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THE *BRIEF*

ISSUE II

INTERJURISDICTIONAL

Editors-in-Chief: Rachel Brouwer and Damai Siallagan
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ARTICLE ONE:

"Governing Beyond Borders: The Case for Tighter Canadian Laws on Overseas Mining"

by Anjalique Raghunauth

Edited by: Alysha Ahmad and Deeba Mehr

ARTICLE TWO:

"The Laws of Claiming Ice: Canadian and Russian Arctic Tensions and the Legality of Flag Planting"

by Samantha de Verteuil

Edited by: Annika Pavlin-Jamal and Ky Vellinga

ARTICLE THREE:

"Referendum and Reference: The Quebec Secession Reference Twenty-Five Years Later"

by Bradley Cox

Edited by: Katie Timms, Mila Shull, Nadia Elkadri

A SPECIAL THANK YOU

To the incredible editors on our team: this publication would not have been possible without your tireless dedication and support.

The Brief would like to specifically thank Damai Siallagan, Rachel Brouwer, Annika Pavlin-Jamal, Alysha Ahmad, Deeba Mehr, Katie Timms, Ky Vellinga, Mila Shull, and Nadia Elkadri.

EDITOR'S NOTE

exclusive

Dear Readers,

We are pleased to present you with Issue II of *The Brief*. *The Brief* is an informal academic publication hosted by the Canadian Law Review that provides a space for legal advocacy and discussion. From legal opinions on cases or proposed bills, to discussions about recent or upcoming legal issues, we seek to inspire a future generation of legal scholars to think, research, and write on critically important topics. Each author featured in Issue II has taken a different approach to this Issue's theme: "Interjurisdictional."

To open, Samantha de Verteuil explores the legal implications of Canada's nationalistic flag-planting in the Arctic in her paper titled "The Laws of Claiming Ice: Canadian and Russian Arctic Tensions and the Legality of Flag Planting." She argues that Canada's Arctic strategy has focused on defending its sovereignty from perceived Russian threats and that this approach ultimately downplays the efficacy of international law and stable governance in the Arctic.

Next, in "Referendum and Reference: The *Quebec Secession Reference* Twenty-Five Years Later," Bradley Cox revisits the *Quebec Secession Reference* and argues that it is contemporarily relevant as a model for secession in constitutional democracies worldwide. He advocates for viewing this critical moment in Canadian history as a living and evolving entity in domestic and international law.

Finally, Anjalique Raghunauth's "Governing Beyond Borders: The Case for Tighter Canadian Laws on Overseas Mining" investigates the deficiencies of Canada's legal framework for holding Canadian mining companies accountable for extraterritorial conduct. Her paper suggests that Canada requires more robust governance mechanisms, such as more stringent enforcement mechanisms and active transparency measures, to ensure Canadian mining operations adequately protect human rights abroad.

We want to make a special thank you to the incredible editors on our editorial board. *The Brief* would like to thank Annika Pavlin-Jamal, Ky Vellinga, Mila Shull, Alysha Ahmad, Katie Timms, Deeba Mehr, and Nadia Elkadri for their contributions. This publication would not have been possible without your dedication and support.

Sincerely,
Rachel Brouwer & Damai Siallagan
Editors-in-Chief 2024–2025

Title

Governing Beyond Borders: The Case for Tighter Canadian Laws on Overseas Mining

Author

Anjalique Raghunauth

Abstract

Canada increasingly faces scrutiny for the actions of its mining industry abroad, particularly in the Global South. This paper critically examines the shortcomings of Canada's legal frameworks in holding Canadian mining companies accountable for their extraterritorial conduct. By analyzing the interplay between Canadian domestic law, international treaties, and the regulatory frameworks that govern extranational corporate mining conduct, this article advocates for more robust governance mechanisms to better protect human rights abroad. In particular, this paper proposes that the current regulatory framework—the *Extractive Sector Transparency Measures Act* (ESTMA) and Bill S-211—incorporates more stringent enforcement mechanisms and active transparency measures to mitigate adverse impacts of overseas Canadian mining operations.

Introduction

Canada is often regarded as a paragon of human rights.[1] The country owes its reputation to a legacy of advocacy, such as its instrumental role in the development of the 1948 *Universal Declaration of Human Rights* and championing the representation of Indigenous rights in the 2015 *Paris Agreement*. However, Canada's popular image as a bastion of human rights starkly contrasts with numerous allegations of human rights violations in Canada's overseas mining industry (COMI).

In 2009, Canada received its first reported incident involving Blackfire Exploration Ltd. in Mexico, resulting in the death of local anti-mining activist Mariano Abarca.[2] During PM Justin Trudeau's 2015 election campaign, the Liberal Party of Canada promised to establish an independent ombudsperson to investigate companies that violate human rights or harm the environment in the Global South.[3] The government has made some progress in establishing effective regulatory frameworks, such as the formation of the Office of the Canadian Ombudsperson for Responsible Enterprise (CORE). Additionally, they have set important precedents through decisions in the Supreme Court of Canada (SCC) like *Choc v Hudbay Minerals Inc.* and *Nevsun Resources Ltd. v Araya*, which allowed for Canadian courts to adjudicate international human rights violations committed by Canadian corporations.[4] However,

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[1] Global Affairs Canada, *Canada's Approach to Advancing Human Rights* (Ottawa: GAC, 2024), online: <international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/advancing_rights-promouvoir_droits.aspx?lang=eng>.

[2] Jennifer Moore & Gillian Cosgrove, *Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy* (2013), online: <miningwatch.ca/sites/default/files/blackfire_embassy_report-web.pdf>.

[3] Chris Arsenault, "Canada Not Walking the Walk on Its Miners' Abuses Abroad, Campaigners Say" *Mongabay* (24 July 2020), online: <news.mongabay.com/2020/07/canada-not-walking-the-walk-on-its-miners-abuses-abroad-campaigners-say>.

[4] *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414 [*Choc v Hudbay*]; *Nevsun Resources Ltd v Araya*, 2020 SCC 5 [*Nevsun v Araya*].

recent allegations of forced displacement against Ivanhoe Mines in southern Africa and human rights abuses against Uyghurs in China against Dynasty Gold underscore the insufficiency of Canada's existing regulatory frameworks.[5]

This paper begins with an overview of the global operations of COMI and their role in perpetuating human rights violations. It then critically examines the regulatory frameworks that govern COMI, demonstrating the negative consequences of weak corporate mining regulations and pointing to the necessity for more robust governance mechanisms. To address the shortcomings of Canada's current regulatory frameworks, it is necessary to amend the *Extractive Sector Transparency Measures Act* (ESTMA) and Bill S-211 with new provisions and revise existing ones that comply with recognized international human rights and labour standards. Regulations should target corporate governance practices. In particular, this paper identifies three target areas: (1) mandating disclosures of COMI's human rights and labour practices; (2) enhancing current reporting requirements to include detailed accounts of social impact; and (3) establishing harsher penalties for non-compliance. These recommendations are guided by the international relations principles of shared resources—Conflict, Co-optation, Competition, and Cooperation—to foster international cooperation in natural resource management and human rights.[6]

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[5] Amnesty International, "Canadian Mining Firm Accused of Human Rights Abuses Linked to Evictions in the DRC" (12 September 2023), online: <amnesty.ca/human-rights-news/canadian-mining-firm-human-rights-violations-drc>; Office of the Canadian Ombudsman for Responsible Enterprise, Press Release, "CORE Investigation Finds Human Rights Abuse by Canadian Mining Company" (26 March 2024), online: <core-ombuds.canada.ca/core_ombuds-ocre_ombuds/news-nouvelles/2024-03-26-press-release-communique.aspx?lang=eng>.

[6] Tana Johnson, "Cooperation, Co-optation, Competition, Conflict: International Bureaucracies and Non-Governmental Organizations in an Interdependent World" (2016) 23:5 Rev Intl Political Economy 737, DOI: <10.1080/09692290.2016.1217902>.

Scope and Scale of Canadian Mining Operations

Today, Canada's mining industry (CMI) ranks among the top producers of diamonds, gold, and other valuable minerals as well as leading global potash production.[7] The sector has been recognized as being a global powerhouse with production valued at $74.6 billion, adding between $156 billion and $2 trillion to the nation's GDP in 2021.[8] In the last few years, the CMI has grown to account for 1,423 mining and exploration companies—almost half of the world's mining companies.[9] Of these companies, 770 have invested in Canadian Mining Assets (CMAs) across approximately 98 countries valued at approximately $214.7 billion (see Figure 1), rising considerably from their previous valuation of $192.2 billion.[10] Africa in particular saw a large growth in CMAs, reaching $37.0 billion concentrated in nations like Zambia. Latin America and the Caribbean—accounting for 49.2% of CMAs abroad—increased to $105.6 billion. Seventy percent of CMAs abroad were concentrated in the Western Hemisphere with assets growing by 14.7% to $150.3 billion. Many of these companies are considered among the worst contributors to poor environmental and human rights practices, with 34% of these companies having been accused of such violations.[11]

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[7] Natural Resources Canada, *Minerals and the Economy* (Ottawa: NRCan, 2024), online: <natural-resources.canada.ca/our-natural-resources/minerals-mining/mining-data-statistics-and-analysis/minerals-and-the-economy/20529>.

[8] *Ibid*; Mining Association of Canada, *The Canadian Mining Story Economic Impacts and Drivers for the Global Energy Transition* (Ottawa: Mining Association of Canada, 2023), online: <mining.ca/flippingbooks/mac-report-2023>.

[9] Natural Resources Canada, *Canadian Mining Assets* (Ottawa: NRCan, 2024), online: <natural-resources.canada.ca/maps-tools-and-publications/publications/minerals-mining-publications/canadian-mining-assets/19323>.

[10] Lauren Salim, "Human Rights Abuses by Canadian-Owned Mining Operations Abroad" (14 June 2022), online: <humanrightsresearch.org/post/human-rights-abuses-by-canadian-owned-mining-operations-abroad>; Mining Association of Canada, *supra* note 8.

[11] *Ibid*.

Human Rights and the Perpetuation of Underdevelopment via the Mining Industry

The Canadian Human Rights Commission defines human rights as thirty fundamental principles to which all human beings are entitled.[12] These principles are the foundation of the ideals of dignity and equality from which notions of justice are derived. In the context of COMI, the right to life, liberty, and security as well as the prohibition against slavery and torture stand out as principles that are frequently violated.[13] The relationship between environmental preservation and human rights is often framed as unidirectional, emphasizing the environment's importance in protecting human rights. However, it is equally important to recognize the inverse relationship whereby protecting human rights can enhance environmental protection. By reducing displacement, preventing exploitative practices such as land-grabbing, and empowering local communities through financial support and stakeholder consultations, human rights safeguards help promote sustainable environmental outcomes.[14] This approach fosters sustainable development, stronger human rights protections, and resilient communities that actively participate in decision-making processes affecting their land and resources.

The experiences of many Indigenous groups in Canada and the United States illustrate the global relevance of this connection between human rights and environmental protection. For example, the impact of the Mount Polley disaster in British Columbia and the proposed Pebble Mine in Alaska threatened the human rights of the Secwepemc Nation, the Yup'ik people, and

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[12] Canadian Human Rights Commission, *About Human Rights* (Ottawa: Canadian Human Rights Commission, 2022), online: <chrc-ccdp.gc.ca/individuals/human-rights/about-human-rights>.

