

AN EXAMINATION OF CANADA'S CLAIM TO SOVEREIGNTY IN THE ARCTIC

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The Arctic is destined to become one of the great crossroads for air traffic, and has been described as the hub of the world. The shortest route from San Francisco to Shanghai is not across the Pacific but via Alaska, and this route is 2,300 miles shorter. Travelling by conventional routes on sea and land from San Francisco to Moscow, via Tokyo and Vladivostok, you cover 15,500 miles. By flying over the Arctic you would shorten the trip by about 10,000 miles. Every capital in Europe is as close to Chicago as is Buenos Aires, for the most highly developed and, except for India and China, the most populous areas of the world lie about the Arctic. The search for the northeast and northwest passage has been solved with the advent of air travel, and some visionaries foresee that atomic cargo submarines will soon use polar routes on a year-round basis.

With the advent of atomic weapons, ballistic missiles and jet aircraft, the problems of defence have been profoundly altered, and the basin of the Arctic Mediterranean has assumed increased strategic importance. World War II saw fighting in both the North Atlantic and North Pacific Oceans, and in Northern Europe. Should another world conflict develop, Canada, Siberia and Alaska all face the prospect of becoming possible crush zones. This recognition of the strategic importance of the Arctic approach to Canada is not new, for when Napoleon read MacKenzie's travelogue on Canadian Arctic mainland explorations over 150 years ago, he gave Marshal Bernadotte the job of attacking eastern Canada from the rear by way of watercourses described by MacKenzie.¹ Similarly, for 150 years following the establishment of the Hudson's Bay Company in 1670, western Canada was settled from the Arctic. Traders, trappers and settlers came that way, even as far south as the Red River.

The opening of the Canadian Arctic began three centuries ago with the search for a northern passage, but our knowledge of the area has grown slowly. Until the development of aviation and problems of defence dictated a need for establishment of weather and scientific stations in the

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polar region, the Arctic archipelago was known only from the journals of the explorers. In recent years, however, the map of the archipelago has changed. This is the result partly of the aerial photography program completed by the Royal Canadian Air Force, and partly of the establishment in the Arctic islands of permanent communities—weather and scientific stations and airfields—which did not exist a few years ago.

Today there is a sense of urgency to develop Arctic potential, and plans are under way to effectively occupy the entire area. Russia is an acknowledged leader in northern development. Compared to our 35,000 inhabitants, the Russian north has 4.5 million. Russia has perhaps a dozen cities above the 60th parallel with populations of 50,000 or more, and has hundreds of miles of northern railways and thousands of miles of surfaced roads. It now allocates about four percent of its gross national product to northern development. Of course, comparisons between Russian and Canada are not entirely valid, for population pressures and geographic and climatic conditions favor Russia.

In North America, the most significant area of northern development has been Alaska, which has grown during the last two decades from an obscure incorporated territory to the 49th and largest State in the American Union. It has been estimated that Alaska could support a population of over one million people, and with full exploitation of its almost inexhaustible resources it will soon take its place among the most important regions of the world.² Although prospects for the Canadian far north are perhaps not as bright as those of Alaska, there can be little doubt as to its increased importance in the future.

Canada has claimed sovereignty over the archipelago north of the Canadian mainland since July 31, 1880, when Great Britain turned the region over to Canada by Imperial Order-in-Council. Canadian territorial claims in this area are not today openly contested by other nations, but there are indications that disputes may arise in the future.

We are not unaware of the scramble which has taken place during the last decade for establishment of territorial sovereignty in Antarctica, or of the fact that the Antarctic Treaty, which was signed at Washington on December 1, 1959, failed to settle the many conflicting territorial claims in that region. Diplomatic negotiations concerning Antarctica prior to the treaty revealed significant differences of opinion about the validity of various methods of acquiring and maintaining territorial sovereignty which have a possible bearing on Canadian claims in the Arctic.

During the 1958 session of the United States Congress a Bill was passed for the expressed purpose of building an atomic icebreaker with which to explore and occupy Arctic islands. This Bill was vetoed by President Eisenhower; however, comments in the American press stated that the United States was interested in extending influence over the

2. *Current Affairs for the Canadian Forces*, Vol. 10, No. 12, Sept. 1, 1956.

Arctic. With an atomic icebreaker, as the Russians now have, the United States would almost eclipse Canada in Arctic research, and this could lead to problems of sovereignty for Canada. Furthermore, it has been stated that the movement of nuclear-powered submarines through northern channels might establish an international waterway.

It is my intention to establish in this article that the islands of the Arctic archipelago and adjacent waters form a constituent part of Canadian territory.

METHODS OF ACQUIRING TERRITORIAL SOVEREIGNTY

Before the sixteenth century territorial acquisition was based in the main upon papal grants, and both Argentina and Chile trace their respective territorial claims in Antarctica back to the Pope's division of the "new world" between Portugal and Spain. During the sixteenth and seventeenth centuries, however, Britain, France and the Netherlands refused to recognize papal grants. Today, no one recognizes papal authority in this realm. There is, however, considerable disagreement over the validity of the various methods of acquiring territorial sovereignty which have been proposed to replace papal grants.

There are three leading cases on the question of acquiring and maintaining sovereignty over *terra nullius*. The earliest of these is the *Island of Palmas Case*.³ This case settled a controversy which arose in 1906 between the United States and the Netherlands concerning sovereignty over the island of Palmas, or Miangas, which is an isolated island about half way between Mindonao in the Phillipines, and the most northern island of the Netherlands East Indies. By a compromise of 1925, the dispute was referred to the Permanent Court of Arbitration for settlement by a single arbitrator in accordance with the principles of international law and any applicable treaty provisions.

The United States contended that the island was discovered by the Spanish, that it was a contiguous part of the archipelago of the Phillipines, that it had been recognized by treaty as early as 1648 as part of the Spanish territory in the Pacific, and that the Spanish interest in the area was ceded to the United States on December 10, 1898 by the Treaty of Paris.

The Netherlands government contended that it, through the Dutch East India Company, had possessed and exercised the right of sovereignty over the island since 1677. This exercise of effective control arose out of agreements with native princes of the island of Sangi, establishing the sovereignty of the Netherlands over the territories of the princes, which included the island of Palmas. By these conventions the local princes were excluded from any relations with foreign powers, and even with their nationals in important economic matters. The conventions established

3. *Arbitral Award in the Island of Palmas Case, United States and the Netherlands*, April 4, 1928 (Per. Ct. Arb.) 26-27; Scott, *Hague Court Reports* (2d ser. 1932) 83, 100-101; see (1928) 22 A.J.I.L. 867, and L. C. Green, *International Law Through the Cases*, 1951 ed. p. 350.

the currency of the Dutch East Indies to be the legal tender; they placed the administration of jurisdiction of foreigners in the hands of the government of the Dutch East Indies; and they imposed on the local princes the duty to suppress slavery, the white slave traffic, and piracy, and to render assistance to shipwrecked persons.

The arbitrator, Dr. Max Huber, found that the island formed part of the Dutch territory. In his judgment, Dr. Huber stated that the United States' claim of title on the basis of discovery could be only an inchoate title, with the right to establish full sovereignty by effective occupation within a reasonable time. He found that since there was no such occupation the inchoate title could not prevail over the Dutch title, which was founded on continuous and peaceful display of sovereignty. The arbitrator rejected completely the contention that International Law would recognize title on the basis of contiguity of territory.

