James Bryce, the British Ambassador in Washington, could not resist quipping that the members of the Unites States Inquiry were "so incompetent that they may before long discredit themselves and interest will subside,"[23] thus displaying the contempt of the British establishment.

The final report of the U.S. Inquiry was strongly critical of established British seafaring practices and the roles that *Titanic's* builders, owners, officers and crew had played in contributing to the disaster. It emphasized the arrogance and widespread complacency aboard the ship, in the shipping industry in general and specifically within the British Board of Trade. But the Inquiry did not find the owners International Mercantile Marine (IMM) or White Star Line negligent under existing maritime laws as they had merely followed standard practices. The disaster was therefore categorized as an *act of God*.[24] How ironic that the sinking of *Titanic* was ultimately deemed to be an *act of God* when the American motto is 'In God we Trust'[25] and Senator Smith desired nothing more than to establish the culpability of a Trust.

The Report was rightly seen in Britain as an attack on the British shipping industry and an affront to British honour. The Foreign Secretary spoke of his contempt for the way the senator had in a 'denunciatory fashion'[26] blamed inadequate regulations implemented by the Board of Trade. The American press was generally supportive of Smith's findings in establishing the facts of the disaster but the British press was not so kind. The populist *Daily Mirror* denounced him for having "made himself ridiculous in the eyes of British seamen. British seamen know something about ships. Senator Smith does not."[27] The conservative *Daily Telegraph* suggested that the inquiry was fatally flawed by its employment of non-experts, which had "effectively illustrated the inability of the lay mind to grasp the problem of marine navigation."[28] The mainstream *Daily Express* opined Smith had "an intimate acquaintance of prairie schooners as the only kind of boat."[29] Conrad, a naturalized British subject, also joined in the condescension towards the American senators stating:

> It is fitting that people who rush with such ardor to the work of putting questions to men yet gasping from a narrow escape should have, I wouldn't say a tincture of technical information, but enough knowledge of the subject to direct the trend of their inquiry.… The august senators, though raising a lot of questions testifying to the complete innocence and even blankness of their minds, are unable to understand what the second officer is saying to them. We are so informed by the press from the other side.[30]

However, some in Great Britain commended the actions of the U.S. inquiry. G. K. Chesterton, a respected English writer known for his criticism of both Progressivism and Conservatism, contrasted the American objective of maximum openness with what he called Britain's "national evil … to leave every enormous question unanswered."[31] He argued it was more important that Smith was trying to record eyewitness accounts than establish facts.

It was not widely known that Senator Smith and his son had travelled on *Titanic*'s sister ship *RMS Baltic* with Captain Smith in 1906. He had dined with the Captain, been given a detailed tour of the ship and therefore had knowledge the general public would not.[32] One reason he had requested the Inquiry was genuine sorrow over the Captain's death. Although ridiculed in print, Smith had asked about the composition of an iceberg to convey that rocks and other solid objects were often lodged in the underwater portions, thus increasing the weight and strength. His questioning regarding drops in temperature was intended to ensure all parties realized this generally indicated nearby ice fields in these particular shipping lanes. Questions during the Inquiry which were repeated to the point of badgering were

mostly intended to force the officers and crew to answer in simple terms and not use complicated technical jargon. The focus on eyewitness statements by Smith, as opposed to the technical explanations of the British Inquiry, has in fact provided the majority of existing information on the tragedy.

When British Prime Minister Asquith announced in Parliament that the Court of Inquiry would afford "the best means of arriving at a conclusion with regard to the circumstances connected with the loss of the *Titanic* and all questions of responsibility involved,"[33] he had emphasized that it was independent and the Board of Trade would have no power to direct the Inquiry. Unionist member Major Archer-Shee was no friend of the Liberal Government and he queried how the Board of Trade might be found culpable when the Court had to ultimately report to the Board itself under the Merchant Shipping Act. Asquith replied that while the report would eventually be submitted to the Board of Trade, the Court of Inquiry was empowered to find the Board culpable.[34] To add to the confusion it was the Board of Trade who commissioned the Inquiry in the first place and provided the twenty-six questions that the Inquiry was charged to answer. In light of this, most of the criticism that the outcome was decided before the Inquiry began appears accurate.

The British Inquiry into the loss of the *Titanic* was headed by Lord Mersey and was composed of five other naval experts in marine construction and architecture.[35] It commenced May 3rd, 1912 emphasizing the question of *why* the disaster happened, rather than following the American inquiry's emphasis on *how*. Specific areas investigated were 'airtight' subdivision within the ship, lifeboat specifications, wireless telegraphy, speed regulations in the vicinity of ice and the use of searchlights. Ninety-six witnesses were called, mainly officers and crewmen from the *Titanic*, *Carpathia*, and *Californian*.[36] There was little focus on eyewitness accounts as only two passengers testified – both from first class. However, over eighty-nine days the British inquiry took far more expert testimony than the U.S. Inquiry, making it the longest and most detailed court of inquiry in British history to that date.[37] It carefully distinguished past responsibility and future recommendation. Therefore based on evidence it could only state what had occurred and propose a remedy.

Although the British Board of Trade Inquiry was widely expected to be more prudent than the flamboyant American Senatorial hearings, the British public was still anticipating an impressive exhibition. The general public was angry that an out-of-date law permitted companies to provide insufficient life-boats on the newer, larger liners. T. W. Moore, Secretary of the Merchant Service Guild summed up the general consensus: "The Board of Trade has its own views, the ship owners' views are largely based upon economical factors and naval architects have their opinions, but the practical merchant seaman is not consulted. The *Titanic* disaster is a complete substantiation of the agitation that our guild has carried on for nearly twenty years against the scheme that has precluded practical seamen from being consulted with regard to boat capacity and life-saving appliances."[38] The general consensus was that there would be little interest in finding either White Star Lines or the Board of Trade negligent.

Conrad pointedly observed in *Reflections: "*And the Admirable Inquiry goes on, punctuated by idiotic laughter, by paid-for cries of indignation from under legal wigs, bringing to light the psychology of various commercial characters too stupid to know that they are giving themselves away — an admirably laborious inquiry into facts that speak, nay shout, for themselves." Even Walter Lord in *A Night to Remember* criticized what he called the "official lie … and planned official prevarication" of the British inquiry.[39] Further evidence of collusion can be found in an article which appeared in *The Times* on February 17, 1908 regarding a speech Justice Bigham (the future Lord Mersey) gave to the Chamber of Shipping. In part, he stated those connected with the industry had to see nothing was done by legislation "or any other means which would decrease the carrying power of this great country."[40] He was advocating that members of big shipping act in the industry's sole interest at all times, even if it meant blocking proposed amendments to existing law. This was four years before he was appointed to the *Titanic Inquiry,* and reveals a definite persuasion towards protecting British shipping interests at all cost.

Lord Mersey delivered the findings of the Wreck Commission on July 30th that "the loss of the said ship was due to collision with an iceberg, brought about by the excessive speed at which the ship was being navigated."[41] Recommendations included major changes in maritime regulations to implement new safety measures such as ensuring that more lifeboats were provided, that lifeboat drills were properly carried out and that wireless equipment was installed on all passenger ships and manned around the clock. As well, an International Ice Patrol[42] was established to monitor the presence of icebergs in the North Atlantic. Maritime safety regulations were also subsequently harmonized through the International Convention for the Safety of Life at Sea (SOLAS).[43] Both measures are still in force today.

In discussing who was deemed to ultimately be responsible for the disaster, Ismay deserves special attention. He was questioned at length in both Inquiries. On Day 11 of the U.S. Hearing:

> *ISMAY:* This is a message I sent. I have not the date of it, but it was received by Mr. Franklin on April 17, 1912 at 5:20 p.m.: "Most desirable

Titanic crew aboard *Carpathia* should be returned home earliest moment possible. Suggest you hold *Cedric*, sailing her daylight Friday, unless you see any reason contrary. Propose returning in her myself. Please send outfit of clothes, including shoes, for me to *Cedric*. Have nothing of my own. Please reply. YAMSI.[44] (Ismay was apparently trying to be devious by spelling his name backwards.)

The U.S. Inquiry had commenced immediately in part because Senator Smith had allegedly been advised Ismay was coordinating this urgent departure. Smith had conferred with the Attorney General on the legality of subpoenaing British subjects. Once witnesses departed the *Carpathia* in New York and were served subpoenas, they could then be legally retained in U.S. custody. When rumors surfaced that Ismay had made further efforts to avoid appearing, he claimed that he had no intention of using legal technicalities or disputing the power of the Senate to interrogate him.[45]

Whether Ismay had behaved like a coward was another point of contention. He faced strong criticism in the U.S. that as managing director of the White Star Line his responsibility was greater than Captain Smith's and he should have been the last to leave *Titanic.* In Edwardian England his survival was held to be an anomaly in an otherwise "noble display of masculine courage."[46] Referencing how knowledgeable men had proclaimed the *Titanic* unsinkable, the *Review of Reviews* bluntly declared: "We prefer the ignorance of Senator Smith to the knowledge of Mr. Ismay."[47] This was quite a declaration for a British newspaper. On Day One of the U.S. Inquiry his actions aboard *Titanic* were discussed:

SMITH: What were the circumstances of your departure from the ship?

ISMAY: The boat was there. There was a certain number of men in the boat, and the officer called out asking if there were any more women, and there was no response, and there were no passengers left on the deck.

SMITH: There were no passengers on the deck?

ISMAY: No sir; and as the boat was in the act of being lowered away, I got into it.[48]

Again on Day 11 of the U.S. Inquiry regarding his action aboard the rescue ship:

ISMAY: Mr. Chairman, I understand that my behavior on board the *Titanic,* and subsequently on board the *Carpathia*, has been very severely criticized. I want to court the fullest inquiry, and I place myself unreservedly in the hands of yourself and any of your colleagues, to ask me any questions in regard to my conduct."

SMITH: Not desiring to be impertinent at all, but in order that I may not be charged with omitting to do my duty, I would like to know where you went after you boarded the *Carpathia,* and how you happened to go there?

ISMAY: No, sir. I think the Captain of the *Carpathia* is here, and he will probably tell you that I was never out of my room from the time I got on board the *Carpathia* until the ship docked here last night. I never moved out of the room.[49]

The Final Report of the British Inquiry also addressed the moral duty of Ismay to wait on board until the vessel foundered. The Inquiry found that after rendering assistance to many passengers he located the last boat on the starboard side actually being lowered and entered it. Therefore it was ruled that he had acted correctly for to do otherwise would simply have added him to the list of victims. Lord Mersey and Ismay were acquaintances which put the former under some suspicion when he deemed certain lines of questioning about conversations between Ismay and Anderson or Captain Smith to be non-factual and therefore inadmissible.[50]

Furthermore, on Day One of the U.S. Inquiry Ismay stated that he was a voluntary passenger but was unable to explain why witnesses claimed he had been handed an iceberg warning by Captain Smith on the Sunday before the disaster. This key action could potentially change the entire interpretation of his role onboard. If it was revealed that he had influenced Captain Smith in setting the ship's course and speed in order to set a record then limited liability laws would not apply (See Appendix I and II). This would open *Titanic's* owners IMM and White Star Lines to further litigation in American and British courts.[51] On Day 11 of the U.S. Inquiry his interactions with the Captain and *Titanic's* designer Andrews[52] were scrutinized:

SMITH: Did you yourself have opportunity to confer with Mr. Andrews during the voyage from Southampton to the place of this accident?

ISMAY: No, sir, I did not. Mr. Andrews dined with me one night. We had no conversation, really, in regard to the ship. Indeed, the only plan which Mr. Andrews submitted to me was a plan where he said he thought the writing and reading room was unnecessarily large, and he said he saw a way of putting a stateroom in the forward end of it. That was a matter which would have been taken up and thoroughly discussed after we got back to England.

SMITH: Were you in conference with the captain during this journey from Southampton?

ISMAY: I was never in the captain's room the whole voyage over, sir, and the captain was never in my room. I never had any conversation with the captain except casual conversation on the deck.

Ismay's testimony would be contradicted in the Limitation of Liability Hearing subsequently held in New York. Passengers Emily Ryerson and Elizabeth Lines both swore affidavits to hearing Ismay discuss with Captain Smith and others how the *Titanic* would surprise everyone with an early arrival and best the record of her sister ship *Olympic's* maiden run.[53]

Sir Cosmo Duff Gordon was a Scottish 5th Baronet *DL*, educated at Eton and a silver medalist in fencing at the 1906 Olympics. While he and Lady Lucille Duff Gordon were not questioned at the U.S. Inquiry, the British Inquiry was drawn into such populist issues[54] as whether the crew of Lifeboat 1 was paid a bribe to not go back and retrieve those in the water. On Day 10 Sir Duff-Gordon was asked:

Question 12584: I must ask you about the money. Had you made any promise of a present to the men in the boat? - Yes I did.

Question 12586: Yes? - There was a man sitting next to me, and of course in the dark I could see nothing of him. I never did see him, and I do not know yet who he is. I suppose it would be some time when they rested on their oars, 20 minutes or half-an-hour after the *Titanic* had sunk, a man said to me, "I suppose you have lost everything" and I said of course. He says "But you can get some more," and I said yes. "Well," he said, "we have lost all our kit and the company won't give us any more, and what is more our pay stops from tonight. All they will do is to send us back to London." So I said to them you fellows need not worry about that; I will give you a fiver each to start a new kit. That is the whole of that £5 note story.[55]

Given the Edwardian notion of decorum it was one of the more remarkable aspects of the British Inquiry to find a man of his standing facing such a charge. Like Ismay, he was vilified for surviving while so many women and children did not. He was further questioned:

Question 12533: Did it occur to you that with the room in your boat, if you could get to these people you could save some? - It is difficult to say what occurred to me. Again, I was minding my wife, and we were rather in an abnormal condition, you know. There were many things to think about, but of course it quite well occurred to one that people in the water could be saved by a boat, yes.

Question 12535: And did you hear a suggestion made that you should go back, that your boat should go back to the place whence the cries came? - No, I did not.[56]

Lord Mersey declared at the close of the hearings that while the 'Duff-Gordon Incident' was immaterial and allegations of bribery were unfounded, it was his opinion that more leadership could have been exercised by organizing a rescue effort.[57]As their social and implied moral superior Sir Duff-Gordon was deemed responsible instead of the crewmen in Lifeboat 1.

Another contentious political issue affecting the British Inquiry was that in 1912 Asquith had renewed attempts to introduce Home Rule in Ireland. This provoked fierce opposition in Ulster, particularly among Protestants who were the majority of the *Titanic* construction workforce. The countervailing political fact was that the head of Harland and Wolff, Lord Pirrie, was a Liberal Ascendancy supporter of the Bill.[58] There was general unrest throughout the country and the working classes were beginning to protest for a greater voice in government. Sections of society such as common laborers and women became increasingly politicized. The National Sailors' and Firemen's Union represented the interests of dock workers and seamen in Liverpool during a strike for minimum wage in 1911. Coal was the second largest industry in Britain and nearly all other industrial production depended on it. A strike in Wales in 1912 crippled the country and brought shipping to a halt. This resulted in the cancellation of the voyage of *Oceanic* and White Star Lines transferred passengers and coal to *Titanic*. When it struck the iceberg all attention was suddenly focused on obtaining information about survivors and the tragedy may have done more to unite the country than any strike or legislation.

There were also questions of regulatory incompetence and of shipowners' influence over British legislation and regulations, but neither Inquiry found negligence by IMM or White Star Lines.[59] Along with the Board of Trade they all had reputations to uphold – so the scapegoat became Captain Lord of the *Californian,* the boat determined to be in closest proximity to *Titanic.* Both Inquiries scorned Lord for purportedly standing by with his crew watching the emergency flares being fired by *Titanic* and not taking action until it was too late. "Such conduct," said Senator Smith, "places upon the commander of the *Californian* a grave responsibility."[60] He was further criticized for allegedly giving conflicting and evasive testimony regarding his actions and the lack of a rescue response.

