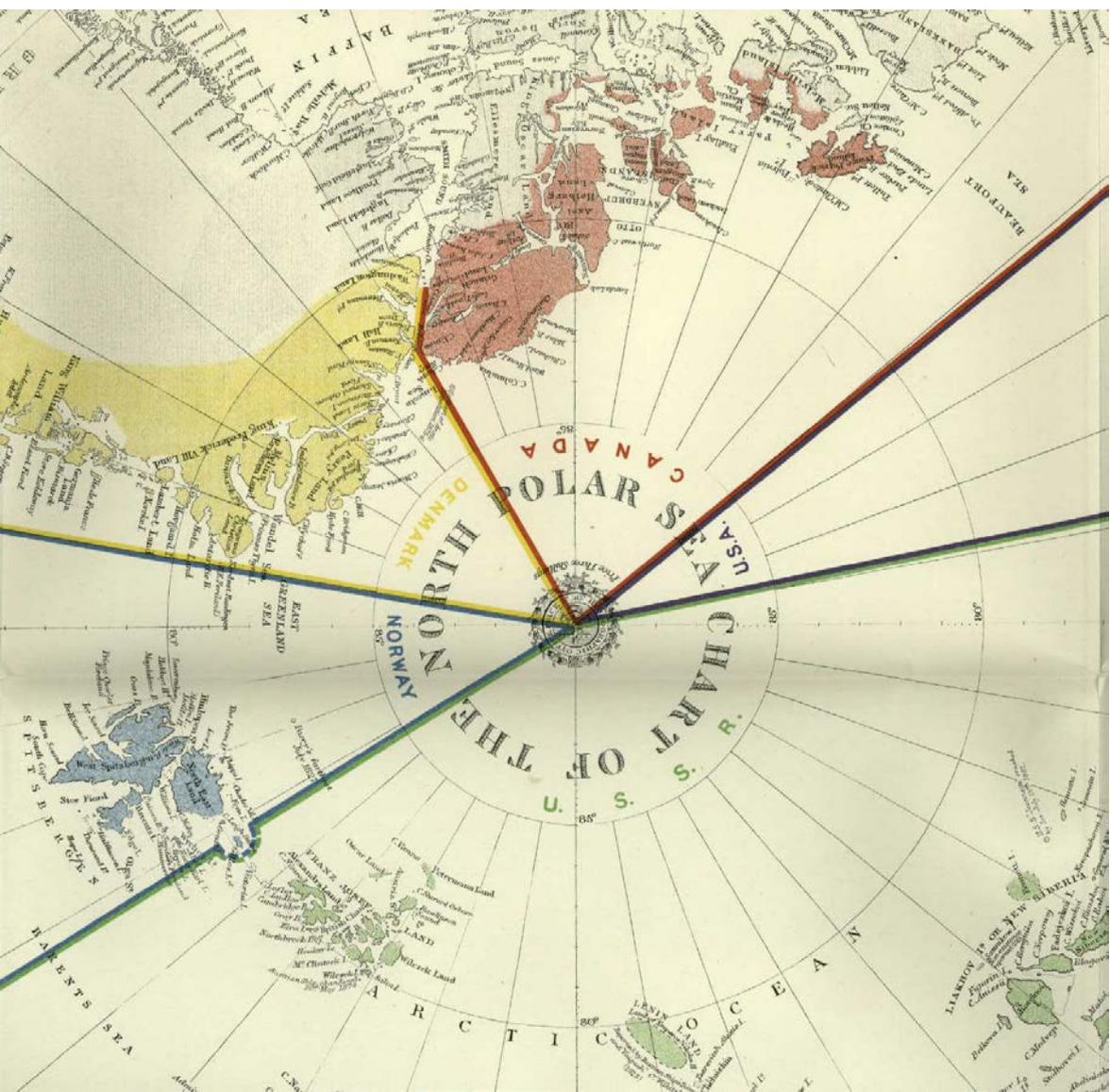


Documents on Canadian Arctic Sovereignty and Security

# LEGAL APPRAISALS OF CANADA'S ARCTIC SOVEREIGNTY: KEY DOCUMENTS, 1905-56

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**Legal Appraisals of Canada's Arctic  
Sovereignty:  
Key Documents, 1905-1956**

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## Introduction: Legal Appraisals of Canada's Arctic Sovereignty, 1905-1956

In his landmark study on territorial acquisition, legal scholar Robert Jennings noted that “the mission and purpose of traditional international law has been the delimitation of the exercise of sovereign power on a territorial basis.”<sup>1</sup> Since Columbus set sail in 1492, popes, jurists and empires had constructed a wide array of legal arguments to justify Europe’s territorial aggrandizement and seizure of land often occupied by Indigenous Peoples, most notably the doctrines of discovery, cession, occupation and conquest. While there was “remarkable stability in these doctrines,” legal historian Andrew Fitzmaurice suggests, “they were subjected to ceaseless reinterpretation.”<sup>2</sup> As states and jurists adjusted the law of nations to suit a wide range of legal and political circumstances, no clear formula for territorial acquisition emerged.

When Canada’s chief astronomer Dr. William Frederick King started to research and write the first legal appraisal ever produced on Canada’s Arctic sovereignty in 1904 (**Document 1** in this collection) he did so at the “zenith of European jurisprudence,” when international law formulated by European states and jurists spread throughout the world.<sup>3</sup> Despite the growing professionalism and enthusiasm of international legal jurists, the legal discourse on territorial acquisition and the establishment of state sovereignty remained underdeveloped, unclear, and shrouded in layers of complexity. Even as legal constructions like the doctrine of effective occupation appeared to become more consistent and cohesive, jurists and states consistently found room for interpretation and exception.<sup>4</sup> The growth of Europe’s formal empires during the last decades of the century highlighted that multiple versions of imperial sovereignty often existed contemporaneously, producing a

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<sup>1</sup> Robert Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), 2.

<sup>2</sup> Andrew Fitzmaurice, “Discovery, Conquest, and Occupation of Territory,” in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 840.

<sup>3</sup> Milos Vec, “From the Congress of Vienna to the Paris Peace Treaties of 1919,” in *The Oxford Handbook of the History of International Law*, eds. Fassbender and Peters, 654.

<sup>4</sup> Vec, “From the Congress of Vienna,” 672. See also Daniel-Erasmus Khan, “Territory and Boundaries,” in *The Oxford Handbook of the History of International Law*, eds. Fassbender and Peters, 225-49.

convoluted legal landscape.<sup>5</sup> Far from being black and white, a tangle of juridical writings and state practice made the legal regime on territorial acquisition murky and grey.

In this confused legal environment King and the other authors of the first documents in this collection tried to bring the North American Arctic Archipelago into the realm of international law. In so doing, they applied the unclear and inconsistent rules of territorial acquisition to the unique and challenging geographical, political and legal terrain of the polar region. There was little legal precedent and few guidelines for how a state could establish sovereignty over uninhabited or sparsely populated areas like the Arctic islands, remote from centres of power and where -- as legal scholar Donald Rothwell has explained -- “there was no immediate intent to colonise as distinct from acquire.”<sup>6</sup> These unique conditions called for adaptations to the law, and the extension of the “taxonomy of occupation.”<sup>7</sup>

When Canadian legal and political experts featured in this document collection attempted to evaluate the strength of Canada’s terrestrial claims in the Arctic Archipelago and to develop strategies to secure them, they faced a bevy of complicated questions. What rights did a state acquire when one of its citizens discovered new land and performed purely symbolic acts, such as planting a flag or installing a cairn? How could states extend their jurisdiction over inhospitable and often uninhabitable lands? What level of occupation or control would be required to secure title to land in the Arctic? Did the unique conditions of the Arctic allow for a relaxation of the rules used in more temperate zones or demand a completely new set of rules?

Even as the decisions in important legal cases like *Palmas Island*, *Clipperton Island* and *Eastern Greenland* clarified the requirements of territorial acquisition in the 1920s and 1930s, the judicial nature of polar sovereignty remained ambiguous. In his 1946 evaluation of Canada’s claims in the Arctic (**Document 27**), American intelligence officer James H. Brewster captured this uncertainty:

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<sup>5</sup> See Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1460-1900* (Cambridge: Cambridge University Press, 2010) and Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

<sup>6</sup> Donald Rothwell, *The Polar Regions and the Development of International Law* (Cambridge: Cambridge University Press, 1996), 2.

<sup>7</sup> Fitzmaurice, “Discovery, Conquest, and Occupation,” 858.

Today it is useless to pretend that the currently accepted legal principles on this subject have crystallized into unchangeable laws, now longer subject to questioning. International law is composed chiefly of a body of customary rules and practices, supplemented by conventions or treaties to which the great majority of civilized states have subscribed. In the absence of a supra-national legislature competent to enact binding laws, the test of the validity of an international rule of conduct is the fact of its general acceptance. As the practice of nations changes, so does the law. Thus the content of the international legal system is permanently in a state of flux, and the uncertainty as to the actual meaning of the law at any given time is increased by the lack of any official organ of interpretation whose dictum is binding upon all states. It follows, then, that there is no unanimity among the authorities as to the correct statement of the international rules governing the establishment of sovereignty over Polar regions. This confusion is heightened by the tendency of many writers to champion the interpretation which, under the circumstances, affords maximum benefit to the states of which they happen to be citizens.

Throughout the period covered in this volume, polar sovereignty remained a twisted “Gordian knot,” as scholars Julia Jabour and Melissa Weber aptly characterize it.<sup>8</sup>

The documents that we have compiled offer historians, lawyers, and policy-makers a window to see how Canadian, American and British legal experts attempted to untangle the complex sovereignty knot in the North American Arctic Archipelago. While Canadian legal appraisals form the foundation of this collection, the British and American documents offer important insight into Canada’s legal title and its general approach towards Arctic sovereignty. Additionally, these documents highlight that each state involved in the Arctic and Antarctic struggled with how to effectively secure its rights and claims. Most scholars tend to highlight consistency in the U.S. legal position while pointing out the inconsistencies in Canada’s, but this assumption downplays the uncertainty evident in American officials’ appraisals and the selective manner in which they asserted their perceived legal rights. While scholars have insinuated that the U.S. government had designs on Canadian territory, the legal

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<sup>8</sup> Julia Jabour and Melissa Weber, “Is it Time to Cut the Gordian Knot of Polar Sovereignty,” *Reciel* vol. 1, no. 1 (2008): 27-40.

appraisals in this collection show that the Americans adopted a flexible approach that allowed it to defend its legal position (relevant to other circumpolar and global contexts) without undermining Canadian sovereignty and bilateral relations.

We hope that the documents in this collection, when read in conjunction with the excellent scholarly work already completed on the history Canada's Arctic policy (see further readings), will allow scholars to embrace the "contextual turn" in legal history. This approach treats legal ideas and concepts as products of their time, of historic systems of thought, and of social and political contexts.<sup>9</sup> Through these documents that explore the core legal concept of polar sovereignty, readers will observe how legal appraisers grappled with the problem of determining the definition and function of sovereignty in the polar regions.<sup>10</sup> International lawyer Michael Akehurst notes that sovereignty "is not a legal term with any fixed meaning... It is doubtful whether any single word has ever caused so much intellectual confusion."<sup>11</sup> Political scientists Thomas Biersteker and Cynthia Weber point out that sovereignty "can be considered as an institution, a discourse, a principle, a structure, or a context" or conceptualized as a set of practices.<sup>12</sup> In short, a fixed and general definition of sovereignty is impossible. In her excellent study of the complex and varied versions of sovereignty utilized by expanding European empires, Lauren Benton captures this central tension. "How do we reconcile these two kinds of knowledge about sovereignty, our certainty about its definition and our recognition of its elusiveness?"

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<sup>9</sup> See Martin Koskenniemi, "Histories of International Law: Significance and Problems for a Critical View," *Temple International and Comparative Law Journal*, vol. 27, no. 215 (2013): 215-40; Bardo Fassbender and Anne Peters, "Introduction: Towards a Global History of International Law," in *Oxford Handbook of History of International Law*, ed. Fassbender and Peters, 13.

<sup>10</sup> The issues of defining sovereignty more broadly are well documented. See for instance, F.H. Hinsley, *Sovereignty*, 2<sup>nd</sup> edition (Cambridge: Cambridge University Press, 1986); Alan James, *Sovereign Statehood: The Basis of International Society* (London: Allen and Unwin, 1986); and Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton: Princeton University Press, 2001). On sovereignty as resting on contradictory principles and practices, see Stephen D. Krasner, ed., *Problematic Sovereignty: Contested Rules and Political Possibilities* (New York: Columbia University Press, 2001), and Christopher J. Bickerton, Philip Cunliffe, and Alexander Gourevitch, eds., *Politics without Sovereignty: A Critique of Contemporary International Relations* (London: UCL Press, 2007).

<sup>11</sup> Michael Akehurst, *A Modern Introduction to International Law*, 6<sup>th</sup> ed. (London: Allen and Unwin, 1987), 15-16.

<sup>12</sup> Thomas J. Biersteker and Cynthia Weber, "The Social Construction of State Sovereignty," in *State Sovereignty as Social Construct* ed. Biersteker and Weber (Cambridge: Cambridge University Press, 1996), 12.

One way would be to refine the theoretical understanding of sovereignty; another, to retell its history.”<sup>13</sup> Biersteker and Weber echo this idea, arguing that scholars must not “dehistoricize sovereignty.”<sup>14</sup> Polar sovereignty has never been a static concept, but is an ever-evolving, legal, political and intellectual construct that must be reviewed in its historical context.

With these concepts and contexts in mind, we intend for this collection to lay the groundwork for more thorough study of and vigorous debate about the legal history of Canada’s Arctic sovereignty. The documents depict the progression of legal thinking on Canada’s terrestrial claims between 1905 and 1956, how it reflected fluctuations in international law, and how legal understandings shaped Canadian policy. Legal scholarship on sovereignty in the polar regions has often fallen into the trap of what David Bederman calls “Foreign Office International Legal History,” succumbing to the “siren sound of historic instrumentalism.”<sup>15</sup> Historical analysis must respect the state of international law at the time when decision-makers weighed options and chose their approach, rather than simply assessing their behavior in light of current legal desires, assumptions, and criteria. We hope that scholars will use this collection to shed additional insight into the complex interaction between state legal appraisals, national policy-making, and the evolving legal doctrine surrounding territorial acquisition.<sup>16</sup>

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<sup>13</sup> Benton, *Search for Sovereignty*, 279. For an effective critique see Krasner, *Sovereignty: Organized Hypocrisy*.