It was conceded by the arbitrator that the acts of Netherlands sovereignty were infrequent, but he stated that the manifestations of sovereignty over a small and distant island cannot be expected to be frequent. It is sufficient that the display of sovereignty existed openly and publicly in the period before the year 1898, when the United States gained control of the Philippines, and that it had existed continuously and peacefully before that date long enough to give to any other claimant power a reasonable possibility to ascertain the existing state of things.

The *Clipperton Island Case*⁴ involved a dispute between the French and Mexican governments over the ownership of Clipperton Island, a desolate, uninhabited coral reef located west of the Hawaiian Islands. The island was first seen by an English vessel in 1705, and rediscovered by a French warship in 1857. The following year a French naval officer visited the island in a commercial ship, and made a symbolic annexation. The French Consulate in Honolulu made a declaration of sovereignty, notified the Hawaiian government, and published the declaration in Hawaii. No further steps were taken by the French government to assert ownership over the island until some thirty-nine years later, when the island was visited by a French warship. Three American citizens were found there collecting guano, and so representations were made to the United States government. A month later, a Mexican warship visited the island, and asserted a claim to it for the Mexican government, maintaining that the island belonged to Mexico as successor to a Spanish title by rights of discovery. The Mexican government further maintained that the French action in 1858 did not satisfy the conditions of International Law for the acquisition of sovereignty over unowned land.

The arbitrator upheld the French claim, and found that even if there was evidence of a Spanish right to sovereignty, there was no evidence that

4. *Arbitral Award of His Majesty the King of Italy on the Subject of the Difference Relative to the Sovereignty over Clipperton Island.* Jan. 28, 1931. See (1932) 26 A.J.I.L. 390 and (1932) 6 *Revue Generale de Droit International Public* (3rd. series) 129.

Spain ever performed any act effectively incorporating the island into her possession. The award stated that the establishment of a local administration by the French was not essential to the annexation of territory of the nature of Clipperton Island. It provided, in part, as follows:

. . . by immemorial usage, having the force of law, the actual, and not the nominal, taking of possession . . . (is necessary to establish sovereignty) . . . Strictly speaking, and in the ordinary cases, that only takes place when the state establishes in the territory itself an organization capable of making its laws respected. But this step . . . is but a means of procedure to the taking of possession and therefore, is not identical with the latter. There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.⁵

The third case is the *Eastern Greenland Case*.⁶ By a royal proclamation of July 10, 1931, Norway declared part of eastern Greenland to be under Norwegian sovereignty. In the same year, the Danish government instituted proceedings against Norway before the Permanent Court of International Justice on the grounds that Greenland was subject to Danish sovereignty. Denmark asked for judgment to the effect that:

the promulgation of the above-mentioned declaration of occupation and any steps taken in this connection by the Norwegian government constituted a violation of the existing legal situation and are accordingly unlawful and invalid.

The Danish government was able to trace its claim to sovereignty over the island back to the date of its discovery in 900 A.D., and to the colonization of the island approximately a century after that date. The initial two colonies established in Greenland were abandoned about the year 1500, and recolonized again in approximately 1600. By the nineteenth century Denmark had nationalized all commercial activities in the island to provide the staples of life for the inhabitants. All hunting and fishing was regulated, and numerous navigational aids were established along the coast to aid shipping. No country had contested Danish sovereignty over the island until the Norwegian decree.

The Norwegian government contended that the Danish settlements had been concentrated in the southwestern part of the island exclusively, and that the Norwegian claim was in the northeastern section of the island, which was populated by Norway.

The court ruled that Denmark held valid title to the entire island of Greenland on July 10, 1931. It was pointed out that the court's decision was based upon three main considerations. First of all, there had been a

5. (1932) 26 A.J.I.L., at p. 393.

6. Per. Ct. Int. Jus., Ser. A/B, No. 53 (April 5, 1933) p. 22; M. O. Hudson, *World Court Reports*, Vol. 3. (1938), p. 175. See Hyde, "The Case Concerning the Legal Status of Eastern Greenland" (editorial comment) in (1933) 27 A.J.I.L. 732.

long period when the Danish claim to sovereignty over Greenland went unchallenged by another power prior to the Norwegian declaration. The second consideration was the arctic climate, and the inaccessible character of the uncolonized parts of the island, and the third was Denmark's ancient claim to the area, as the foundation of rights of sovereignty over an unpossessed and unexplored territory. Denmark's claim was also upheld on the ground that authority had been exercised in the disputed area by Denmark. This activity included the granting of exclusive rights to a man by the name of Taylor in 1863 for trading, mining, hunting, etc. on the east coast, the granting of concessions for the erection of telegraph lines and the passage of legislation fixing the limits of territorial waters. It was conceded that often very little in the way of an exercise of sovereign right is required in thinly populated or unsettled areas, and that it is enough that the other part cannot make out a superior claim.

From a review of the above mentioned cases it is apparent that the principles governing the establishment of territorial sovereignty are numerous, and require detailed examination to establish priorities. It is also evident that the criteria of sovereignty may vary in significance according to the nature of the territory. I now propose to examine these various criteria and their relevance to Canadian claims in the Arctic.

DISCOVERY

Discovery, accompanied by actual or symbolic possession has from the earliest times until the present given at least an inchoate right to establish the sovereignty of the discovering state.

In 1911 the United States unsuccessfully invoked the prescription principle against Mexico, which claimed original discovery (as successor to Spain), but which did not occupy the territory. Mr. E. Lafleur (a Canadian), Presiding Commissioner of the International Boundary Commission, awarded the area to Mexico because Mexico had constantly challenged American control.⁷

However, in 1928, in the *Island of Palmas Case*, the Netherlands successfully invoked the principle of prescription over the opposition of the United States, which based its claim on discovery (as successor to Spain, after the Spanish-American War) not followed by effective occupation. It is doubtful that the decision would have been otherwise if the United States had limited her activity over Palmas to a protest of the actions of the Dutch East India Company, for the arbitrator stated that "territorial sovereignty cannot limit itself to its negative side, i.e., to excluding the activities of other states . . ." The Netherlands' claim was "founded on the peaceful and continuous display of state authority over the island."

7. *Chamizal Arbitration*, award of June 15, 1911. Text published in (1911) 5 A.J.I.L. p. 785.

For a discussion concerning the significance of discovery in conjunction with commercial activity, see the *British Guiana Boundary Arbitration*,⁸ wherein it was stated:

. . . the discovery of new channels of trade in regions not belonging to any State cannot by itself be held to confer an effective right to the acquisition of the sovereignty of the said regions by the State, whose subjects in their private capacity make the discovery. . . . to acquire the sovereignty of regions which are not in the dominion of any State, it is indispensable that the occupation be effected in the name of the State which intends to acquire the sovereignty of those regions.