Both inquiries also reached broadly similar conclusions that *Titanic* Captain Smith had failed to take proper heed of ice warnings and the collision was the direct result of steaming into a dangerous area at too high a speed. However, to protect their interests the British inquiry concluded that Smith had followed long-standing practice not previously shown to be unsafe and ruled that he had simply done what other experienced men would have done in the same position. Some concession was given with the warning that "what was a mistake in the case of the *Titanic* would without doubt be negligence in any similar case in the future."[61]

Adding to the insinuations of corruption and cover-ups, members of the British Cabinet were involved in insider trading of Marconi shares.[62] In 1911/12 the British government negotiated with the British Marconi Company to build a series of wireless transmitting and receiving stations to connect Britain's colonies. During the same period the American Marconi Company increased its capitalization with a huge issue of new shares. In April British Director G. Isaacs offered some of these new shares to his brother the Attorney General (who was to eventually conduct the Crown's *Titanic* case) and other government members, even though the shares were neither approved nor available to the public. Ten days later the shares closed at a value of roughly four times what the insiders had paid for them. Government officials claimed that what they had done was not improper because they bought shares in the American Marconi Company while negotiating a contract with its British counterpart, and no criminal convictions resulted.[63] Marconi was in no way linked to the scandal and world-wide public opinion held that he was a hero whose wireless telegraph was crucial in organizing the rescue effort that resulted in such a large number of survivors.

Although *Titanic* was officially an emigration ship, American immigration laws were not deliberated in either Inquiry. The U.S. Immigration Act of 1891[64] disqualified people with contagious diseases or criminal records, and anarchists and subversives were added to the Act in 1903 due to an increasing fear of radicals. During the nineteenth century rapid industrialization required an influx of workers, but the Dillingham Commission[65] established by President Roosevelt concluded by 1911 that immigration now posed a serious threat to American society and culture and should be greatly reduced. In part this was because immigrants were often illiterate and viewed as inferior to U.S. citizens.[66] Roosevelt's motto on the subject was "We cannot have too much immigration of the right kind, and we should have none at all of the wrong kind."[67] At the same time America was having difficulty absorbing immigrants due to the strain of maintaining services in overcrowded cities.[68] Those denied admission were returned at the expense of the company with whom they arrived at port. Although only 25% of *Titanic's* third-class passengers survived, no mention was made in the final ruling regarding possible discrimination because - despite national opinions - the Inquiry had to be careful not to publicly condemn immigrants. Many had lost their lives in the disaster while others were being returned to Europe because the male head of the family perished and surviving family members were considered destitute and therefore disqualified from entry.

Neither of the official inquiries were criminal proceedings and therefore no culpability was assigned. Paradoxically, Senator Smith's Report was decisive, comprehensive and clear cut in its findings and recommendations while Lord Mersey's Report emerged cautiously vague and full of loopholes. Prevailing political and cultural attitudes in the U.S. and Britain might also be described in these same terms. Significantly, what was not discussed in the final Reports of either Inquiry is politically revealing. In formulating their recommendations, the U.S. Senators gave Marconi and his business interests a wide berth. Constituted as a Senatorial hearing, the Committee could not be seen to be condoning Trusts. Political futures were at stake as the election approached and neither business nor national interests could be considerably upset. In their final Report the Senators could not blemish the shipbuilder's considerable reputation because as Senator Smith himself stated "for Harland & Wolff shipbuilding was both a science and a religion."[69] Remaining silent in this quarter also meant blame could not be laid on J.P. Morgan, IMM or White Star Lines. Immigration, too, was an area of sensitivity and this resulted in the U.S. Senators offering their opinion that so far as the *Titanic* was concerned White Star had been rigorous in complying with all current laws for immigration ships. This meant accountability was shifted to British authorities whose standards were deemed lax.

While the British Inquiry initially appeared more competent than its American counterpart, its comprehensiveness was called into question by contemporaries. This essay has also pointed out many of its short-comings. In delivering recommendations the main objective of the Commission was to minimize damage to the reputation of the Board of Trade, so severely had the Americans criticized it. Yet the Inquiry had to be seen as pro-active on some fronts and thus it recommended changes to the standards the Board applied to ship construction and passenger licensing practices. Marconi's business interests also had the British Commissioners weighing their words carefully, but for completely different reasons than the U.S. Inquiry. Although questioned at length at the U.S. Inquiry, Smith avoided antagonizing Marconi because he was a crucial witness with technical knowledge about wireless operations. Meanwhile, the British Inquiry had to conceal the insider trading scandal by government members.

Surprisingly, the British Inquiry did cast aspersions on individuals - several passengers along with crew members of the *Titanic* and nearby ships were criticized. The Commissioners walked a fine line when discussing White Star Lines out of sensitivity to the public reputations of Ismay and Lord Pirrie. The former was already beleaguered in the press for simply having survived the tragedy. The latter could not have been in a more strategic political place as a supporter of the Irish Home Rule Bill which the Asquith administration knew would have a rocky passage through parliament. Corporate negligence could bankrupt one of the nation's leading shipping lines, and it was imperative to avoid the loss of business and prestige to rival countries.[70]

The British Inquiry was seen as motivated to protect the industrialists who owned *Titanic* against financial loss. Interest in the tragedy and grief for the tremendous loss of life was so profound that for awhile the financial loss was less important. It was, however, the biggest loss ever suffered to that time and the subsequent ruling in the United States regarding limited liability laws greatly changed how vessels would be insured in future. While the total insurance on *Titanic* was $5 million (US), then-current laws would allow survivors to recoup only $90,000 in the U.S. and $300,000 in Britain.[71] (See Appendix II). As it was officially ruled an *act of God,* no one could be found liable.

Conclusions were therefore reached in both Inquiries that ensured only certain truths emerged. The lines of questioning pursued were important, but more significant still were the priorities of those doing the questioning. It is difficult to conclude that Lord Mersey directed the Board of Trade Inquiry in an impartial manner; rather, he emerged as anxious to save the reputation and businesses of his friends in the British shipping industry. In his political career Senator Smith was a social liberal committed to working against political lobbying on the grounds that it undermined democracy, and he was courageous in championing the rights of black Americans.[72] Although some of his questions and comments were a cartoonist's gift, Smith followed through on what he had announced was the U.S. Inquiry's "simple and plain" purpose - to gather the facts relating to this disaster while they were still vivid realities. Impugned due to his style of questioning witnesses, Smith nevertheless revealed more truth about the loss of the *Titanic* than did his ostensibly more knowledgeable counterpart, Lord Mersey. He did not carry the burden of the British establishment and his energy was indeed put to a useful purpose in serving the State.

Appendix I

Excerpts from Speech of Representative Isidor Raynor upon completion of the U.S. Inquiry:[73]

We have an old statute here that is a reenactment of an English statute, passed 175 years ago, and we have never changed it. It was passed during the reign of George II, in 1734. It was improved upon in the reign of George III, in 1786, and again in 1813. That is the limited-liability statute. The owners of the *Titanic* ... can go into the Federal courts, sue out an injunction, have a trustee appointed, and escape all liability whatever for injury to passengers, for injury to goods, or for any cause whatever. That is the statute that is now upon the statute books of the United States. It ought to be repealed or modified. When it was passed it was thought to afford an invitation to shipowners to take to the sea and risk the hazardous character of the adventure, but I apprehend there is no more danger on the sea now than there is on the land; and if these statutes are not repealed there certainly ought to be some modification of them.

The doctrine of "knowledge or privity of the owner" should be swept from the statute book, and should not be necessary in order to hold the owners to a full responsibility to prove that the negligence occurred with the privity or knowledge of the owners. There is no reason why owners of ships should not be responsible for the negligence of the crew in the same way that railroad corporations are held responsible for the negligence of their employees. Now, if you can prove the privity of the owner, you can recover, and ***the only question of privity which arises in the Titanic case is whether the presence of Mr. Ismay on board this vessel carries with it the privity and knowledge of the owner.*** You can recover full damages if you can prove privity and knowledge of the owner, but if you cannot prove the privity and knowledge of the owner, then the company is not responsible for the negligence of its crew, and all that can be recovered is the ship, if it exists, and the freight money, if it is brought into court.

The only open question in this case is whether or not the presence of Ismay on the ship makes the owners responsible. I am inclined to think his presence on the ship would not have this effect. He was one of the trustees of the line. He was one of the directors of the line. He was upon the executive committee of the line. He was chairman of the finance committee or upon the finance committee, and he was president of the line. In fact, he was almost the line itself. But, nevertheless, I doubt very much whether as a proposition of law his mere presence on the ship itself, admitting that he was not present as a passenger, would come within the Federal statute, which holds that damages can only be recovered where there is a privity or knowledge of the owner. Thus stands the law and the law ought to be changed.

For a full discussion of the law as it now stands I refer the Senate to the following cases: *Schoomaker* v. *Gilmore* (102 U.S., 118); *Richardson* v. *Harmon* (222 U.S., 96); the case of La Bourgogne (210 U.S., 97); and *Commonwealth* v. *MacLoon* (101 Mass., 1).

Appendix II

Excerpts from *Merchant Shipping Act* (1894) – Section VIII: Liability of Shipowners [57 & 58 Vic'r.]:[74]

503. (1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity, that is to say: (a) Where any loss of life or personal injury is caused to any person being carried in the ship; (b) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship; (c) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship; (d) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship; be liable to damages beyond the following amounts.

That is to say

(i) In respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods, merchandise, or other things, an aggregate amount not exceeding fifteen pounds for each ton of their ship's tonnage; and

(ii) In respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

(2) For the purposes of this section (a) The tonnage of a steam ship shall be her gross tonnage without deduction on account of engine room; and the tonnage of a sailing ship shall be her registered tonnage: Provided that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use which is certified under the regulations scheduled to this *Act* with regard thereto.

(3) The owner of every sea-going ship or share therein shall be liable in respect of every such loss of life, personal injury, loss of or damage to vessels, goods, merchandise, or things as aforesaid arising on distinct occasions to the same extent as if no other loss, injury, or damage had arisen. ■

Endnotes

[1] United States Senate Inquiry into the Sinking of the RMS Titanic. Section: Reactions. URL: https://3n.wikipedia.org.wiki/United States Senate inquiry into the sinking of the RMS Titanic

[2] Lucien Wolf. (May 4, 1912). The American Inquiry into the Titanic Disaster. *The Graphic*.

[3] *The Edwardian Era.* Edwardianpromenade.com. Para. 2. URL: http://www.edwardianpromenade.com/the-edwardian-era/

[4] *Herbert Asquith Biography.* Spartacus Educational.com. Paras. 10 and 12. URL: http://spartacus-educational.com/PRasquith.htm

[5] Passed in response to rising public concern with the growing power of corporations (especially railroads) and was designed to regulate monopolistic practices. It was one of America's most important documents because it clearly provided the right of Congress to regulate private corporations engaged in interstate commerce. See: *Gibbons* v. *Ogden,* 22 US 1, 1824. Upheld in: Supreme Court: *Munn* v. *Illinois* (1877).

[6] A landmark federal statute in anti-trust law prohibiting certain business activities federal government regulators deemed to be anti-competitive. Each case required an investigation for the courts to rule on legality based on the specific facts. Cases: *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

[7] Robber Baron was a derogatory term applied to businessmen in the 19th century who amassed enormous wealth by engaging in (often) unethical and monopolistic practices, and who also exerted widespread political influence. URL: http://history1800s.about.com/od/1800sglossary/g/Robber-Baron-definition.htm

[8] *Political party Platforms* (1912). The American Presidents Project. Section 3 – Antitrust Law. URL: http://www.presidency.ucsb.edu/ws/index.php?pid=29590

[9] R. and J. Cartwright (2011) *Titanic*. Chapter 1, p. 33

[10] G. Wemyss and M. Pyle. (2012). *When That Great Ship Went Down: The Legal and Political Repercussions of the Loss of RMS Titanic.* Bapton Books. Introduction, p. 3

[11] Richard Howells. (1999) *Atlantic crossings: Nation, class and identity in 'Titanic' (1953) and A 'Night to Remember' (1958).* Historical Journal of Film, Radio and Television. Vol. 19(4). p. 421, para. 1. URL: http://www.tandfonline.com/doi/abs/10.1080/014396899100127#.VcassW9RGM8

[12] R. and J. Cartwright. (2011). *Titanic – The Myths and Legacy of a Disaster*. The History Press Gloucestershire, UK. Chapter 1. p. 19

[13] The agreement included dividend-sharing, route-allocation, a joint committee to oversee the agreement and suspension in the event of war.

[14] V. Burton. (2013). *History 3806: Titanic Histories*. Distance course. Memorial University of Newfoundland. Week 4 Course Notes. p. 2

[15] *Toll of the Sea*. Punch Magazine (1912). Punch.photoshelter.com. URL: http://punch.photoshelter.com/image/I0000Xn9Tl3Mc1yU

[16] Thomas C. Wingfield. (1999). You Do Not Give Answers That Please Me. *American Neptune*. Vol. 59 (4). p. 269

[17] *Impact of Titanic upon International Maritime Law*. Encyclopedia-Titanica. Para. 3. URL: http://www.titanic-inquiry.org/USInq/AmInq01Indx.php

[18] *Titanic Inquiry Project. (*Under: Witnesses) TitanicInquiry.org. URL: http://www.titanicinquiry.org/USInq/AmInq01Indx.php

[19] *United States Senate inquiry into the sinking of the RMS Titanic*. Section: Report & Conclusions. URL: https://en.wikipedia.org/wiki/United_States_Senate_inquiry_into_the_sinking_of_the_RMS_Titanic

[20] John. P. Eaton and Charles A. Haas. (1994). Titanic: *Triumph and Tragedy*. Wellingborough, UK: Patrick Stephens. p. 222

[21] *United States Senate inquiry into the sinking of the RMS Titanic*. Section: Reactions URL: https://en.wikipedia.org/wiki/United_States_Senate_inquiry_into_the_sinking_of_the_RMS_Titanic

[22] Joseph Conrad. *Some Reflections on the Titanic 1912*. Para. 5 URL: http://gaslight.mtroyal.ca/contit01.htm

[23] Iain McLean and Martin Johnes. (2000) Regulation Run Mad: The Board of Trade and the Loss of the Titanic. *Public Administration*. Vol. 78 (4). p. 742, end of 2nd paragraph. URL: https://www.academia.edu/239535/Regulation_run_mad_The_Board_of_Trade_and_the_loss_of_the_Titanic

[24] A legal term for events outside of human control, such as sudden natural disasters, for which no one can be held responsible.

[25] Although not officially adopted as the motto until 1956, it was then in the 4th stanza of the Star Spangled Banner and in 1908 Congress made it mandatory that the phrase be printed on all coins upon which it had previously appeared.

[26] *United States Senate inquiry into the sinking of the RMS Titanic*. Reactions. Para. 3. *URL:* https://en.wikipedia.org/wiki/United_States_Senate_inquiry_into_the_sinking_of_the_RMS_Titanic

[27] Daniel Allen Butler. (1998). *Unsinkable: The Full Story of RMS Titanic*. Mechanicsburg, PA: Stackpole Books. p. 184

[28] Butler. (1998). *Unsinkable*. p. 185

[29] Stephanie Barczewski (2011). *Titanic: A Night Remembered*. Continuum International Publishing Group. London. pp. 68-69. A prairie schooner was a canvas-covered wagon used for long-distance travel in the 19th century. Seen from a distance it resembled a ship at sea.

[30] Joseph Conrad. Section 2, para. 1 ... Section 1, para. 4. URL: http://www.online-literature.com/conrad/notes-life-and-letters/23/

[31] Greg Ward. (2012). *The Rough Guide to the Titanic*. Rough Guides. London. p. 158

[32] Wingfield. (1999). *You Do Not Give Answers*. p. 269

[33] *Lord Mersey –– Obiter Dicta*. Encyclopedia Titanica. Para. 1 URL: http://www.encyclopedia-titanica.org/lord-mersey.html

[34] *Lord Mersey –– Obiter Dicta*. Para. 2

[35] British Wreck Commissioners Inquiry. URL: http://www.titanicinquiry.org/BOTInq/BOT01.php

[36] The *Carpathia* was a Cunard ship that arrived first on the scene and rescued all surviving passengers. The *Californian* was an IMM Leyland ship and nearer to the *Titanic* but didn't take action in time to rescue any passengers.

