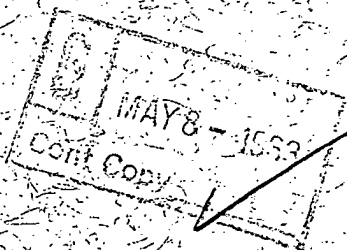


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LA VENTE DE LA CHOSE PERDUE OU VOLÉE

L'Hon. Roger Ouimet

THE CONCURRENT OPERATION OF FEDERAL AND
PROVINCIAL LAWS IN CANADA

W. R. Lederman

CANADIAN CLAIMS TO TERRITORIAL SOVEREIGNTY
IN THE ARCTIC REGIONS

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NOTES SUR LA PROPRIÉTÉ FONCIÈRE AU QUÉBEC

Marie-Louis Beaulieu, c.r.

CASE AND COMMENT

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CANADIAN CLAIMS TO TERRITORIAL SOVEREIGNTY IN THE ARCTIC REGIONS

Ivan L. Head*

I

The polar areas are among the last on earth to be settled by man. These remote lands — for centuries unattractive to either colonizer or invader — present to the international lawyer a laboratory case. Virgin territory, *terra nullius*, to which he can objectively apply the rules relating to territorial sovereignty. The rules to be applied are sought here.

A feudal baron acquired title to *terra nullius* when his occupation was so effective as to deter successfully all attackers.¹ Might, in that case, was right. If the Pope recognized the baron's claim, then the authority of the Christian world stood behind the title.² New rules were devised for new circumstances during the era of great discoveries, *circa* 1460 to 1550, and for a century or more thereafter. "Discovery with symbolic taking of possession was clearly sufficient to constitute title to *terra nullius* before 1700."³ More sophisticated principles became necessary as claims overlapped, however. Even before 1700, 'possession' emerged as the key ingredient in a good title and Spain,⁴ France,⁵ and England rejected claims based solely on discovery. Queen Elizabeth told the Spanish Ambassador that:⁶

... she would not persuade herself that the Indies are the rightful property of Spain ... only on the ground that the Spaniards have touched here and there, have erected shelters, have

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¹von der Heyde, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law" (1936) 29 Am. J. Int'l. L. 448, at 449.

²The power of the Pope to issue the Bulls was supposed to be based on the Donation of Constantine which conveyed to Pope Sylvester and his successors title to many lands. St. Augustine elaborated this into the doctrine that the whole world was the property of God and that mankind enjoyed only a usufructuary interest. The power of disposition of unoccupied areas thus fell to the Popes as part of their claimed authority over all things temporal. This authority rested either in their position as vice-regents of God on earth or as Vicars of Christ. A further ingredient in this Papal power was the obligation of the Church to carry the teachings of Christ to all heathens and infidels; it therefore appeared to the Church to be its normal function to authorize Christian monarchs to acquire territory outside the civilized world.

³Simsarian, "The Acquisition of Legal Title to Terra Nullius" (1938) 53 Pol. Sci. Q. 111, at 112.

⁴Goebel, *The Struggle for the Falkland Islands* (1927), 96, quoted from "Coleccion de los Viajes y Descubrimientos" (1825) 4 Navarrete 312.

⁵Davenport, *European Treaties Bearing on the History of the United States* (1917), v. 1, p. 220.

⁶Camden, *The History of the Most Renowned and Victorious Princess Elizabeth, Late Queen of England* (3rd ed., London, 1675), p. 255.

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given names to a river or promontory, acts which cannot confer property. So that . . . this imaginary proprietorship ought not to hinder other princes from carrying on commerce in these regions and from establishing colonies where Spaniards are not residing, without the least violation of the law of nations.

As the age of discovery gradually merged into the age of colonialism, emphasis became more pronounced on the requirement of occupation or 'real', as opposed to 'constructive', possession as a constituent of title.

In the 19th century, Russia justified its title to Alaska by listing those standards against which, at that time, territorial claims were measured. In a letter to the United States Secretary of State, John Quincy Adams, dated 28 February 1822, Pierre de Poletica, the Russian Minister in Washington, said:⁷

. . . it is easy, Sir, as appears to me, to draw the conclusion, that the rights of Russia to the extent of the North-west Coast . . . rest upon the three bases required by the general Law of Nations and immemorial usages among nations; — that is, upon the title of first discovery; upon the title of first occupation; and, in the last place, upon that which results from a peaceful and uncontested possession of more than half a century; an epoch, consequently, several years anterior to that when the United States took their place among Independent Nations.

A further ingredient, notification of the claim to other nations — an overt expression of *animus possidendi* — was adopted in the General Act of the Conference of Berlin, 1884-1885.⁸

The Berlin Conference spawned as well the requirement for "establishment of authority."⁹ The foundation was thus laid for the modern requirement of international law as later expressed by various international tribunals: ". . . exercise exclusive authority,"¹⁰ ". . . continued display of authority,"¹¹ and ". . . occupation . . . must be effective."¹² These tribunals followed in the path of the Institute of International Law at Lausanne which had declared in 1888:¹³

Projet de Déclaration Internationale relative aux Occupations de Territoires.

Art. 1 — L'occupation d'un territoire à titre de souveraineté ne pourra être reconnue comme effective que si elle réunit les conditions suivantes.

1°. La prise de possession d'un territoire enfermé dans certaines limites, faite au nom du gouvernement;

⁷(1821-22) 9 British and Foreign State Papers 483, at 485.

⁸(1884-85) 76 British and Foreign State Papers 4. It may be argued that the United States practice of 'reserving' its rights to certain territories discovered by its nationals is inconsistent with any requirement for notice. See, e.g., note dated 24 February 1934 from United States Secretary of State to British Ambassador in Washington, Hackworth, *International Law* (1940), v. 1, p. 457, and note dated 16 January 1939 from United States Secretary of State to Norwegian Legation in Washington, Hackworth, *op. cit.*, v. 1, at 460.

⁹The signatories were Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Italy, Netherlands, Portugal, Russia, Spain, Sweden, Norway, and Turkey. The United States signed, but did not ratify, the Act.

¹⁰Arbitral Award of His Majesty the King of Italy on the Subject of the Difference Relative to the Sovereignty over *Clipperton Island* (France-Mexico), 28 January 1931, "Judicial Decisions Involving Questions of International Law" (1932) 26 Am. J. Int'l. L. 390, at 393.

¹¹*Legal Status of Eastern Greenland* [1933] P.C.I.J. ser. A/B, No. 53, at p. 45.

¹²*The Island of Palmas Case* (United States-Netherlands) (1928) 2 R.I.A.A. 829, at 846.

¹³10 *Annuaire de l'Institut de Droit International* 201.

2°. La notification officielle de la prise de possession.

La prise de possession s'accomplit par l'établissement d'un pouvoir local responsable, pourvu de moyens suffisants pour maintenir l'ordre et pour assurer l'exercice régulier de son autorité dans les limites du territoire occupé. Ces moyens pourront être empruntés à des institutions existantes dans le pays occupé.

La notification de la prise de possession se fait soit par la publication dans la forme qui dans chaque état est en usage pour la notification des actes officielles, soit par la voie diplomatique. Elle contiendra la détermination approximative des limites du territoire occupé.

"Effective occupation" has been interpreted many times.¹⁴ The arbitral award in the *Clipperton Island* case stated that the occupying state must take steps to exercise exclusive authority and that "... that only takes place when the state establishes in the territory itself an organization capable of making its laws respected."¹⁵

The development of the international law of territory has been the gradual elimination of 'constructive possession' in favour of 'effective occupation.' The planting of flags, the simple proclamation of claims, the magnification of the claimed area through the device of the 'hinterland' and 'contiguity' theories — all these have passed from favour. Yet boldly evident, as if to deny the ability of international jurisprudence to catalogue orderly its materials, stands a theory seemingly inconsistent with this pattern. It is the polar sector theory.

II

The practice of claiming sovereignty over a sector of the earth's surface, as measured by meridians of longitude, is not new. The first example is found in the Papal Bull *Inter Caetera* of Alexander VI, dated 4 May 1493,¹⁶ later replaced by the Treaty of Tordesillas concluded 7 June 1494 between Spain and Portugal.¹⁷ More recently, various States have circumscribed their claims to portions of Antarctica by meridians of longitude.¹⁸ And several states have subscribed at one time or another to the 'sector theory.'

The Arctic 'sector theory' is rightly associated with Canada for it was first offered by a Canadian, and first debated in the Canadian Parliament. In the half century since the first appearance of the theory, many Canadian statesmen have taken great pains either to criticize it or praise it. Some have offered a disarming display of their open-minded attitude and have spoken on various occasions on both sides of the issue.

An Arctic sector is deceptively simple, and is compounded of only two ingredients: a base line or arc described along the Arctic Circle through territory

¹⁴See, e.g., *Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States) v. Great Britain* (1920) 6 R.I.A.A. 42; *United States (Noyes) v. Panama*, American and Panamanian General Claims Arbitration, [1933] Hunt's Report 155.