Apart from very early Norse explorations, all the known insular areas in the Canadian Arctic were, with a few exceptions, discovered and formally taken possession of by British commissioned navigators from a century to three-quarters of a century ago, and such acts of possession were formally announced to the world in British government blue books. A list of English navigators would include Bylot and Baffin, who discovered Ellesmere Island in 1616, Captain John Ross, R.N., Sir John Franklin, Commander Inglisfield, R.N., Captain Nares, R.N. and many others. The notable exception is the Sverdrup Islands, which were discovered and explored by the Norwegian Commander, Otto Sverdrup between 1898 and 1902. He took possession of these islands in the name of his sovereign in 1900.⁹

Although there was no further act of occupation by Norway of the Sverdrup Islands, there was a conflict of claims with Canada. Negotiations between the two countries ended with an exchange of notes between the two countries in 1930, by which Norway recognized Canadian sovereignty over the Sverdrup Islands.

"Ruperts Land" and the "North-West Territory" were united with Canada by Imperial Order-in-Council dated June 23, 1870. However, owing to existence of doubts regarding the delimitation of these possessions, an Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada, dated May 3, 1878, asked Her Majesty to define the northeasterly, northerly and northwesterly boundaries of Canada as mentioned in the Address.¹⁰ It indicated the intention to proceed with effective occupation of the territories concerned. Imperial Order-in-Council, July 31, 1880, was passed in compliance with Canada's request. It definitely brings within Canada "all British territories and possessions in North America, and all islands adjacent to any of such territories and possessions" not already belonging to Canada or to Newfoundland.

8. *British Guiana Boundary Arbitration* (United Kingdom v. Brazil) June 6, 1904. The King of Italy, arbitrator. Text published in (1905-6) Vol. 99 *British and Foreign State Papers*, p. 930 (Command No. 2166, 1904).

9. Otto Sverdrup, *New Land*; London, Longmans, Green & Co., 1904, Vol. II, pp. 449-50.

10. King, W. F., *Report Upon the Title of Canada to the Islands North of the Mainland of Canada*, Ottawa, Dept. of the Interior, 1905, p. 9.

EFFECTIVE OCCUPATION

The principle of effective occupation became firmly established at the time of the Conference of Berlin, 1885. The General Act, dated February 26, 1885, Article 35, Chapter VI, made it obligatory for the signatory powers to maintain in their respective claimed areas an authority sufficient to protect rights which have been acquired and freedom of commerce and transit (under conditions prescribed). This General Act was replaced by the Treaty of St. Germain-en-Laye of September 10, 1919, which stated in Article 10 an "... obligation to maintain in the regions under their control actual authority and police forces sufficient to insure protection for persons and property and, ... freedom for commerce and transit." Acceptance of this Convention meant concurrence in the requirement of effective occupation. Belgium, Britain, France, Italy, Japan, Portugal and the United States ratified the Convention. There has been general acceptance of this principle since that time for all acquisition of territory. However, as Smedal states:

... if the law requires that the occupation of polar areas be subject to actual taking of possession, it must be recognized, ... that the methods for putting a territory under the authority of a State are not the same in the different cases. The actual means must be adjusted to the particular conditions of the different areas.¹¹

In barren areas it would be unnecessary to maintain constant police vigilance, and regulations for trade and commerce would be commensurate with the actual establishment of settlement or commercial activity.

Occupation has always been an accepted means of acquiring sovereignty over unclaimed territory, and such appropriation gives an original, as distinguished from a derivative, title. Schwarzenberger states that:

the historical starting point of titles to territory is pre-legal sovereignty, that is to say, effective control of a territory by a prince in his own name and with power to defend it. Similarly, under international customary law, a State may extend its sovereignty by the effective occupation of territories which are not under the jurisdiction of any other subject of international law. ... Effective occupation manifests itself by the establishment of adequate State machinery and the actual display of State jurisdiction. The degree of effectiveness required varies with circumstances, such as the size of the territory, the extent to which it is inhabited and, as in deserts or polar regions, even climatic conditions.¹²

The Permanent Court of International Justice, in the *Eastern Greenland* decision, referred to effective occupation as "a claim to sovereignty based ... upon continued display of authority." The court then stated that the display involved two elements that must be shown to exist: (i) the intention and will to act as a sovereign, and (ii), some actual exercise or display of such authority.

With respect to the first element, it appears that all that is required is a public statement by some competent government official, asserting the

11. Smedal, *Acquisition of Sovereignty Over Polar Areas*, 1931, p. 29-32.

12. George Schwarzenberger, *A Manual of International Law*, fourth edition, Vol. I, p. 115.

claim to act as sovereign, or a published assertion of title, such as that of the French government in the *Clipperton Island* case. In that decision it was held that in some circumstances, as when an area is completely uninhabited, occupation need not follow a proved discovery with subsequent proclamation of sovereignty. French sovereignty over Clipperton Island was recognized as continuous from 1858, when a French naval officer aboard a commercial vessel charted the island, the French Consulate in Honolulu afterwards having made and published a declaration of sovereignty.

With respect to the second element, the actual exercise or display of such authority, there are certain requirements as to sufficiency and scope. The first basic requirement is that the claimant must act as a sovereign towards the area. Schwarzenberger states that "the operation of the principle of international responsibility must heavily rely on effective territorial authorities, which can be held responsible to other subjects of international law."¹³ Dr. Huber, in the *Island of Palmas* decision stated that territorial sovereignty involves the exclusive right to display the activities of a state, including offering to other states the minimum of protection of which International law is the guardian. The display of authority must consist of genuine acts of a sovereign; performance of duties which the sovereign owes to its own people and to the international community. The negative approach of merely excluding the activities of other states is insufficient.

In 1909, Norway and Sweden agreed to submit their maritime boundary dispute to a decision of the Permanent Court of Arbitration in the Hague. The tribunal, in awarding Grisbadarne to Sweden, mentioned the following relevant considerations:

The circumstances that Sweden has performed various acts in the . . . region, especially of late, owing to her conviction that those regions were Swedish, as, for instance, the placing of beacons, the measurement of the sea, and the installation of a lightboat, being acts which involve considerable expense, and in doing which she not only thought that she was exercising her right but even more that she was performing her duty.¹⁴

It follows from the above consideration that effective occupation must depend on actual occupation, and the degree of control necessarily will depend on the area. Von der Heydte states:

"effective occupation as generally required does not imply its extension to every nook and corner. It is sufficient to dispose at some place within the territory of such a strong force that its power can be extended if necessary over the whole region in order to guarantee a certain minimum of legal order and legal protection within the boundaries, and to exclude any interference from a third state."¹⁵

It is believed that this is the standard that should be accepted as complying with the requirements of International Law. Furthermore, occupa-

13. *Ibid.*, at p. 117.

14. *Maritime Boundary Arbitration* (Norway v. Sweden) Oct. 23, 1909. Text published in (1910) 4 A.J.I.L. p. 226.

15. Von der Heydte, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law," (1932) 29 A.J.I.L. p. 463.

tion to be effective should be continuous, and not interspersed with or followed by long periods of inactivity. The degree of continuity, however, will vary according to the circumstances. In the *Island of Palmas Award* it was said:

The intermittence and discontinuity compatible with maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed, or again regions accessible from, for instance, the high sea.