[37] Daniel AllenButler (1998). *Unsinkable: The Full Story of RMS Titanic*. Pennsylvania, US: Stackpole Books. p. 194

[38] *Titanic – How the World Received the News*. Section: London Newspapers Condemn Laxity of Law. Midpage. Logoi.com. URL: http://www.logoi.com/notes/titanic/how_world received news.html

[39] *RMS Titanic in Popular Culture*. Section: A Night to Remember and After. Para. 2. *URL:* http://en.m.wikipedia.org/wiki/RMS_Titanic_in_popular_culture#A_Night_to_Remember_and_after

[40] *Lord Mersey –– Obiter Dicta*. Mid-page

[41] *Titanic Inquiry Project*. British Inquiry – Report of the Court. URL: http://www.titanicinquiry.org/BOTInq/BOTReport/botRep01.php

[42] *Impact of Titanic upon International Maritime Law*. Encyclopedia-Titanica.org. Para. 17. URL: http://www.encyclopedia-titanica.org/titanic-impact-on-maritime-law.html. Established in 1914 in response to the sinking of the Titanic the U.S. Coast Guard has been responsible for operation since the end of W.W. I. The primary mission is to alert any seacraft traveling the shipping lanes between Europe and the major ports of the United States and Canada to the presence of icebergs.

[43] The SOLAS Convention in its successive forms is generally regarded as the most important of all international treaties concerning the safety of merchant ships. The main objective is to specify minimum standards for the construction, equipment and operation of ships.

[44] *RMS Cedric* was another White Star Line ship. Due to the immediate commencement of the U.S. Inquiry she eventually sailed for Britain without any survivors.

[45] *To Hold Ismay to the End*. Encyclopedia-Titanica. Section: Has Filed No Protest. URL: http://www.encyclopedia-titanica.org/to-hold-ismay-to-the-end.html

[46] *Titanic – Criticism of Ismay*. Para. one. Logoi.com URL: http://www.logoi.com/notes/titanic/criticism_ismay.html

[47] Butler (1998) p. 185

[48] U.*S. Senate Inquiry. Day 1*. Titanic Inquiry Project. Mid-page. URL: http://www.titanicinquiry.org/USInq/AmInq01Ismay01.php

[49] *U.S. Senate Inquiry. Day 1*. Titanic Inquiry Project. URL: http://www.titanicinquiry.org/USInq/AmInq01Ismay01.php

[50] Wingfield (1999). *You Do Not Give Answers*. p. 278, column 1 - final paragraph.

[51] *The Titanic Reports*. Section: Preface. Para. 9. Redandblackpublishers.com. URL: http://redandblack publishers.com/titanic_preview.html

[52] Thomas Andrews was managing director of Harland & Wolff, in charge of the design and construction of the Titanic and was on board to monitor its operation.

[53] *Limitation of Liability Hearings.* Titanic Inquiry Project. Both depositions available at URL: http://www.titanicinquiry.org/lol/depositions/depositions.php

[54] Emphasizing or promoting ordinary people, their lives and interests.

[55] *British Wreck Commission Inquiry – Day 10.* Titanic Inquiry Project. URL: http://www.titanicinquiry.org/BOTInq/BOTInq10Duff-Gordon01.php

[56] *British Wreck Commission Inquiry – Day 10.* Titanic Inquiry Project. URL: http://www.titanicinquiry.org/BOTInq/BOTInq10Duff-Gordon01.php

[57] *British Wreck Commissioner's Inquiry Report.* Titanic Inquiry Project. URL: http://www.titanicinquiry.org/BOTInq/BOTReport/botRepConduct.php

[58] J. W. Foster. (1997). *The Titanic Complex: A Cultural Manifest.* Belcouver Press: Vancouver. From: http://news.ubc.ca/ubcreports/1998/98mar19/titan.html

[59] Wemyss and Pyle. (2012). *When That Great Ship Went Down*. Chapter 1, p. 8

[60] *Steamship "Californian's" Responsibility.* Titanic Inquiry Project. Near page bottom. URL: http://www.titanicinquiry.org/USInq/USReport/AmInqRep06.php#a5

[61] *British Wreck Commissioner's Inquiry Report.* Titanic Inquiry Project. Last para. URL: http://www.titanicinquiry.org/BOTInq/BOTReport/botRepAction.php

[62] *High Tech and Market Bubbles through History*. Engineering & Technology History. Para. 2. URL: http://ethw.org/High-Tech_and_Market_Bubbles_Through History

[63] *High Tech and Market Bubbles through History*. Engineering & Technology History. Paras. 3-4. URL: http://ethw.org/High-Tech_and_Market_Bubbles_Through_History

[64] *Origins of the Federal Immigration Service.* U.S. Department of Homeland Security. Para. 1 URL: https://www.uscis.gov/history-and-genealogy/our-history/agency-history/origins-federal-immigration-service

[65] A Joint congressional committee formed to study immigration. Forty one volumes of statistics eventually provided support for limiting immigration. Further Acts were passed in 1921 & 1924.

[66] *The History of Immigration Policies in the U.S. (*Section: European Immigration). Networklobby.org. Para. 4. URL: http://www.networklobby.org/history-immigration

[67] *Papers Relating to the Foreign Relations of the United States with the Annual Message of the President Transmitted to the Congress, December 7, 190.3.* United States Department of State (Washington DC: Government Printing Office, 1904). p. xii.

[68] *Progressive Era to New Era, 1900 – 1929.* Library of Congress. Para. 3. URL: http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/progress/immigrnt/

[69] *Speech of Senator William Alden Smith.* United States Senate Inquiry Report. p. 1, para. 6 URL: http://www.titanicinquiry.org/USInq/USReport/AmInqRepSmith01.php

[70] Wingfield. (1999). *You Do Not Give Answers.* p. 277, para. 1

[71] Thomas I. Parkinson. *Problems Growing out of the Titanic Disaster*. *Proceedings of the Academy of Political Science in the City of New York*. Vol. 6 (1). p. 103. URL: http://www.jstor.org/stable/1193310?seq=7#page_scan_tab_contents

[72] *William Alden Smith, Michigan's Titanic Senator*. Section: Senator William Alden Smith is a Self-Made Senator. Para. 7. URL: http://meanderingmichiganhistory.weebly.com/william-alden-smith-michigans-titanic-senator.html

[73] *Speech of Senator Isidor Raynor.* Titanic Inquiry Project. URL: http://www.titanicinquiry.org/USInq/USReport/AmInqRepRaynor01.php

[74] *Merchant Shipping Act*. Part VIII – Liability of Shipowners. pps. 221-222. URL: http://www.legislation.gov.uk/ukpga/1894/60/pdfs/ukpga_18940060_en.pdf

Bibliography

Barczewski, S. (2011). *Titanic: A Night Remembered*. London: Continuum International Publishing Group.

Burton, V. (2013). *History 3806: Titanic Histories*. Distance course. Memorial University of Newfoundland. Week 4 course notes.

Butler, D. A. (1998). *Unsinkable: The Full Story of RMS* Titanic. Mechanicsburg, PA: Stackpole Books.

Cartwright R. and J. (2011). *Titanic – The Myths and Legacy of a Disaster*. Gloucestershire, UK: The History Press.

Eaton, J. P. and Haas, C. A. (1994). *Titanic: Triumph and Tragedy*. Wellingborough, UK: Patrick Stephens.

Foster, J.W. (1997). *The Titanic Complex: A Cultural Manifest*. Vancouver: Belcouver Press.

Howells, R. (1999). Atlantic crossings: Nation, class and identity in 'Titanic' (1953) & 'A Night to Remember' (1958). *Historical Journal of Film, Radio and Television*. Vol. 19 (4).

Lord, W. (1955). *A Night to Remember.* New York: Henry Holt and Company.

Parkinson, T.I. (1915). "Problems Growing Out of the Titanic Disaster." Proceedings of the Academy of Political Science in the City of New York. *The Academy of Political Science*. Vol. 6 (1). pp. 97 – 112.

McLean, I. and Johnes, M. (2000) Regulation Run Mad: The Board of Trade and the Loss of Titanic. *Public Administration*. Vol. 78 (4). p. 729–749.

Wemyss, G and Pyle M. (2012). *When That Great Ship Went Down: The Legal and Political Repercussions of the Loss of RMS Titanic*. Wiltshire: Bapton Books.

Wingfield, T. C. (1999). You Do Not Give Answers That Please Me. *American Neptune*. Vol. 59 (4).

The Maintenance of Power Structures and *Citizens United* v. *Federal Election Commission*

Claire Davis

Law and Society 4000: Multidisciplinary Perspectives on Law and Society

In 2010, the Supreme Court of the United States decided in *Citizens United v. Federal Election Commission (FEC)* that the law restricting corporations from making "electioneering communications" was unconstitutional, as it restricted corporations from using their First Amendment Freedom of Speech rights.[1] As a result, corporations, although still not allowed to contribute directly to a campaign, may now donate unlimited sums of money to independent political activities including films, advertisements and political action committees (PACs). The decision to remove these restrictions on corporate freedom of speech goes against prior legislation such as the 1907 *Tillman Act*. Some, including the majority of Supreme Court judges, believe that this decision allows the purpose of freedom of speech—to create a marketplace of ideas to ultimately find the truth or simply "better"—to be realized. Others argue that corporations have an unfair level of influence that will overpower the voices of individuals and dominate any discourse. Multiple perspectives would agree with the latter argument: from a Marxist perspective, this decision is congruent with the capitalist goal of keeping the wealthy elites in power using the law; in fact, from any perspective that criticizes the law for being a vehicle of inequality, such as Critical Race Theory or Feminist Legal Theory, this could arguably be a way to maintain the preexisting power dynamic, as elites in corporations are generally white men; from a liberal egalitarian perspective such as Ronald Dworkin's, corporations should not have full freedom of speech in the political arena because they then have an unequal level of influence. Its impact will be that for-profit corporations with potentially self-serving motives will have a louder voice in the democratic process than will individuals, especially through the creation of super PACs. One of the biggest concerns with this is that it may lead, intentionally or not, to corporations buying influence.

The Supreme Court decided in this case that electioneering communications made by corporations are protected by the First Amendment right to freedom of speech.[2] Electioneering communications, as defined in the *Bipartisan Campaign Reform Act* of 2002, are publicly broadcasted advertisements that "refer to a clearly identified candidate for federal office" within time frames ranging from 30 to 60 days.[3] Previous decisions such as *Austin* v. *United States* (1993) and *Buckey* v. *Valeo* (1976)[4] had reinforced the limit on corporate First Amendment rights related to corporate speech in political campaigns; the goal with these restrictions was "to avoid corruption or the appearance of corruption."[5] The Supreme Court reversed those limits in *Citizens United v. FEC* because "corporations and unions are composed of citizens who hold First Amendment rights"[6] and the objective of the restrictions was, in their view, not significant enough to justify infringing the right to freedom of speech.[7]

This decision means that corporations and unions can independently finance electioneering communications to help or hinder a candidate with no restrictions on how much they can spend. This and subsequent regulations have led to the creation of Super PACs, which are political action committees funded by these now-limitless donations. The defense for this is that corporations and unions are still not permitted to contribute directly to a campaign,[8] so they cannot coordinate the spending of these finances with the candidate's official campaign. The rationale for this is that the money being spent would be used to promote a political cause or message and not the election of a candidate. Since these regulations were made in the *Tillman Act* of 1907, groups including corporations and unions have been creating ads independently of the official campaigns they support[9] and the accusation that a candidate or campaign is coordinating with donors comes up frequently.[10] This demonstrates that "businesses will not wait for full access to First Amendment rights to have their say in the political arena."[11] Furthermore, indirect contributions will probably be looked upon just as favorably as direct contributions. These historical manipulations of technicalities may make the regulation of corporate influence in elections seem hopeless, but the objective of avoiding corruption should not be abandoned just because it seems difficult.

The result of this case was achieved because the majority believed that a for-profit corporation should have the same First Amendment free speech rights as a natural person.[12] The treatment of "corporations as persons" has been discussed in prior cases and is taken for granted, as demonstrated in *Santa Clara* v. *Southern Pacific Railroad* in 1886 when the Supreme Court declared that it would not hear arguments on whether constitutional rights extended to corporations as if they were human beings because, as one judge stated, "we are all of the opinion that [they do]."[13] Over time, the reasoning behind this presumption has shifted: first, corporations were given the same rights as individ-

uals because they were comprised of individuals, which is faulty reasoning because not every stakeholder in one corporation will necessarily want to endorse the same message, especially as corporations evolve into mega-corporations. Then, corporations were treated as a "natural entity" and "placed…on the same plane as a natural person."[14] Neither of these rationales were discussed in the decision in *Citizens United v. Federal Election Commission*, but the entire issue of corporate influence would be nonexistent if their right to free speech was scrutinized. Although this could be the heart of the issue, Justice Stevens was the only one who acknowledged—in his dissenting opinion—that corporations are very clearly different from human beings.[15]

One argument for allowing corporations the same rights as individuals is that businesses represent a significant economic sector of the population. One of the obvious problems with allowing corporations to have the same status as natural persons is, as the court stated, because corporations are comprised of individuals. The problem with this, as acknowledged within the decision, is that the decision to donate corporate funds to a campaign is made by individuals who already have the right to donate and persuade. As a result, the individuals who control corporations have the opportunity to contribute twice to a campaign. In this way, people who have power over corporations—whom Marx would classify as elites, and in common vernacular may be referred to as top earners—have more than one voice. This is a setback in the path towards equality, and although American history has been no stranger to inequality, the value is present: evidence of it can be found in the Fourteenth Amendment, which provides "equal protection of the laws,"[16] and has been exercised in cases such as *Brown v. Board of Education* when it was decided that segregated public schools were unconstitutional on the basis that they did not provide this equal protection.[17]

There are two significant negative repercussions to allowing corporations to spend as much as they want on election ads. First, corporations can spend money to put candidates or issues on air, which makes the candidates familiar, and familiarity is a large part of electability; buying "voter recognition" is necessary to "nonincumbents."[18] Canadian regulations avoid this problem by regulating the amount of time candidates and parties and their advertisements have on air, especially in relation to one another, so that each party has the same opportunity to broadcast.[19] The United States is far less regulated. With that being said, those who spend the most do not necessarily win, and perhaps the government trusts Americans to engage in the political process beyond just watching ads, which means that the risk of familiarity winning elections is relatively low.

The larger concern with allowing corporations to spend limitlessly on election ads, as acknowledged by the minority, is that corporate spending may buy influence. President Obama notably raised this concern after the decision, stating that it was a "vote to allow corporate and special interest takeovers of our elections," and the result would be "damaging to our democracy."[20] Corporate donations may work as "investments," with the expectation of "political benefits and unequal attempts to influence legislation."[21]

This decision is significant for Anglo-American society because, as Justices Kennedy and Scalia noted, it shifts the protection of freedom of speech to "particular forms of speech…rather than the source of that speech,"[22] although this perception comes with problems. As they stated, the Government should not favor some speakers over others.[23] This is congruent with J.S. Mill's ideas of free speech wherein the merit or truth of the content being expressed will allow it to dominate inferior ideas. However, this "marketplace of ideas" concept is incongruent with reality and benefits those already in power.[24] First, it presumes that there is an objectively universal "better/best"—for example, a better or best message, candidate or cause. This requires the presumption that there are things such as messages, candidates and causes from which all American people—people of diverse backgrounds and classes—can benefit. However, ideas that seem obviously better are often shouted down in this marketplace. For example, universal healthcare, which seems universally beneficial and could provide for a greater degree of equality, and which is quantifiably a better system than private healthcare,[25] has historically been dismissed in the United States. This demonstrates that the very premise behind the marketplace of ideas—that any idea can benefit everyone—is flawed, because even ideas structured to benefit everyone are unfavorable to enough people to be shouted down.