<sup>14</sup> Cynthia Weber and Thomas J. Biersteker, “Reconstructing the Analysis of Sovereignty: Concluding Reflections and Directions for Future Research,” in *State Sovereignty as Social Construct*, 278-286.

<sup>15</sup> David J. Bederman, “Foreign Office International Legal History,” in *Time, History and International Law*, eds. Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (Leiden: Martinus Nijhoff, 2007), 44, 46, 47.

<sup>16</sup> Generally, scholars assessing Canada’s Arctic sovereignty either criticize the government’s failure to attain formal recognition of their country’s claims during these years or simply ignore the variables that shaped Canadian decision-making. See, for example, Shelagh Grant, *Sovereignty or Security? Government Policy in the Canadian North, 1936-1950* (Vancouver: University of British Columbia Press, 1988); Ken Coates, P. Whitney Lackenbauer, William Morrison, and Greg Poelzer, *Arctic Front* (Toronto: Thomas Allen, 2008); Michael Byers, *Who Own the Arctic?* (Vancouver: Douglas & McIntyre, 2009); and Adam Lajeunesse, “Claiming the Frozen Seas: The Evolution of Canadian Policy in the Arctic Waters,” in *Canadian Arctic Sovereignty and Security: Historical Perspectives*, ed. P.W. Lackenbauer (Calgary: Centre for Military and Strategic Studies, 2011), 233-58. Legal scholars tend to analyze past cases and precedents on Canada’s current claims to the Arctic waters rather than discerning how these

## International Law and the Acquisition of Territory: A Complicated History

Papal bulls represented the first attempt to regulate and simplify the territorial claims of rival empires. In 1493, the two most important bulls, *Inter caetera* and *Dudum siquidem*, gave Spain exclusive rights to the non-Christian world west and south of a pole-to-pole line that ran one hundred leagues west of the Azores and Cape Verde Islands. A year later, Spain and Portugal clarified their claims in the Treaty of Tordesillas, which gave Spain everything west and Portugal everything east of a line passing through 60°W latitude.<sup>17</sup> In the fifteenth and sixteenth centuries, as imperial competition increased and European nations took root in colonial territories with widely different geographic and human landscapes, early modern glossators looked to establish clearer guidelines and a common legal language for the acquisition of territory. They struggled, however, to determine a basic formula for establishing sovereignty. Instead, as Lauren Benton and Benjamin Straumann observe, “asserting and defending [imperial] claims ... involved a scattershot legal approach, with multiple, overlapping, and even conflicting arguments being addressed to various, sometimes imagined, audiences.”<sup>18</sup>

To support imperial title and gain international recognition, state agents and early modern glossators first turned to Roman property law, which held that *dominium* (ownership) of properties that were *res nullius* (without an owner) could be acquired by *occupatio* (taking possession), which was “an instant conveyor of ownership.”<sup>19</sup> Empires often used the doctrine of *res nullius* to justify their claim to absolute title over lands that they deemed ownerless, but the presence of Indigenous polities and

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events shaped Canadian thinking as they unfolded. See, for example, Donat Pharand, *Canada's Arctic Waters in International Law* (Cambridge: Cambridge University Press, 1988) and D.M. McRae, “Arctic Waters and Canadian Sovereignty,” *International Journal* 38 (1983): 476-492.

<sup>17</sup> Benton, *Search for Sovereignty*, 23.

<sup>18</sup> Lauren Benton and Benjamin Straumann, “Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice,” *Law and History Review* vol. 28, no. 1 (2010), 29.

<sup>19</sup> Benton and Straumann, “Acquiring Empire by Law,” 2, 14-16 In the North American context, for instance, the doctrine of *res nullius* was often vocalized, but since the English and French saw the need to negotiate treaties and cessions from Indigenous groups, they acknowledged a degree of prior Indigenous ownership. See Brian Slattery, “Paper Empires: The Legal Dimensions of French and English Ventures in North America,” in *Despotic Dominion: Property Rights in British Settler Societies*, eds. J. McLaren, A. R. Buck and N. E. Wright (Vancouver: UBC Press, 2005). The idea of *terra nullius* (land without owner) was derived from *res nullius* by analogy, but Benton argues the term was rarely used at this point.

rival imperial competitors complicated its use.<sup>20</sup> Broader imperial strategies engaged the law of *usucapio* (taking through use), which allowed a person to acquire title over property that already had an owner through *possessio* (possession) over a period of time. In order to keep possession, an owner simply had to show that his claim was better than that of his competitor.<sup>21</sup>

Following in this legal tradition, expanding European empires focused on acquiring proofs that they had better title than any possible competitor, rather than trying to “establish title tout court” or explaining the “legitimacy of title and how the thing in question had been acquired.” While Roman law offered a starting point for the legal discourse on territorial acquisition, it was always “more resource than road map” and weakly defined the steps required for acquiring sovereignty.<sup>22</sup> Between the seventeenth and nineteenth centuries, sovereignty doctrine continued to develop alongside European expansion.<sup>23</sup> Legal historian Lauren Benton’s work shows that empires did not construct one version of sovereignty but multiple adaptations to deal with different geographical or geopolitical situations. Even in the best of cases, the space of empire was “politically fragmented, legally differentiated, encased in irregular, porous and sometimes undefined boundaries.” The agents of empire started to use the word “anomalous” to describe places for which they could not easily define structures of law or the nature of sovereignty.” Faced with anomalous legal spaces, jurists and diplomats looked to “inter- and intra-imperial legal politics,” and the sites of imperial competition, as sources for international law. “A symbolic language of possession” took shape that included planting flags or crosses, holding ceremonies, and more tangible acts such as constructing forts. Geographic knowledge also developed into an important class of information that “played a dual function of

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<sup>20</sup> Fitzmaurice, “Discovery, Conquest, and Occupation of Territory,” 852-853.

<sup>21</sup> Benton and Straumann, “Acquiring Empire by Law,” 16-17.

<sup>22</sup> Benton and Straumann, “Acquiring Empire by Law,” 17, 38. For other perspectives on the “struggle for legitimacy” see Anthony Pagden, “The Struggle for Legitimacy and the Image of Empire in the Atlantic, to c. 1700,” in *The Origins of Empire*, ed. Nicholas Canny (Oxford: Oxford University Press, 1998), 34–54 and Pagden, “Law, Colonization, Legitimation, and the European Background,” in *The Cambridge History of Law in America, Vol. I, Early America (1580–1815)*, ed. Michael Grossberg and Christopher Tomlins (Cambridge: Cambridge University Press, 2008), 1–31.

<sup>23</sup> See for instance, Benton, *Search for Sovereignty*; Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640* (Cambridge: Cambridge University Press, 2006); and Jeremy Adelman, “An Age of Imperial Revolutions,” *American Historical Review*, vol. 113, no. 2 (April 2008): 319-340.

making strange landscapes subject to control and rendering them as property – one sense of *dominium*.”<sup>24</sup> Although the measures deemed necessary for acquiring title multiplied over the centuries, imperial sovereignty often remained “more myth than reality.”<sup>25</sup>

Opposition to the use of discovery and symbolic acts to claim large tracts of territory, and the fictitious sovereignty that they created, steadily grew in both state practice and doctrine. Many English colonies of North America, for instance, argued that title should go to whatever group managed to cultivate the soil first and rows of corn and wheat became incredibly important.<sup>26</sup> By the middle of the eighteenth century, most jurists agreed with Swiss jurist Emmerich de Vattel who argued in his famous *The Law of Nations* that a state could not “appropriate to itself countries which it does not really occupy, and thus engross a much greater extent of territory than it is able to people or cultivate.” Such an action violated natural law, which demanded that the earth be occupied and used.<sup>27</sup> German jurist Georg Friedrich von Martens maintained that first discovery and planting “Crosses, plinths and inscriptions” did not allow a state to acquire territory it did “not cultivate.” Accordingly, as explorers discovered and claimed huge portions of the Arctic and Antarctic in the nineteenth century, jurists gave discovery an ever-decreasing role in territorial acquisition.<sup>28</sup> By the 1850s, Sir Robert Phillimore, probably the most eminent British international lawyer of his generation and author of first comprehensive British treatise on international law in the 1850s, concluded that “Discovery... furnishes an inchoate *title* to *possession* in the discoverer.”<sup>29</sup> First discovery gave a state the exclusive right to occupy newly discovered land, but this

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<sup>24</sup> Benton, *Search for Sovereignty*, 2, 11, 29, and 56. The English aristocrat and explorer Walter Raleigh promised that by “keeping one good fort, or building one towne of strength, the whole Empyre is guarded.” Benton, *Search for Sovereignty*, 82. See also Dale Miquelon, “Envisioning the French Empire: Utrecht, 1711-1713,” *French Historical Studies* vol. 24, no. 4 (2001): 653-677.

<sup>25</sup> Benton, *Search for Sovereignty*, 279.

<sup>26</sup> Stephen C. Neff, *Justice Among Nations: A History of International Law* (Cambridge: Harvard University Press, 2014), 128-129. The colonies used this legal idea to argue that Indigenous Peoples did not have right to the territory they had lived on since time immemorial.

<sup>27</sup> Emmerich de Vattel, *The Law of Nations, Sixth American Edition* (Philadelphia: T. & J.W. Johnson Law Booksellers, 1844), 99.

<sup>28</sup> Quoted in Fitzmaurice, “Discovery, Conquest, and Occupation of Territory,” 844-846.

<sup>29</sup> Robert Phillimore, *Commentaries Upon International Law, vol. I* (2<sup>nd</sup> edition), (London: Butterworths, 1871), 269.

could be lost if the state did not act within a reasonable (though undetermined) period.

While nineteenth century jurists drew strong conclusions on the role of discovery, their findings on the doctrines of prescription and contiguity were less clear. Legal scholar Stephen Neff explains that, under prescription, “rights claimed and exercised for extended periods of time – even if they had no legal foundation initially – ripen, with the passage of time, into true legal rights that other parties are obligated to respect. That is to say, the passage of time *alone* can transform usurpation into right.”<sup>30</sup> Yet no jurist in the nineteenth century could determine exactly how much time had to pass before a right was unchallengeable.<sup>31</sup> Others wondered if time really could cure even the most doubtful and flawed of titles.

Legal opinion on the doctrine of contiguity, which rose into prominence in the nineteenth century, remained less developed. Contiguity held that the occupation of part of a region entitled a state to all the territory (or hinterland) close enough to be considered a single geographic unit.<sup>32</sup> The United States first used the doctrine in its long-standing dispute with Britain over the Oregon territory.<sup>33</sup> In 1844, Secretary of State John Calhoun informed Britain that

continuity furnishes a just foundation for a claim of territory, in connection with those of discovery and occupation would seem unquestionable. It is admitted by all, that neither of them is limited by the precise spot discovered or occupied...It is evident that, in order to make either available, it must extend at least some distance beyond that actually discovered or occupied; but how far, as an abstract question, is a matter of uncertainty. It is subject in each case, to be influenced by a variety of considerations.<sup>34</sup>

The U.S., however, did not rely on contiguity in its legal case and based its claim on several other factors, including rights transferred from Spain, the work of

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<sup>30</sup> Neff, *Justice Among Nations*, 126-127.

<sup>31</sup> See, for instance, Henry Wheaton, *Elements of International Law* (Boston: Little, Brown and Company, 1866), 239.

<sup>32</sup> Also called proximity, propinquity, hinterland, adjacency, continuity, geographic unity, region of attraction.

<sup>33</sup> Travers Twiss, *The Oregon Treaty: Its History and Discovery* (New York: D. Appleton & Co., 1846), 215; Pharand, *Canada's Arctic Waters in International Law*, 28-29. The Oregon territory was west of the Rocky Mountains between latitudes 42° and 54°40' north

<sup>34</sup> Francis Wharton, *A Digest of the International Law of the United States* (Washington, Government Printing Press, 1887), 6-7.

American explorers, and the establishment of trading posts in the region.<sup>35</sup> Nevertheless, the doctrine caught on in state practice and juridical treatises.<sup>36</sup> Although contiguity was put to the test in several territorial disputes involving islands during the second half of the nineteenth century, jurists drew no general conclusion on its applicability.<sup>37</sup> Out of the theory evolved the concept of the sphere of influence, which European powers used to notify other states of the territory they considered geographically or politically bounded to their empire – a concept that most jurists rejected.<sup>38</sup> Thus, state practice and international jurisprudence left the legal status of contiguity unclear in the late nineteenth century.

Uncertainties surrounding the doctrines of contiguity and prescription mirrored the general ambiguity that remained in all international law dealing with territorial claims and sovereignty doctrine. The last three decades of the nineteenth century witnessed a concerted effort by jurists to address this problem by formalizing and fixing the rules of territorial acquisition. This push occurred in the context of the flourishing of international law evident in the 1870s. Legal historian Martti Koskenniemi describes how the peaceful arbitration of such disputes as the Alabama affair between the U.S. and Britain fuelled a growing professional awareness and optimism amongst international legal jurists.<sup>39</sup> Through the creation of the *Institut de droit International* in Ghent and the *Association for the Reform and Codification of the Laws of Nations* (later called the *International Law Association*), “the men of 1873” promoted their positivist doctrine which held that states were the principal actors in international law bound only by the rules to which they consented.<sup>40</sup> Oliver Wendell Holmes Jr. captured their central idea in 1881 in his comment that “the life of law

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<sup>35</sup> Pharand, *Canada's Arctic Waters in International Law*, 29.

<sup>36</sup> Twiss, *The Law of Nations Considered as Independent Political Communities* (Oxford: Oxford University Press, 1861), 170. Sir Travers Twiss, an English jurist, noted, “When a Nation has discovered a country and notified its discovery, it is presumed to intend to take possession of the whole country within those natural boundaries which are essential to the Independence and Security of its Settlement.”

<sup>37</sup> See, Pharand, *Canada's Arctic Waters in International Law*, 31-38. The arbitrator between Great Britain and Portugal in their dispute over Bulama, an uninhabited island close to the west coast of Africa, ruled that Portugal be awarded the island based on its discovery, its settlement and sovereignty over the adjacent coast and Bulama's proximity to mainland, “so near to it that animals cross at low water.”

<sup>38</sup> See J.A. Andrews, “The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century,” *Law Quarterly Review*, vol. 94 (1978): 408-427.

<sup>39</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2001), 40.

