TO GOVERN THE NORTHWEST

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The problem confronted by this paper is to determine whether territorial sovereignty may be properly exercised by the Dominion of Canada over those regions lying to the north of its ten constituent provinces, and, if so, to what geographical extent. International law has traditionally advanced a variety of criteria from which such sovereignty is alleged to flow. The basic hypothesis of this endeavour is an estimation of the degree to which Canada satisfies these criteria together with an argument which hopes to describe the illusory character of such criteria. The conclusion which the thesis hopes to justify is that even if Canada might be found to conform to all the strictures of the said criteria sufficiently to confer sovereignty upon Canada over the material regions, yet the notion of sovereignty is itself an ambiguity worthy of critical reappraisal if the northern ambitions of Canadian nationals are to be ensured.

PREFACE

If the argument contained in the pages which follow seems obscure to the reader uninitiated in the language of the social sciences, it is because the most recent and inventive contributions to the literature have neither become a part of a common vocabulary to this point in time, [illegible] have they undertaken to simplify the problems of social life as so many other approaches are wont to do.

The two suggestions which come face to face in this submission are applicable far beyond the Northwest Territories. They apply wherever mankind has chosen to judge human conduct and enact laws to guarantee certain patterns of future conduct. The suggestions are, first, that the conceptual level at which jurisprudence operates is insufficient for the job which it has contracted; and secondly, that human behaviour is neither incapable of analysis nor amenable to simplification. Notions such as "territory" and "sovereignty" are no less complex than the ideas couched in terms of "Democracy" or "Communism." Nor have they been any less abused.

The Northwest Territories represents the optimal model for a reconsideration of many of these principles. It fulfils virtually all of the requirements of an area fashionably referred to as "underdeveloped." Yet the area is sufficiently close at hand to permit more exacting study

without the liabilities inherent in those ambitions to internal self-rule common to African or Asian states.

Apart from the very recent report of the Advisory Commission on the Development of Government in the North-west Territories, and the largely economic literature associated with it, virtually no comprehensive attempt has been made to examine the politics of the Arctic regions.

More notably, the analytic approach exhorted by this paper has been retarded in the field of Canadian politics. There has been an exaggerated emphasis, by those charged with responsibility for this discipline, upon British history, Canadian political parties and an ostensibly objective commitment to describing left-wing ideologies, whatever these might be. At the same time the tendency has been to "leave the teaching of law to law schools," which schools are observed in awe as the exclusive repositories of an esoteric body of knowledge. Legal and "political" education in Canada are consciously uncomplimentary. Within the social sciences as well there are occupational jealousies which defy any cooperation in fields which clearly clamour for it.

However it would seem to be equally unrealistic to suppose that the law will settle any of these problems as it would be to suppose that the law will not continue to try. Therefore, what the law has to say with regard to sovereignty, if ill-considered and fraught with ambiguities, is nevertheless of pre-eminent relevance to such a study.

ACKNOWLEDGMENTS

Any improvement upon the contributions of the law to the issue of territorial sovereignty would have been foreclosed to myself in the absence of my exposure to Professors Donald J. Grady and Thomas M. Mongar. Their scrupulous commitment to empirical theory promises a renaissance in the social sciences so long hidebound in professionalism.

To the intellectual creativity of Professors Grady and Mongar, to the unflagging patience of my wife Suzanne who typed and retyped the manuscript and to the incentive provided by the Canada Council, this thesis owes its great debt.

TABLE OF CONTENTS

PREFACE iii

ACKNOWLEDGMENTS v

INTRODUCTION vii

1. TO ACQUIRE TERRITORY ... 'CUIUS EST SOLUM'

1. To Delimit the Field 1
2. To Occupy Territory 7

11. THE NATURE OF THE TERRITORY

1. A Vast and Empty Land 29
2. Contiguity 31
3. The Arctic "Islands" 37
4. Ice; Mare Concretum or Solum? 43
5. Territorial Waters 56

111. THE NATURE OF THE ACQUISITION

1. Discovery -- "Veni, vidi ..." 73
2. Cession 93
3. Effective Occupation -- "90% of the Law?" 104
4. Prescription: "To Have and To Hold" 138
5. Recognition: "The North Is Red" 147
6. The Sector Principle: "The Eskimo Pie" 160
7. To Identify The Sovereign:"L'Etat,c'est moi" 193

1V. SOVEREIGNTY AND THE POLITICAL SYSTEM

1. The Common Problem 215
2. To Delimit The Method 218
3. System 225
4. To Allocate Sovereignty 241
   (a) Annexation 242
   (b) Abandonment 243
   (c) Adaptation 246
   (d) Arbitration 249

V. THE POLITICAL SYSTEM 255

Appendix #1

INTRODUCTION

In the following pages an attempt will be made to examine a specific instance of the concept of "territorial sovereignty." The literature which deals with this topic has been resistant to any thoroughgoing treatment of such a concept beyond the judicial treatment. By this it is meant that the courts of law apply a more or less inflexible vocabulary and a time-honoured set of rules to those problems couched in the concept, and the writers stray very little from investigations based upon such vocabulary and such rules. In the case of that territory which lies generally to the north of the Dominion of Canada and which is known to the gazeteer as the "Northwest Territories," no exception is made. The notion of "territory" seems to experience an identification which can claim almost unanimous consensus. It is identified with land. If the connection is tenuous, it seems to be enough for most writers. More scrupulous efforts at distinguishing between those properties which run to the essential character of land are politely dismissed as interesting but trivial. The presumption relied upon by most writers reflects the attitude of the man who, despairing in an attempt to define an elephant, recovered in time to assert confidently that he knew one when he saw one. If "territory", sufficient for the exercise of sovereignty, frustrates precise description, this does not seem to generate much concern

among the jurist or "political scientist."

In the same way, the concept of "sovereignty" is applied in a way which does not readily betray any clear and unequivocal understanding of what the concept means. The most that appears to be conceded is an understanding of the consequences of sovereignty, and a vague familiarity with the ways and means of arriving at or settling upon those consequences. Summarily, the position seems to be that sovereignty springs from a certain locus of national power and serves to confer upon that power certain territorial rights and privileges. Such a statement, obviously heavy with ambiguity, cannot be resolved in an introductory remark. The purpose of an introduction is to put the reader on notice insofar as regards the major problems contemplated by the purview of the paper and the main line of reasoning which is intended to govern his attention.

The "national power" considered here is the Dominion of Canada.

The undertaking of the paper is largely expository and is divisible generally into two parts.

The first part, comprising the first three of the four constituent chapters, attempts to describe the juridical approach to arbitration over territorial disputes between nations. The presumption which inheres in this

approach reflects an exaggerated emphasis on the likelihood of a "peaceful" solution to a contest for territory. This approach, in reciting the legitimate modes of acquiring territory, tends as well to ignore the fact that the arbitration itself, and the procedures and precedents which attach thereto, represents sui generis a viable mode of acquisition. The lines drawn by the law in aspiring to catalogue conduct seem inappropriate on closer examination. One problem introduced by the juridical approach, however, is indisputably relevant to any consideration of the question. The nature of the territory is crucial to the conduct required to satisfy the law. The approach of the law is outlined in these pages in a general way. Positing the hypothetical possibility of an application of this law to the special case of any dispute which might arise over the Arctic regions to which Canada now lays claim, the nature of the territory, as it is likely to affect the argument, is described. The Canadian claim itself is then set down as it most amply fulfils the strictures of "sovereignty" advanced by the law.

What conclusions may be deduced from the first part of this paper are helpful to the Canadian national not so much either as assurances of Canada's persuasive claims to the Northwest as a caution urging politicians to beware of dereliction in the face of foreign pretentions to the region. It augurs neither success nor failure at law.

The contribution contemplated by the review of the juridical prospects for Canada's northern aspirations is such as to betray the unpredictability of such judicial decisions as might flow from a recourse to arbitration.

The cultural and national biases which dwell within the logic of the law seem to colour reason and defy prophecy. The arguments inflated to graphic proportions defy resolution. The modes of acquisition introduced by the law are to be submitted, in consequence of the findings of this paper, as illusory, obsolete, and less than generically exclusive.

For this reason a second part has been added to an otherwise speculative description of the Canadian case.

The second part of the paper represents an attempt to translate the language of the law into the vocabulary now current among empirically-oriented social scientists, especially those whose time and effort have been committed to an examination of the "political system." Where the law hastily disclaims its competency to judge the essential character of sovereignty or the proper "functions of a state," the suspicions of social science seem ever to have been that such pleading does not in any way purify the findings of the law; that in its role as mere moderator, interpreter, broker or scribe, the law is merely engaged at heuristic pronouncements upon the character of the self-same things which it earlier declares to be outside of its

juridical function. Social science bends to the job not only of reclassifying what is declared by the law, but, as well, what is tentatively achieved by the law in its role as renderer of declaration.

When at last the law, as viewed most optimistically for Canadian purposes, concludes that the Arctic is somewhere between ice and land, somewhere between inhospitable and uninhabitable, somewhere between contiguous with and close to the mainland, somewhere between appropriate and "almost" to qualify for the rules of territorial waters; when the law describes Canada's conformity to the modes of acquisition in terms best recited as probably not conqurered, largely ceded, intermittently recognized, and sparsely occupied in pursuance of some discoveries; and when at last the law confers these shaky probabilities upon an entity known only as "Canada", even although it is over one-third of this very Canada which is being enquired into by sovereignty arbitration and even although the law patently obviates any responsibility to define by function or performance what that "Canada" might be, then the need for explication becomes imminent.

The social scientist alone has endeavoured to rethink and restate the law. At a time when every international conflict is initiated in some variation upon the notion of the struggle for territorial sovereignty, it

seems at last prudent to reexamine the work of those custodians of the only deliberately peaceful method of achieving this end. It seems at last urgent to doubt the findings of a forum vested with international legitimacy to rule upon territorial sovereignty without anywhere confirming what is meant by "sovereignty", nor even "territory."

Burgeoning cities, well within the Arctic circle, punctuate the Siberian coastline. Murmansk, Archangel, Nor'Ilsk, Nordvik, Dudinka, Srednekolymsk, Salekhard are young, bustling regional core cities, exceeding ¼ million population in many cases, designed to service vast tracts of immeasurable economic worth.

Polar travel by both atomic submarine and air is clearly shorter, often by half, between the great centres of Europe and Asia and of North America, than the route about the latitudinal circumference of the earth.

Both the vilest ravages of war and the fondest dreams of peace are contemplated in terms which intersect at the north pole.

Neither the availability of natural resources, nor the facility for habitation rely any more upon man's proximity to the grape upon the vine.

The north is habitable. It is the last feasible frontier. And it is alleged to secrete a wealth of resources.

By every method known to the law, almost ½ of the north has been unequivocally staked out by U.S.S.R. in the shape of an arc, based in the Arctic Circle and extending up the parallels of longitude to the North Pole. It is called the Russian "sector."

The Dominion parliament of Canada has hesitantly, even guardedly advanced its inquiries about rights in the north. Answers have been volunteered over-confidently by zealous politicians and cursorily by legal writers imprisoned in their jargon and their analagous precedents.

No specific disputes have resolved the issue.

No formal government documents demarcate beyond ambiguity the precise territory to which Canada's federal representatives assert the right to enforce laws.

Countless foreign incursions continue to exist in the north, rendered ostensibly legitimate by recognition of Canadian customs, shipping and licensing regulations.

Many of the indigenous peoples of the area know no sovereign. The defence of that sovereign is at any rate effected by the U.S.A., in whose name, indeed, the polar region was first discovered.

Dereliction or quiescent surrender may truncate the Canadian north, or some portion thereof. More likely, the law, in its honourable inflexibility may facilitate such a loss. To presume, idly, that the Dominion of Canada exists beyond the northern limits of its ten

provinces, much less to the north pole, would be reckless. To ignore the acquisitive nature of men and nations, and to ignore the appeal of the barren frontier would be downright folly.

On the premise that Canada may one day be called upon to defend her claims to the Northwest Territories in a court of international law, the following undertakes to outline the veracity of all reasonable arguments likely to accompany such a defence. Having exhausted the law and having attempted to discern its most predictable position upon this issue, an attempt will be then made to ascertain whether the Northwest, under the stern test of empirical observation and analysis, can actually be called Canadian.

CHAPTER 1. TO ACQUIRE TERRITORY . . . 'CUIUS EST SOLUM'

1. To Delimit the Field

It would be illusory to suppose that the "modes" by which "national" territory is acquired may be conveniently catalogued. International law does recognize however certain distinguishable practices and these have traditionally been reduced to five.

Lassa Oppenheim enumerates these as: cession, occupation, accretion, subjugation and prescription. [1] The terms "annexation" or "conquest" may be substituted for "subjugation."

Admittedly an esoteric term, "cession"may be understood in a general way as the achievement of territorial sovereignty by way of purchase, treaty or unilateral formal surrender.

The incidence of "accretion" is so rare and inconsequential as to merit only summary definition in these pages. Brierly has described it as "the addition of new territory to the existing territory of a state by operation of nature, as by the drying up of a river

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[1] L.F.L. Oppenheim, International Law, ed. H. Lauterpacht, (8th ed.; London: Longmans, Green & Co., 1955), 1, p.546.

or the recession of the sea." [2] Although the Northwest, as we shall come to see, is by no means immune from such events, the concept of accretion in general is only academic, in view of this paper's goals, because the territorial claims at issue completely engulf and extend far beyond the areas prone to such natural change.

Supposing there to be four remaining "modes" we are confronted with a further problem in cataloguing our data. It is a problem of law and legal nomenclature. The essential meaning that the terms(as earlier advanced) bear, are of a specifically legal character. It may be presumed, for example, that there exist at this moment islands in the South Pacific which are sparsely inhabited by primitive peoples; to which property no 'nation state' as we popularly understand the term, has laid claim. For these purposes it may be estimated that territorial sovereignty is exercised over such islands by the natives. The name given to the right by which such sovereignty obtains may be any of the above. Until the right was challenged, it would not matter. If challenged, terms such as "discovery," "long user," etc., would be used; terms which run to the root of the right to sovereignty, but which are not mentioned among the "modes." The point is that the <u>conclusive</u> event in the struggle for sovereignty, whether that struggle is consummated by tribal

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[2] J.L. Brierly, <u>The Law of Nations</u>, 2nd ed.,(London: Oxford University Press, 1936), p. 126.

war or international arbitration, may be ascertained. Once ascertained, it is thereupon amenable to description within the confines of one among the five suggested modes. For this reason, events of an historical nature which may be of the utmost significance in determining sovereignty and which events lend themselves most readily to categorization (eg. the concept of "discovery"), are terms which are ancillary, at the level of definition, to the concepts couched in the five "modes." A region may be discovered and rediscovered repeatedly -- the Northwest is perhaps the world's most salient example of this -- but the moment of sovereignty is described in terms other than discovery. That moment at which sovereignty is awarded(eg. by the signatories of a treaty, by the annihilation of a race of inhabitants, by fiat or other judicial instrumentality) albeit even that the entire transcript of competing discoveries be both available and crucial to determination, is finally pronounced in legal judgment as "cession", or as "effective occupation," whichever the case may be, but not merely "discovery." Certain characteristics of geography, topography, climate, and, curiously, cartography, also come to play in the determination of territorial sovereignty; some with such potency as to seem to amount to independent modes. These will be handled in turn as they become relevant to this study.

Having reduced our study of the modes of acquisition to four, we will now investigate the matter of "subjugation" or "annexation," which may, like "accretion", also be dismissed early.

Briefly, "subjugation" refers to that device by which might triumphs over right. If the rules of war are unfamiliar to the layman, no notion is more simply expressed than,"to the victor go the spoils." To the extent that any prior claim, to any of the territories currently declared to be within the jurisdiction of the Dominion of Canada, may be advanced by any of the indigenous peoples living therein, that claim will surely fail if the grounds be subjugation. Whomever one may choose to nominate as victor in the few wars conducted on "Canadian" soil, the successors of said wars now govern the nation(or the various parts of it). It is a minor point.

With "subjugation" we are dealing with a _fait accompli_. It matters only as a terrible possibility in the future. It represents one of the five methods by which the Northwest, nay, all of Canada, may come under foreign domination. It has experienced virtually no responsible currency among those scholars who have considered the Arctic question. *

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* "The word 'conquest' is not an appropriate phrase even if it was assumed that it was fighting with the Eskimos(sic) which led to the downfall of ... settlements. Conquest only operates as a cause of loss of sovereignty when there is war between two states and by reason of the defeat(cont'd.)

Before the scope is reduced to an examination of the law which chooses between occupation and prescription, a brief mention must be made of "cession." "Cession" is largely a constitutional question and will be dealt with accordingly further in the paper. One aspect of the concept, however, has come back to roost in the literature even though, like "discovery" it has fallen into complete desuetude. This is the matter of the papal grant.

Previous to the 16th century, the Pope apportioned the "New World" between Portugal and Spain. To the present, the respective claims of Chile and Argentina to the Antarctic trace back to this source. With the Reformation and the age of discovery, Britain, France and the Netherlands came to reject the validity of such grants.

"Today, no-one recognizes papal authority in this realm. There is, however, considerable disagreement over the validity of the various methods of acquiring territory which have been proposed to replace papal grants." [3]

One of those methods most apt to breed debate over the territorial rights to both the polar regions

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*(cont'd.)
of one of them sovereignty passes from the loser to the victorious state. The principle does not apply in a case where a settlement has been established in a distant country and its inhabitants are massacred by the original population. See: The Legal Status of Greenland(infra), p. 23.

[3] Donald R. Inch, "An Examination of Canada's Claim to Sovereignty in the Arctic," Manitoba Law School Journal, Vol. 1, 1962, p. 33.

is the "Sector" principle, to be discussed in greater detail further in this paper. It would seem to trace its inspiration to a papal grant.

> The practice of claiming sovereignty over a sector of the earth's surface as measured by the meridians of longitude, is not new. The first example is found in the papal Bull Inter Caetera of Alexander VI, dated 4 May, 1493, later replaced by the Treaty of Tordesillas concluded 7 June 1494 between Spain and Portugal. More recently, various states have circumscribed their claims to portions of Antarctica by meridians of longitude. And several states have subscribed at one time or another to the 'sector theory." [4]

Whatever historical right Canada has to the Northwest is derivative. It gained through "cession" what Britain had to give. It is for this reason that cession is more appropriately considered at a point in time subsequent to examination of those modes of acquisition available to Britain preceding cession. For, as Max Huber, arbitrator in the Island of Palmas case said, "the transferring country could hardly give more rights than she herself possessed." [5]

We are left with effective occupation and prescription, neither of which principles is introduced in practice without an examination of those events of discovery

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[4] J.G. Castel, International Law: Chiefly As Interpreted and Applied in Canada, (Toronto: University of Toronto Press, 1965), p. 236.

[5] "The Island of Palmas Award," The American Journal of International Law, vol. 22(1928), p. 879.

which punctuate the demographic history of a territory at issue.

Discovery, however, is a recurring theme. If it is not an essential ingredient of cession, yet it could, in arbitration, be an essential ingredient of a conflicting claim. Furthermore, it must, in some form, predate those acts which characterize a particular event of cession. Therefore, although it is almost invariably treated under a separate head early in the literature of most contributions to this field of study, since it is important in the Canadian case before, during and after the significant acts of cession, discovery will not be considered separately at this juncture.

At this point we will instead examine the law as it governs the delimited field of occupation and prescription.

2. <u>To Occupy Territory</u>

Only a brief overview is essential to understanding the problems with which the concept of occupation, be it "peaceful," "effective," or "continuous" is freighted. The rest is distilled in the leading cases on the subject.

"...(D)iscovery, although rather unlikely now on this planet, has been considered even by modern authorities to give an 'unchoate' or temporary title, which must be

perfected subsequently by other means." [6]

If the priority of claims based on discovery came to replace the papal grants for something like two hundred years between 1600 and 1800 AD, there is some disagreement as to when and with what effect the concept of effective possession (occupation) came into being. A.S. Hershey [7] says that it was a standard advocated first in theory and later in fact. Von der Heydte, [8] on the other hand, insists that it has always been of the utmost importance in determining sovereignty.

Following the rejection of papal authority, resort was had to those principles of Roman law which lent themselves to the question of sovereignty. The laws regarding ownership and possession of real and personal property were already well settled and proved convenient for translation from the private to the public(territorial) level. It is for this reason that writers such as Morton Kaplan have been lulled into the conviction that prescription (so important at private law) is the decisive feature of territorial sovereignty.

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[6] G.W.Smith, "Territorial Sovereignty in the Canadian North: A Historical Outline of the Problem," Northern Co-Ordination and Research Centre, -63-7, 1963, p. 1.

[7] See, A.S. Hershey, The Essentials of International Public Law and Organization, (rev. ed.; New York: Macmillan Co., 1935), p. 285.

[8] See F.A.F. von der Heydte, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law," The American Journal of International Law, 29, no. 3, (July, 1935), pp. 448-471.

"Peaceful occupation for a number of years, or prescription, is the most common and successful basis for a claim."[9] This measure may well behoove the squatter in his dealings with a municipal government where statutes of limitation dictate the length of time in excess of which, failing any valid claim to the contrary, no man and his property may be put asunder. But it would be of little solace to the Navaho, the Ojibwa, the Inca, the Maori or the Eskimo. The Eskimo was not even conquered. He was only battled once ... in the massacre of Bloody Fall, in 1771; and then by Indians. Brierly has been quick to point out,

> No rules exist as to the length of possession necessary to create title ... but ... law must recognize facts ... and does accept the long continued definitive possession of territory as a good root of title, without regard to its 'origin'.[10]

The key word, again, is possession, which, in the jargon of international law, amounts to effective occupation. Therefore we have elected to treat prescription, which is a variation on the theme, and "effective" possession, under the same head.

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[9] Morton A. Kaplan and Nicholas deB. Katzenbach, The Political Foundations of International Law, (New York: John Wiley & Sons, 1961), p. 142.

[10] Brierly, *op. cit.*, p. 128.

In a summary way it may be declared that the notion of effective occupation was put forward as a binding requirement for sovereignty over new territories, at the Berlin Conference on Africa in 1884 - 1885. [11] The General Act which resulted from this conference (February 26, 1885, Article 35, Chapter Vl) dictated the need, for all of those nations who put their hand to the treaty, to maintain, in the territories claimed, (or to be claimed), a display of authority sufficient to guarantee freedom of transit and of commerce and to protect whatever rights had already been acquired in that region. The degree of authority deemed "sufficient" of course was described more specifically by a draft of certain ascertainable conditions which had to be met. It is interesting to observe however that the signatory nations, then the undisputed masters of the known world, had come to identify the concept of sovereignty with that of force ... legitimate to the extent that it was recognized in the international arena, as against the internal arena.

On September 10, 1919, the Treaty of St. Germain-en-Laye, which replaced the General Act, specified the character of effective occupation necessary to achieve sovereignty in new African regions by the following words

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[11] For a more comprehensive report of the findings of this conference, see The American Journal of International Law Supplement, 111, No. 1(Jan., 1909), pp. 7-25.

in Article 10, requiring the nations 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.

The signatories ratifying this document included Great Britain, U.S.A., France, Italy, Japan, Portugal and Belgium.

Although it is not uncommon to suppose that this document enhances almost beyond challenge the primacy of the doctrine of effective occupation, it must be remembered that the ingredients of the requirement are in no wise applicable to the polar regions in the way they are to the African regions ... and that some of those nations most intimately involved in the polar question are not included among the signatories of the 1919 treaty; namely the U.S.S.R., Norway, Sweden,,Finland, Denmark, Canada, (by that time a Confederation), Chile, Argentina, New Zealand or Australia (at that time admittedly not yet autonomous).

Furthermore, at this very time, by Order-in-Council promulgated by the newly independent Dominion of Canada, the following policy had just been proposed, vis à vis the huge northern tracts which had as recently as 1880 been acquired by Canada:

> ... no steps be taken with the view of legislating for the good government of the country until some influx of populations or other circumstance shall occur to make such provision more imperative than it would at present seem to be.[12]

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[12] Dominion Order in Council, P.C. No. 1839(Sept.23,1882).

In light of this, Gordon Smith has made the following observation.

> If a foreign state had deliberately undertaken to establish a claim in the archipelago at this time, Canada's legal position would have been, to say the least, vulnerable.[13]

Although more will be said later, about the nature of the Arctic, suffice it to say that for the purposes encountered by this investigation it is territory of a nature which may be properly described as "terra nullius." Legal precedents guiding the acquisition of sovereignty over terra nullius are conveniently few and recent. Although none deals with the Arctic in specie, the analogies available in the law may safely be expected to apply to any future dispute ... most particularly as they regard the so-called "Arctic archipelago." Of the three leading cases on the subject, the earliest is the Island of Palmas Case.[14]

The origin of the dispute in this case is to be found in the visit paid to the Island of Palmas(Miangas) on January 21, 1906, by General Leonard Wood, then Governor of the Province of Moro. His visit led to the statement that the island, undoubtedly included in the "archipelago known as the Philippine Islands," as delimited by Article 111 of the Treaty of Peace between U.S.A. and Spain(i.e.

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[13] G.W.Smith, op. cit., p. 6.

[14] Arbital Award in the Island of Palmas Case(United States and the Netherlands), April 4, 1928(Permanent Court of Arbitration), 2, U.N.R. 1,A.A. 831.

the Treaty of Paris, Dec. 10, 1908), and ceded by virtue of this Article to U.S.A., was still deemed by the Netherlands as forming a part of the territory of their possession in the East Indies. The diplomatic correspondence which followed was inadequate to resolve the issue of sovereignty and, in the final resort, arbitration was agreed upon.

Palmas, it was mutually agreed, was a single isolated island, part of no aggregation of islands, about equidistant from Mindanao(in the Philippine Archipelago) and the Nanoesa group (then part of Netherlands East Indies ... now West Irian, as Indonesia has come to refer to it). The American case had been built upon two main elements of occupation ... discovery(allegedly by the Spanish who ceded the Philippines to the Americans), and contiguity (that it was a contiguous part of the Philippine archipelago, over which domain the U.S.A. did most certainly exercise sovereignty clearly by both cession and occupation.) Both of these rights were clearly derivative, based on Spanish conduct and perfected by acts of cession. The Dutch claim relied on acts of effective occupation since 1677. Pursuant to certain arrangements made with native princes in the island of Sangi, the realm of the princes, which included Palmas, fell under the sovereign control of the Dutch. The princes were excluded from any foreign relations, even inter se on some economic questions. Dutch East Indies

legal tender became the currency of the realm. The Dutch East Indies government administered the jurisdiction of foreigners in these areas and imposed on the princes the duty to suppress piracy, white slave traffic, and slave trading and to aid the victims of shipwrecks. To this end the Dutch would seem to have complied very closely with the requirements set down by the nine-year-old findings of the Berlin conference.

Both parties to the dispute mutually attorned to those principles of law current at the respective periods of time crucial to the case; i.e. the time of discovery, the time of cession to the U.S.A., and the time of occupation by the Dutch. In his consideration of the law and the facts a great deal was declared by the Arbitrator (Dr. Max Huber) by way of _obiter dicta_ which served to bring the law on territorial sovereignty up to date (1928) and which is not without relevance to the Arctic analogy.

First, in the matter of _discovery_, it may be remembered that there has been no little ambivalence on the degree to which legal authorities were willing to admit that an act of discovery gave rise to an inchoate title capable of perfection by further conduct. In view of this imperfection in the long history of the law, Dr. Huber was thrust into examination of those precepts which govern "intertemporal law," i.e. which of different legal systems prevailing at successive periods is to be applied

to a particular case which embraces the various and several periods. The argument in the Palmas case for discovery must concern itself with the discovery of the island itself, and not the archipelago with which it was intermittently alleged to be contiguous and which archipelago indisputably was discovered and effectively occupied by Spain prior to cession to the U.S.A. That is an argument about contiguity which follows at a later time.