Furthermore, this conception of free speech is, as noted above, is structured to benefit top earners, or at least to maintain the *status quo*.[26] Using campaign contributions as an example, it is apparent that the wealthy can "inundate the marketplace with their message, and thereby block out fair perception of the positions" of those less wealthy.[27] This argument would be supported by any theory critical of power dynamics and the law's reinforcement of them, including Marxism, but also Critical Race Theory and Feminist Legal Theory. Critical Racial Theory argues that the law reinforces pre-existing power dynamics to keep white people in power. Race impacts income and wealth, and income and wealth—manifested as corporations—create policy by using the platform that they can afford. In this way, minorities are largely excluded from corporate influence. According to statistics from 2012, 14.2% of the population of the United States was black while 0.8% of Fortune 500 companies had black CEOs.[28] The decision to favour the message instead of the source means that sectors are unrepresented. Not only are minorities excluded from these visible platforms, but the sectors that can use them are

unrepresentative of the American people: in 2014, 96% of Fortune 500 CEOs were white, and boards of directors were generally 86.7% white.[29] This lens of inequality can also be applied through a Feminist Legal Theory lens, as in 2014, 4.8% of Fortune 500 executives were women, meaning that the people with the most power to contribute to campaigns were extremely unrepresentative of the American population along many lines.

This decision is also counter to conceptions of liberal egalitarianism such as that of Ronald Dworkin. Democratic egalitarianism requires democratic deliberation, popular sovereignty and citizen equality.[30] An egalitarian perspective would conceive of the agenda-setting ability of corporations as damaging to the process of deliberation required in democracy, as citizens are exposed to issues that corporations pay to exhibit through print and broadcast media and advertisements. This argument may underestimate the average American's convictions and initiatives, but it would be naïve to believe that most political information comes from sources beyond print and broadcast media and advertisements. The egalitarian perspective would also, like the other theories mentioned, purport that this leads to the powerful having a louder voice, which does not lead to true popular sovereignty or equality.

The decision to allow corporations to fund electioneering communications without limits has led to significant changes in spending on campaigns, but, as seen in the 2012 race between Obama and Mitt Romney, the amount of dollars spent on an election does not ensure victory. With that being said, this decision has given corporations significant agenda-setting capabilities and could lead to buying influence once a candidate takes office. According to several legal theories such as Marxism, Critical Race Theory and Feminist Legal Theory, this decision functions to keep the elites in power. Furthermore, it goes against Dworkin's conception of liberal egalitarianism. Ultimately, to reiterate President Obama's message, this was the wrong decision. ■

Endnotes

1 Federal Election Commission, "Campaign Finance Law Quick Reference for Reporters," http://www.fec.gov/press/bkgnd/bcra_overview.shtml#Electioneering%20Communications%20(Issue%20Ads) (accessed 10 March 2015).

2 *Citizens United* v. *Federal Election Commission,* 558 U.S. (2010).

3 Federal Election Commission, "Campaign Finance Law Quick Reference for Reporters."

4 Stanley Ingbar, "The Marketplace of Ideas: A Legitimizing Myth," *Duke Law Journal*, #1 (1984): 65.

5 Stephen A. Yoder, "Legislative Intervention in Corporate Governance is Not a Necessary Response to *Citizens United v. Federal Election Commission*," *Journal of Law and Commerce* 29, no.1 (2010): 3.

6 Craig R. Smith, "The Evolution of *Citizens United v. Federal Election Commission,*" *Free Speech Yearbook* 45(1) (2011): 132

7 Yoder, "Legislative Intervention in Corporate Governance," 3; Smith, "The Evolution of *Citizens United* v. *Federal Election Commission,*" 131.

8 Smith, "The Evolution of *Citizens United* v. *Federal Election Commission,*": 132

9 Yoder, "Legislative Intervention in Corporate Governance," 2.

10 Blumenthal, Paul. "How Super PACs and Campaigns are Coordinating in 2016." *Huffington Post*. 2015.

11 Randall P. Bezanson, *Too Much Free Speech?* (2012): 63.

[12] Karl A. Boedecker, "Corporate Speech and the Problem of Corporate Personality in *Citizens United v. Federal Election Commission*." *Journal of Legal, Ethical and Regulatory Issues* 17, no. 1 (2014): 38.

[13] Karl A. Boedecker, "Corporate Speech and the Problem of Corporate Personality in *Citizens United v. Federal Election Commission*." *Journal of Legal, Ethical and Regulatory Issues* 17, no. 1 (2014): 41.

[14] *Ibid.,* 42

[15] *Ibid.*

[16] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

[17] *Ibid.*

[18] Gary C. Jacobson, "The Effects of Campaign Spending in Congressional Elections." *The American Political Science Review*, 72 no. 1. (1978): 469.

[19] http://www.crtc.gc.ca/eng/television/publicit/pol.htm

[20] Bezanson, *Too Much Free Speech?:* 7.

[21] Pierre-Yves Néron, "Rethinking the Ethics of Corporate Political Activities in a Post *Citizens United* Era: Political Equality, Corporate Citizenship and Market Failures," *Journal of Business Ethics*, (2015): 5.

[22] Boedecker, "Corporate Speech and the Problem of Corporate Personality," 38.

[23] *Ibid.,* 38

[24] Stanley Ingbar, "The Marketplace of Ideas: A Legitimizing Myth," *Duke Law Journal* #1 (1984): 1.

[25] http://www.economist.com/blogs/democracyinamerica/2009/10/universal_health_insurance_is

[26] Stanley Ingbar, "The Marketplace of Ideas: A Legitimizing Myth," *Duke Law Journal*, #1 (1984): 67.

[27] *Ibid.,* 66.

[28] Jillian Berman, "Soon, Not Even 1 Percent of Fortune 500 Companies will have Black CEOs," *Huffington Post*, 2 February 2015; Signe-Mary McKernan, Caroline Ratcliffe, Eugene Steuerle and Sisi Zhang, "Less than Equal: Racial Disparities in Wealth Accumulation," *Urban Institute* (2013) (Accessed 10 March 2016 at https://fortunedotcom.files. wordpress.com/2014/02/412802-less-than-equal-racial-disparities-in-wealth-accumulation.pdf).

[29] Claire Zillman, "Microsoft's new CEO: One minority exec in a sea of white," *Fortune*, 4 February 2016.

[30] Pierre-Yves Néron, "Rethinking the Ethics of Corporate Political Activities in a Post *Citizens United* Era: Political Equality, Corporate Citizenship and Market Failures," *Journal of Business Ethics*, (2015): 4.

References

Berman, Jillian. "Soon, Not Even 1 Percent of Fortune 500 Companies Will Have Black. CEOs." *Huffington Post*, (2 February 2015): http://www.huffingtonpost.com/2015/01/29/black-ceos-fortune-500_n_6572074.html.

Bezanson, Randall P. *Too Much Free Speech?* (2012): Chicago, University of Illinois Press.

Blumenthal, Paul. "How Super PACs and Campaigns are Coordinating in 2016." *Huffington Post*. 2015. http://www.huffingtonpost.com/entry/super-pac-coordination_us_56463f85e4b045bf3def0273.

Boedecker, Karl A. "Corporate Speech and the Problem of Corporate Personality in *Citizens United v. Federal Election Commission*." *Journal of Legal, Ethical and Regulatory Issues* 17, no. 1 (2014): 37-50.

Citizens United v. Federal Election Commission. 558 U.S. (2010).

Federal Election Commission. "Campaign Finance Law Quick Reference for Reporters." http://www.fec.gov/press/bkgnd/bcra_overview.shtml#Electioneering%20Communications%20(Issue%20Ads) (accessed 10 March 2015).

Ingber, Stanley. "The Marketplace of Ideas: A Legitimizing Myth." *Duke Law Journal*, no. 1 (1984): 1-92.

Jacobson, Gary C. "The Effects of Campaign Spending in Congressional Elections." *The American Political Science Review* 72, no. 2 (June 1978): 469-491.

McKernan, Signe-Mary, Ratcliffe, Caroline, Steuerle, Eugene, Zhang, Sisi. "Less than Equal: Racial Disparities in Wealth Accumulation." *Urban Institute* (2013).

Néron, Pierre-Yves. "Rethinking the Ethics of Corporate Political Activities in a Post *Citizens United* Era: Political Equality, Corporate Citizenship and Market Failures." *Journal of Business Ethics*, (2015).

Smith, Craig R. "The Evolution of *Citizens United* v. *Federal Election Commission*." *Free Speech Yearbook* 45, no. 1 (2011): 131-140.

Yoder, Stephen A. "Legislative Intervention in Corporate Governance is Not a Necessary Response to *Citizens United* v. *Federal Election Commission*." *Journal of Law and Commerce* 29, no.1 (2010): 1-24.

Zillman, Claire. "Microsoft's new CEO: One minority exec in a sea of white." *Fortune*. (4 February 2014).

Protecting Canadian *Charter* Rights: Difficulties with Comprehension of the Police Caution

Jenna Hawkins

Law and Society 1000: Law, Democracy and Social Justice

Our most foundational rights as Canadians – democratic rights, equality rights, language rights and legal rights – are outlined in the *Charter of Rights and Freedoms* (Jones, 2016). To ensure a fair and just judicial system, it is of the utmost importance to guard against violations of an individual's rights (McCormack & Bueckert, 2013). Scholars have explored issues with legal rights in criminal cases, specifically the rights of detained persons. For example, the Right-to-Silence and the Right-to-Counsel ensures that detained persons are protected from self-incrimination and other vulnerabilities during police interviews (Currie, 2004). However, literature suggests that there are a number of barriers to that may impede how detained persons exercise those rights, including a lack of comprehension of their rights. This paper will explore issues with comprehension of the police caution among detained persons, especially for people who have additional vulnerabilities, including youth, individuals with intellectual disabilities, and those of minority groups and different cultural backgrounds.

This paper will begin by offering a brief description of the Canadian *Charter of Rights and Freedoms*, with particular focus on the legal rights of a Right-to-Silence and Right-to-Counsel. Drawing on important court cases, the practice of informing detainees of these rights is discussed. Next, literature on issues of comprehension of the police caution is examined, and it is argued that the lack of understanding on the part of suspects and the general public is a serious problem in ensuring a fair judicial process in criminal cases. Implications of limited comprehension of the police caution are discussed, including problems with protecting detained persons, and admissibility of evidence. Lastly, recommendations for improving comprehension of the police caution are offered, in order to improve protection of these important *Charter* rights for Canadians.

Charter Rights

Under the *Constitution Act 1982*, the Canadian *Charter of Rights and Freedoms* outlines citizens' rights and freedoms. Many of these rights reflect what it is to be Canadian. For example, Section 2 of the *Charter* outlines fundamental freedoms, including (a) religion, (b) beliefs, the press, and expression, (c) peaceful assembly, (d) and freedom of association. Sections 3-5 detail democratic rights, such as the right to vote and limits to legislative assembly duration; Section 6 covers mobility rights which govern how Canadians can move around within and outside of the country (Jones, 2016; McCormack & Beuckert, 2013). The *Charter* also provides for language rights under Section 16-22, and equality rights (Section 15), including freedom from discrimination on the basis of sex, race, ethnicity, etc., and language rights.

Canadians also have a variety of legal rights, which are essential to the protection of accused persons and the proper functioning of the criminal justice system. Within the *Charter*, Sections 7-14 outline these legal rights. For example, Section 7 of the *Charter* outlines the right to life, liberty and security of the person. Canadians are entitled to have a reasonable expectation of privacy/protection from unreasonable search and seizure (Section 8), and freedom from arbitrary detention and imprisonment (Section 9). The *Charter* outlines the right to legal counsel and the guarantee of *habeas corpus* (Section 10), the right to be presumed innocent until proven guilty (Section 11), the right to not be subject to cruel and unusual punishment (Section 12). As well, Section 13 details the rights against self-incrimination, and Section 14 the right to an interpreter in a court proceeding (McCormack & Beuckert, 2013).

For detained persons in criminal investigations, such legal rights are very important. Specifically, the Right-to-Silence and Right-to-Counsel have received a great deal of attention, and case law has clarified how individuals are afforded these rights. First, the Right-to-Silence is contained with Section 7 of the *Charter*, noted above. In terms of case precedent, the case of *R.* v. *Hebert*, the Supreme Court of Canada ruled that Section 7 includes the Right-to-Silence while detained and during police interrogation (Perigoe, 2009). Detainees have a choice regarding whether or not to speak to police, and police cannot interfere with this right through the use of intimation, coercion, promises or threats (Currie, 2004). Second, the Right-to-Counsel is contained within Section 10(b) of the *Charter*: "Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right" (McCormack & Beuckert, 2013). Suspects who are detained or arrested are entitled to speak to a lawyer prior to police questioning.

Individuals who are under arrest/detention are informed of their Right-to-Silence and Right-to-Counsel by the 'police caution' (Snook, Eastwood, & MacDonald, 2010). Police cautions

may vary slightly in format across different police agencies in Canada, but cover the same content. An example of a police caution in Ontario reads like this:

> "I am arresting you for [X offence]. First of all, you have the right to retain and instruct counsel without delay. You have the right to telephone a lawyer if you wish. You also have the right to free advice from a legal aid lawyer. If you are charged with an offence, you may apply to the Ontario Legal Aid Plan for assistance. 1-800-265-0451 is a number that will put you in contact with a legal aid duty counsel lawyer for free legal advice right now. Do you understand? Do you wish to call a lawyer now? Secondly, you are charged with [X offence]. You have the right to remain silent. This means that you don't have to say anything you don't want to. If you do say anything, whatever you say can be used against you in a court. If you refuse to say anything, your refusal cannot be used against you in court. Do you want to say anything about the charge?" (Davis, Fitzsimmons, & Moore, 2011, p. 93).

Detainees must be informed of their Right-to-Silence and Right-to-Counsel in order to ensure that anything they say to police is voluntary, and that any statements are admissible in court (Chaulk, Eastwood, & Snook, 2014).

Police responsibility for informing arrested/detained suspects of these rights was clarified in the case of *R.* v. *Brydges* (1990), in which Justice Lamer of the Supreme Court of Canada asserted:

> "…the right to retain and instruct counsel, in modern Canadian society, has come to mean more than the right to retain a lawyer privately. It now also means the right to have access to counsel free of charge where the accused meets certain financial criteria set up by the provincial legal aid plan, and the right to have access to immediate, although temporary, advice from duty counsel irrespective of financial status. These considerations, therefore, lead me to the conclusion that as part of the information component of s. 10(b) of the *Charter*, a detainee should be informed of the existence and availability of the applicable systems of duty counsel and Legal Aid in the jurisdiction, in order to give the detainee a full understanding of the right to retain and instruct counsel" (Government of Canada Department of Justice, 2015)

R. v. *Brydges* (1990) obligated police to inform suspects detained of their right to instruct counsel and about legal aid services available to them. Access to immediate duty counsel "is an important mechanism for the exercise of the right against self-incrimination" (Currie, 2004, p. 196). The courts have ruled that information on duty counsel and Legal Aid be provided, such that Canadians can invoke their right to legal counsel more easily if they so desire.