[13] *Ibid.*

[14] Ryo Kohsaka & Marie Rogel, "Traditional and Local Knowledge for Sustainable Development: Empowering the Indigenous and Local Communities of the World" in Walter Leal Filho et al, eds, *Encyclopedia of the UN Sustainable Development Goals: Partnerships for the Goals* (Cham: Springer, 2021) 1261, DOI: <10.1007/978-3-319-95963-4_17>; Global Infrastructure Hub, "Stakeholder Identification, Engagement and Empowerment," online: <inclusiveinfra.gihub.org/action-areas/stakeholder-identification-engagement-and-empowerment>.

their environment.[15] In both cases, the contamination of water sources and the damage of culturally important lands threatened the communities' rights to safe drinking water. The underlying issues of environmental degradation and the violation of Indigenous or local rights remain consistent across both domestic and extranational regions. The primary distinction lies in the regulatory environment and the availability of legal recourse for affected parties.

In many countries in the Global South, economic growth is heavily reliant on natural resources and tourism—sectors that are intrinsically linked to the environment and sustained by a robust labour force.[16] When mining companies operate without adequate regulation, their activities not only cause significant environmental degradation but can also erode the foundations of these economies. Contaminated water, soil degradation, and air pollution reduce agricultural productivity, exacerbate health issues, and weaken the labour force, making it increasingly difficult for communities to sustain themselves.[17] In this context, the exploitation of natural resources becomes a double-edged sword: while it may generate short-term economic gains in some countries, in others, rampant corruption enriches officials at the cost of environmental destruction, loss of tourism revenue, and a diminished labour force.[18] Exploitation creates a vicious cycle of impoverishment whereby the same resources meant to drive development instead exacerbate poverty and social inequality. Through this lens, underregulated

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[15] Mining Watch Canada, "Human Rights Breach: Impact of Mount Polley Mine Disaster in British Columbia" (24 May 2017), online: <miningwatch.ca/news/2017/5/24/breach-human-rights-impact-mount-polley-mine-disaster-british-columbia>; Nicole Greenfield, "Alaska Natives Lead Unified Resistance Against Pebble Mine" (20 April 2021), online: <nrdc.org/stories/alaska-natives-lead-unified-resistance-pebble-mine>.

[16] Mahdi Hosseinpour et al, "Evaluation of Positive and Negative Impacts of Mining on Sustainable Development by a Semi-Quantitative Method" (2022) 366 J Cleaner Production 132955, DOI: <10.1016/j.jclepro.2022.132955>.

[17] National Bureau of Economic Research, "The Effect of Pollution on Worker Productivity" (1 September 2016), online: <nber.org/digest/sep16/effect-pollution-worker-productivity>; Alex O Acheampong et al, "Environmental Degradation and Economic Growth: Investigating Linkages and Potential Pathways" (2023) 123 Energy Econ 106734, DOI: <10.1016/j.eneco.2023.106734>.

[18] Chandan Sharma & Ritesh Kumar Mishra, "On the Good and Bad of Natural Resource, Corruption, and Economic Growth Nexus" (2022) 82 Envtl & Resource Econ 889, DOI: <10.1007/s10640-022-00694-x>.

mining companies drive cycles of impoverishment which, in turn, acts against the pursuit of sustainable development objectives. This process thus traps nations in a continuous cycle of underdevelopment.

Governing COMI Human Rights Abuses Abroad

Canada's mining sector is regulated by a combination of domestic laws and international agreements addressing various issues arising from operations abroad. However, these frameworks primarily focus on areas such as corruption and financial transparency without adequately addressing nor penalizing human rights abuses. Domestically, some of the most prominent frameworks that the Canadian government has enacted are the *Corruption of Foreign Public Officials Act* (CFPOA) and the ESTMA, both of which aim to criminalize the bribery of foreign officials by Canadian companies and enhance corporate accountability in international business practices.[19] By requiring businesses (including mining companies) to disclose payments made to foreign governments, these laws indirectly influence corporate behaviour abroad thereby encouraging greater transparency and ethical conduct.[20]

The Canadian government has also implemented the CORE—a committee dedicated to investigating human rights abuses linked to Canadian companies operating abroad, particularly in the mining, oil, and gas sectors. However, unlike the CFPOA and ESTMA, the CORE cannot compel companies to cooperate with investigations or enforce penalties, thus confining its

[19] *Corruption of Foreign Public Officials Act*, SC 1998, c 34; *Extractive Sector Transparency Measures Act*, SC 2014, c 39, s 376 [*ESTMA*].

[20] Global Affairs Canada, *Canada's Fight against Foreign Bribery: Twenty-Fourth Annual Report to Parliament* (Ottawa: GAC, 2023), online: <international.gc.ca/transparency-transparence/bribery-corruption/2022-2023.aspx?lang=eng>.

powers and judicial purview to an advisory role.[21] In cases where human rights abuses are identified, the CORE can only suggest actions such as compensation, public apologies, remediation efforts, or policy changes. It lacks the power to enforce compliance with these recommendations.[22]

Sections 269.1 and 318–320 of Canada's *Criminal Code* also contain provisions that could theoretically apply extraterritorially in cases of severe human rights abuses, namely where these abuses constitute torture or crimes against humanity.[23] However, although the law allows for such applications, this approach is seldom invoked effectively in practice, especially in cases involving Canadian corporations committing abuses abroad.[24] The primary limitation lies in the alleged violations themselves; many do not meet the stringent definitions of torture or crimes against humanity required under these provisions.[25] Consequently, the *Criminal Code* is limited in ensuring corporate accountability in such contexts.

In 2023, the federal government enacted Bill S-211 (*The Fighting Against Forced Labour and Child Labour in Supply Chains Act*) which aims "to reduce the use of forced labour and child labour in supply chains by increasing transparency in these supply chains."[26] The primary

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[21] Office of the Canadian Ombudsperson for Responsible Enterprise, *What Does the CORE Do If It Finds There Was Human Rights Abuse?* (Ottawa: Canadian Ombudsperson for Responsible Enterprise, 2021), online: <core-ombuds.canada.ca/core_ombuds-ocre_ombuds/fact_sheet_3-fiche_descriptive_3.aspx?lang=eng>.

[22] *Ibid*.

[23] *Criminal Code*, RSC 1985, c C-46, ss 318–320, 269.1; Chilenye Nwapi, "Accountability of Canadian Mining Corporations for their Overseas Conduct: Can Extraterritorial Corporate Criminal Prosecution Come to the Rescue?" (2017) 54 Can YB Intl Law 227, DOI: <10.1017/cyl.2017.9>.

[24] Nwapi, *supra* note 23.

[25] *Ibid.*

[26] Housing, Infrastructure and Communities Canada, *Bill S-211, An Act to Enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to Amend the Customs Tariff 2023–24* (Ottawa: Housing, Infrastructure and Communities Canada, 2024), online: <housing-infrastructure.canada.ca/pub/forced-labour-act-loi-travail-force/flcl-tfte-2023-24-eng.html>.; see also Bill S-211, *An Act to Enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to Amend the Customs Tariff*, 1st Sess, 44th Parl, 2023.

shortcoming of Bill S-211 lies in its narrow focus on forced and child labour. This limitation restricts its applicability to broader issues of corporate accountability beyond the context of forced labour and child labour within supply networks.

Canada has also endorsed the *United Nations Guiding Principles on Business and Human Rights* (UNGPs), which provide a global standard for addressing human rights impacts linked to business activities like those of COMI.[27] Canada is also a signatory to several fundamental instruments of the International Labour Organization (ILO) conventions that cover labour rights that are applied to Canadian companies' overseas operations.[28] However, like Canada's domestic regulations, the endorsement of international policies does not necessarily equate with compliance. These international standards are not legally binding and act as an aspirational commitment akin to a 'scout's honour' pledge. Although Canada's legislative frameworks have made strides toward improving corporate transparency, they often fall short of ensuring meaningful accountability for human rights abuses extraterritorially. As such, it is necessary to explore the precedents set by landmark court cases which have expanded the extraterritorial reach of Canadian laws for human rights violations abroad.

Pioneering Legal Decisions

While Canada's existing regulatory frameworks have made strides in promoting corporate transparency and accountability, they remain limited in scope and enforcement. These limitations have been addressed by a number of landmark legal precedents that have shaped the

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[27] UN Office of the High Commissioner of Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (New York & Geneva: UN Human Rights Council, 2011), online: <ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf>.

[28] International Labour Organization, "Conventions, Protocols and Recommendations," online: <ilo.org/international-labour-standards/conventions-protocols-and-recommendations>.

legal discourse on the perception and regulation of extraterritorial violations. *R v Hape* established a standard and called for clearer legislative authority regarding the extraterritorial application of Canadian laws, affirming that Canadian law generally does not apply outside of Canada unless expressly stated by Parliament.[29] In subsequent years, *Choc v Hudbay* clarified that Canadian courts have the authority to void jurisdictional clauses in cases involving alleged human rights abuses by a Canadian mining company's subsidiary abroad.[30] In *Nevsun v Araya*, the SCC permitted Eritrean plaintiffs to pursue a lawsuit against Nevsun—a Canadian mining company—for alleged human rights abuses committed abroad.[31] These cases mark a significant step in affirming that Canadian courts could hear cases involving human rights violations outside of Canada where these violations were caused by Canadian companies. These legal precedents underscore that mining companies must comply with human rights standards, with the potential for civil liability in Canada if violations occur.

However, while *Choc v Hudbay* and *Nevsun v Araya* illustrate that Canadian courts are willing to hear cases involving human rights abuses committed abroad by Canadian companies, very few cases are brought to Canadian courts. The high cost of litigation makes these cases financially prohibitive for many plaintiffs, particularly in regions with weak legal infrastructure.[32] Moreover, the complexity of shifting cases to foreign courts further hinders extranational legal action to be brought to Canadian courts.[33] The limited number of cases that

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[29] *R v Hape*, 2007 SCC 26.

[30] *Choc v Hudbay*, *supra* note 4.

[31] *Nevsun v Araya, supra* note 4.

[32] International Federation for Human Rights, *Litigation Examples in Canada: Extraterritorial Civil Liability of Multinational Corporations for Human Rights Violations* (Paris: FIDH, 2024), online: <corporateaccountability.fidh.org/the-guide/judicial-mechanisms/extraterritorial-civil-liability-of-multinational-corporations-for-human-rights-violations/litigation-examples-in-canada>.

[33] *Ibid.*

have reached Canadian courts highlights both the importance of extraterritorial governance and the challenges in ensuring legal accountability for Canadian companies operating abroad. While these precedents have expanded the scope of Canadian law, they also underscore the systemic barriers that hinder access to justice.