The discovery itself in its origin seems to have amounted, from the evidence, to "seeing." On this matter, Dr. Huber makes the following remarks:

> If we consider as positive law at the period in question, the rule that discovery as such, is the mere fact of seeing land without any act, even symbolic, of taking possession, involved ipso jure territorial sovereignty, and not merely an 'inchoate title', a jus ad rem, to be completed eventually by an actual and durable taking of possession within a reasonable time, the question arises whether sovereignty yet existed at the critical date, i.e. the moment of conclusion and coming into force of the Treaty of Paris.[15]

Hereupon the "intertemporal" law must be introduced. If the act of mere sight was at one time adequate to sustain a claim to territorial sovereignty by reason of discovery, yet the jurisprudence which alone sustains the legality of that claim also expects the law to change through time. If conduct in respect of that claim does not change accordingly, the claim fails in any dispute

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[15] Ibid., 2. U.N.R. 1.A.A., p. 835.

with a higher claim. Dr. Huber states it thus:

> The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words, its continued manifestation, shall follow the conditions required by the evolution of law.[16]

Dr. Huber then reviewing the law which falls between the alleged discovery and the date of arbitration, concluded that "occupation," to constitute a claim to territorial sovereignty at this time, must be effective. In a pronouncement upon the American claim to title through discovery, Dr. Huber has uttered words which cannot be ignored in our estimation of the Canadian north, most especially her more distant islands.

> It seems ... incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such a title ever conferred territorial sovereignty.[17]

Inspired by such a precedent, Canadian nationals would be well advised to keep one eye on the evolving law and the other on their management of the Arctic islands.

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[16] Ibid., 2. U.N.R. 1.A.A., p. 835.

[17] Ibid., 2. U.N.R. 1.A.A., p. 835.

"Mere" discovery, unsubstantiated with any reinforcing acts, did not sustain the American claim to sovereignty. There was no "sovereignty"... so there can be no argument about "abandonment." This consequence of discovery having been dismissed by Dr. Huber, the issue then of whether "inchoate"title(as against perfected sovereignty) was forthcoming from the discovery, as described below. Applying the inter-temporal law, the Arbitrator declared that:

> .... since the 19th century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered.[18]

No act of occupation was found through the relevant period. Yet, assuming that an inchoate title existed sufficient to pass by cession from Spain to U.S.A. in the 1898 treaty, still and yet it would not take priority over the continuous and peaceful display of authority(prescription) over the island as manifested by the Dutch.

On discovery as an ingredient of occupation, the American claim failed. Attention was directed to an American claim on the ground of recognition by a treaty dating as far back as 1648 in the Treaty of Munster(i.e. the Treaty of Peace of January 30, 1648 between *inter alia* Spain and the Netherlands) which includes territorial

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[18] *Ibid.*, 2. U.N.R., I.A.A., p. 836.

determinations between the two nations regarding *inter alia*, the East Indies. No specific boundaries or frontiers were demarcated here and no mention made of the island.

On the Americans' recourse to the notion of "contiguity", on which ground their claim also failed, Huber had much to say of interest to the student of the Northwest and its "adjacent" islands. Consider the parallel.

> Although states have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, 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) ... As a rule establishing ipso jure the presumption of sovereignty in favour of a particular state, this (alleged) principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other states from a region and the duty to display therein the activities of a state.[19]

Dr. Huber was clearly worried about the responsibility which might accrue to him in consequence of a ruling on contiguity which did not even hope to countenance all of the possible combinations of juxtaposition between mainlands and islands, inhabited or otherwise, throughout the world. In precluding Palmas from falling

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19 *Ibid.*,2. U.N.R., I.A.A., p. 838.

within the contiguous ambit of an unresolved archipelago known as the Philippines, he nevertheless so qualified his remarks as not to forever jeopardize the rights of national terra firmae more appropriately fit subject for such territorial claims ... which would have to include the Arctic islands.

In the exercise of territorial sovereignty, there are necessarily gaps, intermittence in time and discontinuity in space. This phenomenon will be particularly noticeable in the case of colonial territories, partly uninhabited or as yet partly unsubdued. The fact that a state cannot prove display of sovereignty as regards such a portion of territory cannot forthwith be interpreted as showing that sovereignty is non-existent. Each case must be appreciated in accordance with the particular circumstances.[20]

Before this "loophole" be construed by Canadian nationals as a blessing which can redound only to their benefit, it must not be forgotten that, shortly after the 1st World War, the Danish explorer and government official Knud Rasmussen undertook an outright denial of Canadian sovereignty over Ellesmere Island(which might be construed as contiguous with Greenland) and this denial was plainly endorsed by the Danish government.[21]

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[20] Ibid., 2, U.N.R., I.A.A., p. 838.

[21] "Report of Advisory Technical Board," in folder, Arctic Islands Sovereignty, Public Archives, Ottawa.

As to Palmas Island it was conceded that the acts of sovereignty by the Netherlands were indeed infrequent, but that manifestations of effective occupation over a small and ostensibly inconsequential island cannot be expected by any standard with very much regularity. It was enough that the display did exist, openly and publicly, before 1898, when U.S.A. took control of the Philippines, and that such sovereignty had endured continuously and peacefully back far enough in time to avail any contending nation of a reasonable opportunity to discern the existing state of affairs.

The next noteworthy chronological instance of arbitration on territorial sovereignty was recorded in 1934, in the Clipperton Island Case.[22]

Clipperton Island is a desolate, uninhabited coral reef between Guatemala and Hawaii, not far from the fabled Galapagos, and straddling the maritime route between San Francisco and Puntas Arenas, Chile ,. and Cape Horn. In 1705 it was first recorded as being sighted by a British vessel. In 1857 it was sighted by a French warship. In 1858 it was visited by a French naval officer who effected a symbolic annexation and repaired straightaway thereafter to Hawaii, where the French Consulate made a declaration of sovereignty, notified the Hawaiian

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[22] Arbital Award of His Majesty the King of Italy on the Subject of the Difference Relative to the Sovereignty over Clipperton Island, (Mexico & France), January 28, 1931 (Permanent Court of Arbitration), 2.U.N.R., 1.A.A., p. 1100. See also (1932) 26 A.J.I.L., p. 390.

government and published said declaration in Honolulu. The island was then forgotten until a French warship revisited it some forty years later and discovered three Americans ... collecting guano. Representations were made to the U.S. government. Presently, proclaimed as successor to Spanish discoveries, Mexico descended upon Clipperton, put in at a harbour and disputed the French acts of 1858 as less than sufficient to fulfill the prerequisites observed by international law for sovereignty over unoccupied land.

The arbitrator upheld the French claim, adding that any colour of right to sovereignty which Mexico (gratia Spain) may have hoped to exert over the island, had since evaporated due to her inertia(it is an old maxim of equity that the law favours the diligent.) To uphold her claim, France was not obliged to establish local government in such a bizarre, lighthouse sort of place. The "ratio, decidendi" of this case enunciates the essence of the law of effective occupation insofar as it concerns itself with a "terra nullius."

> ... by immemorial usage having the force of law, besides the animus occupandi, the actual and not the nominal taking of possession is a necessary condition of occupation. This ... consists of the act(s) ... by which the occupying state reduces its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking ... that only takes place when the state establishes in the territory itself an organization capable of making its laws respected. This ... is ... but a means of

> procedure to the taking of possession, and ... 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.[23]

This latter situation is of course more easily imagined as it concerns a coral atoll, than a boundless frontier of polar desert.

Most relevant to our investigation of the Canadian northwest and Arctic Archipelago, is a precedent recorded in the same year as the Clipperton case. Curiously enough, although it was a case which pitted Norway against Denmark and concerned Greenland, yet the issue of discovery was not at the root of the decision.

Greenland is so named because the Norsemen, aspiring to attract settlers first to Iceland, had found that name(it translates the same) to be a liability. For a land more distant and forbidding they invented a name designed to have an hypnotic effect on colonials from doleful Scandinavia. There is not a little evidence, from findings such as a Brattalid, that in fact the Irish discovered Greenland. Undoubtedly, the Norwegians settled

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[23] Ibid., p. 1105.

it on and off for many years. But on July 10, 1931, by Royal proclamation, Norway declared part of Eastern Greenland to be under Norwegian sovereignty. Canada, with one eye on the location of Greenland and another on the lie of the land and the sparse habitation, recognized quickly the test-case nature of such a proclamat on. Denmark responded under an optional clause of the statute of the Permanent Court of International Justice, asking the court to declare the Norwegian proclamation invalid, on the grounds that all of Greenland was subject to Danish sovereignty. The matter was resolved in The Legal Status of Eastern Greenland.[24]

Again in this case application was made of the inter-temporal law, in order to vitiate any claims that might have been made following the settlements by Eric the Red which, at any rate, had been abandoned. The Danish government was able to trace its colonization back to the 10th and 11th centuries ... and recolonization circa 1600. By 1900 it had nationalized all commercial activities within the island to provide the staples of life for the inhabitants. Hunting and fishing were regulated and navigational aids established on the coast. Until 1931, no other power had sought to contest the Danish claim to Greenland. But the nub of the Norwegian

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[24] The Legal Status of Eastern Greenland, (Permanent Court of International Justice), Series A/B, No. 53, (April 5, 1933), p. 22.

claim was simply that "Greenland" referred to the immediate areas of settlement, and not an extension of sovereignty to the whole island. It did not deny the limited sovereignty in the south-western portion of the island where Danish activity abounded. Its contention was that the island was severable.,., and that Norway, which populated the North-eastern part of the island, had a right to it. After advancing the basic requirements for sovereignty by occupation being, in the first place, a demonstration of intention (animus occupandi) and, secondly, the decisive acts of effective occupation, the Court then dealt with the question of the territorial extent of effective occupation.

> Norway has argued that in the legislative and administrative acts of the 18th century, on which Denmark relies as proof of the exercise of her sovereignty, the word 'Greenland' is not used in the geographical sense but means only the colonies or the colonized area on the West coast. This is a point as to which the burden of proof lies on Norway.[25]

It was held that 'Greenland' (or 'la Groenlande') could only be deemed to be in use in its ordinary common parlance sense, and that the onus upon Norway was found not to have been discharged.

> The fact that most of these Acts were concerned with what happened in the colonies ... all situated on the west coast, is not by itself sufficient ground for holding that the authority,

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[25] Ibid., P.C.I.J., Series A/B, No. 53, p. 28.

> in virtue of which the act was taken ... was also restricted to the colonized area. Unless it was so restricted, it affords no ground for interpreting the word 'Greenland' in this restricted sense.[26]

This of course could open the door to such unrestricted interpretation of the names assigned to a number of minimally administered islands of the Arctic archipelago.

Norway then tried a new tack. It argued that 'Greenland', as the term was used in documents, could not have been intended to include the east coast because, at that time, the east was unknown. Careful scrutiny of the Danish maps of the 17th and 18th centuries, however, evidenced at least a general configuration of Greenland as it was known to cartographers of that era. Even today it is probably too much to expect terrain of this capricious character to hold a permanent , even seasonal, shape of any precision. Carried to the absurd extreme to make the point, the rejoinder to such argument could be that no geographical boundary is discernible with anything but concensual or probabilistic precision. A general configuration would seem to be adequate.

> The conclusion to which the Court is led is that bearing in mind the absence of any claim to sovereignty by another power, and the Arctic and inaccessible character of the uncolonized parts of the country, the King of Norway and Denmark displayed, during the period from the founding of the colonies in 1721(Hans Egede's colonies) up to 1814[27] his authority to an

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[26] Ibid., p. 29.

[27] The King of Denmark was obliged to renounce, in favour of the King of Sweden, his kingdom of Norway, Article 4 of the Treaty of Kiel of Jan.14,1814, except for the Faroes, Iceland and Greenland.

> extent sufficient to give his country a valid claim to sovereignty, and that his rights over Greenland were not limited to the colonized area.[28]

Buttressing these other factors in Denmark's favour were its actual acts of sovereignty over this unexplored territory. In 1863 it had granted exclusive rights to a man named Taylor for trading, mining and hunting on expressly the east coast. It had granted concessions for the erection of telegraph lines, and had passed legislation fixing the limits of territorial waters.

> These acts coupled with the activities of the Danish hunting expeditions ... the number of scientific expeditions engaged in mapping and exploring ... the occasions on which the Godthaab, a vessel belonging to the state ... was sent to the east coast on inspection duty, the issue of permits by the Danish authorities under regulations issued in 1930, to persons visiting the eastern coast of Greenland, show to a sufficient extent ... even when separated from the history of the preceding periods ... the two elements necessary to establish a valid title to sovereignty, namely: the intention and will to exercise such sovereignty and the manifestation of state activity.[29]

The acts so enumerated would seem to represent nothing less than criteria for rendering occupation "effective" in a terra nullius.

A memorable concession made by the Court in finding in favour of Denmark, was worded in the following way:

> ...in many cases the tribunal has been satisfied with very little in the way of actual exercise

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[28] The Legal Status of Eastern Greenland, op. cit., p. 25.

[29] Ibid., p. 28.

> of sovereign rights, provided that the other state could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.[30]

ergo, Arctic islands.

At least one author has suggested as early as 1933 that by that time in the history of Canada's Arctic all foreign claims had evaporated and that Canada's own claim had become paramount.[31] Thirty years later, in an assessment of Canada's right which might be described as cautious, at best, G.W.Smith [32] has endorsed the statement about foreign claims with little qualification. On the subject of Canada's own establishment of her sovereignty, he suggests that if once there were doubts, they have largely been disspelled by the Eastern Greenland case ... which has reduced so clearly the requirement essential to discharging the tasks of occupation in a terra nullius.

With the principles of these cases, fresh in our mind, particularly the similarities to be derived from the Greenland case, we must proceed then to consider the Northwest and the allegedly "Canadian" Arctic.

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[30] Ibid., p. 23.

[31] V. Kenneth Johnston, "Canada's Title to The Arctic Islands," The Canadian Historical Review, XIV, No. 1(March, 1933), pp. 24-41.

[32] Smith, op. cit, p. 12.

One of the purposes of this chapter has been to demonstrate the cognizance which the law takes of peculiar and distinguishing characteristics of disputed territory as a factor in the awarding of sovereignty. The following chapter will examine the physical characteristics of the Northwest and the Arctic archipelago accordingly.

CHAPTER II. THE NATURE OF THE TERRITORY

1. A Vast and Empty Land

An exhaustive description of the climate or the physiography of the so-called Northwest Territories is beyond the scope of this paper. However this much is vital: that excepting a few islands in Hudson and James Bays, all that is Northwest Territories lies north of the 60th parallel.

The northern tip of Ellesmere Island is 2200 miles from Southern James Bay; the McKenzie Delta lies 2100 miles west of southeastern Baffin Island. The islands of the archipelago, plus the more-or-less unbroken mainland to which Canada lays claim, at 1,253,438 square miles, exceeds the combined areas of the Maritime provinces, Quebec, Ontario and Manitoba. The waters of Hudson Bay, James Bay, Hudson Strait, Foxe Basin and other coastal waters are more than three times again as large as the province of Manitoba.

The mainland consists of two major geological regions, the Precambrian(or Canadian) Shield, and the Interior Plains. To the West, the Territories are divided from the Yukon Territory by the mountainous Cordilleran region.

The Department of Northern Affairs provides the following description of the mainland:

> The PreCambrian Shield, consisting of 700,000 square miles of bedrock, mostly granite, extends from Great Slave Lake in the west to Baffin Island in the east. Except for the rugged mountains of the eastern islands, the Shield country rarely rises more than a few hundred feet ... nevertheless, it presents a rugged and barren landscape characterized by rolling hills and valleys. In places the valleys are water-filled, producing striking finger-like lakes. The Western edge of the shield borders the eastern shores of Great Bear and Great Slave Lakes, the largest lakes in Canada. Major rivers of the shield are the Thelon, Kazan, Dubawnt, and the Back. With the exception of the Thelon, these rivers have falls, cataracts and innumerable shallow rapids which impede navigation.
>
> The Interior Plains lie between the Shield and the Cordilleran region of the Western mountains, and are a continuation of the Great Plains stretching from the Gulf of Mexico to the Arctic Ocean. Within the territories they are dominated by the MacKenzie River. In contrast to the rivers of the Shield, the MacKenzie is navigable for the whole of its 1400 mile course. It reaches the sea through an impressive maze of channels which wind through a delta spreading over several hundred square miles.[33]

The size and global position of the territories have a marked effect on the character of settlement, habitation and subsequent administration of such a region. For purposes of sustained occupation, the land is inhospitable; the moreso as it becomes "arctic" by nature. Yet, in a recent report summarizing those features of the geography most likely to influence further attempts on Canada's part to discharge effective control of the North, at least one myth was diminished.

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[33] The Northwest Territories Today, a reference paper for the Advisory Commission on the Development of Government in the Northwest Territories, Catalogue No. R.29-2625, Ottawa, 1965.

> The arctic circle, at north latitude 66°33'03", which passes from near Fort Good Hope through Repulse Bay to Cape Dyer, divides the Northwest Territories in half. North of it, the midnight sun attains a position over the horizon. The high latitudinal position of the Territories is not as detrimental to occupation of the land as is commonly assumed, the polar night's darkness being not nearly so complete as many believe. When the sun is lowest, the full moon is highest. Even half moonlight on the snow yields illumination sufficient for hunting and travelling activities.[34]

At this point we shall examine the nature of the mainland in the light of its potential "occupiability" by nations, rather than individuals.

Assuming that the Cordillera of the Yukon on the west, the provincial borders of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Quebec on the south, and south-east, and the salt sea to the north and north-east, create natural borders which, if not conclusively, render the Northwest mainland at least amenable to Canada's claims for territorial sovereignty, the next question is whether or not the islands can be considered part of the package. This question reduces itself to a number of questions in obvious sequence.

Are the islands contiguous with the mainland(or conversely, is the mainland their *terra firma*?).Are the islands contiguous with one another? If so, is contiguity sufficient to safely consider the islands, in sum, as an

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[34] Development of Government in the Northwest Territories, Report of the Advisory Commission on the Development of Government in the Northwest Territories, Vol. 1, Ottawa, 1966, pp. 74-75, hereinafter referred to as the "Carrothers Report."

archipelago? Are the islands really islands, or are they ice-floes, or half-ice, or pack ice, or temporarily ice? If they are ice, does this preclude them from qualification for sovereignty under the general rules governing occupation? Or do they qualify as part of the high seas? Or does the interpretation vary from time to time depending on their physio-chemical state?

If indeed they are susceptible of occupation, does any superior rule(eg.) territorial waters, override this prospect? If they are not all equally prone to occupation, how is a division to be made? And finally, all else failing, can Canada seek recourse in some ulterior law, short of subjugation, which will guarantee these territories to her, one and all? In the pages that follow, an attempt will be undertaken to answer each of these questions. Although perhaps an illusory conviction, it is submitted here, by way of explanation of the above sequence, that if it can be demonstrated that Canada has a viable claim to sovereignty over the islands, then it is no longer necessary to prove sovereignty over the mainland since a ring of sovereignty will have engulfed it .. as the land would an inland sea.

2. Contiguity

The principle governing contiguity has already been dealt with in the Palmas case(supra)where it will be recalled that Dr. Huber refrained from making any new law in a case which neither rested preponderantly on the issue of contiguity, nor even remotely hoped to consider all possible cases.

The concept of "continuity" refers to one parcel of land cheek by jowl with another. Where such proximity is broken by water to the extent of creating offshore islands adjacent to a major body of land, the selfsame principle is termed "contiguity." Much of the debate supporting contiguity comes from analogies drawn from supporters of continuity. What little favourable literature there is to support contiguity on these grounds comes notably from American authors. D.H. Miller,[35] having reviewed the doctrines variously named "back country", "hinterland", and "territorial propinquity", long ago came to the conclusion that these doctrines would apply fittingly to the Arctic. This approach experienced a glowing tradition in the annals of American colonization. It may seem cynical to suppose it ironic that an American would encourage Canadian proprietorship to the vast Northwest at a time following the aggrieved foreclosure of the U.S. frontier unless the argument envisages the Arctic as continuous with Alaska. On this same theme, L.M. Gould writes 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(sic) 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

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[35] David Hunter Miller, "Political Rights in the Arctic," Foreign Affairs, October, 1925, p. 47.

wilderness to the West.[36]

This is probably a shaky interpretation of American frontier expansion at best. Until confronted with Spanish claims, the American extensions went unchallenged apart from the historic encounters with the American Indian. At this point subjugation became the vogue.

It has been the opinion of George Schwarzenberger[37] that the best title a nation can probably hope to gain by reason ONLY of contiguity would be an inchoate title, requiring further acts of perfection. This too would have to be construed as an optimistic interpretation of the doctrine of contiguity. One writer more realistically explains it this way:

> 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.[38]

The effect of this interpretation would seem clearly to narrow any presumption even of inchoate title, which might enure to the *terra firma*. Effective occupation of a *terra firma* more reasonably considered would seem to

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

[37] See George Schwarzenberger, *A Manual of International Law*, 4th ed., vol. 1, p. 115.

[38] Q. Wright, "Territorial Propinquity," (1918), 12, *A.J.I.L.*, p. 522.

beget only an invitation to an inchoate title. What confounds all the favourable considerations on the matter of contiguity is an issue which, at first blush, would seem to be less than pertinent to this concern, but on closer examination renders any claim to sovereignty based solely on contiguity quite unworkable in practice ... and which is well settled at law. This is the issue of positive duty which accompanies the doctrine of sovereignty.

> Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other states; for its(sic) serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian. 39

In this light, a claim based solely on grounds of contiguity without benefit of pursuant acts of occupation would surely fail. Nor is it an unlikely stance to take that, unconversant with the international law, a nation would hope to uphold a claim over territory based only on a wish to keep others out of a potentially bountiful land.

A memorandum under the letter head of the British Colonial Office, shortly before cession of the Arctic islands to the new government of Canada, reads as follows:

> The object in annexing these unexplored territories to Canada is, I apprehend, to prevent the United States from claiming them and not from the likelihood of their proving any value to Canada.40

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39 Island of Palmas, op. cit., p. 833.

40 Colonial Office Papers, Series No. 42, vol. 759, p. 19(Jan. 27, 1879).

An historiographer's guess at the logic behind this would probably suggest that the U.S.A. would find Canada's proprietorship over the islands less objectionable than British and that for these purposes, this Commonwealth interest would be better policed from Ottawa than London. After all, Alaska had been purchased only twelve years earlier from Russia.

Although this discourse does not necessarily take the position that continuity affords a strong claim to title, it does balk at any inflexible identification of it with contiguity. The one is not tantamount to the other. If they are based on the same spatial considerations at essence, i.e. proximity, yet the feature which distinguishes the two is precisely that feature which should dissuade any parallel use of the two for the purposes of sovereignty. In the case of contiguity the suggestion is that existence of natural boundaries ought not to disable reasonable boundaries, by reason of proximity. In the case of continuity the suggestion is that the lack of natural boundaries ought not to disable the extension of reasonable boundaries. Both of these are burdensome in actual practice to justify. But surely the argument for contiguity is made weaker by the presence of natural boundaries. It invites the theorist to hurdle every natural boundary he encounters where no claim to the contrary exists so long as proximity is reasonable until he has

created an improbable daisy-chain of sovereign territory which he hopes then to protect through time. Such tradition as this would seem to account for the continued sovereignty of Chile, bisected as it is by river after river and land-locking Bolivia.

Surely, as the Eastern Greenland case(supra) has demonstrated, the doctrine of continuity is bound to experience a certain currency in its application to the Polar regions. The reasons for judgment in that case include:

> ..the absence of any claim to sovereignty by another power, and the Arctic and inaccessible character of the uncolonized parts of the country.[41]

One writer in perhaps a rather hasty response to an obvious commitment to proving the islands belong to Canada, intones that to "whatever extent the contiguity principle can be a valid basis of sovereignty, it strengthens Canada's claims over the Arctic."[42]

This may be premature. As pointed out earlier, the Danish claim to Ellesmere Island could find increased validity due to its propinquity with Greenland(a terra firma?). A Canadian insistence on a minimal right by contiguity would

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[41] Legal Status of Eastern Greenland, op. cit.,p.25.

[42] Inch, op. cit., p. 49.

yield Victoria and Banks at the expense of Ellesmere. Further, if accepted, the principle would lead to disavowal of the ancient "positive duty" of sovereignty which to date does not tolerate international trespassing signs in the presence of massive and wilful dereliction.

As surely as some would seek to prop up the notion of contiguity as a source of title to territory, Dr. Huber unequivocally dismisses it as nothing more than that, i.e. a notion.

> 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.[43]

Canada would seem to have ample enough claim to her vast north without entertaining the hazards resident in the none too popular notion of contiguity.

3. The Arctic"Islands"

The Arctic islands are largely unpopulated and, like Greenland, almost inaccessible for ordinary purposes. But they are not at all uniform. In the east, the Precambrian

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[43] Island of Palmas Case, op. cit., p. 843.

rocks form a spine of mountains from Baffin to Ellesmere Island rising at some points to 10,000 feet above sea level, falling into vertical cliffs. Deep fiords indent the eastern coastline; glaciers or permanent ice fields persist in higher altitudes.

The western islands are part of the Arctic lowlands, a product of recent limestones, sandstones, shale and gravel. To the north and northwest of these lies the Sverdrup Basin, an area of higher relief formed by drastic alteration of the sedimentary rocks. The extreme northwest facing out upon the barren polar basin is a shelf of sedimentary rocks that makes up the Arctic Coastal Plain. This polar shelf extends up to fifty miles into the Arctic Ocean before dropping off into the deep waters of the polar basin.

Comparisons or parallels drawn between the Arctic and Antarctic, in any adjudication of sovereignty, are ill-advised. The Antarctic is utterly unpopulated by any aboriginal peoples. Nor is it likely ever to be. The Arctic is both sporadically populated and responsive in some measure to the changes of season. The Antarctic is a continent covering the entire south polar region, while the Arctic consists of groups of islands, more or less associated with various *terra firma*. The pure accident of geography has made the north much more amenable to a *de facto* application of the sector theory, whereby the Antarctic is like a pie which, if submitted to sector, as can only be expected by mutual agreement, would doubtless lead to [illegible]ernational incidents, not in the least because of the current disfavour

in which the sector theory now exists.

The Antarctic is a massive, generally homogeneous shelf of more-or-less immovable ice. The Arctic on the other hand varies from floating islands to an unstable ice-cap.

This latter distinction leads into one of the most moot and furiously debated characteristics of the Arctic archipelago; i.e. whether ice, in its many forms, is to be deemed "land" or "water" for the purposes of determining sovereign rights. The resolution to this debate gains its prominence from one of the oldest principles of territorial acquisition; you can possess land; you cannot possess high seas.

For purposes of clarification, Appendix #1[44] lists the largest or most significant islands in the Arctic which are settled beyond debate to be landed.[45]

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[44] This outline is admittedly sketchy. However, primary sources and specific facts in this endeavour are hard to find and probably not crucial to this endeavour. What is set down in Appendix #1 was obtained from The World Almanac and Book of Facts, ed. Luman H. Long, (New York: Newspaper Enterprise Association, Inc., 1967), p. 288, in which volume ready admission is made of the imprecision of surveys and the resort to estimation.

[45] The primary criterion which are notably used to eliminate insular regions from any argument on the ice-is-water-is-land are simply size, and most important, stability.

Of these islands, Greenland is the largest in the world. Baffin is the fifth, Ellesmere the ninth, and Victoria the tenth largest. The three latter are all in excess of the area of mainland Great Britain. None of the above is smaller than Puerto Rico, Zanzibar, Corsica, Crete, Cyprus, Malta or the Maldives. Fully eight exceed the island of Taiwan.

The argument concerning ice must clearly confine itself to parcels of territory less monolithic. The ice argument has come to be compounded by two somewhat ambiguous factors. On the one hand the Sector principle, to be discussed later in depth, would incorporate high seas which were never solidified. It would simply carve up a piece of the globe ... and, (sky above, sea below, ice, snow, water and terra firma mutability notwithstanding) present it to Canada.