¹⁵*The Clipperton Island Award*, *supra*, note 10 at 393-4.

¹⁶Davenport, *op. cit.*, *supra*, note 5, v. 1, at 71.

¹⁷*Ibid.*, 84, at 95. The treaty was confirmed by the Bull *Ea Quae*, dated 24 January 1506; Davenport, *op. cit.*, v. 1, at 107.

¹⁸See Oppenheim, *International Law* (8th ed., Lauterpacht, 1955), v. 1, 556-7.

unquestionably within the jurisdiction of a temperate zone state, and sides defined by meridians of longitude extending from the North Pole south to the most easterly and westerly points on the Arctic Circle pierced by the state. Under the theory, nations possessing territory extending into the Arctic regions have a rightful claim to all territory — be it land, water or ice — lying to their north. This claim springs from the geographical relationship of the claimant state to the claimed territory; the two areas must be contiguous along the Arctic Circle.

The Arctic sector theory was first publicly propounded by Pascal Poirier, a Canadian Senator, in 1907. Senator Poirier was at that time delivering a speech in the Senate, the upper house of Canada's bi-cameral Parliament, in support of his own motion:¹⁹

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.

Poirier's resolution was abortive. His motion was neither seconded nor put to a vote. The draft resolution embodied in the motion was not accepted by the Senate, and never reached the floor of the House of Commons. Officially, Senator Poirier's Arctic sector theory was a one-man idea, but it rapidly attracted attention disproportionate to the importance attached to it by Poirier himself.²⁰ Poirier said that Canada had four claims to sovereignty in the Arctic regions. The first claim was through the Arctic discoveries of such English explorers as Cabot, Frobisher, Davis, Perry, Baffin, and Fox. The second claim arose out of the cession to the English Crown of all French claims in what is now Canada by the Treaty of Paris in 1763.²¹ The third claim was based on the occupying exploits of the Hudson's Bay Company.²² Only as a fourth ground did Poirier mention sectors:²³

We have a fourth claim, we can establish a fourth ground for ownership of all the lands and islands that extend from the arctic circle up to the north pole. Last year, I think it was, when our Captain Bernier [a noted Arctic explorer of that day] was in New York, a guest of the Arctic Club, the question being mooted as to the ownership of Arctic lands, it was proposed and agreed — and this is not a novel affair — that in future partition, of northern lands, a country whose possession today goes up to the Arctic regions, will have a right, or should have a right, or has a right to all the lands that are to be found in the waters between a line extending from its eastern extremity north, and another line extending from the western

¹⁹1906-07 *Debates*, Senate, Canada, 266.

²⁰Poirier addressed the Senate on the same subject a few years later, but made no mention of the sector theory. Instead, he emphasized the importance of occupation and the exercise of jurisdiction as evidence of sovereignty. See 1909-10 *Debates*, Senate, Canada, 179-184.

²¹The Definitive Treaty of Peace and Friendship between His most Britannick Majesty, the Most Christian King, and the King of Spain, *A Collection of All the Treaties of Peace, Alliance, and Commerce between Great Britain and other powers from the Revolution in 1688 to the Present Time* (London, 1772), v. II, p. 272.

²²These exploits, sweeping though they were, did not match the claims of the Company, however. Poirier quoted a Company claim to all lands lying from the north of Hudson Bay to the North Pole. *Supra*, note 19, at 271.

²³*Supra*, note 19, at 271.

extremity north. All the lands between the two lines up to the north pole should belong and do belong to the country whose territory abuts up there. Now if we take our geography, it is a simple matter.

The Senator then marked off the globe into five sectors, each commencing in the territory of a nation lying immediately below the Arctic Circle: Norway and Sweden, Russia, the United States (Alaska), Canada, and Denmark (Greenland). In doing so he stated:²⁴

From 141 to 60 degrees west we are on Canadian territory. That is the territory that has been discovered by the seamen of England, that has been traversed by MacClure and by Franklin. It is the territory that has been taken possession of by the Hudson Bay Company, and it is the territory that we claim, and I hold that 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. By that means difficulties would be avoided, and there would be no cause for trouble between interested countries. Every country bordering on the Arctic regions would simply extend its possessions up to the north pole.

This passage leaves the impression that Poirier felt that Canada was rightly entitled to the Arctic areas to the north by virtue of discovery and actual possession; that 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.

Senator Poirier was not unfamiliar with the more conventional theories of title to *terra nullius*. Indeed he forecast the later findings of the arbiter in the *Isle of Palmas* case by his statement on effective occupation:²⁵

... in the case of the Arctic wastes and recesses, what is deemed, in my view of it, sufficient to establish possessions and give a good title, is occupancy as much as occupancy can take place. No more would be demanded to make a perfect title for England in those regions than is requisite in the case of France in the Sahara Desert. No one expects France to till the Sahara Desert in order to come within the definition of what is needed to perfect occupancy. The fact is, England did what could be done in the way of occupancy. ...

The sector theory gained little immediate sympathy from the Canadian Government. The Right Honourable Sir Richard J. Cartwright, Minister of Trade and Commerce and the Government leader in the Senate, closed the debate by speaking immediately following Poirier. He said, in part:²⁶

... 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, besides establishing the posts I have referred to, 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. ...

Pascal Poirier and his 'sector theory' have gained a permanent position in the history of the Arctic. In the period between the wars, considerable atten-

²⁴*Ibid.* The German writer Breitfuss in "Territorial Division of the Arctic" (1928-9) 8 Dalhousie Review 456, at 467-8, also suggests 5 sectors: Norwegian-Finnish, Soviet, Alaskan, Canadian, and Greenland. The Soviet writer Lakhtine, on the other hand, in "Rights Over the Arctic" (1930) 24 Am. J. Int'l. L. 703 at 715-6, suggests 6 sectors: Norwegian, Finnish, Soviet, Alaskan, Canadian, and Greenland.

²⁵*Supra*, note 19, at 273.

²⁶*Ibid.*, at 274.

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tion was focused on the far north, and much learned comment about the theory appeared in print. 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? As late as 1930, when some speculation still remained about the existence of an Arctic land mass similar to the sub-continent of Antarctica, the sector principle appeared to differ little from the Spanish and Portuguese claims of the early 16th century. Proponents of the theory, on the other hand, often rested their cases on fragile supports. Poirier had said, for example — but almost parenthetically — that a geographical division of the Arctic would avoid "difficulties" between interested nations.²⁷ The Soviet writer Lakhtine argued that sectors offered the only "practical" solution to the problem.²⁸ Theorists, however, often thought otherwise. Smedal, a prominent Norwegian publicist of the period, was very outspoken:²⁹

The parties on whom the greatest wrong would be inflicted by the sector principle are the States that are not bounded by the Arctic Sea. Any State whatsoever may, 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. Lakhtine objects to this view on the ground that the interests of these States in the Arctic can only be of an 'imperialist character', and that the interests for this reason 'cannot be recognized as being reasonable'. However, 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 ideal character than any other State does in looking after its interests.

Contiguity is the basic ingredient of a sector claim. The reasons advanced in favour of sectors — practicality, simplicity, even inevitability³⁰ — flow from the propinquity of the claimant state to the territories being claimed. The bare principle of contiguity, however, no longer forms — if indeed it ever did — any part of international law with respect to territory. In this sense, the sector theory is related to the now discredited 'hinterland' theory. Smedal regarded the sector theory as a perversion of the hinterland doctrine because under it claims to territory proceed from the centre of a continent out towards the sea rather than from the coast inward. McKitterick, however, found the two theories to be part of the same whole.³¹

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.

²⁷Taracouzio, in *Soviets in the Arctic* (1938), 323, says this argument stems from the "pragmatic school."

²⁸Lakhtine, "Rights Over the Arctic" (1930) 24 Am. J. Int'l. L. 703, at 711.

²⁹Smedal, *Acquisition of Sovereignty Over Polar Areas* (Oslo, 1931, translation by Meyer), p. 62.

³⁰"... if these . . . Powers are satisfied with such a partition, the rest of the world will have to be."—Hunter Miller, "Political Rights in the Arctic" (1925-26) 4 Foreign Affairs 47, at 60. "The sector principle of territorial claims in the Arctic, if confined to lands and waters within the respective sectors, is sufficiently in accord with the inevitable to make its tacit adoption highly probable."—Svarlein, "The Legal Status of the Arctic" (1958) 52 Proceedings of the Am. Soc'y. of Int'l. L. 136.

³¹McKitterick, "The Validity of Territorial and Other Claims in Polar Regions" (1939) 21 J. of Comparative Legislation and Int'l. L. (3rd Series) 89, at 95.

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.