Ensuring Accountability: Changes to Canadian Legislation on Mining Practices

Effectively addressing indiscretions in mining practice and mitigating their impacts requires adopting the best practices for shared and unshared resource bases. Public policy expert Tana Johnson introduced the "4C's taxonomy"—a framework that categorizes relationships between NGOs and international bureaucracies into four types—cooperative, co-optative, competitive, or conflictual—based on whether they share or differ in resource bases and values.[34] Johnson argues that when two actors share similar values but depend on the same resources, one may dominate leading to *co-optation*. Conversely, if actors lack shared values yet tap into the same resource pool, they become *competitors*. Given the historical relationship between CMIs and human rights issues, conflicts often arise with host countries, stemming from differing priorities and values. Mining companies and local stakeholders both rely on natural resources but for different purposes: mining companies view land as a commodity to be exploited for profit, while local communities depend on it for their livelihoods such as agriculture, fishing, and cultural practices. Extraction processes, often involving environmental degradation like deforestation and water pollution, can threaten the local communities' access to these essential resources. This divergence in perspectives—companies prioritizing economic gain and communities emphasizing sustainability—leads to conflicts over land use and environmental

[34] Johnson, *supra* note 6 at 742–744.

protection.[35] Consequently, the clash between economic interests and environmental well-being deepens the divide between mining corporations and local populations. To improve human rights outcomes and mitigate environmental violations, Canada must foster both national and international cooperation by aligning laws and regulations while recognizing the distinct resources and values of different stakeholders.

It is important to note, however, that cooperation does not only mean sharing resources but rather sharing similar ideologies that prioritize the protection of human rights and the environment over profitability and economic dominance. In doing so, Canada will not only continue its legacy of human rights stewardship but become a leader in developing a system for sustainable and ethical mining abroad. This paper proposes that ESTMA and Bill S-211 be amended to include direct and substantive mechanisms that would protect human rights. In comparison to other potential frameworks that could be used to protect human rights abroad, ESTMA and Bill S-211 have the strongest foundation that directly pertains to other aspects of human rights.

Amending ESTMA

ESTMA promotes corporate responsibility by requiring Canadian extractive companies to disclose payments exceeding CAD $100,000 to foreign governments.[36] This transparency aims to reduce corruption and identify revenue management issues in resource-rich countries. If a company has failed to comply or is found guilty under ESTMA, it may face penalties of up to CAD $250,000 for the first offence with subsequent violations carrying penalties of up to CAD

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[35] Anthony Bebbington, *Social Conflict, Economic Development and Extractive Industry: Evidence from South America* (New York: Routledge, 2012).

[36] *ESTMA*, *supra* note 19.

$500,000 in addition to potential criminal charges for willful misconduct.[37] By publicly reporting taxes, royalties, and fees, ESTMA fosters financial transparency through stricter policies and penalties for non-compliance. However, its focus remains narrow and primarily financial, falling short of addressing human rights violations and environmental harm resulting from extractive industry activities.

To address this gap, I propose amending ESTMA to include provisions that safeguard international labour rights and enhance human rights protections. Specifically, these provisions should require COMIs to adhere to internationally-recognized labour standards—such as those set by the ILO—and mandate regular reports on their compliance with these standards. By requiring companies to report their adherence to international labour and human rights standards, the law would go beyond financial transparency and help mitigate the broader social harms that stem from corruption. This would address both the transparency of financial payments and the accountability for actions that directly affect communities and the environment. In this way, an amendment to ESTMA could play a crucial role in reducing not just the financial aspects of corruption, but also the broader negative impacts of the extractive industry. As part of the proposed amendment, mining companies would be required to inform regulatory bodies like the CORE about their operations, specifically detailing how they are mitigating human rights impacts and engaging with local communities to align with international labour rights standards. This would ensure greater accountability by making companies more transparent in their human rights practices. Failure to comply could result in stricter penalties under ESTMA, including restrictions on mining activities and potential loss of projects, thus strengthening the legal framework and promoting corporate responsibility in global operations.

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[37] *Ibid*.

Amending Bill S-211

Bill S-211 aims to reduce labour violations within supply chains by promoting corporate transparency and accountability. The bill requires companies to report on efforts to eliminate forced and child labour from their supply chains. Failure to comply can result in significant financial penalties: if a company does not submit a report or provides false information, it may face a fine of up to CAD $250,000. Bill S-211 thus recognizes the importance of corporate responsibility and the need for accurate reporting to ensure that supply chains are free from human rights abuses. However, its scope remains limited, particularly in addressing the full spectrum of human rights violations such as those linked to environmental damage, community displacement, and broader corporate accountability. It also fails to address the abuse of workers who are not engaged in forced labour. Therefore, Bill S-211 should be amended to include all forms of transactions that Canadian companies partake in overseas.

Internationally, countries like Norway have adopted similar frameworks to those proposed. For example, Norway's *Transparency Act*, implemented in July 2022, requires companies to disclose their human rights and environmental practices, including the impact of their operations abroad.[38] This legislation aims to improve accountability by requiring companies to report on their due diligence efforts and risks related to human rights and environmental issues. Though its impact is yet to be seen in full, the law's penalties for noncompliance—either NOK 25 million (CAD $3.15 million) or 4% of a company's annual revenue (whichever is larger)—along with potential reputational damage, loss of business, and fines from the Norwegian Consumer Authority highlight that it is possible to implement more stringent penalties than those extant in current Canadian legislation.

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[38] *Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven)*, 2021 (LOV-2021-06-18-99) [*Transparency Act*].

Incorporating these provisions into the current Canadian regulatory frameworks would not only align Canada with international best practices but also bolster Canada's reputation as a leader in ethical business conduct. Such legislation would also have a positive ripple effect, incentivizing other countries to strengthen their regulations. Moreover, these changes would benefit host countries by ensuring that Canadian companies contribute positively to their economies and societies rather than exploiting local resources or labour. Such an approach would further align Canada's corporate practices with its international commitments, such as the UNGPs, and reinforce Canada's role in promoting sustainable and responsible business practices globally.

These legal amendments and initiatives would create a robust framework for holding COMI accountable for their actions abroad, ensuring that they respect human rights and environmental standards wherever they operate. Through this lens, cooperation also extends to working with host countries to secure human rights. Host countries must also make an effort to outline their standards of operations. However, the fight against violations of human rights should be viewed as a collective effort. Furthermore, because there is a significant power imbalance between Canada and many countries in the Global South, much of the burden falls on Canada to take responsibility for those who represent its interests and actions abroad. There is a legitimate concern that stricter regulations may drive COMIs to relocate their headquarters, negatively affecting Canada's economy. However, such moves would amount to greater financial and reputational risks for the mining companies. By framing the amendments to ESTMA and Bill S-211 through narratives of ethical leadership and long-term market competitiveness, Canada can increase corporations’ commitment to human rights through compliance in a way that is consonant with prevailing corporate attitudes.[39]

Conclusion

COMIs’ operations highlight a pronounced dissonance between Canada’s reputation as a human rights champion and the human rights violations perpetrated by its companies abroad. Despite some legal precedents and frameworks that attempt to address regulatory issues, the current landscape fails to prevent and effectively penalize transgressions. Balancing Canada’s commitment to combating human rights violations with its adherence to international norms is complicated by relationships between countries, power dynamics, and economic disparities. Amending both ESTMA and Bill S-211 would help clarify ambiguities surrounding overseas jurisdiction and foster stronger cooperative relationships with host countries.

In light of these challenges, there is an urgent need for Canada to strengthen its legal and regulatory frameworks to ensure its companies adhere to the highest standards of human rights and environmental protection regardless of where they operate. The federal government must take more decisive steps to reform Canadian law by implementing stricter penalties for violations and collaborating with host countries to uphold ethical standards. Only through such concerted efforts can Canada reconcile its economic ambitions with its ethical and moral obligations as a paragon of human rights, reaffirming its commitment to global human rights and environmental stewardship.

[39] Shauhrat S Chopra et al, “Navigating the Challenges of Environmental, Social, and Governance (ESG) Reporting: The Path to Broader Sustainable Development” (2024) 16:2 Sustainability 606, DOI: <10.3390/su16020606>.

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LEGISLATION: INTERNATIONAL

Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven), 2021 (LOV-2021-06-18-99).

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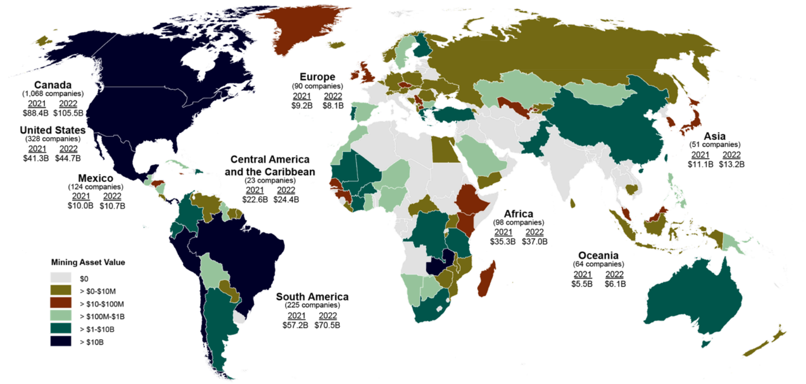

Figure 1. Image highlighting CMA location and total asset value.

Title

The Laws of Claiming Ice: Canadian and Russian Arctic Tensions and the Legality of Flag Planting

Author

Samantha de Verteuil

Abstract

Canada's policies and actions in the Arctic have undermined the authority of the international legal framework that governs the region. This article will argue that by framing its Arctic strategy around the need to defend its sovereignty from perceived Russian threats, Canada has promoted a domestic narrative that downplays the significance of international law. This approach not only weakens the credibility of the legal structures intended to regulate Arctic cooperation, but also shifts the focus toward national interests, eroding the broader framework designed to ensure stability and fair governance in the region. This article begins with a political history of Canada's development as an Arctic power and the role of the Arctic in Canadian national identity. It then discusses Canada's interactions with the legal systems concerning the Arctic, namely UN bodies and prevalent intergovernmental organizations (IGOs). Finally, the article examines Canada's perspective on the validity of Arctic law, emphasizing its disenchantment with collaborative Arctic governance.

A Political Introduction

From its symbolic dominance in national art to its prevalence in past prime ministerial campaigns, the concept of the "Great White North" has long been a central feature of Canadian identity.[1] The government's statement on Canada's Arctic Foreign Policy declares: "Canada is an Arctic power. The True North is our destiny … [t]o not embrace its promise now at the dawn of its ascendancy would be to turn our backs on what it is to be Canadian."[2] Former Prime Minister Stephen Harper authored this quote as a part of his campaign prioritizing economic development for Northern peoples, the heritage of Arctic peoples, and, most notably, the defence of Canada's Arctic sovereignty.[3] These priorities were well-received by the public, ultimately solidifying the Arctic's position in Canada's foreign policy. Canada's strong national projection onto a largely unclaimed and legally contested region has contributed to a growing mistrust of international governing bodies that regulate the Arctic–a region that is not sovereign and relies on a legal regime to ensure neutrality and cooperation among states.[4]

Canada's domestic messaging has often expressed skepticism toward cooperative Arctic frameworks.[5] For instance, the Fraser Institute—a leading Canadian think tank—has characterized the United Nations as a weak institution, criticizing the UN Convention on the Law

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[1] Kari Roberts, "Why Russia Will Play by the Rules in the Arctic" (2015) 21:2 Can Foreign Pol'y J 112, DOI: <10.1080/11926422.2014.939204>.

[2] Canada, *Statement on Canada's Arctic Foreign Policy: Exercising Sovereignty and Promoting Canada's Northern Strategy Abroad* (Ottawa: Government of Canada, 2010), online: <international.gc.ca/world-monde/assets/pdfs/canada_arctic_foreign_policy-eng.pdf>.