Similarly, in the case of *R.* v. *Bartle* (1994) 3 SCR 173 (SCC), the court clarified questions of facilitating a detainee's access to legal counsel. In *R.* v. *Bartle* (1994), the complainant Bartle made an appeal based on an allegation that he did not understand his right to instruct counsel. In this case, Bartle was pulled over while driving and was suspected of being impaired. Hewas given a breathalyser test, which he failed, and was then taken to the local police station. Bartle was read his Rights and Caution, but did not mention immediate access to duty counsel, nor provide the contact information for Legal Aid. While the Trial judge found no infringement on Bartle's *Charter* rights, and that the police had no obligation to provide such information, the Ontario Court of Justice overturned this decision, finding that Bartle's *Charter* rights were infringed upon and there is a duty to provide this information to detainees (*R.* v. *Bartle*, 1994). Ultimately, based on case law, the Right-to-Counsel in Canada includes there are four basic rights: (1) Retain and instruct counsel without delay, (2) Access temporary and immediate duty counsel, (3) Obtain basic information on how to access legal services (e.g., a toll free phone number to duty counsel), and (4) Access free legal counsel if eligible for legal aid (Snook, Eastwood, & MacDonald, 2010).

Evidently, court rulings have dictated that measures be taken by police to ensurethat detainees can actually invoke their rights, especially the Right-to-Counsel, if they desire. Ensuring that detainees are provided information about the availability of duty counsel and legal aid is one way that court rulings have attempted to further protect these *Charter* rights. Accused persons must understand their option to speak with a lawyer, and must be provided with the tools to do so (e.g., a telephone, a telephone number, privacy, contact information for duty counsel, contact information for Legal Aid). Ideally, this would facilitate a process whereby the accused person makes an informed decision regarding whether or not to instruct counsel. However, matters may be more complex than simply relaying information on the individual's Right-to-Silence and Right-to-Counsel. Recent scholarship has suggested that detainees *may not fully comprehend their legal rights* when read to them in the police caution.

Comprehending Rights

There are important considerations with regard to delivering legal rights and ensuring that suspects understand and fully comprehend their rights. As Currie (2004) aptly put it, there are two different objectives here that may be in contrast to one another in practice: "One is meeting a constitutional requirement; the other is providing substantive assis-

tance" (p. 197). That is, when the police caution is delivered and suspects are told about their Right-to-Silence and Right-to-Counsel, is access to these rights being facilitated, or are we merely checking a '*Charter* box'?

In the case of *R.* v. *Evans* (1991) 63 (3d) 289 (S.C.C.), the Supreme Court of Canada examined the level of understanding that the defendant Evans had of his rights based on the police caution delivered to him, as he had an IQ level of 60-80, which is considered low. The police caution was given to him, and he proceeded to a police interview. In the interview, Evans confessed to two murders. The courts found the Evans' *Charter* right to instruct legal counsel was infringed upon, because he did not understand what the police caution meant. In the majority decision, Judge McLachlinof the Supreme Court of Canada explained:

> "… A person who does not understand his or her right cannot be expected to assert it. The purpose of s. 10(b) is to require the police to *communicate* the Right-to-Counsel to the detainee. In most cases one can infer from the circumstances that the accused understands what he has been told. In such cases, the police are required to go no further (unless the detainee indicates a desire to retain counsel, in which case they must comply with the second and third duties set out above). But where, as here, there is a positive indication that the accused does not understand his Right-to-Counsel, the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding" (*R.* v. *Evans*, 1991).

As the case of *R.* v. *Evans* (1991) demonstrates, there are matters – such as IQ level – that must be considered when informing a suspect of their Right-to-Silence and Right-to-Counsel. Based on *R.* v. *Evans* (1991), the police have a duty to ensure that the accused person does understand their rights, which may not be achieved by simply reading and repeating the police caution.

There has been research exploring comprehension of police caution in recent years, in Canada and other jurisdictions. Importantly, recent literature suggests that the general population and the majority of suspects in police custody may lack comprehension of the police caution (Eastwood, Snook, & MacDonald, 2011). When suspects do not understand their rights, they may not make informed decisions regarding invoking those rights. Subsequently, suspects may not assert their Right-to-Silence or Right-to-Counsel, and become more vulnerable within the criminal justice system. This can seriously impede the fairness of the judicial process, may lead to the lack of protection for suspects, and may yield negative outcomes in court.

In an experimental study in Canada by Eastwood and Snook (2010), the researchers explored the level of comprehension among 54 university students when given the Right-to-Silence and Right-to-Counsel cautions. Just 4% of participants fully understood the Right-to-Silence, and 7% fully understood the Right-to-Counsel.The researchers argue that the complex grammatical structures of the sentences within the police caution results in a lack of comprehension (Eastwood & Snook, 2010). Notably, in this experimental study, participants have university-level education and therefore relatively high literacy rates. They also were not undergoing the actual stress involved with an encounter with police. As such, comprehension rates were likely higher in this study than in the general population and among suspects (Eastwood & Snook, 2010). As well, a study by Chaulk, Eastwood and Snook (2014) found low rates of comprehension amongsuspects. Focusing on 60 adult offenders in custody of the RCMP, the researchers looked at both the Right-to-Silence and Right-to-Counsel comprehension. They found that the offenders understood approximately 30% of their rights as they were given through the police caution (Chaulk, Eastwood, & Snook, 2014).

In another research endeavour, Snook, Eastwood and MacDonald (2010) explored detainees' comprehension of the Right-to-Silence and Right-to-Counsel cautions provided by police in Canada. For this study, the researchers analyzed video and audio recordings from 126 police interviews conducted in Atlantic Canada. The findings suggest that Right-to-Silence caution was administered in 87% of the interviews, and the Right-to-Counsel caution was administered 83% of the time (Snook, Eastwood, & MacDonald, 2014). The researchers found that suspects invoked their rights rarely: Suspects invoked Right-to-Silence 25% of the time and Right-to-Counsel in 31% of the cases. The authors suggest that the low levels of asserting these rights likely results from a lack of comprehension and understanding of the rights and the judicial process more broadly. The researchers questioned whether comprehension could be related to the rate of speech at which the police caution is delivered. They suggest that the upper range of speech rate that is acceptable is between 150-200 words per minute, and that a rapid reduction in comprehension occurs above this limit. In their study, they found that the Right-to-Silence caution was delivered at a rate 31% faster than the upper limit, and the Right the Counsel caution was delivered at a rate of just 2% faster than the upper limit (Snook, Eastwood, & MacDonald, 2010). As such, rate of speech may have an impact, especially for the Right-to-Silence caution. The authors argue that because Canadian offenders typically have low literacy rates and a high frequency of learning disabilities, it is imperative that efforts be taken to ensure suspects truly comprehend their rights and caution (Snook, Eastwood, & MacDonald, 2010).

The wider literature suggests that the same issues with understanding police cautions exist elsewhere as well, including the United States and the United Kingdom (Pattenden, 2012; Perigoe, 2009). In a study in England and Wales, researchers Fenner, Gudjonsson, Clare (2002) tested comprehension of the police caution among 30 police suspects and a control group of 24 individuals. Their findings suggest that both groups have very limited understanding of the police caution. Fenner, Gudjonsson and Clare (2002) also found that individuals who have repeated contact with the criminal justice system are not necessarily more familiar with the police caution, and that this does not have an impact on comprehension. This finding indicates that simply reading and repeating the police caution, as it stands, does not facilitate greater understanding. Importantly, 96% of the participants in this study claimed they *did* understand the caution (Fenner, Gudjonsson, & Clare, 2002). Other studies have had similar findings, and researchers have theorized about why suspects falsely affirm an understanding of their rights. Snook, Eastwood and MacDonald (2012) suggest that suspects may indicate an understanding because they are embarrassed to admit they do not understand, or because they want to avoid a longer process or interaction with police. Chaulk, Eastwood and Snook (2014) also point to the power differential between police and the detainee, which may encourage suspects to agree with police regardless of their understanding.

The literature suggests similar finding of limited comprehension in studies of the *public's* understanding of the police caution, as well. In a study in the United Kingdom by Hughes, Bain, Gilchrist, and Boyle (2013), researchers explored comprehension of the police caution among the general population. Of the 60 participants, researchers found that 5% demonstrated full understanding of the police caution when delivered verbally. Interestingly, and in contrast, when the caution was in written format, comprehension rates were much higher at 40% (Hughes et al., 2013). The researchers argue that the verbal delivery of the police caution puts a high memory workload on the listener, which limits their overall comprehension (Hughes et al., 2013).

Comprehension among Vulnerable Populations

Issues with comprehension are exacerbated for particularly vulnerable groups, such as youth, individuals with low intellectual abilities, and individuals who do not speak the same language or who have different cultural backgrounds, including immigrants and aboriginal people. For example, in a study in Toronto, Canada, researchers Peterson-Badali, Abramovitch, Koegl, and Ruck (1999) studied how youth (n = 50) involved in the criminal justice system understood the Right-to-Silence and Right-to-Counsel. The authors found that awareness among youth of due process is not sufficient, and that young people do not adequately understand their legal rights (Peterson-Badali et al., 1999, p. 457). They suggest that for youth, police practices and an intimidating police station environment further reduced the likelihood that they will assert their rights. The authors therefore question whether youth are making truly informed and voluntary decisions about invoking their *Charter* rights in this regard (Peterson-Badali et al., 1999).

Literature also suggests that recent immigrants to Canada may face similar *additional* barriers in comprehension. Specifically, the lack of familiarity with the Canadian legal system, and difficulties with legal language, may result in a lack of understanding about their rights (Currie, 2004). Similar issues have been reported in research on comprehension among aboriginal people. Having different cultural backgrounds, aboriginal people may have challenges fully comprehending their legal rights as explained to them using technical language in the police caution (Currie, 2004).

As mentioned above in reference to the *R.* v. *Evans* (1991) case, individuals with lower intellectual abilities often do not fully understand their rights. Researchers Fenner, Gudjonsson and Clare (2002) found that the intellectual ability is key in understanding content within the caution; those with lower IQ have significantly lower comprehension (Fenner, Gudjonsson, & Clare, 2002). Individuals with low literacy levels, and those with learning disabilities, may also have greater difficulties in understanding the police caution in Canada (Snook, Eastwood, & MacDonald, 2010).

Implications of Limited Comprehension

Failure to ensure that a suspects understand the Right-to-Silence and Right-to-Counsel may have a variety of negative consequences. From a police perspective, the most significant outcome of violating these *Charter* rights is that statements may be inadmissible in court (Fenner, Gudjonsson, & Clare, 2002). Under Section 24(2) of the *Charter*, "evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute" (Fenner, Gudjonsson, & Clare, 2002, p. 513). If it can be proved that the accused was not adequately informed of their Right-to-Silence and Right-to-Counsel, or that there were issues with their comprehension of those rights, evidence may be ruled inadmissible in court. For example, the case of *R.* v. *Evans* (1991) Supreme Court of Canada, mentioned above, illustrates the significance of violating a suspect's *Charter* rights. In this case, the suspect's confession to murder was ruled inadmissible in court because the suspect was found to not fully comprehend their rights as outlined in the police caution. There is a risk of guilty individuals being acquitted on the basis of a *Charter* right violation, if their lack of comprehension is demonstrated in court.

As importantly, and perhaps more likely, a lack of comprehension of one's rights to silence and legal counsel may

result in detainees not making informed decisions about their situation, and suspects becoming vulnerable in the criminal justice system (Currie, 2004; Ferrer, Gudjonsson, & Clare, 2002). As described above, literature suggests that even when individuals do not comprehend the police caution, the vast majority confirm that they do. Snook, Eastwood and MacDonald (2010) suggest that individuals may indicate that they have understood their Right-to-Silence and Right-to-Counsel even when they have not, because they are embarrassed, or they do not want to cause more frustration to the police, and/or they want to move the interview process along more quickly. Suspects who waive their Right-to-Silence and Right-to-Counsel may become vulnerable to police questioning, and ultimately not have the protection-they are entitled to (Currie, 2004).

Recommendations

The lack of comprehension of the Right-to-Silence and the Right-to-Counsel among the public and among suspects must be addressed. There is a need for public education and awareness on legal rights, such that when individuals interact with the criminal justice system they are better equipped to make decisions on exercising those rights. More than this, it may be pertinent to include additional mechanisms to truly facilitate comprehension of the police caution, especially for vulnerable groups. Fenner, Gudjonsson, and Clare (2002) argue that the material within the police caution is just too complex. Moreover, they argue that the language involved is rarely used outside of a legal context, and simply asking the detainee 'Do you understand?' is insufficient in determining true comprehension. They suggest the re-development of the police caution to simplify it (Fenner, Gudjonsson, & Clare, 2002).

Researchers have also suggested practical measures to enhance comprehension among detainees. For example, alternative delivery systems for the police caution may be useful in facilitating greater comprehension. Eastwood and Snook (2010) found in their study that when individuals are given the cautions in written format, this resulted in much higher levels of understanding. They suggest that the written format leads to greater comprehension because the individual can read and re-read the cautions if desired (Eastwood & Snook, 2010). Another strategy, suggested by Fenner, Gudjonsson and Clare (2002), is to present the caution, slowly, sentence-by-sentence to ensure greater comprehension. As well, researchers point to the value of having the detained individual explain back to the police officer, in their own words, what is meant by the police caution and what their rights are (Fenner, Gudjonsson, & Clare, 2002). Lastly, for vulnerable groups, the engagement of an impartial third party – outside of police and legal counsel – may be useful. This entity could explain, in simple terms, what the police caution means, and the potential outcomes of decisions to engage, or not engage, one's legal rights to silence and counsel.

Conclusion

The requirements for police to read and to facilitate arrested/detained persons' understanding of their rights often falls short of ensuring true comprehension. The lack of understanding on the part of suspects, and in the general population, is a cause for concern. As the *Charter of Rights and Freedoms* outlines some of the most foundational rights that Canadians have, it is staggering that the levels of comprehension of some very important legal rights are so low. Difficulties in understanding are, as mentioned, compounded for vulnerable populations, such as youth, recent immigrants, aboriginal people, and those with low intellectual abilities. Overcoming these significant challenges in comprehension is imperative. Efforts to build public education and awareness, coupled with practical strategies to simplify the police caution, may help to enhance comprehension of the Right-to-Silence and Right-to-Counsel. If successful, Canadians' *Charter* legal rights will be better protected. ■

References

Chaulk, S. J., Eastwood, J., & Snook, B. (2014). Measuring and predicting police caution comprehension in adult offenders. *Canadian Journal of Criminology and Criminal Justice, 56*(3), 323-340.

Currie, A. (2004). The nature and extent of unmet need for criminal legal aid in Canada. *International Journal of the Legal Profession*, *11*(3), 191-212.

Davis, K., Fitzsimmons, L., & Moore, T. E. (2011). Improving the comprehensibility of a Canadian police caution on the Right-to-Silence. *Journal of Police & Criminal Psychology*, *26*, 87-99.

Eastwood, J., & Snook, B. (2010). Comprehending Canadian police cautions: Are the rights to silence and legal counsel understandable? *Behavioral Sciences and the Law*, *28*(3), 366-377.

Fenner, S., Gudjonsson, G. H., & Clare, I. C. H. (2002). Understanding of the current police caution (England and Wales) among suspects in police detention. *Journal of Community & Applied Social Psychology*, *12*, 83-93.

Government of Canada Department of Justice. (2015). A review of *Brydges* duty counsel services in Canada. Retrieved from: http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03_la4-rr03_aj4/p1.html

Hughes, M., Bain, S. A., Gilchrist, E., & Boyle, J. (2013). Does providing a written version of the police caution improve comprehension in the general population? *Psychology, Crime & Law*, *19*(7), 549-564.

McCormack, N., &Buekert, M. R. (2013). *Introduction to the Law and Legal System of Canada*. Toronto, ON: Thomson Reuters Canada Limited. Print.

Patry, M. W., Smith, S. M., & Adams, N. M. (2014). Recent Supreme Court of Canada rulings on criminal defendants' Right-to-Counsel. *Psychology, Crime & Law*, *20(*8), 741-755.

Pattenden, R. (2011). Case commentaries: Right-to-Counsel at the police station – United Kingdom and Canada. *International Journal of Evidence & Proof*, *15*, 70-85.

Peterson-Badali, Abramovitch, R., Koegl, C. J., & Ruck, M. D. (1999). Young people's experience of the Canadian youth justice system: Interacting with police and legal counsel. *Behavioral Sciences and the Law*, *17*, 455-465.