III

Much has been written about the application of the sector theory to the Arctic, but only one nation, the Soviet Union, has formally declared its claim to Arctic lands on the basis of the theory. A Decree of the Presidium of the Central Executive Committee of the Union of Soviet Socialist Republics, dated 15 April 1926, and entitled "Territorial Rights of the Soviet Union in the Arctic" reads, in part:³²

Are declared forming part of the territory of the Union of Soviet Socialist Republics all lands and islands already discovered, as well as those which are to be discovered in the future, which at the time of the publication of the present decree are not recognized by the Union of Soviet Socialist Republics as the territory of any foreign state, and which lie in the Arctic north of the coast of the Union of Soviet Socialist Republics up to the North Pole, within the limits between the meridian longitude 32°-4'-35" east from Greenwich passing along the eastern side of Vaida Bay through the triangular mark on the Cape Kekurski, and the meridian longitude 168°-49'-36" west from Greenwich passing along the middle of the strait separating Ratmanov and Kruzenshtern Islands of the Diomedé Archipelago lying in Bering Strait.

The decree refers only to "lands and islands." (Poirier also talked about "lands and islands.") Notwithstanding, Professor Korovin has stated that lands and islands are only part of the Soviet sector, and to conclude that ice and water are not also included "... would be in conflict with the whole idea of the Decree."³³ If ice formations and the seas surrounding the Arctic lands were not included, then "... the polar sector adjacent to the U.S.S.R. would have to be considered as an open sea with all the consequences resulting from such an interpretation."³⁴ Lakhtine asserts that "Polar States acquire sovereignty over them [seas, floating ice and permanent ice] within the limits of their sectors of attraction."³⁵ Lakhtine was, in 1930, the Secretary-Member of the Committee of Direction of the Section of Aerial Law of the Union of Societies' *ossoaviachim* of the U.S.S.R.

Such opinions are not limited to Soviet publicists. Professor Hyde has stated that the sector theory "... marks indifference as to the nature of the surface of the area concerned — whether it be land, or ice, or water."³⁶

IV

Canada has often been referred to as the haven of the sector theory. There is much evidence that this is not so. Canadian Government reception to Senator Poirier's original sector proposition, as stated above, was less than enthusiastic. Nor did it soon change. Poirier had credited Captain Bernier, a sea-faring explorer who had been commissioned by the Canadian Government

³²(1926) 124 State Papers, Part II, 1064-5.

³³As translated by Taracouzio, *op. cit.*, *supra*, note 27, at 348-9.

³⁴*Ibid.*

³⁵*Supra*, note 28, at 712.

³⁶Hyde, *International Law* (2nd ed., 1945), v. 1, p. 349.

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⁴⁰*Op. cit.*

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⁴⁵*Ibid.*, v

to lead several geographical missions into the Arctic, as a proponent of the sector theory.³⁷ Two years later, Captain Bernier was reported by a New York newspaper as proposing that the several nations adjacent to the Arctic Circle should meet for the purpose of dividing up the polar sea. Such a meeting would be, in effect, an implementation of the sector theory. The then Prime Minister of Canada, Sir Wilfred Laurier, was asked to comment on this report in the House of Commons. He replied: "... 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."³⁸

On 10 June 1925, the Minister of the Interior, the Honourable Charles Stewart, told the House of Commons that Canada claimed the territory to the pole "... outlined between the degrees of longitude 60 and 141. ..." ³⁹ Smedal,⁴⁰ David Hunter Miller,⁴¹ and Professor Svarlejn⁴² all regard this as evidence of Canadian support of the sector theory. Miller wrote that the Canadian claims were "... definitely and officially stated by Mr. Stewart, and are outlined on a map laid on the table of the Canadian House of Commons."⁴³ With respect, the Honourable Minister was less definite than Miller contends. The map was not laid on the table of the House (a procedure of some legislative significance) but was instead made available after the conclusion of the day's sitting for examination by Members.⁴⁴ The sector "claim" was made in the following, less than precise, manner:⁴⁵

... international law; in a vague sort of way, creates ownership of unclaimed lands within one hundred miles of any coast, even if possession has not been taken. At least there is a sort of unwritten law in that respect. Of course possession is a very large part of international law as well as any other law.

Mr. Stewart had spoken in much the same terms earlier in the same session.

This vague outline of Canadian policy was a continuation of some hazy Government statements in the period 1922 to 1924. In 1922, during a debate in

³⁷Poirier had stated that Bernier's sector proposal to the Arctic Club was "not a novel affair," but did not enlarge on the statement. (See p. 203 above.) He may have considered the Papal Bulls as precedents. The Canadian Government had itself employed sector overtones when in 1878 it sought sovereignty over the Arctic islands by urging the definition of the Canadian boundaries as: "On the East by the Atlantic Ocean, which boundary shall extend towards the North by Davis Straits, Baffin's Bay, Smith's Straits and Kennedy Channel, including all the islands in and adjacent thereto ... 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 North West by the United States Territory of Alaska."—1878 *Debates*, Senate, Canada, vol. 1, p. 903. The occasion was a joint address to Her Majesty the Queen from the Senate and the House of Commons of Canada. (See pp. 211-212 below.)

³⁸1909-10 *Debates*, House of Commons, Canada, vol. 2, p. 2711-2.

³⁹1925 *Debates*, House of Commons, Canada, vol. 4, p. 4084.

⁴⁰*Op. cit.*, *supra*, note 29, at 65.

⁴¹Hunter Miller, "Political Rights in the Arctic" (1925-26) 4 *Foreign Affairs* 47, at 60.

⁴²Svarlejn, "The Legal Status of the Arctic" (1958) 52 *Proceedings of the Am. Soc'y. of Int'l. L.* 139.

⁴³*Supra*, note 41, at 50.

⁴⁴1925 *Debates*, House of Commons, Canada, vol. 4, p. 4083.

⁴⁵*Ibid.*, vol. 1, p. 1111.

Committee of Supply, the Leader of the Opposition and the Minister of Finance (second only in rank at that time to the Prime Minister) contributed to the following exchange after the Minister had been asked what the Government's policy was with respect to the northern islands:⁴⁶

Minister of Finance — It is a delicate matter to state the policy of the Government on that question.

Leader of Opposition — Has the Government any policy?

Minister of Finance — What we have we hold.

That question to the Minister appears to have been justified by later events. If, at this time, Canada was adhering to the sector principle, it might be expected that Canada would not lay claim to islands lying within the sector of another country. Yet Canada did claim Wrangel Island, which is within the Soviet sector. Prime Minister Mackenzie King told the House of Commons in 1922 that the "Government certainly maintains the position that Wrangel Island is part of the property of this country."⁴⁷ This certainty was short lived. In 1923, the Honourable Ernest Lapointe, Minister of Fisheries in the King government, when asked who owned Wrangel Island, replied: "I should like to know myself."⁴⁸ And the following year, the Honourable Charles Stewart, Minister of the Interior in the same government, said "... as far as Canada is concerned, we do not intend to set up any claim to the island."⁴⁹ The Soviet authorities disposed of the problem by moving in and forceably evicting the residents of the island. By that time the original Canadian occupants had sold their interests to United States citizens, however, and it became unnecessary for Canada to take any official stand.

These Government statements do not appear to endorse the sector theory which, as enunciated by Senator Poirier, was designed to avoid territorial disputes by dividing up the polar areas. The theory did not contemplate unilateral claims in a foreign sector.

In 1938, Canada was evidently endorsing the sector theory. The Minister of Mines and Resources of the Liberal Government told the House of Commons that no foreign challenge to Canada's sovereignty in the Arctic could be successful. He referred to his understanding that international usage had established clearly certain principles upon which sovereignty could be claimed in remote areas of the Arctic which have never been visited by man, and that these principles were favourable to Canada.⁵⁰ He did not enunciate the principles, but they were other than the sector theory because:⁵¹

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.

⁴⁶1922 *Debates*, House of Commons, Canada, vol. 2, p. 1750.

⁴⁷*Ibid.*, at 1751.

⁴⁸1923 *Debates*, House of Commons, Canada, vol. 4, p. 3360.

⁴⁹1924 *Debates*, House of Commons, Canada, vol. 2, p. 1110.

⁵⁰1938 *Debates*, House of Commons, Canada, vol. 3, p. 3080.

⁵¹*Ibid.*, at 3081. Italics added.

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The Honourable Minister did not explicitly state that Canada claimed sovereignty to ice and water, but this may be inferred inasmuch as no land exists within 450 miles of the pole.

Prime Minister St. Laurent repeated in 1953 the Government's view that the Canadian boundary terminated at the pole. He told the House of Commons:⁵²

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

The meaning of his words is not clear. Occupation precludes a claim under the sector theory, but how does a nation occupy the ice and water lying between the Arctic archipelago and the pole? Once again, the observer is invited to assume that Canada lays claim to ice and water as well as to land. That, at any rate, is what Lester B. Pearson wrote in 1946 when he was Canadian Ambassador to the United States. His words were unequivocal:⁵³

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 west boundaries, extended to the North Pole.

