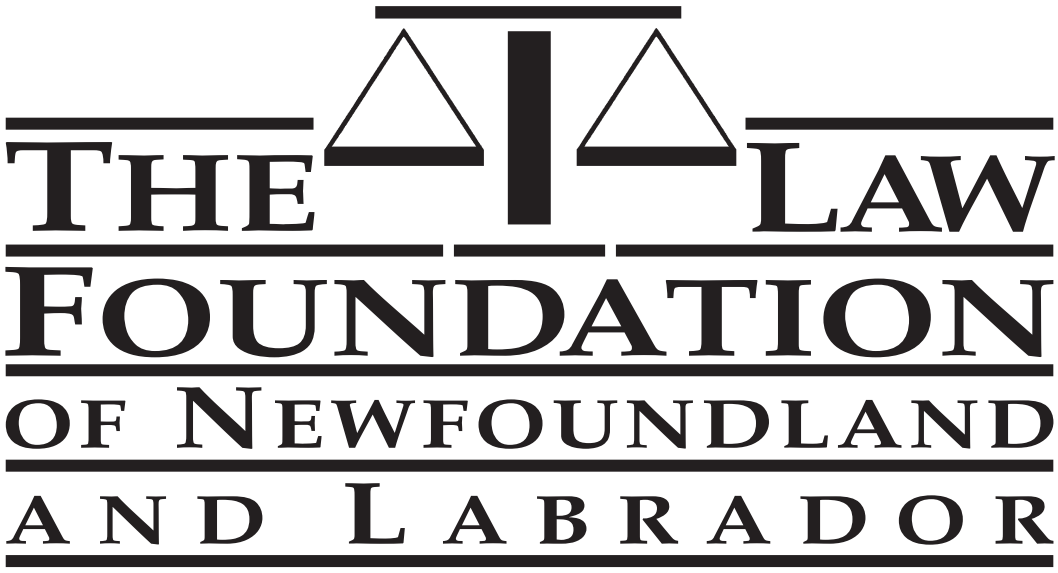

The Law Foundation of Newfoundland and Labrador

Legal Research Awards For Students of Memorial University

2014/2015 Awards

THE LAW FOUNDATION OF NEWFOUNDLAND AND LABRADOR

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Preface

Aubrey L. Bonnell, Q.C.
Past Chair, Board of Governors
Law Foundation of Newfoundland and Labrador

One of the statutory objects of the Law Foundation is to provide scholarships for studies in matters relevant to law. Accordingly, the Law Foundation annually offers up to seven Legal Research Awards 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.

The first annual competition was held in the 1996-1997 academic year and the 2014-2015 competition is therefore the nineteenth consecutive annual competition. As Past Chair of the Board of Governors of the Law Foundation, I am pleased to introduce the winners of this year's competition and their winning papers.

The Awards are open to students 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. This year's winners come from the Departments of Law and Society and Political Science, within the Faculty of Arts, and from the Department of Psychology within the School of Graduate Studies. The scope and diversity of the topics of the papers published in this volume are most impressive. The subjects range from the gathering and use of evidence in criminal matters, public utilities regulatory matters, international law and Canadian constitutional law to anti-corruption laws in Canada.

The quality of the research and writing reflected in the papers is also noteworthy and I congratulate each winner on the submission of an outstanding research paper.

On behalf of the Board of Governors, I would also like to acknowledge and thank the members of the Legal Research Awards Selection Committee for their contribution and commitment to these Awards. Each of them has admitted on many occasions that the process is rewarding and enjoyable but I acknowledge that it is also time consuming and the Board appreciates the time and effort devoted by each of them.

I would also acknowledge the support and co-operation of Memorial University, its officers, Deans, Department leaders and Faculty members with respect to these Awards. That support and co-operation is greatly appreciated.

The annual volumes of winning papers each year are sent to the reference section of Canadian University Faculties of Law, the National Library of Canada, Law Libraries of Supreme and Provincial Courts, Department of Justice, Memorial University, Grenfell Campus, Queen Elizabeth II Library, the Centre for Newfoundland and Labrador Studies and Departmental Libraries, the Law Society of Newfoundland and Labrador and public libraries across the Province. This volume will also be published online on the Law Foundation's website.

Again, my sincere congratulations to this year's winners on their truly outstanding legal research papers.

Aubrey L. Bonnell, Q.C.
Past Chair, Board of Governors
Law Foundation of Newfoundland and Labrador

Law Foundation of Newfoundland and Labrador

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Cecilia Reynolds, Ph.D., *Deputy Provost (Students) and Associate Vice-President (Academic) Undergraduate Studies*

Judy Casey, B.A., B.Ed., *Manager, Scholarships and Awards, Memorial University*

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 2014/2015 Nineteenth Annual Legal Research Awards are:

Standing (l-r) Morgan C. Cooper, Member, 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, Law Foundation, Hon. Andrew Parsons, Minister of Justice and Public Safety, Dr. Susan Dyer Knight, Chancellor, Memorial University, Dr. Gary Kachanoski, President and Vice-Chancellor, Memorial University, The Hon. J. Derek Green, Chief Justice of Newfoundland and Labrador, The Hon. Pamela J. Goulding, Chief Judge, Provincial Court of Newfoundland and Labrador, and William J. Janes, Chief of Police, Royal Newfoundland Constabulary;

Seated (l-r): Zak Keeping, William Casey, Limingcui Emma Huang, Alex Marshall, and Christoph Pike, Awards recipients.

Justin S.C. Mellor, M.A., LL.M., Chair, is the other member of the Legal Research Awards Selection Committee.

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

2014/2015 Awards

(three semesters: Spring/Summer, Fall, 2014, Winter, 2015)

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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Don't SUE Me: Strategic Use of Evidence in Police Interviews

Zak Keeping

Psychology 6400: Social Psychology

Introduction

Recently, the field of best-practice police interviewing procedures has shifted from being accusatorial in nature toward an information gathering approach (Evans et al., 2013). The shift from accusatorial to information gathering was likely due to thecommon elicitation of false confessions arising from the practices that accompanyaccusatorial interviews (Malloy, Shulman, &Cauffman, 2014; Walsh & Milne, 2007). Information-gathering techniques are less likely toelicit false confessions (Meissner et al., 2014). The information police officers obtain during such interviews canhelpthem establish a clear timeline of events, obtain evidence for later probing, exclude or identify potential suspects, and lay charges (Collin, Lincoln, & Frank, 2002; Shepherd, 2007; Abbe & Brandon, 2013). The shift in interviewing of suspects has led to a shift in techniques to best detect deception. Specifically, researchers have considered the strategic use of evidence in police interviews, and the impact that disclosure may have on deception detection and information provision (Hartwig, 2006). Strategic Use of Evidence (SUE) refers to the presentation ofevidence collected against the interviewee during police interviews. The presentation of evidence in interviews is common practice; a survey of 631 police officers revealed that 99% confronted suspects with evidence of their guilt during interviews (Kassin et al., 2007).

This paper seeks to evaluate the utility of SUE as a viable technique in police interrogations. In particular, the paper considers the application of SUE as a technique for deception detection and as an information provision tool. Finally, this paper makes recommendations for and against SUE, as it applies to legal settings (e.g., police interviews, jury decision making).

Before examining the application of SUE, it is important to note that different countries have different regulations on what evidence can be presented during an interview. For instance, Kassin and Kiechel (1996) noted that in the United States, police are able to present fabricated evidence to detainees in order to obtain a confession. Kassin and Kiechel employed an experimental design to test the effect that presenting damning false evidence has ona suspect's likelihood of confessing. In the experiment, participants were instructed not to press the "ALT" key during a typing test or the computer would crash; then at a pre-determined time, the computer would crash regardless of whether the participant pressed the key. In the fabricated evidence condition, a confederate said that they witnessed the participant pressing the key, whereas in the truthful condition, no evidence was presented. Participants in the fabricated evidence condition admitting to having pressed the key (even though they did not press the key) on 94% of occasions. Members of the control group confessed less than half the time. A number of studies show that the presentation of false evidence can result in false confessions (Redlich & Goodman, 2003; Swanner, Beike, & Cole, 2009).

The Strategic Use of Evidence in Police Interviews

One of the tenets of SUE is when to disclose the evidence to a suspect (i.e., time of disclosure). In addition, field data showed that almost 80% of interviews in the United States involved the disclosure of evidence at the onset of an interview (Leo, 1996). However, despite the wealth of forensic evidence provided to police officers (e.g., DNA, CCTV footage), they often receive little or no training on how to present or interpret forensic data (Smith & Bull, 2013). There are contradictions in the theinterrogation training materials. For example, techniques intended to elicit confessions (see Reid Model, Inbau, Reid, Buckley & Jane, 2001) advocate presenting evidence at the beginning of an interview.Techniques intended to gather information (e.g., PEACE Model) argue for presentation of evidence later in the interview, after information has already been gathered (Soukara, Bull, Vrij, Turner, &Cherryman, 2009; Jordan, Hartwig, Wallace, Dawson, & Xhihani, 2012). Jordan et al., have argued that when evidence is disclosed from the onset of an interview, guilty suspects can adapt their alibi to incorporate damning evidence.The field of evidence disclosure has yet to reach a consensus on where evidence is best disclosed.

As a potential solution to the "when to disclose" debate, Hartwig, Granhag, Strömwall, and Vrij (2005) have suggested that "drip-feeding procedures" (i.e., gradual disclosure of evidence throughout the interview), could solve the hypotheticaldetriments associated with early disclosure. The authors predicted that deceptive people distance themselves from evidence (i.e., incorporate detachment between themselves and potential evidence) in police interviews more than truth tellers do. The authors argued that this distance would be evident in differences in the amount of details provided by suspects. In other words, guilty parties would provide less

details about the crime itself, whereas innocent parties would incorporate many details about the crime, and damning evidence, into their stories, believing the police will be capable of determining their innocence based on their testimony. Evidence for their prediction comes from both

a) self-report data in studies on which lying strategies are most commonly used, (Strömwall, Hartwig, & Granhag; in press), and

b) meta-analyses (Depaulo et al., 2003) that reveal liar's accounts involve less details than truth teller's accounts.

Hartwig et al. believe the illusion of transparency theory (i.e., the tendency for people to overestimate the degree to which others can understand their personal thoughts) explains these differences, because innocent people are more likely to incriminate themselves, believing their testimony will rule them out as suspects (i.e., the interviewer will know they are telling the truth). The illusion of transparency theory has received a great deal of support in other areas of social psychology (Garcia, 2002; Gilovich, Medvec, & Savitsky, 1998).

To test the predictions of Hartwig et al., (2005), Sorochinski et al., (2013) had participants commit a mock crime and then give either a truthful or a deceptive statement to a researcher who was unaware of whether the participant was telling the truth. The participants were assigned randomly to either an Early Disclosure (i.e., evidence presented at the start), Late Disclosure (i.e., evidence presented at the end), or a Gradual Disclosure (i.e., evidence presented throughout) condition. Liars omitted more information than innocent subjects, which is consistent with previous findings (Hartwig, Granhag, Strömwall, & Kronkvist, 2006). Converesely, Vrij and Granhag (2012) argued that innocent parties provide more details only during free narrative questioning; liars actually provideless details than truth-tellers on probed and unexpected questioning.

In a real life setting, the use of late disclosure as a deception detection technique is inapplicable. Sorochinski et al. (2013) noted that in an applied field, it is nearly impossible to tell which details are fabricated and which are truthful.In a real police interview, officers are not able to compare the statement of a suspect with a truthful version. Furthermore, the inconsistencies in an innocent suspect's account may be wrongfully misinterpreted as deception. Despite this major hurdle, researchers have tried to test the efficacy of disclosure as an interviewing technique.For instance, Hartwig, Granhag, Strömwall, and Kronkvist (2006) found that trained interviewers could accurately identify whether a statement was accurate 85.4% of the time. The same study found that on 14.6% of occasions, trained interviewers wrongly believed a suspect was lying. More troubling, theraters in the Hartwig et al., study were not blind to the distribution of liars and truth-tellers; and the authors did not ensure that the participants in their laboratory experiment would be as motivated to lie (i.e., suspects who committed an actual crime have the potential consequence of jail time). Considering the negative consequences such limitations would have in the real world (e.g., concentrating investigations on an innocent individual, eliciting false confessions, etc.), SUE as a deception detection tool is not yet proven to be effective.

Even though the late disclosure of evidence is not effective as a deception detection tool, there may be somebenefits to disclosing evidence late in an interview. Sellers and Kebbel (2009) argued that early disclosure of evidence can be harmful to the rapport-building process. Techniques that harm rapport are well known to negatively impact suspects' willingness to cooperate in interviews (Vallano & Compo, 2011). The rapport-building process has received much attention in police interviewing literature (Abbe & Brandon, 2013; Tickle-Degnen& Rosenthal, 1990), and results consistently show that interviews containing rapport result in more suspect-provided information (Collins, Lincoln, & Frank, 2002; Barker et al., 2008). Furthermore, Alison, Alison, Noone, Elntib and Christiansen (2013) analysed 418 police interviews, and found that rapport-harming procedures (i.e., implementing an accusatorial style at the onset of an interview) have a significant detrimental effect on cooperation in police interviews. Clearly there are some benefits to withholding information from the onset of the interview, and then presenting the information later.