Perigoe, K. (2009). Exclusion of evidence for failure to advise suspects of the Right-to-Counsel and to silence before custodial police interrogation: Comparing the United States and Canadian doctrines and the reasons for their difference in scope. *Journal of International Law & Foreign Affairs*, *14*(2), 503-530.

R. v. *Bartle*, 1994 3 SCR 173, 1994 CanLII 64 (SCC). *The Canadian Legal Information Institute*. Retrieved from: https://www.canlii.org/en/ca/scc/doc/1994/1994canlii64/1994canlii64.html.

R. v. *Evans* 199163 (3d) 289 (S.C.C.). The Canadian Legal Information Institute. Retrieved from:https://www.canlii.org/en/ca/scc/doc/1991/1991canlii98/1991canlii98.html?searchUrlHash=AAAAAQALci4gdi4gZXZhbnMAAAAAAQ&resultIndex=2.

Snook, B., Eastwood, J., & MacDonald, S. (2010). A descriptive analysis of how Canadian police officers administer the Right-to-Silence and Right-to-Legal-Counsel cautions. *Canadian Journal of Criminology and Criminal Justice*, *52*(5), 545-560.

The Northwest Passage: International Strait or Internal Waters?

Patrick Cameron

Political Science 3210: International Law

Introduction

The Arctic North has been a symbol of Canadian heritage for decades and serves not only as historical grounds for the Inuit people but as a unique and diverse ecosystem for many walks of life. However, over the years disputes have been raised in the international community, mainly coming from the United States, concerning Canada's claim to Arctic sovereignty. Most of these debates surround Canada's claim of the Northwest Passage, a strait in the Canadian archipelago that connects the Atlantic and Pacific oceans, as internal waters which are subject to Canadian rule. The opposition to this stance, coming from the United States and other states such as the United Kingdom, argues that the Northwest Passage is in fact an international strait and not internal waters, and hence is subject to free passage for all warships, ice breakers, submarines and commercial vessels. By using primary legal texts, as well as cases that pertain to the law of the sea, Canada's claim can be supported by understanding the location of the Northwest Passage inside ofthe straight baselines of the Canadian Archipelago, as well as its inability to meet the criteria of an international strait.

The Northwest Passage

Before diving into the claims from both sides of the debate it is first necessary to provide some information about the Northwest Passage, such as history, physical characteristics as well as its current legal status which will be of importance to draw upon in later sections. The Northwest Passage lies amidst Canada's Arctic Archipelago and connects the Atlantic and Pacific oceans. The first recorded voyage of the Northwest Passage was from 1903 to 1906 by a Norwegian Explorer named Roald Amundsen (Elliot-Meisel, 2009). Due to the world's rising temperatures, sea ice has been decreasing at around 8% per year (Dufresne, 2008), widening the Passage and making it a more realistic trade route for commercial vessels. This, combined with the fact that the Northwest Passage is 9,000 kilometers shorter than the Panama Canal and 17,000 kilometers shorter than the Cape Horn route (Kraska, 2007), makes the Passage a very advantageous route for shipping purposes and acts as an incentive for foreign states to declare it an international strait. Currently, the Canadian and American governments are entered into an agreement called the *Agreement on Arctic Cooperation* which permits American vessels to navigate throughout the passage upon the consent of the Canadian Government (Clarke & Schultz, 1993). However the U.S, as well as Canada, state that these cooperative guidelines do not affect their original stances on the Passage, creating a *modus vivendi* for the time being (Clarke & Schultz, 1993). What the claims of these two countries are, as well as what they are based upon, will be explained in the following section.

Claims

Canada argues that the Northwest Passage falls under internal waters due to two claims; one being that the Passage is considered "historical waters" and the second being that the Passage is considered internal waters by the fact that it lies within straight baselines (Dufresne, 2008). These claims were mainly a response to the crossing of the *SS Manhattan*, a modified U.S oil tanker owned by the Humble Oil Company in 1969 (Elliot-Meisel, 2009). This crossing arose much concern from Canadian citizens about the lengths the federal government is taking to protect the sovereignty of the north; leading to a unilateral declaration of internal waters in 1970 and other unenforceable declarations up until the federal government made its claim based on straight baselines in 1986 (Elliot-Meisel, 2009). These claims were based on the 1951 Fisheries case involving Norway and the United Kingdom, where Norway claimed the internal waters of the archipelago known as the *skjaergaard*-based on the construction of strait baselines (Fisheries Case, 1951). Misconceptions about the crossing arose, in which the public viewed the crossing as a blatant act of defiance by the US government over the Canadian control of the Arctic. However, the *SS Manhattan* was a commercial vessel and was not directly associated with the US government and also asked permission for Canadian Captain T.C Pullen to be aboard the voyage as "the Government of Canada's representative" (Elliot-Meisel, 2009). Yet ever since the government of Canada begun making claims of internal waters in its Arctic, the United States government has been quick to dispel these positions on the notion that the Northwest Passage is indeed an international strait, most of which are based off the 1949 Corfu Case. In the following paragraphs both legal arguments will be presented with supporting documentation, and evidence will be given to support the notion that the Northwest Passage is indeed within internal waters and should not be considered an international strait.

International Strait?

The American claim of an international strait is based upon the decisions made in the 1949 Corfu Case involving

the United Kingdom and Albania, where the criteria of what an international strait must meet was set out, and later translated to the United Nations Convention on the Law of the Sea (Corfu Channel Case, 1949) (UNCLOS, 1982). The two criteria set out for an international strait, and which the U.S argues the Northwest Passage fits into are:

1. that the route connects two oceans and
2. the route is useful for navigation (Carnaghan & Goody, 2006).

In terms of the first criteria there is no dispute, by looking at any map of the Canadian Arctic it is easy to tell that the Passage connects the North Atlantic Ocean to the Pacific. It is the second criteria of functionality that one can dispute in contention with the claim made by the United States. Firstly, as Donat Pharand who is an expert in the Canadian Archipelago points out, the United States bases the functionality of the Northwest Passage on its potential for navigation and not on the actuality of usage (Pharand, 2007). This is based on the fact that the Passage is widening due to changes in temperature as mentioned earlier, and leads one to believe it could be of value in the future. Yet there are a couple ways that this argument can be seen as weak. Article 34 of the UNCLOS is titled "Legal status of waters forming straits *used* for international navigation" (UNCLOS, 1982), which alludes to the past or current state. Also, the Corfu Case of 1949, which the U.S and others who support the idea of an international strait refers to, describes the functionality of the strait in its current condition, not future (Corfu Channel Case, 1949). It is than necessary to compare the functionality of the Corfu Channel, which was a high traffic route, to the Northwest Passage, which on the other hand has seen little navigation over the years due to its unfavourable conditions. Since its first crossing, the Northwest Passage has seen on average only one passing every ten years. In fact, the record number of crossings in one year is only 30 in 2012, which then fell to 17 in 2014 (Trends in Shipping in the NWP..., 2015). This is compared to the Corfu Channel, which according to research done by Pharand, saw 2,884 crossings between 1936 and 1937 (Pharand, 2007). The difference between these two numbers are staggering and one can see the massive divergence in what the parties view as functional. On the side of the Corfu Channel, you can see a route that is used by thousands of ships, by many different countries, and at a regulatory pace. However, when looking at the Northwest Passage there is no history of consistent travel and even in today's age with improved technology and stronger ships the record number of ships to pass in a year is only a mere 30 (Trends in Shipping in the NWP..., 2015). From the inability to meet the second criteria set forth by the UNCLOS it can be said that the Northwest Passage is unable to meet the status of an international strait.

Internal Waters?

Canada's claim that the Passage is within internal waters is based on two claims:

1. that it is considered historical waters and
2. The Northwest Passage lies within straight baselines.

The first claim of historical waters is believed by many scholars to be the weakest claim of the two. A definition of what constitutes historical waters is usually referred to the one given by L.J Bouchez where he states that there are three basic requirements:

1. exclusive exercise of state jurisdiction,
2. a long lapse of time, and
3. acquiescence of foreign states (Pharand, 2007).

These requirements are reflected in the 1951 Fisheries Case where the Norwegian government called upon their claim of historical waters on the basis of their granting of licenses to hunt fish and whales that date back to the 17th century-meeting the first and second requirements (Pharand, 2007). On the third requirement, the government of Norway showed that there were no prior objections by foreign states to their practices in the *skjaergaard* until the United Kingdom made a formal protest 60 years after the establishment of its straight baseline (Pharand, 2007). Canada's arguments are not as strong as Norway's were in 1951 based upon the third requirement of acquiescence of foreign states since the United States has been active and immediate in its protests of Canada's claim.

The strongest claim made by the Canadian government pertaining to the Northwest Passage is the one based upon the fact that the Passage is located within straight baselines. The UNCLOS sets out two mandatory and one optional criteria for the establishment of straight baselines in Article 7;

1. follows the general direction of the coast,
2. the close link between land and sea and
3. economic interest (UNCLOS, 1982).

On the subject of the general direction of the Canadian Arctic Archipelago, Article 7 (3) states that "The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast", that direction being East-West (UNCLOS, 1982). Using the eye test from a common map it is clear to see that the Canadian Archipelago does not deviate to any extreme from the general direction of the coast line. The Archipelago even meets the criteria set forth by the US Government on the Limits in the Seas where fringe islands should not deviate more than 20^0 from the opposite coastline (Developing standard guidelines…, 1987).

On the point of the second criteria, according to Article 47(1) of the United Nations Convention on the Law of the

Sea, states are permitted to draw straight baselines connecting the "outermost points of the outermost islands" where the ratio of area of water to area of land is between 1 to 1 and 9 to 1 (UNCLOS, 1982). To these points, Donat Pharand believes that due to the close relationship between customary laws of the sea and the LOS, these requirements need to be liberally applied and that since the ratio of sea to land in Canada's case is 0.822 to 1, compared to the 3.5 to 1 in the case of the *skjaergaard,* these ratios are more than enough to allow the formation of straight baseline along the Canadian Archipelago (Pharand, 2007).

The third criteria, which is optional as stated earlier, pertains to the economic interests over a long period of time of the straight baseline. In the example of the 1951 Fisheries Case, Norway would be able to draw upon its history of issuing fishing and whaling licensing over the region that dates back to the 17th century (Pharand, 2007). In the case of Canada, the arctic nation has had plenty of displays of economic interests over the past starting with the Inuit people who are Canadian citizens and have relied on fishing and hunting in the arctic for centuries, continuing these practices today (Arctic People Food Hunting Tools, 2007). Also, since Canada purchased the arctic region from Britain in 1880 they have taken part in many economic activities that reinforces the third criteria such as: the *Fisheries Act* in 1906, the distribution of whale licences, the establishment of an Eastern Arctic Patrol in 1922, and many others (Pharand, 2007). The above examples add credibility to Canada's case of the Arctic Archipelago being drawn with straight baselines, and in turn theirfight for the Northwest Passage being part of internal waters under the UNCLOS.

Conclusion

In the coming years, with global warming melting much of the ice allowing for easier passage in the Canadian North, it will be important for Canada to protect its claim to the Northwest Passage as internal waters. This can be done by disproving the notion of an international strait while holding strong to the stance that it is indeed subject to internal waters. Canada can discredit the claim made by the United States, and other concerned nations, by proving that the Passage has limited functionality, resulting in the inability to meet the criteria of an international strait. Finally, by proving that the Northwest Passage is internal waters by virtue of strait baselines Canada can make a strong case to the international community, with the support of past legal text, and finally declare without contest that the Northwest Passage is indeed internal to Canadian waters. ■

References

Canada, Northwest Territories, Environment and Natural Resources. (2015, May 29). *Trends in Shipping in the Northwest Passage and the Beaufort Sea*. Retrieved March 6, 2016, from http://www.enr.gov.nt.ca/state-environment/73-trends-shipping-northwest-passage-and-beaufort-sea.

Carnaghan, M., & Goody, A. (2006, January 26). *Canadian Arctic Sovereignty* (Canada, Political and Social Affairs Division). Retrieved March 1, 2016, from http://www.lop.parl.gc.ca/content/lop/researchpublications/prb0561-e.htm#ATheNorthwest.

Clarke, J., & Schultz, G. (1993). *Arctic cooperation: Agreement between the United States of America and Canada, signed at Ottawa January 11, 1988* (Canada.). Washington, D.C.: Dept. of State. Retrieved March 1, 2016, from https://treaties.un.org/doc/publication/unts/volume 1852/volume-1852-i-31529-english.pdf.

Dufresne, R. (2008, January 10). *Controversial Canadian Claims over Arctic Waters and Maritime Zones* (Canada, Law and Government Division). Retrieved March 1, 2016, from http://www.lop.parl.gc.ca/content/lop/researchpublications/prb0747-e.htm.

Elliot-Meisel, E. (2009). Politics, Pride, and Precedent: The United States and Canada in the Northwest Passage. *Ocean Development & International Law,40*(2), 204-232.

International Court of Justice. (1952). *Fisheries case (United Kingdom v. Norway) Judgment of December 18th, 1951*. Hague. Retrieved March 3, 2016, from http://iilj.org/courses/documents/UnitedKingdomv.Norway_ICJ1951_.pdf.

International Court of Justice. (1949). *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*. Hague: The Court. Retrieved March 3, 2016, from http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=1&p3=4.

Kraska, J. (2007). The Law of the Sea Convention and the Northwest Passage. *The International Journal of Marine and Coastal Law, 22*(2), 257-282. Retrieved March 3, 2016.

Pharand, D. (2007). The Arctic Waters and the Northwest Passage: A Final Revisit. *Ocean Development & International Law, 38*(1-2), 3-69. Retrieved March 1, 2016, from http://www.tandfonline.com/doi/abs/10.1080/00908320601071314.

The Arctic People - Food / Hunting / Tools. (2007). Retrieved March 6, 2016, from http://firstpeoplesofcanada.com/fp_groups/fp_inuit3.html.

United Nations. (1982). *United Nations Convention on the Law of the Sea*. Montego Bay. Retrieved March 3, 2016, from http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

The United States of America, Bureau of Oceans and International and Scientific Affairs. (1987). *Developing standard guidelines for evaluating straight baselines*. Washington, D.C.: Office of Ocean Law and Policy. Retrieved March 6, 2016, from http://www.state.gov/documents/organization/59584.pdf.

Manila and the Dragon: The Problems with Compulsory Jurisdiction

Christopher Ivancic

Political Science 3210: International Law

Historical Context

The South China Seas, hereafter SCS, are a flurry of activity. Located above Indonesia, with tides hitting Vietnam, Malaysia, Brunei, and, the Philippines, issues of sovereignty are common as countries desperately try to extend their territory by claiming islands located in the middle of the sea, of which there are over 200. It's estimated that a third of the world's sea-born crude oil sails through the SCS, making these disputes a geopolitical focal point.[1]

Exacerbated by the existence of hydrocarbons under the sea bed, China has taken steps to ensure that its claims will not be dismissed easily. In 1995 China took control of a number of islands located in the Spratly islands constellation[2], and in 2012 it did the same with landmasses in the Scarborough Shoal to the north[3], both well within the Philippines exclusive economic zone (EEZ).

Proceedings

In 2013 the Philippines began arbitration proceedings against China under Annex VII of the United Nation's Convention on the Law of the Sea (UNCLOS).[4] Jurisdiction of the Annex VII tribunal over signees is compulsory, and reservations cannot be made when signing onto UNCLOS pursuant to its built-in dispute resolution mechanisms.[5] China and the Philippines are both party to the treaty ratifying in 1996 and 1984 respectively. Despite this China released a paper contending that the Arbitral Tribunal did not have jurisdiction over the matter, and refused to participate in the arbitration process.[6] In an October 2015 decision the arbitral tribunal found that China was bound by the decisions of the tribunal regardless of whether they decided to take part in the proceedings. China has disregarded this decision as null and void, maintaining that the arbitral tribunal does not have jurisdiction over the matter.[7] The Philippines seeks a determination from the tribunal on three separate matters:[8]

a) China's historic claims of sovereignty within the SCS are inconsistent with the Convention and thus invalid;

b) Are contested maritime features considered islands? And if so does this constitute an extension of the EEZ? and;

c) China has violated the Philippines sovereign rights and freedoms under the Convention through construction of structures and fishing activities.