<sup>40</sup> Anghie, *Imperialism, Sovereignty and the Making of International Law*, 42-43.

has not been logic: it has been experience.”<sup>41</sup> This group wanted to stop studying law as an abstract philosophy and turn it into a science, based on the study of real world experiences and situations that provided concrete and practical rules states could actually use.<sup>42</sup> More than anything, the “men of 1873” wanted states to see the value and practicality of a coherent international legal system.

In the creation of Europe’s formal empires, “the men of 1873” found the opportunity that they had been seeking. For most of the nineteenth century, countries tried to control trade or governments in growing their informal empires, but had little desire to formally occupy foreign territory. Starting in the late 1870s, however, the European powers took active steps to build their formal empires in Africa, the Pacific, and Southeast Asia. Koskenniemi has revealed how “the end of informal empire meant that European public institutions – in particular, European sovereignty – needed to be projected into colonial territory.”<sup>43</sup> International law and the lawyers that studied it now had a strong sense of purpose -- and a clear goal. Antony Anghie argues that the empire building of the late nineteenth century offered to international law “the same opportunity they traditionally extended to the lower classes ... the opportunity to make something of yourself, to prove and rehabilitate yourself.”<sup>44</sup> European states used the law to argue that the millions of ‘uncivilized’ people whom they colonized had no such thing as sovereignty or territory. Thus, their lands were free for the taking. For international lawyers, the colonies (and the competition they generated between Europe’s powers) provided justification for the prevailing belief that law could play an important role in the management of international relations.

To solve the legal problems created by the “Scramble for Africa,” European states had to iron out the rules for acquiring land. To do this, and to answer other pressing questions concerning the freedom of navigation and trade throughout the Congo and Niger Rivers, the European powers organized an international conference. In the summer of 1884, the conference’s two founders, German Chancellor Otto von Bismarck and French Foreign Minister Jules Ferry, explained that it would provide “a definition of formalities necessary to be observed so that new occupations on the African coasts shall be deemed effective.” The delegates would try to determine how a state could demonstrate adequate proof of possession, without getting into legal and

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<sup>41</sup> Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, 1881), 1.

<sup>42</sup> Neff, *Justice Among Nations*, 223-224.

<sup>43</sup> Koskenniemi, *Gentle Civilizer of Nations*, 121.

<sup>44</sup> Anghie, *Imperialism, Sovereignty and the Making of International Law*, 63-64.

moral issues such as the “right to colonize” or the status of Africa’s Indigenous polities. (No one questioned that Africa would be partitioned amongst the European powers.)<sup>45</sup> When word of the conference seeped out, international lawyers looked expectantly for what had been missing over the last centuries: a clear and concrete guide for territorial acquisition.<sup>46</sup>

The results of the Berlin Conference, which ran from November 1884 to February 1885, proved legally impuissant. “None of the thirty-eight clauses [in Berlin’s General Act had]...any teeth,” Thomas Pakenham memorably concluded. “It had set no rules for dividing, let alone eating, the cake.”<sup>47</sup> Only two of the Act’s articles dealt with territorial acquisition, and they were general formulations “whose applicability was limited to an almost meaningless minimum.” Article 34 required states to make a public declaration (formal notice) of new acquisitions to the other signatory states. Article 35 stated that “the Signatory Powers of the present Act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African Continent sufficient to protect existing rights and, as the case may be, freedom of trade and of transit under conditions agreed upon.” States were pleased to sign on to an act that laid out “no criteria for what would constitute ‘effectiveness’” and that was limited to acquisitions along the west African coast, where there was already very little land left to take.<sup>48</sup> The Act watered down the administrative duties thrust on states and generally avoided “surges of colonial liabilities.”<sup>49</sup> In the end, the conference established no golden rule for the expectations of colonial sovereignty, or any rigorous general guidelines that might have hindered imperial claims the world over.<sup>50</sup>

The lack of legal clarity meant that states were not bound by any general rule and could continue to settle conflicts on an *ad hoc* basis between powers, taking into consideration any factors relevant to a given situation. The European powers

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<sup>45</sup> Matthew Craven, “The Invention of a Tradition: Westlake, The Berlin Conference and the Historicisation of International Law,” in *Constructing International Law: The Birth of a Discipline*, eds. Vec Milos and L. Nuzzo (Frankfurt am Main: Klosterman), 390.

<sup>46</sup> Jörg Fisch, “Africa as terra nullius: The Berlin Conference and International Law,” in *Bismarck, Europe and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition*, S. Förster, W.J. Mommsen and R. Robinson, eds. (Oxford: Oxford University Press), 348.

<sup>47</sup> Thomas Pakenham, *The Scramble for Africa, 1876-1912* (New York: Random House, 1991), 254.

<sup>48</sup> Koskenniemi, *Gentle Civilizer of Nations*, 123-124.

<sup>49</sup> Robinson, “Conference in Berlin and the Future in Africa, 1884-1885,” 22-23.

<sup>50</sup> Koskenniemi, *Gentle Civilizer of Nations*, 125-127.

embraced this ambiguity in the years that followed. In the 1880s, Portugal made extensive claims to a solid block of land between the Indian Ocean and the Atlantic, which France and Germany accepted in 1886 and Britain accepted five years later (after it claimed a large chunk of the territory for itself). In 1890, the 'rules' established in Berlin played no role in an Anglo-French agreement on western Sudan and in an Anglo-German one on East Africa. States continued to justify extensive hinterland and sphere-of-interest claims based on their control of small sections of African coastline.<sup>51</sup> As had been the case for centuries, exclusivity and proof of a stronger title -- rather than establishing an absolute title -- remained the most important part of territorial acquisition.

The British also refused to accept that Article 34 of the General Act had established the need to formally notify other states of their territorial intentions in other parts of the globe. In 1900, British Law Officers reported that 'it is not necessary that a formal notification should be made to foreign powers' and that 'no rule of International Law has been evoked rendering such notification essential to the validity of annexation.' It is not our usual practice to make these notifications."<sup>52</sup> Formal notifications could lead to formal challenges -- a danger that the British did not want to entertain, especially in the polar regions.

In short, state practice highlighted that the Berlin Act had almost no influence on imperial policies regarding territorial acquisition. Despite their expressed wish to find international law in the realities and experiences of state practice, international lawyers of the late nineteenth century continued to "write as if effective occupation were principal legal requirements of colonial title."<sup>53</sup> They hailed Berlin's General Act as a major benchmark in the development of international law -- a sign of its progress from the days of the Treaty of Tordesillas, discovery and symbolic acts -- even though actual state practice had not changed much since the fifteenth century.<sup>54</sup> The Act had only dealt with the west coast of Africa, but most legal scholars believed that doctrine, legal opinions, and state practice would generalize the rules for the rest of the world.

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<sup>51</sup> Jeffrey Herbst, *States and Power in Africa: Comparative Lessons in Authority and Control* (Princeton: Princeton University Press, 2000), 70-72.

<sup>52</sup> Minute, 19 April 1907, United Kingdom, National Archives (NA), Kew, FO 371/194, cited in W.M. Bush, *Antarctica and International Law: A Collection of Inter-state and National Documents, vol. III* (London: Oceana Publications Inc., 1988), 247.

<sup>53</sup> Koskenniemi, *Gentle Civilizer of Nations*, 155.

<sup>54</sup> E.S. Maine, *International Law: The Whewell Lectures* (London: Murray, 1887), 66-67; C. Salmon, *L'occupation des territoires sans maître* (Paris: A Giard, 1887), 31-101.

Accordingly, the *Institut de droit international* devoted several meetings and articles to start to fill in the details about effective occupation.<sup>55</sup> “Taking possession,” the *Institut* concluded, “is accomplished by the establishment of a responsible local power, provided with sufficient means to maintain order and assure the regular exercise of its authority within the limits of the occupied territory.”<sup>56</sup>

Other jurists expanded the legal discourse on effective occupation, with some demanding higher levels of state action than the *Institut*, and others less. In 1886, the Swiss legal scholar Johann Caspar Bluntschli wrote that “temporary or artificial occupation can only create an artificial right.”<sup>57</sup> Fyodor Fyodorovich Martens, the Russian international publicist, noted that states had to fulfill the “material occupation of the newly discovered land, the introduction of an administration.” He stressed that the state had to make its power felt throughout the entire territory.<sup>58</sup> The German jurist-consult Dr. Friedrich Heinrich Geffcken examined the colonial efforts of Belgium in the Congo Free State and argued that “it is very doubtful whether the Congo State can rightfully claim over a territory more than 2,000,000 square kilometers ... extending in part over regions entirely unexplored ... even though its right to those limits as been acknowledged by other states.”<sup>59</sup> Geffcken hinted at the gap that existed between state practice and legal doctrine.

Ironically, while Great Britain embraced spheres of influence and hinterlands around the world, the major English legal commentators all called for some degree of effective occupation. William Edward Hall, whose major treatise on international law first appeared before Berlin but went through several subsequent editions, reflected actual state practice and belief when he argued that a state could justify “moderate negligence” in claimed territory if “discovery, coupled with the public assertion of

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<sup>55</sup> Fitzmaurice, “Discovery, Conquest, and Occupation of Territory,” 857; Ferdinand Martitz, “Occupation des territoires – Rapport et projet let résolutions présentés à l’Institut de droit international,” *Revue de droit international et de législation comparée*, vol. 19 (1887): 373.

<sup>56</sup> James Brown Scott, ed., *Resolutions of the Institute of International Law Dealing with the Law of Nations, with an Historical Introduction and Explanatory Notes* (New York: Oxford University Press, 1916), 87.

<sup>57</sup> Fitzmaurice, “Discovery, Conquest, and Occupation of Territory,” 846. See also J.C. Bluntschli, *Le droit international codifié* (Paris: Guillaumin, 1886), 178, and Charles Salmon, *L’occupation des territoires sans maître* (Paris: A Giard, 1887), 31-101.

<sup>58</sup> Quoted in Thomas Willing Balch, “The Arctic and Antarctic Regions and the Law of Nations,” *The American Journal of International Law*, vol. 4, no. 2 (April 1910): 270-271.

<sup>59</sup> Geffcken cited in John Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press, 1894), 166.

ownership, is followed up from time to time by further exploration or by temporary lodgments in the country” (as evidence of “continued interest”).<sup>60</sup> Legal treatises written after Berlin, however, all presented more stringent versions of effective occupation. John Westlake, the Whewell Professor of International Law at the University of Cambridge, approvingly cited Geffcken’s conclusions in his 1894 book *Chapters on the Principles of International Law*.<sup>61</sup> Lassa Oppenheim, Britain’s leading international law expert who enjoyed close ties to the Foreign Office,<sup>62</sup> sketched out the requirements of occupation in his magisterial *International Law*, regarded as the most authoritative treatise on the subject in the English language.<sup>63</sup> Oppenheim argued that a title claim was only perfected through settlement accompanied by administrative acts – otherwise, acts of occupation represented ‘fictitious occupation’ only.<sup>64</sup> Nonetheless, Oppenheim, like all the other jurists, offered few specific examples of what actually constituted *effective occupation* or the level of required activity.

Despite all the ink spilled on the doctrine, effective occupation remained an unclear and ambiguous doctrine, wide open to interpretation, at the turn of the twentieth century. Multiple versions of imperial sovereignty persisted, and any common formula for territorial acquisition remained as elusive and obscure as it had in previous centuries. State practice was disconnected from the doctrinal writings of international lawyers. Despite international lawyers’ continued emphasis on occupation, when they looked at actual practice they “could hardly continue to insist that colonial title could follow only from setting up effective administration.”<sup>65</sup> British Prime Minister Lord Salisbury captured the situation in 1896:

There is no enactment or usage or accepted doctrine which lays down the length of time required for international prescription, and no full definition of the degree of control which will confer territorial property on a nation, has been attempted. It certainly does not depend solely on

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<sup>60</sup> W. E. Hall, *A Treatise on International Law*, 1<sup>st</sup> edition (Oxford: Clarendon Press, 1880), 89. The section reads the same in editions published after the Berlin Conference.

<sup>61</sup> John Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press, 1894), 166-167.

<sup>62</sup> Mathias Schmoeckel, “Lassa Oppenheim,” in *The Oxford Handbook of the History of International Law*, eds. Fassbender and Peters, 1152-1155.

<sup>63</sup> Anghie, *Imperialism, Sovereignty and the Making of International Law*, 39.

<sup>64</sup> Lassa Francis Lawrence Oppenheim, *International Law: A Treatise* (Oxford: Clarendon Press, 1905), 295-296.

<sup>65</sup> Koskenniemi, *Gentle Civilizer of Nations*, 154.

occupation or the exercise of any clearly defined acts. All the great nations in both hemispheres claim, and are prepared to defend, their rights to vast tracts of territory which they have in no sense occupied, and often have not fully explored. The modern doctrine of "Hinterland", with its inevitable contradictions, indicates the unformed and unstable condition of international law as applied to territorial claims resting on constructive occupation or control.<sup>66</sup>

At the end of the nineteenth and beginning of the twentieth century, several arbitrations shed further light on the rules of territorial acquisition and indicated the need for effective occupation.<sup>67</sup> Still, the force of these decisions was weakened by the nature of arbitration, where every panel was entirely independent of the other and "rulings by one are not binding on others." Many of the arbitrators were not trained lawyers, and gave obscure, underdeveloped reasons for their decisions.<sup>68</sup> As a result, even with the decisions of these cases filtering through the growing international legal community, the legal discourse on territorial acquisition and the establishment of state sovereignty remained unsatisfactory and confused.

### The Documents: Appraising Canada's Sovereignty in the Arctic

Through the halcyon days of nineteenth-century British exploration in the North American Arctic Archipelago, the Admiralty and Colonial Office spent little time pondering Britain's claim to the Arctic islands. Sir John Barrow, Second Secretary of the Admiralty for almost forty years and a major supporter of the Royal Navy's exploration efforts, even argued that planting the flag and making claims was a waste of time in a region unable to support European settlement.<sup>69</sup> Despite this opinion, historian Shelagh Grant points out that the Admiralty carefully charted every

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<sup>66</sup> Van Varick, *Documents Relating to the Program of the First Hague Peace Conference, Laid Before the Conference By the Netherland Government Translation*, 1921, reprint (London: Forgotten Books, 2013), 98-99.

<sup>67</sup> These included the *British Guiana* case, the *British-Venezuela Dispute*, and the *Behring Sea Arbitration*.