On the other hand, there are certain islands of a purely glacial character, which float about the Arctic .... to the extent even of floating from jurisdiction to jurisdiction. They have proven able to sustain settlements for months on end, although their demise is clearly near at hand. If they are to be deemed capable of sovereignty in the absence of a Sector principle it could mean that any nation (eg) USSR, China, would be entitled to situate itself one one of these "islands" for the strategic duration of its ephemeral life.

One such ice island, Arlis 11, carried scientists from several countries some 5,000 miles around the Arctic Ocean guided only by the capricious wind and water currents. It sailed into the Greenland Sea, through Denmark Strait, and on to the North Atlantic before breaking up in June, 1965. During its four "occupied" years, it drifted at a rate of two to three miles daily, and was chilled by -40° F. temperatures and 60 M.P.H. winds.

1.5 by 2.5 miles in size, Arlis 11 was first seen in April, 1959 by Canadian surveyors. In spring, 1961, the U.S. Office of Naval Research sponsored research stations manned by personnel from four American universities. The scientists shared their voyage with foxes and polar bears ... some for as long as three and one-half years. Replacements and mail were transported from Barrow, Alaska. Evidence of disintegration caused by Atlantic swells caused abandonment, but the beacons and transmitters were left in place to ascertain that point where it finally deposited its debris, rocks, buildings, etc. During the four years, information was acquired about weather, navigation, polar flights, shortest routes, ice-formation, water chemistry, plankton, jelly fish, crustaceans, life support, cartography, core samples from the ocean floor, prehistory, communications, geomagnetic studies ... all by Americans .. and aliens.

And now,

> The United States is ... manning ice-island T-3 (Fletcher's Island) which, at last report, was in the Beaufort Sea and north-east of Point Barrow ... Ice-islands such as this(thought to be a fragment from the ice shelf of Ellesmere Island) are much more stable for occupancy and research projects for they are 80 to 100 feet thick, whereas ice floes average ten feet or less.[47]

Ice-islands are rare on the Soviet side of the Arctic Ocean. But, beginning in 1937, the Russians pioneered the planning of ice-floe drift stations and are now known to have at least two in operation, "North Pole 3" and "North Pole 4".

> A research station manned by the Soviet Union in 1962 off the coast of Siberia drifted more than 1,000 miles to the Canadian Arctic and developed fissures. It was abandoned and a new station was organized.[48]

There is much evidence to the effect that Greenland is merely a monstrous ice-island, sliding past Canada at the rate of 4/10"each per year. If this is the case, it merely represents the supreme exaggeration of the logic that MIGHT be applied to all ice-islands, i.e. that, for the duration of their habitable lives, they may be considered territory over which national sovereignty can be exercised.

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[47] Almanac, 1966, op. cit., p. 277.

[48] Ibid., 1964, p. 583.

Admiral Peary evidently considered the North Pole, which he discovered in 1909, to be fit subject for sovereignty. Using Ellesmere Island as his base, in 1909 he succeeded, after several attempts, in planting the American flag at or near the pole and claimed "the entire region and adjacent" [49] for the U.S.A. He then wired his President, saying, "I have the honour to place the North Pole at your disposal." The U.S.A. has never acted on such a claim because they have persisted in the belief that the Pole is frozen water, not land. Well, is it?

4. Ice; Mare Concretum or Solum?

Two general schools have grown up around the two interpretations which may be placed upon ice. Insofar as it is stable and at least intermittently habitable, the one school chooses to define it as land. Insofar as it is composed of water and settlements upon it are rendered ephemeral for this reason, then is it deemed by the other school to be water. When the issue comes up for practical application, the "land" school views it as fit subject for the exercise of sovereignty, and the "water" school falls back upon the prohibition against possession of the high seas.

A survey of the literature makes this much, at least, to be clear. No precedent has as yet resolved the

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[49] Robert E. Peary, The North Pole, (New York: F.A. Stokes & Co., 1910), p. 297.

matter for legal purposes. Neither side is altogether accurate in its estimation of ice. The logic used to sustain either argument is derivative, i.e. because we know A and B to be true we are obliged to attorn to C.

Such a survey however behooves the argument of this paper. As has been earlier suggested, the determination of the nature of territory runs to the heart of a predisposition towards territorial rights.

In the first place then, let us examine the "ice-is-land" doctrine and then see if it can stand the strain of comparison. This paper admits to a proclivity towards ice being land. It hopes then to review this doctrine, and then to aspire gamely to falsify it. If in this endeavour the former is indeed renounced, it will cast grave doubt upon a number of presumptions made by "governments." It will inflate the utility of the Sector theory to Canada's claims in the polar north. And this, as we shall come to see, could lead to some peculiar consequences.

Initially, the ice-is-land argument is advanced suggestively, by casting doubt upon any uncompromising treatment of ice as water.

C.C.Hyde has said,

> 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.[50]

In this the seed of doubt is planted, causing the responsible scholar to undertake an examination of the specific character of said substance. Following are several such undertakings:

> 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.[51]

> The main mass that fills the central and largest part of the Arctic Sea constitutes the Arctic pack. It occupies about 70 per cent of the whole conventional area of the Arctic Sea. The two other classes occupy concentric belts around the Arctic pack — the fast ice, the outer belt, and the pack ice, the belt between the fast ice and the Arctic Pack. The pack ice in winter occupies about 25 per cent of the conventional area of the Arctic Sea, and the fast ice about five per cent.[52]

> These three types may be described more clearly as:

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[50] C.C.Hyde, "Acquisition of Sovereignty Over Polar Areas," 19 Iowa Law Review, 1934, p. 286.

[51] This was proferred in the Canadian House of Commons by the then Minister of Northern Affairs & Natural Resources, November 27, 1957, reported in Debates of the House of Commons of Canada(1957-58),vol. 11, p. 1559.

[52] Transche,"The Ice Cover of the Arctic Sea With A a Genetic Classification of Sea Ice," in Problems of Polar Research," 92,(American Geographical Society.)

> ... fast, or coastal ice which freezes during the winter on fiords and bays and along the coast, and melts in the summer; the Arctic Pack, and the pack or drift ice formed between the other two.[53]

Too often quotations taken out of context appear to make a case for ice-is-land. In Castel,[54] the following proposition appears on the credit side of the ice-is-land debate.

> ...if the North Polar Sea were open there would be no question of its being as free as any part of the broad Atlantic and Pacific Oceans. The North Polar Sea, however is covered with ice. Ice, unlike the water of the high seas, is a solid substance upon which mankind can build habitations and live for an indefinite period of time. Thus, during the Russo-Japanese War, the Russians built during the winter seasons a railroad on the ice over Lake Baikal and established a station midway across the frozen lake. And over that piece of railroad they forwarded many thousands of men and great quantities of stores and implements of war. In that sense it may be urged that men might permanently occupy the ice cover of the Polar Sea.[55]

There the reference terminates without further qualification. In fact, as the title of Balch's article hints, he concludes that the immobile ice at the south pole may be made subject for sovereignty, but the frozen seas of the North Pole are incapable of ownership. To this point the assertions on the polar ice have been more

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[53] T.A. Taracouzio, Soviets in the Arctic, (New York: Macmillan& Co., 1938), p. 352.

[54] J.G.Castel, International Law etc., op. cit., p.253.

[55] T.W. Balch, "The Arctic and Antarctic Regions & The Law of Nations," (1910). 4 A.J.I.L., p. 265.

exploratory than affirmative. Sigrist, a Soviet author, has taken a firm position.

> We refuse to admit any legal difference between frozen land and immobile ice; indeed, transportation is just as possible over such ice as it is over land which is frozen and covered with snow. If on the ice one may encounter open water, polyn'ias and other obstacles, one may also encounter ditches, ravines and rivers on land.[56]

This in 1928. Recalling now the intimation made by Hyde in his 1934 article, it is to be noted that in 1945 he seems to have come down strongly on the side of ice-is-land. Questioning the wisdom of law which would found sovereign rights on the substance of habitable property or on its permanent connection with immovable terrain, he reasons,

> This should be obvious in situations where the particular area is possessed of a surface sufficiently solid to enable man to pursue his occupations thereon and which also in consequence of its solidarity and permanence constitutes in itself a barrier to navigation as it is normally enjoyed in the open sea.[57]

Recent Canadian authors have become quite definite about their positions.

> Ice is not merely a form of water; it is a solid substance. Laws evolved for a liquid(..and arguments in favour of freedom of the seas all rest on the liquid quality of the sea) do not necessarily apply

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[56] Sigrist, "Soviet Law in the Arctic,"(1928) 28 Robochii Sud, 986.

[57] C.C.Hyde, International Law,(2nd ed.1945)vol.1,p.348.

> to a solid. Ice can be settled upon; ice is a barrier to navigation; ice possesses defined limits. There is little about ice to invite a comparison with water.[58]

With even greater resolution it has recently been stated:

> Shelf ice is indistinguishable from the ice covering the land itself. Since there is no borderline between the ice covering the land and the 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.[59]

At this point in time, the Soviet Union alone has elected to claim sovereignty over the polar ice-pack. Why has Canada not? Quite apart from reasons involving American diplomacy, the following observations are made.

(a) The Canadian Arctic is very sparsely populated, especially when compared to Siberia. "On the average, in the Northwest Territories, there is only one inhabitant in every 80 miles ... in Asiatic Russia, north of 60°, one inhabitant to every two or three miles."[60]

(b) The Canadians' claim to the Arctic is greatly enhanced by the _Eastern Greenland_ decision(_supra_).

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[58] Castel, _op. cit._, p. 255.

[59] Inch, _op. cit._, p. 53.

[60] _Peoples of the Northwest Territories_, Queen's Printer, Ottawa, 1957, p. 5.

(c) That decision was based, to Denmark's benefit on, inter alia, ..."the Arctic and inaccessible character of the uncolonized parts of the country."

(d) The foregoing arguments allegedly in favour of ice-is-land and of Canada's claims, and notably those points introduced by Canadian authors were based mainly on the logic that ice invites an unsurmountable analogy with land.

(e) If these latter arguments succeed, then the law would be estopped from denying that, for these purposes, some ice,(eg. Arctic Pack) was land.

(f) It would then be confronted with judging whether Canada's polar regions were really of "an Arctic and inaccessible character" if they had already been pronounced "land."

(g) This conflict could be resolved in only two ways:

i. by saying that although it was land, Canada's polar area was still "of an Arctic and inaccessible character," or

ii. by saying that, being land, Canada's polar area was <u>not</u>"of an Arctic and inaccessible character".

The predictable results of such findings would be, respectively:

i. to conclude that the law(which must also be applied to Antarctic) by a proclamation that "Arctic and inaccessible" was tantamount to land, or

ii. to remove Canada's disproportionately underpopulated polar area from the protection of the <u>Eastern Greenland</u> ruling, thus requiring an immediate influx

of people to meet a newly raised standard.

What the above intends to say then, is that more harm than good is done in the cause of Canadian sovereignty by arguing that ice is fit subject for possession because it is like land. Not unlike the Canadian claim to the archipelago based on contiguity, it seems that the simplest and most superficially persuasive argument, presented in good faith on Canada's behalf, reckons, upon closer scrutiny, to be the most hazardous. If the Arctic is no Paradise, the obvious argument for it is a Fool's Paradise.

The argument this paper proposes is as follows;

The islands, the ice-cap and the waters that divide them, admittedly given to change of state in some parts from water to ice and back, are, by reason of this ambivalence(i.e. the freezing-liquefying versus the liquefying-vaporizing sort) clearly "of an Arctic and inaccessible character ..." even more so than Greenland. Therefore even less "effective occupation" must be expected to suffice such a capricious terra nullius. Only token acts of animus occupandi need be performed in furtherance of prior rights of discovery and cession to meet the Eastern Greenland criterion. And, in practice, this is made very easy with the benefits of aviation. Why argue that ice is land-like because it is occasionally habitable? Why not argue that it is only barely habitable, therefore "Arctic" and therefore "inaccessible." ..... and who cares about whether

the _Eastern Greenland_ decision is over-ruled?

To someone hopelessly committed to Canadian sovereignty over the Arctic, the suggestion by a fellow countryman that the ice-is-water argument must take precedence would seem like nothing short of treason. All manner of arguments have been used to enrich the notion of a uniformly Canadian Arctic. It has been said that "reclaimed land is land nonetheless" and that parts of the Arctic simply reclaim themselves. Arguments have been heard to the effect that since Eskimos lived out their lives on ice, that to deny ice was land would be to legislate that Eskimos walk on water. It has been insisted by some that Arliss 11 and T3 are ships of state, that ships of state lodged in pack ice are themselves transformed into pack ice. What boggles the mind is the perseverence at this approach. Any Canadian hoping to defend his Northern frontier would do well to consider the multiplicity of U.S. installations and co-operative U.S.-Canadian ventures there present. If Peary's claim to the polar region in 1906 could be deemed perfected by U.S. occupation since then, Canada could find herself encircled by the U.S.A. However no nation, much less the U.S.A., could lay claim to the area if ice-is-water. Canada would be "as sovereign" to the north as she is to the east and west, i.e. to the limit of territorial waters (discussed infra). To press the ice-is-land issue could well serve to compromise the

American presence in the far north, reducing Canada, in the event of a U.S. - Soviet holocaust, to a total crush zone. Some merit may well be found in examining the ice-is-water debate without wholly prejudicing the ice-is-land debate.

In this venture it must be kept ever present in mind that the spirit of this paper is to try to avoid illusory arguments in Canada's favour, as well as to dispute arguments that are apparently to her detriment.

A number of the arguments interpreting ice as water are largely academic and so merit only passing attention here. By this is meant that they are no more or less a matter of unfalsifiable opinion (albeit zealously held) than the ice-is-land propositions. Among such opinions number those of the Canadian Clute,[61] Balch,[62] Oppenheim,[63] Scott,[64] Taraconzio[65]. They are mainly built on improbably hypothetical cases. Instance of how academic they are was evidenced interestingly in the Taracouzio case.

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

[62] Balch, op. cit.

[63] Oppenheim, op. cit., p. 543.

[64] James Brown Scott, "Arctic Exploration & International Law,"(1909)3 A.J.I.L., pp. 928-41.

[65] Taracouzio, op. cit., pp. 356-7.

Fretting in 1938 about the legal ramifications likely to spring from a USSR weather station breaking loose and floating into sovereign territory, his fear was realized in the "North Pole 7" which floated 1200 miles to a point off Baffin Island. Nothing happened, beyond a brief revitalization of speculation among legal scholars.

The more legitimate arguments based in international law would seem both to abuse the principle of "freedom of the seas" and also to serve in current practice, as anachronistic. Mainly these arguments may be thus recapitulated.

(a) By its elusive nature the sea evades possession.

(b) It is not consistent that one nation should possess the inexhaustible resources of the sea.

(c) The sea has no boundaries. Credit is given these arguments in the following words, respectively:

> i. The open sea is in its own nature not to be possessed, nobody being able to settle there is to hinder others from passing.[66]

> ii. ... use of the open sea, which consists in navigation and fishing, is innocent and inexhaustible; that is, he who navigates or fishes in it does no injury to anyone ... the sea ... is sufficient for all mankind.[67]

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[66] de Vattel, Law of Nations, (1760), volume 1, p. 8, paragraph 280.

[67] Ibid., paragraph 281.

iii. ... real reason for freedom of the open sea is ... freedom of communication, and especially commerce, between the States which are severed by the sea.[68]

(d) Liquids ... cannot be taken possession of unless they are contained in something else; ... lakes and ponds have been taken possession of, and likewise rivers, because they are restrained by banks. But the sea is not contained by land.[69]

Briefly re-examined, without pretending to know all the law in which these principles are couched, they would appear to fail the test of the Arctic.

(a) Hindrance of passage is effected by the Arctic waterways themselves.

(b) Navigation is all but impossible in the distant north except in the rare case by atomic submarine. Commerce is unlikely ever to occur across the Arctic and communication in polar regions is satisfactorily achieved by air.

(c) Liquids that freeze would seem to be amenable to some form of de facto possession(how else could an igloo be called a'home'?).

To frustrate further this logic, it might be remarked how Captain Jacques-Ives Cousteau has come to agitate for the need to colonize the ocean floor. To this end, six oceanauts carried out the industrial experiment known as Conshelf Three in September, 1965, under Cousteau. They

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[68] Oppenheim, <u>op. cit.</u>, p. 543.

[69] Hugo Grotius, "De Jure Belli ac Pacis,"(1646 ed.) in <u>The Classics of International Law Edition</u>,(Oxford), p.190.

lived upon the sea floor at 328 feet for three weeks ---
the deepest underwater base man has yet established. They
then constructed a five-ton oil-well 370 feet beneath the
surface.

Science would seem to be moving along too quickly
for the patient jurist with his falsifiable verities. In
one area however, a direct collision between law and
science has availed law of its most salient argument against
any territorial claim to polar ice. This is founded in the
maxim, "Cuius est solum, eius est usque ad caelum et ad
inferos." Liberally translated: He who owns the land, so
owns it from the top of the sky to the bottom of the
earth. The convention on International Civil Aviation
was forced to admit that if the Arctic Pack assumes the
character of a state, then so too must the sky above and
sea below. In view of the convergence of the meridians
of longitude, it would be theoretically impossible to
fly very close to your own pole. Undersea, how could one
stake out boundaries?

Especially significant is the facility offered
by transpolar air travel. Canada would be acting against
the interests of air travel at large by precluding this

course to the rest of the world on the basis of the old maxim.

What the above approaches would seem to recommend to our attention is that,

(a) The struggle to render legitimate any claim to Arctic sovereignty on the foundation of the ice-is-land argument is not only in vain, but, since the Eastern Greenland case, unnecessary to promote Canada's interest, and;

(b) The argument that ice-is-water and that the high seas defy possession, though increasingly less credible, due to advances in science, is still popular enough to achieve legitimacy in the international forum insofar as it concerns the Arctic. Furthermore, such an interpretation would serve Canada's desire of overriding the general rule against the "exclusionary" side of sovereignty. It would exclude Canada as well perhaps. But then there would arise the next obvious Canadian claim ... to the "territorial waters" around the undisputed land areas.

5. Territorial Waters

Not unlike the Hydra of Greek Mythology, the Canadian claim to sovereignty over the Arctic seems to regenerate upon each discouragement. The last section preceded from the premise that much of the Dominion of Canada was landed, and examined the extent to which this properly could be extended beyond the limits which international opinion will already vouchsafe to her. By the

same token, some of the area under consideration is perennially water, in no way amenable to occupation in the normal sense. If enclosed, as the great northern lakes or inland seas, then, although not occupiable per se, they are still considered fit subject for sovèreignty. In this latter category no argument has ever been made about Hudson Bay, James Bay, Great Bear Lake or Great Slave Lake. All the islands in the former two have been conceded to be part of the Northwest Territories. Hudson Bay[70] at 475,792 square miles is at least the thirteenth ranking ocean -- sea in the world, (some, called larger, are indeterminate). Great Bear Lake and Great Slave Lake are respectively the eighth and eleventh largest "lakes" in the world. They are the two largest lakes totally within Canada. They are fresh water. Also ranking are Lake Nettilling(32nd at 1,956 square miles) in Baffin Island, and Lake Dubawnt(42nd at 1,600 square miles) in Keewatin.

None of the popular sources include figures for bodies of water such as Amundsen Gulf, Coronation Gulf, Queen Maud Gulf, the Gulf of Boothia, Cumberland Sound or Foxe Basin, to name a few. Foxe Basin is comparable in size to the Black Sea; the Gulf of Boothia to the Baltic Sea. The reason for this is symptomatic of a world wide reluctance to decide for once and for all, what these

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[70] Figures admittedly imprecise, taken from Almanac, op. cit., pp. 275-285.

bodies of water really are. The jargon of cartographers is very misleading in this regard. Lancaster Sound is as navigable as McLure Strait, McLintock Channel or Prince Edward Inlet. Cumerland Sound is a bay as is Admiralty Inlet, whereas Chesterfield Inlet is as much a river as is the St. Lawrence. Baffin Bay is comparable to the Sea of Okhotsk or the Caribbean, and Davis Strait is as much open sea as the Mediterranean.

If ice is land, most of these Arctic bodies, at least seasonally, would be converted into constructive lakes. If the "high seas" is a concept inspired in a hope to protect freedom of movement and navigation, it is important to note here that, to this point in history the Arctic archipelago does not lie astride any shipping routes. The only impetus to penetrate the elusive Northwest passage has been for purposes of exploration, security, or simply, as Mount Everest, "because it is there." The Canadian position on the inter-archipelago waters has been to declare them territorial waters ... an icy, labyrinthine, closed shop.

Once again this paper, taking the Canadian side, hopes to lay bare the Canadian argument and then dignify it by trying to falsify these arguments. The suspicion by now has come to be that the best Canadian position(see contiguity and ice-is-land debates) is to renounce its

obvious claims, with their built-in liabilities.

The most obvious claim to all of those waters that lie between the islands, is the one that has been legitimized by the U.S. government.

By its application to the Canadian government for the right to enter these waters to service its DEW line installations, pursuant to the provisions of the Canadian Shipping Act,[71] the U.S.A. has in fact acquiesced to the Canadian position. What the U.S.A. in so doing has not done, is recognize any claims beyond those waters which Canada may claim by the Sector principle.

The Canadian Arctic archipelago may appear at first glance to invite analogy to the Philippine or Malay-Indonesian Archipelagoes. In those cases, attempts to declare as territorial the waters about their islands have aborted. It must be observed however, that the reasons which act to frustrate such claims, do not obtain in the Canadian case. These reasons may be considered as:
(a) Unlike the Arctic, they are immediately abreast of several world shipping lines.
(b) Neither group forms, through its accident of geography, the viable, unified entity that is the Arctic archipelago. The Arctic group, " ... is orderly in the sense that its

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[71] "The Canada Shipping Act,"(short title), Revised Statutes of Canada, 1952, par. 29.

> outer limits are unbroken by vagrant islands lying far-distant from the regular and symmetrical shape of the whole. The archipelago forms a natural extension of the continent and shares with it a common continental shelf.[72]

(c) The many islands of those archipelagoes are being constantly contested over for sovereignty(eg) Palmas, and very little geography substantiates the supremacy of any one challenge. The arguments are historical. The Arctic on the other hand is virtually unseverable(witness the willingness of Norway to recognize this as it turned over the Sverdrup Islands to Canada, in 1930). The longer its islands go uncontested, the stronger grows the Canadian claim by, *inter alia*, prescription.

(d) The racial heterogeneity which characterizes settlement on the islands of the Asian archipelagoes is nowhere in evidence in the Arctic case.

(e) The most graphic feature of the Arctic archipelago, its proximity to a vast and distinctly Canadian *terra firma* is, in no wise, duplicated in the Asian cases ... although the prospect of a Chinese dominated south-east Asia could change that. As discussed earlier, this last consideration, i.e. contiguity, is probably weak and ill-advised by itself. Indeed, the Sverdrup transfer from Norway, albeit amicable, was accompanied by insistence from Norway that their release of the islands must in no

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[72] Castel, *op. cit.*, p. 251.

way be deemed an endorsement of the doctrines of Sector or contiguity. Despite this strategic disclaimer and our own earlier recriminations about contiguity, it cannot be denied that all previous scholarly arguments conferring the archipelago upon Canada would be rendered sterile in the absence of the continental proximity. This is where the argument loses much of its momentum. What sets out to be superficially, at least, a fool-proof defence of a Canadian archipelago, really breaks down into two parts:

(a) The islands form a geographic unity capable of homogeneous treatment by the government, not to be disabled by the fact that they are divided by some very broad waters that flow to the open sea.

(b) That government ought to be Canada.

Contiguity seems to have crept back into the logic in the name of territorial waters.

If, by application of the law of territorial waters, and that alone, Canada could succeed in gaining international recognition over a zone completely circumscribing the archipelago, no recourse would ever have to be sought to contiguity or the Sector principle.

At least three statutory instruments dictate the Canadian law in this respect.

(a) The Coastal Fisheries Act [73]

> ..designated by any Act of Parliament of Canada or by the governor-in-council as the territorial waters of Canada, or any waters not so designated being within three marine miles of any of the coasts, bays, creeks or harbours of Canada, and includes the inland waters of Canada.

(b) The Canada Customs Act [74]

> ... all territorial waters of Canada and all waters forming part of the territory of Canada, including the marginal sea within three marine miles of the baselines on the coast of Canada, determined in accordance with international law and practice.

(c) The Territorial Sea and Fishing Zones Act [75]

> Sec. 3(1) ... territorial sea of Canada comprises those areas of the sea having, as their inner limits, the baselines described in section 5 and as their outer limits, lines measured seaward and equidistant from such baselines so that each point of the outer limit line of the territorial sea is distant three nautical miles from the nearest point of the baseline. (The fishing limit is nine miles beyond the 'outer' limit).
>
> Sec. 3(2). The internal waters of Canada include any areas of the sea that are on the landward side of the baselines.

The technicalities of how the co-ordinates for these base-lines are arrived at are not crucial to this study. Minor exceptions are made and modification of these baselines are contemplated, in the rare event of overlap

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[73] "The Coastal Fisheries Protection Act," Statutes of Canada, 1952-53, cap. 15, sec. 2(b).

[74] "The Canada Customs Act," Revised Statutes of Canada, 1952, cap. 58, sec. 2(1)(b).

[75] "An Act Respecting the Territorial Sea and Fishing Zones of Canada," Statutes of Canada, 1964, cap. 22.

with another nation's baselines. What is important to us is that the "baseline" concept appears to have been adopted once, as above, in 1964, and again in article four of the below:(in 1958)

(d) Geneva Convention on the Territorial Sea

> Article 1.1. The Sovereignty of a State extends, beyonds its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea ...
>
> Article 4.1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

Although a number of points of varying relevance to this study were covered in this Convention, the most important issue is that the document reflected a willingness to accept the principle of drawing straight baselines from headland to headland in the case of deeply indented coastlines, instead of following the sinuousities of the coast. One glance at a polar projection betrays immediately the impact this augurs for Canadian claims. What must not be ignored is the inferiority of this document before the prevailing rules of international law which may conflict, and the fact that it has not yet been ratified.

We look for the source of this "baselines" doctrine

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75 "An Act Respecting the Territorial Sea and Fishing Zones of Canada," Statutes of Canada, 1964, cap. 22.

of territorial waters, to the:

Fisheries Case.[77] In that case the "baselines" notion was developed on three grounds. Inasmuch as the doctrine is supported by at least the four statutes above, it would seem sufficient only to measure the Arctic circumstances against the criteria from which the doctrine draws its justification. These have been limited to three.

(a) It is the land which confers upon the coastal state a right to the waters off its coast. It follows that while such a state must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of baselines must not depart to any appreciable extent from the general direction of the coast.[78]

(b) Regarding the close relationship between certain sea areas and the land areas which divide or surround them,

> The real question raised in the choice of baselines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of inland waters.[79]

(c) Regarding the scope of things which extend beyond purely geographical considerations,

> ... that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.[80]

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[77] Fisheries Case(United Kingdom & Norway)(1951), I.C.J. Reports 115.

[78] Ibid., p. 133.

[79] Ibid.

[80] Ibid.

Although not particularly advantageous to the Canadian claim, the third issue certainly does nothing to frustrate it. The waters are not inextricably bound to the islands by economic ties such as fishing grounds. But the channels do provide the only sea routes through and among the islands ... being arteries as it were of an insular community. At the same time, these sea routes are not used by the world at large with any shadow of regularity. As for usage, such sovereign demands(recall "Shipping Act" supra) as Canada has been wont to exert upon any foreign vessels would suffice to show that already a pattern does exist which is not likely to be altered.

Peculiar to the Canadian case is the circumstance of its straits(even for Canada's own economic purposes) being frozen over for part of the year. The International law which asserts that straits shall be free for all nations and for the purpose of innocent passage, cannot be practiced with anything approaching a guarantee in the archipelago. Nor are these straits used for navigation alone. Some, such as Lancaster Sound, may at times, open up onto the high seas beyond. But for most of the year they are clotted with ice. Navigators may well expect to winter in the Arctic; and a ship "frozen in" is a "fixture" tantamount to land (or ice) itself. In order to control shipping and to prevent vessels from landing at specified ports, it is constantly posed as

essential to Canada's interest that these Northern Straits be considered territorial waters.