[3] *Ibid*.

[4] Peter Hough, *International Politics of the Arctic: Coming in from the Cold* (Abingdon: Routledge, 2013); Klaus Dodds, "Flag Planting and Finger Pointing: The Law of the Sea, the Arctic and the Political Geographies of the Outer Continental Shelf" (2010) 29:2 Political Geography 63, DOI: <10.1016/j.polgeo.2010.02.004>.

[5] Another example is when former Prime Minister Stephan Harper warned Canadians of individuals "who are actually trying to turn the Arctic Council into some kind of international governance model that washes away the notion of sovereignty in the Arctic." See Joël Plouffe, "Stephen Harper's Arctic Paradox" (December 2014), online: <cgai.ca/stephen_harpers_arctic_paradox>.

of the Sea (UNCLOS) as a legal mechanism that Russia could exploit to assert military control over vast portions of the Arctic.[6] While this analysis is speculative and lacks substantial legal grounding, it reflects a broader Canadian apprehension toward the efficacy of international law in the Arctic.[7]

All Arctic claims that Russia has submitted to the UN Commission on the Limits of the Continental Shelf (CLCS)—the body responsible for adjudicating Arctic territorial claims under UNCLOS—have been within the well-defined legal parameters agreed to by Canada.[8] In 2001, Russia filed its initial appeal for control of Arctic territory, making it the first national applicant in history.[9] However, the CLCS functionally denied Russia's request and asked for a revision of their submission with more scientific evidence. In 2015, Russia completed their revised submission, also providing two additional addenda in 2021, ultimately leading to their favorable recommendation outcomes in 2023. These outcomes resulted in international recognition of Russia's claim to approximately half of the North Pole (reference Fig 1 and Fig 2).[10]

Canada submitted its first Arctic claim in 2013—12 years after Russia.[11] This delay likely explains why Russia's claims have progressed more quickly than those of Canada. If Russia exercised undue influence over the UNCLOS process, as suggested by the Fraser Institute, it would be reasonable to assume that its claims would have been accepted far more swiftly. For

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[6] Alan Dowd & Alexander Moens, "Meeting Russia's Arctic Aggression" (10 August 2010) online: <fraserinstitute.org/article/meeting-russias-arctic-aggression>.

[7] Plouffe, *supra* note 5.

[8] Andrey Todorov, "Russia's Arctic Shelf Bid and the Commission on the Limits of the Continental Shelf, Explained" (2 Mar 2023), online: <belfercenter.org/publication/russias-arctic-shelf-bid-and-commission-limits-continental-shelf-explained>.

[9] *Ibid*.

[10] *Ibid*.

[11] *Ibid*.

instance, Norway applied to the CLCS in 2006 and was the first country to receive favorable recommendations in 2009.[12] Yet, while Canadian Arctic policy accuses Russia of maneuvering legal loopholes, this same accusation is not positioned against Norway. Additionally, Russia's claim to a significant portion of the Arctic, including half of the North Pole, is often supported by the demographic fact that approximately 50% of Arctic inhabitants are Russian citizens.[13] This statistic is documented by the Arctic Council, a major international body which facilitates cooperation amongst Arctic states.[14] The fact that Russian inhabitants populate a significant portion of the Arctic territory—a fact recognized by the Canadian chair of the Arctic Council—does not support the dominant Canadian rhetoric that Russian claims are motivated by militarization alone.

The territorial dispute of the Arctic is rooted in national identity for both Russia and Canada.[15] Both nations' political ties to the Arctic are fundamental to their national self-conceptions, driving each to adopt assertive and often militaristic Arctic policies in order to receive domestic approval.[16] The parallel nature of these nations' respective Arctic policies reflects what could be described as a distinction without a difference. Russia and Canada engage in similarly antagonistic acts while the latter accuses the former of misconduct.[17] A notable example of this dynamic is the planting of flags in contested Arctic territory. While Canada has denounced Russia's 2007 flag planting beyond its legally recognized borders, Canada undertook

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[12] *Ibid*.

[13] Hough, *supra* note 4.

[14] Notably, Canada was the first chair of the Arctic Council from 1996 to 1998 and remains an active participant.

[15] P Whitney Lackenbauer, "Mirror Images? Canada, Russia, and the Circumpolar World" (2010) 65:4 Intl J 879.

[16] Roberts, *supra* note 1.

[17] Lackenbauer, *supra* note 15.

the same symbolic act two years prior.[18] As expressed in P. Whitney Lackenbauer's analysis of Canadian and Russian Arctic relations: to Canada, the true crime was not the act of flag planting itself, but the fact that it was a Russian flag.[19] Political tension between the two nations stems less from violations of international law and more from competing assertions of national identity through achieving Arctic sovereignty.[20]

Canada and Russia have, however, experienced periods of cooperation and trust regarding Arctic governance. In 1992, then-Prime Minister Brian Mulroney and Russian President Boris Yeltsin issued an Arctic cooperation agreement, marking a period of collaboration.[21] In 2000, the "Northern dimension of Canada's foreign policy" stated a key priority was working with Russia to address northern challenges.[22] In 2003, Canada officially ratified UNCLOS, after Russia joined in 1997.

However, in the Canadian government's 2010 statement on Arctic foreign policy, it is clear that Canada's main Arctic partner is the United States—a country which has still refused to ratify the UNCLOS—and has provided 60% of the funding for increased Canadian military presence in the Arctic.[23] This raises the question: is Canada's militaristic chest-thumping regarding the Arctic compatible with the international rule of law?

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[18] *Ibid*.

[19] *Ibid.*

[20] Roberts, *supra* note 1.

[21] Lackenbauer, *supra* note 15.

[22] *Ibid*.

[23] Government of Canada, *supra* note 2; Murray Brewster, "Canada's 'Tenuous Hold' in Arctic Could Be Challenged by Russia, China, Says Top Soldier" *CBC News* (18 Oct 2022), online: <cbc.ca/news/politics/wayne-eyre-arctic-russia-china-defence-1.6621040>.

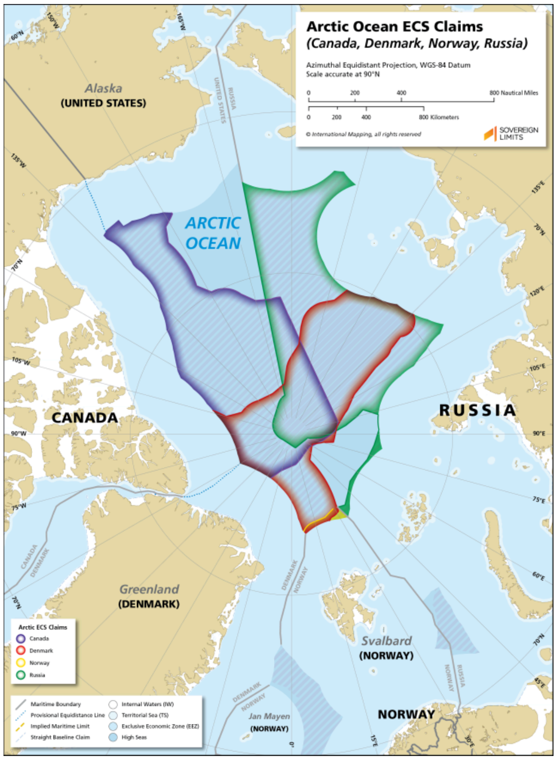

Fig 1. Image of Overlapping UNCLOS Claims.[24]

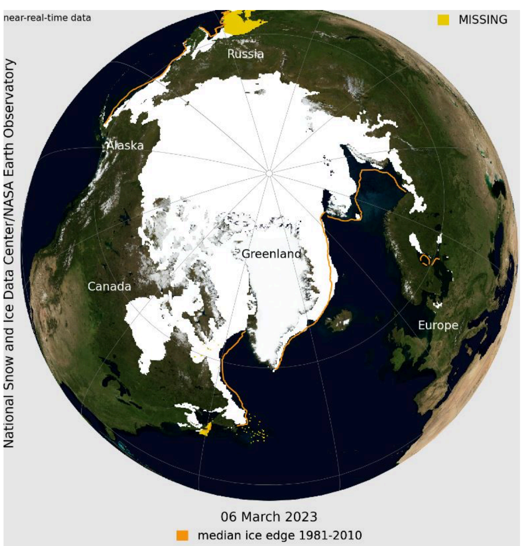

Fig 2. North Pole Ice Sheet as of March 2023.[25]

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[24] Petra Gümplová, "Continental Shelf and the Quiet Ocean Commons Grab" (9 Jan 2024), online: <internationallaw.blog/2024/01/09/continental-shelf-and-the-quiet-ocean-commons-grab>.

[25] National Snow and Ice Data Center, "Arctic Sea Ice Reaches Maximum Extent for 2023" (15 March 2023), online: <nsidc.org/news-analyses/news-stories/arctic-sea-ice-reaches-maximum-extent-2023>.

The Facade of an Anarchic Arctic

In North American rhetoric, the Arctic is often depicted as an icy, unexplored expanse, seemingly detached from the regulatory and bureaucratic frameworks of modern governance and ripe for seizure through military assertion and flag planting. This perception portrays the Arctic peoples as "unclaimed Canadians" in a "lost sovereign land."[26] This nationalistic framing is not unique to Canada—Russia has constructed the Arctic in a similar fashion in its own geopolitical narrative. However, what is unique to the Canadian framing is the relative apathy toward Arctic law.[27] The prioritization of national interests above all else reduces this region to mere patriotic foot-stomping.

Arctic law is complex; the legal framework is replete with overlapping territorial claims, "grey zones" of jurisdiction, numerous governing bodies, and coveted resources such as oil, fish, and metals.[28] If "Canada's Arctic" is unclaimed under international law, what law governs this expanse of ice?

Commenting in 2010 on the legal status of the Arctic, a judge on the International Tribunal for the Law of the Sea observed that the region may "turn out to be a laboratory for a new international legal regime."[29] Since then, this statement appears to have been remarkably prescient. Facilitating cooperation and policy, the Arctic Council is composed of eight states: Norway, Russia, the United States, Canada, Iceland, Sweden, Finland, and Denmark (via

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[26] Canada, *supra* note 2.

[27] Plouffe, *supra* note 5.

[28] Ekaterina Piskunova, "Russia in the Arctic: What's Lurking Behind the Flag?" (2010) 65:4 Intl J 851.

[29] Paul Arthur Berkman et al, *Baseline of Russian Arctic Laws* (New York: Springer Berlin Heidelberg, 2019).

Greenland and the Faroe Islands). As the region's most prominent source of soft law, the Arctic Council generates legal and political customs based on mutual interest and value alignment.[30]

The Arctic Council is one of several IGOs operating in the region. Others include the Conference of Parliamentarians of the Arctic Region, the International Maritime Organization, the Barents Euro-Arctic Council, the Northern Forum, as well as bilateral groups and organizations focused on Arctic fishing.[31] These organizations form a net of customary law across the region, each supporting others by incentivizing the compliance of involved parties.[32] Bad faith within one IGO can ripple across this network and erode trust, ultimately undermining the broader support within and beyond the Arctic governance framework. An example of this occurred when, in 2010, then Canadian Foreign Affairs Minister Lawrence Cannon invited the five "coastal" Arctic states (Norway, Russia, the United States, Denmark, and Canada)[33] to a summit as he believed these countries should have the primary influence on agenda-setting for the Arctic region.[34] Canada's exclusion of the non-coastal Arctic states, including Iceland, Finland, Sweden, and Indigenous groups, led former U.S. Secretary of State Hillary Clinton to publicly criticize Canada's actions, claiming that the uninvited parties "have legitimate interests in the region."[35] While the summit did not impact Canada's Arctic Council membership, it altered its broader diplomatic perception. The United States, having accused Canada of creating divisions amongst the Arctic Council, refused to support Canadian initiation of a leadership

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[30] *Ibid*.