Another variable of SUE that may prove beneficial in police interviews is the type of evidence to present (e.g., strong or weak, physical or observed).This reflects the fact that the main reason reason for confessing, according to self-report data (Gudjonsson, 2007; Sellers & Kebbell, 2009) and field studies (Gudjonsson & Petursson, 1991), is the strength of evidence. Sellers and Kebbell found that when presented with strong evidence, participants rated interviewers as being more fair in the interview process, rated the evidence against themselves as being stronger, rated the evidence against themselves as being more accurate, and confessed more often. Furthermore, the authors predicted that not focusing on a suspect's potential guilt until the end of an interview fosters open-mindedness on the part of interviewers, and reduces cognitive biases. However, Sellers and Kebbell warned that investigatorsmust be cautious when applying these findings;when confronted with inaccurate evidence, suspects are liable to question the interviewer's credentials, distrust them, and ultimately not cooperate in the investigative process. A loss of cooperation is detrimental to the information-gathering objective of many interviewing strategies. Evidently, when trying to apply SUE to interviews, officers need to be certain that the evidence they present is legitimate.

Limitations of Applied SUE

There are various limitations to the application of SUE in police interviews. One of the major limitations is the suspect's right to silence. Section 11 (c) of the Canadian Charter of Rights and Freedoms permits suspects in criminal investigations to not testify against themselves (i.e., remain silent during questioning). Any benefits that could be accrued from strategically using evidence (e.g., information provision, obtaining a confession) are not possible if a suspect remains silent. In order to understand the frequency exercising one's right to silence, Moston and Engelberg (1993) analysed the content of 133 police interview transcripts. The authors found that a suspect strategy of complete silence (i.e., refusing to answer any questions) was used in approximately 5% of cases, and a strategy of refusing to answer specific questions (e.g., "no comment") accounted for approximately 7% of all responses. Evidently, cooperation of the suspect may influence a police officer's ability to implement SUE; in other words SUE can only be effective if the suspect waives their right to silence.

Another limitation of SUE is the uncertainty of its application across populations.The underlying assumption of SUE is that guilty suspects provide fewer details in order to distance themselves from the alleged crimes. Persons with certain demographic characteristics may say less during their accounts may wrongly be considered liars.Younger children remember less information than older children in interviews (Sternberg, Lamb, Orbach, Esplin, & Mitchell, 2001). Children may not have the cognitive capacity to use the same lying and truth telling strategies used by adults (Clemens et al., 2010). Westera, Kebbell, and Milne (2011) noted that when cameras record interviews, interviews involving crimes that are highly sensitive (e.g., rape complainants) make interviewees reluctant to provide details, which may lead officers to believe that they are fabricating their accounts. Vulnerable populations such as children and rape victims may therefore be suspected of lying when SUE is used, even though other factors are contributing to their decreased information provision. In light of these findings, unless the physical evidence suggesting a victim has lied is damning, SUE should probably not be employed, especially with vulnerable populations.

To test the applicability of SUE techniques with children, Clemens et al., (2010) examined SUE using a mock-crime design in youth aged 12-14 to determine whether or not children used the same lying strategies as adults. Their results were consistent with findings in adult studies; children employ distancing strategies in the same manner as adults. Clearly, SUE techniques such as late disclosure can be applied effectively with children. Moreover, Tubb, Wood, and Hosch (1999) found that when suggestive evidence disclosure was used throughout a child-suspect interview, jurors were less likely to convict the accused, believing the confession to be illegitimate. Evidently, late disclosure has both preventative and proactive benefits for police interviews, in both applied policing and applied juror decision-making fields.

A final limitation of SUE in interviews is the inherent external validity between laboratory studies and real life. SUE is only able to determine relative gains for techniques such as deception detection. In other words, in real life, a researcher would not be able to compare the story of somebody who did commit a crime to the story of somebody who had the exact same experience, but did not commit the crime. Until SUE is able to show absolute gains rather than relative gains, it should probably not be used as an investigative tool for deception. However, as the literature has proven that there are characteristic differences in the accounts that liars and truth tellers provide, and that leaving information undisclosed until the end of the interview can increase the amount of provided information, it follows that police interviews should be adopt this practice.

Recommendations on the Strategic Use of Evidence

There are several barriers to overcome in order to begin to apply findings of SUE research to police interviews. First, the findings greatly benefit police officers who adopt an information gathering approach to their interviews, but may not help police officers who use confession-eliciting techniques. Second, existing training materials need to adapt to new findings – many researchers have noted that training manuals are far behind empirical data (Soukara, Bull, Vrij, Turner, & Cherryman, 2009; Jordan et al., 2012; Dando & Bull, 2011). More important than updating the training manuals, police training in interview protocols as a whole must be expanded. As previously mentioned, police officers often receive little training, (and in some cases no training), as to what information should be gained through interviews (Smith & Bull, 2013). In consideration of how many times a confession is the most essential evidencethat can be offered in proof of a crime, any techniques that improve the ability of the police to obtain reliable confessions. However, police interviewers need to be aware of the potential consequences of the misapplication of SUE in interviews. Despite the obvious limitation of only being able to make relative judgments, the main researchers in the field (e.g., Hartwig, Granhag, Strömwall, Vrij) have failed to either notice or rectify this issue. It is this author's recommendation that police officers refrain from using SUE to detect deception. The burden of proof in criminal investigations require the accused to be guilty beyond a reasonable doubt – and the 15% of incorrect judgments currently shown in literature (even in relative only judgments) raises more than just reasonable doubts about the efficacy of SUE as a detector of deception. ■

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Appeal of P. U. 9 (2014) to the Supreme Court of Newfoundland and Labrador Regarding the Disposition of a Surplus in Newfoundland and Labrador Hydro's Rate Stabilization Plan Account

William Casey

Law & Society 2000

Introduction

Regulated industries present an interesting interaction of society and the law. In certain industries, such as electrical transmission and distribution, it is difficult to create an open market economy due to the high cost of assets and the inefficiency associated with duplicating assets. As a result, it is deemed prudent to establish a regulated legal monopoly for the protection of society and the service provider. In Newfoundland and Labrador, as inmost Canadian jurisdictions, the provision of electricity to consumers is one such regulated industry.

As a result of this monopoly structure, governments establish regulators to oversee the utility industry. Decisions by regulators can have far reaching consequences on society, both intended and unintended. Also, as the companies involved often have to answer to their owners and investors for their capital investments and operating performance, legal action is common when a regulator's decision is unfavorable or in violation of accepted regulatory principles.

In Newfoundland and Labrador, the Board of Commissioners of Public Utilities (PUB) oversees the operations of Newfoundland Power and Newfoundland and Labrador Hydro, in addition to responsibilities overseeing other industries. There have been several appeals of PUB decisions in recent history. One contentious decision occurred in 2006, when Newfoundland Power received a refund from the Canada Revenue Agency and the PUB's Consumer Advocate sought leave to appeal the decision of how to record the refund.

The decision discussed herein arises from a surplus in an account called the Rate Stabilization Plan (RSP), which is held by Newfoundland and Labrador Hydro. A surplus of customer's money has built up in this account as a result of load shifts and price variations intrinsic in the operation of the power system. At the direction of the Government of Newfoundland and Labrador through Order in Council OC2013-089, Newfoundland Hydro applied to the PUB to dispose of the surplus in this account through a refund to customers. This order authorizing this refund was provided through Board Order P.U. 9 (2014). The point of contention surrounds the various classes of customers and which of these classes are to be paid the refund. The PUB took a very literal interpretation of OC2013-089, directing the refund to all electrical customers, regardless of whether or not they contributed to the surplus.

The two utilities and the Consumer Advocate appealed Board Order P.U. 9 (2014) to the Supreme Court of Newfoundland, as permitted in section 102 of the *Public Utilities Act*. The parties to the appeal have made submissionsthat the distribution of the funds is inequitable and will result in paying out a significant amount of money inappropriately. The outcome of this appeal will determine the refund amount received by a large number of electricity consumers and will potentially have the risk of setting a regulatory precedent for future refunds of the same nature in Newfoundland and Labrador.

As of the time of writing, the appeal is ongoing.

Rate Stabilization Plan Origin

In order to fully understand the RSP surplus and its disposition, the original establishment of the RSP in 1985 must be explained.

Initially, Newfoundland and Labrador Hydro(NLH), was an unregulated provider of electricity. The Provincial Cabinet, through acts of legislation, set the wholesale rates charged to customers. Newfoundland Power was, as it is now, a regulated public utility under the purview of the PUB.[1]

Government setting of wholesale rates continued into the late 1970's, when the government of the day decided that the PUB should regulate Newfoundland Hydro. This increased the openness and transparency of the rate-setting process and established a non-partisan level of oversight. As part of this process, a new mechanism for setting wholesale electricity rates had to be implemented.

After the PUB's regulation of NLH began, electricity rates in Newfoundland had two components. The first was the base rate for a kilowatt-hour of electricity. This was set by the PUB and represented the cost of service for everything except the cost of fuel burned at the Holyrood thermal generating station. The base rates would be adjusted through a general rate application, typically on a three-year basis.

The second component to electricity rates was called the Fuel Adjustment Charge. This took the form of an added surcharge on customer utility bills. Each month, the cost of the fuel burned at the Holyrood plant in the prior month would be charged to customers through the surcharge. In his then position as Mayor of the City of St. John's, now current Chairman of the PUB Andy Wells, wrote a history of the RSP in connection with a 2001 General Rate Application by Newfoundland Hydro. He detailed many of the reasons behind the change in billing methods and the unpopularity of the former fuel surcharge.

According to then Mayor Wells, there were two main factors leading to the public dislike of the fuel surcharge. The first was the design of the surcharge. Costs relating to the fuel burned at Holyrood in any given month were recovered in full from consumers in the subsequent month. Newfoundland is a cold climate where electricity use is highly dependent on the heating load. That is to say, electrical baseboard heating significantly impacts electricity use during the colder months of the year. The Fuel Adjustment Charge ensured that consumers'utility bills would be higher by orders of magnitude in the winter months. Needless to say, for most consumers money would have been tight in the winter. Many residents of the province were still living on a fishing-based income and as a result unemployment was highest in the winter.[2] Add in the impact of the Christmas season on most consumers' finances, and the high electricity billsresulting from the fuel surcharge proved very unpopular.

Secondly, the amount of the surcharge would vary significantly from month to month. Although the surcharge was based on the cost of fuel burned at Holyrood, most customers would have no idea as to what their actual electricity bill would be until it was received. Variations in the price of oil, daily use and efficiency achieved at Holyrood would cause seemingly random variation in consumers' electricity bills. In many cases, the fuel surcharge would be much greater than the regular charge.[3]

As a result of these two factors, public outcry against the Fuel Adjustment Charge eventually came to a head in the early 1980's. Several consumers groups, such as a popular one from Flatrock led by Ms. Roma Peddle[4], eventually were successful in making the Fuel Adjustment Charge a political issue. Ultimately the PUB, utilities, consumer representatives, and government devised an alternate rate structure which remains in place today with only minor changes.

In 1985, as part of a Newfoundland Hydro General Rate Application, the current rate structure was proposed. It served to create an account called the Rate Stabilization Plan (RSP) that would serve as a regulatory asset to be drawn up or down as costs related to Holyrood fuel varied from month to month. When setting rates, the PUB would build in a forecast price and quantity of fuel to be burned at Holyrood. As price and quantity burned fluctuate throughout the year, a surplus or deficit will build in the account. Then once a year, typically on July 1, the electricity rates charged to customers will be adjusted, with consideration given to return the RSP account to a reasonable balance. This rate design with annual adjustments stabilized the monthly variations experienced by consumers under the previous rate structure.

Electricity is generated primarily through two sources in Newfoundland.[5] Relatively cheap hydroelectric power is generated year round as the base supply of electricity. Electricity generated from the burning of fossil fuels is used during periods of increased demand to make up any shortfall, such as would be experienced during the cold winter months. Under the current rate structure incorporating the RSP, customers essentially over pay in the summer months for relatively cheap hydroelectric power in order to subsidize their consumption of relatively expensive fossil fuel generation during the winter months. This rate design has the benefit of stabilizing consumer electricity rates throughout the year.

In terms of paying into this account, only customers on the Island of Newfoundland contribute to the RSP through the electricity rates they pay. This is again related to the origin of this account. The RSP is in place to stabilize against price fluctuations on the island interconnected system resulting from the cost of oil burned at Holyrood and the amount of hydropower available relative to fossil fuel burned. Customers in Labrador are not funding the RSP, as they do not have access to electricity generated at Holyrood. Rural customers on the Island served by NLH typically pay the same ratesas customers served by Newfoundland Power, however these customers have their electricity rates subsidized and what these customers pay in rates does not cover the cost incurred to provide their service.[6]

In recent years, the RSP account has managed to accrue a surplus owed to customers on the order of $112 million.[7] This is primarily related to the length of time NLH has gone between General Rate Applications. NLH last went before the PUB for a General Rate Application in 2006.[8] In the nearly nine years since wholesale electricity rates were last set for NLH, substantial shifts in the customer load on the electricity system in Newfoundland have occurred. Several of the industrial customers on the system, most notably paper mills at Stephenville and Grand Falls, have shut down since the 2006 General Rate Application. As a result, the amount of fuel burned at Holyrood and associated annual costs of fuel have dropped without these customers drawing from the grid. As a result the cost of fuel included in base electricity rates was overstated and as a result the costs recovered from customers to offset the fuel cost was also overstated. This surplus has been sitting in the RSP account accruing interest for several years.

Order in Council OC2013-089

In April 2013, the provincial government issued OC2013-089 to address the issue of the growing RSP surplus. An order in council, like legislation, has legal force.