If the Canadian custom, usage and legislation could be found to fall within the four corners of the "Norwegian fisheries" decision, such a finding could very well result in the devolution upon Canada of a "closed" archipelago.

It remains only to be answered then whether Hudson Bay can be legalized as a "closed sea" ... a Canadian lake. It is a frank admission of this paper that too much has been written on this to do the subject service in these pages. It is law, in the main, in aid of the defintion of "bays." And it is a subject which, lacking challenge has fallen into desuetude. Only a few major arguments will be sketched here. Recalling our earlier caveats about contiguity, it will be observed in what follows that the one contingency conspicuously overlooked is the question of how the issue would be resolved in the event of Quebec secession.

Much of the argument supporting sovereignty over Hudson Bay rests on principles, yet to be discussed in this paper, of discovery, cession, effective occupation, acquiescence, recognition and sector.

Two geographical problems have proven to be the most vexatious in determining the rights over Hudson Bay.

(a) The location of its mouth for legal purposes, and (b) the width of its mouth. As it appears on the map, the mouth seems to run down a line following the north-east shore of Southampton Island, between Cape Digges off Ungava and the base of the Melville Peninsula. However for all practical purposes of navigation the mouth of the Bay follows a line across the eastern entrance to Hudson Strait. Having entered the Hudson Strait there is no way out except through the very narrow Fury and Hecla Strait(which forms the north boundary of Melville Peninsula, is largely choked with ice and itself leads to another body of water over which the "Bay" argument may prevail, i.e. the Gulf of Boothia.)

Assuming the most favourable choice of mouths, i.e. Hudson Strait, obtains, the problem then turns to its width, being at no point less than 35 miles(between Cape Chidley and Resolution Island). Despite general rules of international law to the contrary, the Canadian government has always acted in a way consistent with an animus occupandi over the Bay, including a statute declaring the Bay to be territorial waters of Canada. [81]

Those "contrary" rules of international law are:

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[81] R.S.C. 1927, cap. 73, sec. 9, ss. 10; Statutes of Canada, 1906, cap. 45, sec. 9(12).

> Gulfs and bays and other arms of the sea, whose openings towards the sea do not exceed six miles in width, are uniformly regarded as within the maritime domain of the state which holds the coast land.[82]

> Most ... refer to defensibility from the shore as the test of occupation; some suggesting, therefore, a width of one cannon shot from shore to shore or three miles; some a cannon shot from each shore, or six miles; some an arbitrary distance of ten miles.[83]

In a review of the leading 1910 case of North Atlantic Coast Fisheries Arbitration,[84] Professor Hall has shown that the three mile rule exercised inflexibly, worked a hardship.

> Tribunal rejected the argument of the United States that the alleged three mile limit was, as a rule of international law, applicable to bays, and that a bay ceased to be territorial if it exceeded six miles inter fauces terrae. The tribunal's reasons ...(1) the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast, e.g. conditions of national and territorial integrity, defence, commerce, and industry;(2) the opinions of jurists and publicists show that, speaking generally, the three mile limit should not be strictly and systematically applied to bays.[85]

This broad ruling did not violate the law as it then stood. In the earlier 1877 Direct U.S.Cable case

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[82] Wilson on International Law(Hornbook Series), 2nd ed., at p. 76.

[83] Direct U.S. Cable Co. v. Anglo-American Telegraph Co., (1877) L.R. 2 A.C. at p. 419.

[84] The North Atlantic Coast Fisheries, Tribunal of the Permanent Court of Arbitration, 1910/Scott, Hague Court Reports(1916), 146,11 U.N.R. IA.A. 167.

[85] Hall's International Law, 8th [illegible], p. 196.

which had the effect of permitting Newfoundland sovereignty over Conception Bay, despite the excessive size of its mouth, the following rule was advanced.

> ... the British government has for a long period exercised dominion over this bay ... and their claim has been acquiesced in by other nations so as to show that the bay has been for a long time occupied exclusively by Great Britain.[86]

This argument obtained notwithstanding the ancient rule that you cannot possess the high seas. The test seems to have become one of demonstrating effective occupation and concurrent acquiescence, whereupon the Hudson Bay debate becomes an historical argument... of treaties and whaling expeditions, etc. What does not appear is any rebuttal of the point that no degree of occupation and acquiescence will serve to reduce the untamed high seas to possession. The argument still persists that Hudson Bay, wherever be its mouth, is still high seas. More recently, a statement on this question sums up the Canadian position.[87]

> A bay ... means a defined inlet, penetrating into the land, moderate in size, and with both shores subject to the same sovereign. An inlet, at the mouth of which one can see clearly from shore to shore may be presumed to

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[86] Conception Bay Case (supra) p. 423.

[87] See Sir Cecil Hurst in British Year Book of International Law, 1922-23, p. 54.

> have been appropriated as part of the national territory and will therefore constitute a bay; for working purposes this distance may be taken as ten miles and the line will then pass from headland to headland. In the case of a larger inlet, it lies on the territorial state to establish that it has been appropriated as part of the national territory. Where this is not proved, the line from which the territorial waters are measured will not pass from headland to headland, but will cross the inlet at the spot where it first narrows to such an extent as to be obviously a bay; in practice this may be taken as the place where it first narrows to tmn miles.

Hudson Bay is not "moderate." It qualifies as a "larger inlet," dictating the need for the "territorial state" to establish that the bay "has been appropriated as part of the national territory," on pain of opening it up in theory to the world.

Considering this and other claims to the Bay, V.K. Johnston has concluded.

> By the rule of international law... from British authorities, Canada has title to Hudson Bay and Hudson Strait. On the basis of occupation and acquiescence by other states in that occupation, Canada also has title to Hudson Bay and Hudson Strait, notwithstanding the general six(or ten) mile rule of International law -- for Canada has occupied and has developed the Bay and the Strait for navigational purposes as parts of the Canadian national domain; that occupation has not been disputed and therefore has been acquiesced to, in both other states.[88]

No matter which way they slice it, the proponents of a closed Hudson come up with the same long argument ...

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[88] V.Kenneth Johnston, "Canada's Title To Hudson Bay and Hudson Strait," 1934, 15 B.Y.B. 1.L. p. 15.

acts of occupation acquiesced to by others. No argument directly confronts the fact that the bay is a sea. No author dares suggest that Quebec secession would probably cause the remainder of Canada, if it tolerated secession, to hasten to a declaration of the Bay as high seas. Why? Churchill is Canada's main port to the Hudson.. with ready seasonal access to the European markets. It is in Manitoba. But one must pass through Hudson Strait to get to it. In the event of Quebec secession(which could include above-mentioned claims to or occupation of continguous Baffinland and thence Melville peninsula), the straits headlands would both belong to Quebec.

Although it seems less than a scholarly submission, it seems safe to guess that the most workable territorial claim to the Hudson would be a statement that,

"... trespassers will be prosecuted...."

i.e. an open admission of the fact that Canada is willing to defend what it considers to be its territory with a show of might.

Otherwise, this writer can see no good end being served by an attempt to twist the law of nations to try and legitimize a claim which, legitimate or not, Canada would protect anyway. It would only weaken the law, set a precedent of "occupation" over the high seas which could be abused anywhere, and diminish the strength of Canada's claims to areas over which the international law serves

Canada very well.

The discussion has led us to the doorstep of Canada's actual claims, as they are and have been exercised over the Northwest. Such doctrines, thusfar sidestepped in favour of a clinical look at the territory itself, as discovery, cession, occupation etc., will now be brought to life in the Canadian case.

The chapter just finished sought only to discern the extent to which the territory may be, due to its character, subject to sovereign rights. The following chapter examines what has been done.

CHAPTER 111. THE NATURE OF THE ACQUISITION

"There are strange things done
In the midnight sun
By the men who moil for gold."
– Robert Service

1. Discovery —"Veni, vidi"

Exploration and discovery of the Northwest occurred both before and after the acts of cession which are alleged to have transferred the Arctic to the Dominion of Canada. But only those "discoveries" that precede cession fall properly into the ambit of those events which might give inchoate title. Those subsequent events fall under the head, more properly, of effective occupation (infra).

Briefly here it must be pointed out that those dates which interest us, concerning cession, are 1870 and 1880. The nature and validity of the events which mark these dates will be examined later. For the present they serve only as demarcation dates. Thyy represent the points in time up to which and not beyond, the rights, which Britain might be deemed to have been competent to transfer, must have been secured by British acts of discovery and exploration.

Before any enumeration of those specific events, a few words are necessary to an understanding of the doctrine of discovery.

In the first place, to be effectual, the act of discovery must not be performed merely by a private citizen, regardless of his nationality. In this the law is not settled upon how much conduct is sufficient to consider a discoverer to be an agent of a sovereign state. No small amount of the earth's surface is known to have been stumbled upon by mercantile adventurers. For even an inchoate title to flow from a discovery, some formality on the behalf of a sovereign state must accompany the discovery.

> ...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.[89]

The discovery then must be more than private and more than "mere" discovery. It must be accompanied by some form of symbolic possession.

To a Scottish newspaper, in a discussion of the merits of the claim made to Antarctica by Admiral Byrd in 1929, just after he had flown over the South Pole, the following summation, albeit sententious, was volunteered.

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[89] British Guiana Boundary Arbitration(United Kingdom and Brazil), June 6, 1904. The King of Italy, arbitrator. See (1905-6)British and Foreign State Papers, p. 930.

"He has seen ... as we have seen the moon."[90]

For most practical purposes of deliberating contested areas, discovery is most often resurrected by one nation as a better right than "prescription" by another. Two notable cases(both involving U.S. [illegible] intimate where the line is drawn between the two.

In the Chamizal Arbitration,[91] a tract of land claimed by Mexico, as successor to Spain, by dint of original discovery was challenged by U.S.A., who had long occupied the area, on the grounds of prescription. A Canadian, E. Lafleur, the Presiding Commissioner, found in favour of Mexico because Mexico had constantly registered their dispute over American control. Is this the stern test? If it is it would seem to invite breach of the rule that territorial sovereignty cannot limit itself to its negative side, (i.e.) the U.S. found itself on the other end of the dispute. A successor to Spain (after the Spanish-American war), the U.S. based its claim to the Palmas Island on discovery. Now the Dutch invoked the principle of prescription and it was found that whatever rights had initially risen out of the initial discovery had not been perfected by effective occupation.

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[90] Quoted by G. Smedal, Acquisition of Sovereignty over Polar Areas, (trans. by Meyer),(Oslo: 1931), p. 52.

[91] Chamizal Tract Arbitration(Mexico-United States) (1910) 5 A.J.I.L. at p. 785, finally settled in (1964) 58 A.J.I.L. 336.

The detailed arguments set down by Dr. Huber have been reproduced above.[92] Briefly restated they examined the two possible interpretations which might be found to redound to the benefit of the U.S. claim, being:

(a) that discovery alone yielded sovereignty; if shown this would dictate a need for the Netherlands to show abandonment, or,

(b) that discovery alone yielded inchoate title which needed only to be completed by acts of occupation.

Respectively considered, the American claims were dismissed because:

(a) The effective date was the date of cession from Spain to U.S.A., by which time, through operation of the intertemporal law, mere discovery was shown not to amount to sovereignty....therefore abandonment need not be shown; and,

(b) Whatever inchoate title did pass to the U.S.A. had never been secured by any palpable acts of effective possession.

Hence, the "peaceful and continuous display of state authority" by the Dutch over the island was found to prevail over the U.S. claim. This must not be considered to be a statement of the primacy of the "prescription

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92 Island of Palmas(supra: notes 15,16,17.)

doctrine. The question does arise however, in comparing this with the "Chamizal" decision whether constant challenge by the U.S.A. of Dutch presence at Palmas would have had the same consequences in favour of the U.S.A. as such acts were found to have for Mexico, whose pronouncements of dispute superceded a clear claim of prescription by the U.S.A.

"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." [93]

For it was at this juncture that Dr. Huber introduced the time-honoured doctrine of no-negative-side. Admittedly the Chamizal and Palmas decisions seem to betray an incongruity in the law, if not a tacit prejudice against U.S. proprietorship over lands claimed by 'underdogs.' Such facts obviously play a large part in decisions of this character. It would not be in the nature of the U.S.A. (at a time replete with the fever of manifest destiny) to expect them to do as the Mexicans did and simply register periodic challenges in respect of lands which they considered to be rightfully their own. So too by 1928 the absence of U.S. occupation in an area which appeared strategic would seem to denote a decided uncertainty by the U.S.A.

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[93] Inch, op. cit., p. 36.

as to their rights to that property. But this is neither a sound basis in law nor an empirically respectable ground for speculating on the conclusions arrived at by international justice.

What we can say with an assurance that, notwithstanding the caprice of the evolutionary "intertemporal" law, approximates a guarantee, is that any claims that Canada may have to the Arctic by grace of British discovery and cession, must be shown to be ...

(a) a discovery perfected to the satisfaction of the law as it stood in 1870-1880, and

(b) a more recent discovery perfected by the more recent standards of occupation.

We have learned that in a terra nullius the criterion for such occupation, in furtherance of perfected discovery, is minimal. We have learned also that in the absence of prescriptive rights by any other sovereign state, the historic right of discovery and symbolic possession remains unviolated.

> .... if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occuping 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. [94]

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[94] Clipperton Island Case, op. cit., p. 393.

In a very summary way, this paper will now outline those acts of discovery which may, at least academically, be construed as competitive in the far North.

For a variety of reasons it is not necessary to examine the Mongoloid migrations. Archaeology continues to affirm the belief that, in distant prehistory, nomadic peoples crossed the Bering Straits and probably sired every specy of indigenous North American from Skraeling to Aztec, from Esquimaux to Arapaho. In the area most likely to confound our findings(the Eastern Arctic, including the islands) three main cultural epochs are discernible.

From 2000 B.C. to 800 B.C. the"Sarqaq" or pre-Dorset peoples reflected a culture similar to cultures identified in findings in Alaska and with the Siberian Stone Age. The climate seems to have been generally warmer than it is today.

From 800 B.C. to 1300 A.D. the "Dorset" culture flourished until the climate became more severe. Alarnerk, perhaps the largest archaeological site in the Canadian Arctic,was one of their settlements, on the mainland across from Igloolik Island. The North Uglit Islands is suspected to be the final refuge of the Dorset people.

From 1200 A.D. to 1700 A.D. the "Thule" culture prevailed, giving rise, it is generally supposed to the current strain of Eskimo.

The Thule people ... represent the last wave of immigrants originating in Alaska who.. easily subjugated or exterminated their Dorset predecessors... There is no clearly defined dividing line between the Thule culture and the present-day population.[95]

Considerations of these peoples for purposes of sovereignty is omitted here since they neither came from nor created any sort of sovereign state capable of advancing a claim to the territory. They have not themselves presented any claim, and at any rate, have been subjugated.

The first evidence of sovereign presence upon Canadian soil comes to us from the notorious pre-Columbian school whose adherents, such as Farley Mowat, demonstrate through such seductive documents as "Nyal's Saga" that the Vikings discovered North America.

On a Spring day about 1003 A.D., Thorfinn Karlsefni, Icelandic master mariner and seaborne trader, led a flotilla of four ships west from Greenland on the first settlement voyage by Europeans to the New World...Sailing south from Baffin Island, the flotilla coasted the sea-girt Terngat Mountains of Labrador... and called the country Helluland ... Land of Great Rocks. The Ships held their course into more southern waters where, so each man hoped, lay the smiling land called Vinland which had been discovered ten years earlier by Lief Eriksson and Bjarni Herjolfsson from Greenland.[96]

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[95] G. Anders, Northern Foxe Basin: An Area Economic Survey, unpublished government document, Department of Northern Affairs, Ottawa, 1965, p. 50.

[96] Farley Mowat, West Viking, (Toronto: McClelland And Stewart, 1965), p. 47.

Indeed do the sagas tell of the birth of Snorri, to the wife of Karlsefni, as the first white child born in North America, predating Virginia Dare.

Another legend, by no means unpersuasive, bestows credit for the first visitation upon an Irish monk, St. Brendan the Navigator, who is purported to have touched upon Canadian soil from his leather hulled craft as early as 580 A.D.

Whatever the merit of these histories, the effect of the intertemporal law suffices to render such discoveries either inadequate or abandoned. Since these ancient times however the following appearances in the Arctic have been made by explorers other than those owing first allegiance to the English Crown.[97]

1596 -- Willem Barents and Jacob van Heemskerek(Holland); discovered Bear Island, touched the northwest tip of Spitsbergen, 79° 49'N., rounded Novaya Zemlya and wintered at Ice Haven.

1619 -- Jens Munk(Denmark) explored the Hudson Bay region and claimed it for Denmark.[98]

1728 -- Vitus Bering(Russia) proved that Asia and America were separated by sailing through the Bering Strait.

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[97] The data which follow have been drawn from sources too numerous to enumerate here. In lieu of an exhaustive list, this paper will endeavour to cite in specific cases the volume which carries the principal account of the discovery under consideration.

[98] C.C.A. Gosch(ed.)Dani[illegible] [illegible]ctic Expeditions 1605 to [illegible], (2 vol.; London: Hakluyt Society, 1897)II, 15,19,2[illegible],[illegible].

1733-40 -- Great Northern Expedition(Russia) undertook to survey the entire Siberian Arctic Coast.

1741 -- Vitus Bering(Russia) sighted Alaska from the sea and named Mr. St. Elias. His Lieutenant, Chirikoff, discovered the coastal lands.

1820 - 23 -Ferdinand von Wrangel(Russia) completed a survey of the Siberian Arctic coast .. he joined the explorations made by Cook at North Cape to confirm the separation of the continents.

These are the only instances of discovery in the Arctic previous to the acts of cession in 1870 and 1880. To this point only the 1619 proclamation by Munk would serve to interfere with whatever claims Britain had.

In the British light, up to this time, the following discoveries serve to uphold British sovereignty to the Arctic. The British discoveries were, in almost every case, characterized by formal taking of possession in the name of the sovereign and published, for all the world to see, in the British government Blue Books.

1497 -- Sebastian Cabot, under the flag of Henry VII, explored the North coast of Labrador.

1576 -- Martin Frobisher of the Muscovy Company, put in at Frobisher Bay on Baffin Island and pronounced the English dominion over all the "Meta Incognita." [99]

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[99] Richard Hakluyt, The Principal Navigations, Voyages, Traffiques and Discoveries of the English Nation, (12 volumes; Glasgow: MacLehose and Sons, 1903-1905) VII, p. 282.

1587 -- John Davis discovered Davis Strait and explored to Sanderson's Hope, 72°12' N.

1607 -- Henry Hudson travelled north along the east coast of Greenland to Capè Hold-With-Hope, 79°30', then proceeded north of Spitsbergen to 80°23' N. Returning he discovered Hudson's Touches(Jan Mayen). In 1610 he navigated Hudson's Bay.

1610-30 -- James, Foxè and Button all led expeditions up through Hudson Strait and Hudson Bay, and the east coasts of Baffin, Devon and Ellesmere Islands became known.

1613 -- Thomas Button was the first European to venture into the Igloolik area, in North Foxe Basin.

1616 -- William Baffin and Robert Bylot coursed Baffin Bay to Smith Sound, and most of Ellesmere Island.

Generally, interest was confined to areas south of the 60th parallel and to the eastern Arctic. Exploration abated somewhat at this time, and, in 1670, the Hudson's Bay Company(to be discussed later) received its charter from the British government. After something like a century of fur trade in the southern interior, a new rash of discoveries reflected the competition between the Hudson's Bay Co. and the rival Northwest Co., both owing allegiance to the British Crown.

1771 -- Samuel Hearne (HBC) crossed overland with a band

of Chipewyans from Prince of Wales Fort(Churchill) on Hudson Bay to the mouth of the Coppermine River.

1778 -- James Cook passes through Bering Strait to Alaska and on to North Cape, Siberia.

1789 -- Alexander Mackenzie(Northwest Co.) journeys from Montreal all the way to the mouth of the Mackenzie River.

1806 -- William Scoresby goes north of Spitsbergen to 81° 31'.

Another lapse accompanied the Napoleonic Wars, after which exploration began again in even greater earnest.

1818 -- Captain Ross leading a Royal Navy expedition came to the conclusion that Lancaster Sound was a bay.

1819-22. Sir John Franklin proceeded through the North-west entire to Great Slave Lake, up the Coppermine River and out into the Coronation Gulf.

1819-20 -- Parry, searching for the Northwest Passage, reached as far across the passage as Melville Island where he wintered before returning.

1821-23-Parry on a second voyage explored Foxe Basin.

1824-5 -Parry on a third voyage explored Prince Regent Inlet.

1824 --- Parry and Lyon travelled north along the east coast of Melville Peninsula. They wintered near Cape Fisher on Winter Island then pressed on to Fury and Hecla Strait which thdy found to be blocked by solid ice. They wintered at Igloolik and next year were still unable to penetrate Fury and Hecla Strait which, at last, they judged to be impassable.

1825-7 --- Franklin, on a second voyage with Dr. John Richardson, explored the entire Arctic mainland coast between the Coppermine River and Return Reef in Alaska.

1826 --- Richardson left Franklin at Point Separation on the Mackenzie River and sailed eastward to explore the coast over to Coppermine. "As his party travelled close to shore and landed nightly to make camp, many contacts were made with the Eskimos who were camped along the length of the coast." [100]

1829 --- Captain Ross conducted a private expedition during which his nephew, J.C.Ross arrived at the magnetic north pole in the Boothia peninsula. Roes himself did not get back home until 1833. In the interim

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[100] G. Abrahamson, Tuktoyaktuk-Cape Parry: Area Economic Survey, unpublished government document; Dept. of Northern Affairs, Ottawa, Ont. Jan., 1963, p. 8.

a search was conducted by Back who had participated in both of Franklin's voyages.Back went overland from Great Slave Lake to the headwaters of the Back River, then down river by canoe to Montreal Island. Further trips were led in the name of the Royal Navy by Capt. Nares(who investigated Northern Ellesmere Island) and Captain Inglis-field.

1837 - 39 -- Dease and Simpson(HBC) explored the remainder of the Arctic mainland coast from Coronation Gulf to Montreal Island.

1837 -- Thomas Simpson had registered the first genuinely invalid claim in the far north.[101] At Point Barrow on the Alaskan coast he claimed the territory for the Hudson's Bay Company. This territory had been placed unequivocally outside British jurisdiction by that treaty in 1825[102] between Russia and Great Britain whereby the 141st meridian of longitude was mutually declared to be their common frontier.

1845 -- Sir John Franklin still searching for the elusive Northwest passage, vanished. His two ships, the Terror and the Erebus, were last seen entering

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[101] Thomas Simpson, Narrative of the Discoveries on the North Coast of America, etc.(London: R. Bentley, 1843), pp. 8,153.

[102] Treaties and Conventions Between GreatBritain and Foreign Powers, III, pp. [illegible]52-66.

Lancaster Sound on July 26 of that year. His disappearance, preceded by a concentration upon those regions generally known to us to be south of the Northwest passage, or east of it, triggered the most fruitful acceleration of quest through the Arctic yet undertaken. For the 14 years that followed, dozens of relief expeditions covering thousands of square miles of unexplored terrain, strove to find the key to the disappearance of Franklin. At last in 1859, a cairn on the bleak Point Victory, near Cape Victoria, told of Franklin's demise in 1847 and of the abandonment of his ships in 1848. Many skeletons and relics were found on King William's island.

Men whose names have since become enshrined upon Mercator's projection of the Canadian Arctic, set out at this time in search of Franklin. They include the Rosses, Pullen, Austin, Penney, Collinson, McClure, deHaven, Kennedy, Bellot, Englesfield, Kellet, Kane and others.

1846-50 -- and later in 1853-54, Rae made two trips looking for Franklin ... and he happened onto the western coast of Melville Peninsula.

1846 -- McClintock sledged 1,408 miles overland in 105 days.

1857 -- Roderick Ross MacFarlane(HBC) explored the length of the Anderson River.

1858 -- McClure by land and water completed the voyage through the Northwest passage.

1863 -- Hall traversed from Wager Inlet in Hudson Bay to Igloolik, overland from the head of Lyon Inlet to Jenness River.

In 1870 and 1880 the acts of transfer were performed by the English parliament, bestowing upon the New Dominion all the Arctic lands in its possession.

To this point in time it seems safe to say that only the claim of Munk of Denmark runs contrary to British sovereignty over all those regions listed above as having been discovered. In answer to what seems no more than an academic question at this time, Munk appears to have been preceded by James, Foxe, Button, Hudson and Frobisher to the same general area. Insofar as the Arctic had been explored to this point then, the transcript of discovery would seem to vest all the known land in that vicinity, in Great Britain. It was hers to cede.

What remains to be studied in the general area of discovery, is the region not yet discovered. The contest for sovereignty at this point becomes one between the Dominion of Canada and all other sovereign nations.

Following Confederation in 1867, the Canadian government dispatched a number of expeditions to the north to secure and patrol her newly acquired rights to the Arctic. By 1910, eight such expeditions had covered

the north, most notably, in 1884, 1885 and 1886, in 1897 by William Wakeham,[103] in 1903-4 by A.P. Lowe,[104] in 1904-5 by Major Moodie of the Mounties[105], and by Capt. J.E. Bernier in 1906-7[106] and in 1908-9[107] and in 1910-11.[108] In each case instructions from the Canadian government caused formal ceremonies of possession to be enacted by these expeditions wherever they travelled. One such ceremony is of particular interest to us.

On July 1, 1909, Captain Bernier mounted a tablet on Melville Island with the following inscription:

> "Winter"Harbour, Melville Island,
> C.G.S.'Arctic', July 1, 1909.
>
> This memorial is erected today to commemorate the taking possession for the Dominion of Canada the whole Arctic Archipelago lying to the north of America from longitude 60°W to 141°W up to the latitude of 90°N.
>
> J.E.Bernier,
> Commander.[109]

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[103] William Wakeham, <u>Report of the Expedition to Hudson's Bay and Cumberland Gulf in the Steamship'Diana'</u>, (Ottawa: Queen's Printer, 1998).

[104] A.P.Low, <u>The Cruise of the Neptune 1903-4</u>, (Ottawa: Government Printing Bureau, 1906).

[105] <u>Report of the Royal North-West Mounted Police 1905</u>, part IV

[106] J.E.Bernier, <u>Cruise of the "Arctic" 1906-7</u>(Ottawa: King's Printer, 1909).

[107] J.E.Bernier, <u>Cruise of the "Arctic" 1908-9</u>, (Ottawa: Government Printing Bureau, 1910).

[108] W.W.Stumbles et al, <u>The Arctic Expedition 1910</u>, (Ottawa: Department of Marine and Fisheries)

[109] See <u>1909-10 Debates</u>, House of Commons, Canada, vol. 1, p. 1730; see also Bernier, 1908-9, (supra) p. 192.

Consider this in the light of the following events:

(a) in 1900, the Norwegian Otto Sverdrup discovered the as yet unknown islands now named the Sverdrup Islands(Axel Heiberg and the Ringnes Islands) during his expedition of 1898-1902. He claimed these new discoveries in the name of the Norwegian Sovereign.[110]

(b) 1903 - 1906 -- The Norwegian Roald Amundsen took a ship throu h the Northwest Passage in what is reputed to be the first clear passage through. He then explored some of the coast of Victoria Island which had remained to this point unexplored.[111]

(c) In 1907, Senator Pascal Poirier of the Canadian Upper House introduced into the Parliament the following motion:

> That it be resolved that the Senate is of the opinion that the time has come for Canada to make a formal declaration of possession of the lands and islands situated in the north of the Dominion and extending to the North Pole.[112]

(d) On April 6, 1909, the American Robert E. Peary after repeated attempts, finally succeeded in planting the flag of the U.S. at the north pole and placing the area at the disposal of the American president.[113]

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[110] Otto Sverdrup, New Land: Four Years in the Arctic Regions(2 vols: London: Longmans, Green & Co., 1904), II, pp. 449-450.