The Minister of Northern Affairs and National Resources of the St. Laurent Government expressed contradictory views to the House of Commons in 1956:⁵⁴

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. There is no doubt about it and there are no difficulties concerning it . . . We have never upheld a general sector theory. 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.

The most recent ministerial pronouncement, of special significance because it was voiced by a member of the Conservative Government and was the first policy statement on this subject made by an administration out of office from 1935 until 1957, was read to the House of Commons in 1958 by the Honourable Alvin Hamilton, Minister of Northern Affairs and National Resources. Mr. Hamilton was answering a question asked by Mr. Lesage, his Liberal predecessor in the portfolio.⁵⁵

Mr. Lesage — Are the waters of the Arctic ocean north of the Arctic archipelago up to the north pole, in the so-called Canadian sector, Canadian waters?

Hon. Alvin Hamilton — Mr. Speaker, the answer is that 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

⁵²1953-54 *Debates*, House of Commons, Canada, vol. 1, p. 700; reprinted in (1954) 6 *External Affairs* 16 (Ottawa).

⁵³Pearson, "Canada Looks Down North" (1945-46) 24 *Foreign Affairs* 638. Mr. Pearson later served as Secretary of State for External Affairs in the St. Laurent Government.

⁵⁴1956 *Debates*, House of Commons, Canada, vol. 7, p. 6955.

⁵⁵1957-58 *Debates*, House of Commons, Canada, vol. 2, p. 1559.

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.

Mr. Hamilton's subsequent statements appear to be consistent with established principles of international law. He has said in the House of Commons: "Sovereignty is the effective occupation of an area by a country which has command or control over it."⁵⁶ On another occasion: "This great northland of ours is not ours because it is coloured red on a map. It will only be ours by effective occupation."⁵⁷

Few Canadian policies have been so inconsistently or unhappily interpreted over the years as that pertaining to the Arctic frontiers. The most recent statements indicate that Canada now relies in the last instance upon effective occupation. What then of the sector theory? Is it, as regards Canada, only a myth? Or was it once a part of Canadian policy which has now fulfilled its purpose and has disappeared in the wake of increased civilization in the Arctic? Whatever its role, the sector principle must be viewed in the perspective of the total Canadian claim — a claim with broad foundations, a claim, according to the Canadian Government, which is consistent with the principles of international law.

V

Canada's claim to territorial sovereignty in the Arctic has many roots. Discovery, exploration, acquisition by treaty, effective occupation — all ingredients are present.

Discovery and Acquisition

A Canadian historian has written: "A careful examination of histories of exploring expeditions to and amongst the Arctic islands will clearly show that all except Axel Heiberg Island and the Ringnes Islands . . . were discovered and named by British explorers."⁵⁸ Commencing with the voyage in 1497 of John Cabot's son Sebastian to the northern coast of Labrador under commission of King Henry VII, any historical account of Arctic North America contains little else but English names: Frobisher in 1576, Davis in 1585-7, Hudson in 1610, Baffin in 1615 and 1616. After a pause of almost two centuries, the assault on the North-west passage was renewed. In 1819-20 Perry reached Melville Island; in 1831 Ross discovered the north magnetic pole; in 1845 Franklin

⁵⁶1958 *Debates*, House of Commons, Canada, vol. 2, p. 1979.

⁵⁷*Ibid.*, at 1989. Prime Minister Diefenbaker has since said, in a peripheral fashion, that: ". . . everything that could possibly be done should be done to assure that our sovereignty to the North Pole be asserted, and continually asserted, by Canada."—1958 *Debates*, House of Commons, Canada, vol. 4, p. 3652.

⁵⁸Johnston, "Canada's Title to the Arctic Islands" (1933) 14 *Canadian Historical Rev.* 24, at 25.

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navigated Lancaster Sound before perishing in Franklin Straits in 1846. M'Clintock sledged 1,408 miles overland in 105 days. Finally, in 1858, McLure, by land and water, made the North-west passage. Following Confederation in 1867, the Canadian Government itself commissioned several Arctic explorations. By 1910 there had been eight such missions, the first three in 1884, 1885 and 1886. In 1909 Captain Bernier mounted a tablet on Melville Island inscribed:⁵⁹

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 of 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.

Steffanson was in the north from 1913 to 1918. In 1944, the Royal Canadian Mounted Police schooner 'St. Roch' navigated the North-west passage in a single season for the first time.⁶⁰

What it did not discover, the Canadian nation acquired by purchase and treaty. The Treaty of Paris, 1763,⁶¹ ceded to Great Britain all of France's possessions in North America except the islands of St. Pierre and Miquelon. The boundary between British North America and Russian Alaska was fixed by treaty in 1825.⁶² The northern boundary remained undeclared, however, even following Confederation. The Government of the new Dominion of Canada passed an Order-in-Council dated 30 April 1875 requesting the transfer from the United Kingdom of all the lands to the north of the Dominion. This was followed by a joint address to Her Majesty the Queen from the Senate

⁵⁹See 1909-10 *Debates*, House of Commons, Canada, vol. 1, p. 1730.

⁶⁰See: "The Voyage of the St. Roch through the Northwest Passage—1941-42," at (1944) 4 *The Polar Record* 115 (The Scott Polar Research Institute, Cambridge University); Wordie, "The Voyage of the St. Roch through the Northwest Passage—1944," at (1945) 4 *The Polar Record* 259.

⁶¹*Supra*, note 21.

⁶²Convention between Great Britain and Russia, signed at St. Petersburg, 16 February 1825, (1824-25) 12 *British and Foreign State Papers* 38. The treaty employed the language "... la même ligne méridienne du 141ième degré formera, dans son prolongement jusqu'à la Mer Glaciale, la limite entre les Possessions Russes et Britanniques sur le Continent de l'Amérique Nord-Ouest." The word "jusqu'à" may be translated so that the line will extend "up to" the frozen sea or "up to and including" the frozen sea. Lakhtine argues in favour of the more liberal translation and relies on the wording of the 1867 treaty of sale of Alaska: "... proceeds due north, without limitation, into the same Frozen Ocean."—Malloy, *Treaties, Conventions, International Acts, etc. between the United States of America and Other Powers* (1910), v. 2, 1521, at 1522. Lakhtine contends that this treaty justifies the 1926 Soviet Decree annexing an Arctic sector. See note 32, *supra*. "Jusqu'à" is equivocal. Both David Hunter Miller—note 41, *supra*, at 61—and Smedal—note 29, *supra*, at 67—concede this. The P.C.I.J. considered the meaning of the word in its advisory opinion with respect to *The Monastery of Saint-Naoum* [1924] P.C.I.J. ser. B, No. 9, at p. 20 and found it impossible to affirm either the exclusive or inclusive interpretation.

and House of Commons of Canada on 3 May 1878. After expressing the doubtful status of the northern boundary, the address continued:⁶³

That, to avoid all doubt in the matter, it is desirable that an Act of the Parliament of the United Kingdom of Great Britain and Ireland should be passed defining the North-Easterly, Northerly, and North-Westerly Boundaries of Canada, as follows, that is to say: On the East by the Atlantic Ocean, which boundary shall extend towards the North by Davis Straits, 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 North West by the United States Territory of Alaska.

The Imperial Government did not comply precisely with the request. By an Order-in-Council dated 31 July 1880, "... all the British possessions on the North American continent, not hitherto annexed to any colony. . ." were transferred to Canada.⁶⁴ Boundaries were not defined. A half-century later, this omission prompted the following comment in a Canadian Government publication: "... the reason advanced by those who have studied the attitude of the British authorities is that it was finally considered inadvisable to define that which according to available knowledge was indefinite. . ."⁶⁵ The northern boundary was fixed by a proclamation for the first (and only) time in 1895.⁶⁶ The most northerly point was stated to be $83\frac{1}{4}^{\circ}$ North latitude at the intersection of that parallel with $63\frac{1}{2}^{\circ}$ West longitude, then sloping, on the east, southwards through Robeson Channel, Kennedy Strait, Smith Sound, Baffin Bay, and Davis Strait to the Atlantic Ocean and, on the west, southwards off the west side of the archipelago to the mainland.

Earlier, in 1869, the Dominion had purchased from the Hudson's Bay Company the vast tracts known as Rupert's Land.⁶⁷ Section 146 of the British North America Act, 1867,⁶⁸ enabled this to be done. Rupert's Land had been described in the Company's charter, dated 2 May 1670, by which Charles II granted to "The Governor and Company of Adventurers of England trading into Hudson's Bay":⁶⁹

... the sole trade and commerce of 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,

⁶³1878 *Debates*, Senate, Canada, vol. 1, p. 903.

⁶⁴Canada Gazette, 9 October 1880.

⁶⁵Canada, Department of the Interior, *Southern Baffin Island* (1930), 12.

⁶⁶59-60 Vict., S.C. 1896, at p. xlvii-xlviii.