OC2013-089 is a short, roughly two pages in length. The first page is dedicated to removing a freeze on increases to the rates charged to industrial customers on the Island. This is related to the RSP in that funds from the account will be needed to phase in revised rates over a three-year period. Approximately $49 million is ear marked from the RSP surplus for this purpose.[9]

The second page of the order in council deals with the remaining balance in the RSP account after the amount forindustrial customers has been withdrawn. The order requires that the balance of the account (the Newfoundland Power RSP surplus) is to be refunded to ratepayers in the form of "direct payments or rebates," as part of the NLH General Rate Application which was ongoing at the time.[10]

This order is vague as to how to carry out the refund, leaving leeway for the PUB to apply accepted regulatory practice to the situation. It can be noted however that the refund to customers is a departure from the norm. Most surpluses in the RSP account are managed through adjustments to consumer rates prospectively. OC2013-089 specifically prohibits this course of action and requires a refund directly to individuals.

Description of Board Response and Order PU9 (2004)

On October 31, 2013, and amended on November 7, 2013, NLH applied to the PUB for an order to carry out the directions from OC2013-089.

The PUB determined that there were 5 main areas of the application to consider:

1. That the Newfoundland Power RSP Surplus refund be paid to Newfoundland Power and to those rural customers whose rates are determined based on the rates charged by Newfoundland Power.

2. That the Newfoundland Power RSP Surplus be refunded to Newfoundland Power customers on their April 2014 electricity bills and be basedon their total energy consumption on bills issued during the period January 2013 to December 2013

3. That NLH's rural customers, whose rates are based on Newfoundland Power's rates, receive a similar refund on their April 2014 electricity bills basedon their total energy consumption on bills issued during the period January 2013 to December 2013.

4. That the refund to rural customers be refunded from the Newfoundland Power RSP surplus.

5. That any net refund to Newfoundland Power's customers be in the form of a refund to each customer's account.[11]

As can be seen from the appeal, no party was satisfied that the PUB was correct in its interpretation of OC2013-089.

Sections 99 through 102 of the *Public Utilities Act*[12], describe the procedure for appealing a decision of the PUB to the Court of Appeal.[13]

Newfoundland and Labrador Hydro Issues / Consumer Advocate Issues

NLH and the Consumer Advocate share the same objections to the decision reached by the PUB. The PUB interpreted OC2013-089 as intending to make the refund available to all ratepayers in the Province with the exception of the industrial customers, addressed separately in both orders.

During the PUB application andthe subsequent appeal , both NLH and the Consumer Advocate submitted that the RSP surplus should "be distributed amongst all customers who were affected by RSP adjustments because, had the RSP surplus amounts been distributed to customers through normal RSP adjustments, those changes would have affected the Hydro Rural Interconnected customers and [some of] the isolated Hydro rural customers." Hydro, in the initial application to the PUB, did not specifically request that theseclasses of customers be exemptedor included in the refund. These customers were added to the list of refunded customers by the PUB in Order P.U. 9 (2014).

In court all parties have taken the position that correctness should be the standard of review, falling to reasonableness should the court be dissatisfied in correctness being the appropriate standard. This is to be expected, as correctness is the standard that would allow the court to most easily overturn the PUB decision. All parties rely on *Dunsmuir* v. *New Brunswick* to justify this position.[14]

Again, the major difference between these parties and Newfoundland Power is the with respect to which specific classes of customers included. The decision will determine which customers receive the refund and the amount they receive.

NLH references a similar case in 2012 where the same parties appealed a decision of the PUB regarding the RSP. In the 2012 case,[15] the PUB declined to redistribute the RSP surplus between customer classes due to other procedural

issues that had been raised. This judgment reinforced the authority of the PUB to deal with regulatory surpluses in accordance with the broad powers of the *Act* establishing its oversight.

A final issue is raised with respect to the plain meaning approach the PUB took with interpreting OC2013-089. Modern interpretation of statute involves consideration of contextual factors as well as the plain meaning of words in the statute.

Newfoundland Power's Issues

Newfoundland Power has made several of the same arguments as the Consumer Advocate and NLH. Newfoundland Power also relies on *Dunsmuir* in arguing for the correctness standard of review.

The substantial difference between Newfoundland Power and the other parties revolves around the interpretation of which customer groups are eligible for the refund of the RSA surplus. Newfoundland Power argues for the exclusion of the Hydro rural customers as they are subsidized by Newfoundland Power customers to the tune of approximately $54 million per year.[16] The argument follows that, as these customers are subsidized, that is to say the rates they pay do not cover the cost to provide service to these customers; it is impossible for any of their payments to have contributed to the surplus in the RSA. Fundamentally the argument follows; you cannot refund money to a customer who did not contribute to the surplus.

Government Intent

In discussing the interpretation of OC2013-089, it is important to ascertain the intent of the Government in issuing the order.

In 2013, the Government was being heavily criticized for the Muskrat Falls project. First Nations groups were pursuing land claims and costs for the project were climbingwell above early estimates. Government was also criticized for over ruling the PUB on the review process for Muskrat Falls. As well, NLH had failed to meet electrical demand in January 2013, leaving thousands of customers without power.

This is the environment that produced the order in council. It is important to note that the order presents a significant departure from previous dealings with the RSP. It can be inferred that the Government wanted consumers to see a tangible refund in their hands rather than a less tangible reduction in rates.

The reasons behind this course of action will never be precisely known, but in the context of the political climate, it can be inferred that the Government was attempting to buy the electorates approval for the current power system and alleviate some of the criticism and vitriol that was directed at Government.

Interpretation of Statute

All parties to the appeal have contended that the PUB erred in engaging in a literal interpretation of the Order in Council rather than considering the context and overall intent of the Order. The PUB interpreted "remaining customers" in the strictest sense of the word, namely those not included under the class of Island Industrial Customers. This interpretation is clearly spelled out on page 9 of P. U. 9 (2014):

> The Government direction does not restrict or narrow the customers to receive the refund except to say that it is to go to the remaining ratepayers after the exclusion of the Island Industrial Customers. It does not direct the Board to further or set out any criteria as to specific classes of customers eligible or entitled to the refund. The Board does not accept Hydro's suggestion that OC2013-089 makes it clear that the Board is authorized to consider ordering refunds to all customers that are involved in and affected by the Rate Stabilization Plan surplus.[17]

On page 11 of P.U.9 (2014) the PUB clearly states that "If it was the intent of Government that only certain customers were entitled to the surplus refund this could have been clearly stated."There are two problems with this position. Firstly, the PUB is inconsistent in its interpretation. OC2013-089 explicitly titles the distribution of the surplus as a "refund" to customers. The PUB conveniently ignores the dictionary definition of a refund. According to the *Merriam-Webster Dictionary* a refund is defined two ways.

> REFUND - transitive verb. 1. to give or put back
> 2. to return (money) in restitution, repayment, or balancing of accounts[18]

The argument exists that Government limited customers eligible for payment of the RSP surplus by specifically describing the distribution of the surplus in the account as a "refund". Being that a refund is a return, repayment, or balancing of accounts, describing the distribution of the RSP surplus in this manner limits customer eligibility to those who paid into the account. The PUB's decision fails on this point.

Secondly, even if the PUB's interpretation of the plain meaning of the word refund is deemed correct, the use of the plain meaning in interpreting statute is not consistent with current practice. The Supreme Court of Canada recently held that:

> This issue raises a question of statutory interpretation which must be resolved according to the modern

principle of statutory interpretation: "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (R. Sullivan, Sullivan on the Construction of Statutes (5th ed. 2008), at p. 1, citing E. A. Driedger, The Construction of Statutes (1974), at p. 67). We underline that the starting point is the text of the provisions in their grammatical and ordinary sense.[19]

As Newfoundland Power has argued, OC2013-089 must be read in light of s.16 of the *Interpretation Act*, RSNL 1990, c. 1-19. That section assures that every act or regulation "shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the act, regulation, or provision according to its true meaning."

Consistent with this guideline on statutory interpretation, it is contended that the PUB, when interpreting OC2013-089, should have considered the context of the order and the wording chosen. In a law intending to refund a surplus to consumers of the service that generated the surplus, the PUB should have interpreted the words "remaining ratepayers" in the context of those remaining ratepayers who *contributed to the surplus*. Again, the PUB's decision fails on this point.

Societal Impact

The societal aspect of this case should not be underestimated. There exists a surplus of $112 million for refund to consumers. According to the Consumer Advocate, the overall impact of the inclusion of the contentious customers would reduce the overall refund to deserving customers by approximately $17 per customer.[20]

More importantly, however, is the danger of establishing a regulatory precedent for returning future surpluses. Should the PUB decide that all customers are entitled to RSP adjustments; the precedent could be set that all customers will receive similar refunds in the future. Future refunds could be much greater than $17 per customer.

Perhaps of greater concern is the public's perception of the power system and its oversight by the PUB's. The public has been critical of the PUB, Government and the utility companies since the Muskrat Falls project was approved. In the subsequent years, mounting costs and power blackouts caused by equipment failure have contributed to poor public opinion of the system.[21] Of particular concern, is the perception that Government meddled in the business of the PUB and prevented the fair and impartial review of the Muskrat Falls project.[22] It has been suggested that these factors contributed to the resignation of Premier Kathy Dunderdale.[23]

Analysis of the Case

Based on the above analysis, the appeal of the PUB's decision should succeed. Fundamentally, the interpretation of the "remaining ratepayers" should be taken to mean the remaining ratepayers who contributed to the RSP surplus. It is fundamentally unjust to give a refund to customers who have not contributed to the surplus at the expense of those who paid in. This plainly eliminates the majority of the non-Newfoundland Power customers.

The only argument for including another class of customers pertains to those customers who would have benefitted from reduced rates if an RSP rate adjustment had been made to dispose of the surplus. This is the class of rural customers who pay ratesbased on the Newfoundland Power customer rates. As these customers would have benefitted from reduced rates under the RSP, they therefore paid above what their rates should have been, and arguably could be entitled to receive a refund.

The weakness of this argument is that these customers do not pay their fair share of costs. Newfoundland Power estimates[24] that other ratepayers subsidize these customers to the tune of $50 million per year. Since the rate paid by this class of customers is insufficient to cover the cost of service delivery, a portion of these customer's rates could not possibly have accrued into the RSP.

It is the author's opinion that these customers are not entitled to a refund. Even considering the increased rates paid by these customers, the costs of providing them with service exceeded what they paid. Their discounted utility ratesalready increased the rates paid by other customers. The position that these customers should not be eligible for a refund is supported by the admission of a government spokesperson that "the directive was that money should be returned to the people who paid in".[25]

A bigger concern is the PUB's abdication of responsibility. The *Electric Power Control Act* specifically grants the PUB jurisdiction in respect to issues such as this. The PUB erred in deciding that the Order in Council was to be implemented without critical thought or the application of industry best practices. The PUB either does not understand its own mandate or has specifically misinterpreted the obligations placed upon it in this case.

The failure of the PUB is in part a result of ambiguity of OC2013-089. Government's order was less than two pages in length and left many of the specifics for disposing the surplus unstated. There was no discussion of customers to be included or other specifics beyond the basic division between industrial customers and retail customers. As a result, considerable interpretation was required by the PUB to facilitate the disposal of the RSP surplus.

The question can be raised as to why the Government felt it was necessary to provide this rebate. The accepted practice has always been to eliminate a surplus through prospective adjustments to utility rates. It can be inferred from the political climate that Government was attempting to use the surplus to create political capital and influence public opinion.This departure from accepted and historic practice places a significant portion of the blame on Government.

NLH also has a share of the blame. In designing the application put before the PUB resulting in P.U. 9 (2014), NLH failed to remove the ambiguity surrounding which customers were to be included in the refund. NLH also failed to sufficiently justify the position it held regarding the exclusion of the customers that were later included by the PUB. As a result, by putting the PUB into a position where significant questions remained as to who should be included in the surplus, both Government and NLH respectively failed to provide suitable guidance and evidence for the disposition of the surplus. ■

Endnotes:

[1] Much of the discussion of the history of rate setting for Newfoundland Hydro is taken from a letter written by then sitting Mayor of St. John's Andy Wells. The letter is available from http://www.pub.nf.ca/hyd01gra/Correspondance/NoticeAndyWells.pdf

[2] This is discussed in Andy Well's letter to the public utilities board. This information is also referenced in the Newfoundland Hydro 1985 annual report in the discussion of the new rate methodology.

[3] This was a common criticism noted in both the Letter by Mr. Wells and the NLH Annual Report of 1985.

[4] Andy Wells specifically mentioned this group in his letter as being particularly effective.

[5] Wind farms are installed at Fermuse and Ramea. These represent an insignificant proportion of the installed generation on the island.

[6] Taken from the Newfoundland Power submission in the appeal

[7] The CBC ran a news article giving the balance as of Feb 19, 2015. http://www.cbc.ca/news/canada/newfoundland-labrador/power-rebate-should-only-go-to-newfoundland-customers-advocate-says-1.2964107

[8] PUB Website - There has been a General Rate Application ongoing since 2013, however this application was amended in 2014 and is not yet complete.

[9] Amended from 56.5 in August of 2013

[10] This order in council is available from the PUB Website as attachment 15 of request for information PUB-NLH-051 of the NLH 2013 General Rate Application.

[11] This section is a direct quote from board order P.U. 9 (2014). This order is available from the PUB website at http://www.pub.nf.ca/applications/NLH2013ApprovalofRSPRules/files/order/pu9-2014.pdf

[12] RSNL1990 CHAPTER P-47.