[111] Roald Amundsen, The Northwest Passage, (2 vols:London: A. Constable & Co.Ltd., 1908).

[112] 1906-1907 Debates, Senate Canada, 266.

[113] Robert E. Peary, The North Pole, (New York: F.A. Stokes Co., 1910.

These claims and notions, up to and including the Bernier inscription less than three months after Peary's conquest of the pole, are quite clearly at variance. Bernier's claim represents the practical symbolic act contemplated by Poirier. It would appear to be in furtherance of a general animus occupandi. But the Sverdrup Islands were unrecorded previous to Sverdrup's discovêry and they fall immediately within the 'Sector' confines mouthed by Poirier and Bernier. Furthermore no Canadian had reached the pole, nor had any English navigator before cession. That the area was still undiscovered and conceivably fair game for the first sovereign state to erect its flag on the unfound land was borne out when the 1913-18 Canadian Arctic Expedition, led by Stefansson, at last rounded out the configuration of the Archipelago by the discovery of Borden, Brock, Meighen and Lougheed Islands .[114] In this latter endeavour, he was specifically instructed by the Canadian government to take formal possession of such islands.[115]

Implicit in such formal direction would seem to be anything but a clear, unwavering belief on the part

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[114] Vilhjalmur Stefansson, The Friendly Arctic, (New York: MacMillan Co., 1943).

[115] Dominion Order-In-Council, P.C. No. 406(Feb. 22, 1913.)

of the Canadian government that Bernier's claim was a good one,

The problems springing from the lack of uniformity in the rules governing discovery is illustrated in the case of the Danish denial of Canadian sovereignty over parts of Ellesmere Island. The Danes had always been active in the North. After World War 1, the 5th Thule Expedition (1921-4) saw Therkel Matthiassen, Peter Freuchen and Knud Rasmussen scrupulously course and map the entire region in and about Igloolik, North Foxe Basin and Melville Peninsula before repairing for Greenland, from whence Rasmussen(himself part Eskimo) registered the denial.

To this point in time, pursuant to the foregoing noteworthy instances of discovery, the Sverdrup Island matter has been satisfactorily resolved. The Danish claims have been ignored, and neglected by the Danes to an extent probably sufficient to constitute waiver. The American claim to the north pole and vicinity posss an ineffable anomaly.

As we have witnessed in our discussions earlier, no great currency popularly supports the ice-is-land theorem. Even contiguity in its broadest interpretation can hardly embrace the polar shelf. The polar pack is not fit and proper for the customary application of the laws of territorial waters. And the pole was discovered

by a very vocal American. Further upon this a number of American adventures have preceded the presence of Canadian nationals at 90° N. Byrd, Ellsworth, Bennett, etc. long ago flew over it. The Nautilus, the Skate, the Sargo and Seadragon, all U.S. nuclear submarines have initiated transpolar travel underwater. As the field narrows, only "Sector" seems sufficient to sustain a Canadian claim at law to the immediate polar region. Under the caption "effective occupation" this will be examined more carefully. Suffice it to observe these "maps originating in the United States did not show that lands to be Canadian Soil until World War 11." [115A]

2. Cession

This section might aptly be subtitled, "A Brief Constitutional History of Canada's Northwest Territories." For what Canada did not gain in the north through discovery, she obtained by treaty or by purchase. The rights that Canada received through transfer from Britain, as mentioned earlier, were no greater than the rights Britain possessed at the time of transfer. As we have come to observe in the section on "discovery" those rights, at 1887 and 1888

115A Carrothers Report, *op. cit.*, p. 22.

indisputably did not include all that is now known to be the Arctic. What was transferred, by what devices and with what legal effect will be the substance of the present undertaking.

On the 2nd of May, 1670, a Royal Charter was granted to "The Governor and Company of Adventurers of England trading into Hudson's Bay"(hereinafter referred to as 'H.B.C.'). The HBC claimed as its territory a boundless tract of land which, on any up-to-date map could be seen to incorporate most of what is Western Canada, as well as an ample portion of the north-west United States. The HBC dèclared as well its exclusive right to trade in this territory. The charter was worded in such a way that the land grant was to be considered by the British Crown as "one of our plantations or colonies in North America." The first Governor of HBC was to be Prince Rupert. The territory then, logically, would be named "Rupert's Land." The extent of proprietorship was almost without qualification. The Charter was constituted to name the HBC and its successors to be "the true and absolute lords and proprietors" of the said territory. The sole qualification was that said giant was to operate subject to satisfaction of a nominal rent, and of course, allegiance due to the King. In their Records, the HBC generally refer to the whole of the territories over which they exercised their jurisdiction as "Rupert's Land."

In fact, its boundaries were never very clearly ascertained. In a general way it was meant to include the entire Hudson Bay watershed ... all the land watered by streams flowing into Hudson Bay. In practice the jurisdiction exceeded these limits.[116]

Despite the obvious intentions of sovereignty inherent in the wording of the Charter, the Charter was under constant attack from the French colony until 1763, from Montreal-based fur interests thereafter until 1821, and then from Upper and Lower Canadas, united and separated, until Confederation in 1867. Over all those assaults the heavy hand from London prevailed.

> Few documents have been challenged by such powerful interests or recognized at one time or another for two centuries, by such an array of official evidence ... by order-in-council, by act of parliament, by royal commission, by the opinion of the law officers of the crown, by treaty and by select parliamentary committee.[117]

Any prior or paramount claim by the French colony was vitiated in 1763 by the Treaty of Paris[118] which ceded to Britain all France's North American possessions except the microscopic islands of St. Pierre and Miquelon.

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[116] Most of the source material in this regard is available in "The Canadian Northwest: Its Early Development and Legislative Records, Minutes of the Council of the Red River Colony and the Northern Department of Rupert's Land," Publications of the Canadian Archives, No. 9(ed.), by Prof. E.H. Oliver, Ottawa: Government Printing Bureau, 1915.

[117] Chester Martin, "The Royal Charter," The Beaver, Outfit 276(June, 1945), p. 26.

[118] "The Definitive Treaty of Peace & Friendship between His Most Brittanick Majesty, the Most Christian King and King of Spain," A Collection of All the Treaties of Peace, Alliance & Commerce between Gt. Britain & Other Powers, (London, 1772) v. 11, p. 272.

On 12th of June, 1811 a handsome tract of land was granted by H.B.C. to one of its larger stockholders, Lord Selkirk. This was located along the banks of the Red and Assiniboine Rivers in the southern part known as the Red River Settlement.

The Treaty of Ghent of 1814 re-established the peace that had been interrupted by the War of 1812. It contained dispositions, inter alia, to trace the frontier between the U.S.A. and Canada. And it passed the demarcation line through some of the Red River Settlement, continuing on to the Rocky Mountains along the 49th parallel. The portion of the Red River Settlement remaining in British possession became the "District of Assiniboia." All claims of the HBC extending south of the 49th parallel were rendered forever inoperative. Rupert's Land was diminishing.

The rivalry between the HBC and the North-West Fur Company became at last more than the traffic could bear. In 1821 the two great fur-trading companies amalgamated, to carry on in the name of the Hudson's Bay Company. Pursuant to this amalgamation, an ordinance of May 29, 1822,[119] divided the HBC territories into four districts for administrative purposes. These were called "departments"

[119] "Resolutions of the General Court of the Company," held 29th May, 1822" in Canadian Northwest (supra).

of which the "Northern Department" was one. It may be deduced from the minutes of its Council that the Northern Department was supposed to comprise the territory which lies between Hudson's Bay on the East, the Rocky Mountains on the West, and the U.S.A. on the South, with the Arctic Ocean on the North.

> The Northern Department also exercised jurisdiction over certain other territories, including territories to the West of the Rocky Mountains, and certain districts in the East. It sat once a year, either at York Factory, or Norway House, or Fort Garry.[120]

In 1825 the Alaska boundary was settled by treaty[121] between Russia and Great Britain, consummated in St. Petersburgh(now Leningrad) on February 16 of that year. Unhappily, it was written in the diplomatic lingua franca... French. Where some less ambiguous wording might have resolved forever the matter of polar sovereignty, the French in this treaty so stated as follows:

> ...et, finalement, du dit point d'intersection, la même lingue méridienne du 141e degré formera, dans son prolongement jusqu'au la Mer Glacial, la limite entre les possessions Russes et Brittanniques sur le continent de l'Amérique Nord-Ouest.

Whether the word "jusqu'au"(literally: until) was meant to be translated as "up to" or as "up to and including" the

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[120] Unpublished manuscript, F. Read, "Jurisdiction and Constitution of the Courts in Manitoba," Notes of lectures on Elementary Civil Procedure, Winnipeg, Manitoba Law School, 1962, p. 3.

[121] 12 British and Foreign State Papers(1824-25)p.38.

"Frozen Sea" has never been settled. In 1867 the treaty of sale of Alaska[122] stated ..."proceeds north, without limitation, into the Frozen Ocean". If this in English is equivocal, it is submitted that it is so because it is reliant on the ambiguity fathered by the French. This much seems safe to say. If the American claim succeeded to a boundary extending north along 141° to the pole, then Peary's claim fails in respect of all the territory to the east of that meridian.

By 1857, the HBC was of the general opinion that the territories encompassed by its vague "Rupert's Land" by now admittedly delimited by the 49th parallel and the 141° meridian, still included all the residual territory caught by words of the 1670 Charter, namely:

> .. all these seas, straits, bays, rivers, lakes, creeks and sounds, in whatsoever latitude they shall be, that lie within the entrance of the straits, commonly called Hudson's Straits, together with all the lands and territories upon the countries, coasts and confines of the seas, bays, lakes, rivers, creeks and sounds aforesaid, that are not already actually possessed by, or granted to any of our subjects, or possessed by the subjects of any other Christian prince or State.[123]

That this was beyond dispute was formally declared

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[122] Treaties, Conventions, International Acts, etc. between the United States of America and Other Powers, (1910) v. 2, 1522.

[123] Charters, Statutes, Orders-in-Council, etc. relating to the Hudson's Bay Company, (London, 1931), pp.3-21.

by the then Governor Simpson in 1857 before a Select Committee of the British House of Commons.[124]

Ten years later Confederation was formalized in the British North America Act,[125] to this day an instrument of the British Parliament.

Section 146 of this B.N.A. Act declared.

"It shall be lawful for the Queen ... to admit Rupert's Land and the North-Western Territory, or either of them, into the Union ..."

Thereupon the Rupert's Land Act, 1868, and the Rupert's Land(Loan) Act were passed to provide for the purchase of HBC's rights. These were incorporated into the British(BNA) legislation in 1871.[126]

Government was first provided for these newly acquired territories by the Temporary Government Act of 1869, a measure which was almost immediately replaced by the Manitoba Act of 1870.

By Imperial Order-in-Council dated June 23, 1870, "Rupert's Land" and the "North Western Territory" were united with Canada.

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124 Report from the Select Committee on the Hudson's Bay Company, with Proceedings, Minutes of Evidence, Appendix and Index, (July-August, 1857), p. 46.

125 The British North America Act, 1867; 30-31 vic. cap. 3.

126 "An Act for the Temporary Government of Rupert's Land and the North-Western Territory when United with Canada." Confirmation of Acts of Parliament of Canada, 32 & 33 vic. (Can.)

The Northwestern or Indian Territory, held under license, included all remaining British continental territories west of Hudson Bay except British Columbia.

> There was no authoritative delimitation of some of the other boundaries ... notably those between the territories and on their north. Thus any challenge concerning the transfer of 1870 would presumably have attacked either the validity of the Company's prior title or the doubtless boundaries.[127]

The second notable transfer occurred in 1880. It was inspired in confusion. The HBC had not considered the islands part of their proper jurisdiction. They were not Rupert's Land. Several requests for whaling permits in Baffinland in 1874 by British and Americans led to the conclusion that the islands had not passed in the transfer. However, due to the acts of many of the explorers, the islands appeared to be British. In 1875, a Northwest Territories Act was passed moving the seat of government from Fort Garry, Manitoba, to Battleford, on the North Saskatchewan River. To fix the jurisdiction of this new land, in the same year(April 30) the new Dominion enacted an Order-in-Council requesting a second transfer ... of all those lands not comprehended by the 1870 transfer ... whatever they might be. Shortly thereafter, the joint houses of the Canadian Parliament, on May 3, 1878, addressed Her Majesty the Queen, so asking for a definition of the as

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[127] G.W. Smith, *op. cit.*, p. 3.

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yet indeterminate northerly, northeasterly and northwesterly boundaries of Canada, indicating that, once defined, it was the new Dominion's express intention to get to the business of occupying such regions. The address was worded as follows:

> That, to avoid all doubt in the matter ... an Act should be passed defining the ... Boundaries of Canada as follows ..., On the East by the Atlantic Ocean, which boundary shall extend towards the North by Davis Strait, Baffin's Bay, Smith's Straits and Kennedy Channel, including all the islands in and adjacent thereto, which belong to Great Britain by right of discovery or otherwise; on the North the Boundary shall be so extended as to include the entire continent to the Arctic Ocean, and all the islands in the same westward to the one hundred and forty-first meridian west of Greenwich, and on the Northwest by the United States Territory of Alaska.[128]

As we now know, it was an excessive request. The Sverdrup Islands and the Queen Elizabeth Islands were as yet not known to exist. If the request was clearly an appeal for the whole sector, the whole sector was perhaps not all Britain's to pass. If the request was unequivocal, the British response to it was not. On July 31, 1880, by Imperial Order-in-Council, the British Parliament complied to this extent, viz., "... all the British possessions on the North American continent, not hitherto annexed to any colony ..." [129]

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[128] 1878 Debates, Senate, Canada, Vol. 1, p. 903.

[129] Canada Gazette, 9 October 1880.

Two British motives underlying the hasty yet imprecise transfer, bear cursory examination. It was "hasty", it is suggested for the reasons earlier discussed (see note 40, supra) i.e. to preclude U.S. intervention. It was imprecise because the law of nations availed the British of no more latitude. It could only transfer what it had. And it was less than certain what that was. In order to pass as much as it could and to hasten American exclusion, the Imperial Parliament seems to have written Canada a blank cheque for the unexplored north. The validity of the 1870 and 1880 transfers at any rate raise some interesting points of unsettled law in the international field.

> Whether these were cessions in the international sense is perhaps a moot point, since in each case one form of British sovereignty was substituted for another. It may be added that while the transfers were doubtless binding upon British subjects, they were not necessarily binding upon foreign states, which conceivably could have raised some awkward questions about them at the time. Fortunately for us, none did.[130]

One interesting vignette often introduced to demonstrate the almost irresponsible haste and obscurity with which the 1880 transfer was fraught is such that its wording, taken verbatim, could be readily construed as a gift to Canada of Bermuda, the West Indies and British Honduras.

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[130] G.W. Smith, op. cit., p. 2.

The first and last time that a northern boundary was ever proclaimed occurred in 1895.[131] On this occasion the most northerly point of Canadian sovereignty was asserted to be $83\frac{1}{2}^{\circ}$ N. at the intersection of $63\frac{1}{2}^{\circ}$ W., then sloping, on the east, southwards through Robeson Channel, Kennedy Strait, Smith Sound, Baffin Bay and Davis Strait to the Atlantic Ocean; on the west, southwards off the west side of the archipelago to the mainland.

From that point forward, the British parliament washed its hands of the enigmatic Arctic which had buried so many of her mariners, leaving the young Dominion of Canada to cope with the shop-worn principles of InternationalqLaw.

In less than five years a Norwegian was to discover for the first time Axel Heiberg, Ellef Ringnes, Amund Ringnes, and King Christian Islands. American whalers and speculators were to pour into the north for profit, often unlicensed. Indeed, in less tha a year, gold was struck in the Klondike.[132]

Literally thousands of prospectors were to ravage the forbidden north. Canadians must clearly learn to occupy territory.

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[131] 59-60 Vict., Statutes of Canada, 1896, pp. x/viii

[132] Pierre Berton, Klondike: The Life And Death of the Last Great Gold Rush, (Toronto: McClelland & Stewart Ltd., 1958.

3. Effective Occupation - "90% of the Law?"

It became generally incumbent upon Canada from the 1870-1880 period of transfers, to make good her undertaking to exercise sovereignty over the north. Some of the acts performed in furtherance of this requirement have been anticipated in the latter pages of the section on discovery(supra). In the cases so far considered in this discourse, it is clear that effective occupation must depend on actual occupation, and that the degree of control necessary will depend on the nature of the region(which has been examined in depth in Chapter 2(supra).

In these pages no pretence is made to exhaustively catalogue all those acts and events which might reasonably support a Canadian claim founded on occupation. In the first place, neither time nor space would permit it. In the second place, such an endeavour would court a presumptuous aggregation of data under broadly ill-defined categories, as if to say, "this, this and this are instances of Canadian occupation(whatever that may be,) therefore, etc."... and, in the third place, most such events generally intimate the existence of the fudiments of a "political system" within the boudaries prescribed by this article. Such events would cry out impatiently for microscopic study and readily lend themselves to an examination of far greater proportions than this study contemplates. Ever mindful of the largely international

and legal rather than historical or empirical character of the theme of this thesis, we will confine ourselves to events only of extraordinary salience to the concept of acquisition; those events which, upon the occasion of any future arbitration based on "occupation", would serve as sine qua non for the final decision. But first the concept itself.

As we have earlier suggested, the Canadian rights over the north are largely derivative. Furthermore an attempt has been made to show how the law is not settled and unanimous about those rules governing sovereignty which rules might superficially appear to secure Canada's claim to the far north. Therefore, failing all else, Canada may yet be called upon to fall back upon her last and most practical resort, i.e. actual occupation, to uphold her claim.

The tendency has been to set down some general rules about occupation, then to examine the territory under consideration and vary the rules to fit the circumstances. By way of illustration it may be suggested that a nation state although continuously occupied by the same peoples would be disabled from positing occupation as sufficient for sovereignty should those peoples be subjugated by invading nations. At the other extreme, a general compliance by unsubjugated peoples with the rules of sovereignty-by-occupation will never suffice to occupy the high seas.

Both these extremes find witness in the Arctic regions (the subjugated Amerindians, the ice-is-water controversy) and have been duly considered. Between these extremes reside all the variations of habitation and of geography. So numerous are they as to seemingly necessitate a "subjective" standard, i.e. each claim to sovereignty by virtue of occupation to be judged on the merits of its peculiar circumstances.

It has, despite these high minded promises, been a great ordeal for the author of this paper to discern just exactly what is meant by the sweeping generalization made by the jurists and other contributors to this field.

They seem agreed upon some few principles which may be conveniently operationalized as follows.

They would agree that the English settlement at Jamestown, the French at Louisbourg, or the Spanish in Florida were each insufficient to lay claim to the entire continent, on the basis of the schoolboy logic that there was in each case an inability to defend it all, an inability to traverse it all, and indeed an inability to even approach knowing it all. If this much is beyond debate it is not very much nor very helpful. What it conspicuously fails to do is to anticipate the "modern" era of communication and the diminution of the world's frontiers. The reason behind this and the following lengthy preamble to the specifics of "effective occupation" in the Arctic, is to forewarn the reader of the ambiguities begotten by

changing times and by a law rendered antique not so much through dereliction as by the evaporation of operative analogies fit for the current subject matter. It is in the nature of the law not to invent test cases. Indeed, in matters of territorial sovereignty it would be at the peril of war to presume to try. Inasmuch as the law must await the day when nations elect to seek the counsel of international arbitration, it daily watches its standards for sovereignty sink into the past. Therefore, any issue concerning Canadian territorial rights in the Arctic based on the criteria of effective occupation, must, so long as the devide of <u>stare decisis</u> governs jurisprudence, look back to the last judgments on this issue which <u>seem</u> ipso facto to resemble the current problem. In so doing, they will, as shortly shall be demonstrated, find themselves confronted with a paralyzing dilemma.

This is so because, regarding a terra nullius, or even sparsely populated regions, the law intimates something about the notion that less habitable or hospitable lands require less show of force, display of authority, or regular contact with the remotest parts than would normally be the case. But the judgments come out of an era when up to date communication systems, aviation and nuclear-powered submarines were largely a comic-strip improbability. We have reached a point in time where South Africa in 1967 could occupy the Arctic archipelago as effectively, if not

moreso, as Denmark could occupy Greenland at the time of the Eastern Greenland decision, in 1933(or even now for that matter.) In view of the bent of the occupation criteria toward the notion of the "ability to occupy"(i.e. financial ability, military ability, ability based on proximity, population, habitability of terrain, etc.), and in view of the minimal difficulties now facing any would-be occupation of any terrain, however inhospitable it might be, how are we to translate the jargon of yore into the present day? Are we to presume that the mere accretion of the ability to occupy requires that less and less be done? Or are we to presume that, since the physical sciences have rendered the moonscapes of old to be more accessible, therefore a would-be sovereign is expected to reflect a commensurate measure of accelerated occupation?

In the Eastern Greenland decision(supra)the Danish claim to the entire island was upheld, despite marginal habitation and activity, upon the logic that, due to its "Arctic and inaccessible character," it was unreasonable to expect the Danish government to penetrate further, provide more services, spend more money or send more inhabitants to Greenland. What the Danish government was doing was sufficient ... at the time, under the circumstances and in view of the region. Quaere: Insofar as penetration became easier, services easier to provide, inhabitants more easy to sustain and more people in the world to apparently

justify colonization, NOT due to any recession of the ice-cap or other essential change in Greenland herself, then therefore do these changes cause Greenland to be less "Arctic and inaccessible"? If so, does it raise or lower the standard of occupation sufficient to be effective? At one time the notorious Apache could not be tamed in the absence of a long chain of American forts ... strategically on the spot. Hypothetically, he could be ruled from Washington, Honolulu or Anchorage in 1967, by air, by satellite communication and so forth. Policing is easily achieved from the opposite ends of the earth. Hence, the forts may may be deemed as no longer necessary. To guard against intruders, radar will tell the story. The point is summarily this. By the curiously unprophetic standards of international law that weigh and measure behaviour prerequisite to exerting sovereignty over barren regions ... it could be very well argued that Canada has gained territory in the north, questionably held at one time by "occupation," through a process which will be referred to here and now as "scientific accretion", thereby diminishing the need to do anything more about the Arctic than to register periodic "animus occupandi", let us say, at the United Nations. Let us then look at the law that is supposed to govern this facet of sovereignty.

As was stated earlier in this discussion, effective occupation must depend on actual occupation, and the degree

of control necessary will depend on the nature of the region. The preliminary remarks have dealt mainly with the second matter, the suggestion being that the rules regarding the nature of the region may be less relevant (notwithstanding the niceties mentioned in Chapter 2) by reason of "scientific accretion." The first term, actual occupation, remains to be resolved. It contemplates the possibility of much increased habitation and activity in the barren region, which would at all costs require some form of on the spot control accountable to a distant sovereign. Therefore, if the "Arctic and inaccessible" measure is out of date, the concept of effective occupation retains its currency in light of the reality that certain remote centres of population are burgeoning. All of the law in these matters seems to obviate several questions which the common man might have reason to challenge. In the event of arbitration it does not take into account the wishes of the inhabitants of an area(who might, as in the case of 'irredentists' be virtually dismembered). Nor does it permit the argument that any entity except a so-called sovereign state may be entitled to exercise a valid claim over disputed territory.

It seems to poo-poo the prospect of any sort of happy anarchy to exist over any length of time or any appreciable distance. Therefore the law expects and virtually encourages a sort of macabre fair play whereby

great numbers of people, with some allegedly common interest or nationality, are expected to extend their frontiers as far as they can, to jealously defend the limits of their penetration, to somehow impose a conccionable sort of conformity upon the inhabitants trapped therewithin(if less than conscionable it is generally disregarded, as being "their business"), and in all other respects to "play the game," as epitomized in the precipitous turn-of-the-century symbiosis called "balance of power." Nomads, practicioners of transhumance or the saeter system, "acephalic" tribes as in North Africa, groups like the palaeolithic throwbacks of New Guinea who are totally ignorant of humanity outside their small bailiwicks, masses as in India whose cultures are hopelessly incompatible one with the other, are all for legal purposes at the supranational level, recognized as lawfully engulfed by the sovereign power of whatever governing body is permitted by other governing bodies to brandish the sword. The rule of law, couched in the euphemism of "[illegible]rity" is might. If it does play as obviously into the subtleties which accompany claims to sovereignty through discovery, cession, contiguity, prescription, the sector principle et al, it emerges out of an elusive nomenclature as the abiding theme of effective occupation.

The Berlin Conference[133] of 1885 and its resurrection in 1919[134], as we have seen earlier, obliged the signatories, on the brink of African colonization, "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."

This touchstone, the dates of which remarkably coincide with Canadian incursions into the Northwest, fails to betray the obligation which a sovereign state must discharge to secure uninhabited land.

One major point this paper has made is that in this day and age, the degree of de facto settlement is all that should matter since the nature of the land is so much less an obstacle due to scientific advances. However, historically, the nature of the land was a paramount consideration. Distance, climate and fecundity dictated man's settlement. And it was at just such times as these that the sovereignty over these regions was being negotiated. In the absence then of any current dispute, the relevant time of occupation could scarcely avoid the issue. This is why the literature is replete with qualifications made about the nature of the land.

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[133] See note 11(supra).

[134] *The General Act and Declaration at Brussels*, 2 July, 1890 at Saint-Germain-en-Laye, 10 September 1919.

In his 1930 article, "Rights Over the Arctic,"[135] Professor W. Lakhtine has insisted that effective occupation is unreasonable to expect. Gustav Smedal, the Norwegian, in 1931 recognized the impracticability of effectively occuping forbidding territory. He said,

> ... 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 different cases. The actual means must be adjusted to the particular conditions of the different areas.[136]

What he does not deny is that, however vacant or inaccessible these regions may be they are not therefore ineligible for the exercise of sovereignty. Merely the rules governing sovereignty must be altered. Recalling the 1932 Clipperton Island decision(supra) Professor Dickenson reflected in the following year [137] that the only occupation necessary in such regions is that which is appropriate and possible under the circumstances. Once again the issue is obscured for us since what is possible or appropriate has drastically changed with the advent of science. In the same year, Von der Heydte seems to reinforce this princple. He goes even further by implying

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[136] G. Smedal, Acquisition of Sovereignty over Polar Areas, Oslo:1931, p. 29.

[135] W. Lakhtine, "Rights over the Arctic"(1930), A.J.I.L, 710.

[137] Dickenson, Editorial Comment on:"The Clipperton Island Case,"(1933), 27 A.J.I.L. 130.

some validity of the contiguity argument which he justifies by force of arms.

> ..effective occupation ... 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.[138]

At the time this is being written, such a standard would present a most interesting problem should the Sinai peninsula be submitted for arbitration in a dispute between Israel and Egypt. For it seems that since neither "nation" has appreciably filled this arid and forbidding land with its nationals, the decision would have to turn on which of the two nations could offer the "stronger" force. Clearly it would be Israel if Egypt is assumed to be the "third state." Therefore a decision sought in lieu of subjugation would be decided at last on the very basis of subjugation, which device the international forum seems pledged to deplore.

As an afterthought, even the 1919 version of the Berlin Conference was not immune from making qualifications about the extent to which "effectiveness" varied with local conditions.

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[138] F.A.F. Von der Heydte(supra note 8) at p. 463.

"Considérant que les territoires sont actuellement placés sous des autorités reconnues, qu'ils sont dotés d'institutions administratives conformes aux conditions locales." [139]

The combination of a show of force and its mitigation due to the vacancy of the land, is the measure emphasised again by George Schwarzenberger, where he declares, [140]

> 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 the circumstances, such as the size of the territory, the extent to which it is inhabited and, as the deserts or polar regions, even climatic conditions.

The test, then, has been eminently "subjective." Inherent under all the massive ambiguities with which the "legalese" is fraught(what is "adequate" state machinery, "actual" display, power "if necessary," a "minimum" of "order"?) is the uncomplicated principle that, so long as you are a nation, you can own whatever it looks like you can defend, and it takes less to convince the international jurists that you can defend empty land. This is clearly out of date since, if no other nation but Egypt existed,

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[139] See Note 11(supra).