In summation, we may conclude that effective occupation is recognized as the oldest and most acceptable means of establishing territorial sovereignty; and it is achieved by displaying such controls over an area as any state normally organized would, and which are sufficient to guarantee to all persons freedom of commerce and transit and maintenance of order. Although the sovereign must continuously exercise jurisdiction throughout the area, the standard is flexible, and requires more activity in areas densely populated than it does in areas sparsely inhabited.

Having secured, as successor to Great Britain, a right to sovereignty by discovery, Canada proceeded with her intention to effectively occupy the area.

In 1884 Lt. A. R. Gordon in the D.G.S. *Neptune* investigated the sea route to Churchill through Hudson Bay, and established scientific stations in Hudson Strait.¹⁶ In 1885 and 1886 the work continued in the *Alert*, under the command of Lt. Gordon.¹⁷ In June, 1897, the *Diana* left Halifax under Commander William Wakeham, and sailed as far as a group of whaling stations in Cumberland Sound, eastern Baffin Island. Wakeham's farthest north point was Kekerten Island (65° 42'N) where he:

landed and hoisted the Union Jack in the presence of the agent, a number of our own officers and crew, and the Esquimaux, formally declaring in their presence that the flag was hoisted as evidence that Baffin's Land with the territories, islands and dependencies adjacent to it were now, as they always had been since their first discovery and occupation, under the exclusive sovereignty of Great Britain.¹⁸

In 1903 the *Neptune* patrolled the waters of Hudson Bay and the eastern Arctic islands to aid in the establishment of permanent stations for the collection of customs, the administration of justice, and the enforcement of Canadian law. The crew visited the western part of Hudson Bay, Baffin Island, and Lancaster Sound, raising the Canadian flag and taking formal possession of Ellesmere Island, Devon Island and Somerset Island.¹⁹ In 1906 and 1907, Captain Bernier, in command of the C.G.S. *Arctic*, carried out similar operations. He proceeded to Albert Harbour, North Baffin Island, where he informed the whalers that they must take out

16. *Seventeenth Annual Report of the Department of Marine and Fisheries*, Ottawa, Maclean Roger & Co., 1885, pp. 189-229.

17. *Sessional Papers of Canada*, No. 11c, (1886) and 15 (1887).

18. *Report of the Expedition to Hudson Bay and Cumberland Gulf*, Canada, Dept. of Marine and Fisheries, Ottawa, 1898, p. 12.

19. A. P. Low, *Report on the Dominion Government Expedition to Hudson Bay and the Arctic Islands, 1903-04*, Ottawa, Government Printing Bureau, 1906, p. 3.

licenses under Canadian Whaling Regulations; he landed at no less than fifteen places, on different islands, and took formal possession of them in the name of Canada, usually by raising the flag, reading a formal document, erecting a cairn, and depositing in it the document of possession. Whenever natives were encountered they were informed that they were Canadians, and were expected to conform to the laws of Canada. Customs duties were collected from whalers to the extent of several hundred dollars.²⁰ At about the same time, on the other side of the Arctic archipelago, a Royal Northwest Mounted Police post was established on Herschell Island to collect customs from the whalers who wintered there, and to enforce the law.

In the following year, Captain Bernier again commanded the C.G.S. *Arctic* on a similar Arctic journey, and on Dominion Day, 1909, he and his crew "assembled around Parry's rock to witness the unveiling of a tablet placed on the rock, commemorating the annexing of the whole of the Arctic archipelago."²¹ The tablet reads, in part, as follows:

This Memorial is erected today to commemorate the taking possession for the Dominion of Canada of the whole Arctic archipelago lying to the north of America from longitude 60 degrees west to 141 degrees west up to latitude 90 degrees north.²²

The C.G.S. *Arctic* made several trips to the islands of the Arctic archipelago on administrative and exploratory duties, establishing law and order. Since 1922 the Eastern Arctic Patrol has carried government officials, including doctors, scientists, and officers and constables of the Royal Canadian Mounted Police to their duties in the Arctic settlements. These expeditions have carried out administrative authority in many out-of-the-way places, and visited islands where no police post has been established. In 1960 Canada launched the icebreaker, *John A. Macdonald*, exceeded in power only by the Russian atomic-powered icebreaker *Lenin* and a United States icebreaker, *Glacier*. This new icebreaker supplemented the work carried out in the Arctic by the Canadian icebreakers *D'Iberville* and *Labrador*. In 1954, H.M.C.S. *Labrador* established that the North-West Passage is navigable for four years out of five for two months. The *Labrador* passed through the North-West Passage from east to west and was the first vessel to circumnavigate North America in a single season.

In order to carry out sovereign commitments in the Arctic archipelago and establish effective occupation, Royal Canadian Mounted Police Posts were reopened at Craig Harbour (in 1951) and at Alexander Fiord (in 1953) on Ellesmere Island. Resolute Bay outpost was reopened on Cornwallis Island in 1953, and Sachs Harbour on Banks Island, during the same year. Other police outposts are located in the archipelago at Cambridge Bay,

20. J. E. Bernier, *Report on the Dominion Government Expedition to the Arctic Islands and the Hudson Strait on board the C.G.S. "Arctic," 1906-07*, Ottawa, King's Printer, 1909.

21. J. E. Bernier, *Report on the Dominion of Canada Government Expedition to the Arctic Islands and Hudson Strait on board the C.G.S. "Arctic,"* Ottawa, King's Printer, 1910, p. 192.

22. *Ibid.*, at p. 195.

Victoria Island, at Spence Bay, Boothia Peninsula and at Pond Inlet, Pangnertung, Frobisher Bay, Lake Harbour, and Cape Dorset on Baffin Island.

Post offices were established by the Canadian government at each of the northern outposts. In 1950 Canada's most northerly post office was established at Alert on the northern shore of Ellesmere Island. If there is a resident R.C.M.P. constable he is usually the postmaster; otherwise postal duties are carried out by meteorological station staff.

In the year 1953 the cabinet approved customs and immigration offices at twenty-two points, eight of which were in far northern islands, at Resolute Bay, Mould Bay, Isachsen, Craig Harbour, Alexandra Fiord, Eureka, Alert and Sachs Harbour. These offices are all operated by personnel of the R.C.M.P.

The Canadian government has also passed regulatory acts concerning mining, hunting and fishing, etc., in the Arctic islands. A Bill was introduced in 1925 to amend the Northwest Territories Act by providing for the issuing of licenses to scientists and explorers wishing to enter the Territories. During debate in the House of Commons, June 1, 1925, the Minister of the Interior, the Hon. Charles Stewart, pointed out that it was not intended to collect any taxes, but rather to assert our sovereignty. To this end, the Northwest Territories Act and implementing Ordinances and Regulations were passed.²³

In order to regulate hunting and fishing, the Arctic Islands were included in a special Arctic Islands Preserve described in P.C. 1146 of July 19, 1926, as including the sector between Meridians 60 and 141. As was stated above, Norway tried to reserve rights to hunt and fish in the Sverdrup Islands, but Canada pointed out that it was necessary to preserve the animals and fish for the local inhabitants, and denied the Norwegian request.