[13] Ibid., s.102. The remaining sections describe the process to initiate an appeal and notify the PUB and other parties.

[14] *Dunsmuir* v. *New Brunswick,* [2008] 1 S.C.R. 190, 2008 SCC 9 is a landmark case in determining appropriate standards of review. In essence, this case states that substance of the review is more important than the form.

[15] *Newfoundland and Labrador Hydro* v. *Newfoundland and Labrador (Board of Commissioners of Public Utilities),* 2012 NLCA 38 (CanLII), <http://canlii.ca/t/frrnp>

[16] PU 9 2014

[17] PU 9 2014 pg 9 lines 25-30.

[18] Retrieved from http://www.merriam-webster.com/dictionary/refund

[19] Paragraph 14: *R.* v. *Conception, 2014* SCC 60 (CanLII), <http://canlii.ca/t/gdshq>

[20] CBC article

[21] This negative opinion led to the retaining of Liberty Consulting Group for a large-scale review of supply issues and power outages. The PUB maintains a record of this investigation at: http://www.pub.nf.ca/applications/IslandInterconnectedSystem/index.htm

[22] http://www.thewesternstar.com/News/Local/2012-11-17/article-3121611/Muskrat-Falls-has-long-been-a-done-deal/1

[23] http://www.theglobeandmail.com/news/politics/how-tory-rifts-and-muskrat-falls-helped-bring-about-dunderdales-resignation/article16460786/

[24] PU9 2014

[25] taken from a CBC Article available at http://www.cbc.ca/news/canada/newfoundland-labrador/power-rebate-should-only-go-to-newfoundland-customers-advocate-says-1.2964107

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Assessing the Senkaku/Diaoyu Territorial Dispute under International Law Framework

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Political Science 3210: International Law

Introduction

The Senkaku/Diaoyu Islands, with many other names[1], are perhaps the locus of the most intensive territorial disputes in East Asia. Ever since the end of the 1960s, Japan and China have been archenemies fighting for the sovereignty of the islands. This essay starts with a glance of the origin and development of the disputes. Then, it will review the legal principles involved in land claims and maritime boundary delimitation, and apply these principles in the evaluation of the legal claims from both states. Afterwards, this essay takes a new perspective and analyzes the framework of International Law not as a solution but the cause of all the aforementioned problems. Overall, this essay argues that placed under International Law framework, Japan's legal claim for the territory is more convincing. However, due to the problems of International Law, a strong legal argument is not influential in the territorial disputes.

Backgrounds

With "five small volcanic islands and three outcroppings", Senkaku/Diaoyu Islands occupy an area of less than ten square kilometres (Nasu and Rothwell, 2014: 5). The Islands have geographic proximity to both Japan and China: located 220 nautical miles (nm) from Japan's Okinawa Islands, and 230 nm from mainland China. (Pan, 2007: 71; Ministry of Foreign Affairs, Japan, 2013: 1).

The breakout of the dispute can be traced back to a 1968 United Nations report. After surveys on "coastal mineral resources", the UN Economic Commission for Asia and the Far East (ECAFE) indicated the "possibility of a substantial amount of petroleum and natural gas" surrounding the Senkaku/Diaoyu Islands (Lee and Park, 2012: 3; see also Ministry of Foreign Affairs, Japan, 2013: 2). Shortly after the report, the United States transferred jurisdiction of Ryukyu Islands (琉球諸島) to Japan in 1972 (Lee and Park, 2012: 3). Among the islands transferred were the Senkaku/Diaoyu Islands, resulting in the dispute between the Republic of China and Japan. After the regime change between People's Republic of China (PRC) and Republic of China (ROC, or Taiwan)[2] in the 1970s, controversies over territorial sovereignty have intermittently sparkled tensions among Japan, PRC, and Taiwan.

In the twenty-first century, a series of incidents saw the escalation of the dispute and tensions. In 2003, PRC established Chunxiao gas field "three miles west of boundary line claimed by Japan" (Lee and Park, 2012: 4). As the gas field was connected to what Japan considered to be their sideof the sea and resource, Japan called for a cessation of the Chinese programs. In the absence of China's response, Japan started allowing civilians to prospect the waters surrounding the Senkaku Islands. From 2005 to 2008, conflicts between Japan and China were incessant. The incidents and the hostility lasted until 2008, when they were forced to cool down as the Chinese President Hu Jintao was about to visit Japan (Ministry of Foreign Affairs, China, 2008).

Again in 2010, Japan arrested Chinese personnel after a collision between a Japanese patrol boat and a Chinese fishing boat, pushing the enduring tensions to the climax (Lee and Park, 2012: 4-6).

The Law and Its Implication

Acquisition of Territory

To claim a territory, the states involved can follow one of the five modes recognized by International Law: "occupation, cession, prescription, conquest, and accretion" (Kindred et al, 2006: 433). Occupation is commonly associated with discovery. Namely, to establish a territory acquisition through occupation, a state must demonstrate two elements: the discovery of a land without prior claims, and the effective control over the territory (Harry, 2013: 666-67; Kindred et al, 2006: 433). To constitute the second element, there must be *animus occupandi*[3] and actual sovereignty control (Harry, 2013: 667; Ramos-Mrosovsky, 2008: 914). While private and commercial acts do not count, government activities like patrolling, economic activity, building infrastructure, etc., can be evidence of effective control and *animus occupandi* (Ramos-Mrosovsky, 2008: 914-15).

The second mode, cessation, means that the territory is transferred "from one state to another" (Kindred et al, 2006: 433). Modern International Law defines such transfer to be "peaceful transfer" (Ramos-Mrosovsky, 2008: 915-16).

The third mode is prescription. Its notion entails that "a state that fails to contest other states' assertions of sovereignty over its territory can lose its rights for failure to insist upon them" (Kindred et al, 2006: 433; Ramos-Mrosovsky, 2008: 916).

In practice, if a state does not protest the invasion by another state, the inaction may be seen as acquiesce for abdicating the rights over the territory (Ramos-Mrosovsky, 2008: 916).

The last two modes are conquest and accretion. Conquest is the acquisition by force or through war. Modern International Law no longer recognizes such acquisition. Accretion refers to the change of territory due to natural changes (Kindred et al, 2006: 433).

Complementing the five modes of territorial acquisition is the cardinal principle of inter-temporal law (Nasu and Rothwell, 2014: 8). Per Max Huber, inter-temporal law stipulates that "juridical fact must be appreciated in the light of the law contemporary with it," instead of the law that would be applicable at the time of the disputes take place (United Nations, 2006: 845). This principle is upheld by the International Court of Justice (ICJ), who decides that "even if [the] mode of acquisition[4] does not reflect current international law, the principle of inter-temporal law requires that the legal consequences… be given effect today" (*Cameroon* v. *Nigeria, 2002*).

Delimitation of the Sea

As Senkaku/Diaoyu Islands are located at midst of the waters, the dispute also involves delimitation[5] of the sea. Per the United Nations Convention on the Law of the Sea (UNCLOS), a "hierarchy of zones" and their respective rights derive from an island. The zone with the highest level of sovereign rights is the internal water, which a state can claim up to 12 nautical miles (nm) from the baseline[6] (UNCLOS, 1982). This area is considered to be the territorial sea over which a state has full sovereignty (Ramos-Mrosovsky, 2008: 908-909).

Up to 200 nm from the baseline is the Exclusive Economic Zone (EEZ). In the EEZ, a state has considerable sovereign rights, including the ones over resources of the water and the seabed (UNCLOS, 1982). A state can also claim rights over the continental shelves[7], which, if natural prolongation exists, covers the area up to 350 nm from the baseline (Ramos-Mrosovsky, 2008: 910). A state "exercises… sovereign rights for the purpose of exploring [the continental shelf] and its natural resources" (UNCLOS, 1982). However, due to the overlaps between continental shelves and high seas where "all states may navigate freely and exploit natural resources and none may claim sovereignty or jurisdiction," a state has significantly less control in continental shelf area (Ramos-Mrosovsky, 2008: 911).

The Claims and the Assessment

Legal Claims

PRC's legal claim to the Senkaku/Diaoyu Islands can be seen as the occupation mode of territorial acquisition. It stresses its discovery of the islands as part of Taiwan in the Ming Dynasty (1368-1644), and cites historical documents as evidence (Drifte, 2013: 11). For instance, there are records of Chinese sailors' arrivals, fishing activities, and the harvesting of raw medical materials for the royal family's use (Chiu, 1999: 10-12, and Ramos-Mrosovsky, 2008: 925-26). Also presented is the evidence that China "incorporated the islands into its maritime defenses in 1556" (Pan, 2007: 77). The PRC claims that Japan "grabbed" Diaoyu islands as part of Taiwan through invasion (State Council Information Office, China, 2012). Relying on the 1951 *Peace Treaty of San Francisco*[8], China argues that Japan should have returned the Islands as part of Formosa (Denk, 2005: 97-98). Formosa was a territory that China was forced to cede to Japan under the 1895 *Shimonoseki Treaty* and was dictated by the 1951 treaty to be returned to China (Pan, 2007: 80-81).

Likewise, Japan based its territorial claim on occupation. The islands were incorporated into Japan as *terra nullius* in 1895 via the *Shimonoseki Treaty* (Nasu and Rothwell, 2014: 5). Ever since, Japan has been "continuously occupying the islands" (Drifte, 2013: 11). In response to China's argument, Japan highlights that in the 1951 Treaty, there is no reference of Senkaku/Diaoyu Islands as part of Formosa (Nasu and Rothwell, 2014: 5). Thus, the treaty "has nothing to do with the legal status of these islands" (Denk, 2005: 97-98). Japan also questions PRC's standing in the dispute, since the signatory of all of the relevant documents is the ROC (Ikegami, 2013: 1-2). Over the years, Japan has leased theSenkaku/Diaoyu Islands for hunting purpose, built governmental facilities like weather stations and a heliport, and provided coast guards and patrol. These activities can be relied on as proof of exercise of sovereignty (Ramos-Mrosovsky, 2008: 923).

The two states not only disagree on territory ownership but also a dispute settlement mechanism. Since UNCLOS was ratified by both Japan and PRC in 1996, it is equally applicable and binding on both states (Drifte, 2013: 22). Under the UNCLOS framework, China "emphasizes natural prolongation" and inclines to settle conflicts "on the basis of international law and in accordance to principle of equity" (Lee and Park, 2012: 8). In contrast, Japan adopts the median-line approach[9] (Pan, 2007: 83).

Assessment

The divergence of Japanese and Chinese legal claims can be broken down into three major points, the first being whose legal claim fulfills the requirement of International Law better. Since both Japan and China rely on the discovery and occupation of the Islands to claim the territory, it is essential to determine whose occupation truly establishes sovereignty. Some scholars cite official maps to show that China has included the Islands in its military defense long before Japan's discovery (Chiu, 1999: 15-16). Thus, what Japan discovered does not qualify as *terra nullius*.

However, discovery alone may not be sufficient to merit sovereignty. As mentioned, effective control over the territory is necessary for proving occupation. This necessary condition shall be met by the proof of government activities. Whereas both states have evidence to show their nationals' activities in the area, Japan's evidence seems to outweigh China's with stronger connection to the government. Moreover, "Japan has held the islands" as administrator since 1971 (Harry, 2013: 671-72). Its exercise of actual sovereign control has great probative value, which China lacks.

Even if China succeeds in establishing its occupation, its sovereignty over the Islands may be challenged on the basis of prescription. Regardless of the regime change, neither ROC nor PRC had protested Japan's occupation of the Islands from 1945 to 1971 (Ramos-Mrosovsky, 2008: 929). Such remarkable inaction allows Japan to effectively argue for China's abdication of territory via acquiesce.

The second point questions whether Senkaku/Diaoyu Island went under Japanese control — through seizure or cessation — legally. On one hand, PRC insists that Japan invaded the Islands and forced China to sign the *Shimoneseki Treaty*; on the other hand, Japan points to the fact that the treaty was signed indicates a lawful cessation. Here, the inter-temporal law can be detrimental to PRC's claim. Although conquest is no longer recognized by International Law, "forcible annexation or conquest based on aggressive imperialism" would be permitted at the time Japan took the Islands (Nasu and Rothwell, 2014: 9). Simply put, for all the difficulties China has to prove Japan's invasion of Senkaku/Diaoyu Islands, it may eventually turn out to be useless to counter Japan's claim.

The third point focuses on conflict settlement mechanism. As the UNCLOS is not crystal-clear on this point, one looks to the case law for general direction. The *North Sea Continental Shelf Case* of 1969 supported the natural prolongation of land territory criteria (Germany v Denmark and Netherlands, 1969). However, in a subsequent 1985 case, the ICJ decided natural prolongation was not conclusive on territorial claim (*Libya* v. *Malta, 1985*; Lee and Park, 2012: 15). Where Japan and PRC disagree on solutions to maritime boundary disputes, these precedents can enfeeble PRC's approach. Meanwhile, Japan's insistence on median-line approach does not resolve the issue. In exemplary continental shelf cases, although the ICJ has considered median-line approach as part of the analysis, the final delimitation was never determined by sole reliance upon this approach. There were multiple clarifications that the ICJ deemed the median-line approach ancillary but not conclusive (*Libya* v. *Malta, 1985; US* v. *Canada, 1984; Denmark* v. *Norway, 1993*).