Issues

Compulsory jurisdiction at first seems contrary to the principles of international law, a clear encroachment of state sovereignty. Generally states become parties to treaties which require that they give jurisdiction to a certain court or tribunal as a means of dispute resolution for that specific treaty, as is the case of the Philippines and China with UNCLOS. Yet, China persistently objects to the proceedings brought against them and continues construction on a number of reefs located within the Philippines EEZ. Upon these reefs China is building islands, complete with buildings, airstrips, and harbors.[9] If the decision of the arbitral tribunal on jurisdiction was meant as a figurative warning shot, China certainly hasn't taken notice. Compulsory jurisdiction cannot force a state to engage in a proceeding and because of this there will also be complications enforcing the decision. China's actions indicate that regardless of the ruling they will not cease their activities in the SCS. They have invested billions of dollars into island construction and it's going to take more than an order from a court whose jurisdiction they do not recognize for them to cease and desist.

Compulsory jurisdiction is a failed experiment in international law and China will not adhere to the decision of the arbitral tribunal. This is because of the failure of compulsory jurisdiction in practice, the custom of state autonomy relative to pacta sunt servanda, and the inability of the Courts to make accurate determinations without adequate representation from the involved parties.

Analysis: Compulsory Jurisdiction in Practice

China is not the only state to deny the jurisdiction of the mandatory dispute resolution mechanism enshrined within UNCLOS. In the Arctic Sunrise case, Russia refused to participate in the proceedings brought against them by the Netherlands in the International Tribunal of the Law of the Sea (ITLOS).[10] If compulsory jurisdiction does not prohibit states from unilaterally denying the jurisdiction of the dispute resolution mechanism then it is going to be largely ineffective.

A large signing incentive at the time of ratification was the compulsory jurisdiction clause; it was thought that this would put small states and powerful states on equal footing. Both would be subject equally to international law, and neither would be able to act with impunity. In principle this is effective, but in reality large states are able to abuse their rel-

ative power by refusing to give jurisdiction to decision making bodies. Given that powerful states, such as Russia, China, and the United States are able to act with impunity on the global stage, it comes as no surprise that they are able to abuse their power positions in regards to jurisdiction. If action like this becomes common place then UNCLOS, to which over 180 states are a party, would surely lose efficacy.

Compulsory jurisdiction is little more than a hegemonic tool which can be employed by the power states. Weaker states which cannot afford to face economic sanctions are forced to comply with the jurisdictional requirements of the treaty and strong states are able to exercise their hegemony to pick and choose which cases they will take part in. Compulsory jurisdiction is not the means by which David slays Goliath, and the ambitious hopes of fair and true dispute resolution under UNCLOS are unfounded. This is exemplified by the case of China and the Philippines and will surely be reflected in future UNCLOS arbitration in the SCS; it will be shaped by smaller states bringing proceedings against larger bully states, such as the instant dispute between the Philippines and China or delimitation conflicts between Malaysia and smaller Brunei. Compulsory jurisdiction is used and abused by "dominant states and will not be upheld when it conflicts with their perceived political interests."[11]

In a list compiled in 2000, only two of the thirteen cases put before the International Court of Justice (ICJ) where the respondent disputed the jurisdiction of the court can be said to have yielded any fruitful results. That being said, the losing parties in both of those cases, the United State and Iran respectively, did not comply directly with the courts judgements.[12] This is the pitfall of compulsory jurisdiction; countries are likely to comply with verdicts only if they are meaningfully involved in the dispute resolution process. Regardless of the outcome of the arbitration case ongoing between the Philippines and China, China is not likely to respect the decision. The failure of compulsory jurisdiction within contentious cases resolved by the ICJ is sure to dog UNCLOS arbitration.

Analysis: The Perils of Pacta Sunt Servanda

Pacta Sunt Servanada is a pillar of international law, the idea that promises made should be respected. This concept loses efficacy when it does not have an enforcement mechanism. Afterall this is a necessary part of all legal doctrines: a set of rules, when broke necessarily require sanction. This is true of the criminal law, with prison sentences and of civil law with damages. If international legal systems are to be effective there must be some sort of enforcement mechanism. The question then arises: carrot or stick? The arsenal available to states when furthering their diplomatic interests is unique and diverse. States can provide incentives or disincentives for various conduct, but not with as much precision or impact as in domestic law.

Reparations prove ineffective in these circumstances. If a country denies the jurisdiction of a court, it follows that they will deny the jurisdiction of a court considering reparations pursuant to the disputed decision. Given China's position as a vetoing member of the United Nations Security Council, the chances of an enforceable outcome are lowered further. The good faith obligation on China to comply with the provisions of UNCLOS is not proportionate to what they stand to gain from expanding their reach in the SCS; control of an essential international trade route and an unknown wealth of hydrocarbons. China has taken concrete steps to establish themselves in the SCS and it's going to take more than a good faith obligation to thwart their expansionist dreams.

The Philippines are in no situation to place economic sanctions or cut off diplomatic ties with China. In 2010 China was the Philippines third largest trade partner, an important foreign investor, and a large source of tourism.[13] With the world economy down, now is not the time to cut economic ties. The bilateral trade between the two countries reaches an excess of 10 billion dollars a year, and their closeness, both economically and geographically, has allowed for China's territorial bullying to be ignored.

Compulsory jurisdiction contains a manifest conflict between pacta sunt servanda and state sovereignty. States are going to act out of self-interest when at all possible, and, though supported by pacta sunt servanda, compulsory jurisdiction cannot compensate for the problem of state sovereignty. "All customary norms possess the same legal status"[14] and because of this lack of clear hierarchy the system remains in deadlock.

Analysis: Legitimatizing International Arbitration

When proceedings move forward after a party in a dispute has shown that they do not give jurisdiction to the court, the dispute resolution mechanism is delegitimized overall and the outcome is less likely to be complied with. In order for an outcome to be legitimate and respected it is necessary that the involved parties be present so that the court may make accurate determinations on the facts. In the Arctic Sunrise Case, ad hoc Judge David Anderson expanded on the impact of the decision of the Russian Federation not to appear.

> "While the position of the Netherlands was made clear, the stance of the Russian Federation had to be taken from its diplomatic communications, legislation and the decisions of courts in the Russian Federation. Unfortunately these materials were both incomplete and in places inconsistent, making the task of the tribunal more difficult… Non-appearance does not serve the efficient application of Part XV of the Convention or, more widely, the rule of law in international relations."[15]

In order for a court to make accurate determinations on matters of fact and law it is necessary that the parties be equally represented. When a court makes a determination based on the inferred position of an actor they soil the necessary compartmentalization for a legitimate justice system. The judge does not assume what a defendant is going to plead in a criminal proceeding. This causes complications in international dispute resolution as it is difficult to get the relevant parties to submit to the jurisdiction of the court.

In the instant case China has taken a firm stance on the jurisdiction of the arbitral tribunal, through the publication of documents related to the statement of claim filed by the Philippines and decision on jurisdiction and admissibility, but, has yet to meaningfully engage with the merits of this case through "diplomatic communications, legislation, and the decision of [domestic] courts". This creates difficulties as the court is only be able to guess what arguments would be made by China, and increase the likelihood that China will disregard the finding of the court.

Conclusion

In the case of China and the Philippines, if China is able to act without repercussions then the floodgates will be open for mass violations of UNCLOS. The integrity and spirit of the Convention is at stake, and the only foreseeable way to maintain UNCLOS is for the international community to take a hard stance against Chinese expansion in the SCS. The international arbitration under UNCLOS is plagued by the ineffectiveness of compulsory jurisdiction which lacks a meaningful enforcement mechanism, has historically failed, and delegitimizes the arbitration process. ■

Endnotes

[1] U.S. Energy Information Administration. "The South China Sea is an important world energy trade route" (2013)

[2] Dzurek, Daniel. "China Occupies Mischief Reef in Latest Spratly Gambit" Center for Borders Research. Boundary and Security Bulletin. (1995)

[3] Asia Maritime Transparency Initiative. "Scarborough Shoal: A Red Line?" (2016)

[4] Consulate General of the Philippines. "Submission of Notification and statement of claim on the west Philippine sea dispute" (2013)

[5] UNCLOS, Art 309.

[6] Ministry of Foreign Affairs of the People's Republic of China. "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration initiated by the Republic of the Philippines" (2014)

[7] Ministry of Foreign Affairs of the People's Republic of China. "Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines" (2015/10/30)

[8] An Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea. The Republic of the Philippines and The People's Republic of China. Award on Jurisdiction and Admissibility. (2015)

[9] Asia Maritime Transparency Initiative. "Airstrips Near Completion: New towers. Construction on Subi and Mischief Reefs" (2016)

[10] Kingdom of the Netherlands v Russian Federation.The "Arctic Sunrise" Case. International Tribunal for the Law of the Sea (2013)

[11] Hong, Nong. "UNCLOS and Ocean Dispute Settlement" Routledge (2012) at page 111. Relating to the conduct of China in the South Seas.

[12] Oda, Shigeru. "The Compulsory Jurisdiction of the International Court of Justice: A Myth? A Statistical Analysis of Contentious Cases". The International and Comparative Law Quarterly Vol. 49, No. 2 (Apr. 2000) pg 263-264

[13] Embassy of the Philippines. "Overview of Philippines – China Relations" (Republic of the Philippines). Beijing, China (2010)

[14] I. Lukashuk. "The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law". The American Journal of International Law Vol. 83, No. 3 (1989) at pg 515.

[15] The "Arctic Sunrise" Case, Declaration of Judge Ad Hoc Anderson, at para 2.

References

U.S. Energy Information Administration. "The South China Sea is an important world energy trade route" (2013).

Dzurek, Daniel. "China Occupies Mischief Reef in Latest Spratly Gambit" Center for Borders Research. *Boundary and Security Bulletin*. (1995).

Asia Maritime Transparency Initiative. "Scarborough Shoal: A Red Line?" (2016).

Consulate General of the Philippines. "Submission of Notification and statement of claim on the west Philippine sea dispute" (2013).

1982 United Nations Convention on the Law of the Sea. 1833 UNTS3 /[1994] ATS 31 / 21 ILM 1261 (1982).

Ministry of Foreign Affairs of the People's Republic of China. "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration initiated by the Republic of the Philippines" (2014).

Ministry of Foreign Affairs of the People's Republic of China. "Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines" (2015/10/30).

An Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea. The Republic of the Philippines and The People's Republic of China. Award on Jurisdiction and Admissibility. (2015).

Asia Maritime Transparency Initiative. "Airstrips Near Completion: New towers. Construction on Subi and Mischief Reefs" (2016).

Kingdom of the Netherlands v *Russian Federation*. The "Arctic Sunrise" Case. International Tribunal for the Law of the Sea (2013).

Hong, Nong. "UNCLOS and Ocean Dispute Settlement" Routledge (2012).

Oda, Shigeru. "The Compulsory Jurisdiction of the International Court of Justice: A Myth? A Statistical Analysis of Contentious Cases". *The International and Comparative Law Quarterly* Vol. 49, No. 2 (Apr. 2000) pg 263-264.

Embassy of the Philippines. "Overview of Philippines – China Relations" (Republic of the Philippines). Beijing, China (2010).

I. Lukashuk. "The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law". *The American Journal of International Law* Vol. 83, No. 3 (1989).

Tsilhqot'in Nation v. *British Columbia*: A Landmark Case in Canadian Aboriginal Law

Alex Marshall

Political Science 3830: Aboriginal Government and Politics in Canada

Introduction

The purpose of this essay is to examine and analyze the 2014 Supreme Court of Canada decision of *Tsilhqot'in Nation* v. *British Columbia* and assess its implications for Canadian and Aboriginal society. The essay will first provide an overview of the salient details of the case and then examine and explain why it is both an affirmation of past Supreme Court of Canada decisions and a landmark case in its own right. It will then examine how this case differs from earlier important cases dealing with Aboriginal claims and entitlements, and its significance going forward.

***Tsilhqot'in Nation* v. *British Columbia* - An Overview**

The Tsilhqot'in Nation (TN) is a group of six aboriginal bands who have lived for several centuries in a remote area in central British Columbia (BC). Over this long history they have lived off the fruits of the land, repelled outsiders and negotiated terms with European traders who used their lands. From the TN perspective "the land has always been theirs" (*Tsilqot'in Nation* v. *British Columbia*, 2014).[1] Since Canada's formation the issue of Tsilhqot'in land title had not been resolved. That all began to change in 1983 when the BC government passed the *Forest Act* and provided a third party lumber company, Carrier Lumber Ltd., a licence to harvest and cut trees in the TN's territory. As a result of this unilateral action by the province one of the six bands, the Xeni Gwet'in First Nation (XGFN), attempted to prevent this from occurring. After a series of events that included a protest and blockade of a bridge Carrier Lumber was using, the provincial government decided to enter into talks with the XGFN. Unfortunately, these talks only led to a stalemate. In 1998, the other five bands came together with the XGFN and the TN made a claim for Aboriginal land title. At the time, both the provincial and federal governments opposed this title claim. As a result, the matter was brought to the Supreme Court of British Columbia where a trial began in 2002 (*TN* v. *BC, 2014*).

The trial lasted for five years. During the proceedings the trial judge went through an extensive process to determine whether the TN had a rightful claim to the land. This included him visiting the area in question and listening to many locals, historians and experts. The trial judge eventually ruled that the TN "were entitled to a declaration of Aboriginal title" (*TN* v. *BC, 2014*, para. 7). Unsatisfied by this result, the BC government then appealed the decision to the British Columbia Court of Appeal.

At the Court of Appeal, the Court reversed the decision of the trial judge. The Appeal Court set a higher standard of proof of prolonged and exclusive land occupation, that was necessary to acquire Aboriginal title. It then determined that the TN did not fulfil this criteria. Accordingly, the Court of Appeal reversed the decision. The TN then appealed to the Supreme Court of Canada (SCC) and was granted leave.

In their consideration of the merits of the TN's claim to aboriginal land title, the SCC Justices reviewed other SCC decisions which had dealt with aboriginal law and land rights. These included such landmark Aboriginal cases as *Calder, Guerin, Sparrow, Delgamuukw,* and *Haida*. What follows below is a brief summary of the Court's analysis of these cases and their relevance to this case.

The SCC noted that unless Aboriginal peoples had signed treaties with the Crown, their land rights continued to be legally valid (*Calder* v. *Attorney-General of British Columbia*, 1973). The enactment of s.35 of the *Constitution Act*, 1982 was also central to the determination of Aboriginal rights, including land rights, the Court noted. This section of the Constitution recognized and reaffirmed existing Aboriginal rights:

> 35.(1) The existing aboriginal and treaty rights of the aboriginals are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

In *Guerin* v. *The Queen* (1984), the court found that the Crown had a fiduciary duty to the Aboriginal people because of the "pre-existing legal right" which Aboriginal people had regarding their "use and occupation of the land prior to European arrival" (*Guerin* v. *The Queen* (1984), pp. 379-82). This meant that the Crown had a responsibility to act in a manner that would benefit Aboriginal peoples and respect their rights.

In 1990, the SCC found in *Sparrow* that s. 35 constitutionally protected all non-extinguished Aboriginal rights. The Court in turn imposed a fiduciary duty on the Crown with respect to these rights, thereby reinforcing *Guerin* (*R* v. *Sparrow* 1990). Also, the Court found that government legislation could interfere with s. 35 only if it fulfilled two requirements: the legislation must further a "compelling and substantial" purpose, and compensate for the infringed Aboriginal interest under the fiduciary obligation imposed on the Crown (*R* v. *Sparrow* 1990, pp. 1113-19).