It has been governmental policy to carry out research, and leave development to private individuals; however, during 1960 permits were issued for petroleum exploration by private corporations on more than 39 million acres in the Arctic Islands. Resources Minister Hamilton announced the figures when the deadline for permits was reached, and stated that the leases would run for 12 years.²⁴

Furthering government exploration, the icebreaker *John A. Macdonald*, under Captain James Cuthbert, during 1961, established a nuclear automatic weather station at Axel Heiberg Island, and then sailed to a latitude of 80 degrees, 30 minutes north, which was a record for Canadian vessels.²⁵

In 1962 the Canadian government decided to take a final effective step to integrate the archipelago with the rest of Canada, and arranged

23. R.S.C. 1927, c.142. Of particular interest is The Scientists and Explorers Ordinance passed by the Northwest Territories Council in 1926, which requires foreign scientists and explorers to take out permits.

24. *Winnipeg Free Press*, Saturday, July 16, 1960.

25. *Winnipeg Free Press*, Thursday, November 2, 1961.

legislation to extend the vote to all Canadian citizens in the Arctic by adding the Northwest Territories Districts of Keewatin and Franklin to the Mackenzie River riding. Canada has now established effective occupation throughout the Arctic archipelago.

SECTOR PRINCIPLE

The "sector principle" refers to delimitation of territorial claims in the polar regions. The boundaries of politically claimed areas in these regions are meridians which meet at the poles to form a pie-shaped sector whose base in the Arctic is the Arctic coastal area of a boundary nation or state, and in the Antarctic, a designated segment of latitude usually 60 degrees south. The designation "sector" is derived from the shapes of the claimed areas.

On February 20, 1907, Senator Pascal Poirier, speaking in the Canadian Senate, moved that the time had come for Canada to make a formal declaration of possession of the lands and islands situated in the north country, and extending to the North Pole. The Senator based his proposal on the fact that discovery of the Arctic islands had been made chiefly by the British explorers, whose rights Canada had inherited. Following Confederation, however, the expeditions to the north had included those of the Norwegian, Sverdrup, and several Americans, and it was these more recent events that were focusing public attention on the far north.

In the course of his speech, Senator Poirier maintained that all the islands between 141 and 60 degrees west longitude up to the North Pole were Canadian territory. He suggested that the division of the Arctic area according to what has since become known as the "sector principle" would reduce international conflict in the area and that the Arctic islands might prove a valuable asset to Canada should minerals be discovered there or the climate get warmer. Finally, he drew attention to the fact that Canada's east and west coasts were restricted by the southward extension of Alaska and the northern extension of Labrador, which was not then part of Canada, and that it might eventually become necessary "to have the North Pole as a way out of the Dominion."

This proposal has assumed great significance in modern times, not only because it applies to Canadian claims over a particular part of the earth's surface, but also because it propounded the "sector principle", which has since been so widely adopted by other nations claiming sovereignty over areas in the polar regions. As a result of the Senator's statements, Canada is generally credited as being the first country to lay claim to a sector of either of the polar regions.

It should be noted that the sector principle is merely a variation of a theme quite common in the evolution of North American boundaries. From the earliest times proclamations had been made in Canada which included areas defined merely by parallels of latitude or longitude or both. The Treaty of Tordesillas began with a line of longitude, the early French boundary documents with lines of latitude. The sector claim merely used

two lines of longitude as the east-west limits of a proclamation of sovereignty. The southern limit was an area that was known and over which sovereignty was established; the northern limit was the Pole. Thus the "sector principle" was merely a variation of a standard method used throughout the history of Canada to extend political sovereignty from a settled area to an unknown area. To claim unknown lands was not new. Jeffreys, in 1761, for example, maintained that Canada's limits to the west extended "over countries and nations hitherto undiscovered."²⁶ The Duc de la Rochefoucault went even further, and stated, in 1795, that Upper Canada comprised "all the known and unknown countries extending as far as the Pacific . . . and is bounded also northward by unknown countries."²⁷ Others maintained that "as to Canada, or New France, the French would scarce admit it had any bounds to the north on this side of the Pole."²⁸ The idea of contiguity is also a familiar one in American history; "it was the basis upon which the colonies and early Atlantic seaboard states projected their claims hundreds of miles into the wilderness to the west."²⁹

Senator Poirier's motion does not appear to have been officially adopted until June 1925, when the Minister of the Interior stated, on several occasions during debates in the House of Commons, that Canada claimed "right up to the Pole."³⁰ He also defined the longitudinal limits of the claim, and tabled a map showing its extent. In December 1953, the Prime Minister of Canada reiterated the claim during House of Commons debate when he said:

We must leave no doubt of our active occupation and exercise of our sovereignty in these northern lands right up to the pole.³¹

Lines delimiting the sector have subsequently appeared on political maps of Canada published by the federal government. These lines however, it is presumed, should merely be regarded as lines of allocation, which are delimited through the high seas or unexplored areas for the purpose of allocating lands without necessarily conveying sovereignty over the high seas.

The Soviet Union adopted the sector principle on April 15, 1926, when a decree of the Central Executive Committee declared:

as being territory of the Soviet Union all lands and islands discovered or to be discovered between the Arctic coast of the U.S.S.R. and the North Pole in the sectors between meridians of 168° 49'30" east, and not acknowledged by the Soviet government at the time of the publication of this decree as being under the sovereignty of another State.³²

26. *Statutes, Documents and Papers Bearing on the Discussion Respecting the Northern and Western Boundaries of the Province of Ontario, etc.*; Toronto: Hunter, Rose & Company, 1878, p. 55.

27. *Ibid.*

28. *Ibid.*, at p. 54.

29. L. M. Gould, "Strategy and Politics in the Polar Areas," *The Annals of the American Academy of Political and Social Science*, vol. 225, Jan. 1948, p. 106.

30. *Debates of the House of Commons of Canada*, 1925, pp. 3773, 4069 and 4083.

31. *Debates of the House of Commons of Canada*, 1953, p. 700.

32. L. Breitfuss, "Die Territorialy Sektoreinteilung der Arktis;" *Petermanns Geographische Mitteilungen* (Gotha), vol. 74, 1928, pp. 23-28.

The official United States viewpoint was contained in a letter from Secretary Adams to Secretary of State Stinson, dated September 23, 1929³³ regarding a private citizen's proposal that the U.S. should take the initiative in precipitating an international agreement for partitioning the Arctic into sectors (U.S., Canada, Denmark, Norway and Russia). Mr. Adams stated that it was the opinion of the Navy Department that the sector principle:

- (a) Is an effort arbitrarily to divide up a large part of world's area amongst several countries.
- (b) Contains no justification for claiming sovereignty over large areas of the world's surface.
- (c) Violates the long recognized custom of establishing sovereignty over territory by right of discovery.
- (d) Is in effect a claim of sovereignty over high seas, which are universally recognized as free to all nations, and is a novel attempt to create artificially a closed sea and thereby infringe the rights of all nations to the free use of this area.

This opinion is more or less consistent with the American position in Antarctica, whereof it is said that the United States has not recognized any claims, and has reserved all its rights. Notwithstanding, Congress awarded a medal to Lincoln Ellsworth on June 16, 1936:

. . . for claiming on behalf of the United States approximately three hundred and fifty thousand square miles of land in Antarctica between the eightieth and one hundred and twentieth meridians west of Greenwich, representing the last unclaimed territory in the world.