⁶⁷For an account of these negotiations, see the *Report of the Delegates Appointed to Negotiate for the Acquisition of Rupert's Land and the North-West Territory*, laid before the Parliament of Canada by Command of His Excellency the Governor General, 17 May 1869 (Queen's Printer, Ottawa).

⁶⁸The British North America Act, 1867; 30-31 Vict., c. 3.

⁶⁹*Charters, Statutes, Orders-in-Council, etc. relating to the Hudson's Bay Company*, (London, 1931), p. 3-21. The Charter granted to the Company wide political and administrative powers but recognized the ultimate sovereignty of the British Crown. All territorial acquisitions of the Company benefited the Crown, therefore. Individuals, in law, cannot claim territorial sovereignty. See: Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), 108.

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, . . . and that the said land be from henceforth reckoned and reputed as one of our plantations or colonies in America, called 'Rupert's Land.'

Canada now needed but a single further piece to complete its land map. This was provided in 1930 in the form of an exchange of notes between the Governments of Norway and Canada which removed any lingering doubts about the Sverdrup Islands, discovered by a Norwegian. The Government of Norway recognized Canadian sovereignty over the islands but added, interestingly, that they were ". . . anxious to emphasize that their recognizance 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'."⁷⁰

Effective Occupation

Canada is cognizant of the doctrine of effective occupation. The Minister of Northern Affairs and National Resources told the House of Commons in 1958:⁷¹

. . . you can hold a territory by right of discovery or by claiming it under some sector theory but where you have great powers holding different points of view the only way to hold that territory, with all its great potential wealth, is by effective occupation.

The Leader of the Opposition said much the same thing:⁷²

The sector theory itself is not enough; it must be followed by rights based on discovery and effective occupation.

At what point does occupation become 'effective?' The standard is subjective. Professor Dickinson has interpreted the *Clipperton Island Award* of 1932 as applying to all uninhabited and uninhabitable regions, and as meaning that the occupation which is required of such regions is only such occupation as is appropriate and possible under the circumstances.⁷³ He considers this to be in each case a question of fact and regards the principle as being ". . . a realistic and altogether satisfactory solution from the legal point of view."⁷⁴ Von der Heydte assimilates effectiveness to the presence of human beings:⁷⁵

Effectiveness . . . means the guarantee of a minimum of protection to one's own subjects as well as to foreigners coming to the region. Effectiveness then seems to be best illustrated by the actual display of sovereign rights, the maintenance of order, and protection. But as a matter of fact sovereign rights can be exercised only over human beings, in inhabited lands; a certain order can be maintained only amongst human beings, *i.e.*, again in inhabited coun-

⁷⁰*Canada Treaty Series* (1930), v. 1, No. 17. A statue of Sverdrup was erected in Steinkjer, Norway in 1957; Canada contributed to the cost.

⁷¹1958 *Debates*, House of Commons, Canada, vol. 4, p. 3540.

⁷²*Ibid.*, at 3512. The Leader of the Opposition was the Hon. Lester B. Pearson. See p. 209 above for Mr. Pearson's views 13 years earlier when Canadian Ambassador to the United States.

⁷³Dickenson, Editorial Comment on: "The Clipperton Island Case" (1933) 27 *Am. J. Int'l. L.* 130.

⁷⁴*Ibid.*, at 133.

⁷⁵von der Heydte, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law" (1935) 29 *Am. J. Int'l. L.* 448, at 463.

tries; and protection too can be granted only to human beings. It would be a misconstruction of the doctrine of effectiveness to say that sovereignty over completely uninhabited lands presupposes in every case actual occupation.

Schwarzenberger, too, believes that the standard varies from place to place.⁷⁶

Few commentators would disregard effective occupation as a factor in the determination of sovereignty in polar areas. The judgment of the Permanent Court of International Justice in the case concerning the *Legal Status of Eastern Greenland*⁷⁷ has been criticized as detracting from the importance of the principle. Reeves observed that the attitude of the Court in that case may "... be of support to a state which is seeking to strengthen its claim to territory upon bases other than effective occupation."⁷⁸

Lakhtine is one of the few who argue against effective occupation, on the ground that it is an unreasonable obligation in the Arctic.⁷⁹ It is suggested that the better opinion is that of Hyde:⁸⁰

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 observation 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. . . .

One yardstick of occupation may be the amount of money expended in the area by the sovereign power; the trappings of civilization and bureaucracy are expensive. The Government of Canada spent \$4,000 in the Arctic in 1920, \$300,000 in 1924, and \$33.2 million in 1959. The far north is administered from Ottawa with the advice of a Council on which sit elected and appointed members. The Yukon Territory and the Northwest Territories each elect a representative to the House of Commons.

The many activities of an advanced society have existed in the north for decades. The Canadian Government had occasion to catalogue some of these in 1925. The United States, without preliminary notification to the Canadian Government, had announced that the MacMillan Expedition (organized by the National Geographical Society, but with the active assistance of the United States Navy) planned to fly over and explore Baffin, Ellesmere, Axel Heiberg

⁷⁶Schwarzenberger, *International Law* (3rd ed., 1957), v. 1, p. 298.

⁷⁷*Legal Status of Eastern Greenland* [1933] P.C.I.J. ser. A/B, No. 53.

⁷⁸Reeves, Editorial Comment on: "George V Land" (1934) 28 Am. J. Int'l. L. 117, at 119. See also Hyde, Editorial Comment on "The Case Concerning the Legal Status of Eastern Greenland" (1933) 27 Am. J. Int'l. L. 732, at 736-7.

⁷⁹Lakhtine, "Rights Over the Arctic" (1930) 24 Am. J. Int'l. L. 703, at 710.

⁸⁰*Op. cit.*, *supra*, note 36, at 348. A 'local condition' factor was recognized in the Convention between the British Empire, Belgium, France, Italy, Japan, Portugal, and the United States of America, revising the General Act of Berlin, 26 February 1885, and the General Act and Declaration of Brussels, 2 July 1890, at Saint-Germain-en-Laye, 10 September 1919. The preamble read in part: "Considérant que les territoires intéressés sont actuellement placés sous des autorités reconnues, qu'ils sont dotés d'institutions administratives conformes aux conditions locales. . . ."—(1919) 112 *British and Foreign State Papers* 901.

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and certain other Arctic islands. Parliament passed an amendment to the Northwest Territories Act requiring licenses of Arctic scientists and explorers.⁸¹ Secretary of State Kellogg recognized the implication of applying for a license and asked for further information on the Canadian agencies "temporarily" in the north. The Canadian reply outlined the location, personnel and permanent character of R.C.M.P. posts, and continued:⁸²

In regard to the duties of members of the Royal Canadian Mounted Police stationed in the Eastern Arctic, it may be added that 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 and issuing destitute relief where necessary, enforcement of all the Ordinances and Regulations of the Northwest Territories, including Game Laws and the protection of Musk Oxen, and the issue of Game, Animal and Bird Licenses to the various Trading Companies, the supervision of liquor permits, the enforcement of the Migratory Birds Convention Act for the Department of the Interior, the enforcement of the Criminal Code and Assistance to the Post Office and Customs Department as set forth in the last paragraph above, as well as to the Department of Mines and Agriculture in the collection of Eskimo material and ethnological and biological specimens.

Members of the Force are also called upon to assist in the taking of the Census and assisting the Director of Meteorological Service in the taking of readings at the different Posts from time to time, and to supply topographical information to the Federal Service. In addition, Police patrols to surrounding settlements and Eskimo villages and also extended patrols to remote points are made by each detachment for the purpose of obtaining the information required.

Hackworth reports that the United States requested licenses.⁸³

Military activities and defence installations such as the Distant Early Warning line have introduced permanent habitation into the Arctic to a degree thought impossible ten years ago. A Canadian flag now flies over a permanent establishment at Alert on the northern tip of Ellesmere Island, north of 82° North latitude.⁸⁴ Social security, too, has reached the Arctic. A monthly task performed wherever Canadians live — be they Eskimos or newcomers — is the distribution of Family Allowance cheques.⁸⁵

Many publicists have asserted that Canadian activities in the north constitute effective occupation. David Hunter Miller said as early as 1925 that "... while it cannot be asserted that Canada's title to all these islands is legally perfect under international law, we may say that as to almost all of them it is not now questioned and that it seems in a fair way to become complete and admitted."⁸⁶ In 1931, Gustav Smedal said: "A good precedent of how to take

⁸¹16 Geo. V, S.C. 1925, c. 48, sec. 1.

⁸²*Foreign Relations of the United States* (1925), v. 2, p. 571-3.

⁸³Hackworth, *International Law* (1940), v. 1, p. 463.