[140] Schwarzenberger, "Manual, etc.", op. cit., p. 115.

Israel could obviously "defend" the entire world. The reality is that force of arms will determine who governs a disputed territory except in the event of peaceful arbitration. And, if the latter is invoked, it seems pure folly to argue about the character of the land in the face of the aforementioned "scientific accretion." Yet, without resort to the anachronistic laws about the "ability to occupy" otherwise vacant territory, the courts are stuck with recourse to the quaint refinements of original title by discovery or to plain and simply conducting a duel between the disputants.

Little imagination would divine their option.

What rests heavy on the books as the last great precedent which invites analogy to the Canadian claim, is the Eastern Greenland case. It has been suggested by Kenneth Johnston[141] and by G.W. Smith, that if all else were to fail, this decision has secured the Arctic archipelago for Canada.

> ... the court recognized Denmark's title not merely to East Greenland but to all Greenland, even though it is more than nine-tenths uninhabited. If at any subsequent time Canada's title to the archipelago had been formally challenged, the precedent of the East Greenland case would, I think, have been sufficient to decide the case in her favour.[142]

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[141] See Note 31(supra).

[142] G.W. Smith, op. cit., p. 12.

This seems to be mistaken logic; a false sense of security. Why? In that case, the court set down two ingredients for the "continued display of authority" essential to the establishment of a territorial claim based upon effective occupation. The first of these was the intention and the will to act as sovereign; the well-known "animus occupandi." If Denmark evinced such a will Canada must confront the embarrassment of the 1882 Dominion-Order-In-Council [143] declaring that "no steps be taken with the view of legislating for the good government of the country until ..."

Jesse Reeves has argued quite persuasively that the Greenland decision appears to be ".. of support to a state which is seeking to strengthen its claim to territory upon bases other than effective occupation." [144] Yet in 1958, Walter Dinsdale, Minister of Northern Affairs and National Resources, made the following statement to the House of Commons of Canada:

> ... where you have great powers holding different points of view the only way to hold ... territory, with all its great potential wealth, is by effective occupation. [145]

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[143] See note 12(supra)

[144] Jesse S. Reeves, Editorial Comment on "George V Land," (1934), 28 A.J.I.L. p. 119.

[145] 1958 Debates, House of Commons, Canada, vol.4, p. 3540.

What seems readily to flow from the Minister's remark is not an interpretation of rights by occupation based upon a minimal commitment justified by the desert nature of the land, but rather a vigorous penetration of the Arctic "wastes." An emasculation of the right by effective occupation would seem anathema to the north-gazing young Canadian national. The Greenland decision could clearly redound to the benefit of the U.S.A. with its DEW line installations, its co-operative research projects, its subpolar expeditions, its Peary legacy and its unquestioned ability to defend, as no other, the far north from any concerted pretensions by the U.S.S.R.

Effective occupation MUST mean nothing less responsible than systematically populating the islands, serving and educating the indigenous peoples, working the land, symbolically pronouncing sovereign claims and garrisoning the boundaries wherever they may be, if the concept is to enure to the permanent proprietorship of Canada.

It is important then to re-examine some few of those approaches to the notion of effective occupation which tend less towards concessions made in light of barren land and more towards concessions to a vigilant squattocracy; a principle founded on who is there rather than who is not. In this regard, acts of development, expenditures undertaken and the bare facts of 1967 communication make

amply more sense. Perhaps a more articulate exhortation of this slant is voiced by Charles C. Hyde, as follows:

> If on account of the rigor of the climate in the polar regions, the minimum requirements of the law of nations for the acquisition of a right of sovereignty over newly found lands are to be deemed to be relaxed when the area concerned is within those regions, the scope and character of the relaxation need careful analysis and observance as practices are in course of development. At the present time, means of communication and transportation as well as control are such as to justify a demand for more than an assertion of dominion by a mere symbolic act, and to cause the perfecting of a right of sovereignty to be dependent upon the exercise of some measure of control.[146]

This statement at least streamlines the law if it does not resolve the practical problems. It admits to a flexible measure of effectiveness, responsive to technical change. But it leaves unsettled the larger question regarding the "animus" of the occupier. The mental element suggested by Hyde above does not seem to vary. In the old style he seems to endorse the Clipperton position that the occupying spirit is mainly expected to reflect an intention to exert dominion and control over territory. Therefore, his view that the old standard of the conduct sufficient to accompany the act must vary as it becomes less "unreasonable"(as Lakhtine would say) to expect physical presence in proclaimed regions, does not at all fulfill

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[146] Charles C. Hyde, International Law, (2nd ed.), (1945) VOL.1, p. 348.

the expectations of this paper. It only renders the old view more respectably modern. Still moot is the issue of why, if the exertion of control is all that is required to ensure a right and if control is more easily exerted as science reduces the accessible horizons, of why <u>more</u> physical presence should be exerted. The answer to this, only feebly alluded to in the literature is available from a fusion of two less popular yet all the same irreversible principles, being, (a) to exclude other nations is not enough, and (b) to exert a right without undertaking a concurrent duty, is not enough. For both these principles, the Clipperton Island logic is inoperative, even though so many jurists have relied on it. In the first place, there was no attempt nor any need to exclude others from the island until the two disputants came to court. At this time they could both be attributed with little more motivation than mere exclusion, so that their respective exclusionary aspirations simply cancelled each other out, leaving other evidences to scramble for priority. In the second place, no duty could be expected to accompany any pronouncements even symbolic, of sovereignty. Being uninhabited and about as prolific as the dark side of the moon, the island is only strategic like Bikini, or Galapagos may be deemed to be. It is the genuine and indeed rare case where the "circumstances" not only <u>can</u> be held to properly dictate the degree of occupation, but also to defy change despite the changing

times. Perhaps it could serve as the busy headquarters for a mythical Captain-Nemo nation of some future time. But the law ought not, it is here suggested, be premised on such unlikely fantasies. Certainly it is ill fit to be a litmus for the vast Arctic.

What we have tried to show so far is the orientation of the law to admitting of a negative right by inflexible rules rather than a positive duty by flexible rules. We have tried to show how the colonial temper was to hoard as much land as possible at the least expense and to concoct a law which enhanced original titles without requiring continuous demonstration of formal occupation. The Eastern Greenland decision compounds this view. We have tried to suggest that the old law does not call for increased activity in desert regions only by reason of progress having reduced inaccessibility and habitability, because the old law is premised on defensibility, guarantees of territorial integrity, protection of frontiers and so on which can be achieved from the sovereign core area with even less gunboat presence or soldierly outpost than ever before. Radar will tell of any foreign incursion and missiles will eliminate it. The "occupier" can sit thousands of miles away and do nothing but press buttons, urge regional autonomy and make formal gestures in high places about territorial sovereignty.

If the standard is viewed as a "duty", the modern era clearly maximizes the duty and operationalizes the concept of ability to occupy. It would insist that now that modern aviation etc., has opened the north, it must be inhabited, guarded, exploited, and its people cared for to an extent deemed by the international forum as "reasonable," in the circumstances. If then the national budget cannot absorb the expense, if economic expertise cannot woo investors, if Canadian citizens are neither sufficiently numerous nor hardy to move north, or if the Canadian militia cannot apparently defend its frontiers(note: this is only one ingredient of the "duty" syndrome) and guarantee the commercial freedom and territorial integrity so venerated of old, then Canada should not, in any arbitration be awarded said territory on the basis at least of effective occupation. What this paper must guard against at this point is, as has happened earlier, a stumbling into the following section. For the invitation herewith is to entertain no longer a rule about how little must be done to perfect an original claim, but rather who, amongst contesting sovereigns, can show they have done the most. This matter carries us into "prescription" at a time when something remains to be said about effective occupation.

Canada's north is becoming less and less a terra nullius. The conviction this paper would hope to relay is that standards of effectiveness of occupation can be

derived more appropriately, in the jaws of the Malthusian nightmare, from the inhabitants of the North themselves, and from the extent and character of actual government "activity" rather than government "ability." This is not to say that effectiveness is vitiated in the absence of actual occupation. It merely invites a substitution of willingness to discharge a duty for willingness to enforce a right. It proposes further that "ability" is an abstraction less than consonant with the spirit of the law: The law should surely be no less reluctant to recognize a claim to territory based on future ability to defend, than it would be to enforce punishment for an N.S.F. post-dated cheque(i.e. drawn in the hope of the future ability to pay). Intent and deed must coincide. Consider the curious reasoning of T.E.M. McKitterick:

> At any given moment there are large tracts of Northern Canada where no persons or property are to be found, yet the courts of Canada, possessing as they do the ability to control persons who may resort there, may fairly be said to exercise jurisdiction over those areas. If Canada were for any reason incapable of exercising such jurisdiction, the only conclusion which could be reached would be that she did not possess a good title to the ownership of these areas.[147]

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[147] T.E.M. McKitterick,"The Validity of Territorial and Other Claims in Polar Regions"(1939)21 Journal of Comparative Legislation and International Law(3rd series)at p. 95.

of her armed forces and the relegation of her constitution's residual power to a mere enumerated power(witness the confinement of the "peace, order and good government clause")[148] the Dominion Government is hard pressed to exercise jurisdiction even over its oldest constituents. Property, civil rights, education, grants-in-aid, double taxation, etc., are gradually eroding federal jurisdiction to a mere symbolism. Yet the opinion of the natives of Ontario, Quebec, Alberta and so forth is that they are at least equal partners in Confederation, and would certainly attorn to no other "national" sovereign than the one lodged at Ottawa. The test of "authority", the subjective estimate of prerequisite authority, would seem less than the most certain guarantee of effectiveness. It is proposed that the term "efficient" in its broad rather than mathematical sense be more appropriate. This means to say that the fruits of the exercise of duty are measurable. They are measurable in two ways; (a) deeds performed in furtherance of duty to claimed but indisputably uninhabited lands, and (b) inhabited land. Where the legal writers would impose the minimal degree of occupation in the former case and the much accelerated degree in the latter, this thesis takes just the opposite view.

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148 See B.N.A. Act, (supra) at sec. 91.

Von der Heydte has mentioned that it would be "a misconstruction of the doctrine of effectiveness to say that sovereignty over completely uninhabited land presupposed in every case actual occupation."[149] Perhaps he is correct. Perhaps no absence of inhabitants should *prima facie* disable sovereignty. But to lump together pure *terra nullius*, sparsely populated regions and even moderately populated but inhospitable regions is not sound in logic. The difference between one inhabitant and none is a vast difference, even if considered in the view that an inch on the end of Cleopatra's nose would have changed the history of the World. Not one human inhabits Mars or walks the seas. If but one did or does the regulations of territoriality must answer to it. Therefore, so long as Mars and the high seas remain effectively unoccupied by reason of current reality, then the presumption must be made(as it has been historically about the high seas) that such a region is unavailable for pretensions about sovereignty. The specific reasons why they are not habitable should not matter, since, at any rate, they are ephemeral reasons, subject to the extent of scientific gains. It should only be presumed that the reasons are, for the time being, good enough. Therefore, if great northern tracts are, as Von der Heydte and McKitterick tell us, utterly uninhabited,

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[149] F.A.L. Von der Heydte(supra note 138), p. 463.

then it should be presumed for the time being that they are uninhabitable and so unfit subject for the law of nations to confer sovereignty. Now, admittedly, in view of these peculiarly polar regions being "of this world" and, it may be argued(ice-is-land), hopefully occupiable, it is unrealistic to expect that they will be treated in practice as incapable of sovereignty. However, it must be remembered that (a) effective occupation is not the <u>only</u> recourse to claims for sovereignty(eg) the sector principle as we shall see, could secure territory for the aspirant nation without abuse being done the doctrine of effective occupation through attempts to distort it; and (b) this is only posed as a "presumption" which at law is only a device to perfect the fact-finding process, which device may be relieved in the presence of sufficient evidence. Evidence for these purposes, varies of course, depending upon whether the test used is "subjective" or "objective."

Traditionally the subjective test has made greater demands on a disputant than the objective test in the course of relieving an onus of proof. Thence, since the subjective test re <u>terra nullius</u> has been so generously prescribed by the literature, it should remain. It should remain not as a tool to show how uninhabited territory needs only a modicum of marginal occupation to be effective. It should remain as the highest form of proof that, despite a general presumption to the contrary,(founded on the dearth of in-

habitants) the area in question in specie should be treated as subject for title. This way, the ice-cap etc., gets to be treated like the high seas without any degeneration into the debate about whether it is the high seas even though Eskimos, whalers and scientists are scuttling across its surface. If this were the standard observed by the jurists, it is safe to say that it would force aspiring sovereigns into their hinterlands to protect their frontiers, socialise their adopted natives and generally possess their land. If this endeavour proved to be impossible, then any conditional rights to sovereignty would be rescinded by Mother Nature, requiring the law to merely rubber-stamp the verdict. Extravagant pretences made by distant capitals over empty ice would be taken out of the lap of international justice.

The other way in which it has been suggested that the fruits of duty are measureable involves inhabited terrain. A thoroughgoing explanation of just what is meant by this will have to attend the later remarks on the concept of sovereignty. It may be capsuled by temporarily supposing in a very normative way, that the occupied north is the rimland and the government at Ottawa is the heartland from whence the agencies emerge, charged with ensuring sovereignty. The McKitterick message suggested that legal jurisdiction springing from the centre to the rim was the touchstone of sovereignty. Others such as the heirs of the Berlin Conference

of maintaining order, guaranteeing free transit and so forth.

Looking at this from a functional angle, these would seem more like a response from decisions initiated within government circles and effected upon distant peoples. This sketch is deliberately crude at this point. The critical issue is that the measures should spring from indicators which come from the inhabitants themselves. For example, there has been little if any hue and cry from the Indians and Eskimos(the majority in the north) for exercise of the English common law, for defence against the Russians, or for assurances of free transit. However, there has been an increase in familiarity with English and French languages, in exercise of the franchise, in reception of welfare monies, in settlement and employment in "Western" towns and institutions and adoption of many Western folkways. These are, it is often argued, indices of consent or of acquiescence. If these people come to view themselves as participants in or governors of the Dominion of Canada, then the traditional source of sovereign claims, i.e. Ottawa, needs to send less and less agents to invoke effective occupation. The agents will be there already.

The old style standards of effective occupation, it is unabashedly submitted here, are mypoic tools of old colonialism. Though no polemic is intended on this issue, it is interesting to note that all that voluntarily remains of the British Empire(which was occupied by precisely the method.

entertained at the Berlin Conference attended by Britain) to a few nations which came historically to identify themselves as British. The processes of cultural secularization and structural differentiation as they took place within the "new" nations took on the vestments of Anglicization. This would seem to be the key to effective occupation in the Arctic; not to send trainloads of southerners into the north, but to acculturate northerners into Canadian ways, such as political institutions which in striving for provincial status would hold sentiments not unlike natives of Manitoba. The old standards such as degree of protection from foreign incursion are untestable except in the event of war. Cultural characteristics such as voting behaviour or frequency of English or French spoken are measurable.

Application of the old standards, in the event of dispute could possibly result in American proprietorship over the uninhabited regions, and would encourage near imperialistic paternalism over the inhabited regions. Application of the standards <u>here</u> recommended would encourage self-government leading to constitutional province-hood in the inhabited regions. In the uninhabited regions it would divest anyone of the right to sovereignty, leaving ample room for the Canadianized populace to percolate into these regions. This latter endeavour would be encouraged by replacing the "right-via-occupation" standard with the duty

standard. This would enable us to seek out instances of expense undertaken in performance of such duty as being indicators of a valid and conscionable _animus occupandi._

We are then at the stage where we must investigate, as promised, some few instances which might serve to corroborate a Canadian claim by effective occupation.

A general survey of the literature on this issue yields, as may be expected, heavily documented accounts of the penetration first of government dispatched expeditions into the territories to proclaim vast tracts in the name of the Dominion, followed by Northwest and Royal Canadian Mounted Police and "East Arctic" patrols posted in the north for the old reasons of establishing by their constabulary presence, a "right."

> Under government instructions they took note of all activities at the places visited, imposed licenses upon Scottish and American whalers, collected customs duties upon goods brought into the region, and generally impressed upon both Eskimos and Whites that henceforth they would be expected to obey the laws of Canada.[150]

In a case more suitably discussed under the caption recognition," the federal government in 1925 had an opportunity to disclose to the U.S. government, at the behest of its Secretary of State, the specific instances which she deemed sufficient to amount to effective occupation. It is too long to recite. But an

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[150] G.W. Smith, _op. cit._, p. 8.

excerpt not out of context should illustrate its general tenor.

> ... all the Mounted Police detachments in the Eastern Arctic are Post Offices and Customs Ports, and the non-Commissioned Officers in charge have been appointed Postmasters and Collectors of Customs. Furthermore, the duties of members of the Force stationed in the Eastern Arctic include the supervision of the Welfare of the Eskimo for the Department of Indian Affairs, educating them as far as possible in the White Man's laws..[151]

The deeds are seemingly in quest of a right.

There is on the books at least one dominant case on the side of the "duty" approach. It predates the _Eastern Greenland_ (do little) and Clipperton Island (do nothing) decisions, as well as the Palmas case which held that the display of authority must consist in genuine acts of a sovereign.

The case involved the area of Grisbadarne in a maritime boundary dispute between Norway and Sweden in 1909. Finding in favour of Sweden, the Arbitration Court cited at the time the following conduct:

> ...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 she was exercising her right but even more that she was performing her duty.[152]

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[151] _Foreign Relations of the United States_(1925) vol. 2, p. 572.

[152] _Maritime Boundary Arbitration_(Norway V. Sweden) Oct. 23, 1909. Text published in 1910, 4 _A.J.I.L._, p.226.

The danger which this paper anticipates is not really so much that Canada is ineffectively occupying the Arctic as it is that international tribunals are imprisoned by inappropriate standards governing effectiveness which may augur badly for Canada. Despite cynical references in these pages about Canada's "R.C.M.P. standard" of effectiveness, she would seem in fact to have observed the strictures of duty intimated by the *Grisbadarna* judgment.

"The Government of Canada spent $4000 in the Arctic in 1920, $300,000 in 1924, $33.2 million in 1959."[153] In 1964-65, fiscal year, the Department of Northern Affairs and National Resources alone spent $80,894,714.84 as compared to only $6,925,589.35 revenue.[154] This would seem evidence enough of the "sense of duty" inherent in the Canadian government when taken together with the fact that, first, these figures do not include the substantial investments undertaken by private concerns, and secondly, the fact that, according to the Dominion Bureau of Statistics, 1961 census, the entire population of the Northwest Territories was only 22,998, of which 42% (9,765) were white, being largely self-supporting, young, male transient or government workers who viewed the area as a limited liability community.

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[153] J.G. Castel (Supra, note 4), at p. 247.

[154] Dept. of Northern Affairs & National Resources, Annual Report Fiscal Year 1964-65, Ottawa: Queen's Printer, 1965, p. 81/

The nature of the Canadian commitment seems emphatically "dutiful" when one peruses such government documents as "Government Activities in the North."[155] In this volume is recorded scrupulous accounts of the annual undertakings of each relevant government agency and Crown Corporation active in the Northwest Territories. The record of each agency is prefaced, in the format as it stands, with a preamble entitled "Responsibilities." It takes little imagination to translate this into a statement of duties undertaken at great cost(see figures supra) by all such agencies. Insofar as more than 50 such agencies are surveyed exhaustively, it would suffice our curiousity only to recite the alleged responsibilities of several of the more interesting of such agencies as representative of a general proclivity to duty. For obvious reasons this will preclude the lengthy duties advanced by the Department of Northern Affairs.

1. Citizenship and Immigration
   Indian Affairs Branch[156]

   The administration of the Indian Act ... to assist Indians to participate fully in the social and economic life of Canada ... specific programmes in the fields of education, economic development, social welfare and community development. All of these programs foresee the Indian people sharing the

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155 *Government Activities in the North - 1965*, Advisory Committee on Northern Development, Department of Northern Affairs, Ottawa: July 1966.

156 *Ibid.*, p. 14.

> rights and responsibilities of citizenship and participating on the basis of equality of opportunity through the full spectrum of Canadian life.

It is interesting to observe momentarily at this juncture that the BNA Act(supra) at section 91 (24) defines Eskimos as "Indians." Yet in the Indian Act, a mention of "an Indian"[157] does not include therein any personage of that race of aborigines commonly known as Eskimos. Eskimos are governed by the Royal Proclamation of 1763. This was affirmed in the case of _R. v. Kogarolak._[158] In that case, Mr. Justice John H. Sissons of the Territorial Court of the Northwest Territories, held that the Royal Proclamation is the _Magna Carta_ of the Eskimo, and that the Game Ordinance of the NWT does not abridge the Eskimo's right under the proclamation to hunt, trap and fish at all times on all "unoccupied" crown lands in the Arctic.

2. _Immigration Branch_ [159]

> ...admission of immigrants, non-immigrants, returning Canadians and returning residents and deporting undesirables ... promoting the development of the North.

3. _External Affairs_ [160]

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[157] _Revised Statutes of Canada_, (1952), cap. 149, as amended, see 4.

[158] _R. v. Kogarolak_, (1959), 28 W.W.R. 376.

[159] Govt. Activities, _op. cit._, p. 19.

[160] _Ibid._, p. 31.

.. any activities in the north conducted on behalf of or in co-operation with foreign governments or their agencies, in particular scientific or other projects in both the civil and military spheres ... concerned with boundary waters in this area ... granting of permits etc. for foreign scientists and explorers wishing to work in the north.

4. <u>Justice</u>[161]

... administration of justice in the Territories including the organization and maintenance of territorial courts of civil and criminal jurisdiction ...

Notice how, unlike the provinces, civil(i.e. common law) jurisdiction is vested in the federal government. This would please Mr. McKitterick.

5. <u>Canadian Armed Forces</u>[162]

...support of Canada's external and defence policies in the North by contributing to the maintenance of Canadian sovereignty in the Arctic .. in some areas .. in cooperation with the U.S.A.

6. <u>Royal Canadian Mounted Police</u>[163]

... remains the only law enforcement agency in the ... Northwest Territories ...policing the municipalities of .. Yellowknife and Hay River.

7. <u>Marine Operations Branch</u>[164]

... providing transportation facilities .. for.. commercial enterprises; servicing aids to navigation ... ice probes.

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[161] *Ibid.*, p. 44.

[162] *Ibid.*, p. 91.

[163] *Ibid.*, p. 185.

[164] Ibid., p. 210.

It would seem at least conditionally safe to say that the performance of these responsibilities discharges in no small way the criteria set down by the Berlin Conference and the Grisbadarna case to name a few. The settlements are countless and increasing. And the aboriginal peoples are slowly attorning voluntarily to both the jurisdiction and the way of life of these burgeoning settlements with their "Western" orientation. Such settlements range in size from surveyed townsites to small groups of buildings around trading ports or medical centres. Typical of the number of settlements necessary to be visited for the purposes of a comprehensive survey of the N.W.T. is to be found in the undertaking of the Carrothers Report.[165]

> In sum, the commission travelled some 10,285 air miles within the Northwest Territories, visited 51 communities, held 59 public hearings and ... came in contact with 3,059 adults, or greater than one out of every five adult residents of the Northwest Territories.

The topic "effective occupation" leads magnetically into a comprehensive account of territorial government, demography and the social system(s) of the Arctic. This is a temptation which must in all fairness to the strict limits of this thesis be temporarily foregone despite the graphic illumination it would shed

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[165] Carrothers Report (supra, note 34) at p. 7.

upon this topic. We have considered effective occupation only as it makes its presence felt upon international jurisprudence vis a vis territorial sovereignty. The nuts and bolts of the specific variety of occupation as it is effected in the material region will be put in abeyance. The facts outlined above however would seem to indicate that the Canadian governmental approach to effectively occupying the Northwest tends to be in phase with the suggestions made by this paper, although less than consonant with the unpredictable criteria fashionable in the courts of international justice.

Therefore, it may be by way of a kiss of death that Gustav Smedal (earlier quoted as typical of the school that tolerates reduced activity in barren regions) has chosen to say of Canada's Arctic,

> A good precedent of how to take effective possession of polar areas is Canada's handling of the Arctic Islands lying north of its coasts.[166]

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[166] Smedal, op. cit., p. 35.

4. Prescriptions: To Have and To Hold

The doctrine of prescription is an amalgam of several of the other principles so far considered in this paper. It has served, when invoked successfully, not to confer original title, but rather a derivative form of title based on long-continued use and enjoyment of territory. Again, perplexing issues are raised about citizenship, about the inability of all but sovereign states to lay claim to contested or new territory and about time limits. It has been used in many of the cases discussed above, sometimes successfully. Yet with all its currency it has never been defined with any precision. Indeed, as late as 1949, the International Law Commission, in a report[167] to the U.N. Secretariat, advised that jurists such as de Martens and Rivier are known to hold the view that "acquisitive prescription" is not to be considered part of the general International Law.

This of course could be no more than an enlightened opinion, or a prophecy. For in the Chamizal, Palmas and Grisbadarna cases, prescription of one form or an other was the main argument of one of the sides. In the latter two cases, it succeeded. At least a vague hint of what is meant by the term is available to us from

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167 Survey of International Law in relation to the Work of Codification of the International Law Commission, Lake Success, 1949.

these cases. Perhaps a few of the basic criteria of prescription may be extracted from these cases.

In the _Chamizal_ case,[168] although the U.S.A. relied on its more or less continuous occupation of an area "discovered" by Mexico, the Mexican argument prevailed by reason of their regularly having challenged U.S. control over the area. Therefore, it would seem that occupation must be uncontested to enhance a claim by prescription. More on this later. It has been pointed out earlier however, in the introductory pages of our discussion on "discovery" that even if the U.S.A. in the _Palmas_ case[169] had limited its activity to regular challenges over Dutch occupation, as Mexico had done in the _Chamizal_ case, they would have been unable to defeat the Dutch claim of prescription. The best that can be said then is that a claim by prescription is more easily sustained in the absence of any objection. But it may also prevail despite objection, depending on the circumstances; uncontested occupation for certain; even contested occupation perhaps. Dr. Huber had this to say about prescription.

> The principle that continuous and peaceful display of the functions of state within a given region is a constituent element of territorial sovereignty, is not only based on the conditions of the formation of independent

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[168] Chamizal Arbitration(_supra_, note 91).

[169] Island of Palmas Arbitration(_supra_, note 1[illegible]).

States and their boundaries (as shown by the experiences of political history) as well as on an international jurisprudence and doctrine widely accepted; this principle has further been recognised in more than one Federal state, where a jurisdiction is established in order to apply, as need arises, [illegible] international law to the interstate relations of the State's members.[170]

And further, as applied to the s[illegible],

As to the conditions of acquisition of sovereignty by way of continuous and peaceful display of state authority (so-called prescription) ... the following must be said: The display has been open and public .. in conformity with usages as to exercise of sovereignty over colonial states. A clandestine exercise of State authority over an uninhabited territory during a considerable length of time would seem to be impossible. An obligation for the Netherlands to notify to other powers the establishment of suzerainty over the Sangi states did not exist. Such notification, like any other formal act, can only be the condition of legality as a consequence of an explicit rule of law.[171]

So in a general way the elements of effective occupation underly prescription. The display of authority need apparently not be perfected by formal notification. This is to be presumed. But it must be "continuous" and "peaceful" and preferably "uncontested."

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[170] _Ibid._, p. 833.

[171] _Ibid._, p. 843.

The attitude of the law is betrayed in the Grisbadarna case, where it is stat[illegible],

> It is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little [illegible] possible.[172]

This of course typifies [illegible] ambiguities courted by the law. It is not at all so settled. Nor are there any handy measuring sticks suggested for ascertaining what is a "long time", much less what "actually exists." Nor has the law ever attempted to conscientiously spell out what constitutes "change", much less "little" change. One interesting touchstone long applied to the English common law concept of "a long time" insofar as it governed prescription, was the frankly absurd notion of "legal memory." This was considered to flow back to the year 1189 A.D., the date of the accession of Richard 1 to the throne of England, beyond which, the mind "runneth not to the contrary."