Norway, which borders on the Arctic, has twice denied the sector principle. On March 1, 1930, the U.S. Minister to Norway informed the U.S. Department of State, in connection with a current Norwegian expedition to the Antarctic:

. . . that Norway has no intention of annexing territory charted by the "Norwegia," but that it would object to applying the sector principle to the south polar regions and that freedom of the seas would be claimed.³⁴

Nevertheless, on January 14, 1939, Norway issued a Royal decree placing under Norwegian sovereignty that part of the coast of the Antarctic continent which stretched from the boundary of the Falkland Islands Dependency (which extends to the Pole) on the west, to the boundary of the Australian Antarctic Dependency on the east (which also extends to the Pole), with the territory situated within the coast and adjacent waters.³⁵

In the exchange of notes concerning the Sverdrup Islands, August 8 and November 5, 1930, Norway formally recognized Canada's claim of sovereignty over the Sverdrup Islands and stated:

. . . my government is anxious to emphasize that their recognizance of the sovereignty of His Britannic Majesty over the islands is in no way based on any sanction whatever of what is named the sector principle.³⁶

33. Department of State, file 800.014 Arctic/26, Opinion of the Navy Department. Quoted in Hackworth, Green H., *Digest of International Law*, Washington, 1940-44; vol. 1, pp. 463-464.

34. *Ibid.*

35. *Ibid.*, p. 462.

36. *Ibid.*, p. 463.

Denmark has never specifically declared adherence to the sector principle, but in practice it is partly committed to it because of its claim to Greenland on the basis of the "essential unity of the whole area." Gilbert Gidel, who acted as attorney for Norway in the *Eastern Greenland Case*, stated that in his opinion:

Not everything is to be rejected in the idea of contiguity if there is not to be seen in it a juridical principle and title. Said idea is similar to the notion of control which is bound to the effectiveness that the actions of a political authority must have over a territory in order to create, on its own behalf, a title of sovereignty. If, in general, a State is required, when it desires to occupy a polar territory to establish in this territory a local authority or administration, it must, however, be admitted that said State may exercise over an Antarctic (or Arctic) region, from one or several points in the sub-antarctic or temperate zone, a control that answers the conditions of effectiveness required by the law.³⁷

Many writers have commented on the acceptance of the sector principle and have questioned its validity. Smedal states that "it is not a legal principle having title in the law of nations," and he points out that this is partly admitted by those who uphold it, for "States that claim sovereignty in sector areas nevertheless attempt to take charge of lands lying in these areas by effective occupation."³⁸ Hyde remarks that although Canada is understood to approve of the sector principle, "it appears to deem it necessary to fortify its position by other processes, and to endeavour in fact to exert a claim as its own."³⁹ McKitterick states, "the sector theory is the last survivor of the old 'hinterland' principle as applied to continents, and appears to have no stronger basis in international law than that now discarded theory."⁴⁰ Gould argues that:

the sector principle . . . presumes sovereignty over all the lands discovered and yet to be discovered between the base and the boundary meridians on the roughly triangular sector. Obviously by implication, claimant nations relinquish their rights to claim anything beyond the sector boundaries. In a sense, this principle violates the principle of contiguity of geographical proximity.⁴¹

Other writers have favored the principle. According to Dollot, "the solution given by Senator Poirier is very ingenious and, in general terms, certainly acceptable. It offers, at least, a starting point for a more detailed discussion."⁴² Dollot distinguished two types of arctic territories: those nearer to the northernmost countries, in which these countries would have preferential rights, and those at a greater distance, which would be open to the discovery of any nation.

37. *Aspects juridiques de la lutte pour l'Antarctique*, Paris, 1948, p. 36. (Quoted in *Chilean Sovereignty in Antarctica*, Oscar Pinochet de la Barra, Editorial Del Pacifico SA, Santiago de Chile.)

38. *Supra*, note 11, at p. 64.

39. Charles C. Hyde, *International Law*.

40. T. E. M. McKitterick, "The Validity of Territorial and Other Claims in Polar Regions," (1931), p. 26. *Journal of Comparative Legislation and International Law*.

41. *Supra*, note 28, at p. 106.

42. Rene Dollot, "La question de la souverainete des terres arctiques" (1908), p. 15. *General de Droit International Public*, p. 412. (Written under the pseudonym of R. Waultrin.)

Forty years after expressing these ideas Dollot again referred to polar sectors during lectures on International Law given at the Hague in 1949, and stated that the sector theory has become the theory that best adapts itself to the Arctic, and constitutes, at least, "a principle for peaceful delimitation." Concerning Antarctica he says:

In truth, we are inclined to believe that the time for giving Antarctica a statute has not yet arrived, and this is the reason why the empirical solution of the sector, even though insufficiently respected and lacking other merits, offers temporarily the advantage of channelizing rival ambitions.⁴³

Paul Fauchille, in his treatise on International Law, says:

"The occupation which the poles allow of is an occupation of exploitation, and not an occupation of habitation. That is for the polar regions the only occupation which seems to be admissible; but it is necessary that it exist. Here, as in the case of every other unoccupied region, the mere fact of discovery is inoperative to produce a definite right."⁴⁴

According to Fauchille, polar territories must be divided into zones of influence corresponding to each of the continents, establishing in each zone a joint-dominion in which the countries of the respective continents will participate. The Russian author Lakhtine agrees with the division into zones of influence which he calls "regions of attraction," and says that because of the impossibility of rigorously applying the rules for effective occupation in polar regions:

law, little by little, started to admit that within polar limits an effective occupation could not be made and that it should be replaced by the extension of the sovereignty of the adjoining State, according to the geographic and economic influence of the sector principle.⁴⁵

During lectures concerning the Chilean claim to sovereignty in Antarctica, Oscar Pinochet de la Barra stated that:

- (1) The presumption or belief that a country adjacent to an Antarctic territory has therein exercised, in permanent or almost permanent form, acts of dominion, with more frequency and political intention than another that is not adjacent.
- (2) The necessity for an adjacent country of possessing the Antarctic sector facing it, because of its national defence, the establishment of meteorological observatories for the development of its aviation, of its agriculture, etc.
- (3) The possibility of exploiting its natural resources more properly.
- (4) The impossibility of delimiting rights over an immense unoccupied, inaccessible continent, except by meridians that form a triangle with its vertex at the Pole . . . the occupation of certain accessible points along the coasts being sufficient.⁴⁶

This argument, supporting application of the sector principle in Antarctica, recognizes the fact that South America is the only continental land mass close enough to base a possible claim on the doctrine of con-

43. Rene Dollot, "Le droit international des espaces polaires" (1949), p. 75. *Recueil des Cours, Academie de Droit International*, p. 190.

44. P. Fauchille, *Traite de Droit International Public* (1925), Book I, Part II, p. 658.

45. W. Lakhtine, (1929) 13 *Revue de Droit Aerien*, p. 540.

46. *Supra*, note 37, at p. 45.

tiguity. The doctrine of geographical proximity does not offer support for the majority of sector claims in Antarctica. It has been the practice of states, however, to extend the principle beyond its logical bounds; for instance, England chiefly basing her claim in Antarctica upon possession of the Falkland Islands, and France, upon possession of Madagascar.