[31] Roberts, *supra* note 1.

[32] Berkman*, supra* note 29.

[33] I.e., Arctic states whose coastline extends into the Arctic Ocean. Geographers often consider the Arctic Ocean to begin just north of Iceland, since the country lies south of the Arctic circle. While Sweden and Finland hold territory within the Arctic circle, they do not have any coastline that borders the Arctic Ocean.

[34] Plouffe, *supra* note 5.

[35] *Ibid*.

position within the Arctic.[36] Effectively, Canada's bad faith in the Arctic Council temporarily destabilized the United States' support for Canadian Arctic policy.[37]

In addition to these customary law mechanisms, UNCLOS serves as the region's comprehensive legal regime.[38] UNCLOS establishes a clear set of legal processes through which states can submit claims for international recognition of Arctic territories as their sovereign continental shelves. While some scholars argue that UNCLOS may only function as customary law—due in part to the United States' refusal to ratify it—UNCLOS remains distinct from the soft law produced by Arctic IGOs.[39] It is crucial to separate UNCLOS from customary laws produced by IGOs, as the UN provides international recognition of a state's sovereignty over a portion of the Arctic. In this way, it is not solely a legal agreement made amongst a group of mutually interested parties but an internationally recognized law that can expand a nation's domestic jurisdiction.[40]

While each Arctic country has the authority to develop its own policies and political strategies, the UN oversees the international recognition of state claims and IGOs help regulate state actions. The legal framework in the Arctic operates on a system of checks and balances, creating a complex environment of imagined and actual jurisdictions. The Arctic is not a lawless region, but a melting pot of international law.[41]

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[36] *Ibid*.

[37] *Ibid*.

[38] See *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994).

[39] Will Schrepferman, "Hypocri-sea: The United States' Failure to Join the UN Convention on the Law of the Sea" (31 October 2019), online: <hir.harvard.edu/hypocri-sea-the-united-states-failure-to-join-the-un-convention-on-the-law-of-the-sea-2>; Byers, Michael, "Cold Peace: Arctic Cooperation and Canadian Foreign Policy" (2010) 65:4 Intl J 899.

[40] Berkman, *supra* note 29.

[41] *Ibid*.

Canada's Pillar in the Arctic Regime

Before UNCLOS, Canada was not a major power in the Arctic.[42] Between two global powerhouses during the Cold War, Canada's role in the Arctic was built around safeguarding American interests against potential political escalation. Russia perceived Canadian Arctic policy as "The US [being] an 'imposing brother' who [hid] behind a 'little boy' Canada."[43] Russia's most direct bomber route was over the pole and its aspirations for naval power required Soviet access to the Arctic straits.[44] Canada became a geopolitical buffer state between warring powers. These conditions initiated militarization in Canadian Arctic policy.

With Canada's ratification of UNCLOS, power within the Arctic shifted. Now, potentially entitled to sovereignty over vast reaches of Arctic water, Canada is no longer a mere buffer to the United States but a matched Arctic power to Russia. Only after the ratification of UNCLOS did protection of Canadian Arctic sovereignty become rooted in national identity. After the implementation of UNCLOS, Harper's speeches began shaping a Canadian ethos of delegitimizing the law of the Arctic.

Three years after the Canadian ratification of UNCLOS in 2003—and shortly after assuming office—the Harper government removed the position of the Ambassador for Circumpolar Affairs.[45] In 2006, the Canadian government failed to send a minister to the Salekhard Ministerial Meeting of the Arctic Council.[46] Although former Prime Minister Harper

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[42] Ciara Sebastian, "New Power, New Priorities: The Effects of UNCLOS on Canadian Arctic Foreign Policy" (2013) 3:1 Polar J 136, DOI: <10.1080/2154896X.2013.783279>.

[43] *Ibid*.

[44] *Ibid.*

[45] *Ibid*.

[46] *Ibid.*

strongly emphasized Canadian Arctic policy, particularly focusing on militarization, these actions undermined the very international influence Canada had recently secured. Such political decisions carry significant consequences, as missteps in Arctic diplomacy could jeopardize Canada's relations with other Arctic states and damage domestic relations with Indigenous Peoples' Organizations (IPOs), who are permanent participants in the Arctic Council.[47] With the dominant narrative in contemporary Arctic policy returning to one of guns and nationalism, the legal truth of the North Pole has become increasingly difficult to discern.[48] The escalation of Canada's military activities in the north may upset the precedent of international cooperation, forcing Canada out of beneficial Arctic support networks.[49] The Arctic Institute Center for Circumpolar Security Studies has publicly criticized increased militarization in the Arctic and the risks it poses to cooperation.[50] To maintain its political influence and preserve its role in Arctic governance, Canada should consider these warnings and avoid further escalating its military posture.

However, as Russia increasingly presents itself as the Cold War enemy of the past rather than the potential ally of the future, the possibility of trust between Canada and Russia diminishes. Given Russia's ongoing violations of humanitarian and international law in Ukraine, building trust between the two nations is challenging. The positioning of Russia as a potential threat within the Arctic holds its weight as the popular justification for increased Canadian

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[47] *Ibid*.

[48] Birgitte Annie Molid Martinussen, "Canada's New Billion-Dollar Defense Investment: Strong Arctic Focus" *High North News* (11 Apr 2024), online: <highnorthnews.com/en/canadas-new-billion-dollar-defense-investment-strong-arctic-focus>.

[49] Sebastian, *supra* note 42.

[50] Ragnhild Groenning, "Why Military Security Should Be Kept Out of the Arctic Council" (2 June 2016), online: <thearcticinstitute.org/why-military-security-should-be-kept-out-of-the-arctic-council>.

militarization.[51] The Canadian public views Russia's proximity to their borders with suspicion and mistrust, doubting Russia's willingness to follow international norms.[52]

Given the mistrust Canadians harbour toward Russia, the pressing question remains: does Russia feel the same distrust toward Canada? In an analysis of domestic Russian publications, the dominant narrative is no.[53] Despite Canada's open denunciation of the Russian invasion of Ukraine at the 2015 Arctic Council meeting, domestic Russian language paints Canada as a potential Arctic ally.[54] In a content analysis of the public Russian press, comments about how the two states' forces could collaborate to better support regional search and rescues in the Arctic remain the dominant framing of Russian-Canadian Arctic relations.[55]

While this perception may come as a surprise to many Canadians, it does align with the historical trajectory of Russian Arctic policy. By the end of the Cold War, Russia had pushed for Arctic collaboration and consistently expressed eagerness to abide by Arctic international law.[56] Russia's foreign policy drastically differs in its treatment of the Arctic versus Ukraine despite Canadian news outlets often conflating the two.[57] Russia has orchestrated encroachments on

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[51] Office of the Prime Minister of Canada, *Our North, Strong and Free: A Renewed Vision for Canada's Defence* (Trenton, ON: Office of the Prime Minister), online: <pm.gc.ca/en/news/news-releases/2024/04/08/our-north-strong-and-free-renewed-vision-canadas-defence>.

[52] Plouffe, *supra* note 5.

[53] Evgeniia (Jen) Sidorova, "Content Analysis of the Russian Press Before and After the Ukraine Crisis: Russian-Canadian Relations in the Arctic: Hope for Better?" (2019) 25:3 Can Foreign Pol'y J 269, DOI: <10.1080/11926422.2019.1605915>.

[54] *Ibid.*

[55] Minna Ålander, "High North, High Tension: The End of Arctic Illusions" (11 May 2023), online: <fpri.org/article/2023/05/high-north-high-tension-the-end-of-arctic-illusions>; Colin Wall & Njord Wegge, "The Russian Arctic Threat: Consequences of the Ukraine War" (, online: <csis.org/analysis/russian-arctic-threat-consequences-ukraine-war>; Sidorova, *supra* note 53.

[56] Lackenbauer, *supra* note 15.

[57] Plouffe, *supra* note 5; Sidorova, *supra* note 53; Wall & Wegge, *supra* note 55.

Ukraine's independence and survival throughout history. This is not the case in the Arctic.[58] During long periods of authoritarian dominance within Russia, Russia's Arctic policy still prioritized UN validation, engagement with the Arctic council and other groups, and maintaining a rhetoric of regional collaboration and trust. None of these traits have been present in Russia's relationship with Ukraine or other ex-Soviet countries more broadly. The Arctic is a unique and relatively uncharacteristic aspect of Russian foreign policy, but an aspect nonetheless. Russian aggression within the region remains improbable due to Russia's historical engagement within the Arctic and the positive framing of Canada in the Russian press. There is likely no risk to Canadian sovereignty in the Arctic.[59]

Perceived Legal Legitimacy and Disenchantment with International Law

When the power balance of the Arctic shifted with the introduction of UNCLOS, so did Canadians' perceived entitlement to the region. Under UNCLOS, Canada was led to believe that if it proved the North Pole's waters were an extension of its continental shelf, the land was theirs. In 2013, the same year that Canada's claim was submitted to the UN Commission on the Limits of the Continental Shelf (CLCS), a press conference was held among Natural Resources Canada, the Department of Fisheries and Oceans, and Foreign Affairs to question why Canada's Arctic claim remained incomplete despite mapping tens of thousands of kilometers of Arctic seabed and

[58] Roberts, *supra* note 1.

[59] The dominant Canadian orientation of Russia as an Arctic rival has been of interest to academics due to its misalignment with the historical reality of the region. Canadian scholar Joël Plouffe theorizes that "... the Harper government decided to pick a low-impact rhetorical fight with Russia to boost its image and try to restore Canada's power relations in the international arena, a goal that previous governments had failed to achieve. With a Manichaean conception of world affairs, the Prime Minister identified Russia as the *other* in the Arctic—the bad guy—while the process of reinforcing Canada-U.S. relations was in full force." While this theory is beyond the scope of this essay, it is of note to mention. See Plouffe, *supra* note 5.

years of work.[60] When asked about the delay, Canadian Foreign Affairs lawyer Hugh Adsett stated that the objective was to secure the largest possible area for Canada.[61] Leona Aglukkaq, then-chair of the Canadian Arctic Council, described Canada's claim to the UN Commission on the Limits of the Continental Shelf as "defending [Canadian] sovereignty."[62] This language implied that the Arctic was already considered Canadian territory, despite the unresolved international legal process. The stark contrast between Canada's domestic rhetoric, which assumes rightful ownership, and the international dialogue, which awaits conclusive evidence, highlights the tension between nationalistic ambitions and the requirements of international law.

