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Political Rights in the Canadian Arctic

Although there has been a respectable amount of legal scholarship dealing with sovereignty in the Arctic, the issue, at least in relation to the Canadian Arctic, has never been settled. This may be about to change.

On March 11, 1969, The Los Angeles Times-Post news syndicate distributed a story with the following lead sentence:

> Allegations that an American map of Canada disputes Canadian sovereignty over some islands of the arctic archipelago have raised suspicions in Parliament that the United States may be looking at these islands with an acquisitive eye.

Although the United States State Department has not questioned Canada's arctic jurisdiction and the existence of such a map has never been publicly demonstrated, the issue has again been brought to light.[1] Its importance results from the recent discovery of oil in northern Alaska, only 200 miles from the Canadian border, and the predictions of more and larger strikes to cover the area.[2] United States oil companies are developing huge tankers which will weave through the arctic islands of the "Northwest Passage" to deliver the crude oil to east coast refineries until a pipeline can be completed in the mid 1970's.[3] The same Times-Post story quotes Prime Minister Trudeau as saying,

> Of course we claim we have sovereignty to all the lands in the north. This claim will have to be established in law and internationally. I do not think there will be any great difficulty about the land itself, but the problem has arisen about the ice and the water and whether the water is inland, or territorial, water. That is rather a difficult question.

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[1]The issue of sovereignty over the polar ice was raised in 1947 when a Russian scientific team drifted on an ice flow into the Canadian "sector." The issue was again raised when the United States atomic submarine "The Nautilus" went under the North Pole, thus necessarily entering the Canadian "sector."

[2]See informative articles in *Business Week*, February 1, 1969, p. 50 et. seq., and in *Newsweek*, March 10, 1969, pp. 78-79. See also *Arctic Research*, Ed. by Diana Rowley, Arctic Institute of North America, Ottawa, 1955.

[3]Humble is converting the S. S. Manhattan, a 115,000 ton tanker, into an icebreaker. Although the Manhattan is the largest tanker in the U.S. merchant fleet, if she proves successful ships more than twice as large will be built to service the route.

It is to these problems that this paper is addressed. In order for Canada to claim maximum control over the area including the arctic islands, it must first establish sovereignty over the islands, then show that the seas in the area are at least territorial seas, and finally show that they are in fact interior waters or should be treated as such. This narrowing process can be accomplished one step at a time, or a one step approach to accomplishing this by means of the "sector principle."

By the sector principle, a State within the Arctic Circle claims sovereignty over all lands to its north, measured from the meridians of longitude marking the limits of its easterly and westerly frontiers and extending northward to the final intersection of those meridians at the north pole.[4] Although first proposed in 1907,[5] the sector principle as such has never been officially espoused by the Canadian government. However, in 1953 the then Prime Minister of Canada, Mr. St. Laurent, told the House of Commons, "We must leave no doubt about the effect of our active occupation and exercise of sovereignty in these northern lands right up to the Pole."[6] From this can be inferred at least an intention to comply with the rule of international law requiring occupation and control to assert sovereignty. The problem is a practical one: how to exercise effective control and occupation of a vast snowland where the temperature remains more than 100° below freezing for extended periods of time?

Those favoring Canadian claims point out that the Permanent Court in the *Eastern Greenland* case[7] referred to a title derived from a "continued display of authority" rather than using the phrase "effective occupation." This "continued display of authority" was interpreted as meaning (1) the intention and will to act as sovereign coupled with (2) some actual exercise or display of such authority.[8] Canada has demonstrated a continuing will and intention to act as sovereign, and she has endeavored to make the best possible display of authority. This includes regular patrols of the Arctic by the Royal Canadian Navy,[9] and by the Royal Canadian Mounted Police, the establishment of The Department of Northern Affairs and Natural Resources, and certain legislation in Parliament relating to the Canadian sector. Among this legislation is the Canadian Shipping Act[10] with which United States vessels, in servicing DEW line stations, have always either

[4]Hyde, *International Law*, 349 (1945).

[5]Senator Poirier proposed that Parliament allocate "polar sectors" to Norway and Sweden, Russia, United States, and Canada. The motion was not adopted. *Debates of the Senate of the Dominion of Canada*, 1906-7, 10th Parliament, 3d sess. (1907) 266-267.

[6]Saturday Night, August 30, 1958, p. 34.

[7]P.C.I.J., Ser. A/B, No. 53; 3 Hudson, Wolrd Court Reports 81 (1938).

[8]1948 British Yearbook of International Law, 334.

[9]Saturday Night, August 30, 1958, p. 34

[10]Revised Statutes of Canada, 1952, Ch. 29.

complied or been granted a waiver of its requirements.[11] Other Canadian legislation requires all expeditions into the area of the Canadian sector to secure permits from the Department of Northern Affairs;[12] this requirement has since been fulfilled by the scientists and explorers of many countries,[13] thus providing a kind of limited recognition.