<sup>68</sup> Neff, *Justice Among Nations*, 328-330.

<sup>69</sup> John English, *Ice and Water: Politics, Peoples and the Arctic Council* (Toronto: Allen Lane, 2013), 47.

discovery and claim made by British explorers and added them to its imperial map.<sup>70</sup> Nevertheless, Britain did not formally annex the Arctic islands or clarify its territorial rights in the region. As a result, when an American engineer William Mintzer applied to the British government for a tract of land in the Cumberland Gulf in February 1874 so he could start a mining industry, he alarmed the Colonial Office. Officials pondered how they could clarify British rights in the Arctic while forestalling any further American interest.

A precedent already existed in British North America. In 1869, the Hudson's Bay Company had surrendered its vast territories (Rupert's Land and the Northwest Territory) to Great Britain, and Canada accepted them from Great Britain the following year. The Colonial Office decided that a similar transfer would work for the Arctic islands. After careful deliberation, the British approved an order-in-council on 31 July 1880 stating that "all British territories and possessions in North America, and the islands adjacent to such territories and possessions which are not already included in the Dominion of Canada, should (with the exception of the Colony of Newfoundland and its dependencies) be annexed to and form part of the said Dominion." By this act, Britain gifted to Canada whatever territories or territorial rights it had in the Arctic Archipelago. The completeness of Britain's own title at that time, and the extent of its territories, remained uncertain.<sup>71</sup> Fortunately for Canada, no foreign state questioned the transfer and no American challenges crystallized.

For its part, Canada did little to consolidate its administrative or practical control over its new territorial gift over the next fifteen years.<sup>72</sup> In 1882 Ottawa even passed an order-in-council recommending that "no steps be taken with the view of legislating for the good government of the country until some influx of population or other circumstances shall occur to make such provision more imperative than it would at the present seem to be."<sup>73</sup> Not until 1895 did the dominion bother to draw boundaries on the map and subdivide the Canadian North into administrative

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<sup>70</sup> Shelagh Grant, *Polar Imperative: A History of Sovereignty in North America* (Vancouver: Douglas & McIntyre, 2010), 105.

<sup>71</sup> On the 1880 transfer and the events leading up to it, see Gordon W. Smith, "The Transfer of Arctic Territories from Great Britain to Canada, and Related Matters, as Seen in Official Correspondence," *Arctic*, vol. 14, no. 1 (1961): 53-73.

<sup>72</sup> Order in Council PC 1839, 23 September 1882, quoted in Grant, *Sovereignty or Security?*, 5.

<sup>73</sup> Gordon Smith, "Sovereignty in the North: The Canadian Aspect of an International problem," in *The Arctic Frontier*, ed. R. St. J. Macdonald (Toronto: University of Toronto Press, 1966), 204.

districts.<sup>74</sup> By that time, the Canadian claim to the Arctic Archipelago rested on British acts of discovery and little more. As the ‘heroic age’ of polar exploration dawned, however, questions surrounding territorial acquisition and title became far more pressing.

Foreign expeditions, such as those led by the American Robert Peary and the Norwegian Otto Sverdrup, fanned throughout the Arctic Archipelago and uncovered large swathes of the region. While these explorers flew their national flags on High Arctic islands, a new flood of American whalers started to operate in the Beaufort Sea. In 1903, the Alaska Boundary Dispute exacerbated jurisdictional worries, reinforcing Canadian concerns that the U.S. thirsted for territory in the North. These events prompted officials in Ottawa to consider the historic and legal basis for Canada’s claims in the region.<sup>75</sup>

In 1904, the job of clarifying the extent of Canada’s northern possession and evaluating the foundations of Canadian title to the Archipelago fell to Dr. Frederick William King. After decades of experience as a Dominion Land Surveyor and chief astronomer, King was one of Canada’s leading experts on territorial boundaries. Most recently he had assisted Clifford Sifton, the Minister of the Interior, in preparing Canada’s case for the Alaska Boundary Tribunal.<sup>76</sup> King now applied his considerable legal and historical knowledge on boundaries and territorial claims to the North American Arctic.

King’s *Report upon the Title of Canada to the Islands North of the Mainland of Canada* (**Document 1**) offered the first Canadian legal appraisal of Canada’s claims in the Arctic Archipelago. King stressed the ambiguity that existed on what territorial

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<sup>74</sup> The North was divided into the districts of Ungava, Franklin, Mackenzie and Yukon. The District of Franklin included, “all those lands and islands comprised between the one hundred and forty-first meridian of longitude west of Greenwich on the west and Davis Strait, Baffin Bay, Smith Sound, Kennedy Channel and Robeson Channel on the east which are not included in any other Provisional District.” Gordon W. Smith, *A Historical and Legal Study of Sovereignty in the Canadian North: Land, 1870-1949*, ed. P. Whitney Lackenbauer (Calgary: University of Calgary Press, 2014), 188.

<sup>75</sup> On these early Canadian government efforts see Janice Cavell, “‘A little more latitude’: Explorers, Politicians, and Canadian Arctic Policy during the Laurier Era,” *Polar Record*, vol. 47, no. 4 (2010): 289–309, and William Morrison, *Showing the Flag: The Mounted Police and Canadian Sovereignty in the North, 1894–1925* (Vancouver: UBC Press, 1985).

<sup>76</sup> Shelagh Grant, “Dominion Land Surveyors and Arctic Sovereignty in the Early 20<sup>th</sup> Century,” *Ontario Professional Surveyor* (Winter 2011): 24–27. See also Daniel S. C. Mackay, “James White: Canada’s Chief Geographer, 1899–1909,” *Cartographica* vol. 19, no. 1 (Spring 1982): 51–61.

rights Canada had inherited from Britain in 1880. While the transfer may have handed Canada all the islands adjacent to the Canadian coastline, what about unknown islands that lay 400 miles or more from the mainland? King speculated that because British acts of discovery and possession were never formally ratified by the state prior to the 1880 transfer, Canada's assumption of authority might not have had full international force. Given these uncertainties, King was forced to conclude that "Canada's title to some at least of the northern islands is imperfect."

Canada's response to foreign activities in the Arctic Archipelago, coupled with ongoing concerns about the strength of its title, was to embark "on a long range, though relatively low-key, program of finding out more about her northern territories, securing Canadian sovereignty, and advancing the frontiers of scientific knowledge," historian Richard Diubaldo explained.<sup>77</sup> To regulate American whaling, the North-West Mounted Police (NWMP) established a post on Herschel Island in the Beaufort Sea in 1903.<sup>78</sup> Following the footsteps of earlier Canadian northern voyages led by William Wakeham and Albert Peter Low, Joseph-Elzéar Bernier began patrolling the waters of Hudson Bay and the Arctic islands, asserting control and indicating Canada's supervision over the region. Bernier intercepted and imposed licenses on foreign whalers, collected customs duties, conducted geographical research, and performed ceremonies of possession to reinforce Canada's sovereignty.<sup>79</sup>

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<sup>77</sup> Richard Diubaldo, *Stefansson and the Canadian Arctic* (Montreal & Kingston: McGill-Queen's University Press, 1978), 7.

<sup>78</sup> See Morrison, *Showing the Flag*, 78-85.

<sup>79</sup> For more on Bernier's work in the Arctic Archipelago see Cavell, "Sector Claims and Counter-claims," 293-310; Cavell, "'As far as 90 north': Joseph Elzéar Bernier's 1907 and 1909 sovereignty claims," *Polar Record* 46, no. 239 (2010): 372-76; Alan MacEachern, "J. E. Bernier's Claims to Fame," *Scientia Canadensis* 33, no. 2 (2010): 43-73; Marjolaine Saint-Pierre, *Joseph-Elzéar Bernier: Capitaine et coureur des mers* (Sillery, Quebec: Septentrion, 2004); David Eric Jessup, "J.E. Bernier and the Assertion of Canadian Sovereignty in the Arctic," *American Review of Canadian Studies* 38, 4 (2008): 409-29; Season L. Osborne, "Closing the Front Door to the Arctic: Capt. Joseph E. Bernier's Role in Canadian Arctic Sovereignty" (unpublished M.A. thesis, Carleton University, 2003); Yolande Dorion-Robitaille, *Captain J.E. Bernier's Contribution to Canadian Sovereignty in the Arctic* (Ottawa: Indian and Northern Affairs, 1978); and T.C. Fairley and Charles E. Israel, *The True North, the Story of Captain Joseph Bernier* (Toronto: Macmillan, 1957). Notable primary works are J.E. Bernier, *Report on the Dominion of Canada Government Expedition to the Arctic Islands and the Hudson Strait on Board the C.G.S. 'Arctic' 1906-1907* (Ottawa: King's Printer, 1909); Bernier, *Report... 1908-09*; Bernier, *Report on the Dominion Government Expedition to the Northern Waters and Arctic Archipelago on the D.G.S. 'Arctic' in 1910* (Ottawa: King's Printer, 1911); and Bernier, *Master*

Although limited in scope, these activities marked an important shift from Canadian inactivity in previous decades.

Concurrent to Bernier's forays into the Arctic, Senator Pascal Poirier offered an easier and far more definite method for securing sovereignty in the Arctic: the sector principle. In a speech to his Senate colleagues in Ottawa, Poirier warned that that American "navigators" had flown the stars and stripes throughout the Arctic Archipelago. Instead of idly waiting for Washington to raise the "question of title" to Arctic territory, Poirier insisted that the Canadian government "precede our friends to the south, and assert in as public a manner as possible our dominion over those lands."<sup>80</sup> He anticipated 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 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.<sup>81</sup>

Such a system would allow the Canadian government to insist that "from 141 to 60 degrees west we are on Canadian territory ... 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."<sup>82</sup>

Although Poirier's idea seemed radical, it resembled the hinterland claims and spheres of influence approach that state practice had regularized in Africa. Nevertheless, Sir Richard Cartwright, the government leader in the Senate (who maintained that Canada's title was already secure) rebuked and rejected all of Poirier's suggestions.<sup>83</sup> The sector idea, however, did not die. Bernier took another expedition into the heart of the Arctic Archipelago in 1908, armed with the knowledge that two

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*Mariner and Arctic Explorer: A Narrative of Sixty Years at Sea from the Logs and Yarns of Captain J.E. Bernier, FRGS, FRES* (Ottawa: Le Droit, 1939).

<sup>80</sup> Canada, Senate *Debates*, 20 February 1907, 271.

<sup>81</sup> Quoted in Ivan Head, "Canadian Claims to Territorial Sovereignty in the Arctic Regions," *McGill Law Journal* 9 (1963), 203-4, and in Pharand, *Canada's Arctic Waters in International Law*, 9-10.

<sup>82</sup> Canada, Senate *Debates*, 20 February 1907, 271. On the background to Poirier's statement, see Smith, *Historical and Legal Study*, 151, 181-197; and Janice Cavell and Jeff Noakes, *Acts of Occupation: Canada and Arctic Sovereignty, 1918-25* (Vancouver: UBC Press, 2010), 73-74.

<sup>83</sup> Canada, Senate *Debates*, 20 February 1907, 273-274.

of his American acquaintances, Robert Peary and Frederick Cook, were simultaneously trying to reach the North Pole. Faced with a likely American claim to the Pole, Bernier took dramatic action to secure Canada's northern claims. On 1 July 1909, just months before Peary and Cook informed the world that they had reached the North Pole, Bernier had his entire crew march to Parry's Rock on Melville Island. There, Bernier installed a plaque that took sweeping possession of the "whole Arctic Archipelago lying to the north of America from long. 60°W to 141°W up to latitude 90°N."

While Poirier's proposal and Bernier's sector claim were briefly discussed in the media and British Parliament, the Canadian government never officially entrenched them in federal statute. In 1913, the Colonial Office warned the Governor General that the full extent of the land transferred to Canada in 1880 "has nowhere been formally defined" and emphasized that "it is not desirable that any stress should be laid on the fact that a portion of the territory may not already be British"<sup>84</sup>— a caution that, Shelagh Grant points out, inspired a long-lasting policy of discretion when discussing Canada's Arctic claims.<sup>85</sup> Instead of articulating a public, official position on Arctic sovereignty, Canada continued its policy of quietly extending its knowledge of and presence in the Arctic Archipelago. Although the First World War and its immediate aftermath were marked by a general lapse in Northern activity, a clear exception was Vilhjalmur Stefansson's two-pronged Canadian Arctic Expedition in the western Arctic from 1913-18. The last of the "old-fashioned expeditions," the main purpose of Stefansson's northern party was to "discover new land along the 141<sup>st</sup> Meridian" and to map the edge of the continental shelf in the Beaufort basin. In the end, the explorer discovered and took possession of several islands for Canada, adding several thousand square kilometres to the country's territory, while clarifying cartographically ambiguous territory such as Prince Patrick Island.<sup>86</sup>

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<sup>84</sup> Lewis Harcourt to Governor General, 10 May 1913, Library and Archives Canada (LAC), RG 7 ser. G-21, Vol. 412, file 10045. Thanks to Dr. Janice Cavell of the Historical Section at the Department of Foreign Affairs, Trade and Development for sharing this document with us. It will be reproduced in a future volume of *Documents on Canadian External Relations* dedicated to Arctic sovereignty issues which will provide more detailed context for some of the legal discussions covered in this collection.

<sup>85</sup> Grant, *Polar Imperative*, 207, 213.