The tensions between national and international governance foster social mistrust amongst populations which feel that IGOs are a barrier to what is 'rightfully' theirs. Perceived social legitimacy of international law and organizations has been an area of expanding research, as distrust of these systems grows globally.[63] Initially, the dominant sociological model relied on representation and shared values.[64] This model held that those who engaged with these legal apparatuses would view them as legitimate as long as their voices were heard, the system was procedurally unbiased, and the organization reflected values it aligned with.[65] This model held that social legitimacy rested in the process rather than the outcome. Groups engaged with legal

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[60] Max Paris, "Canada's Claim to Arctic Riches Includes the North Pole" *CBC News* (19 December 2013), online: <cbc.ca/news/politics/canada-s-claim-to-arctic-riches-includes-the-north-pole-1.2456773>.

[61] *Ibid.*

[62] *Ibid.*

[63] Lisa Maria Dellmuth et al, "Institutional Sources of Legitimacy for International Organisations: Beyond Procedure Versus Performance" (2019) 45:4 Rev Intl Stud 627, DOI: <10.1017/S026021051900007X>.

[64] See also Lisa Maria Dellmuth & Jonas Tallberg, "The Social Legitimacy of International Organisations: Interest Representation, Institutional Performance, and Confidence Extrapolation in the United Nations" (2015) 41:3 Rev Intl Stud 451, DOI: <10.1017/S0260210514000230>.

[65] For example, the United States of America would feel that a legal apparatus centered on the values of the free market, individualism, and liberty was more legitimate than one based on socialist or communal values. See Dellmuth et al, *supra* note 63.

systems could meaningfully accept a ruling not in their favour if the process reflected the traits described above. While academia still broadly holds this sociological model to be true for domestic legal systems, it no longer does so on the international stage.

Because participants must believe governing institutions have the authority to regulate conduct, conflicting ideas of domestic and international governance can delegitimize international law and organizations.[66] This issue is the root of Canadian decentering of Arctic international law. Since the Harper administration, the Canadian government has not viewed the UN or the Arctic legal network as institutions that have a legitimate authority to regulate Canadian Arctic behaviour.[67] The legitimacy of international organizations depends on their ability to comply with the demands of member states, a social legitimacy stabilized by outcomes rather than processes.[68] Until the UN recognizes Canadian Arctic claims, Canada aims to continue to undermine the legitimacy of Arctic cooperation institutions under claims of "sovereignty."

Conclusion

Canadian Arctic policy is incompatible with international law because Canada often dismisses the legitimacy of the legal frameworks governing the region. The Arctic region is ruled by a network of customary laws that depend on cooperation and voluntary compliance to ensure order. Canada has yet to receive its desired outcome from the UN Commission on the Limits of the Continental Shelf, meaning that Canadian domestic law does not apply to the North Pole.

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[66] Dellmuth et al, *supra* note 63; Jonathan Jackson, "Norms, Normativity, and the Legitimacy of Justice Institutions: International Perspectives" (2018) 14 Annu Rev L Soc Sci 145, DOI: <10.1146/annurev-lawsocsci-110316-113734>.

[67] Plouffe, *supra* note 5

[68] Dellmuth et al, *supra* note 63; Dellmuth & Tallberg, *supra* note 64.

Ironically, Canada's current Arctic policy risks its exclusion from the Arctic network which could hinder data collection and seabed mapping, ultimately limiting evidence for its UN claims. Furthermore, exclusion from this network would sideline Canada in deliberations on Arctic law. As shown by both Norway and Russia's favorable outcomes to their CLCS submissions, active compliance and participation in international Arctic law ensures the fastest and most reliable route to verify Canadian Arctic claims on the global stage. By undermining international law, Canada ultimately weakens its position as a significant Arctic power.

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Title

Referendum and Reference: The *Quebec Secession Reference* Twenty-Five Years Later

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Abstract

This essay seeks to bridge the impact of the *Quebec Secession Reference* between domestic and international law through an account of its context, legacy, and contemporary importance. Additionally, it hopes to inspire further discussion of this vital ruling as a historical precedent and a living and dynamic legal saga. It traces the *Reference*'s critical facts and background before measuring its ramifications for Canadian law and the global law of secession. Concluding remarks follow the final discussion section and advocate for the continued analysis of the *Quebec Secession Reference* as an evolving entity in domestic and international law.

Introduction

The Quebec secession movement of the latter half of the twentieth century forever changed Canadian and international law. Spurred by centuries of discord, the government of Quebec saw fit to transform dreams of a sovereign Quebec into reality through a provincial referendum. This referendum represented more than a bid for independence for the delicately poised Canadian Confederation. It was, manifestly, a threat to Canada's hard-fought federative unity and the reciprocal relationship between the provinces and the federal government.[1] The referendum catapulted Canada and its provinces into a new era of constitutional uncertainty, challenging deep-seated Canadian constitutional principles that could only be reconciled through the expert knowledge of the Supreme Court of Canada (SCC). What began as guidance for constitutional fortification soon became one of the most significant rulings in the history of international secession law.

This paper argues that the resulting *Quebec Secession Reference* is not a static decision but a continuously developing tool in domestic and international law worthy of revisitation. It illustrates this critical decision as a fundamental historical ruling and an ever-changing legal instrument that continues generating new discussions, applications, and concepts after over two decades. This essay proceeds in three sections. The first section covers the background of the *Quebec Secession Reference*, analyzing both the referendum and the *Reference* in detail. Next, this paper details the contemporary significance of the *Quebec Secession Reference* by examining its implications for modern Canada, reactionary legal challenges, and contribution to

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[1] Allan Tupper, "Reflections on the 1995 Québec Referendum: Problems and Possibilities" (1996) 7:2 Const Forum Const 29 at 30.

normative and abstract public international law. The conclusion reflects on the importance of continued debate and discussion surrounding the *Quebec Secession Reference*.

A Background on the Referendum and *Reference*

The Referendum

The referendum is preceded by a long history of events and debates. This paper only discusses the referendum's conception and immediate aftermath. The referendum was ignited by the sovereignty approach adopted by Parti Quebecois (PQ) leader Jacques Parizeau in 1995.[2] Parizeau and the PQ's sovereigntist wing were faced with the difficult task of presenting the notion of sovereignty to the people of Quebec. Questions of legitimacy made secession through referendum a tentative project.[3] Consequently, the PQ strategically framed the secession process as a negotiation with the federal government. Soon after, Parizeau successfully tabled a series of documents outlining the proposed economic and political partnership between Canada and a newly sovereign Quebec.[4] Sovereignty was thus portrayed as tepid cooperation with Canada rather than outright severance. This concept manifested in Bill 1*: An Act Respecting the Future of Quebec*, which sought to grant the National Assembly of Quebec the power to declare sovereignty and adopt exclusive powers.[5] The proposed economic and political partnership between Canada and Quebec would thereafter materialize through negotiations after a successful

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[2] Jonathon W Penney, "Deciding in the Heat of the Constitutional Moment Constitutional Meaning and Change in the *Quebec Secession Reference*" (2005) 28:1 Dal LJ 217 at 232.

[3] *Ibid* at 234.

[4] Sudha Pai, "Quebec Separatism: October Referendum and Beyond" (1996) 31:41 Econ & Political Weekly 2796 at 2796–2797.

[5] Daniel Turp, "From an Economic and Political Partnership Between Quebec and Canada to a Canadian Union" (1996) 7:2 Const Forum Const 91 at 93.

referendum. Nevertheless, Bill 1 asserted that a unilateral declaration of independence would occur regardless of the outcome of these negotiations.[6]

In furtherance of this unilateral intent, the PQ refused to consult with the Canadian government or federalist[7] Quebecois politicians when drafting the referendum question.[8] The final question read:

> Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?

This question referenced a partnership with Canada that neither Quebec nor Canada could agree upon. Furthermore, secession in a Canadian context was unprecedented and, thus, a method of negotiating such a partnership did not yet exist.[9] The question's vague wording also confused and misled voters.[10]

The draft of Bill 1 also faced a constitutional challenge from Quebec City lawyer Guy Bertrand,[11] who argued that the bill violated the *Canadian Charter of Rights and Freedoms*.[12] To dismiss the motion, the Attorney General of Quebec argued that the topic of secession was *ultra*

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[6] Errol P Mendes, "The Legacy of the *Quebec Secession Reference* Ruling in Canada and Internationally" in Giacomo Delledonne & Giuseppe Martinico, eds, *The Canadian Contribution to a Comparative Law of Secession: Legacies of the Quebec Secession Reference* (Cham: Palgrave Macmillan, 2019) 9 at 10, DOI: <10.1007/978-3-030-03469-6_2>; H Wade MacLauchlan, "Accounting for Democracy and the Rule of Law in the *Quebec Secession Reference*" (1997) 76:1 Can Bar Rev 155 at 158.

[7] Quebec Federalists believe in the continuity of Quebec as an entity within the Canadian federation.

[8] Mendes, *supra* note 6 at 12–13.

[9] *Ibid*.

[10] *Ibid* at 16.

[11] Guy Bertrand began his legal challenge prior to the date of the referendum.

[12] Mendes, *supra* note 6.

vires[13] the jurisdiction of Canadian courts since Quebec sovereignty would materialize through a democratic process, whose procedures are protected by public international law.[14]

The referendum went ahead anyway on 30 October 1995. The majority voted to remain in Canada, shifting Quebec sovereignty to an inert state.[15] Nevertheless, aspects of the referendum—and the broader topic of Quebec secession—continued to haunt the Canadian government. The PQ had introduced the possibility of a provincial unilateral declaration of independence into Canadian legal discourse, which sparked questions about the rule of law and due process. Moreover, the government of Quebec's response to Guy Bertrand's challenge indicated an unacceptable repudiation of the rule of law by a state actor.[16] As a result, the federal government quickly recognized the necessity of a constitutional framework for future secession attempts, referring the matter to the SCC.[17]

The *Reference*

This reference effectively became an analytical grid to assess secessionist claims "in the rather unusual setting of a liberal constitutional democracy, where a civil society exists, and where the rule of law prevails."[18] Yet beyond measuring the legal contours of provincial secession, the entire endeavour would also fortify and maintain Canada's four underlying

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[13] *Ultra vires* (or "beyond the powers") is typically used in discussions of constitutional law to distinguish a subject that is not available to an individual or organization.

[14] *Ibid.*

[15] Pai, *supra* note 4 at 2798.

[16] Mendes, *supra* note 6 at 12.

[17] *Ibid*.

[18] Jean-François Gaudreault-DesBiens, "The *Quebec Secession Reference* and the Judicial Arbitration of Conflicting Narratives about Law, Democracy, and Identity" (1998) 23:4 Vt L Rev 793 at 794. For details on reference procedure, see *Supreme Court Act*, RSC 1985, c S-26, s 53(1)(2).

constitutional principles: the rule of law, federalism, democracy, and the rights of minorities during times of secession.[19] The fortification of these principles flowed from the content of each question submitted to the SCC:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law regarding the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?[20]

Recognizing the combined domestic and international significance of these questions, the SCC devised an innovative ruling to go beyond simply answering each question. The SCC crafted a comprehensive analysis of secession in domestic and international law from the perspective of Canada's constitutional principles.[21] With these principles in mind, the SCC turned to the first question.

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[19] Mendes, *supra* note 6 at 13.

[20] *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC) at para 2, online: <canlii.ca/t/1fqr3>.

[21] Penney, *supra* note 2 at 241.