⁸⁴Some concern has been expressed in Canada that these manifestations of sovereignty have perhaps accrued to the benefit of the United States and not to Canada. See, e.g., 1958 *Debates*, House of Commons, Canada, vol. 4, p. 3652. These fears were allayed by the Minister of National Defence who told the House of Commons that: "Everywhere you go at all these stations on the D.E.W. line you now see the scarlet coat of the Royal Canadian Mounted Police."—1959 *Debates*, House of Commons, Canada, vol. 2, p. 1518.

⁸⁵Robinson, "Family Allowances in the Canadian Arctic" 6 *The Polar Record* 345 (The Scott Polar Research Institute, Cambridge University, 1952).

⁸⁶*Supra*, note 41, at 53.

effective possession of polar areas is Canada's handling of the Arctic islands lying north of its coasts."⁸⁷ T. E. M. McKitterick said in 1939:⁸⁸

... the question is not one of jurisdiction over persons and property situate in the territory at a given moment, but the ability to exercise jurisdiction over persons and property which may be found there at any time in the future. For example, 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.

VI

Canada's claims to territorial sovereignty over the Arctic mainland and the islands of the archipelago within the Canadian 'sector' have never been challenged by another state. The two nations most intimately concerned with this area are, coincidentally, the two most powerful and influential in the world—the United States and the Soviet Union. Between these two states lies Canada.

The U.S.S.R., having incorporated the sector theory as part of its national policy, would display inconsistency if it denied the Canadian claim. The Secretary of State for External Affairs of Canada reported to the House of Commons in 1959:⁸⁹

A search of departmental records has failed to disclose any dispute since 1900 between Canada and either the Union of Soviet Socialist Republics or the United States of America concerning the ownership of any portion of the Canadian Arctic.

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.⁹⁰ It has not claimed on the basis of Peary's overland trip to the Pole in 1909 or Byrd's polar flight in 1926.⁹¹ Nor has it advanced a sector claim on the basis of the Alaskan penetration of the Arctic Circle.

Suggestions have been cast out intermittently that territorial claims in the Arctic be settled by treaty; the Spitzbergen⁹² and Antarctic⁹³ Treaties have

⁸⁷Smedal, *Acquisition of Sovereignty Over Polar Areas* (Oslo, 1931, translation by Meyer), p. 35.

⁸⁸McKitterick, "The Validity of Territorial and Other Claims in Polar Regions" (1939) 21 J. of Comparative Legislation and Int'l. L. (3rd Series), 89, at 93.

⁸⁹1959 *Debates*, House of Commons, Canada, vol. 2, p. 1822.

⁹⁰See, e.g., Hackworth, *International Law* (1940), v. 1, p. 399-459.

⁹¹With respect to claims made as a result of flights over an area, Smedal writes: "When Admiral Byrd had at the beginning of 1929 made his first flights in Antarctica and had discovered new land, the title of the United States to the new discovered territories was under discussion. A Scotch newspaper then stated with much justification that the merits of Admiral Byrd were limited to the fact that he had seen the new lands. 'He has seen them,' it was stated, 'as we have all seen the moon.'"—Smedal, *Acquisition of Sovereignty Over Polar Areas* (Oslo, 1931, translation by Meyer), p. 52.

⁹²Treaty Regulating the Status of Spitzbergen, 2 L.N.T.S. 7; United States T.S. 686; *Canada Treaty Series* (1947), No. 20.

⁹³Treaty on the Antarctica, signed 1 December 1959, between Argentina, Australia, Belgium, Chile, the French Republic, Japan, New Zealand, Norway, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America; *British Treaty Series* (1961), No. 97; *United States Treaties and Other International Agreements Series*, No. 4780.

been urged as precedents. These proposals usually fail to define the claims requiring settlement, or to acknowledge that the treaties cited expressly reserve the question of sovereignty — in the first case in favour of Norway, and in the second case by declaring a moratorium. Philip C. Jessup wrote in 1947:⁹⁴

Should it become apparent that the resources of Antarctica or its air-strategical potentialities are of great importance, it will no doubt become necessary to settle the conflicting claims to sovereignty. Any decision in regard to that area would obviously be a powerful precedent for the settlement of comparable claims in the Arctic despite the physical differences between the two areas. It is possible that the matter could be adjusted by a conference such as that which produced the Berlin Act of 1885 concerning Africa.

In 1938 Taracouzio urged that "... the convocation of an international conference appears not only a logical way conclusively to determine the legal status of the Arctic, but also an urgent necessity, if good will among the states is to be preserved."⁹⁵ He suggested a modified sector theory, with application to land but not to ice, water or airspace.

Professor Svarlein resurrected Taracouzio's proposition in 1958 before the American Society of International Law.⁹⁶ A suggestion that the United States, the Soviet Union and Canada waive their claim to the airspace above their Arctic territories may have been worthy of consideration in 1939 — but surely not in the D.E.W. line era of 1958. Svarlein argued that a recognition of the sector principle for territorial apportionment of land areas, but not for water, ice or airspace (*even over land*), would be an acceptable compromise between the sector principle and the principle of effective occupation. He did not reveal what compromise was involved in surrendering airspace above the land areas — territory which he later admitted to be part of the "... *status quo* ... within the region."⁹⁷ Control of the airspace rests in the sovereign of the subjacent land; it is unrealistic to suggest that any Arctic state will surrender such rights in the absence of a substantial *quid pro quo*.

Any national challenge to Canada's claim would take the form of a declaration of non-recognition, or of a competitive claim. The latter is difficult to envisage. Even in the unlikely event that the Canadian title could be shown not to satisfy objective standards, no other state could make a better claim. In those circumstances, Canada's title — even if not 'good', would certainly be 'better'. The Permanent Court of International Justice dealt with this issue in the case of the *Legal Status of Eastern Greenland*. The Court said:⁹⁸

Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power. In most of the cases involving claims to

⁹⁴Jessup, "Sovereignty in Antarctica" (1947) 41 Am. J. Int'l. L. 117, at 119.

⁹⁵Taracouzio, *Soviets in the Arctic* (1938), p. 366.

⁹⁶Svarlein, "The Legal Status of the Arctic" (1958) 52 Proceedings of the Am. Soc'y. of Int'l. L. 136, at 143. Professor Svarlein does not say that his proposal for a 'compromise' convention is basically the same as that of Taracouzio; the two appear to be identical, however.

⁹⁷*Ibid.*, at 142.

⁹⁸*Supra*, note 77, at 46.

territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger . . . It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise 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.

In the same vein, Schwarzenberger says:⁹⁹

(courts) . . . are not primarily concerned with the elaboration of the general rules governing title to territory, and their operative scope in relation to third States, but with the relative superiority of the evidence produced by the parties.

The International Court of Justice heard conflicting claims to territorial sovereignty in the *Minquiers and Ecrehos* case (France/United Kingdom).¹⁰⁰ The judgment read, in part:¹⁰¹

Of the manifold acts invoked by the United Kingdom Government, the Court attaches, in particular, probative value to the acts which relate to the exercise of jurisdiction and local administration and to legislation.

Among the "acts" to which the Court referred were: criminal judicial proceedings, inquests, tax assessments, fishing licenses, public registry of deeds, customs, census, and construction of such public works as shipways and buoys. Canadian activities in the Arctic are easily as extensive.

VII

The archipelago lying to the north of the Canadian mainland is well-defined geographically; it is orderly in the sense that its 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. It does not lie astride any shipping routes. Canada regards the water between the islands as Canadian territorial waters, and this claim has been recognized by the United States. Prime Minister St. Laurent reported to the House of Commons in 1957 that United States vessels servicing D.E.W. line stations are required to apply to Canada for waivers of the provisions of the Canada Shipping Act¹⁰² before proceeding.¹⁰³

The unitary appearance of the formation and, to a lesser extent, its location suggest support to a claim to these waters as internal waters. Surrounded on all sides by Canadian territory, they possess the *character* of Canadian waters. It is highly unlikely that uninterrupted surface passage from the Labrador Sea to either the Arctic Ocean or the Beaufort Sea, or vice versa, will ever be a reality. Future demands for the right of innocent passage through the archipelago are speculative to a degree.

⁹⁹*Op. cit.*, *supra*, note 76, at 290.

¹⁰⁰The *Minquiers and Ecrehos* case (France/United Kingdom) [1953] I.C.J. Reports 47.

¹⁰¹*Ibid.*, at 65.

¹⁰²R.S.C. 1952, c. 29.

¹⁰³1957 *Debates*, House of Commons, Canada, vol. 3, p. 3186.

The widths of some of the straits and entrances in the archipelago are wider than those limits ordinarily accepted by law for territorial waters, but their remoteness reduces the interest of the international community. Even the academic controversy over the status of Hudson Bay — lively at one time¹⁰⁴ — is now stilled. The passage of time enures to the benefit of the Canadian claim.