<sup>86</sup> Vilhjalmur Stefansson, *The Friendly Arctic: The Story of Five Years in Polar Regions* (New York: Macmillan, 1921), 142-226, and Borden's foreword, xxiv. See also Robert Bartlett *Last Voyage of the Karluk* (Boston: Small, Maynard, 1916), 306; Diubalo, *Stefansson and the Canadian Arctic*; and Trevor H. Levere, "Vilhjalmur Stefansson, the Continental Shelf, and a

Ottawa had spent little time evaluating its sovereignty in the Arctic since the King report, but a perceived threat from Denmark led to a flurry of appraisals in the early interwar period. The direct catalyst was Danish explorer Knud Rasmussen's apparent denial of Canadian sovereignty over Ellesmere Island, and the Danish government's apparent endorsement of his stance. Historians Janice Cavell and Jeff Noakes argue that, in reality, Rasmussen and the Danish government never denied Canadian sovereignty in the Arctic. Instead, they allege that Stefansson stoked sovereignty concerns in the hopes that he would be rewarded with a new expedition to occupy the northern islands.<sup>87</sup>

Regardless of the veracity of the Danish threat, the situation forced Canadian officials to rigorously explore their country's sovereignty in the Arctic. Interestingly, none of the major legal reports written in 1920 and 1921 suggested the government utilize the sector principle in the Arctic. Instead, all called for further acts of occupation. Armed with a law degree from Harvard University and ample experience as the legal adviser to Prime Ministers Robert Borden and Arthur Meighen, Loring Christie wrote a review of Canada's position at the end of October 1920 (**Document 2**). Christie pointed out that Canada's sovereignty concerns involved the islands of the High Arctic north of Lancaster Sound, many of which had been discovered and explored by foreign expeditions. As legal advisor, he stressed that occupation was necessary to perfect Canada's title to these islands. In the "special" conditions of the Arctic, however, Christie maintained that repeated local acts and "effective control" should suffice in securing Canadian sovereignty. A few months later, James Bernard Harkin, the commissioner of the Dominion Parks Branch, produced another appraisal of the Canadian position, although his interest and enthusiasm was not matched by specific legal expertise (**Document 3**). While Harkin believed that Canada had inherited an inchoate right to many of the Arctic islands from Britain, he also stressed that no Canadian title existed to others. Alongside Harkin's negative report came an in-depth study of the history of British and Canadian activities in the Arctic by Canadian associate archivist Hensley R. Holmden, who concluded that, in 1880, "the Imperial Government did not know what they were transferring and on the other hand the Canadian Government had no idea what they were receiving" (**Document 4**). Holmden's appraisal concluded that the imperial government had

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New Arctic Continent," *British Journal for the History of Science* vol. 21, no. 2 (1988), 238, 240.

<sup>87</sup> See Cavell and Noakes, *Acts of Occupation*, and Smith, *Historical and Legal Study*, 215-266.

intended to transfer only the islands discovered by British explorers, not all the territory up to the pole.

Although these appraisals indicated vulnerability in Canada's legal position and caused temporary worry in Ottawa, the perceived Danish threat had all but blown over by the summer of 1921. Most Canadian officials accepted repeated Danish assurances that they had no interest in contesting Canada's sovereignty over the Arctic islands. Accordingly, the "fear about what Denmark might do in the archipelago was gradually replaced by concern over what Canada herself ought to do," historian Gordon W. Smith later observed.<sup>88</sup> The Danish 'threat' and the legal appraisals it spawned inspired the "transformation of Canada's earlier Arctic policy – in which proclamations and other purely 'formal acts of possession' were deemed sufficient – into a more active and sustained postwar program that emphasized the need for 'acts of occupation' even on remote and uninhabited northern islands like Ellesmere."<sup>89</sup> When the Liberal government of William Lyon Mackenzie King came to power at the end of 1921, it instituted an annual ship patrol in the Eastern Arctic and started to expand the newly-renamed Royal Canadian Mounted Police (RCMP) permanent presence on the Arctic islands, beginning with new posts at Pond Inlet on Baffin Island and Craig Harbour on Ellesmere Island in 1922.<sup>90</sup> In the following years, Canada gradually expanded its acts of occupation in the Arctic Archipelago.

In the spring of 1925, however, word reached Ottawa of another potential threat to Canada's sovereignty over the High Arctic islands. American explorers Donald MacMillan and Richard Byrd, with U.S. government backing, hoped to aerially explore the area between Canada's northernmost islands and the North Pole that summer, using bases on Axel Heiberg and Ellesmere Island. The State Department had not consulted with Ottawa on this mission or applied for any permissions or permits. In response, Ottawa established the Northern Advisory Board to discuss the implications of the American expedition on Canada's sovereignty and lay out possible

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<sup>88</sup> Smith, *Historical and Legal Study*, 265.

<sup>89</sup> Cavell and Noakes, *Acts of Occupation*, 6.

<sup>90</sup> For more on Canadian government activity in the Arctic in the early 1920s see, Morrison, *Showing the Flag*; Janice Cavell, "The Origins of Canada's First Eastern Arctic Patrol, 1919–1922," *Polar Record* 45, no. 233 (2009): 97–112; Peter Schledermann, "The Muskox Patrol: High Arctic Sovereignty Revisited," *Arctic*, vol. 58, no. 1 (2003): 101–109; and Smith, *Historical and Legal Study*, 341–67.

policy responses.<sup>91</sup> The Board tasked James White, an official from the Department of Justice, to prepare a report on the legal basis of Canada's sovereignty in the Arctic.

White was a geographer with long-standing interest and involvement in territorial boundaries and the Arctic. In 1904, he had been responsible for drawing up a map for the Department of the Interior that used the 141<sup>st</sup> and 60<sup>th</sup> meridians running to the North Pole as Canada's northern boundaries – an early, quasi-official use of the sector principle.<sup>92</sup> Two decades later, he prepared the most thorough report on Canada's legal title to that time<sup>93</sup> (**Document 5**). In his wide-ranging analysis, White discussed the need for effective control, the role played by contiguity, the evidence for a Canadian “hinterland,” and prescription. He delved into the major treatises on international law, especially those by Hall and Oppenheim, and supported his arguments by citing decisions and commentary from the important cases on territorial acquisition.

After careful deliberation, the Northern Advisory Board decided to continue relying on the internationally accepted method of effective occupation to strengthen Canada's claims, supported by a government announcement of a sector claim in the House of Commons.<sup>94</sup> On 1 June 1925, Minister of the Interior Charles Stewart stood in the House of Commons and claimed all the land between Canada's coast “right up to the North Pole.”<sup>95</sup> Ten days later, Stewart elaborated that “Canada claims the territory outlined between the degrees of longitude 60 and 141 but I have nothing to say regarding any claim the United States may make. They have Alaska and naturally they will lay claim to land north of their territory there, which would be adjacent to ours.”<sup>96</sup> Stewart made it clear that any explorer or scientist who wished to travel in Canada's sector had to apply to Ottawa for a license.

Following Stewart's parliamentary proclamations and his subsequent explanatory statements to the press, the Northern Advisory Board assisted in producing two notes

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<sup>91</sup> For further information on the MacMillan Expedition and Canada's response, see D.H. Dinwoodie, “Arctic Controversy: The 1925 Byrd-MacMillan Expedition Example,” *Canadian Historical Review* 53, no. 1 (March 1972): 51–65; Cavell and Noakes, *Acts of Occupation*, 217–41; and Smith, *Historical and Legal Study*, 321–40.

<sup>92</sup> Curiously these borders still appear on Canadian maps today. See Pharand, *Canada's Arctic Waters in International Law*, 5.

<sup>93</sup> Cavell and Noakes make this argument in *Acts of Occupation*, 227.

<sup>94</sup> For a further explanation of the important role that James White played in Canada's legal strategy, see Cavell and Noakes, *Acts of Occupation*, 75, 221, 227.

<sup>95</sup> Canada, House of Commons *Debates*, 1 June 1925, 3773.

<sup>96</sup> Canada, House of Commons *Debates*, 10 June 1925, 4085.

for the British embassy in Washington that introduced the sector principle, established the foundation of Canada's legal title to the northern islands, listed the administrative acts in place for the region, and laid out Canada's Arctic policy (**Documents 6 and 7**). This information formed the foundation of British conversations with the State Department about the MacMillan expedition and Canada's Arctic sovereignty, which in turn led to the first in-depth American appraisals of the bases for Canada's legal title.

American officials had only recently started to think about the judicial nature of polar sovereignty. In the spring of 1924, Secretary of State Charles Hughes received two letters that forced the State Department to articulate a coherent polar policy for the first time. The first note came from the Norwegian government explaining that Norway would claim all land discovered during an upcoming trans-Arctic flight by the explorer Roald Amundsen. The second came from Anson W. Prescott, secretary of the Republican Publicity Association, who inquired whether the United States had a valid claim to Wilkes Land, an area in the Antarctic first spotted by the U.S. Exploring Expedition in 1840. In his replies to both notes, Hughes insisted that discovery alone, without "actual settlement" of the discovered land, did not provide a country with a legitimate claim to sovereignty.<sup>97</sup> Out of these statements was born the Hughes Doctrine, which formed the foundation of U.S. polar policy. At heart, it was a defensive legal position meant to ensure potential U.S. rights in the Arctic and Antarctic. Under the Hughes Doctrine, proclamations, repeated visits, temporary outposts and a semblance of control did not allow a country to acquire sovereignty over polar territory. Akin to more temperate zones, the U.S. position held that countries had to settle, colonize and exploit polar lands before they could successfully claim them. Accordingly, U.S. officials refused to recognize any polar claim that did not meet its very strict interpretation of the requirements of sovereignty.

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<sup>97</sup> S.W. Boggs, Department of State, Office of the Historical Adviser, "The Polar Regions: Geographical and Historical Data in a Study of Claims to Sovereignty in the Arctic and Antarctic Regions," 21 September 1933, United States National Archives and Records Administration (NARA), College Park, Maryland, Record Group (RG) 59, CDF 1930-39, Box 4522, file 800.014, Arctic/31, and Charles Hughes to Norwegian minister, 2 April 1924, *Foreign Relations of the United States 1924* (Washington: U.S. Government Printing Office, 1939), 519-520. For an extended discussion, see Lackenbauer and Kikkert, "The Dog in the Manger – and Letting Sleeping Dogs Lie: The United States, Canada and the Sector Principle, 1924-1955," in *The Arctic Ocean: Essays in Honour of Donat Pharand*, eds. Suzanne Lalonde and Ted McDorman. (Leiden: Brill, 2014), 216-39.

When Stewart outlined Canada's sector claim in 1925, he unwittingly ensured the polar policies of the United States and Canada had become polar opposites. With the Hughes Doctrine, the U.S. adopted the most conservative approach to the acquisition of polar sovereignty of any country with interests in the Arctic or Antarctic. By publicly announcing its use of the sector principle, Canada articulated one of the most liberal approaches. While the Canadian government's two-pronged sovereignty strategy may have focused on effective occupation, as the American legal appraisals in this collection highlight, the U.S. government associated Canada's position with the sector principle.

Charles Cheney Hyde, the experienced lawyer in charge of the office of the solicitor, set the tone for the American response when he questioned whether the British (Canadians) had achieved effective occupation in the Arctic, raised the possibility of applying the Munroe Doctrine to the situation, and implied that the region might be open to first country that could "settle and occupy" the region (**Document 8**). An appraisal prepared by the Division of Western European Affairs echoed these concerns and asked exactly how much territory Canada could "effectively occupy" through each of its RCMP posts (**Document 9**). Although the State Department considered issuing a statement rejecting Canada's claims to some of its northern islands (**Document 10**), the MacMillan expedition left the Arctic having failed to find any new land or accomplish much, the Americans decided there was no reason to risk irreparable damage to their relationship with Britain and Canada by sending the note. In a more detailed study of sovereignty in the polar regions, that Division of Western European Affairs acknowledged that Canada was one of the only states with interests in the Arctic to be attempting effective occupation, even if it was "only by a slender line of patrol posts extending along the eastern boundary of the territory claimed." Despite the limited number of RCMP posts, the report admitted that they were strategically placed to control the "entrance offering the least natural physical resistance ... to the remainder of the Canadian sector" (**Document 11**). Nevertheless, the State Department did not believe that Canada was doing enough to meet the strict American interpretation of effective occupation in the polar regions.

The State Department was not the only institution to explore Canada's claims at this time. When the British Admiralty, Foreign Office and Dominion Office prepared a major review of Commonwealth polar policy before the Imperial Conference of 1926, they studied Canada's title to the Arctic islands and its use of the sector principle, which became the source of vehement disagreement between the departments. The Admiralty had no interest in supporting the sector principle, which

the Soviet Union had just used to claim a vast portion of the Arctic, and insisted that it contradicted fundamental principles of international law. Importantly, the Admiralty argued that sector principle had arisen out of a misunderstanding of the Anglo-Russian Convention of 1825 and the Russian-American Treaty of 1867 (**Documents 12 and 13**). While the Dominions Office argued that the treaty set the 141<sup>st</sup> meridian as the western boundary of Britain's Arctic territory straight up to the North Pole, the Admiralty bluntly concluded that "the original text clearly indicates that the boundary (which is entirely a land-boundary) should be regarded as terminating when it arrives at the Arctic Ocean, and not as proceeding 1200 miles further to the Pole" (**Document 16**). In the Admiralty's eyes, the Canadian sector had no basis in any law or treaty.

In sharp contrast, the Dominions Office (and Foreign Office to a lesser degree) wanted to do whatever was necessary to support Canada's Arctic policy in its entirety, including its use of the sector principle. As the Dominions Office prepared its official report on Canada's claims in the Arctic (**Documents 14 and 15**), permanent under-secretary of state Sir Charles Davis argued that "it would be impossible for the D.O. to let Mr. Mackenzie King go back to Canada without an assurance that the Canadian claim in the Arctic would be fully supported by H.M. Government."<sup>98</sup> Davis argued that Britain was "morally bound" to support Canada, and the Dominion Office legal appraisal laid out the precedents and bases of Canada's sector claim more than any previous study had done. Despite their disagreements on the sector principle, all of the British departments involved in the polar review concluded that if the Canadian government continued its "peaceful penetration" of the Archipelago, its sovereignty would become unchallengeable in due course.

After the surge of activity and appraisals in 1925, the Canadian government slowly continued its "peaceful penetration" into the Far North. The Eastern Arctic patrol continued, more RCMP posts were constructed (including one on the Bache Peninsula on Ellesmere Island), and police officers extended their patrols in the High Arctic islands. Ottawa also continued to utilize the sector principle in its broader sovereignty strategy. A 1926 Order-in-Council, for instance, established the Arctic Islands Game Preserve comprising all the land within the Canadian sector.<sup>99</sup> Oswald

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<sup>98</sup> Lt. Commander R.T. Gould, RN, Territorial Claims in the Polar Regions: Notes of a Conference held at the D.O. 2 November 1926, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927.

<sup>99</sup> Referenced in Pharand, *Canada's Arctic Waters*, 51, and 1929 map on 52. See also LAC, RG 25, vol. 4252, file 9057-40 pts. 1-2.