The SCC began by elucidating the necessity of a constitutional amendment to permit provincial secession from Canada.[22] The SCC did not, however, discuss which of the constitutional amending formulae[23] would be required.[24] As for the particular matter of unilateral secession, the SCC paid close attention to the underlying principle of democracy. Canada's constitutional democratic principle maintains that legitimacy flows from the expression of "the sovereign will of a people."[25] Essentially, a legitimate democratic expression to secede from Canada, demonstrated by a clear majority, would trigger the constitutional amendment process and effect secession.[26] The SCC did not, however, elaborate on what a "clear majority" entails.[27]

Transitioning into the principle of federalism, the SCC outlined a reciprocal obligation for both parties to negotiate the necessary constitutional amendments. This obligation would also be triggered by a democratic expression of a desire to secede and would guide the final constitutional amendment process.[28] However, a democratic expression would not force all parties to *accede* to the secession of a province. Coupling federalism and the rule of law, the SCC stated that Quebec could not impose the terms of a proposed secession during the negotiation stage.[29] Instead, a balance must be struck where all parties exercise their rights and

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[22] *Quebec Secession Reference*, *supra* note 20 at para 84.

[23] Canada has four distinct primary constitutional amending formulae.

[24] Mendes, *supra* note 6 at 15.

[25] *Quebec Secession Reference*, *supra* note 20 at para 66.

[26] *Ibid* at para 87.

[27] Cristie Ford, "In Search of the Qualitative Clear Majority: Democratic Experimentalism and the *Quebec Secession Reference*" (2001) 39:2 Alta LR 511 at 512.

[28] *Quebec Secession Reference*, *supra* note 20 at para 88.

[29] *Ibid* at para 91.

responsibilities in a mutually respectful manner.[30] The SCC listed several consequences of absent or inadequate negotiation processes. For instance, negotiations ignoring the four constitutional principles would lack legitimacy, and acting without negotiating secession would violate Canadian law.[31]

The second question invited the SCC to turn its attention to international law. The SCC affirmed that international law—like domestic law—neither supports nor denies the right of unilateral secession. Nevertheless, because international law prioritizes the integrity of states and confines the creation of new states to domestic legal frameworks, unilateral secession would likely be unsupported.[32] The SCC then turned to the right of a people to self-determination. This right protects the freedom of peoples, rather than a state, to shape their political status.[33] Although it is a general principle of international law, this right is still subject to limitations.[34] For instance, although all peoples have a right to self-determination, expressions of this right affecting territorial composition attract constraint.[35] Article 6 of the *Colonial Peoples Declaration* establishes that any attempt to disrupt national unity and territorial integrity will offend the principles of the United Nations.[36] The SCC deferred to these principles by

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30 *Ibid* at para 93.

31 *Ibid* at paras 95, 103–104.

32 *Ibid* at para 112.

33 Mirza Ljubović, "The Right to Self-Determination of Peoples through Examples of Åland Islands and Quebec: Recommendations for Peaceful International Legal Order" (2023) 53:2 Rev European & Comp L 189 at 191, DOI: <10.31743/recl.16229>.

34 *Quebec Secession Reference*, *supra* note 20 at para 114.

35 See *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 arts 9—14 (entered into force 23 March 1976).

36 See *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGA, 15th Sess, UN Doc A/RES/1514(XV) (1960) GA Res 1514 (XV), art 6.

referencing international instruments, such as the *Declaration on Friendly Relations*, stipulating that the right to self-determination does not allow a territory to secede unilaterally simply because it houses a distinct "people."[37] Thus, self-determination cannot be realized through unilateral separation; instead, it must occur through domestic processes. However, unilateral expressions of self-determination are permissible in exceptional circumstances.[38]

Exceptional circumstances pertain to subjugated peoples who lack domestic methods for self-determination such as stable political institutions. These groups have a right to break away from their oppressors. In the case of Quebec, however, the SCC quickly ruled out this possibility, citing the province's access to democratic institutions.[39] For this reason, the right to external self-determination reserved for oppressed peoples was deemed unavailable to Quebec.[40] The *Reference* promptly concluded when the SCC answered the first two questions in the negative, rendering the third redundant. However, the *Reference*'s significance expands far beyond its particular context in 1998. This paper now turns to its legacy and contemporary importance.

Legacy and Contemporary Importance

Implications for Modern Canada

A discussion of the legacy of the *Quebec Secession Reference* must inevitably begin in Canada where its precedence is most acutely felt. The reciprocal obligation to negotiate in good faith, explored above, is a product of the SCC's reasoning that applies to future secession

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[37] *Quebec Secession Reference*, *supra* note 20 at para 128.

[38] *Ibid* at para 131.

[39] *Ibid* at para 132.

[40] *Ibid* at paras 136, 138.

attempts.[41] The concept is a revolutionary method of legitimizing secession; however, exercising legitimate secessionary proceedings may prove challenging. The SCC acknowledged that the involvement of all levels of government and minority groups would make negotiations tricky.[42] Nevertheless, the SCC implored all participants to reconcile these struggles through the framework of the rule of law.[43] This call to action is significant in light of the Quebec government's previous attempt to secede in opposition to the rule of law. Principles of federalism and the protection of minority rights constituted a large portion of this mandate.[44]

Forming the concept of a reciprocal obligation to negotiate was a remarkable feat. The SCC condensed all four of Canada's constitutional principles into this brand-new legal instrument that must be used in future cases of secession. Moreover, the SCC spoke to further underlying objectives by clarifying that the obligation to negotiate would be triggered by a clear expression of the desire to pursue secession by the population of a province.[45] Gaudreault-DesBiens qualifies this ingenuity by stating, "Hence, the Court in one paragraph accomplished two important tasks: (1) it *recognized* the legitimacy of a popular expression for secession [. . .] and (2) conferred a duty of good faith negotiations on the provincial and federal governments, in the event of such a popular expression."[46]

Albeit in a skeletal form, a legitimate secession procedure had materialized. Although the SCC may be required to intervene if its recommendations are ignored, several critical details rest

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[41] Mendes, *supra* note 6 at 18.

[42] *Ibid* at 19.

[43] *Quebec Secession Reference*, *supra* note 20 at para 96.

[44] *Ibid*.

[45] *Ibid* at para 88.

[46] Gaudreault-DesBiens, *supra* note 18 at 242.

with political actors.[47] Leaving bare these details exemplified the SCC's intention to defend the separation between its jurisdiction and the ambit of Canada's elected officials.[48] To illustrate, reserving the selection of the amending formula for effecting secession to the political branch demonstrates the SCC's commitment to judicial independence.[49] The SCC upheld parliamentary sovereignty while decisively forming a secession framework, exemplifying the delicate balance of Canadian state governance. Thus, the SCC implicitly encouraged a dialogue between the rule of law, political forces, and popular will, giving new light to Canada's long-standing constitutional doctrine.[50] According to legal scholar Jonathon Penney, this new "dialogical" constitutional reality of the *Reference* may further support the legitimacy of the Canadian constitutional order.[51] At the very least, this dialogue affords the Canadian public some flexibility in codifying the SCC's recommendations through their elected officials.

An Act to Give Effect to the Requirement for Clarity as Set Out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference (hereafter, the *Clarity Act*) was arguably the most significant legislative ordinance passed after the *Quebec Secession Reference* and sought to fill a crucial gap in the SCC's reasoning.[52] The *Clarity Act* aimed to determine what circumstances would trigger the Canadian government's obligation to negotiate in good

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[47] Mendes, *supra* note 6 at 20.

[48] Vincent Kazmierski, "Draconian but not Despotic: The 'Unwritten' Limits of Parliamentary Sovereignty in Canada" (2010) 41:2 Ottawa L Rev 245 at 286.

[49] Mendes, *supra* note 6 at 15. Parliamentary sovereignty is the ability for the legislature to perform its duties without being unduly limited by another force.

[50] *Quebec Secession Reference*, *supra* note 20 at para 48; see Nick E Milanovic, *Introduction to Public Law* (Concord, ON: Captus Press, 2015) at 28; see also Barbara Darby, "Amending Authors and Constitutional Discourse" (2002) 25 Dal LJ 215 at 255.

[51] Penney, *supra* note 2 at 259.

[52] See *An Act to Give Effect to the Requirement for Clarity as Set Out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*, SC 2000, c 26 [*Clarity Act*].

faith. More precisely, it created criteria that would determine what constitutes a "clear expression" of a province's desire to secede.[53] The *Clarity Act* states that Parliament will not accept any referendum question that

> [M]erely focuses on a mandate to negotiate without soliciting a direct expression of the will of the population [or] envisages other possibilities in addition to the secession of the province from Canada [. . .] that obscure a direct expression of the will of the population.[54]

Furthermore, the views of other actors in the Canadian Confederation—such as Indigenous peoples and the Senate—must be considered when determining the clarity of the question.[55] The *Clarity Act* was also inspired by the PQ government's unscrupulous practices, such as the intentionally vague wording of Bill 1.[56] The most crucial component of the *Clarity Act* decisively stated that, following successful negotiations, the unanimity formula must be activated to amend the Constitution.[57] Thus, the *Clarity Act* fills the procedural gaps the SCC left to the legislature during the *Reference* and will act as a legal rudder for provincial secession.

Challenging Secession from the Past to the Present

An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State (introduced to legislature as "Bill 99"; hereafter, the *Quebec State Act*) was the Quebec government's response to the *Clarity Act*.[58] Composed of the PQ government's interpretation of the *Quebec Secession Reference*, it focused on Quebec's right

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[53] Mendes*, supra* note 6 at 25.

[54] *Clarity Act*, *supra* note 52, s 1(4).

[55] Mendes, *supra* note 6 at 25-26.

[56] *Ibid*.

[57] *Ibid*.

[58] See *An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State*, CQLR c E-20.2 [*Quebec State Act*].

to self-determination under international law and explicitly rejected the *Clarity Act.*[59] The *Quebec State Act*'s status remains ambiguous and has not escaped legal contest. In August 2018, Keith Henderson[60] challenged Bill 99 and, much like Guy Bertrand, presented a new challenge to the Quebec secession movement.[61] Henderson challenged the constitutionality of articles 1 to 5(1) and 13 of the *Quebec State Act*, which explicitly claim Quebec's unitary and inalienable right to self-determination. He first argued that the impugned provisions of the *Quebec State Act* are *ultra vires* the National Assembly of Quebec because they confer an unlimited constitutional amending power upon the legislature.[62] Next, he submitted that the impugned provisions invoke the right of peoples to self-determination in international law to effect secession, thereby violating his minority rights and freedoms under the *Charter*.[63] Ruling on this matter, the Quebec Superior Court found the *Quebec State Act* constitutional and that the impugned articles did not afford Quebec a right to unilateral secession.[64] Unsatisfied with this ruling, Henderson successfully sought leave to appeal his case to the Court of Appeal of Quebec.[65]

The appeal centred around Henderson's original motion for declaratory relief and relied on his two previous arguments.[66] Before beginning his analysis, the Honourable Justice

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[59] Peter Bowal & Mackenzie Bowal, "Provinces Leaving Canada Part II: The Clarity Act" (2020) 44:4 LawNow 49 at 51.

[60] Henderson's opposition to Quebec secession began as an intervener in the *Quebec Secession Reference* where his arguments were rejected by the SCC.

[61] Mendes, *supra* note 6 at 11.