The Problem of International Law

Whilst most people rely on International Law as the guideline for dispute settlement, few have realized that it could have caused the problems in the first place. Particularly, in regions like East Asia where the cultural, historical, and political backgrounds are fundamentally different from those of International Law[10], International Law can be problematic and unhelpful. For instance, the zoning of internal waters, the EEZ, and the continental shelvesisincompatible with East Asian geography. There is only 360nm coast-to-coast distance between Japan and PRC (Harry, 2013: 666; Ramos-Mrosovsky, 2008: 911). It is thus mathematically impossible to have two 200nm EEZ as defined by UNCLOS without conflicts in the East China Sea.

International Law fuels the tension by adding too much value on small islands. The provisions in UNCLOS impart strategic importance on the Senkaku/Diaoyu Islands. A successful territorial claim of the Islands gives a state a new starting point to draw the lines of its territorial sea, the EEZ, and the continental shelfs. What follows are the extension of territory and the monopoly of potential resources. While the East Asian states are geographically close to each other, the extension of territorial control will confer military and defense advantages as well.Also, with the dearth of relevant cases, the settlement Senkaku/Diaoyu Islands— if there will be any— will set precedents for other on-going disputes in East Asia[11] (Harry, 2013: 664).

Furthermore, by "encourag[ing] the assertion of sovereignty and penaliz[ing] states for appearing to acquiesce in a rival state's claim to a disputed territory," International Law leaves the involved states no choice but to engage in aggression (Drifte, 2013: 22-23). International Law and its vague norms arm nationalists on both sides to argue for the territorial rights and act radically (Ramos-Mrosovsky, 2008: 906-7, 929). For example, right-wing Japanese have persistently defied China by claiming to purchase the Islands, and Chinese actionists repetitively flag the Islands (Wenweipo, 2012). Such acts create a dilemma for the governments. On one hand, if the government sides with nationalists' acts, it is prone to disturb the diplomatic bond with the other state. On the other hand, if the government ignores the nationalists' demand, it will be pictured as weak and unable to defend the country. Similarly, the government in the corresponding state will have to face the same problem. In other words, both states involved in a territorial dispute may end up with less room for a diplomatic solution because the dispute has been hijacked by its nationalists.

Lastly, International Law seems to be incapable of solving the disputes. So far, there is no international convention of territorial disputes (Harry, 2013: 665; Ramos-Mrosovsky, 2008: 913). Even if there is convention, whether the convention can be enforceable is doubtful. With the decentralized nature of International Law, and the lack of effective enforcement mechanism, International Law can be *de facto* non-binding.

Powerful states can easily ignore International Court decisions that are adversary, with little risk of being challenged by less powerful states (Ramos-Mrosovsky, 2008: 937). Specifically, given China's "growing economic and military power, and creeping diplomatic and economic influence abroad", the influence of international law's in imposing binding measures upon China can be minimal (Saul, 2013: 197). Japan has already demonstrated a general tendency to not irritate China: it has refrained from bringing litigation which would be at the expense of gains through Sino-Japan economic cooperation (Koo, 2009: 209-11; Huang, 2014: 47).

Conclusion and Reflection

For the past decades, the Senkaku/Diaoyu Islands have ignited considerable territorial disputes and hostilities among involved states. Both relying on the occupation mode of acquisition, Japan and China each have their evidence in support of their legal claims for the territory. Given Japanese governmental connection with the Islands, China's acquiesce, and the inter-temporal law, Japan should have the better legal argument were it to submit claims to International Court. However, because of the nature and consequences of the East Asia boundary dispute international law is not well-suited to determine a satisfactory solution. There is not an effective enforcement mechanism. Furthermore, involved states may not be willing to sacrifice their economic gains to vigorously pursue the claim. Scholars have suggested the International Law is of limited value in territorial disputes. The adversaries to the Senkaku/Diaoyu dispute will continue to make public arguments based upon international law, but not rely upon the law to decide the boundaries (Ramos-Mrosovsky, 2008: 939). A more likely result will be the imposition of the boundaries most favourable to China under terms which favor China. Compared to the ineffective legal process under International Law framework, the regional stability and settlement of disputes are more likely to be achieved through diplomacy and joint management of the disputed area, which have proved successful in other cases (Saul, 2013: 204).■

Endnotes:

1. In Taiwan (Republic of China), the Islands are known as T'iaoyutai Islands (釣魚台列嶼). Taiwan also has legal claims for its sovereignty over the Islands as the legitimate regime of China. However, given that the main aim of the essay is to study legal principle via the territorial dispute, and the complexity of regime change and legal disputes between ROC and PRC, this essay will not detail Taiwan's claims.
2. After the second Chinese civil war (1946-50), Kuomintang (KMT, or Chinese Nationalists Party) relocated to Taiwan and declared its continuing existence as Republic of China (ROC). The Chinese Communist Party (CCP) remained and secured control of Mainland China where the People's Republic of China was founded in 1949 and replaced ROC in United Nations in 1971. Both KMT and CCP consider themselves the only legitimate regime of China.
3. Meaning "affirmative demonstration of intent to occupy the territory."
4. The original writing refers to the root of title in *West Sahara* case.
5. In International Law, delimitation means drawing lines that affect borders, territory distribution and the sovereign rights related to the said borders and territory. See, especially, Article 50 and 70 of UNCLOS.
6. Baseline is the starting point which the territorial sea and other zones like the EEZ are measured. This depends on the situation, there are different types of baseline. Sea amos-Mrosovsky, Carlos. 2008. "International Law's Unhelpful Role in the Senkaku Islands." *University of Pennsylvania Journal of International Law* 29(4): 903- 946; also see UNCLOS for details.
7. Per UNCLOS Article 76(1), "The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."
8. The treaty signed between Japan and states of Allied Power as the official end of World War II.
9. Also known as the equidistance principle, this approach proposes delimitation by using a median line. The states involved in disputes should have equal distance from their shores to the said line.
10. Many principles and customs in International Law are derived from or related to the Western civilizations, i.e. Roman traditions, European-centric views.
11. For example, the Dokto/Takeshima Dispute between Japan and South Korea, the Kuril Islands Dispute between Russia and Japan, etc.

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Interpreting the POGG Principle: A Decentralist JCPC, A Centralist SCC?

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Political Science 3820: Constitutional Law in Canada

Introduction

The "Peace, Order, and Good Government" (POGG) principle is significant for the division of power between federal and provincial governments. The Judicial Committee of Privy Council (the JCPC), and the Supreme Court of Canada (the SCC), being the highest appellate courts of their time, interpreted the POGG principle differently. This essay reviews the origin of the POGG principle, studies representative cases heard by each court, and analyzes the decision, reasoning, and influence of these cases. The essay argues that the JCPC's narrow reading of the POGG principle curtailed the power of the federal government, contrary to the founding Fathers' design.

The POGG Principle: Origin

The Confederation of Canada was a result of political compromise. On one hand, "a strong central government was needed in order to fulfill the desires of a new economy, expansion of the West and a strong military able to fend off the Americans," on the other hand, Quebec and the Maritimes were afraid that confederation would harm their autonomy and identities (Weiler, 1974: 93; Dyck, 2008: 31; Smith, 2004:42). To acquire sufficient support for the Confederation and to balance different needs, the founding Fathers of Canada chose a federal system that would allow "the central government to deal with common purpose, and the provincial governments to look after local concerns" (Dyck, 2008: 31). Accordingly, the division of power was entrenched into s.91 and s.92 of the *British North America Act, 1867*.[1]

However, the semantics of s.91 enables the federal government a broad scope to exercise its authority (Monahan, 2006: 254):

> *"It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces…"* [emphasis added] (Department of Justice, Canada, 2014)

Known as the POGG principle, the wording of s.91 allows the federal government to legislate over matters not enumerated in s.91 or s.92, and to override provincial power as fulfilling its responsibility of peace, order, and good Government. Due to the expansive nature of the power that the federal government has through the POGG principle, many scholars argue that a centralized Canada was the founding Fathers' original intent (Supreme Court of Canada, 2013).

The JCPC: A Narrow Interpretation

Although the founding Fathers deliberately allocate powers for a strong central government, the JCPC did not interpret s.91 and s.92 as the Fathers had wished. Instead, it "severely narrow[ed] the powers of POGG… and expand[ed] the provincial power of property and civil rights" (Verrelli, 2007: 40-41).

Citizen's Insurance Co. v. *Parsons* is one of the first cases in which the JCPC curtailed the usage of the POGG principle. In this case, the insurance company refused to reimburse a storeowner for losses from a fire by relying on Ontario's *Fire Insurance Policy Act*. In response, the owner contended that the Ontario legislation violated the division of powers in s.91 and s.92 of the *Constitution Act, 1867*. Therefore, he did not need to comply with this *ultra vires* legislation (British and Irish Legal Information Institute, 1881: 4-5).

Citizen's Insurance is a case about the jurisdiction of a non-enumerated matter. The subject matter, insurance, is not listed in the Constitution. Unlike what the founding Fathers intended, the JCPC reasoned that the POGG principle should not give rise to a residual power that would be so strong as to render the provincial powers in s.92 meaningless (Russell, 1989: 37). Although federal government has power to legislate over trade and commerce per s. 91(2) in *Constitution Act, 1867,* the JCPC excluded intra-provincial trade and commerce from federal jurisdiction (see British and Irish Legal Information Institute, 1881). The JCPC went on to dictate that the federal government *might* only exercise its power over trade in three situations: "political arrangements in regard to trade requiring the sanction of Parliament (i.e., international trade arrangements); regulation of trade in matters of interprovincial concern; and general regulation of trade affecting the whole Dominion" (Russell, 1989: 61). Accordingly, the JCPC narrowed the applicable area of POGG and limited the practice of federal power listed in s.91.

In the subsequent *Local Prohibition Reference, 1896,* the JCPC continued the narrow reading of s.91 and the lim-

its imposed on the POGG principle. In this case, where the power to regulate liquor consumption and sale was involved, the JCPC upheld the principle set out in previous cases that the POGG principle could not be invoked if it would infringe upon provincial autonomy "over matters of a local or private nature" (Russell, 1989: 53-54). The JCPC recognized that the provincial power to legislate on local matter should not be derogated by the federal government's general power (British and Irish Legal Information Institute, 1896: 6-7). In this decision, Lord Watson came up with what is now referred to as the national concern branch of the POGG principle. To prevent encroachment on provincial power and infringement on provincial autonomy, the JCPC confined the invocation of the POGG principle. Only if the "matters [that] are unquestionably of Canadian interest and importance," and that there is no violation of any provision for provincial power enumerated in s.92, can the principle be invoked (British and Irish Legal Information Institute, 1896: 8).

In the *Board of Commerce Act Reference,1921,* the JCPC further confined the use of the POGG principle. In this case, Lord Haldane recognized that s.92 imposed on provincial legislatures the exclusive authority over property and civil rights (Russell, 1989: 61). The federal legislation in dispute limited commercial activities and thus violated provinces' exclusive authority (Russell, 1989: 61-62). In this reference case, the JCPC limited the application of the POGG principle to situations *"… such as those of war or famine, when the peace, order, and good Government of the Dominion might be imperilled under conditions so exceptional"* (British and Irish Legal Information Institute, 1921: 6). Only in these situations can the federal government justify its infringement upon provincial powers.

This limitation on the application of the POGG principle developed into the emergency branch of the principle, and was upheld in the *Unemployment Insurance Act Reference, 1937*. Whereas the Crown attempted to justify Parliament's legislation by appealing to the nation-wide severity of the unemployment problem, the JCPC did not accept that the problem would "threaten the well-being of the Dominion" (Russell, 1989: 97-98). Having contemplated the level of abnormality, exceptionality, and necessity, the JCPC decided that the case was "far … from the conditions which may override the normal distinction of powers in section 91 and 92" (British and Irish Legal Information Institute, 1937: 10). In other words, the JCPC precluded economic plight from emergency situations. Thus both the applicability of the POGG principle and the power of federal government were curtailed. This reference case was a blow to those who had wished "the powers assigned by the constitution to the central government would be sufficiently broad" (Russell, 1989: 97).

One may argue that the JCPC also interpreted the POGG principle broadly, and allowed the federal government some residual power. In *Russell* v. *The Queen, 1882* and *Canada Temperance Act Reference, 1946*, cases pertaining to liquor sales and consumption, the JCPC approved the use of the POGG principle since the subject matter was not enumerated in s.91 or s.92, (British and Irish Legal Information Institute, 1882: 6-14; *see also*: British and Irish Legal Information Institute, 1946: 3). Likewise, the JCPC confirmed Parliament's jurisdiction over aeronautics in the *Aeronautics Reference*. Since aeronautics did not exist when the founding Fathers drafted the Constitution, the JCPC approved Parliament assuming the jurisdiction through the POGG principle (British and Irish Legal Information Institute, 1931: 10). This reasoning was approved but not applied in *Radio Communication Reference* (*see* British and Irish Legal Information Institute, 1932).[2]

Although these cases somewhat revived the POGG principle, they were not representative of the JCPC's general attitude towards the application of the principle. In the majority of cases, the JCPC read the POGG principle narrowly and refused to expand federal power (*see* Russell, 1989: 31-122). More importantly, even in cases in which the POGG principle was invoked to extend federal power, the rulings proved not to be influential in subsequent cases. As discussed, the *Local Prohibition Reference* challenged the broad interpretation of the POGG principle adopted in *Russell* v. *The Queen*. The reasoning that allowed the use of the federal government's residual power in the *Aeronautics Reference* was distinguished within a year in the *Labour Convention Reference* (*see* British and Irish Legal Information Institute, 1937; also Russell, 1989: 106). Likewise, the JCPC had not given the *Canadian Temperance Act Reference* due deference in subsequent cases (Russell, 1989: 118).