Sterling Finnie, the director of the Northwest Territories and Yukon Branch of the Department of the Interior, emphasized that the Preserve “and its appearance on our maps also has a bearing on British sovereignty in the North and serves to notify the world at large that the area between the 60<sup>th</sup> and 141<sup>st</sup> Meridians of Longitude, right up to the Pole, is owned and occupied by Canada.”<sup>100</sup>

The late 1920s found Canada, along with Britain, engaged in negotiations with Norway over the Sverdrup Islands. Between 1898 and 1902, Norwegian explorer Otto Sverdrup had led a scientific expedition to northwest Greenland and into the waters of Canada’s Arctic Archipelago, over-wintering for three years on Ellesmere Island from which he set out to discover, claim and partially survey Axel Heiberg, Amund and Ellef Ringnes Islands, and King Christian Island.<sup>101</sup> On several occasions after the First World War, Norwegian officials (whose government vehemently condemned the application of the sector principle) had questioned Ottawa about the source of Canada’s rights to the islands. Ultimately, the Norwegian government decided not to challenge Canada’s claim to the islands and in 1929 permitted Sverdrup to approach Ottawa with an offer to give up any rights he might have in the Arctic Archipelago in return for monetary compensation.<sup>102</sup>

Questions over ownership of the Sverdrup Islands inspired the next round of legal appraisals by Canadian and British officials, all of which were positive about Canada’s legal title. In January 1930, a Canadian General Staff study produced by Lieutenant-Colonel Harry Crerar, a senior staff officer at the Directorate of Military Operations and Intelligence,<sup>103</sup> highlighted how all “the sources of national title to lands” – discovery, effective occupation, control, contiguity and prescription – were working to strengthen and secure Canada’s title. The particularly emphasized the importance of prescription to Canada’s case. It pointed to a 1904 map showing Canadian sector lines and argued that “this official map was published twenty-six years ago, and

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<sup>100</sup> O.S. Finnie to Dr. O.D. Skelton, 31 August 1926, LAC, RG 25, vol. 4252, file 9057-40, pt. 2.

<sup>101</sup> Lyle Dick, *Muskox Land: Ellesmere Island in the Age of Contact* (Calgary: University of Calgary Press, 2002), 218.

<sup>102</sup> For the best accounts of the complicated negotiations around the Sverdrup question, see Thorlief T. Thorliefsson, “Norway ‘Must Really Drop their Absurd Claims Such as That to the Otto Sverdrup Islands.’ Bi-Polar International Diplomacy: the Sverdrup Islands Question, 1902-1930” (unpublished master’s thesis, Simon Fraser University, 2006) and Smith, *Historical and Legal Study*, 295-312.

<sup>103</sup> See Paul Dickson, *A Thoroughly Canadian General: A Biography of General H. D. G. Crerar* (Toronto: University of Toronto Press, 2007), 90.

obviously a tacit acquiescence during over a quarter century on the part of Norway, the United States and of other nations bars their right to protect [*sic*: protest] the Canadian claim.” A subsequent comment noted that “so far as can be determined, the countries mainly interested in the Canadian Arctic Archipelago have not officially accepted the boundaries prescribed by Canada in 1904, and re-affirmed in 1925. On the other hand, silence can reasonably be accepted as acquiescence” (**Document 17**). A few months later, a British Foreign Office report by Sir Laurence Collier (the Head of the Northern section monitoring developments in Scandinavia) tracing the origins and legal development of the sector principle argued that the sector principle was on its way to general acceptance, thus bolstering this idea (**Document 18**). Collier also emphasized Canada’s efforts at effective occupation throughout the Archipelago, which made any Norwegian or American challenges highly unlikely. An unsigned note on “Ellesmere” in the files of Canada’s Department of External Affairs shared this optimism. The brief analysis concluded that the two RCMP posts on the northernmost island of the archipelago met the requirements of international law and state practice, effectively extending Canada’s control and sovereignty over the entire island (**Document 19**).

These appraisals were written during an important time in the development of international law on territorial acquisition. Although the *Palmas Island* (1928), *Clipperton Island* (1931) and *Eastern Greenland* (1933) decisions clarified certain elements of the law, they also raised fundamental questions and failed to provide a clear formula for territorial acquisition.<sup>104</sup> In 1928, jurist Max Huber arbitrated the dispute between the U.S. and the Netherlands over Palmas Island, a tiny, sparsely-populated speck in the Dutch East Indies. The *Palmas Island* case changed the legal discourse on sovereignty and had enormous ramifications on the polar regions. “Max Huber as single arbiter in the American-Dutch dispute regarding the sovereignty over the Island of Palmas rendered a verdict that is still the classical text on the acquisition of sovereignty,” legal scholar Cornelis G. Roelofsen concluded.<sup>105</sup> Unlike other arbitrations on territorial disputes, Huber infused his decision with “certain far-

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<sup>104</sup> Legal scholar, F.M. Auburn has actually argued that the *Palmas*, *Clipperton Island* and *Eastern Greenland* cases only served to further confuse the international law on territorial acquisition. F.M. Auburn, “The White Desert,” *International and Comparative Law Quarterly*, vol. 19 (April 1970): 233.

<sup>105</sup> Cornelis G. Roelofsen, “International Arbitration and Courts,” in *The Oxford Handbook of the History of International Law*, eds. Fassbender and Peters, 167.

reaching doctrinal statements of a general character.”<sup>106</sup> He supported the idea of an inchoate right, but explained that contiguity had “no foundation in international law.” He insisted that the ‘continuous and peaceful display of territorial sovereignty’ was indispensable for a valid title, although he admitted that “sovereignty cannot be exercised in fact at every moment on every point of territory...with the maintenance of the right necessarily differ accordingly as inhabited or uninhabited regions are involved.”<sup>107</sup>

The *Clipperton Island* decision of 1931 repeated Huber’s findings on effective occupation in several respects. The decision given by the arbiter, His Majesty Victor Emmanuel III, reaffirmed that the level of effective occupation necessary to secure a territorial claim was whatever was appropriate and possible in a given set of circumstances. With regard to an uninhabited island like Clipperton, this amounted to extremely little – the notice given of French occupation in 1858, constituting little more than an act of symbolic annexation. Although Emmanuel admitted the French had never “exercised her authority there in a positive manner” neither did they intend to abandon their title, which had already been perfected.<sup>108</sup>

The low bar set for effective occupation seemed to be upheld by the subsequent decision of the Permanent Court of International Justice in the *Eastern Greenland Case*. The court ruled that Denmark had demonstrated sufficient authority over parts of Greenland to claim the entire area as its own, although this jurisdiction was manifested solely by Danish legislative acts which could not be effectively enforced in most of the territory involved.<sup>109</sup> All of these cases seemed to point to the effectiveness of Canada’s sovereignty strategy in the Arctic.

While these three cases (especially *Eastern Greenland*) set a modest threshold for “effective occupation” in sparsely-populated regions like the Arctic, they did not lay out specific requirements or establish a simple formula for polar sovereignty. The Permanent Court’s decision was based on a wide array of factors, including the decisive Norwegian acknowledgement of Danish sovereignty and the lack of foreign

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<sup>106</sup> Daniel-Erasmus Khan, “Max Huber as Arbitrator: The Palmas Case and Other Arbitrations,” *The European Journal of International Law* vol. 18, no. 1 (2007): 163.

<sup>107</sup> *Island of Palmas Case* (or Miangas), United States v Netherlands, Award, (1928) II RIAA 829, ICGJ 392 (PCA 1928), 4th April 1928, Permanent Court of Arbitration [PCA].

<sup>108</sup> Edwin D. Dickinson, “The Clipperton Island Case,” *The American Journal of International Law*, vol. 27, no. 1 (1933): 130-133.

<sup>109</sup> *Legal Status of Eastern Greenland (Denmark v. Norway)*, [1933] *P.C.I.J.* (Ser. A/B) No. 53. See also Janice Cavell, “Historical Evidence and the Eastern Greenland Case,” *Arctic* 61, no. 4 (December 2008), 433–41, and Smith, *Historical and Legal Study*, 313-20.

opposition. While American international lawyer Charles Cheney Hyde accepted the importance of the decision insights on effective occupation, he also concluded that the special circumstances of the case ensured that the “decision may perhaps be deemed to lack the significance otherwise to be assigned to it as an enunciation of legal principle concerning the created and extent of rights of sovereignty.”<sup>110</sup> Accordingly, the international law on territorial acquisition remained unsettled in the eyes of legal authorities at the time, and offered no clear, general guide for states with claims in the polar regions.<sup>111</sup> States also could not be sure that the rulings in these three cases would stand test of time, would not be challenged and overturned, or that developments in the polar regions would not render obsolete the criteria for effective occupation considered in these decisions. The international law on territorial acquisition was further complicated by the growing tendency of legal scholars to support the national positions of their countries in the polar regions.<sup>112</sup>

By the early 1930s the United Kingdom, New Zealand, Australia, France, the Soviet Union and Canada had employed the sector principle to claim vast portions of the Arctic and Antarctic, often ignoring the need for occupation altogether. This met with a hostile reception in some countries, including the United States. In 1929, for example, the U.S. Navy decried the application of the sector principle in the Arctic as an illegal attempt by a few of the world’s powers to unfairly divide up a large portion of the globe.<sup>113</sup> Samuel Boggs, the State Department’s geographic adviser and one of the leading U.S. government experts on polar affairs, interrogated sector claims in

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<sup>110</sup> Charles Cheney Hyde, “The Case Concerning the Legal Status of Eastern Greenland,” *The American Journal of International Law*, vol. 27, no. 4 (Oct. 1933), 738.

<sup>111</sup> Donald Greig, “Sovereignty, Territory and the International Lawyer’s Dilemma,” *Osgoode Hall Law Review* vol. 26, no. 1 (Spring 1988): 166.

<sup>112</sup> Gustav Smedal is the prime example of this politicization. Smedal was a strong Norwegian nationalist who dreamed of building a polar empire for Norway. The first step in creating this empire was to discredit the claims of other countries in the polar areas of interest to Norway. This objective shaped the book Smedal produced in 1931, called *Acquisition of Sovereignty Over Polar Areas*. Of note, Smedal’s opinions became a major source cited in future Canadian appraisals of Arctic sovereignty. See, in particular, Smedal, *Acquisition of Sovereignty Over Polar Area* (Oslo: Gyldendal Forlag, 1931). Other examples of legal analyses that may have been swayed by nationalistic impulses include David Hunter Miller, “Political Rights in the Arctic,” *Foreign Affairs* no.4 (1925), 47-60; W.L. Lakhtine, “Rights Over the Arctic,” *The American Journal of International Law* vol. 24, no. 4 (1930): 703-717.

<sup>113</sup> Letter from the Secretary of the Navy (Adams) to the Secretary of State (Stimson), 23 September 1929, quoted in Donat Pharand, *The Law of the Sea of the Arctic with Special Reference to Canada* (Ottawa: University of Ottawa Press, 1973), 142.

both polar regions in this context in 1933. Boggs admitted that the United States had interests and possible claims in the Canadian Arctic sector, but predicted that these claims could “not be presented, however meritorious, if allowed to lapse much longer” because the Canadians were “rather effectively” establishing jurisdiction in their sector (**Document 20**). Boggs ended his survey by suggesting the U.S. formally challenge the sector principle wherever it might be used.

Three years later, cognizant that the next year’s Imperial Conference would once again look at polar claims and the sector principle, T.L. Cory, the solicitor of the Northwest Territories Branch in Ottawa, compiled a lengthy report on sovereignty in the Arctic. He noted that “the Sector Theory is perhaps the weakest and has little if any weight under International Law” and argued that Canada should do more to occupy the Arctic islands. Cory was especially worried about the High Arctic islands west of the RCMP posts established on the eastern fringe of “Canada’s vast Arctic claim.” Gustav Smedal’s legal scholarship led Cory to believe that more had to be done to extend Canadian control throughout the entire archipelago. He insisted that Canada’s annual Arctic patrol did not extend Canada’s sovereignty in the Arctic, nor was it a “substantial factor in maintaining the claim already established,” and he argued for a new main base on Devon Island from which administrators, surveyors and scientists could operate throughout the Arctic, establishing more “permanent occupation” (**Document 21**).

While Cory raised concerns about Canada’s Arctic sovereignty claim, the American government and press was largely fixated on the South Pole in the late 1930s, where the U.S. Antarctic Service Expedition tried to establish a semblance of permanent occupation. The onset of the Second World War also drew the Canadian government’s focus away from the Arctic, when Ottawa became more acutely concerned with American interest and activities in the Canadian Northwest. Although Prime Minister Mackenzie King allowed the Americans onto Canadian soil with few constraints in the interests of continental defence, he was suspicious of their ultimate intentions. As the war progressed, officials in Washington acknowledged that they had to respect their northern neighbour’s interests – and its chronic insecurities. Although Canada would emerge with its sovereignty intact,<sup>114</sup> American defence activities in the Northwest and in portions of the Northeastern Arctic

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<sup>114</sup> P. Whitney Lackenbauer, “Right and Honourable: Mackenzie King, Canadian-American Bilateral Relations, and Canadian Sovereignty in the Northwest, 1943-1948,” in *Mackenzie King: Citizenship and Community*, eds. John English, Ken McLaughlin, and Lackenbauer (Toronto: Robin Brass Studio, 2002), 151-168.

(including Baffin Island) during the war raised real concerns in Ottawa about its sovereignty over the northern islands.

During the war, several officials in the Department of Mines and Resources assessed Canada's efforts in the Arctic. In February 1944, J.G. Wright, a member of the Northwest Territories Administration, noted that "it is the far and western islands, which are reached by our administration mostly in theory, where our claims to sovereignty are most likely to be questioned." He surmised that "if we wish to strengthen our claims to Arctic sovereignty by setting up weather stations and other scientific stations, that is still another matter and rather outside the scope of the existing U.S. weather stations, which are all in regions where no one is likely to question our sovereignty."<sup>115</sup> The following January, Wright's superior, R.A. Gibson, suggested that Canada establish weather stations in the region to resolve the pressing "sovereignty question."<sup>116</sup>

The Americans, however, started to plan for weather stations before Ottawa had decided on the matter. As relations between the Soviet Union and the United States deteriorated at the end of the Second World War, North American defence analysts began to shift their mental maps to looking at the world from the perspective of the North Pole. Polar projection maps made the United States' proximity to the Soviet Union strikingly obvious. Strategists started to make nightmarish predictions of hostile bombers flooding over the northern approaches to wreak havoc on the continent's urban, industrial heartland, and some planners contemplated ambitious projects to serve the broader interests of continental defence.