The United States has never taken an official position on the sector principle. However, Hackworth reports that when a private citizen suggested to President Hoover that the United States should take the initiative in bringing about an international agreement for the partitioning of the Arctic region into national sectors of the continguous countries, the Navy Department stated that the proposed course of action

> (a) is an effort arbitrarily to divide up a large part of the world's area amongst several countries;
> (b) contains no justification . . .;
> (c) violates . . . establishing sovereignty by right of discovery;
> (d) is in effect a claim of sovereignty over high seas, which are universally recognized as free to all nations. . . .[14]

For obvious reasons no State which would not gain territory under the sector principle advocates it. Since the main argument favoring the sector principle has always been the accessability of the contiguous State the further progress of air transportation may well leave the principle without a justification. Starke feels that

> one thing is clear. The practice of a limited number of states in making sector claims has not created a customary rule that such a method of acquiring territory is admissible in international law. In that connection reference need only be made to the reservations of non-sector States (including the United States) on the validity of sector claims, and to the view in many quarters that the polar regions should be internationalized.[15]

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[11]The following exchange is recorded at 1957 *Debates*, House of Commons, Canada, Vol. III, p. 3186:

> Mr. Green: "May I ask the Prime Minister whether the Canadian Government considers these waters [Canadian Arctic Archipelago, specifically Bellot Strait, Lancaster and Melville Sounds] to be Canadian territorial waters, and, if so, whether the United States government considers such to be the case?"
> Mr. St. Laurent (Quebec East): "I do not know whether we can interpret the fact that they did comply with our requirements that they obtain a waiver of the provisions of the Canadian Shipping Act as an admission that these are territorial waters, but if they were not territorial waters there would be no point in asking for a waiver of the provisions of the Canadian Shipping Act."
> Mr. Green: "There is no doubt, then that the Canadian government at least considers them as territorial waters?"
> Mr. St. Laurent (Quebec East): "Oh, yes, the Canadian government considers that these are Canadian territorial waters, and we make it a condition of the consent we have given to these arrangements that they apply for a waiver of the provisions that would otherwise apply in Canadian territorial waters."

[12]Statutes of Canada, 1925, 15-16, Geo. V, Ch. 48.
[13]Hyde, 350.
[14]Hackworth, *International Law*, 463-464 (1940).
[15]Starke, *International Law*, 138 (1958).

In addition to claims based on the sector principle Canada claims the northern areas based on several historical facts. The first is the exploits of certain English explorers dating from the seventeenth century. Such men as Cabot, Perry, Baffin, Frobisher, Davis, and Fox claimed far northern areas for the crown, many of which areas now bear their names. The second is the 1763 Treaty of Paris. By this treaty all of the French claims in what is now Canada were ceded to the Crown of England. These claims included a large part of the eastern archipelago.[16] The third historical claim is based on the far reaching occupying exploits of Hudson's Bay Company. The Hudson's Bay traders and trappers established in the far north the closest thing possible to effective occupation under the circumstances.[17] When taken together these three historical claims to the Canadian archipelago are at least very convincing.

Thus it appears that in Canada's case the sector principle is valid not as the basis for a claim to the Arctic archipelago, but as the geographical definition for such a claim based on other factors. Assuming, then, that Canada owns the islands, the question becomes what is the nature of the water surrounding them?

A Canadian writer reports that "Canada regards the water between the islands as Canadian territorial waters, and this claim has been recognized by the United States."[18] Such a claim is in conflict with the general rules of international law. The islands in question are large well-defined masses of land varying in size from a hundred or so miles to thousands of square miles. Generally the distance between any two of these islands is well in excess of twenty-four miles.[19] The greatest bound to its territorial waters that Canada has claimed, however, is twelve miles.[20] It would therefore appear that much of the water separating the islands is high seas. The claim is made for Canada based on the decision in the 1951 *Norwegian Fisheries* Case[21] that all of the waters in the archipelago should be treated as Canadian territorial waters.[22] In that case the International Court said, "What matters, what really constitutes the Norwegian coast line, is the

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[16]Head, *Canadian Claims to Territorial Sovereignty in the Arctic Regions*, 9 McGill L. J. 200 (1963).

[17]Johnston, *Canada's Title to Hudson Bay and Hudson Strait*, XV British Yearbook of International Law I, (1934).

[18]9 McGill L. J. 218. The author realizes that a writer's claim of U.S. recognition and actual recognition can be two different things. In this connection see 24 Am. J. I. L. 707, where Lakhtine cites Paul Fauchille for the proposition that ". . . the government of the United States of American relinquished its claims in the Canadian sector, and acknowledged the sovereign rights of Canada there."

[19]See *Arctic Research*, Ed. by Diana Rowley, The Arctic Institute of North America, Ottawa, 1955.

[20]Bishop, *International Law*, 490 (1964).