[62] *Henderson c Procureure générale du Québec*, 2018 QCCS 1586 at para 136.

[63] *Ibid* at para 130.

[64] *Ibid*.

[65] Mendes, *supra* note 6 at 45.

[66] *Henderson c Procureur général du Québec*, 2021 QCCA 565.

Mainville of the Court of Appeal of Quebec reiterated the confidence of the trial judge in the constitutionality of the impugned provisions. Notwithstanding the acknowledgment that the *Quebec State Act* may have been designed with secessionist intentions, Justice Mainville agreed with the trial judge and ultimately dismissed the appeal.

Ruling on Henderson's first proposal, Mainville deferred to the SCC's refusal to determine an appropriate amendment procedure and its condition that this issue could only be revisited as a valid justiciable issue.[67] Considering this precedent, Mainville rejected Henderson's first argument because it focused on amendment power and procedure.[68] Interestingly, Mainville provided a fascinating insight into Henderson's first argument by stating:

> As the appellant did in the context of the *Secession Reference*, he is seeking to entrench an eventual hypothetical initiative for Quebec's independence in a mold [*sic*] within each Canadian province, and the federal government would have an absolute and unilateral right of veto over the process. The Supreme Court, however, did not endorse this approach.[69]

Mainville's statement appears to uphold the fundamental principles invoked by the SCC in the *Reference*, offering a contemporary juridical interpretation of its reasoning. As for Henderson's second proposal, Mainville could not accept the submission that the mere idea of a "Quebec people," as referenced in the impugned legislation, amounts to a secessionist attempt to invoke the right to self-determination of peoples in international law.[70] As stated by the SCC in the *Quebec Secession Reference*, the existence of a "Quebec people" has no bearing on the fact that

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[67] *Ibid* at para 94.

[68] *Ibid*.

[69] *Ibid* at para 110.

[70] *Ibid* at para 96.

Quebec does not qualify for the right to secede from Canada unilaterally.[71] Furthermore, a secessionist movement by the government of Quebec does not violate the Canadian constitution so long as it abides by the legal framework established by the *Secession Reference*.[72]

Ultimately, Henderson's twenty-year-long battle with Quebec separatism concluded when his appeal was dismissed. Nevertheless, this case is significant as part of the legal saga jump-started by the referendum while also showing Canadians that Quebec secession remains a contemporary issue. As stated by the SCC in their ruling, these crucial issues are not moot and may remain as such for some time.[73] Perhaps new legal challenges may emerge or Henderson might be granted leave of appeal to the SCC, although such possibilities appear unlikely.

Fashioning Abstract Concepts of Secession

The influence of the *Quebec Secession Reference* exists far beyond Canadian jurisdictions and may lead to other innovations in international law. In the words of former Minister of Foreign Affairs Stéphane Dion, "The Court's opinion has a universal scope and significance that may help pacifically solve complex and delicate national breakup situations."[74] Although Dion primarily referred to its power of clarity, his statement could apply to the *Reference*'s influence on international notions of legitimacy. Secession has existed internationally as a constitutional taboo. However, following the *Reference*, its international reception could be met with less disapproval. Secession no longer has to be a creature elusive to

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[71] *Ibid*.

[72] *Ibid* at para 98.

[73] Mendes, *supra* note 6 at 15.

[74] Stéphane Dion, "Secession and the Virtues of Clarity" (2013) 44:2 Ottawa L Rev 403.

the realms of politics and law.[75] Instead, the *Reference* showed that secession can exist within legal frameworks, both domestically and internationally. This approach is reproduced by the concept of constitutionalizing secession.[76]

Professor of comparative public law Giuseppe Martinico illustrates the constitutionalization of secession through supposed "exit-related conditionality." Exit-related conditionality occurs when the original state only accepts the secession of its territories after they have followed a set of prescribed rules and guidelines.[77] This concept seems to create a transitional environment where secession is achievable through adherence to the fundamental principles of the original nation. In this sense, a seceding territory would exist between two conflicting worlds until the completion of the constitutionalized secession process.[78] Although procedurally significant for other cases of global secession, Martinico argues that exit-related conditionality would protect the rights of territorial residents who did not desire independence.[79] The *Quebec Secession Reference* exemplified this concept by signalling that secession, despite being condemned, can be reconciled through constitutional law. Rather than expressly permitting unilateral secession—or even endorsing it—the SCC fashioned a method to procedurally bridge the gap between two realms. Martinico writes that this creates a less revolutionary visage for

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[75] Giuseppe Martinico, "'A Message of Hope': A Legal Perspective on the *Reference*" in Giacomo Delledonne & Giuseppe Martinico, eds, *The Canadian Contribution to a Comparative Law of Secession: Legacies of the Quebec Secession Reference* (Cham: Palgrave Macmillan, 2019) 249 at 250, DOI: <10.1007/978-3-030-03469-6_12>.

[76] *Ibid*.

[77] *Ibid* at 253.

[78] *Ibid*.

[79] *Ibid* at 254.

secession movements. In the future, secessions with an "exit clause" could be perceived as reasonable and diplomatic rather than an act of radical political ideology.[80]

The SCC's opinion produced another valuable insight aimed at mitigating populism during secessionist attempts. Rather than accepting the results of a referendum as absolute, the SCC sought mediation.[81] Martinico referenced the SCC's insistence that democracy is more than majority rule and operates alongside constitutional values.[82] This crucial distinction speaks to an anti-majoritarian approach that rejects the absolute authority of democratic expression. Populist movements, as reactionary to corruption and institutional neglect, look to referendums as a method to circumvent the instruments of representative democracy, such as constitutionalism and the rule of law.[83] The rule of law and constitutionalism are thereby protected by the SCC's careful definitions of democracy and deference to political actors on specific issues—an endeavour that eventually culminated in the *Clarity Act*.[84] Although only tacitly populist, the Quebec government's original attempt to bypass the rule of law through its referendum demonstrates the significance of the *Reference*'s anti-populist potential.[85] The above methods could readily apply to other international jurisdictions facing similar circumstances.

Global Secession Movements and the *Quebec Secession Reference*

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[80] *Ibid*.

[81] *Ibid*.

[82] *Ibid* at 256.

[83] *Ibid* at 255.

[84] *Ibid* at 256-257.

[85] Giuseppe Martinico, "Preserving Constitutional Democracy from Populism - The Case of Secession Referendums" (2019) 39:2 NJCL 139 at 155–157.

The *Quebec Secession Reference* contributed new instruments to the international legal toolkit on secession that may be harnessed by seceding territories in other constitutional democracies. Scotland, for instance, underwent an independence referendum in September of 2014 and is, on several levels, comparable to Quebec's referendum of 1995. In fact, Scotland's referendum is exemplary in terms of the lessons learned from the *Quebec Secession Reference*. As explored above, the SCC's attention to notions of democratic legitimacy through clarity culminated in its recommendation that future referendum questions avoid confusing rhetoric.[86] Unsurprisingly, the government of Scotland spent a significant amount of time and resources in drafting its central question.[87] These efforts culminated in the following: "Do you agree that Scotland should be an independent country?" The content of this question is unmistakable and starkly contrasts the confusing question issued by the government of Quebec in the 1995 referendum.[88]

Scotland's referendum question echoes the SCC's emphasis on democracy and democratic legitimacy, but it is not the only example of the *Reference*'s influence on Scottish independence. The "Scotland question" is a prevailing topic among the scholars and politicians of the European Union (EU) and focuses on how a newly independent Scotland would be integrated within the union.[89] The question has been approached in several different ways, and

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[86] *Quebec Secession Reference*, *supra* note 20 at para 87.

[87] Mendes, *supra* note 6 at 17.

[88] For a detailed breakdown of the question itself and voting statistics, see Élections Québec, *1995 Referendum on Quebec's Accession to Sovereignty* (Quebec: Elections Quebec, 2024), online: <electionsquebec.qc.ca/en/results-and-statistics/1995-referendum-on-quebecs-accession-to-sovereignty>.

[89] Alastair MacIver, "Metaconstitutionalising Secession: The *Reference* and Scotland" in Giacomo Delledonne & Giuseppe Martinico, eds, *The Canadian Contribution to a Comparative Law of Secession: Legacies of the Quebec Secession Reference* (Cham: Springer International Publishing, 2019) 111 at 114–115, DOI: <10.1007/978-3-030-03469-6_6>.

one such approach invokes the SCC's principle of constitutional tolerance of secession movements.[90] Alastair MacIver, referencing Joseph Weiler, writes that membership within the EU, based on acceptance of Union norms, adds a new dimension to constitutional tolerance. According to Weiler, constituent countries of the EU *voluntarily* submit to an overarching ethos while, in Canada, the provinces *involuntarily* submit to federal principles.[91] This astute analogy is furthered by the observation that, unlike Canada, the EU has no single constitutional order that supersedes the authority of the constitutions of its member states where the constitution is supreme.[92] MacIver furthers these ideas and seemingly opines that the independence of EU member states equates to a rejection of constitutional tolerance because such a principle is unnecessary in a European context.[93] The influence of the *Reference* manifests itself in this transmission of constitutional tolerance from the Canadian to European political and legal landscape and will very likely apply to future European secession bids.

The influence of the *Reference* in a European context illustrates this crucial ruling's applicability to constitutional democracies. The recognition that internal avenues for self-determination—such as democratic expressions and constitutional amendment—are the most appropriate method of secession could foreseeably apply to other democratic nations.[94] This characterization of internal methods of secession—existing implicitly in the international legal

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[90] *Ibid*.

[91] *Ibid*.

[92] *Ibid* at 116.

[93] *Ibid* at 117.

[94] Ljubović, *supra* note 33 at 190.

theory of "negotiated secession"[95]—was given colour by the *Reference*.[96] By revitalizing this theory, the SCC demonstrated that external expressions like unilateral declarations of independence have become unnecessary in constitutional democracies. Thus, one of the most significant legacies of the *Reference* in international law becomes clear. In countries with strong democratic institutions, attempts to secede through an external expression of the right to self-determination can be easily countered by a mutually respectful and constitutionally valid negotiation process.

Concluding Remarks

The *Quebec Secession Reference* was a turbulent gallery of legal "firsts" for Canada and international law. Its effect on Canadian society continues to be felt in every corner of the federation, and its legacy survives in Canadian legal discourse. The legal shockwave generated by the *Reference* was replicated in legislation, such as the federal *Clarity Act* and the *Quebec State Act,* as well as the various challenges to these legislative changes like the *Henderson* jurisprudential saga. It is an event that, through brilliant legal and political maneuvering, galvanized the fundamental principles of the Canadian constitution while still honouring the institutional restraints attached to the judiciary. Its products exist not only on the pages of the SCC's reasoning but also in the writings of commentators worldwide. In this way, the SCC's most critical findings continue to evolve and grow. Scholars continue to build upon the SCC's crucial interpretations and its contribution to the constitutionalization of secession. The products of the *Reference* have proved to be a valuable addition to the global law of secession. The

[95] This theory calls on states to cooperatively permit secession through legal reforms and agreements.

[96] Ljubović, *supra* note 33 at 204.

Reference will always be more than Canada's big "what if?" As an inseparable component of the Canadian legal landscape and an ever-changing force in international law, its relevance supersedes mere memory. This paper calls for a revitalized discussion of the *Reference* and continued development of its critical innovations.

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