In the spring of 1946, U.S. defence officials peppered Ottawa with proposals to improve their capabilities in the Arctic, including the establishment of several permanent weather stations on uninhabited islands in the archipelago. American officials repeatedly assured their Canadian counterparts that the weather stations program would not jeopardize Canadian sovereignty, but never offered to recognize Canada's sector claim or title to the islands of the entire archipelago (**Document 22**). When politicians and civil servants raised quiet concerns about whether Canada had established clear sovereignty over its remotest Arctic islands (particularly areas in which the Americans now proposed development projects), Ottawa delayed approval for the joint weather stations project. American-built installations in remote areas

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<sup>115</sup> Wright to Gibson, 9 February 1944, LAC, RG 85, vol. 823, file 7140.

<sup>116</sup> R.A. Gibson to Dr. John Patterson, 2, January 1945, LAC, RG 85, Vol. 823, File 7140.

where few Canadians had ever visited could be seen as problematic.<sup>117</sup>

A U.S. Air Coordinating Committee report from December 1945 exacerbated Canadian worries with its recommendation that American reconnaissance flights should look for undiscovered Arctic islands in the “unexplored” area north of Prince Patrick Island and west of Grant’s Land (Ellesmere) – areas theoretically within Canada’s sector – which the United States could claim to serve as platforms for weather stations and polar communications. The report indicated that “the U.S. may not have recognized” Canada’s claims to everything within its sector and requested more research on Canada’s position.<sup>118</sup> By focusing on potential “undiscovered” islands, however, the report implicitly acknowledged that all discovered islands already belonged to Canada. After summarizing the report, however, Canadian official R.M. Macdonnell wondered whether “we ought not to discuss the sovereignty question with the United States and endeavour to secure their agreement to our claims about Canadian sovereignty” (**Document 23**).

In one of the most comprehensive Canadian legal appraisals created in the midst of the U.S. Arctic defence proposals, the Canadian Cabinet Defence Committee’s study, largely authored by Major-General D.C. Spry (the Vice-Chief of the General Staff), drew a negative assessment of Canada’s sovereignty. Overlooking government activities which served to assert sovereignty in the interwar years, the study suggested

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<sup>117</sup> On sovereignty and security issues during the Early Cold War, see Kenneth C. Eyre, “Custos Borealis: The Military in the Canadian North” (unpublished Ph.D. thesis, University of London - King’s College, 1981); Shelagh Grant, *Polar Imperative: A History of Arctic Sovereignty in North America* (Vancouver: Douglas & McIntyre, 2011), 283-300; David Bercuson, “Continental Defense and Arctic Security, 1945-50: Solving the Canadian Dilemma,” in *The Cold War and Defense*, eds. Keith Neilson and Ronald Haycock (New York: Praeger, 1990), 153-70; Kikkert, “Pragmatism and Cooperation: Canadian-American Defence Activities in the Arctic, 1945-1951” (unpublished M.A. thesis, University of Waterloo, 2009); P. Whitney Lackenbauer and Peter Kikkert, “Sovereignty and Security: The Department of External Affairs, the United States, and Arctic Sovereignty, 1945-68,” in *In the National Interest: Canadian Foreign Policy and the Department of Foreign Affairs and International Trade, 1909-2009*, eds. Greg Donaghy and Michael Carroll (Calgary: University of Calgary Press, 2011), 101-20; Kikkert, “1946: The Year Canada Chose Its Path in the Arctic,” in *Canadian Arctic Sovereignty and Security: Historical Perspectives*, ed. P. Whitney Lackenbauer (Calgary: Centre for Military and Strategic Studies, 2010), 69-110; and Daniel Heidt, “Clenched in the JAWS of America? Canadian Sovereignty and the Joint Arctic Weather Stations, 1946-1972,” in *Canadian Arctic Sovereignty and Security*, 145-70. On the general U.S. approach towards Canada’s use of the sector principle see Lackenbauer and Kikkert, “Dog in the Manger.”

<sup>118</sup> December 1945 Air Coordinating Committee report, LAC, RG 25, vol. 3047, PJBD file 113.

that a lack of effective occupation, settlement, or development weakened Canada's position. While, the United States "tacitly acknowledges Canadian sovereignty over ... discovered islands," it noted, "it is of great importance that Canada should carefully safeguard her sovereignty in the Arctic at all points and at all times, lest the acceptance of an initial infringement of her sovereignty invalidate her entire claim" (**Document 24**).

In Ottawa, the major debate over how to proceed occurred between those who wanted to force the United States into a public recognition of Canada's sovereignty along the lines of the sector principle and those who thought that more informal guarantees represented a more viable option. Lester Pearson, the Canadian Ambassador in Washington, insisted that Canada was right to worry about its sovereignty and argued that Ottawa should act to secure "public recognition of our sovereignty of the total area above our northern coasts, based on the sector principle" (**Document 25**). Undersecretary of State for External Affairs Hume Wrong acknowledged the long-held American rejection of the sector principle, however, and argued that the State Department would not "fall in line" with Pearson's suggestion "if falling in line means that they are asked to proclaim their adhesion to the sector theory of Arctic sovereignty."<sup>119</sup> Wrong also believed that Canada's legal position in the Arctic was vulnerable, characterizing it as "unchallenged but not unchallengeable," but insisted that it was politically and legally astute to work with the United States and thus avoid provoking a challenge (**Document 26**).

U.S. defence and meteorological plans for the Arctic, and Ottawa's hesitation to accept their proposals, led to several detailed American legal appraisals of Canada's Arctic sovereignty in 1946. All dismissed the sector principle as invalid, but the authors of these reports also struggled to find a coherent set of "clear legal principles" about how polar territory could be properly acquired. They were certain that, in some of the Arctic islands, Canada's efforts at effective occupation fell short of the standards outlined by the U.S. in its Hughes Doctrine. Intelligence officer Lt.-Colonel James Brewster pointed out that the Canadian Arctic was "little-known, only incompletely explored, and inadequately administered and patrolled." In his view, Canada had done little to actually "settle" the Arctic, and its decision to close police posts in remote regions such as Ellesmere Island in the interwar years had eroded its claim to effective occupation (**Document 27**). The intelligence branch of the

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<sup>119</sup> H.H. Wrong to A.D.P. Heeney, 8 June 1946, LAC, RG 25, vol. 3347, file 9061-A-40, part 1.

Atlantic Division of Air Transport Command, in its study of Canada's claims, noted that "the United States could present a fairly well documented legal defense in support of any action its Government desired to take in Melville Island, Prince Patrick Island, and Grant Land [northern Ellesmere Island], particularly since the American Government has consistently maintained that sovereignty cannot be claimed without a degree of effective occupation, colonization and use that until the present has not been achieved in the Canadian Arctic" (**Document 29**). Nevertheless, both reports concluded that an international judicial body would likely find in Canada's favour in light of the *Eastern Greenland* ruling that polar sovereignty did not appear to require development or mass settlement comparable to benchmarks for occupation in temperate regions. A 1946 State Department policy statement on the polar regions concurred that Canadian officials were "in a position to support their claims to superior title by concrete evidence of acts of possession and control exercised without challenge for a considerable period" (**Document 28**).

Given these conclusions, American officials avoided any discussion of the sector principle during the early postwar negotiations that laid the foundation for bilateral defence cooperation in the Arctic. The United States never offered to publicly recognize Canada's claims, given that this would have required articulating a legal basis for this acquiescence and they would not accede to a formal sector approach. Behind closed doors, however, the United States accepted Canadian guidelines devised to quietly confirm Canada's sovereignty over the Arctic islands north of the its mainland.<sup>120</sup>

Soon after its formation in 1948, the Canadian government's Advisory Committee on Northern Development commissioned a large-scale study of Canadian sovereignty in the Arctic by External Affairs legal adviser E.R. Hopkins (**Document 30**). Rather than simply reproducing older legal appraisals that sought to justify Canada's Arctic sovereignty based on every source or doctrine of international law that might apply, Hopkins sought to determine what legal arguments best supported Canada's title to the northern islands. He surveyed major cases, decisions, treaties and legal writings on territorial acquisition that affected Canada's position and posited

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<sup>120</sup> Lackenbauer and Kikkert, "Let Sleeping Dogs Lie," 234-38. In this book chapter, we argue that, in the years that followed, a steady flow of joint defence agreements recognizing Canada's control in the Arctic Archipelago served to alleviate many of the sovereignty concerns that existed in reports prepared by Canadian officials in 1946. Nonetheless, Canada's title to the Arctic islands remained a popular topic for Canadian officials engaged in the northern defence projects, especially as an increase in the level of activity seemed imminent.

that Canada should base its claims on the effective occupation and control that it had achieved throughout the Archipelago, concluding that Canada could use discovery, geographical dependency, contiguity, prescription and the sector principle as backup legal arguments. Hopkins argued that international legal developments had made it “possible for a state to exercise effective control over a polar territory without establishing a local authority within the limits of this territory. Thus, control may be exercised, exceptionally, from a point located either in the temperate zone or in another polar territory.” In his view, sovereignty meant control, specifically of the means of access into the Archipelago which Canada had exercised since the start of the twentieth century. He explained that recognition of state’s sovereignty over territory could be either “express or implied,” and he concluded that Canada’s title to the Arctic islands had achieved near “universal recognition.”

The positive tone of Hopkins report was echoed by Vincent MacDonald, the dean of the Dalhousie Law School, who Ottawa asked to present Canada’s case “in its most effective and persuasive form” (**Document 31**). Although MacDonald used Hopkins’ research as the foundation for his report, he more systematically situated Canada’s case within the broader currents of international law. In his opinion, Canada’s effective occupation in the entire Arctic Archipelago was quite strong in light of the *Palmas* and *Eastern Greenland* decisions. “Accordingly,” MacDonald argued, “the conclusion appears inevitable that Canada has made so many displays of sovereignty, in so many respects, in so many places, for so long a period, and with so little challenge, as to establish its title to the whole of the Canadian Arctic region by effective occupation in conformity with international law.” Like Hopkins, MacDonald also maintained that Canada should hold other legal arguments in reserve for any territory it felt it had not effectively occupied.

The glowing appraisals by Hopkins and MacDonald were matched by a 1951 U.S. State Department statement on the polar regions that simply explained that “we have not been inclined to challenge Canadian claims to jurisdiction over those areas in which the Canadian government is exercising control,” which seemed to constitute most of the Archipelago (**Document 32**). Nonetheless, External Affairs remained concerned about Canada’s terrestrial sovereignty into the 1950s. In 1953, the Canadian government made the decision to re-name the northernmost islands of the Archipelago above the Lancaster Sound-Parry Channel-M’Clure Strait line the Queen Elizabeth Islands, in honour of Elizabeth II’s coronation. In early 1954, officials discussed whether to inform specific foreign missions with interests in the Arctic about the re-naming, in light of the ongoing legal debate about the need to formally

notify foreign states of territorial claims – a debate that extended back to the Berlin Conference in 1885. K.J. Burbridge from External Affairs' Legal Division insisted that formal notification of Canada's "unquestioned sovereignty" over the Queen Elizabeth Islands might actual lead to protests from states afraid to lose "their rights in this general area." He cast some doubt on the Canadian position when he concluded that "Canadian sovereignty over Arctic areas only remains to be perfected by the continuous and actual exercise of state activity in this region. In time, this will be sufficient to confer an absolute title in international law." In short, Burbridge believed that more work was required before Canada would secure absolute title to the High Arctic islands (**Document 33**).

Later that year, External Affairs noted that the sector principle might still be needed to bolster Canada's title in the Archipelago. The department doubted that the theory could "by itself be a sufficient legal root of title," and argued that the laws of territorial acquisition (which now rested "on a firmer basis than almost any other branch of customary international law") clearly showed the effective occupation should be considered the major source of Canada's sovereignty. Still, the sector principle offered some practical value "by affording a convenient geographical area within which our intention to exercise sovereignty over territory is evident to all and the actual display of Canadian sovereignty increasingly effective.... The sector theory operates to give Canada the benefit of the rule that effective occupation need not be felt in every nook and cranny of the territories claimed" (**Document 34**).

The final agreement between Canada and the U.S. to construct the Distant Early Warning (DEW) Line, an Arctic radar chain to provide advance warning of a transpolar Soviet bomber attack, alleviated residual concerns about Canada's terrestrial sovereignty over the islands of the Arctic Archipelago.<sup>121</sup> The U.S. legal appraisals prepared in the lead up to and aftermath of the DEW Line treaty reflect the American decision to accept Canada's title to the Arctic islands. They reiterated the different approaches that Canada and the U.S. took towards polar sovereignty, especially concerning the sector principle and the requirements of effective occupation. Some American officials still doubted that Canada had done enough to occupy parts of the Archipelago, as indicated in a May 1955 report from the U.S. Embassy in Washington noting that "Canadian claims in the area which have

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<sup>121</sup> Exchange of Notes between Canada and the United States of America Governing the Establishment of a Distant Early Warning System in Canadian Territory, 5 May 1955, Canada Treaty Series 1955, No. 8.

heretofore been weak because the islands are almost unoccupied and other countries might have claims on the basis of earlier exploration” (**Document 36**). Consistent with previous practice, however, the U.S. acknowledged that it would lose more than it could gain by challenging the legal position of its neighbour and close ally. The State Department fully realized that most Canadian sensitivities about Arctic sovereignty emanated from the U.S. refusal to formally and publicly recognize Canada’s title. For example, a 1956 report suggested that “a great deal of the Canadian formality now apparent in matters concerning Canadian possessions in the North probably stems back to attitudes adopted by us in the 1920’s” (**Document 37**).

In the years that followed the Second World War, the respectful approach of the U.S. government towards the Arctic defence projects soothed Canadian fears about potential threats to terrestrial sovereignty. By following the parameters that Ottawa established for continental defence projects, the U.S. had implicitly acknowledged Canada’s sovereignty over all the islands of the Arctic Archipelago (**Documents 35 and 36**). The bilateral relationship in the Arctic had changed significantly since the controversy over the MacMillan expedition in 1925. By the mid-1950s, the U.S. sought Canadian “authorization for every move we make on known lands in the northern archipelago, and we have long since all but foresworn any rights that might have devolved to us by reason of the early explorations” (**Document 37**).

After the DEW Line Agreement, the Canadian government’s primary sovereignty concerns shifted from the Arctic islands to the waters around them. Government legal appraisals now focused on questions surrounding the extent of the territorial sea, straight baselines, and the status of the Northwest Passage – the subject of subsequent volumes in the *Documents on Canadian Arctic Sovereignty and Security* series.