[21]Fisheries Case (United Kingdom v. Norway), 1951 I. C. J. Rep. 116.

[22]Saturday Night, August 30, 1958, p. 34.

outer line of the 'skjaergaard.' "[23] This "skjaergaard" is a group of about 120,000 islands, rocks, and reefs closely following Norway's coastline. If Norway's four-mile territorial sea had been measured only from some point on land, large gaps would have been left in which other nations could fish. This is much the same position in which Canada views its archipelago. If there is much of a geographical difference it seems to be Canada's advantage, in that the water separating its islands is frozen solid for most of the year, and only for a brief period in the summer can it be navigated.

Finally, there is the claim that these waters should be treated as Canadian internal waters. A Canadian writer asserts that

> the unitary appearance of the formation and, to a lesser extent, its location suggest support to a claim to these waters as internal waters. Surrounded on all sides by Canadian territory, they possess the *character* of Canadian waters.[24]

Viewed as a whole the archipelago suggests an isthmus connecting northern Canada and Greenland. If the outer boundaries of the "isthmus" were connected with a solid strip of land there would be no problem in finding the territory to be wholly Canadian, deeply gouged by many large lakes. By being frozen most of the year this is, in fact, the case. For most of the year there is simply no practical difference between the islands of the Canadian Arctic and an isthmus. Thus, just as the Norwegian Fisheries Case was practical in extending the Norwegian mainland to include islands the same type of reasoning would extend the Canadian mainland to include the arctic islands.

If the "isthmus" theory could be accepted to the extent of using the outer boundaries of the islands as the baseline for measuring the territorial sea the 1958 Geneva Conference on the Law of the Sea[25] would make the waters internal. Article 5 (1) provides that "waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State." However, Article 5 (2) precludes Canada from preventing the innocent passage which Humble proposes for its super-tankers:

> Where the establishment of a straight baseline in accordance with Article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or as part of the high seas, a right of innocent passage . . . shall exist in these waters.

There would be a problem only if Canada historically had claimed the waters as internal; this is not the case.

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[23]1951 I. C. J. Rep. 118.

[24]Head, *Canadian Claims to Territorial Sovereignty in the Arctic Regions*, 9 McGill L. J. 218 (1963).

[25]U. N. Doc. No. A/Conf. 13/L. 52 (1958), in effect as to the United States as of September 30, 1962; in effect as to Canada as of September 10, 1964.

However, since Canada has not made an official claim that these waters are internal, the right of innocent passage could not be disputed. According to Jessup, in his book on territorial waters, "As a general principle the right of innocent passage requires no supporting argument or citation of authority; it is firmly established in International Law."[26] Passage is innocent so long as the ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal state.[27] Article 14 (4) of the 1958 Geneva Conference states that

> Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal state. Such passage shall take place in conformity with these articles and with other rules of International Law.[28]

Certainly the passage of a tanker full of crude oil qualifies as innocent.

Several answers are thus possible to the original questions posed concerning non-Canadian claims to islands in the Canadian archipelago and the right of United States merchant shipping to use the water there. It is the view of this writer that Canada has full sovereignty over the islands within the Canadian "sector." Historically Canada has claimed these islands and no other country has challenged the claim; such acquiescence alone should be sufficient to establish title in Canada. Couple with this the best possible occupation and control and a few treaties, et cetera, and Canada's title becomes indisputable.

The right of United States merchant shipping to use the water in the Canadian archipelago depends on the nature of that water. If it is high seas there is, of course, no problem. If it is Canadian territorial water, the 1958 Geneva Convention on the Law of the Sea, as well as International Law, require that the right of innocent passage be given the United States ships, so long as they comply with certain Canadian navigational standards.[29] If it is Canadian internal water Canada has complete control over it, unless it was previously known as territorial water or high seas, in which case the right of innocent passage exists.[30] This writer believes that the water should be treated as territorial. It is too much in the nature of Canadian to

[26]Jessup, *The Law of Territorial Waters,* 120 (1927).

[27]This sentence was proposed by the United States as the wording for article 14(4).

[28]Article 16(4) provides that "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State."

[29]Article 17 of the 1958 Geneva Conference provides that "Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of International Law and, in particular, with such laws and regulations relating to transport and navigation."

The Canadian Shipping Act, found at Revised Statutes of Canada, 1952, Ch. 29, Sec. 714, provides that if (1) a foreign ship is required to meet similar requirements in its home country as Canadian ships are in Canada, and (2) if the foreign country exempts Canadian ships similarly, then Canada will exempt the foreign ship from the requirements of this act.

[30]Article 5(2), 1958 Geneva Conference on the Law of the Sea.

be treated as high seas and it is too much in the nature of high seas to be treated as Canadian.

In relation to the original problem the United States had best cast its acquisitive eye in directions other than the islands between Canada and the North Pole. But if it wants to send the biggest tankers ever built through the coldest water in the world to load with crude oil, that's all right. It's the American way.