> ... the farther 1189 receded the more difficult it became to prove continuous use back to that time, and in consequence, the courts modified the acquired proof of use for as long as living witnesses could remember.[173]

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172 Maritime Boundary Arbitration (Supra note 52) at p. 233.

173 See Holdsworth, History of English Law (1926, 3rd ed.) pp. 343 - 350.

In North America of course, this rule does not now apply.

".. the Court may take judicial notice of the fact that America was discovered in 1492."[174]

What rule has been substituted?

... a period of no less than 20 years' unexplained, continuous use (adopted by analogy to Statutes of limitation) would suffice to justify a finding that a grant, now lost, had been made.[175]

Well, at any rate this is not international law, which must bend with different histories of contending nations. But still, for the purposes of prescription, some standard of length beyond the intuitive measure of "reasonable time" would seem appropriate. No specific limit has been set however. It has been suggested from time to time that barren regions may allow a reduction in whatever length of time might be considered to uphold a successful claim by prescription. In negotiating the Alaskan boundaries, Russia set down the principle that fifty years of uncontested possession was sufficient to yield sovereignty in the Arctic regions.[176]

The laws which have governed prescription within nations have of course varied, and "international"

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[174] Master J. in Abell v. Woodbridge & York (1917) 37 Dom. Law Rep. 352.

[175] Bora Laskin, Cases and Notes on Land Law, Toronto: University of Toronto Press, 1958, p. 577.

[176] Debates of the Senate of the Dominion of Canada, 1907, p. 275.

jurists can scarcely help but be sympathetic to the legal system in which they were educated, since no consensus has served to legitimize any international rules of prescription. [illegible] where the Roman law was invoked in a prescription [illegible] was in the [illegible] of the <u>Meeraugo Question</u> between Aust[illegible]ary.[177] Here the standard dictated that further upon long standing occupation, possession must be exercised "peacefully, publicly and continuously." If not for the best of reasons(as we have argued under the caption "effective occupation"), yet it is probably safe to guess that the stringency of continuous possession would probably be relaxed in polar regions.

If one of the ingredients of acquisition by prescription is occupation of a character which seems to define effectiveness in terms of long, continuous authoritative yet peaceful and largely uncontested possession, <u>all</u> in the absence of an original title through discovery or cession, yet still another ingredient exists which relies not so much on any proprietary pretensions by the claimant as on the inaction of a disputing state. Once again we must restrain ourselves from spilling over into the following section on "recognition." The default of the nation, perhaps most graphically described as a prior owner, over territory long occupied by another,

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177 See <u>Revere de Droit International et de Legislation Comparee</u>(1902), p. 207.

generally referred to as "acquiescence." We have earlier encountered this term in our discussion of the cases governing bays. The concept seems to have been the *sine qua non* of the "Conception Bay, Newfoundland" case.

"Acquiescence is a term wh[illegible] up in the law regarding notions of "*volens*," "*sch*[illegible]", "silence", abandonment and so forth. But summarily it may be explained as "prolonged inaction" .. which also suggests a time limit. It raises the question of whether or not after a certain period of time uninhabited land once rightfully claimed through the original title of one sovereign state becomes thereafter subject to open season, as it were. George Schwarzenberger tries to explain this to us:

> 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.[178]

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178 Schwarzenberger, Manual ..., *op. cit.*, p. 117.

Apart then from the general evidences of continuous and peaceful occupation, the principle of prescription gains its prominence in circumstances where one nation tries to upset the claims of another by evincing long user on their own part and acquiescence on the part of its opponent through long inaction and abandonment. When acts of acquiescence are formalized into the shape of compliance, written admissions or treaties or other such behaviour which respects the "new" sovereign, these latter deeds are catalogued under the rubric of "recognition", a first cousin to acquiescence. Acquiescence itself may be conceived of as constructive recognition.

Insofar as most of Canada's north is claimed by Canada as discoverer or heir and successor by cession, or as effective occupier over terra nullius, the doctrine of prescription is only likely to come into play in the Arctic where(a) some other nation has some colour of right to territory, and(b) no formal statement has, to date, conclusively resolved this right. The questions concerning Wrangel Island, the Sverdrup Islands and others would seem to be settled under "recognition." Only the Danish claims of Rasmussen and the as yet unannounced American rights in parts of the Arctic serve as subject for any possible future debate on the issue of prescription. All the rest of the north would seem to be amenable to the stronger arguments for sovereignty.

By "stronger" is meant that it is not even necessary to declare, re most parts of the Arctic that any long since abandoned settlements or discoveries existed at all.

The record of constructive recognition by other nations, sufficient to afford Canada a prescriptive possession of the Arctic, is conveniently packaged in the following review:

> While the Canadian government was thus endeavouring to solidify its northern claims, other countries were losing interest. Denmark evidently let the issue of Ellesmere Island drop, and, at least tacitly, accepted Canadian sovereignty there. Russia made no attempt to retaliate for Canada's bad manners in the Wrangel Island affair, and stayed on her own side of the North Pole ... in the United States, where newspapermen and international lawyers had for years been asking embarrassing questions about various aspects of Canada's sovereignty in the North, there was evidently little official disposition to contest Canadian claims, at least to land territory.[179]

One writer, perhaps impulsively, applauds Canadian prescriptive rights. "On the facts, it is evident that Canada has a valid claim to sovereignty, superior to any other state, on the grounds of prescription."[180] In the event of a showdown with any other state on the grounds of prescription, this may be true. But as we have observed, the hypothetical showdown would not likely

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179 G.W. Smith, op. cit., p. 11.

180 D.R. Inch, op. cit., p. 51.

take place on the grounds of prescription. And if it did, Canada may still have to answer some of those "embarrassing questions" posed by the U.S.A. In this regard, the logical step would seem to be to try to frustrate such possibilities by seeking out acts of recognition.

5. Recognition -- "The North Is Red"

Where we have earlier described that element of prescription (i.e. the third party element) that is, acquiescence, as constructive recognition, so we might think of recognition as constructive cession. The effect it has is similar to that of acquiescence. Referred to in much of the literature as a "political remedy," it does not produce for the beneficiary state any better title than it already had. Rather it elicits the spectre of "estoppel." It precludes the "recognizing" state from denying at a later date that it recognizes the sovereignty of the "recognized" state over the land in question. It amounts to an insurmountable concession by one state to another. It is as if the recognizing state cedes or donates to the beneficiary, a parcel of land over which it does not itself have any right. Recognition does not engender then a derivative right. It is, on the contrary, prohibitionary by its nature. It is as if the recognising state has transferred to the other a more or less permanent right of intense refusal to <u>that</u> state.

What this might be construed as amounting to is a left-handed sort of exception to the "no-purely-evolutionary" rule set down by Dr. Huber. For it seems that as between two competing states both in default of the most minimal degree of occupation, one need only introduce recognition by the other to 'estop' that other from contesting the sovereignty. As in the case of acquiescence, then, what is sought here, is the act of nation-states other than Canada, regarding territory claimed by Canada.

With one exception: Wrangel Island. In 1921 a group organized under Canadian leadership and headed by Vilhjalmur Stefansson, landed on Wrangel Island north of Siberia for the purposes of exploiting its resources, dramatizing the unreliability of the Sector principle and establishing British sovereignty there. [181] Though unoccupied it was within the Russian sector. In 1922 Prime Minister Mackenzie King announced, "The Government certainly maintains the position that Wrangel Island is part of the property of this country." [182] His Fisheries Minister Ernest Lapointe, when asked in the following year who owned Wrangel Island, was moved to say, "I

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[181] V. Stefansson, <u>The Adventure of Wrangel Island</u>, London: J. Cape, 1926.

[182] <u>1922 Debates</u>, House of Commons Canada, vol.2, p. 1751.

should like to know myself."[183] In this same year, an American group purchased the holdings of the Canadian group and proceeded to work on the island. In 1924, King's Interior Minister Charles Stewart declared, "As far as Canada is concerned, we do not intend to set up any claim to that island."[184] Then again in 1925, Stewart said, "We have no interest in Wrangel Island."[185] In the interim, between the two Stewart statements, a Soviet ship forcibly removed the U.S. firm's employees from the island about the same time as a Canadian expedition to the island failed to arrive. Through vocal acts of recognition, Canada has taken herself out of an exchange with Russia which might have lasting effects on the Sector principle.

In the absence of any other act, the probative value of recognition alone may be enough to bestow territory upon the recognized nation, especially if it comes from the only nation with a prior right or else the nation with the best right. This would seem to be what assured Russia of her right to Wrangel.

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[183] 1923 Debates, House of Commons, Canada, vol.4, p.3360.

[184] 1924 Debates, House of Commons, Canada, vol.2, p. 1110.

[185] 1925 Debates, House of Commons, Canada, vol.4, p. 3773.

> However weak a title may be initially, recognition estops the state which has granted it from subsequently contesting the validity of the recognised title. Moreover, persistent non-recognition by state practice of certain titles may lead to their falling into disuetude.[186]

A not uncommon suggestion, from those interested in resolving sovereignty questions such as those which may be presumed to exist in the Arctic, has been to _induce_ recognition. The method commonly proposed is by convening multi-national conferences and draughting multi-national treaties, whereupon the signatures of all but the beneficiaries would amount if not to cession, certainly to recognition. Treaties such as those concerning Spitzbergen[187] and Antarctica[188] are proposed as models. But such propositions have two liabilities at least. In the first place they fail to outline those claims which they think should be settled. This may be understandable since if the proposal is forthcoming from anyone who may be deemed an agent of a state, the proposal itself could be construed as partial recognition of the states mentioned as disputing claimants, and also serve those states as evidence of non-recognition of all states not

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[186] Schwarzenberger, _Manual_ etc., op. cit., p. 116.

[187] _Treaty Regulating the Statutes of Spitsbergen_, 2 L.N.T.S.[illegible]; Canada Treaty Series(1947), no. 20.

[188] _British Treaty Series_(1961), No.97. Signed Dec. 1, 1959 by Argentina, Australia, Belgium, Chile, France, U.S.A., U.K., U.S.S.R., Japan, New Zealand, Norway & South Africa.

mentioned(eg.) if a U.S. government official in articulating such a proposal neglected to mention his own nation's claims to the Arctic, Canada could allude to this as a root to estoppel against further U.S. claims. In the second place these proposals generally ignore the fact that the two treaties regularly cited as precedents(supra) have in each case reserved, in express terms, the issue of sovereignty. In the Spitzbergen case such reservation has been specifically in the favour of Norway. In the Antarctic case, a moratorium has been placed on the right to exercise sovereignty. Article IV, section 2 states,[189]

> No acts or activities taking place while the present treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present treaty is in force.

Clearly then, an observance by international experts of the hazards of recognition inherent in drafting treaties which propose settlement of territorial claims, has provoked them to "draft out" any inferences of recognition, as per Article IV(supra) section 1.

> Nothing contained in the present treaty shall be interpreted as ...(c) prejudicing the position of any contracting party as regards its recognition or non-recognition of any other state's

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[189] Ibid.

right of or claim or basis of claim to territorial sovereignty in Antarctica.

One interesting legal device for arguing sovereignty on the grounds of recognition, is by tendering as evidence, maps made by another (hopefully a contestant) nation, upon which inscriptions or colourings or other such markings betray recognition. This would seem particularly apt in the case of any dispute between Canada and U.S.A. The author of this thesis himself owns a map printed in the U.S.A. which, although not an official government map is protected by an official government trade mark, and which features the "World" on Mercator's projection, with the U.S.A. in green and "Canada" as well as all the Arctic archipelago in red. A great deal has been written on this subject.[190] This might seem however to violate the "hearsay rule" of evidence as it is meant to apply to documents. In regard to "foreign" maps, this may be questionable. But the rule regarding Canadian maps is well settled. In the case of Rex v. Bellman[191] it was held that Admiralty charts and Canadian hydrographic maps officially prepared under governmental authority are admissible in evidence as "public documents," and so represent one of the exceptions

[190] See for example: Weissberg, "Maps As Evidence In International Boundary Disputes: A Reappraisal," (1963), 57 A.J.I.L. 781; and Charles C. Hyde, "Maps As Evidence In International Boundary Disputes (1933) 27 A.J.I.L. 311, which article Weissberg has brought up to date.

[191] Rex. v. Bellman (1938) 3 D.L.R. 548.

to the hearsay rule. In this case the maps were used to prove the territorial limit of three miles in a prosecution under the Canada Customs Act. It would seem then that if public documents do not offend the hearsay rule, then any denial of admissibility by an international forum of a government-supervised map would be tantamount to denying the sovereignty of the nation alleged to have prepared the map. It is not enough to have prepared the map. It is not enough to show in this way that international courts admit maps for these purposes without showing more succinctly what practices are observed in such admission. Such practices are discussed in the <u>Island of Palmas Arbitration</u>.[192]

> Only with the greatest caution can account be taken of maps in deciding a question of sovereignty, at any rate in the case of an island ... maps which do not precisely indicate the political distribution of territories ... must be rejected forthwith, unless they contribute --supposing that they are accurate -- to the location of geographical names....(O)nly of value when there is reason to think that the cartographer has not merely referred to already existing maps...[193] as seems very often to be the case ... but that he has based his decision on information carefully collected for the purpose. Above all, then, official or semi-official maps seem capable of fulfilling these conditions, and they would be of special interest in cases where they do not assert the sovereignty of the country of which the government has caused them to be issued.

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192 <u>Island of Palmas</u>(supra, note 14) at p. 837.

193 It is proposed that this practice would indeed offend the hearsay rule.

In plain language this means that for determining sovereignty over the Arctic, it WOULD be admissible evidence to show the International court that maps authorized by U.S. government fail to indicate any U.S. claim to the Arctic Archipelago or otherwise in the Northwest. Immediately we recall the observation made in the 1966 Carrothers Report,[194] stating that..."maps originating in the United States did not show these lands to be Canadian soil until World War 11."

Recognition takes another form in the shape of compliance with Canadian legislation. It would seem fair to say that every whaler who licensed with the Canadian government, every traveller who stopped at customs, every fisherman who strayed not into territorial waters, was in the process of performing an act of recognition.

In 1925 the MacMillan expedition prepared to fly over and explore many Arctic islands, including Baffin, Ellesmere and Axel Heiberg. Although organised by the (Canadian) National Geographic Society, it was heavily aided and equipped by the U.S. Navy and without prior notification to the Canadian Government, the U.S. Government suddenly announced its readiness. The Canadian Parliament straightaway amended the Northwest Territories

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[194] See Note 115A, supra.

Act[195] to the effect that all scientists and explorers were thereupon required to obtain licenses before proceeding into these regions. At first the U.S. Government balked at such requirement. Canada insisted.[196] Mr. Coolidge's Secretary of State, Frank B. Kellogg could smell the implications of responding to the amendment. It would amount to compliance, pure and simple; and compliance meant recognition of sovereignty over the Arctic. Shrewdly he elected to request more information from the Canadian Government on Canadian agencies which he described as "temporarily" in the north. It is impossible to tell whether this qualification transmitted by him would serve to water down the effects of an act of compliance. But comply they did,[197] for that expedition, and again in 1927 and 1928.[198] ....So it is reported.

This paper readily admits to having dwelt mainly in this section upon the American claims which might

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[195] 16 Geo. V.; Statutes of Canada, 1925, cap. 48, sec. 1.

[196] 1925, House of Commons Debates, Canada, vol.4, p. 3773. See also Richard Finnie, "First Short-Wave in The Arctic-II", The Beaver, outfit 281 (March, 1951), p. 23.

[197] Hackworth, International Law, 1940, vol. 1, p.463.

[198] A.E. Millward, Southern Baffin Island, (Ottawa: Department of the Interior, 1930), pp. 100-101.

be construed as the most potentially sound in any dispute with Canada. It has been shown how treaties, maps and compliances with legislation may inflate the Canadian claim over the American claim by reason of recognition ... the political remedy.

> The United States has neither disputed the claim nor made any of its own, its policy being one of reservation in both the Arctic and the Antarctic. It has not claimed on the basis of Peary's overland trip to the Pole in 1909 or Byrd's flight in 1926. Nor has it advanced a sector claim on the basis of the Alaskan penetration.[199]

This follows because, "The United States has expressly denounced the Sector principle."[200] To this the writer has added however, "(the United States) ... has recognised Canada's claims to sovereignty over Arctic Islands by diplomatic correspondence."

The U.S.S.R. on the other hand, has most emphatically emphasized the Sector Principle. In 1926, Russia formally promulgated as part of her own domestic policy, her own Sector decree.[201] It would seem then a form of recognition of Canadian right to the Arctic based if no other wise upon the Sector Principle. It follows both axiomatically and geometrically. At any rate, as Howard Green was pleased to report in 1959,

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[199] J.G. Castel, *op. cit.*, p. 249.

[200] D.R. Inch, *op. cit.*, p. 51.

[201] *British & Foreign State Papers*, CXXIV(1926), p. 1064. See also T.A. Taracouzio, *Soviets in the Arctic*, (New York: Macmillan & Co., 1938), p. 382.

> A search of departmental records has failed to disclose any dispute since 19[illegible]0 between Canada and either Union of Soviet Socialist Republics or the United States of America concerning the ownership of any portion of the Canadian Arctic.[202]

Notwithstanding the Wrangel Island adventure(after all, was this really "any portion of the CANADIAN Arctic?), this search would seem to yield a sound prima facie case for recognition(of the acquiescent variety) in the favour of Canadian sovereignty.

The Sverdrup Islands, discovered by the Norwegian Captain Otto Sverdrup during his 1898-1902 expedition and thereupon claimed for Norway[203] has been described earlier as one of those territories finally obtained by Canada by cession[204] to the tune of $65,000. But even before that time there were lingering doubts as to the validity of Norway's claim. There was of course the Sector argument. But also there was an exchange of notes inspired in the hope of gaining written recognition of Canada's claim. The decisive note on August 8, 1930(see note 204, supra), formally recognized Canadian sovereignty, saying,

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[202] 1959 Debates, House of Commons, Canada, vol.2, p. 1822.

[203] Otto Sverdrup(supra, note 110).

[204] Canada Treaty Series(1930), vol. 1, no. 17.

My government is anxious to guard also that their recognition of the sovereignty of his Britannic Majesty over these islands is in no way based on any sanction whatever of what is named the 'sector principle.'

If none among sector, discovery, occupation or previous cession affords Canada a proper claim, then Norwegian recognition is the root of Canada's title, perfected in final cession.

There comes at last the Danish claim to parts of Canada's north which through all this study's previous resources has not been apparently dispelled. The potential gravity of this claim has been enunciated by V.K. Johnston in the following words,[205]

> In 1921 a controversy arose with Denmark as to Canadian title to parts of Ellesmere Island, which lies far to the north of Hudson Bay. The controversy has not ended so far as is known, in any recognition by Denmark of Canadian title to the area in question, but beginning in 1920, and in each year thereafter, the Canadian government has dispatched an annual expedition to patrol the northern waters, and has established police, customs, and postal stations at numerous points on the Arctic Islands. By these means the title of Canada has been established to all that Arctic sector contained in the district of Franklin; that title has recently been admitted and recognized by Norway. The title of Canada to the Arctic Archipelago, and, consequently, to Baffin Island and the islands in the Hudson Bay and Hudson Straits thus rests on the basis of effective occupation, if not on general acquiescence.

What is particularly puzzling about Mr. Johnston's reliance on occupation and his admitted loss of faith in

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[205] V.K. Johnston(supra, note 88), at p. 14.

any Canadian challenge to Denmark on the basis of recognition is that he has written his article less than a year after the *Eastern Greenland* decision, about which he should, as an expert, have been eminently aware. Perhaps he was searching for deliberate recognition of the "we admit that..." variety. The successful Danish case, it will be recalled, was based on the essential unity of the Greenland area; that if habitations in Greenland were so hopelessly inaccessible as to be considered only accidently contiguous, yet the island was an inseverable unit. This argument was committed to paper in legal form and it succeeded. It must surely dictate judicial notice of Denmark's commitment to such a principle, however shadowy, enough to estop her from denying the same argument to her Canadian neighbour. But if this was not enough, Denmark joined with Norway at the convention of 1924 to plot Greenland's boundaries ... which included no more or less than the island itself. Great Britain recognized these boundaries.[206] Surely these two acts are adequate to construe Danish recognition of a Canadian Baffinland.

Happily, no convention of the kind suggested earlier, to breed lasting recognition, has ever come to

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[206] W. Lakhtine, "Rights Over the Arctic," (1930), 24 *A.J.I.L.*, p. 716.

pass. Such a circus it would be as if it [illegible] to be final. Expertise of every [illegible] would be there with theories on ice, on magnetic versus geographic north poles ... and Roman versus English Common Law precepts of ownership and possession.

Canada has, instead, settled gracefully into her "status quo" and reinforces her claim with every item of Eskimo art to be cranked out of Cape Dorset and with every sourdough and every mounted policeman that bays the northern lights.

> It is always easier to agree on the status quo than on any particular modification of the status quo. To the extent that agreement is more important than minor change, the reinforcement of the status quo is obvious.[207]

In so many words: to acquire Canada's Arctic would mean knocking the Arctic chip off the Canadian shoulder, mindful that, as Canada's shoulder gets bigger, so too does the chip. Failure to "recognize" it is to be blind and deaf.

6. The Sector Principle --"The Eskimo Pie"

By far the most enigmatic of all claims to the Arctic is the Sector principle. Unlike the others it does not flow from any one genus of claim. Nor has it experienced any unanimity of approval or disapproval.

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[207] Kaplan & Katzenbach, (supra, note 9) at p. 141.

Few writers seem to fully grasp the numerous implications it involves, for the better or the worse. Even fewer seem to fully understand it at all. Yet surprisingly, those who purport to understand it, tend to condemn its simplicity after realizing some of the unforeseen complications it could generate if it is accepted. Logically it might fall as well into the chapter on "nature of the territory" as into "nature of the acquisition." This paper cannot hope to anticipate all the problems inherent in it. If for no better reason, this is so because many of such problems would only emerge in the event of an unequivocal reception of it at the international level. All that can be promised honourably is to weigh the arguments for and against it. This will be attempted in the only systematic way that the principle permits; that is, to examine chronologically the supporting arguments and then to attempt chronologically to falsify these. What little resists the test may be expected to be at the essence of Sector principle.

Claims to boundless tracts of unknown land have long been popular in early North America. The Hudson Bay Company was notorious for its pretensions to title over all the lands north of the Bay to the North Pole. The writer Jeffreys, in 1761 insisted that Canada's western frontiers extended "over countries and nations hitherto

undiscovered." [208] A claim with patently no basis in international law. In 1795, Le Duc de la Rochefoucault posited a more specific but no less extensive boundary for Upper Canada, being "all the known and unknown countries extending as far as the Pacific ... bounded also northward by unknown countries." [209] Other writers were moved to observe, regarding the boundaries of New France at that time, "... the French would scarce admit it had any bounds to the north on this side of the pole." [210] This then was the legacy inherited by the new Dominion as it sought around the turn of the century to secure its right to the distant north; a legacy of a perverse contiguity or continuity.

Heralded as the father of the Sector principle, Senator Pascal Poirier in his celebrated speech to the Canadian Senate on February 20, 1907, seems, on closer examination, to have had no such firm and paramount policy in mind. What Poirier had done, at a time when some of Canada's claims seemed suddenly precarious, was to initiate a motion in the Senate.

> That it be resolved that the Senate is of the opinion that the time has come for Canada to make a formal declaration of possession of the lands and islands situated in the north of the Dominion, and extending to the North Pole. [211]

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[208] *Statutes, Documents & Papers Bearing On The Discussion Respecting the Northern & Western Boundaries of the Province of Ontario*, etc., Toronto: Hunter, Rose & Company, 1878, p. 55.

[209] *Ibid.*

[210] *Ibid.*, p. 54.

[211] *1906-07 Debates*, Senate, Canada, p. [illegible].

It was at a time when Sverdrup had discovered the islands west of Ellesmere, when Rasmussen was issuing challenges in the east, when Peary(1906) was the first to reach the pole, and throughout which American whalers and prospectors were pouring into both ends of the Northwest. Claims by discovery and occupation seemed suddenly less likely to confer upon Canada the total north she presumed to be her own. The Poirier speech was made simply in support of his own motion. He stated that Canada's claims to Arctic proprietorship were four-fold. Dismissing the first three(British discoveries, British cession and H.B.C. occupation), he proceeded to Canada's fourth ground,

> ... for ownership of all the lands and islands that extend from the Arctic circle up to the north pole ...(I)n future partition of northern lands, a country whose possession today goes up to the Arctic regions ... should have a right ... to all the lands ... in the waters between a line extending from its eastern extremity north, and from another line extending from the western extremity north.[212]

He then described five sectors in the Arctic, each one relying for a base on one of the nations whose territory abuts the Arctic Circle, being(1) Russia,(2)Norway-Sweden, (3) U.S.A.(Alaska), (4) Canada and (5) Denmark (Greenland). He described that arc of the Arctic Circle between 141 and 60 degrees W. to be exclusively Canadian

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[212] *Ibid.*

by reason of Canadian occupation and English discoveries. North from there to the pole he claimed as sovereign Canadian territory by this logic:

> ... no foreigner has a right to go and hoist a flag on it up to the north pole, because it is not only within the sphere of possession of England, but it is in the actual possession of England. This partition of the polar regions seems to me to be the most natural, because it is simply a geographical one ... difficulties would be avoided ... every country bordering on the Arctic regions would simply extend its possessions to the north pole. [215]

Before hasty impressions be drawn, as has elsewhere been done in respect of Poirier's declaration, several points must be made. Poirier confessed that he received his idea from Captain Bernier. As is often mistaken, his proposal does not catch all the water in the sector, but only all the islands in the water in the sector. No stand is taken on the interpretation of ice.

For those who reject the Sector principle on the grounds that its relegation to the Antarctic would rob them of their vested interest, it must be recalled that for Antarctic to properly fit the analogy, only nations whose territory is intersected by the Antarctic circle would be eligible for a Sector claim if the parrallel is to remain constant to the Poirier model. No nation owns land in the Antarctic circle, nor even as far out as

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215 Ibid.

the 60° latitude which in all cases but the Falkland Island dependencies forms the arc baseline for all other sector claims.

The tendency has been to exaggerate Poirier's speech. Yet his motion was neither seconded nor put to a vote. The draft resolution embodied in his motion was rejected by the Senate, and it never reached the Commons. Speaking on the same topic in 1910,[214] Poirier went on at length about sovereignty through effective occupation and the exercise of legal jurisdiction. He never even mentioned Sector. The true aim of Poirier has probably been captured in the following summation.

> Poirier felt that Canada was rightly entitled to the Arctic areas to the north by virtue of discovery and actual possession ... the Sector theory was more of a policy of containment to be employed by all Arctic nations, but one on which Canada need not rely in the first instance.[215]

Due perhaps to the timing and novelty of the speech it has gone down as Pascal Poirier's innovation. Today, writers find it difficult not to characterize Poirier as a fire-eating Canadian nationalist.

Rene Dollot within the year was applauding Poirier's proposal as, at minimum, the ideal point of departure, saying

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214 1909-1019 Debates, Senate, Canada, pp. 179-184.

215 J.G. Castel(supra, note 4) at p. 236.

"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."[216]

On the matter of the requirement of propinquity to the north, it was one of Dollot's pet theories that for the purposes of allocating rights there were two kinds of Arctic territories. (a) Territories nearer to the most northern nations would avail those nations of preferential rights; and (b) territories at a greater distance from the most northern nations were fair game for anyone's discovery. This breakdown does nothing to improve on the fairly clear Poirier standard of the Arctic circle.