Although the sector principle has not received universal acceptance, an impressive number of countries have, by their actions, given it at least tacit approval, and writers have for many years supported it. It may now be accepted as a principle recognized in International Law for establishing the basis of a claim to sovereignty, but giving only an inchoate title which must be followed by effective occupation. There is evidence that most countries which have claimed territory in the polar regions are taking effective steps to consolidate their claims by establishing effective occupation in the area.

Notwithstanding Canada's claim in the Arctic by way of discovery and effective occupation, a claim based on the sector principle has also been advanced. In Mr. Pearson's national development speech of July 7, 1958, in the House of Commons he stated:

. . . we have claimed sovereignty under what we call the sector theory over the prolongation north, right to their meeting at the north pole, of the east and west extensions of our boundary. If we are to make that claim stick, and it is certainly important we should make it stick, we have to do everything that is possible, everything that is practical, to develop those areas and reinforce whatever rights we may have in law with the right of occupation.⁴⁷

If the sector theory is to prevail in the Arctic, Canadian claims will be valid on that basis alone.

CONTIGUITY

Some writers assert that a valid claim to sovereignty over a new area can be based simply on its geographical proximity to territory already occupied. This is known as the doctrine of continuity; where the same principle is applied to islands off shore but beyond the territorial waters, the doctrine is known as contiguity.

Miller reviewed the doctrine of "territorial propinquity," "back country," or "hinterland" as applied in the colonization of the Americas, and concluded that the doctrine would apply in the Arctic.⁴⁸ Gould states that:

the principle of contiguity or geographical propinquity . . . presumes that nation-states which are nearest to new or unexplored and unclaimed lands have a proprietary claim simply because of propinquity. Such presumptions would have some validity if the new lands were accessible only through adjacent areas of the nearby State. . . . The idea of contiguity is a familiar one in American history; it was the basis upon which the colonies and early Atlantic seaboard states projected their claims hundreds of miles into the wilderness to the west.⁴⁹

47. *Debates of the House of Commons of Canada*, July 7, 1958, p. 1963.

48. David Hunter Miller, "Political Rights in The Arctic," *Foreign Affairs*, Oct. 1925, p. 47.

49. *Supra*, note 29, at p. 106.

Schwarzenberger, however, in his consideration of titles to territory, concludes that those which are based on contiguity are at most inchoate titles.⁵⁰ In 1918 Wright, no doubt with the Berlin Conference in mind, said:

The present law . . . would seem to justify no claim to territory beyond that effectively controlled, although the adjacent state may justly claim the right of notification, with an option to make good the constructive claim by actual occupation.⁵¹

Dr. Max Huber in, the *Island of Palmas Arbitration* decided that:

the title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law . . . It is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a state from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearings to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even governments of the same state have on different occasions maintained contradictory opinions as to its soundness.

The Permanent Court of International Justice, in its decision that Danish sovereignty extended over the whole of Greenland, rather than just the colonized areas, tend to give some recognition to the doctrine of continuity in the polar regions. The court pointed out that its judgment was based largely on two considerations, namely:

the absence of any claim to sovereignty by another power, and the Arctic and inaccessible character of the uncolonized parts of the country.⁵²

To whatever extent the contiguity principle can be a valid basis of sovereignty, it strengthens Canada's claims over the Arctic. It can be argued that the Arctic archipelago is an island fringe off a mainland coast which physically and geographically forms a unity with the mainland, and that the waters between the islands, and between the islands and the mainland, can properly be treated as internal waters. Even in summer many of the islands are linked by ice and settlements, and travel takes place on the ice. There is a very close relationship between the sea and the land in this Arctic archipelago.

PRESCRIPTION

Schwarzenberger writes that:

A state may perfect a title to territory by exercising peaceful and effective jurisdiction over the territory for a prolonged period. In virtue of the principle of good faith, prolonged inaction on the part of the third states which, at one time, might have been in a position to contest the claims of the state now in effective occupation gradually comes to be viewed as acquiescence. Then, such states are estopped from contesting the occupant's title. This title to territory as "acquisitive prescription," is actually a title with multiple roots and is based on the interplay of the rules underlying the principles of sovereignty, consent and good faith.⁵³

50. *Supra*, note 12, at p. 116.

51. Q. Wright, "Territorial Proximity," (1918) 12, A.J.I.L. 522.

52. *Legal Status of Eastern Greenland*. Permanent Court of International Justice (1933), Series A/B No. 53.

53. *Supra*, note 12, at p. 117.

The *Meerauge Question* (Austria-Hungary) decision was based on Roman Law standards of prescription, whereby, in addition to holding territory for some time, it is required that the possession be exercised peacefully, publicly and continuously.⁵⁴ And the Permanent Court of Arbitration at the Hague, in awarding *Grisbadarne* to Sweden, did so on the basis of prescription. In this decision the court stated:

It is a settled principle of the law of nations that a state of things which actually exists and has existed for along time should be changed as little as possible . . .⁵⁵

In the *Chamizal Arbitration*, the United States unsuccessfully invoked the prescription principle against Mexico, which claimed original discovery, and constantly challenged American control. The Netherlands, however, successfully invoked the principle of prescription over the opposition of the United States, which claimed original discovery (as successor of Spain) in the *Island of Palmas Arbitration*, because occupation by the Dutch East India Company had been effective and uncontested.

Although most writers and courts have given effect to the principle that a claim by prescription is a good claim to sovereignty, the International Law Commission reported to the Secretariat of the United Nations that some jurists, including Rivier and de Martens, hold that "acquisitive prescription" is not part of general International Law.⁵⁶

No definite time limit has been set for establishing title by acquisitive prescription; however it is considered that this limitation would vary as between inhabited and barren areas, and may be abridged by recognition. Russia, during the discussion arising out of the Alaska boundaries, laid down the doctrine that fifty years of uncontested possession gave sovereignty over Arctic regions.⁵⁷

It may be argued with merit that Canada has a claim to sovereignty over the Arctic islands and waters on the basis of prescription. In reply to a question, on May 20, 1938, the Minister of Mines and Resources stated in the Canadian House of Commons, that no challenge had been made, so far as he was aware, to Canadian sovereignty over the Arctic archipelago.

Official Canadian maps have shown the existing boundaries since 1904, and Canada has claimed sovereignty over the area ever since Confederation. Senator Poirier's motion of February 20, 1907, which is cited as the beginning of the sector principle, was given international promulgation by writers, and Canada's claims to sovereignty remain unchallenged. In 1920, Canada protested to Denmark against the killing of musk-ox on Ellesmere Island by Greenland natives, and in 1921 the Canadian government informed Denmark that should the Rasmussen expedition discover islands in the sector between Canada and the North Pole these would

54. *Revere de Droit International et de Legislation Comparee* (1902), p. 207.

55. *Maritime Boundary Arbitration* (Norway-Sweden), Oct. 23, 1909 (1910) 4 A. J. I. L., p. 233.

56. *Survey of International Law in relation to the work of codification of the International Law Commission*, Lake Success, 1949.

57. *Debates of the Senate of the Dominion of Canada*, 1907, p. 275.

belong to Canada. During 1922 and 1923 diplomatic correspondence between the British and Canadian governments on the one hand and the government of the United States on the other, acknowledged the Canadian claims to sovereignty within the Arctic archipelago.⁵⁸ On the facts it is evident that Canada has a valid claim to sovereignty, superior to any other state, on the grounds of prescription.