Only two other groups of islands bear even a superficial resemblance to the Arctic archipelago. These are Indonesia and the Philippines. Two material distinctions exist, however. Neither of these archipelagos forms a natural extension of a continent, nor does either form a cohesive unit of relatively land-enclosed dimensions. The islands are distributed across a vast expanse of water in the form of an Indonesian chain, and in a formless Philippine scattering. Again, both groups are located on world shipping routes. Emphasis is given to these distinctions by the overlapping of present Indonesian and Philippine territorial water claims. Far from displaying a distinctive national character, some waters in this area are subject to conflicting claims.

Baselines surrounding the archipelago, as provided for by Canadian law,¹⁰⁵ do not necessarily offend against the provisions of the Convention on the Territorial Sea and the Contiguous Zone¹⁰⁶ or against the principles laid down by the International Court of Justice in the *Norwegian Fisheries* case.¹⁰⁷ The three considerations of relevance to a court were enumerated in the *Fisheries* case:¹⁰⁸

... some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts. 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.

Another fundamental consideration ... is the more or less close relationship existing between certain sea areas and the land formations 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.

Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.

An application of these three considerations to the waters of the Arctic archipelago may well lead to a conclusion in favour of Canadian base lines

¹⁰⁴See e.g., Hackworth, *International Law* (1940), v. 1, p. 700-701; Balch, "Is Hudson Bay a Closed or an Open Sea?" (1912) 6 Am. J. Int'l. L. 409; "The Hudsonian Sea is a Great Open Sea" (1913) 7 Am. J. Int'l. L. 546; Johnston, "Canada's Claim to Hudson Bay and Hudson Strait" (1934) 15 British Y.B. Int'l. L. 1.

¹⁰⁵The Coastal Fisheries Protection Act, 1-2 Eliz. II, S.C. 1952-53, c. 15, sec. 2(b): "... designated by any Act of the 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." The Canada Customs Act, R.S.C. 1952, c. 58, sec. 2(1) (b): "... 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 base lines on the coast of Canada, determined in accordance with international law and practice. ..."

¹⁰⁶U.N. Doc. A/CONF. 13/L.52, 28 April 1958.

¹⁰⁷*Fisheries case (United Kingdom v. Norway)* [1951] I.C.J. Reports 115.

¹⁰⁸*Ibid.*, at 133.

circumscribing the entire archipelago. Unquestionably, considerations one and two are opposed to each other. Weighing these two geographical factors, it may be argued reasonably that the second is of the greater importance in the Canadian Arctic. The map certainly suggests that the channels are more closely linked with the land than are bodies of water that do no more than form a coast line, no matter how rugged and indented that coast might be. These archipelago waters give the appearance of forming part of the territory. The third consideration, if not of great assistance to a Canadian claim, is not destructive. No economic tie in the form of fishing grounds ties these waters to the islands, but the channels do form the only sea routes through the islands and in that respect form lines of communication among them. As observed earlier, these channels do not form part of any sea routes followed by any maritime states, and it is not likely that they ever will. The hazards of navigation and the remoteness of the archipelago therefore appear to prevent any other state from acquiring any sort of economic interest in these waters. Usage has not existed for nearly as long as was the case off Norway, but such sovereign demands as Canada evidently makes upon foreign vessels plying these waters does indicate that a usage exists.

Prime Minister St. Laurent told the House of Commons in 1956 that the *Fisheries* case "... has set a principle which we think should be applicable to our own shores. We think the conditions are such that the decision that was there rendered would apply to many parts of the Canadian shores. . ."¹⁰⁹

VIII

The fascination which attracts international lawyers again and again to Arctic territorial discussions is in large part accounted for by ice. Only in the polar areas does ice exist in sufficient quantities and with sufficient stability to support permanent structures. This permits ice to be employed as land, and contrasted with water. Is ice able to support a national territorial claim in areas which would, under less severe climatic conditions, be open sea? Sector claims are not selective; the quality of the surface is immaterial. It may be land, ice or water.

A vast area of the Arctic Ocean is covered with a permanent, but migratory, polar ice pack. The dimensions of the pack vary little from year to year, and its edges are often defined on maps. On this ice are buildings and airstrips. But not all Arctic ice is stable. Taracouzio writes:¹¹⁰

... ice in the Arctic may be divided into three types: fast, or coastal ice which freezes during the winter in fjords and bays and along the coast, and melts in the summer; the Arctic Pack,

¹⁰⁹1956 *Debates*, House of Commons, Canada, vol. 7, p. 6702. For a discussion of the political aspects of the archipelago and the application of the *Fisheries* case, see Cohen, "Polar Ice and Arctic Sovereignty," *Saturday Night*, 30 August 1958, p. 12 (Toronto).

¹¹⁰*Op. cit.*, *supra*, note 95, at 352. The extract quoted from Tranche is found in "The Ice Cover of the Arctic Sea with a Genetic Classification of Sea Ice," at *Problems of Polar Research*, 92 (American Geographic Society).

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¹¹¹Balch, "265, at 265-6.

¹¹²*Supra*, no

¹¹³Sigrist, "

¹¹⁴Taracouz

¹¹⁵*Supra*, no

¹¹⁶Clute, "T

¹¹⁷*Ibid.*, at

¹¹⁸Taracouz

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and the pack or drift ice formed between the other two. The volume of each of these varieties is given by the Russian oceanographer Transehe: '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 5 per cent.'

It is the Arctic pack which invites an analogy to land, and which is often distinguished from other sea areas which cannot be reduced into possession. Balch sketches this distinction:¹¹¹

... 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 might be urged that men might permanently occupy the ice cover of the Polar Sea.

It is the solid property of ice, permitting occupation, which is emphasized by the Soviet writers Lakhtine¹¹² and Sigrist.¹¹³ Sigrist has written:¹¹⁴

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. . . .

The 'ice-is-water' school recognizes that ice may be occupied but contends that such occupation is temporary, and somewhat mobile. Balch has pointed out the general easterly drift of the ice pack and claims that occupation "... would be too precarious and shifting to and fro to give anyone a good title."¹¹⁵ A Canadian writer, Clute, took the same position. He found "... it is surprising that it should have been so much as suggested. . ."¹¹⁶ that the ice surface could be reduced into possession, because the ice forms part of a navigable body of water. To prove that the Arctic Ocean is navigable, Clute pointed to the passage across the north polar basin of the *Fram* with the Norwegian explorer Nansen.¹¹⁷ Nansen required three years — 1893 to 1896 — to "navigate" this distance. Taracouzio questions the fate of a settlement, such as a Soviet meteorological station, built on the ice pack should it break off and drift away. He asks whether this floe should be regarded as a piece of Soviet soil, a merchant vessel flying the Soviet flag, a Soviet warship, or as a vessel in distress.¹¹⁸ Working in the opposite direction, Taracouzio asks if legally

¹¹¹Balch, "The Arctic and Antarctic Regions and the Law of Nations" (1910) 4 Am. J. Int'l. L. 265, at 265-6.

¹¹²*Supra*, note 79, at 712.

¹¹³Sigrist, "Soviet Law in the Arctic" (1928) 28 *Robochii Sud* 986.

¹¹⁴Taracouzio, *op. cit.*, *supra*, note 95, at 349.

¹¹⁵*Supra*, note 111, at 266.

¹¹⁶Clute, "The Ownership of the North Pole" (1927) 5 Canadian Bar Rev. 19, at 20.

¹¹⁷*Ibid.*, at 21.

¹¹⁸Taracouzio, *op. cit.*, *supra*, note 95, at 358-9.

moving vessels are transformed by nature into violators of Soviet territory if they become frozen into the Soviet sector of the permanent ice pack.¹¹⁹

Hyde was cognizant of the mobility of ice:¹²⁰

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.

Those, like Clute, who insist that ice is water and therefore incapable in law of occupation, often distort the logic of the freedom of the open sea. There are three basic arguments in favour of the freedom of the high seas:

(a) The sea is incapable of being possessed because it is elusive and evades possession.

The open sea is in its own nature not to be possessed, nobody being able to settle there so as to hinder others from passing.

— Vattel¹²¹

The Ocean or open Sea is by Nature not capable of being reduced into the Possession of a Nation, since no permanent settlement can be formed upon its ever changing surface; neither is it capable of being brought under the Empire of a Nation, as no armed fleet can effectively occupy it in its full extent, so as to preclude other Nations altogether from the use of it. Nature herself has in these respects set limits to human enterprise and human ambition.

— Twiss¹²²

(b) It is inconsistent that the inexhaustible resources of the sea be possessed by a single nation.

It is manifest that the 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, and that the sea, in these two respects, is sufficient for all mankind.

— Vattel¹²³

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

— Oppenheim¹²⁴

(c) The sea is not susceptible of possession because it has no definite boundaries.