Simply put, the JCPC "consolidate[d] a narrower construction" of the POGG principle (Russell, 1989: 118). It rarely allowed the expansion of the federal government's POGG power. Even if the application of the POGG was allowed, it would not be consistently applied in subsequent cases (Marx, 1970: 57). It can reasonably be argued that the JCPC generally diverged from the founding Fathers' intent. The JCPC prevented the federal government from obtaining greater power and broader jurisdiction, and thus obstructed a stronger central government from emerging.

The SCC: Striking the Balance

Many claim that the JCPC eroded the centralist design underlying the *Constitution Act, 1867* (Cooper, 2012: 1). In contrast, the SCC's interpretation of the POGG principle is closer to the original intent of the Constitution.

Johannesson v. West St. Paul was the first case in which the SCC dealt with the POGG (Russell, 1989: 131). In this case, provincial legislation on aerodromes was challenged. The SCC upheld the JCPC's decision in

Aeronautics Reference in which the federal government was granted the residual power over aeronautics. The SCC reasoned that the regulation of aerodromes and the regulation of aviation were "indivisible" as a whole, and that separating them would render federal regulation impractical (Supreme Court of Canada, 1952: 294-296, 328-329). Thus, although aerodromes were not explicitly "included in the subject matter" of aeronautics, the federal government should still have jurisdiction to legislate (Supreme Court of Canada, 1952: 295). Through this case, the SCC not only rectified the inconsistency bequeathed by the JCPC, but adopted reasonable interpretation of the POGG principle so that the federal power can be properly exercised.

In *Attorney General of Nova Scotia* v. *Attorney General of Canada, 1951*, the SCC was asked if different levels of government could transfer their exclusive power between each other. Having observed that "no power of delegation is expressed either in section 91 or in section 92," the SCC reasoned that "to permit of such an agreement would be inserting into the Act a power that is certainly not stated and one that should not be inferred" (Supreme Court of Canada, 1951: 34-38). The Court rejected an argument that relied on the POGG principle and did not extend power of transferring jurisdiction to Parliament or the provincial legislatures. Therefore, neither level of government could obtain power outside the intention of the Constitution. Unlike the JCPC who ignored the Constitution design to allow its own decentralist reading of the POGG principle, the SCC adhered to the original intent of the Constitution and maintained the balance between federal and provincial power (See Saywell, 2002).

The decision on the *Reference re Anti-Inflation Act, 1976* is another attempt by the SCC to strike a balance between federal and provincial power pertaining to the POGG principle. In this decision, the Court differentiated the national concern branch from the emergency branch by their nature and restriction. The national concern branch would allow legislation that has a permanent effect however the scope of legislation should be restricted. The SCC echoed the reasoning in *Aeronautics Reference* and confirmed the federal government's power over newly recognized matter under the POGG principle (Russell, 1989: 162-63). Yet, if Parliament was to invoke the POGG principle via the national concern branch, its subject matter of legislation must be narrowly defined, and must "not [be] enumerated in either s. 91 or s. 92 … and is not of a merely local or private nature" (Supreme Court of Canada, 1976: 461). Otherwise, numerous kinds of operations that may relate to the use of power enumerated in s.92 may be justified, thus "render[ing] most provincial power nugatory" (Supreme Court of Canada, 1976: 378). While the SCC recognized federal power in matters of national concern, it also devised mechanisms to prevent this power from overreaching.

In contrast, the emergency branch of the POGG is much less restricted. In an emergency, the federal government can exercise its power with "no limits other than those dictated by the nature of the crisis" (Supreme Court of Canada, 1976: 378). In other words, the federal government can override provincial powers. The temporality is the only limit when invoking the emergency branch of the POGG. Since a great crisis would be temporary, there is no justification for an enduring infringement upon the provincial power. In this way, the SCC allowed the federal government the necessary power to "deal with the common purpose", while also afforded protection to the provincial power (Dyck, 2008: 31).

In *R.* v. *Crown Zellerbach Canada Ltd, 1988,* the SCC further developed its approach to the POGG principle. When determining the jurisdiction of "regulation of [waste] dumping in provincial marine waters", the SCC allowed Parliament to override provincial power (Supreme Court of Canada, 1988: para. 1). Having established that the control of ocean pollution would be a matter of singleness, indivisibility, and distinctiveness, the majority of the Court determined that the matter being dealt with was a national concern (Supreme Court of Canada, 1988: para. 37-40). It sided with the Crown's argument that "the control of ocean pollution … is a matter that goes beyond local or provincial interests and is a matter of national concern to Canada as a whole" (Supreme Court of Canada, 1988: para. 48). Thus, Parliament could validly enact the legislation over provincial water.

It is note worthy that in *Crown Zellerbach*, the SCC removed a restriction on the use of the national concern branch. In the *Anti-Inflation Reference*, the SCC required that federal power invoked through the national concern branch must not violate a provincial government's jurisdiction under an enumerated matter in s.92 (Russell, 1989: 273). However, in *Crown Zellerbach Canada Ltd*, the SCC "amplif[ied] the national concern doctrine, via what is known as the 'provincial inability test'" (Villadangos, 2009: 511-543). The provincial inability test was used in the case to evaluate if a problem would require a manoeuvre that a province alone would not be capable of performing. Upon fulfilling the requirements of the provincial inability test, the existence of a national concern would be established, and the POGG would be justifiably invoked to empower Parliament. In other words, the provincial inability test established a lower threshold for the federal government to use the POGG principle. If a single province cannot effectively deal with a problem concerning other provinces or the entire Canadian society, Parliament can justify its intervention even if its action involves provincial powers protected in s.92 (Supreme Court of Canada, 1988: para. 33-34).

Conclusion

To balance the need for a central government and the call for autonomy in provinces, the *Constitution Act, 1867*

lays out the division of power between federal and provincial governments in s.91 and s.92. The preamble of s.91, however, was worded flexibly so the federal government could expand its authority to matters not listed in s.91 and s.92, or could override provincial power, when warranted by the government's duty of "peace, order and good government." In hallmark cases relevant to the POGG principle, the JCPC demonstrated a decentralist tendency when interpreting the principle. Unlike what the founding Fathers intended, the JCPC read the principle in a narrow way so as to curtail federal power. At times, there were decisions that approved the application of the principle; however, the reasoning in these decisions was either contradicted in subsequent cases or not put into further practice. In contrast, the SCC is less restrictive in applying the POGG principle. While the SCC allows the federal government the necessary power to address national concerns as intended by the founding Fathers, it also provides sufficient protection to provincial power. The SCC's jurisprudence demonstrates that it is more capable of striking a moderate balance between federal and provincial powers. ■

Endnotes:

[1] Later renamed as *Constitution Act, 1867*.

[2] In *Radio Communication Reference*, the JCPC did not rely on the POGG principle to grant Parliament the power to legislate over non-enumerated matter. Instead, the JPCP allowed Parliament's regulation of the radio and communication through treaty power. However, the JCPC agreed with the reasoning set out in *Aeronautics Reference* regarding Parliament's residual power in pursuant to the POGG principle.

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An Analysis of *R.* v. *Hart* and the Legal Framework Surrounding "Mr. Big Operations"

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Thesis

The purpose of this short essay is to analyze the key elements of the 2014 Supreme Court of Canada case of *R* v. *Hart*, and to show why the Court's majority opinion in this case has improved the Canadian justice system as a whole despite the very real possibility that the accused may have been guilty of murder. That is the central thesis of this essay. An understanding of the facts of the Hart case is essential to gaining an insight into the Supreme Court of Canada's ruling, and the analysis which supports my thesis.

Case Summary

Nelson Hart was a man in his mid-thirties residing in Gander, Newfoundland and Labrador. He lived on social assistance and had a somewhat limited mental capacity.[1] In August of 2002, he brought his three year old twin daughters (Karen and Krista) to a park near Gander.[2] Adjacent to the park was Gander Lake which has a wharf leading from the park out to the lake. The exact events that transpired at the park may, unfortunately, never be known. Somehow both of Mr. Hart's daughters ended up in the Lake and subsequently drowned. Throughout the course of the police investigation into their deaths, Mr. Hart gave several versions of what happened, including that he panicked and drove home immediately to get his wife to help, and another that he had a seizure at the scene.[3] Given such statements, the police were suspicious of his potential complicity in their deaths. However, they did not have enough evidence to charge Mr. Hart and the investigation "went cold."[4]

The RCMP decided two years later to attempt to lure Mr. Hart into a fictitious criminal organization in order to coax a confession from him or to learn of new evidence that might help lead to a possible conviction. A couple of undercover officers were able to befriend Mr. Hart and he quickly became engaged in a new lifestyle as a career criminal. The officers built a sense of trust with Mr. Hart. They flew him around Canada and treated him to fancy meals and hotels. This included a trip to Vancouver to meet the head of their alleged criminal organization ('Mr. Big'). During the meeting with Mr. Big (which was recorded with a hidden camera) Hart confessed to the murders.[5] Two days after the meeting he participated in a reenactment at the crime scene with an undercover officer. During this reenactment, he confessed again.[6] Over the course of the police investigation Mr. Hart confessed on three separate occasions to murdering his daughters. On the basis of this evidence, Mr. Hart was arrested and charged with murder.

At the Supreme Court of Newfoundland and Labrador Trial Division, the judge denied an application by Mr. Hart's lawyer to have the evidence obtained by the Mr. Big operation excluded. He ruled that Mr. Hart "was given a number of chances to leave the operation but he made no effort to do so."[7] The judge also rejected the notion that Mr. Hart was "threatened and intimidated by the undercover operatives."[8] The trial judge also denied an application by Mr. Hart "that he be allowed to testify with the public excluded from the courtroom."[9] In March of 2007, Mr. Hart was found guilty. He appealed the conviction to the Newfoundland and Labrador Court of Appeal.

In September of 2012 the Court of Appeal unanimously (3-0) found that the trial judge erred in dismissing Hart's application to have the public excluded from the courtroom. On the issue of the admissibility of the Mr. Big evidence, the Court also unanimously held that Mr. Hart was indeed under "state control."[10] They also determined that Mr. Hart's s.7 *Charter* right to silence had been violated. The Justices concluded by a 2-1 margin that two of the three confessions made during the course of the investigation "ought to have been excluded because they were obtained in breach of his [Mr. Hart's] right to silence under s.7 of the *Charter*."[11] However, they were unanimous in their finding that one of the three confessions made was admissible. The Court therefore ordered a new trial.

The Crown successfully applied to the Supreme Court of Canada for leave to appeal the conviction. At the Supreme Court of Canada there were two main issues:[12]

1. Whether the trial judge erred in admitting the confessions made by Mr. Hart during the Mr. Big operation; and
2. Whether the trial judge erred in precluding Mr. Hart from testifying with the public excluded from the courtroom.

There were three separate decisions written by the seven judge panel. Justices McLachlin C.J., Lebel, Abella, Moldaver and Wagner were in the majority with Justices Cromwell and Karakatsanis writing separate concurring opinions.

The majority first decided that Mr. Hart should have been allowed to testify without having the public present in the Court room. Moldaver, J., writing for the majority, stated "testifying in order to disavow them [the confessions] was a near tactical necessity for the respondent [Mr. Hart]…It was incumbent on the trial judge, in the unique circumstances of this case, to take reasonable steps to accommodate the respondent's disability and to facilitate his testimony."[13] The majority stated that Mr. Hart could have easily been accommodated and that the public could have stayed informed on the proceedings by "broadcasting his testimony into another courtroom on closed circuit television."[14] The Court would have granted a new trial based solely upon this error. Nevertheless, the Court also considered it appropriate to decide on the admissibility of the confessions made by Mr. Hart.

The majority held that the trial judge erred in admitting the confessions made by Mr. Hart to the undercover officers. The majority considered that the prejudicial nature of these confessions outweighed any probative value that they may have contained.[15] The majority called into question whether the extreme lengths the police went to in order to obtain a confession from Mr. Hart were necessary. The Court held that all the confessions were inadmissible. The case was sent back to the Trial Division, where the Crown decided not to proceed with a new trial.

Analysis of Supreme Court of Canada Decision and Support of Thesis

For many it may seem as if the Supreme Court of Canada's decision was a miscarriage of justice. Evidence on which Mr. Hart had been convicted at his first trial would not be available at a second trial. Excluding evidence obtained under a "Mr. Big" operation could result in the acquittal of a person who had by his own admission committed murder. Yet my thesis is that the Supreme Court of Canada's decision improved the Canadian judicial system. On the face of it, this may seem contradictory.

I do not, nor should anyone, support the commission of a crime, particularly the crime of murder. If indeed Mr. Hart did murder his children he should be held accountable. But he must be held accountable through a proper legal process. Every Canadian citizen is entitled to that constitutionally entrenched right, no matter what their background or crime they have been charged with. It was this right that was at stake in this case and it was fundamental to why the Supreme Court of Canada rendered the decision that it did.