In *Delgamuukw* v. *British Columbia* (1997) the Court ruled that Aboriginal title represents the possession of the land before British sovereignty (*Delgamuukw* v. *British Columbia*, 1997). Also in *Delgamuukw*, the Court ruled that in order for infringements of Aboriginal title to be justified, they must satisfy the s. 35 test as set out in *Sparrow* noted above.

The Court also referenced the 2004 case of *Haida Nation* v. *BC (Minister of Forests)*. In that case a development was being proposed which was to occur on the land occupied by the Haida Nation. The Haida Nation had asserted Aboriginal title to this land but had not established it. The Court concluded in that case that consultation with the Haida Nation was needed before development could proceed (*Haida Nation* v. *British Columbia (Minister of Forests)*, 2004).

Upon concluding their analysis of all these cases, the Justices outlined five propositions which were relevant to this case (*TN* v. *BC,* 2014, para. 18):

1. Crown title is subject to Aboriginal land interests where such interests have been established;
2. Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits;
3. Governments can infringe Aboriginal rights conferred by Aboriginal title but only where they can justify the infringements on the basis of a compelling and substantial purpose and establish that they are consistent with the Crown's fiduciary duty to the group;
4. Resource development on claimed land to which title has not been established requires the government to consult with the claimant Aboriginal group;
5. Governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands.

The Justices began their analysis of this case by noting that the *Delgamuukw* test for Aboriginal title was based on whether the Aboriginal group had "occupation" of the land in question prior to European sovereignty. In order to fulfil this necessary condition, three characteristics were needed: the occupation must be sufficient, continuous and exclusive (*TN* v. *BC,* 2014, para. 25; *Delgamuukw* v. *British Columbia* (1997), para. 143). The Court analyzed each of these characteristics in detail.

Sufficiency of occupation. In determining the necessary requirement for sufficiency of occupation, the Court identified two main considerations. Firstly, the Aboriginal group or band has to show that historically it has "acted in a way that would communicate to third parties that it held the land for its own purposes." Secondly, "[t]here must be evidence of a strong presence on or over the land claimed" (*TN* v. *BC,* 2014, para. 38).

Continuity of occupation. The second characteristic needed for establishing Aboriginal title is the notion of continuity of occupation. In order to fulfil this requirement there must be evidence that the land in question has and continues to be used by the claimant group since, and preceding, European sovereignty (*TN* v. *BC,* 2014).

Exclusivity of occupation. The final characteristic is exclusive occupation. According to the findings in the Delgamuukw case, the claimant group must have had "the intention and capacity to retain exclusive control" over the lands (*Delgamuukw* v. *British Columbia*, 1997). The Court in this case clarified this statement by noting that (*TN* v. *BC,* 2014, para. 48):

> "[e]xclusivity should be understood in the sense of intention and capacity to control the land… Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group…Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control."

With these three criteria defined and confirmed, the Court considered whether the TN was qualified to be awarded Aboriginal title.

Was Aboriginal Title Established in this Case?

The Court ruled that the evidence in this case was sufficient to conclude that the TN had satisfied the three necessary criteria for Aboriginal title (*TN* v. *BC,* 2014, para. 51-66). The land in question had been regularly used by the TN, thereby satisfying the sufficiency of occupation requirement. Through extensive research of archaeological, historical and oral evidence conducted at trial there was sufficient evidence to fulfil the continuity of occupation requirement, and to demonstrate their occupation pre-dated European sovereignty. Finally, there was ample evidence to support the notion that the TN protected the land from outsiders, thereby fulfilling the exclusivity of occupation requirement. As a result of these findings, the Court ruled that the TN fulfilled the necessary

requirements for Aboriginal title. The Court then went on to analyze just what rights Aboriginal title confers.

What Rights do Aboriginal Title Confer?

The Court began its analysis of the rights conferred by Aboriginal title by noting principles outlined by Dickson, J. in *Guerin*. In that case the Court concluded that when European sovereignty was asserted, Aboriginal legal rights to their lands were not extinguished and still existed.

The Court determined that Aboriginal title allows those that possess it to use their lands free of external pressures or trespass; however, there are certain restrictions upon how they use the land. For example, the land must be used in a way that would not hinder future generations (*TN* v. *BC,* (2014), para. 88). The Court also noted that "governments and others seeking to use the land must obtain the consent of the Aboriginal title holders" (*TN* v. *BC*, 2014, para. 76). The Court held that in certain circumstances a government could justifiably infringe upon Aboriginal title rights. In order for a government to infringe on such title rights, and the wishes of the Aboriginal group, three criteria must be met and established in court:

"1. that [government had] discharged its procedural duty to consult and accommodate;
2. that its actions were backed by a compelling and substantial objective; and
3. that the governmental action is consistent with the Crown's fiduciary obligation to the group" (*TN* v. *BC,* 2014, para. 125)."

In such circumstances a court could authorize a government's proposed actions.

The Court also differentiated between what the government must do when Aboriginal title is and is not present. When it is not, the Crown must consult and attempt to accommodate the "unproven Aboriginal interest" (*TN* v. *BC*, 2014). However, when it has been established, the Crown must not only consult, but must also keep its actions consistent with s. 35 of the *Constitution Act*, 1982 (*TN* v. *BC*, 2014).

In conclusion, the Justices had the following observations (*TN* v. *BC,* 2014, para. 88):

Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one carve-out — that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult and must also be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown's fiduciary duty to the Aboriginal group.

The Justices then applied these conclusions to this case. They found that the province of BC had a duty to consult with and accommodate the interests of the TN before the third party developments were approved. Since the province had not done so, the Court found the province in breach of its duty owed to the TN and, therefore, that it did not have the authority to authorize commercial activity on lands to which TN had title (*TN* v. *BC,* 2014). Though this finding was the first of its kind in Canadian history, and sufficient itself to allow the appeal, the Court went further. It decided to clarify the nature of provincial rights to pass legislation dealing with lands under Aboriginal title.

Although the Court by this point had found that the TN had a right to Aboriginal title to the land in question, the Court found it necessary to also consider whether the B.C. *Forest Act* was constitutional.

In their review they noted that three questions arise when assessing the constitutionality of provincial legislation that applies to land held under Aboriginal title. They are:

"1. Do provincial laws of general application apply to land held under Aboriginal title and, if so, how?
2. Does the British Columbia *Forest Act* on its face apply to land held under Aboriginal title? and
3. If the *Forest Act* on its face applies, is its application ousted by the operation of the *Constitution of Canada*?" (*TN* v. *BC,* 2014, para. 100)."

The Court considered the purpose of the B.C. *Forest Act*. The Court found that its overall purpose was to apply to Crown lands, however it wasn't clear that TN land was Crown land. This finding meant that the legislation would only have effect over land that was not covered by Aboriginal title. Since the land in question in this appeal had been established by the Court to be under Aboriginal title, the *Forest Act* could not apply to it (*TN* v. *BC,* 2014).

This left one final question for the Court to consider; whether the *Forest Act*, and other provincial legislation dealing with land under Aboriginal title, are constitutional. The Court reviewed s. 91 (24) of the *Constitution Act*, 1867 which grants the federal government the right to enact legislation regarding Aboriginals, and s. 92 (13) which allows each province to make laws regarding property and civil rights within their province (*TN* v. *BC,* 2014). As a result, forestry on land under Aboriginal title seems subject to both provincial and federal jurisdiction. The Court noted the competing interests. The Justices noted that when there are disputes over jurisdiction between governments, two long-

standing doctrines are used to resolve them: the doctrines of paramountcy and interjurisdictional immunity (*TN* v. *BC,* 2014).

After prolonged review, the Court ruled that neither of these doctrines apply in this case. Accordingly, provincial legislation dealing with forestry on land under Aboriginal title is constitutional, subject to the s. 35 framework as set out in *Sparrow* and *Delgamuukw*. The Court concluded its analysis of the case by noting that the constitutional issue of jurisdiction in this case was not one of dispute or conflict between the provincial and federal government, "but rather how far the provincial government can go in regulating land that is subject to Aboriginal title or claims for Aboriginal title" (*TN* v. *BC,* 2014, para. 152). The Court ruled that s. 35 must be addressed in the determination of such issues.

Although this case relied on and reaffirmed several of the SCC's previous decisions which dealt with Aboriginal title and rights, it was a landmark decision in its own right as will be seen below.

A Landmark Decision with Potentially Significant Implications for the Future

The SCC's decision in this case was both historic and an affirmation of Canadian Aboriginal jurisprudence regarding Aboriginal land rights. In addition the decision will likely have a number of implications affecting Canadian and Aboriginal society moving forward. I will discuss each of these aspects in turn.

The Court's decision in this case was historic; never before had any Canadian court awarded Aboriginal title to a particular area of land. Previous court decisions had dealt with the issues of whether Aboriginal title exists *(Calder)*, what obligations are owed to Aboriginal people by the Crown *(Guerin)*, and what are the necessary criteria for an Aboriginal people to be awarded Aboriginal title *(Delgamuukw)*. The establishment of Aboriginal title bestowed upon the TN is truly a unique case in Canadian jurisprudence.

In addition to being historically significant, the case reaffirmed and built upon previous court cases which have dealt with the issue of Aboriginal land rights and title. The Court considered the legitimacy of Aboriginal title and drew extensively from *Delgamuukw* in their analysis and conclusions of what criteria are necessary to establish Aboriginal title. In so doing, the Court applied the three part test found in *Delgamuukw* to determine whether in this case the TN met this test. Drawing on extensive evidence introduced and uncovered at trial the Court found that the TN fulfilled these criteria. This ruling in essence reaffirmed *Delgamuukw's* three-part test.

Further, the Court affirmed the finding in *Sparrow* that s. 35 provides constitutionally entrenched rights to Aboriginals and that those rights can only be infringed upon if they further a "compelling and substantial" public purpose and also account for the infringed Aboriginal rights that are safeguarded under a fiduciary obligation imposed upon the Crown (*TN* v. *BC,* 2014).

The Court also affirmed the long held condition that the Crown must consult with the impacted Aboriginal people regarding land use when Aboriginal title has not been proven or established. When there is an Aboriginal title the Crown must both adhere to this duty to consult and, in the absence of any negotiated agreement, it must also justify in court that any contemplated action of the Crown falls within the valid legal reasons that are consistent with s. 35 (*TN* v. *BC,* 2014).

The Court's decision is also a landmark ruling in its finding that provincial legislators have the right to enact laws dealing with the development of lands under Aboriginal title. The Court ruled that provincial legislation can apply to lands under Aboriginal title as long as the legislation conforms with the s. 35 framework as set out in *Sparrow* (*TN* v. *BC,* 2014). In making this determination the Court expressly overturned the doctrine in *R* v. *Morris*, 2006, that provincial governments were prohibited from passing laws related to Aboriginal land rights (*TN* v. *BC,* 2014). This is a significant finding that defines provincial government rights vis-a-vis Aboriginal title lands. It provides a legal framework guiding relationships between Aboriginal land holders and provincial governments.

As a result of these changes, provincial governments now have a clearer framework to which their legislation and actions must conform. It provides clarification and allows legislatures better insight to ensure they are not overstepping their legal authority.

As noted, this decision will likely have significant implications. It had the immediate effect of granting the TN the right to Aboriginal title and to the use of their lands. It is also likely to have broader potential future impacts. As the case was only decided a year ago, many of the longer term effects are yet to be seen. Nevertheless, three possible implications of this decision can be identified: the potential for many more claims of Aboriginal title (McMillan LLP Aboriginal Law Bulletin, 2014), the prospect of halting or cancelling resource developments in lands under dispute (*TN* v. *BC,* 2014), see para. 18) and the possibility of further provincial legislation affecting Aboriginal lands (McMillan LLP Aboriginal Law Bulletin, 2014).

It is difficult to predict whether a large number of claims to Aboriginal title will occur as a result of this case. Of the ones that might occur they are more likely to come in British Columbia and the west since most Aboriginal lands in others parts of Canada were ceded to the Crown through treaties

(*TN* v. *BC,* 2014, para. 4). In any case, wherever future claims originate, the claimants will need to ask themselves a very important question: are they ready to enter the long and arduous process of Aboriginal title litigation (Aboriginal Law Bulletin)? This case serves as a good example. The issues that preceded litigation occurred in the early 1980s. The final decision by the SCC was rendered in 2014, a period of over thirty years. No doubt many thousands of working hours and dollars were put into this case over that timeframe. So while there may be potential for Aboriginal title to be granted in some instances, and while this case may expedite future processes somewhat, Aboriginal peoples and bands may still be reluctant to go through such a process. They will have to weigh the costs and benefits before doing so.

Another potential implication of this case is that resource development may have to be cancelled or halted if they have been initiated without consent of an Aboriginal group who may acquire title after these projects have begun. It is beyond the scope of this essay to predict whether this will indeed have an impact upon resource development moving forward, but it certainly highlights the possibility that current or future resource development could be affected by Aboriginal title claims (*TN* v. *BC,* 2014, para. 18).

As a result of this decision, provinces now have a clearer framework in which to make laws which could impact Aboriginal lands. Both the requirements for consultation with affected Aboriginal groups and the framework for workable legislation would appear to be positive steps for future relations with our Aboriginal peoples.

Finally, it is likely this decision will strengthen the hand of Aboriginal peoples in their efforts to protect their rights, and in their dealings with provincial and federal governments.

Conclusion

The case of *Tsilhqot'in Nation* v. *British Columbia* was both an affirmation of past jurisprudence regarding Aboriginal land title and rights as well as a significant historical legal decision. The Court reviewed previous landmark cases in Canadian Aboriginal law such as *Calder, Guerin, Sparrow* and *Deglamuukw* and reaffirmed their validity. They helped the Court reach the conclusion it did in this case, that the TN fulfilled the necessary conditions, as set out in those previous cases, to be granted Aboriginal land title.

The specific granting of Aboriginal land title by a Court has never before occurred in Canadian law. This in itself makes it a landmark decision in Canadian jurisprudence. With the rendering of this decision, three main implications can be adduced. It is indeed possible that as a result of this case a flurry of claims to Aboriginal title will occur in the near future. As mentioned above, though, Aboriginal groups and bands will need to weigh the almost inevitably long and arduous process of litigation with the benefits of acquiring Aboriginal title. In some cases the risk and opportunity cost may be worth the reward. Also, current and future resource development taking place on lands that are, or are claimed to be, subject to Aboriginal title may need to be altered, delayed or cancelled. Given the SCC's ruling on this matter, such eventualities could come to fruition. Finally, now that provincial governments have a clarified framework and guidelines with respect to enacting legislation which does not unduly infringe upon Aboriginal rights to their lands, it is also possible that there could be an increase in, or revision of, provincial legislation in this area.

Overall, this is a sound and reasoned decision which continues the evolution of Canadian Aboriginal jurisprudence by providing and granting Aboriginal peoples increased rights to lands they have never relinquished. It may also lead to improved relations between the Canadian provinces and our indigenous people. ■

Endnote

[1.] Hereinafter *Tsilqot'in Nation* v. *British Columbia*, 2014, will be referred to as *TN* v. *BC*, 2014.

Bibliography

Supreme Court of Canada cases cited

Tsilhqot'in Nation v. *British Columbia*, 2014 SCC 44

Calder v. *Attorney-General of British Columbia*, [1973] S.C.R. 313

Guerin v. *The Queen*, [1984] 2 S.C.R. 335

R. v. *Sparrow*, [1990] 1 S.C.R. 1075

Delgamuukw v. *British Columbia*, [1997] 3 S.C.R. 1010

Haida Nation v. *British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511

R. v. *Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915

Constitutional Sections cited

s. 35 Constitution Act, 1982.

s. 91 (13) Constitution Act, 1867.

Online Sources cited

Junger et al. *McMillan LLP Aboriginal Law Bulletin*, June 2014. Retrieved on November 10, 2015 from: http://www.mcmillan.ca/Supreme-Court-declares-Aboriginal-title-in-Tsilhqotin-Nation-v-British-Columbia