RECOGNITION

The elasticity of recognition makes this device an eminently suitable means for the purpose of establishing the validity of a territorial title in relation to other states.

However weak a title may be initially, recognition estops the state which has granted it from subsequently contesting the validity of the recognized title. Moreover, persistent non-recognition by state practice of certain titles may lead to their falling into desuetude.⁵⁹

It was for this purpose that Canada prompted the exchange of notes with Norway over the shadowy Norwegian claim to sovereignty to the Sverdrup Islands. Similarly, Denmark had asked other countries to recognize her sovereignty over all of Greenland, and the Permanent Court of International Justice decided that a statement by the Norwegian Minister of Foreign Affairs to the effect that "the Norwegian government would not make any difficulty in the settlement of the problem," was binding on that country, and recognition of Danish sovereignty over all of Greenland.

Recognition is a political remedy which may be obtained for various considerations, and although it cannot give a state any better title than previously existed, in so far as other states are concerned, it will stop the granting state from contesting the validity of the recognized title.

Should there have been any lingering doubts about the Canadian sovereignty over the Arctic archipelago, possibly they have been dispelled by acts of recognition. Certainly the countries with special interests in the Arctic have extended recognition in various ways. Russia, by adopting the sector principle as domestic law, acknowledges Canadian interests in the "Canadian Sector." Norway, in the above mentioned diplomatic notes concerning the Sverdrup Islands, recognized Canada's claims. Denmark, by her arguments as to the sovereignty over the whole of Greenland in the *Eastern Greenland Case*, based on the essential unity of the whole area, and by the Convention of 1924 between Norway and Denmark, which fixed Greenland's boundaries (and was recognized by England)⁶⁰ has probably recognized Canada's claims also. The United States has expressly denounced the sector principle, but, as stated in the above paragraph, has recognized Canada's claims to sovereignty over Arctic islands in diplomatic correspondence.

58. W. Lakhtine, "Rights Over the Arctic" (1930) 24 A.J.I.L., p. 716.

59. Schwarzenberger, *Supra*, note 12, at p. 116.

60. W. Lakhtine, "Rights Over the Arctic" (1930) 24 A.J.I.L., p. 716.

SOVEREIGNTY OVER ICE ISLANDS AND LANDLOCKED ICE

A problem unique to the polar regions is the question whether sovereignty can be claimed over frozen seas. In the absence of judicial authority it is not possible to answer this question with confidence. It is known, however, that man can land and live on the various kinds of ice found in the Arctic. "T3", an ice island, was occupied by a United States research team for a total of approximately thirty months, and the Soviet drift stations "North Pole 3" and "North Pole 4," both have been occupied for more than a year. In the Antarctic, Admiral Byrd's base, Little America, has been established and maintained on the Ross Ice Shelf, and airplanes have successfully landed and taken off from it.

When Admiral Peary completed his successful journey to the North Pole in 1909 he sent a telegram to the President of the United States: "I have the honor to place the North Pole at your disposal." The explorer considered that his discovery and claim of the North Pole entitled the United States to ownership of the area. No claim has been made by the United States, however, because the Pole is over frozen ocean, not land. Numerous writers, such as Scott⁶¹, Oppenheim⁶² and Clute⁶³, have agreed with this position, and regarded the Pole merely as high seas in solid form. Other writers, such as Lindley⁶⁴, Lakhtine⁶⁵, and Smedal⁶⁶, to name a few, take the view that since it may be occupied it may be the subject of sovereignty. Balch, however, differentiates between the frozen seas at the North Pole, which are continuously in motion, and immobile ice at the South Pole, and concludes that the former are incapable of ownership, while the latter can be made the subject of sovereignty.

Hyde observes that

it is not apparent why the substance of which an area is composed, however subject to deterioration or ultimate dissolution, or the absence of proof that it remains an immovable mass, renders it unreasonable for states to deal with it as though it were land, to the extent at least of asserting and gaining respect for exclusive rights of control or dominion therein.⁶⁷

In reply to a question in the House of Commons on November 27, 1957, the Minister of Northern Affairs and National Resources answered in part:

The Arctic Ocean is covered for the most part of the year with polar ice having an average thickness of about eight feet. Leads of water do open up as a result of the pack ice being in continuous motion, but for practical purposes it might be said for the most part to be a permanently frozen sea. It will be seen then, that the Arctic Ocean north of the archipelago, is not open water nor has it the stable qualities of land. Consequently the ordinary rules of international law may or may not have application.⁶⁸

61. James Brown Scott, "Arctic Exploration and International Law" (1909) 3 A. J. I. L., pp. 928-941.

62. L. Oppenheim, *International Law*, vol. 1, 8th ed., London, p. 543.

63. A. R. Clute, "The Ownership of the North Pole" (1927) 5 *Canadian Bar Review*, p. 19.

64. M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), p. 6.

65. W. Lakhtine, "Rights Over the Arctic" (1930) 24 A. J. I. L., pp. 703, 712.

66. G. Smedal, *Acquisition of Sovereignty Over Polar Areas*, Oslo (1931), pp. 29-32.

67. C. C. Hyde, "Acquisition of Sovereignty Over Polar Areas", (1934), 19 *Iowa Law Review*, p. 286.

68. *Debates of the House of Commons of Canada* (1957-58), Vol. II, p. 1559.

It is believed that there should be some difference between ice islands and landlocked ice. Ice islands are capable of supporting occupation, as stated above, and therefore a limited degree of control may be exercised over these islands by the occupying power. Should the floating ice islands enter territorial waters they would, however, be subject to the jurisdiction of the local sovereign authority. Shelf ice, on the other hand, is indistinguishable from the ice covering the land itself. Since there is no borderline between the ice covering the land and seaward ice, and the shelf appears externally as a whole, the same principle should be applied to the whole, and sovereignty extended to the tide crack, if any. To deny ownership because of some application of the rules regarding freedom of the seas, when sea navigation is made impossible by the solid nature of the water seems absurd.

In the case of straits which are frozen over for only part of the year other considerations, in addition to those mentioned above, will apply. As a general rule, International Law provides that straits shall be free for all nations for the purpose of innocent passage, but the case of these northern straits is different, for they are not used for purposes of navigation only. Although some of them, like Lancaster Sound and Barrow Strait, may at times lead to the open sea beyond, yet they are blocked by ice during a greater part of the year. A navigator therefore may expect to winter in the Arctic, and a ship frozen in the ice is as effectually attached to the land as if it were in a harbor. In order to control shipping, and to prevent vessels from landing except at specified ports, it is necessary that these northern straits be considered territorial waters.

In conclusion it is suggested that International Law may recognize an exclusive claim to sovereign rights exercised by a state occupying an ice island for the duration of its occupancy; such rights to terminate on vacating the island, except for short periods due to emergency which would not be construed as a factual vacating of the island. Ice islands floating or grounded in territorial waters, however, would be subject to the sovereign jurisdiction of the local state, which must be able to deal with the problem of shipping as seems appropriate. On the other hand, since there is no apparent division between seaward ice and the ice cap over land, shelf ice and landlocked ice may be considered as part of the sovereign state to which they are affixed.