There is a natural reason which forbids that the sea . . . should become a private possession. The reason is that occupation takes place only in the case of a thing which has definite limits . . . Liquids . . . cannot be taken possession of unless they are contained in something else;

¹¹⁹*Ibid.*, at 356-7. Taracouzio's 1938 hypothetical Soviet 'island' case actually occurred in 1960-1 when a Soviet scientific station, "North Pole 7", floated 1,200 miles from the Soviet sector to a point off the east coast of Baffin Island. See the N.Y. Times (Paris ed.), 6 Nov. 1961. The United States plans to freeze a ship in the Arctic ice to serve as a floating research laboratory, recalling the 1893 voyage of the *Fram* and Taracouzio's second case. See the N.Y. Times (Paris ed.), 20 Oct. 1961.

¹²⁰Hyde, "Acquisition of Sovereignty Over Polar Areas" (1933-34) 19 Iowa L. Rev. 286, at 288.

¹²¹Vattel, *Law of Nations* (1760), v. 1, p. 8, para. 280.

¹²²Twiss, *The Law of Nations* (2nd. ed., 1884), p. 284.

¹²³*Op. cit.*, *supra*, note 121 at 8, para. 281.

¹²⁴Oppenheim, *International Law* (8th ed., Lauterpacht, 1955), v. 1, p. 593-4.

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as being thus contained, lakes and ponds have been taken possession of, and likewise rivers, because they are restrained by banks. But the sea is not contained by the land. . .

— Grotius¹²⁵

Ice is not merely a form of water; it is a solid substance. Laws evolved for a liquid (and the above arguments in favour of freedom of the seas all rest on the liquid quality of the sea) do not necessarily apply 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? These distinctions prompted Hyde to say:¹²⁶

It is not apparent why the character of the substance which constitutes the habitual surface above that level (*i.e.* of the sea) or its lack of permanent connection with what is immovable, should necessarily be decisive of the susceptibility to a claim of sovereignty of the area concerned. 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 solidity and permanence constitutes in itself a barrier to navigation as it is normally enjoyed in the open sea.

Canadian claims to the waters of the archipelago are supported by the oft-frozen state of those waters. In that remote, unusual part of the world, the community of nations may well choose to note not only the peculiar formation of the archipelago which lends such a Canadian character to the waters, but to take heed as well of the solid state which those waters usually assume. This combination leaves little basis for objections from other states to a Canadian claim to the waters as internal waters.

The Soviet Union is the only state which appears to claim sovereignty over the polar ice pack. A vital flaw in any claim to ice is the inability of the claimant state to control the airspace above and the water below. The territorial integrity cannot be maintained. This is significant in the mid-twentieth century when the sector theory becomes three dimensional in concept. Arctic skies and Arctic waters are the medium for air and submarine traffic. Should the polar ice pack attract the character of one state, then presumably the superjacent airspace acquires the same national character.¹²⁷ So does the subjacent, unfrozen water. (*Quaere*, can one say *cujus est solum ejus est usque ad coelum et ad inferos*¹²⁸ in circumstances where there is no *solum*, but instead *mare concretum*?) Many states may well claim an interest in the skies above or the waters below the pack — an interest in innocent passage which does not exist over or within the waters of the archipelago for one cannot fly over the archipelago waters without penetrating the national airspace over Canadian soil, nor will submarines wish often to penetrate the archipelago on an uninterrupted passage.

¹²⁵Grotius, "De Jure Belli ac Pacis" (1646 ed.) in *The Classics of International Law Edition* (Oxford), at p. 190.

¹²⁶Hyde, *International Law* (2nd. ed., 1945), v. 1, p. 348.

¹²⁷Convention on International Civil Aviation; Appendix II to the Final Act of the International Civil Aviation Conference; T.I.A.S. No. 1591, *Canada Treaty Series* (1944), No. 36.

¹²⁸See Cooper, "Roman Law and the Maxim "Cujus est Solum" in *International Air Law*" (1952-55) 1 McGill L.J. 23.

Claimants of the polar pack face a further difficulty. If the surface is possessed, then it follows that the air is also possessed. But the chief means of exercising jurisdiction over the surface of the Arctic is by means of aerial travel. It may be said that in the far north the surface assumes its national character from the air upon which it relies for support and control.¹²⁹ In these circumstances, do aerial incursions into a foreign sector amount merely to violations of the territorial integrity, or are they more serious derogations of sovereignty — challenges to the title of the claimant state?

Professor John Cobb Cooper asserts flatly that the polar pack of the Arctic Ocean is not subject to occupation, nor is the sky above it:¹³⁰

While it may be contended that under modern aviation conditions such ice-covered seas can be controlled from the air and thus occupied, the same thing can be said of the open seas. But without question an attempt by a single State in time of peace to seize any part of the high seas or the airspace above and to maintain exclusive control in such areas would be an act of aggression against all other States. No more reason or excuse exists to admit that ice-covered seas and the airspace above them may be seized by a single State and all other States thereby excluded, than to admit that the open seas and the airspace above them may legally be similarly seized and held.

An innocent motive may be attributed to the occasional incursion into the airspace by civilian aircraft, but none whatsoever by foreign submarines, for naval vessels require previous permission to navigate territorial waters.¹³¹ There is no evidence that United States or British submarines seek permission or give notice when navigating below the Arctic ice pack.

Modern scientific achievement compounds the difficulties facing those states who seek title to the polar pack.

IX

Territorial sovereignty is a compound of several factors, involving both rights and responsibilities. The sovereign has the authority to rule over the territory and the persons and objects within it. Within the territory the sovereign exercises legislative powers, dispenses justice, and administers the manifold activities of the modern state. The sovereign has the right to control access to the territory and to oppose the exercise therein of the authority of foreign states, both rights being subject to the principles of international law. The sovereign bears the obligation of protecting within the territory the rights of foreign states and the interests of their citizens. The exercise of these state activities not only accrues lawfully to the territorial sovereign, but the manifestation of them is indicative of who is the sovereign. A claim to territorial sovereignty, if not accompanied by such a manifestation, falls below

¹²⁹Taracouzio quotes the Soviet jurist Korovin as saying: "... regular visits by coast guard air forces should be considered sufficient to establish this 'permanency' of occupation." *At op. cit.*, *supra*, note 95, at 340.

¹³⁰Cooper, "Airspace Rights Over the Arctic" (1950) 3 *Air Affairs* 517, at 537 (Washington).

¹³¹In these respects see: Anderson and Blair, *Nautilus 90 North* (1959), pp. 9-10.

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the present international standard and will fail if challenged by a state which can point to a superior claim.

All states, in the course of their history, found their territorial claims on various grounds: on discovery, on intended possession, on constructive possession, on actual possession. The list is not necessarily progressive; the grounds may be regarded as accumulative and even complementary. States seek to found their claims to title on as broad a basis as possible, and to include as many of these factors as they are able. This collection of diversified claims to title is recognized in international law and is called "historical consolidation." The term represents the gradual perfection of title which, at the outset, lacked certain necessary fundamentals. Schwarzenberger speaks of this consolidation process in the following terms:¹³²

Seen in . . . historical perspective, the consolidation of territorial titles appears in its proper context of the evolution and expansion of international society. Then, three essential features of this phenomenon become apparent. First, consolidation of title is normally a gradual process. Secondly, in the beginning, every title is necessarily a relative title, and its holder aspires to transform it into an absolute title. Thirdly, the more absolute a title becomes, the more it rests on multiple foundations. Its constituent elements may be as varied as the devices which, at any time, international law makes available for the purpose of making such a title valid against third States.

It was a historical consolidation upon which Norway relied in the *Fisheries* case. It is upon a similar consolidation, but extending over a shorter period of time, that Canada relies with respect to her territorial claims in the Arctic. Discovery, exercise of jurisdiction, settlement, exclusion of foreign states — these are the various acts to which Canada points. As the years pass and as the occupation becomes more effective, always in the absence of any foreign claim, the title assumes those characteristics of continuity and peaceful lack of disturbance which international law requires to be present in a valid territorial claim. Just as is the case with the law of prescription, no definite rule can be established with respect to the length of time which must pass in order to validate a title. As Oppenheim has said (speaking of prescriptive title):¹³³ "The question at what time and in what circumstances such a condition of things arises, is not one of law, but of fact."

It is suggested that time and circumstances both favour Canada in the Arctic. No challenge of any merit has been made against Canadian claims since at least 1900. The circumstances of geography, terrain and climate which exist in the Arctic are losing their deterrent power as Canadian occupation becomes ever more effective. Nations recognize that inflexibility is not a desirable attribute in international law any more than it is in municipal law; therefore "effective occupation" does not bear the same absolute interpretation in polar areas as it does in temperate zones. The standard is constant but its

¹³²Schwarzenberger, *International Law* (3rd ed., 1957), v. 1, p. 292. See also on the same point, Johnson, "Consolidation as a Root of Title in International Law" [1955] Cambridge L.J. 215.

¹³³*Op cit.*, *supra*, note 124, at 577.

application is relative according to the circumstances. Canada appears to meet the standards.

From the first voyages of discovery in the fifteenth century, to the distribution of Family Allowance cheques in the twentieth century, Arctic North America has, for 450 years, progressively become The Canadian Arctic.