It was clear at the outset that the Supreme Court Justices were concerned with the lengths to which the undercover police officers went in attempting to procure a confession from Mr. Hart. They noted that the operation lasted for 4 months and that in that timeframe, Mr. Hart "participated in 63 'scenarios' with the undercover officers."[16] In addition to being wined and dined and given trips to various Canadian cities, Mr. Hart was paid over $15,000 for his 'work' during this period. The entire cost of the operation exceeded $400,000.[17]

The Court noted that this Mr. Big operation was "extremely intensive." It "preyed upon the respondent's [Mr. Hart's] poverty and social isolation."[18] Given such coercive techniques, the majority concluded that Mr. Hart had "an overwhelming incentive to confess – either truthfully or falsely."[19] These realities cast "serious doubt on the reliability of the respondent's confessions."[20] In addition to the prejudicial impacts on Mr. Hart, the majority were also clearly troubled by the process or procedures followed in this case: "[w]ithout question the police conduct in this case raises significant concerns, and might well amount to an abuse of process."[21] Moreover, the reliability of the confessions was brought into question because of the "complete lack of confirmatory evidence."[22] In the end, the majority concluded that the "probative value" of the confessions was "outweighed by their prejudicial effect."[23] Admitting the confessions compromised Mr. Hart's right to a fair trial and amounted to a miscarriage of justice. The evidence was inadmissible.

In summary, the Supreme Court of Canada concluded the police methods employed in the Mr. Big operation were invalid, amounted to entrapment and manipulation of Mr. Hart, and compromised his rights to a fair trial. Seen in this context, I believe the Supreme Court of Canada Justices dealt appropriately with a number of important legal issues arising from the *Hart* case. The decision was in keeping with maintaining the integrity of the legal process.

The significance of the Supreme Court of Canada decision, however, was not just that it identified and corrected flaws in the legal process dealing with Mr. Hart's trial. The decision had the effect of clarifying and correcting the rules governing such matters.

Before the ruling in this case, it was much easier for evidence obtained through a Mr. Big operation to be admitted at trial. There were fewer defenses and protections afforded to the accused. Such operations were conducted with few legal rules or guidelines. This could lead to situations, as in this case, where due legal process could be compromised and the rights of the accused, jeopardized or circumvented. The Court noted in this case that many legal protections afforded to accused persons did not apply to Mr. Big operations.[24] In particular, the majority described concerns with respect to investigation and interrogation processes, obtaining confessions and the right of the accused to legal counsel. The Court concluded there were three reasons why the lack of a suitable framework dealing with Mr. Big operations resulted in insufficient protection to accused persons: the danger of unreliable confessions[25]; the prejudicial effect of Mr. Big opera-

tions[26]; and the potential for police misconduct.[27] In light of these concerns they developed a framework which had significant implications for the Canadian judicial system and the conduct of any such operations in the future.

The first new approach recognized a new common law rule of evidence. Under this rule, all Mr. Big confessions will be presumptively inadmissible at trial. The Crown has the burden of establishing that "on a balance of probabilities the probative value of the confession outweighs its prejudicial effect."[28] Secondly, with a view to curtailing abuse of investigative processes, the Court provided guidance for trial judges on how to correctly apply the doctrine of abuse of process to Mr. Big operations.[29] The Court identified several ways in which such operations could amount to an abuse of process. These included inducements, threats, physical violence, as well as preying on potential vulnerabilities of an accused such as mental health problems, substance addiction or youthfulness.[30] These factors could amount to an abuse of process.

The Supreme Court ruling provided needed clarity and direction with respect to how evidence can be obtained and the rights of the accused safeguarded in proceedings involving Mr. Big operations. In its ruling, the Court addressed a deficiency in the Canadian legal system and corrected it. This is truly a landmark decision. As a result, all future targets of Mr. Big operations will have ample opportunities to challenge the admissibility of evidence that very easily could be illegally obtained.

Conclusion

The immediate effect of the Supreme Court of Canada's decision in this case was to decide upon the admissibility of a confession obtained by way of a Mr. Big operation. The Supreme Court concluded that Mr. Hart's rights had been circumvented and the evidence used to convict him, to have been inadmissible. The decision ensured the accused's right to a fair trial in the context of a Mr. Big operation. The decision established a framework for the conduct of future Mr. Big operations. In making this ruling the Supreme Court of Canada established a legal framework that adequately protects an accused's right to a fair trial, and the state's interest in preserving the integrity of the justice system to prosecute and convict those who are guilty of a crime. The Canadian justice system has been improved and strengthened as a result of the Court's decision in this case. ■

Endnotes:

1 *R* v. *Hart, 2014* SCC 52, (hereinafter referred to as Hart), at para. 23
2 Hart, at para. 16.
3 Hart, at paras. 19-21.
4 Hart, at para. 22.
5 Hart, at para. 35.
6 Hart, at para. 36.
7 Hart, at para. 41.
8 Ibid.
9 Hart, at para. 42.
10 *R.* v. *Hart, 2012* NLCA 61, at para. 198.
11 Hart, at para. 44.
12 Hart, at para. 49.
13 Hart, at para. 53.
14 Hart, at para. 54.
15 Hart, at paras. 146-147.
16 Hart, at para. 38.
17 Ibid.
18 Hart, at para. 148.
19 Hart, at para. 140.
20 Hart, at para. 141.
21 Hart, at para. 149.
22 Hart, at para. 143.
23 Hart, at paras. 146-147.
24 Hart, at para. 79.
25 Hart, at paras. 68-72.
26 Hart, at paras. 73-77.
27 Hart, at paras. 78-80.
28 Hart, at para. 85.
29 Hart, at paras. 111-118.
30 Ibid.

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R. v. *Handy, 2002* SCC 56, [2002] 2 S.C.R. 908

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R. v. *Babos, 2014* SCC 16

Drone Strikes under International Law

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Political Science 3210: International Law

States that wish to prosecute the War on Terror have become increasingly reliant on conducting targeted killings with Unmanned Aerial Vehicles – commonly known as "drones" - to achieve their desired ends. This practice involves the use of lethal force by drones operated by one state's military against an alleged terrorist or armed combatant situated in another state's territory. Drone attacks have been predominantly carried out by the United States of America against persons associated with Al-Qaeda and affiliated operatives in the states of Pakistan, Yemen, and Somalia (Brooks, 2014: 89). Although the legality of drone strikes may be doubtful under a number of interpretations of international law, the strikes have continued. International law has failed to deal effectively with the use of drone strikes.The application of existing international legal concepts to assess the legality of drone strikes leads to ambiguous and often contradictory conclusions, preventing the development of a clear and reasonable criteria for judging the acceptability of the practice. To advance this argument, I will first examine how the laws concerning the use of force (*jus ad bellum*) deal with drone strikes. This will include an analysis of the ambiguities and shortcomings of these provisions. Second, I will look at drone strikes under international humanitarian law (*jus in bello*) and describe how these laws also produce unclear results when applied to drone strikes. Finally, I will offer conclusions and possible solutions to the problems discussed.

Drone Strikes and Jus ad Bellum

International law has strict provisions regulating the use of force. Article 2(4) of the United Nations Charter calls on all United Nations (UN) members to refrain from "the threat or use of force against the territorial integrity or political independence of any state" (Currie, Kindred & Saunders, 2014: 2). However, other provisions of the UN Charter offer exceptions to this prohibition. Article 51 establishes the "inherent right of collective or individual self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security" (Currie, Kindred & Saunders, 2014: 11). Additionally, Chapter VII of the Charter grants the Security Council the power to act against "any threat to the peace, breach of the peace, or act of aggression" with force until peace and security have been restored (Currie, Kindred & Saunders, 2014: 9). In practice, this amounts to the Security Council passing a resolution authorising one or more members to use force (Brooks, 2014: 91).

When these rules are applied to assess the legality of drone strikes, the following questions have to be addressed. Dodrone strikes constitute "armed attacks." If so, the state carrying out the strikes must either prove that it isacting in self-defence or demonstrate that it has the support of the Security Council. If not, it is guilty of aggression as outlined by UN General Assembly Resolution 3314 (XXIX) (Casey-Maslen, 2012: 603).

To address this issue, it is necessary to determine the definition of an armed attack. When elaborating on the definition of an armed attack carried out by groups armed and equipped by foreign states in the *Nicaragua* case, the International Court of Justice set a high standard for what constitutes an armed attack. The court found that the "scale and effects" of the operation marked the difference between an armed attack and a "mere frontier incident" (ICJ, 1986). When viewed from this perspective, a single, surgically precise drone strike may be too insignificant to constitute an armed attack. However, the reality of contemporary drone strikes is more akin to repeated bombardment than surgical precision (Casey-Maslen, 2012: 602). Therefore, the far more plausible interpretation is that drone strikes are armed attacks and may be acts of aggression. This is consistent with General Assembly Resolution 3314 (XXIX), which states that the use of weapons by one state on another's territory or the bombardment of that territory constitutes aggression (Currie, Kindred & Saunders, 2014: 796).

It is therefore clear that states conducting drone strikes must prove that they are either acting in self-defence or under authorization from the Security Council. Both claims are of unclear legitimacy under international law. Traditionally, the right to self-defence has only been afforded to states being attacked by other states (Orr, 2011: 738). This interpretation of Article 51 has been reiterated by the International Court of Justice (ICJ) in its 2004 Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ, 2004). However, a number of ICJ judges have rejected this view (Orr, 2011: 739). Furthermore, customary international law on the matter as set out by the paradigmatic *Caroline* case leads to a contrary conclusion. The prevailing interpretation of the *Caroline* case allows states to use force to repel non-state actors (Orr, 2011: 739).

Even if it is accepted that a state has the right to use force in self-defence against a non-state actor, the use of force in self-defence is only legitimate if it passes what is known as the *Caroline Test*. This international legal custom ensures that the use of force in self-defence is only lawful where it is necessary and proportional (Casey-Maslen, 2012: 604). Necessity requires that the state attacked must have no ability to stop the assault except by force. Proportionality demands that a state counter the threat and go no further. The ICJ's 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* clarified that necessity and proportionality are the two requirements for the legitimate use of force in customary international law (ICJ, 1996). Whether the use of a drone strike fits these two criteria is uncertain. This is because drone strikes are almost always undertaken in anticipatory self-defence, or under the expectation that the target will carry out an armed attack unless stopped by the use of force (Brooks, 2014: 92).There is no consensus on whether anticipatory self-defence is legal under international law (Orr, 2011: 740).

The issue of whether counter-terrorist drone strikes are authorized by the Security Council is also ambiguous. Security Council Resolution 1373 makes it clear that the states that fall victim to terrorist acts have a right to use force in self-defence (UN Security Council, 2001). The United States continues to assert that this gives it the right to target suspected terrorists around the world and to take all necessary measures to prevent terrorist acts (Brooks, 2014: 92). However, it can be reasonably argued that the resolution, which was passed in 2001, does not continue to give the United States the right to use force in self-defence fourteen years later (Committee on International Law, 2014: 11).

As demonstrated above, international law on the use of force is often unclear when applied to drone strikes, rendering it ineffective on the subject. A traditional interpretation of "necessity", for example, could easily lead to the conclusion that most drone strikes against suspected terrorists are illegal. This is because it is almost impossible for intelligence agencies, even with the best information available, to know with certainty that a concrete, imminent threat is present which cannot be mitigated by non-lethal force (Brooks, 2014: 93). However, the United States of America defends its campaign of drone strikes by citing Security Council Resolution 1373, which calls on Member states to "take the necessary steps to prevent the commission of terrorist acts" (UN Security Council, 2001). Acting under the assumption that any Al-Qaeda operative represents a potential terrorist threat, the United States conducts drone strikes in accordance with this resolution. Furthermore, the prevention of terrorist acts is almost impossible when the only military action that can be taken conforms to the traditional interpretation of necessity. This apparent contradiction in international law has allowed the United States to act in defiance of a long-standing custom, yet international law can do little about it. If the world's only superpower, citing a plausible interpretation of a Security Council resolution, wishes to continue carrying out drone strikes in violation of a custom, what can international law do?

Additionally, the ICJ's interpretation of self-defence as being limited to actions against states is not only ignored by states conducting drone strikes, but it is also entirely out of step with the nature of modern conflict. It is unreasonable to expect that any state should endure an act of violence with no right of self-defence simply because of the nature of the attacker, and as non-state groups become increasingly capable of mass destruction, this shortcoming becomes even more unreasonable. Furthermore, it contradicts the very idea of a right to self-defence. Fortunately, one of international law's relative strengths in this area did allow some action to be taken. Namely, the Security Councilpermitted the use of force against non-state actors (terrorist groups) in the wake of the September 11th attacks. However, it is unlikely that Resolution 1373 grants states an indefinite right to use force in self-defence, so the drone campaign against Al-Qaeda and its affiliates that continues to this day is likely to fall outside the scope of the resolution. Despite this relatively straightforward argument, there has been no attempt to challenge the United States' interpretation of this resolution in international court, and any attempt to repeal or modify the resolution will likely result in a veto from the United States (Brooks, 2014: 95). Therefore, the lack of clarity in this resolution will continue to impact the use of drone strikes.

Drone Strikes and Jus in Bello

International humanitarian law has also dealt with drone strikes ineffectively. To demonstrate this, it is necessary to first identify the relevant provisions of international humanitarian law. Foremost among these is the concept of "armed conflict", as the existence of an armed conflict determines whether international humanitarian law or international human rights law governs the legality of the use of force (Committee on International Law, 2014: 104). If a drone strike is being carried out against a legitimate target in an armed conflict, it can be considered legal. If the drone strike's legality is determined under international human rights law, it is extremely unlikely that it is permissible (Lubell, 2010: 255).

The existence of an armed conflict was defined by the International Criminal Tribunal for the Former Yugoslaviain *Prosecutor v. Tadic*, when it stated that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between Governmental authorities and organized armed groups or between such groups within a State" (ICTY, 1995). In *Prosecutor* v. *Boskoski*, the tribunal clarified that the intensity of the conflict and the organization of the parties involved can be used as a test to determine the existence of an armed conflict (ICTY, 2008).