As we have mentioned, Poirier attributed his notion to Captain Bernier(although he did intimate that this was not the only source of his idea; perhaps he remembered the Papal Bulls.) Two years later in 1909, Bernier was in the news again, suggesting to a New York newspaper that those nations which lay adjacent to the Arctic circle should convene for the purpose of dividing up the polar sea. Such a meeting would portend a clear implementation of the pure Sector principle. For as we may recall, Poirier had only gone so far as to propose title over the islands in the sector. So perhaps Bernier should properly be regarded as the sire of Sector. At any rate,

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[216] Rene Dollot, "La Question de la Souveraineté des Terres Artiques," General de Droit International Public, 1908, p. 412,(written under the pseudonym of R. Waultrin.)

As we shall later come to see, Bernier's remarks were not well received. However, in June 1925, the concept seems to have at least gained official government adoption when the Minister of the Interior reportedly stated in the House of Commons that Canada claimed "right up to the pole." [217]

About this time recognition of the concept accumulated the impetus of international popularity. This was inevitable so long as there were other lands likely to profit from such logic. Paul Fauchille advanced the proposition that polar terrain be chopped up into zones of influence which zones would correspond to the continents. In each such zone he envisaged the prospect of a joint-dominion in which participation would spring from the nations of the respective continents. He introduced a mode of distinguishing territory, for purposes of bestowing sovereignty, by a guage of functionality of occupation.

> 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. [218]

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[217] 1925 Debates, House of Commons, Canada, pp. 3773, 4069 and 4083.

[218] Paul Fauchille, Traite de Droit International Public (1925), Book 1, Part II, p. 658.

This is not out of line with Poirier who postulated his ideas partly on the coming need to resolve mineral rights in the potentially cornucopian north. The functional distinctions are seemingly more realistic than Bollet's proximal divisions. But still there is a failure to foresee the degree to which modern man will tame his environment. The interesting feature of this is to observe the evolution that the Poirier proposal is undergoing. It is not unlike the metamorphosis of a vicious rumour.

The inevitable occurred in 1926, when the Central Executive Committee of the U.S.S.R. on April 15, pronounced,

> ... 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.[219]

Nothing is left to the imagination. The Russians carved a slice out of the polar-projection pie and all that therein is. It was a huge slice. It has never been altered. No nation has ever challenged it. At the very least then the rest of the world was devised the rest of the Arctic, to carve up, to bicker over or to abandon. But the Sector principle was a *fait accompli*. What remained after the Russian declaration might be looked upon as a sector by default. It seems more than a coincidence that the pre-

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

ponderance of criticism which freights sector literature occurred at this time, or shortly thereafter. What motivated it, can only be surmised.

If any question lingered about the reasoning behind the Russian declaration, the Russian author W.Lakhtine hastened to justify the Russian decree. He has chosen notably to espouse the logic earlier advanced by Fauchille, when he says,

> ...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.[220]

Fauchille's zones of influence are referred to by Lakhtine as "regions of attraction" no less exploitable and uninhabitable in his mind's eye than Fauchille's.

Not at all out of character with the Russian propaganda of the day was Lakhtine's defence to the complaint that sector deprived nations that were conceivably more competent or deserving to exploit the "regions of attraction" simply by virtue of the accident of geography, whereby they were not immediately adjacent.

Lakhtine dismissed this argument as an attempt to support claims which could only be "imperialistic" by their character and for this reason "cannot be recognised as being reasonable."[221]

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[220] W. Lakhtine(1929), 15 *Revue de Droit Aérien*, p.5[illegible]

[221] W. Lakhtine, "Rights Over the Arctic," (1930), 24 *A.J.I.L.*, 703.

This, together with his assertion that sector was the only practical solution to an odious problem, Lakhtine been published in the U.S.A., a nation notorious for its unwillingness to tolerate sector claims. Characteristic of American ambivalence is the June 16, 1936 citation from Congress to Lincoln Ellsworth, 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.

The idea of Poirier, so eloquently endorsed by Lakhtine, that sector would eliminate the gross difficulties presented by the North is described by T.A. Taracouzio as a commitment to the "pragmatic school."[222]

As time passed, what appears to be endorsement of the spirit of the Sector principle in Canada tends to be articulated in a way that could embarrass a Canadian claim to Sector. For if sector obtains, then it is beyond dispute that anything further need be done. It is not only the best claim one can have. If you have it, it is all you need.

Yet in 1938, Canada's Minister of Mines and Resources applied the following reasoning to reinforce his

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[222] Taracouzio, op. cit., at p. 323.

conviction that no challenge to Canada's Arctic sovereignty could hold up. He said that international usage had established certain principles upon which sovereignty could be claimed in remote areas never visited by man, and that these principles favoured Canada. Superficially such a tenor suggests the Sector principle. He never did spell out these principles except to say,

> What is known as the Sector principle, in the determination of these areas is now very generally recognized and on the basis of that principle AS WELL our sovereignty extends right to the pole within the limits of the sector.[223]

This will prove to be typical of the contradictory statements made by most Canadian public officials in this matter. They seem to favour a Canadian Arctic and so they graft "sector" onto whatever doctrines they are already vaguely familiar with. Most of these contradictions seem to be perpetrated by politicians rather than theorists. Similar to the U.S. case of rewarding Ellsworth as if he had a right to effect Sector, the government of Norway, no less an opponent of Sector, has its embarrassment as well.

On January 14, 1939, by Royal decree, Norway placed under its sovereignty the coast of Antarctica from the Falkland Islands Dependency(which goes into the Pole) on the west, to the boundary of the Australian Antarctic Dependency, on the east,(also extending to the

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[223] 1938 Debates, House of Commons, Can., vol. 3, p. 3081.(The emphasis is supplied by the author.)

pole, in effect [illegible] unto itself a sector.[224]

Lester Pearson, now Prime Minister of Canada, spoke of things to come while Ambassador to the U.S.A. in 1946. He as much as uttered the Sector principle, a doctrine patently denied in the United States, in these words:

> A large part of the world's total Arctic area is Canadian. One should know exactly what this part comprises. It includes not only Canada's northern mainland, but the islands and the frozen sea north of the mainland between the meridians of its east and western boundaries, extended to the North Pole.[225]

This is as clear a statement of the principle as ever existed and in no uncertain terms exceeds the modest proposal of Pascal Poirier.

A recent suggestion that dignity may be brought to the American view of Sector comes from those who recognize that the principle is in fact merely a variation of the doctrine of contiguity, which, although moderately renounced earlier in these pages, holds a high place in American folklore.

> ... 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.[226]

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[224] Green H. Hackworth, Digest of International Law, (Washington, 1940-44), vol. I, p. 462.

[225] Lester Pearson, "Canada Looks Down North," (1945-46) 24 Foreign Affairs, 638.

[226] L.M. Gould, "Strategy & Politics in the Polar Areas," The Annals of the American Academy of Political and Social Science, vol. 225, January 1948, p. 105.

As our investigation proceeds from stage to stage and from year to year, the superficial development would seem to betray an accretion of resignation if not popularity towards the Sector principle. As we have cautioned earlier however, the first considerations would be confined to the favourable literature. Even this latter must be understood to elicit an illusory consensus towards Sector. For much of it is contradictory, founded on imperfect or uncertain reasoning. Denmark, for example, has never formally adopted the principle. She is inextricably committed however to some version of the contiguity theme since her success in the Eastern Greenland decision, which was partially won on the tenet of the "essential unity of the whole area." It would seem to some Danes that they were disabled then from denying the Sector principle. That Norway suspects her own association with some mitigated form of the Sector principle can be distilled out of the cumbrous language of the Norwegian counsel in the Greenland case, where he says, in his opinion:

> Not everything is to be rejected in the idea of contiguity if there is not to be seen in it a juridicial 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 to 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 ensures the conditions of effectiveness
required by the law.[227]

In the same year, and also on the Antarctic, comes a further claim from Oscar Pinochet which demonstrates that, at either pole, the greatest support for sector comes from the nations adjacent to those regions. This of course is not unreasonable to expect. The principal reasons are well articulated by Pinochet: [228]

> (a) 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.
> (b) 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.,
> (c) The possibility of exploiting its natural resources more properly.
> (d) 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 coast being sufficient.

This account bases its strength on some of the rather shop-worn notions about contiguity that certain presumptions should flow from the accident of adjacent juxtaposition. It resurrects as well the proposition of Fauchille that polar regions are amenable only to occupation for exploitation and are otherwise unfit for survival. Well, if unfit for survival, such regions are

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[227] Gilbert Gidel, Aspects Juridiques de la Lutte pour l'Antarctique, Paris 194[illegible], p. [illegible] (quoted in Oscar Pinochet de la Barra, "Chilean Sovereignty in Antartica," Editorial del Pacifico SA, Santiago de Chile).

[228] Pinochet de la Barra, ibid., p. 45.

as much unfit for Chileans as Russians or Americans. In view of their technology, Americans and Russians have probably rendered such areas less accessible than Chileans or Argentinians. The principle initially voiced by Poirier included overlap by the dominant tenant into the Arctic (ergo Antarctic circle). No South American nation is even close. Only British possessions in the Scotia Sea even approach the Antarctic circle. The Sector proclaimed by Chile far exceeded the five odd degrees of latitude that this nation covers. Chileans have no colour of right either through discovery, cession, accretion, prescription, occupation, subjugation or even contiguity which is better than any other among the many nations intermittently there. It is no wonder they would resort to Sector. One day, oil may be found there.

In fact, as Poirier has intimated, one day the ice caps may melt. But by the same token, Chile might be earthquaked out of existence. If Chile is so concerned with futuristic territorial problems, the latter would seem more likely to occur.

Yet, shortly after Pinochet wrote, Rene Dollot, who forty years earlier had vigourously endorsed Poirier's theory as apt for the Arctic, again subscribed to it. With forty years to consider the practicability of the doctrine, he told his students at s'Gravenhague that Sector was not only best for the Arctic, but also, reflecting Pinochet,

served as a convenient principle to establish 'peaceful cohabitation' in the Antarctic as a whole. He put it this way.

> 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 channelising rival ambitions.[229]

Such a naive suggestion would seem unbecoming of a scholar in this field. The "temporary channelizing" immediately bestows a colour of right. The intimation that time is not ripe for statute simply encourages a prolongation of such channelized ambitions. By the time it was deemed at last ripe for statute, prescription would have enured to the benefit of the channelised squatters from afar. Yet the suggestion by Fauchille, by Lakhtine, by Pinochet and by Dollot, is, in each case, that the area is never going to be accessible. If the nature of the region is not going to change, and since Sector (otherwise than for reasons of channelizing ambitions) is founded on a hope to solve questions begotten of the nature of poles, then Sector-claimed lands, it follows, are never going to be ripe for statute. Or if they are, no more so than right now. And the prescriptive claims, through *inter alia* Sector, are never going to be

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[229] Rene Dollot, "Le Droit international des espaces polaires," *Recueil des Cours, Academie de Droit International* (1949), p. 75.

weaker than they are right now. The proposal then that a Sector-oriented Balkanization of the Antarctic is, by its invoking of some allegedly temporary postponement, a stroke for peace in the poles, is pure chop logic. Ten years after Bollot wrote, a treaty was indeed entered into, by twelve nations, in which was stated in Article IV, sec 1(a), "Nothing contained in the present treaty shall be interpreted as:(a) renunciation by any contracting Party of previously asserted rights or, or claims to territorial sovereignty in Antarctica." [230]

Currently, of the twelve signatories, seven claim sectors, notably excluding Japan, South Africa, Russia and U.S.A. Of the seven, three overlap almost wholly, being Chile, Argentina and the British Falkland Islands dependency. The French sector is only a sliver sandwiched between two massive Australian Sectors which comprise almost one-third of the continent, and sustained by the "presence" of Madagascar. The New Zealand "Ross Dependency" Sector is "beneath" New Zealand while the Norwegian Sector is "beneath" South Africa, and, only coincidentally, Bouvet Island. Another one-third of the continent, the mainly "Pacific" Sector, is only a Sector by default. These delineations have shown to have no bearing whatever on activity there and only reckon to

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[230] See note 189, (supra).

complicate any pretensions by any ambitious nation to more formal sovereignty. The recommendation here submitted is that analogies for purposes of the Sector principle in the Arctic, drawn from the Antarctic, (and vice versa) are unworkable.

Furthermore, as to Canadian claims to the Arctic under the Sector principle, most of them must be recognised as the ill-considered, albeit patriotic, exhortations of politicians.

In 1953, Prime Minister Louis St. Laurent declared to the Commons:[231]

> We mustleave no doubt about our active occupation and exercise of our soveriegnty in these lands right up to the pole.

Consider the unwitting contradiction here. It is something like 450 miles from the tip of Ellesmere to the Pole, and all the area thereabouts is hostile Arctic Ocean or ice pack. All St. Laurent could mean would be that some sort of proximate occupation would confer the remainder of the Sector on Canada. Yet Sector requires no such acceleration of occupation. All this statement really betrays is a doubt in the mind of the Prime Minister as to the validity of a thorough-going Sector claim, although it is often quoted in aid of Canada's right by Sector. In 1958, Lester Pearson in a speech on national development,

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[231] 1953-54 Debates, House of Commons, Canada, vol.1, p. [illegible].

imported this self-same ambiguity when he said,[232]

> 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 that we should make that claim stick, we have to do everything that is [illegible] everything that is practical, to develop these [illegible] and reinforce whatever rights we may [illegible] law with the right of "occupation."

A certain eclecticism seems to attach to the Canadian claim to the Arctic; as if to say, for protection of that region, "try everything, and, by the way, don't forget to mention the Sector theory."

In point of fact, the Sector theory resurrects the long-renounced hinterland doctrine, distorts the theories of contiguity and continuity out of proportion, makes short shrift of the argument of ice-is-water, purports to occupy high seas, to own undiscovered territory, to possess air space and ocean floor, to exceed territorial waters, to exclude without inhabiting and to confer territory, without imposing any concurrent duty to patrol or otherwise effectivdly occupy, upon only those nations which by freak accident of nature and history, have tumbled into a vague sort of adjacency to a part of the earth's surface which is attractive only really because it represents the last frontier and probably has some minerals underground.

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[232] 1958 Debates, House of Commons, Canada, p. 1563.

Yet whatever small right that may be squeezed out of it, even as a concession by those who reject it to those patriots who uphold it because they live nearby the poles, is inexorably repeated in defence of a Canadian Arctic.

> It may now be recognised as a principle recognised 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.[253]

This statement draws its support only from the Canadian political pronouncements mentioned above. It has no foundation at law. But that is not always so important if public opinion attaches sentiment to it. It may serve as reason enough to sway the lay Canadian into a righteous defence of territory over which the literature assures him he has an inchoate title. Following is the literature which is less sympathetic with the Sector theory. Perhaps in sum, the prospects for the theory may be divined.

From the first, Sector has experienced very little serious reception beyond the isolated pronouncements cited above. Poirier's celebrated statement of it, though outliving all disclaimers, was at the time received by the following reply.

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[253] D.R.Inch(supra, note 3), p. 48. Emphasis supplied by the author.

I may state to my hon. friend that the importance of having the boundary of Canada defined to the northward has not at all escaped the attention of the government. They have, as the hon. gentleman knows, sent out an expedition very recently to that region, and have established certain posts, and they have likewise exercised various acts of dominion. They have ... levied customs duties and have exercised our authority over the various whaling vessels they have come across, which, I think, will be found sufficient to maintain our just rights in that quarter.[234]

If Senator Poirier was moved by the aforesaid foreign incursions into the Arctic, the government seemed confident in its ability to sustain its rights without recourse to a concept with unforeseen consequences. Two years later, upon hearing of Captain Bernier's proposals for a convention to divide up the north, Canada's new Prime Minister Sir Wilfred Laurier said, "..if Captain Bernier spoke as he is reported to have spoken, all I can say is that I think he had better keep to his own deck."[235]

The issue of Sector remained dormant until the Russian decree of 1926. At this point, as we have said, the interested nations were more or less obliged to take a position. It is in the era that follows that we gather some of the most significant pronouncements on the matter.

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[234] per Sir Richard Cartwright, Minister of Trade and Commerce; 1906-07 Debates, Senate, Canada, p. 274.

[235] 1909-10 Debates, House of Commons, Canada, p. 274.

Amongst the most important was an American government dispatch in response to a private citizen's proposal for an international agreement partitioning the Arctic into Sectors between Canada, U.S.A., Denmark, U.S.S.R., and Norway. It came by [illegible] of official communique from Secretary of the Navy Charles Francis Adams to Secretary of State Henry Stimson in the Hoover cabinet on Sept. 23, 1929, reading, that the Sector principle....

> (1) Is an effort arbitrarily to divide up a large part of the world's area amongst several countries.
> (2) Contains no justification for claiming sovereignty over large areas of the world's surface.
> (3) Violates the long recognized custom of establishing sovereignty over territory by right of discovery.
> (4) 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.[236]

Notwithstanding the citation to Lincoln Ellsworth seven years later, and the venerated American frontier claims based on the hinterland theory, this would seem to accurately represent the current American policy on the matter. If the same principles once served American adventurers so long ago, they seemed to have been eschewed today. In Antarctica, U.S.A. retains a right by reservation

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[236] Department of State, file 800.014 Arctic/26, Opinion of the Navy Department.

in treaty. Denial of Sector also keeps alive America's hopes to perhaps one day press a claim in the Arctic. In neither pole would Sector be of any use to U.S.A. So she has rejoined the Russian decree by saying that, if for no better reason, Sector amounts to an invalid claim over high seas. Yet all Poirier had said was, "all the lands ... to be found in the waters."

Norway quickly joined the American position. In an assurance communicated to the U.S. Minister to Norway, the latter was able to report to his government, re Norwegian presence in Antarctica, on March 1, 1930, 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.[237]

In that same year (November 5th), in resolving the Sverdrup Island dispute with Canada, Norway confirmed her disavowal of Sector, and, in so doing, conceivably estopped Canada from applying that doctrine to sustain her claim to those islands. The Norwegian government averred that it was ...

> ... anxious to emphasize that their recognizance of the sovereignty of His Brittanic Majesty over these islands is in no way based on any sanction whatever of what is named the Sector principle.[238]

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[237] Hackworth (note 224, supra) at p. 464.

[238] Canada Treaty Series (1930) vol. 1, no. 17.

As we have seen, like U.S.A. in the Antarctic, Norway too has its Sector claims. But they are again, much less consequential than would be a similar Norwegian claim in the Arctic where their evidences of disclaimer would surely prevail.

Throughout [illegible]50 era, the writers leaned, in the main, towards an attempt to disgrace the principle so suddenly cast in their midst by the Russians. The disagreements over the rules governing rights to territory have accompanied if not engendered almost every war known to man. At time of writing, the hostilities in Viet Nam, South Arabia, Yemen, the Middle East, the Rann of Kutch, Nigeria-Biafra, Rhodesia, Southwest Africa, West Iran, Kashmir, Gibralter, Sinkiang, Hong Kong and not so long ago, Serbia, Karelo-Finland, Abyssinia, East Prussia, Tyrol-Istea, Algeria, Katanga, Saar, Holstein-Schlesweig, Alsace-Lorraine, Sudetenland, Panama and even Ireland represent only a few of those aberrations of disputed claims, to often vast pocket parcels of land, that have dishonoured the twentieth century. It is not surprising that a sudden Russian declaration of proprietorship over millions of square miles of the earth's surface, without any qualification and in diametrical opposition to several of international law's most inviolable principles, should be met with some suspicion. For if unchallenged, it represents the biggest, cheapest

single absolute land-grab in the world.

> Opponents of the theory argued powerfully that national claims under the theory were in exact reverse order to the normal process of acquisition. The sector theory places territory in the legal possession of a state even before it is discovered. How, it was argued, can a state claim sovereignty over areas about which it knows absolutely nothing?[239]

Let us examine very briefly the more prominent among these opponents before descending upon the Canadian sector in specie.

Gustav Smedal introduced both ethics and evidentiary doubts to renounce Sector.

> The parties on whom the greatest wrong would be inflicted ... are the States that are not bounded by the Arctic sea. Any State whatsoever, from scientific or economic reasons, be interested in having the sovereignty over an Arctic land, and it is quite illegitimate to exclude such a State from obtaining this on the pretence that its territory is not lying sufficiently far to the north.[240]

It is this argument that is contemplated by Lakhtine's early mentioned cry of 'imperialism.' The Smedal rejoinder to this is,

> ... it cannot in any way be admitted that a Sector State, in looking after its economic and political interests, in the Arctic, is performing an act of a more elevated or

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[239] Castel, (supra, note 4) at p. 239.

[240] Gustav Smedal, Acquisition of Sovereignty over Polar Areas, (Oslo, 1931, translation by Meyer), p. 62.

> ideal character than any other State does in looking after its interests.[242]

He then suggests a tacit sort of estoppel which may obtain in the case of states using this principle. "States that claim sovereignty in Sector areas nevertheless attempt to take charge of lands lying in these areas by effective occupation."[243] He must have had Canada in mind if it can be shown that Canada really proferred such a claim. It is probably not a very strong point to make. The connection is very vague ... except when Messrs. Pearson and St. Laurent actually mouth the hope of perfecting sector claims by occupation.

In a more contemporary statement which will be shown to find great favour in this paper, T.E.M. McKitterick, earlier denounced for his equation of effective occupation with the concept of 'ability,' has had this to say:

> The sector theory is the last survivor of the old 'hinterland' principle as applied to continents, and it appears to have no stronger basis in international law than that now discarded theory. Under the present system, the occupation by one state of land falling within the sector of another can at the most be regarded as unfriendly, but there seems to be no reason for assuming that it would amount to a breach of the law.[244]

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[242] *Smedal*, supra.

[243] *Ibid.*, p. 64.

[244] *McKitterick* (supra, note 147), at p. 95.

Charles C. Hyde, in corroborating Smedal's position on the inveterate resort to occupation by nations claiming sector rights, refers specifically to Canada; that Canada "appears to deem it necessary to fortify its position by other processes, and to endeavour in fact to exert a claim as its own." [245]

Admittedly nothing in the law dictates that occupation and sector claims must be mutually exclusive. Let us suppose that a nation first of all undertakes acts of occupation which would in the ordinary course of events meet the standard sufficient to sustain title. Then, subsequent to these acts but prior to a challenge by another nation, the occupier then issues a decree of sector. Presuming the challenger's claim to be a good one but inferior to the occupier's claims through occupation, would the occupier's claim be expunged, or rendered inferior to the challenger's lesser claim because of the sector claim in the interim? If so, then the challenger would only have to defeat the Sector claim to succeed in arbitration. And it is a reasonable guess that any colour of right by discovery, bare occupation, prescription, etc. would, in view of the current mood of the courts, be sufficient to defeat the sector claim. For this reason, Canada's celebrated multiplicity of possible claims to the Arctic might work against her.

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[245] *Supra*, note 57.

McKitterick has told us that sector derives from 'hinterland', an anachronistic first cousin to continuity and contiguity. If this is so, it would seem to spring from bad blood. But there are still a few ardent defenders of continuity and contiguity, especially among those American writers with a sense of history. So let us pretend for the moment that contiguity experiences all the good favour that its defenders would it. In this new light sector still has trouble. M.M. Gould argues that:[246]

> ... the sector principle ... presumes sovereignty over all the lands discovered and yet to be discovered between the base and 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 propinquity.

At the risk of sounding editorial, this must be lauded for its ingenuity. It 'hits' sector, as it were, 'high and low.' Once the principle falls back upon the essential argument supporting it(i.e.) contiguity, then that prop is knocked out from under it. The argument might run something like this. Sector relies on contiguity which is at best of dubious value at law. Contiguity is then zealously defended. In the course of this defence it suddenly comes out that sector violates contiguity.

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246 Gould, (supra, note 36), at p. 106.

In the closing days of the St. Laurent government, several years after the hortatory appeals by Pearson and St. Laurent to occupy "our sector," that government's Northern Affairs minister reflected a change of heart about the Sector principle.

> We have never subscribed to the sector theory in application to the ice. We are content that our sovereignty exists over all the Arctic Islands. To our mind the sea, be it frozen, or in its natural liquid state, is the sea; and our sovereignty exists over the lands and over our territorial waters.[247]

A closer look will reveal that this is really very little less than the pretensions of Poirier. If the ice cap itself is not receding, Canada's claim to it seems to be. By way of explanation this discourse would submit that this policy merely reflects an increased confidence in Canada's title by occupation. The Sector principle comes from a time when the effectiveness of Canada's occupation of her Arctic did not seem suddenly adequate to withstand several foreign claims to the contrary. Sector was an innovation whose ephemeral popularity seems to have waxed and waned with Canada's belief in her own occupation.

The above denial was uttered by Jean Lesage. Two years late he interrogated his successor in the Diefenbaker administration, Alvin Hamilton, on the same issue, asking

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[247] 1956 Debates, House of Commons, Canada, vol. 7, p. [illegible].

...re the waters of the Arctic ocean north of the Arctic archipelago up to the north pole, in the so-called Canadian sector, Canadian waters?"[248]

Mr. Hamilton's answer, except for the incredible statement of the same year by Opposition Minister Pearson, looms as the ranking definitive statement on the matter. It is confounded only by the fact that since then, Mr. Pearson has become Prime Minister. Mr. Hamilton said,

> All the islands north of the mainland of Canada which comprise the Canadian Arctic Archipelago, are of course part of Canada. North of the limits of the archipelago however, the position is complicated by unusual physical features. The Arctic Ocean is covered for the most part of the year with polar pack 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. Before making any decision regarding the status which Canada might wish to contend for this area, the government will consider every aspect of the question with due regard to the best interests of Canada and to international law.[249]

Parliament did not have to wait long for his decision. In the same year; "This great northland of ours is not ours because it is coloured red on a map. It will only

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[248] 1957-58 Debates, House of Commons, Canada, vol.7, p. 6955.

[249] Ibid.

be ours by effective occupation."[250] ... [illegible] to wonder less than ten years later, whether "this great northland" is ours yet.

All the logic and sentiment which underlies the sector principle has been heard before. It is what inspired the "American" west, the doctrines of continuity and contiguity, and the obsolete hinterland theory. No less than this same inspiration provoked the infamous geopolitical formula of Sir Halford MacKinder in 1904, that...

> ...he who rules Eastern Europe commands the Heartland of Eurasia; who rules the Heartland commands the World Island of Europe, Asia and Africa; and who rules the World Island commands the world.[251]

By the 1930's, Dr. Karl Haushofer had twisted the idea into the infamous, "Geopolik." It took only a jot of nationalism for the black genius of Hitler to brew the notion into "Lebensraum" and "tomorrow the world."

It is encouraging then to observe that, apart from a Russian recalcitrance which is unlikely to be challenged or pressed into service in Antarctica, and the patriotic overtures of Lester Pearson, the Sector principle may conditionally be pronounced dead, and Canada its grave.

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250 1958 Debates, House of Commons, Canada, vol. 7, p. 6955.

251 Sir Halford MacKinder, Democratic Ideals and Reality (New York: Holt, 1919), p. 150.

Were it otherwise, then when the first astronaut plants the first flag on the first square inch of the moonscape, the laws of the poles will leap into a prominence never dreamed of in the days of Pascal [illegible].

7. To Identify The Sovereign

"L'etat, c'est moi"

The foregoing treatment of Canadian sovereignty has been almost exclusively confined to the legalistic approach as it is described in the texts and treatises on international law. There rem[illegible] toward the questions more immediately concerned with the essential nature of sovereignty. Such considerations are bound to lead us into certain ontological arguments about the character of the "nation state."

Legal literature, for reasons which seem compatible with the functions performed by and expected of the law, tends to avoid these issues. Outstanding among these reasons would be the following:

(a) The law in its "blind and inexorable" role of dispenser of justice, prohibits itself from any consideration of facts not introduced to it by the parties in dispute;

(b) The law in its last resort is accountable to a "nation state." It presupposes the "state" concept. It is in this way disabled from any revision of the concept;

(c) The law is governed by legal precedent and statute in the narrow sense and by public opinion in the broad sense. It is, in this way, a creature of its own procedures, of its own "sovereign", or of the same organic root as its sovereign. Although jurisprudence represents an attempt to reexamine and restate in more systematic terms