However, these concepts are far too ambiguous to determine whether the use of drones in places like Yemen, Somalia, and Pakistan is part of an armed conflict. While the United States has continually asserted that its drone campaign is part of a single armed conflict, many legal scholars and courts reject the idea of a single, de-territorialized War on Terror (Brooks, 2014: 95). The main point of contention in this argument is whether Al-Qaeda and its affiliates are sufficiently well-organized to be considered parties to a conflict. In this dispute it is to be expected that states such as the United States will take advantage of ambiguity to advance a threshold of organization that suits their interests.However, the United States does have a few strong points on its side. The level of organization required to carry out a protracted campaign of terrorism is far lower than that required of a standard war, such as that dealt with in *Prosecutor v. Tadic* (Committee on International Law, 2014: 122). Further, there is nothing precluding such terrorism from being considered armed violence. In fact, Security Council Resolution 1373 seems to treat a terrorist attack as an armed attack by granting recourse to the use of force to states that fall victim to terrorist attacks. The problem with this lack of clarity is that if individual states are allowed to act according to opportunistic definitions of key international legal concepts governing the use of drone strikes without being challenged by other states, then international law is undermined. The permissibility of drone strikes would not be subject to a clear criteria governing the legality of drone strikes.

Even if drone strikes occur in the context of an armed conflict, the principle of proportionality[1] under international humanitarian law must be considered. Proportionality requires that the potential for collateral damage be outweighed by potential strategic benefit in a way that ensures the former is not "excessive" (Barnidge, 2012: 440; Committee on International Law, 2014: 169). However, the calculus used to determine strategic benefit and potential collateral damage is open to political manipulation and fraught with inaccuracies (Barnidge, 2012: 399). Furthermore, "excessive" is an imprecise term that has rarely been interpreted in legal contexts (Committee on International Law, 2014: 169). Many scholars argue that drone warfare is inherently excessive, as the removal of risk of death from states' militaries has made them more inclined to justify violent action that has a higher risk of collateral damage (Committee on International Law, 2014: 172).

Conclusions

The solution to this lack of clarity in international law is the development of new legal regime. One approach is to develop a formal treaty governing the use of drone strikes. This could settle some of the more fundamental questions regarding proportionality and the status of drone strikes as an "armed attack". It would, however, be unlikely to answer the broader questions, such as whether the drone strikes are permissible when conducted in anticipatory self-defence or whether the War on Terror truly is a single armed conflict. This is because the states with the greatest stake in the matter, such as the United States, are unlikely to bind themselves tosuch a treaty when the status quo works in their favour. An alternative is for one state to challenge the legality of another state's drone strike in the International Court of Justice. This would help to create case law specifically regarding drone strikes. Unfortunately, such a measure would be unlikely to succeed, since the state perpetrating the strike could withdraw itself from the jurisdiction of the court. Scholars such as Daniel Brunstetter and Megan Braun have advanced another possibility, which is the creation of a *jus ad vim* to govern "ongoing but discrete small-scale uses of force" (Brooks, 2014: 99).

This paper has focused on how the application of existing international legal concepts to drone strikes has resulted in ambiguous and sometimes contradictory results. Consequently, there has been no clear criteria developed to address this new but important phenomenon. If there continues to be little action taken, then a practice which has killed over a thousand in the past decade will remainoutside international law. Further, drone strikes are unlikely to cease. As the technology to conduct drone warfare spreads, the absence of a clear legal framework may ultimately work against liberal democracies fighting the War on Terror. ■

Endnotes:

[1] This is distinct from the concept of proportionality in the laws governing the use of force.

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An Analysis of Canada's Stance on Anti-Corruption

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Introduction

In recent years, Canada hasstrengthened its position in the global battle against corruption by introducing harsher penalties for violating *Corruption of Foreign Public Officials Act* and increasing enforcement. The objective of this paper is to analyze Canada's enforcement of international anti-corruption standards and highlight the impact that anti-corruption legislation has had on Canadian businesses. The paper concludes that Canadian businesses should implement corporate compliance programs.

Significance of Research

As the majority of business markets have been impacted by globalization, it has become increasingly important for companies to be aware of international anti-corruption standards. The World Economic Forum has estimated that global corruption costs the economy approximately $2.6 trillion USD per year.Corruption deters investment, weakens economic growth and undermines the rule of law ("*Why exposing and preventing corruption is important*", n.d.). To combat the economic impact of corruption, international bodies such as the Organization for Economic Co-operation and Development have adopted conventions that impose harsh sanctions upon offenders so as to deter unethical behaviour and to impose a global standard for business transactions. These global standards are often reflected and ratified though federal legislation; such legislationcan have serious legal implications for companies.

For Canadian businesses, the recent free trade agreement negotiated between Canada and the European Union will help to facilitate this international expansion. It is now more important than ever for Canadian companies to be aware and understand the implications of the federal anti-corruption laws.

Evolution of Global and Canadian Anti-Corruption Law

Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions

Anti-corruption measures are a policy issue that has been given an increasingly important place on the international stage. In November 1997, the Organization for Economic Co-operation and Development (OECD) negotiated the *Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions.* This Convention states that bribery and corruption are a "widespread"phenomenon which raises "serious"political and moral concerns (*Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions and Related Documents,* 2011). As the international community considers corruption a threat to good governance and economic development, the Convention commits signatory states to combatting bribery in international business transactions, including taking measures to ensure that the bribery of a foreign public official is a criminaloffence in their jurisdiction (*Convention,* 2011*)*.

Corruption of Foreign Public Officials Act

Canada has implemented the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* through the 1998 *Corruption of Foreign Public Officials Act* (*CFPOA*). This *Act* not only implements Canada's commitments to the Convention, but also serves as a link between three sets of rules: the OECD Convention, the United States *Foreign Corrupt Practises Act* and the *Criminal Code of Canada.*

The preamble of the *CFPOA* explicitly states that the *Act*implements the *Convention on Combating Bribery of Foreign Offices in International Business Transactions,* thereby allowing Canada to meet international standards. In the *Act*, the definition of "foreign officials" mirrors the one found in the *Convention*. The *Act* defines a "foreign official"as a person who holds a legislative, administrative, or judicial position in a foreign state, a person who performs public duties for a foreign state or a person who is an official or an agent of a pubic international organization comprised by two or more states; 'business' is defined as "any business, profession, trade, calling, manufacture or undertaking of any kind in Canada or elsewhere" (*Corruption of Foreign Public Officials Act*, 1998).

In recognition of Canada's strategic economic proximity to the United States, the *CFPOA* adopts some of the fundamental principlesof the United States anti-corruption legislation such as the 1977 *Foreign Corrupt Practises Act* (Martin, 1999). The similarities between the two acts was not coincidental but was done intentionally to promote consistency and uniformity. The rationale was that Canadian companies who are active in the United States are subject to the provisions of the *Foreign Corrupt Practises Act* and are

therefore held accountable under both the Canadian and U.S. legislation (Martin, 1999). The consistency between the two acts means that companies operating on both sides of the border need not be concerned with inconsistent laws.

2009 OECD Council Recommendation

Approximately a decade after the negotiation of the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,* the OCED Council published a series of recommendations to reiterate international commitment and further combat the corruption of foreign public officials. One of the key recommendations of the Council was for member states to ensure vigorous and comprehensive implementation of the *Convention*; to this end, the Council recommended that states periodically review their laws implementing the OECD Convention, and their enforcement of these laws. The 2009 Recommendation also directed the Working Group on Bribery in International Business Transactions to conduct a systematic review of member states so as to monitor and promote the full implementation of the OECD Convention (Organization for Economic Cooperation and Development, 2009).

This review found that the Canada's enforcement regime for the *CFPOA* was problematic in several important areas. The Working Group recommended that Canada amend their legislation to clarify that the *Act* applied to all international business and not just for-profit businesses. The Group also found that Canada needed to take the measures to prosecute Canadians who commit offences abroad and ensure that the penalties for the offencesare proportionate and act as a deterrent ("Canada's enforcement of", 2011). While the Group noted that enforcement of the *Act* was improving, it concluded that action was necessary in order to ensure Canada's ability to successfully prosecute offenders and enforce the Convention.

Canada's Response: Bill S-14

In June 2013, in an effort to quell international criticism and strengthen Canada's commitment to anti-corruption measures, Parliament passed *Bill S-14* amending the *CFPOA*.The amendments follow the OECD Working Group's recommendations, and reflect Canada's increasingly strong stance on anti-corruption. The amendments increase the maximum sentence of imprisonment for bribing a foreign public official to 14 years, and expand the definition of "business" by removing the requirement that a business be "for profit". In addition, the Bill creates a new offence relating the falsification of books and records to bribe a foreign official or to hide such bribery. Importantly, the amendments expand the jurisdiction of the *Act*. Previously, the *CFPOA* only applied when part of the offence was committed in Canada and there was a "real and substantial"link between the offence and Canada. The Bill extends the jurisdiction of the *Act* so that it applies to all companies, citizens and permanent residents of Canada regardless of whether the offence was committed in Canada *(Bill S-14,* 2013). These jurisdictional and penalty amendments together address the perception that Canada is "soft"on corruption (Debenham, 2014).

Significant Charges under the *CFPOA*

The evolution of Canada's strong stance on bribery of foreign officials can not only be witnessed through international conventions and amendments to the *CFPOA,* but also through the actual enforcement of the law.

Niko Resources (2011)

The first major prosecution under the *CFPOA* occurred in 2011 when an Alberta oil and gas company, Niko Resources, was charged with a breach of s.3 (1)(b). ("Corruption Charge Laid Against", 2011). In May of 2005, the company provided the use of a $190,984 vehicle to the Bangladeshi State Minister for Energy and Mineral Resources in order to influence the Minister in dealings with Niko Bangladesh. Niko pleaded guilty and was fined approximately $9.5 million ("Corruption Charge Laid Against", 2011).

Griffiths Energy International Inc. (2013)

The second major prosecution also occurred in the Alberta energy sector. Griffiths Energy International Inc. was charged with providing a $2 million "consulting contract" to the wife of the Chad Ambassador to Canada which allowed the company to obtain the exclusive rights to three large oil and gas concessions in Chad. Griffiths pleaded guilty and was fined $10.35 million. This fine was the largest fine ever imposed under the legislation (Kaiser, 2013).

Nazir Karigar (2014)

A landmark prosecution under the *CFPOA* is *R.* v. *Karigar*.The principal of Cryptometrics Canada, Mr. Nazir Karigar, was accused of taking a leadership role in a conspiracy in which bribes were offered to Air India officials and India's Minister of Civil Aviation, in order to secure a multi-million dollar contract to supply facial recognition software and related equipment (*R.* v. *Karigar,* 2014). Although the Karigar and his accomplices were ultimately unsuccessful in bribing anyone or in securing the contract, Karigar was charged and convicted of a single count of offering to bribe a foreign official. The Court acknowledged Karigar's co-operation and reputation as mitigating factors. However, due to the sophistication of the scheme and Canada's treaty obligations, the Court imposed a custodial sentence of three years (maximum penalty is five years imprisonment) (*R* v. *Karigar,* 2014).

R. v. *Karigar* was the first time a sentence of incarceration had been given to a corporate official under the *CFPOA*, as all previous prosecutions had been against cor-

porations and had involved a guilty plea and a fine. This sentence demonstrates that the Canadian legal system is sensitive to the importance being placed on anti-corruption on the international stage and does not want to appear lenient on such matters (Debenham, 2011). The penalty also serves as a deterrent because it sends a strong message that individuals, not just corporate entities will be held responsible and penalized under the *Act* (Boscariol & Mattalo, 2014).

Implications for Canadian Corporations

R. v. *Karigar* exemplifies to those Canadian companies and executives that do business abroad that corruption will not be tolerated. Given the consequences, it is now especially important for Canadian companies operating abroad to be aware of the *Act* and take the appropriate measures to ensure corporate compliance.

An effective corporate compliance program works to proactively detect and prevent violations of the law. It is important to note that while the Canadian legislation applies to all Canadian companies operating both inside and outside of Canada, other foreign legislation may also apply. Therefore, an effective corporate compliance program is one that not only considers Canadian legislation, but encompasses anti-corruption compliance in all areas of the business (Biegelman & Biegelman, 2010).

There are many tools, guidelines and policies available to companies so as to facilitate monitoring corporate compliance. The Canadian chapter of the global organization Transparency International, Transparency International Canada, has published a six step tool to ensure compliance to the *CFPOA:*

Commit: in order to ensure compliance to the *CFPOA* the company and its executives must commit to anti-corruption programmes

Assess: Canadian companies must assess the status and risk of the foreign environment where they are operating.

Plan: An anti-corruption programme must be effectively planned by the company so that its requirements are clear.

Act: An anti-corruption programme is only effective if the company takes appropriate measures to act on the plan and any violations.

Monitor: Monitor the controls and progress of the programme.

Report: Report any discrepancies immediately and report compliance to shareholders (Transparency International Canada, 2014).

By following these steps, companies can ensure that they are in compliance with federal legislation and thus reduce the risk of charges under the *CFPOA*.

Conclusion

As this analysis has demonstrated, Canada's increasingly firm stance on enforcing the *CFPOA* is having implications for businesses. The federal government will continue to impose strict regulations and penalties for corruption of foreign officials. As is evident in *R.* v. *Karigar,* courts are now willing to impose harsher sentences for offences. Given Canada's stance on the issue and today's global market, it has become critical that businesses with operations both inside and outside of Canada to develop corporate compliance programs so as to ensure they meet the minimum standards of all anti-corruption legislation. ■

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