# 1. Memorandum, W.F. King, Chief Astronomer, to Hon. Clifford Sifton, Minister of the Interior, Report upon the Title of Canada to the Islands North of the Mainland of Canada, 23 January 1904

Published in *Report upon the Title of Canada to the Islands North of the Mainland of Canada* (Ottawa: Government Printing Bureau, 1905)

The following preliminary report upon the title of Canada to the Northern Islands is submitted:

*Transfer of Rupert's Land and North-western Territory.* 'Rupert's Land' and the 'North-western Territory' were united to Canada by Imperial Order in Council, June 23, 1870.

This Order was passed in pursuance of the British North America Act, 1867 (Sec. 146), and the Rupert's Land Act, 1868. All the requirements of these Acts in that behalf were complied with, and the full title to these territories accordingly became vested in Canada.

The precise description of the territories to which the names 'Rupert's Land' and 'North-western Territory' were applied does not, however, clearly appear. It seems never to have been determined upon authority.

*Description of Rupert's Land.* Rupert's Land is the name applied in the charter of the Hudson's Bay Company (1670) to the territory in which the lands were granted to them in free and common socage (as distinguished from those further territories in which the same charter gave them exclusive rights of trade without property in the soil), and comprised 'all the countries, coasts and confines of the seas, bays, lakes, rivers, creeks and sounds,' 'in whatsoever latitude they shall be, that lie within the entrance of the straits commonly called Hudson's straits,' and that were not 'already actually possessed by or granted to any of our subjects, or possessed by the subjects of any other Christian Prince or State.'

This description has had various interpretations. That claimed by the Hudson's Bay Company in 1857 was that Rupert's Land extended to the watershed of all waters falling into Hudson bay. (See Sir George Simpson's evidence before the Select Committee of the House of Commons). A map drawn by the company's geographer, Arrowsmith, was submitted to the committee, and serves to exhibit this claim in detail. (See Alaska Tribunal proceedings: British map No. 21, United States map No. 35).

The boundary line of Rupert's Land in this map begins at Cape Chidley, at the south-eastern entrance to Hudson strait, and follows the height of land all the way around (except where limited by the international boundary), to the northern extremity of Melville peninsula. It then crosses Fury and Hecla strait and continues easterly and southerly through Cockburn Land and Baffin Land (the large islands

north of Hudson strait) to a point on the Atlantic between Frobisher strait and Cumberland inlet.

This line, on the western side, leaves out of Rupert's Land, and places in the 'other British Territories' a small piece on Milk river, adjoining the international boundary, and the valleys of the Mackenzie, Yukon, Coppermine, Back, &c., rivers. To the north it leaves out a strip of Cockburn Land and Baffin Land, facing on Davis strait and Baffin bay, of 200 to 250 miles wide, and all the islands in the Arctic ocean. Rupert's Land extends, in the Saskatchewan region, to the Rocky mountains.

This line appears to mark the utmost limit to which Rupert's Land, under any reasonable construction, could extend. The schedule of Hudson's Bay Company's posts, which is attached to the deed of surrender, seems to have been drawn according to this description.

However, the Award of the Boundary Commission of 1874-78, which was confirmed by the Judicial Committee of the Privy Council, curtails Rupert's Land in its southern part, by placing the northern boundary of the province of Ontario at Albany river and James bay.

It is possible that, if a case arose as to the northern limits of this territory, the courts might likewise curtail it there. It seems unlikely that it would be held to extend beyond the limits claimed in 1857.

*Description of North-western Territory.* The designation 'North-western Territory' is even more vague. When it was first used does not appear. Its first appearance in an authoritative document appears to be in Section 146 of the British North America Act. It is absent from the earlier documents, which have been consulted, such as the Hudson's Bay Company's charter, the Act of 1821 for regulating the fur trade, the licenses of trade granted to the united Hudson's Bay and North-west Companies in 1821 and 1838, &c. In the schedule attached to the deed of surrender, the 'Northern Department,' 'North-west Territory' includes the Athabaska and Mackenzie river districts.

In their letter of February 8, 1869, to Sir F. Rogers, Colonial Office, Sir George E. Cartier and Mr. McDougall, the Canadian delegates, asked for the transfer of the North-west Territory, or all that part of British North America from Canada on the east to British Columbia, Alaska and the Arctic ocean on the west and north, not heretofore validly granted to and held by "The Government and Company of adventurers of England trading into Hudson's bay."

The above indicates that the North-west Territory, or North-western Territory, was generally understood to include all the unorganized territory to the west of Canada and Rupert's Land.

Whether it was understood to include the islands in the Arctic ocean, and the strip of the islands above referred to, facing on Davis strait and Baffin bay, is not clear. It is all a matter of inference merely, without guidance from any authoritative and precise description. In short, the boundaries of the territory annexed to Canada

are uncertain. Rupert's Land and the North-western Territory together may or may not include all the territory to the Arctic ocean; they may or may not include the northern islands.

*Address to the Queen, 1878.* Having such considerations in view, the Parliament of Canada, in May, 1878, presented an Address to Her Majesty, in which it was stated that doubts existed regarding the northerly and north-easterly boundaries of the Northwest Territories and Rupert's Land; that it was expedient that the right of Canada to all of British North America and the islands adjacent thereto (with the exception of Newfoundland) should be placed beyond question; and that, to avoid all doubts, it was desirable that an Act of Parliament be passed 'defining the north-easterly, northerly and north-westerly boundaries of Canada, as follows.' Here follows a precise description, drafted to include all islands between Davis strait, &c., continued northerly, and the 141st meridian.

*Imperial Order in Council, 1880.* On July 31, 1880, an Imperial Order in Council transferred to Canada 'all British territories and possessions in North America, not already included in the Dominion of Canada, and all islands adjacent to such territories or possessions' (with the exception of the Colony of Newfoundland and its dependencies).

*Discussion of the Order in Council of 1880.* This action falls short of what was asked for by Canada in these respects:

First, it does not clear up any existing doubt as to the exact meaning of 'Rupert's Land and the North-western Territory' in the British North America Act of 1867.

Second, it is an Order in Council, not an Act of Parliament. A question arises whether a good title was thereby given. Though formerly it was considered that the boundaries of a colony lay within the Sovereign's prerogative to alter or adjust, then Dominion of Canada was not an ordinary colony, but a special creation by parliament of a character previously unknown in constitutional law. The Act creating it provided for the future addition to it by Order in Council, under certain conditions, of certain specified colonies, and two specified territories: no provision was made for any further addition. The inference might be that territories other than those so named could not be added to the Dominion under authority of Order in Council merely. It is to be observed that the Order in Council purports, not to explain the meaning of the Act of 1807, a function presumably within the powers of Council, but to deal with territory 'not already included in the Dominion of Canada.'

However, the law officers of the Crown had decided that such action was *intra vires*; the Governor General was so advised by a dispatch from the Colonial Office of April 18, 1870. Nevertheless, some doubt seems to have remained, which led to the passing, in 1895, of an Act by which 'where the boundaries of a colony have, either before or after the passing of this Act, been altered by Her Majesty the Queen in

Council, or letters patent, the boundaries as so altered shall be and be deemed to have been from the date of the alteration, the boundaries of the colony.'

Third, the Order in Council of 1880 adds to Canada all the British possessions in North America, without defining what these possessions include. Such definition, whether made by Order in Council, or Act of Parliament, but especially the latter, would have greatly strengthened, in an international sense, Great Britain's own title.

*Title by Discovery in International Law.* This title rested upon discovery by British navigators, with some acts of formal taking of possession. Such title, according to writers on international law, is imperfect, unless confirmed either by subsequent ratification of the possessory acts by the Sovereign power, or by subsequent occupation by its subjects. Of these, occupation is the more important. A lapse of title apparently may ensue in the absence of occupation. Ratification, however, of acts of possession, made publicly and solemnly, as by an Act of Parliament, if not protested against by other states, evidently clears up any dispute as to occupation up to the time, at least, of the ratification.

It is not proposed in this preliminary report to go further into the question of the validity of Great Britain's title. The full consideration of this calls for inquiry into individual acts of possession and occupation by Arctic explorers and others. Information is being collected bearing on this point, and will be reported later on.

*The language of the Order of 1880 discussed.* Leaving this aside for the present, and returning to the Order in Council of 1880, which, with the confirming Act of 1895, forms the basis of Canada's title, we find this conveys 'all British territories and possessions in North America, and all islands adjacent to such territories and possessions,' not already belonging to Canada or to Newfoundland.

This expression is not altogether free from vagueness. 'North America,' according to geographical usage, has two meanings. In precise language, it means the mainland of the continent. Again, in a general way, without much precision, the word is applied to a certain quarter of the globe. Here it seems to mean the *continent*, excluding the islands. Then what is the meaning of 'adjacent,' the 'islands adjacent'? North of the continent is an archipelago of large islands, separated from one another by passages, most of which are much wider than the usual territorial waters. Some of these islands are 300 or 400 miles distant from the mainland.

*The intention of the parties to the transfer of 1880.* Failing to get a precise definition from the words of the documents, recourse must be had to the intentions of the parties, Great Britain and Canada.

*What Canada asked for.* Canada, in 1878, asked for a boundary line 'on the east by the Atlantic ocean, which boundary shall extend towards the north by Davis strait, Baffin bay, Smith strait 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 whole 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.’

*Limitations of the Transfer by Great Britain.* The Order of 1880, refers to the Address, and is apparently intended as a compliance with the request of Canada, but does not quote the description. From this it may be argued that Great Britain expressly refrains from claiming all the lands within the limits stated. All her possessions in this quarter are, indeed, intended to be transferred, but what her possessions consist of is left to be ascertained otherwise.

*Inaction of Canada.* For light upon the understanding by Canada of the effect of this document we have to wait fifteen years. A search through the Canadian statutes and Orders in Council fails to show any recognition even of the fact that these lands had been transferred to Canada, until 1895.

The North-west Territories, by the revised statutes of 1886, comprise Rupert’s Land and the North-west Territories, excluding Manitoba and Keewatin. No amendment to this North-west Territories Act, so as to include the northern territories, appears to have been enacted up to the present time.

*Formal action by Canada in 1895.* The Order in Council of October 2, 1895, constituting the provisional districts of Ungava, Franklin, Mackenzie and Yukon, seems to have been the first formal acceptance by Canada of the territories and islands transferred in 1850. The date of this Order was subsequent to the passage of the Colonial Boundaries Act of 1895.

*Defective Description.* The description in this Order in Council is defective. The districts of Yukon and Mackenzie are stated to include the northern part of the continent with all the islands within three geographical miles. The description of Franklin is not so worded as to include all the islands more than three miles from the mainland. Yet the Order in Council closes by stating that its effect will be to divide into provisional districts all the unorganized and unnamed portions of Canada.

The effect of this is virtually to declare that certain islands in the Arctic ocean, some of them off the mouth of the Mackenzie river, are not part of Canada.

It may also be noted, *en passant*, that this Order in Council purports to divide the North-west Territories into districts, whereas the territory actually divided lies, in part, beyond the statutory limits of the North-west Territories.

The description includes in the district of Franklin all the known islands eastward of the Beaufort sea and westward of Kennedy channel, &c., to the ‘farthest north of Commander Markham’s and Lieutenant Parr’s sledge journey’ in 1876. All islands

known to exist between the 141st meridian and the channel west of Greenland are included in one or other of the districts, barring only the (evidently accidental) omission of certain islands above referred to.

*Order in Council of 1897.* By the amending Order in Council of December 18, 1897, the error in the former description is set right, Yukon and Mackenzie include the islands for twenty miles from the coast, and Franklin all the others.

*Discrepancies between time Orders in Council and Acts of Parliament.* Here it is necessary to refer to certain discrepancies between these Orders in Council of October 2, 1895, and December 18, 1897, and certain Acts of Parliament.

By proclamation of August 16, 1897, the 'Yukon Judicial District' was constituted. Its boundaries were described in accordance with the boundaries given by the Order in Council of 1895 to the 'Yukon Provisional District.'

By the Yukon Territory Act of 1898, the boundaries of 'Yukon Territory' accord with those of 'Yukon Judicial District' and consequently differ from the boundaries of 'Yukon Provisional District,' as defined by Order in Council of December, 1897.

If the 'Yukon Territory' of the Act is held to be identical with the 'Yukon Provisional District' of the Order in Council, then the latter was annulled, and the Northern boundary of Canada was withdrawn to where the Order of 1895 placed it, three miles from the coast.

However, the Yukon Territory Act, as amended in 1901, again alters the description, extending the boundary of the territory to twenty miles from the coast, and so far agreeing with the Order of 1897, although it still differs from it in a minor point affecting the internal boundary between Mackenzie and Yukon.

#### SUMMING UP.

To sum up, the following are the principal points which it has been sought in the foregoing to elucidate:

1. Full title to Rupert's Land and the North-western Territory was transferred to Canada in 1870.
2. No exact and authoritative definition of Rupert's Land and the North-western Territory has been given. It is uncertain whether these include the islands to the north, or all the mainland itself.
3. In 1878, the Parliament of Canada, recognizing the uncertainty as to the boundaries of the territory added in 1870, asked for a rectification of the boundaries on the north, with a definitive description of the territory which should belong to Canada.
4. By the Imperial Order in Council of 1880, Canada was extended to cover all British territories and islands in North America. Such at least was the intent of the Order, though it might be obscured by a rigid verbal construction.

5. The Order of 1880 did not definitely describe the territory added to Canada. It only partially solved the difficulty as to boundaries.
6. Any doubts as to the legality of the transfer in 1880 were set at rest by Act of Imperial Parliament in 1895.
7. No action was taken by Canada to accept or incorporate the added territory between 1880 and 1895.
8. The Canadian Order in Council of October 2, 1895, which was the first formal and authoritative statement of the extent of British or Canadian territory to the north, was defective in an essential point.
9. The amending Order in Council of 1897 corrects the error in that of 1895, but may itself be open to question through the passing of the Yukon Territory Act of 1898.
10. Canada's title to the northern islands is derived from Great Britain's. Great Britain's title rests upon acts of discovery and possession. These Acts were never, prior to the transfer to Canada, ratified by state authority, or confirmed by exercise of jurisdiction, &c. Canada's assumption of authority in 1895 may not have full international force.

The conclusion from the foregoing seems to be that Canada's title to some at least of the northern islands is imperfect. It may possibly be best perfected by exercise of jurisdiction where any settlements exist.

In a further report it is proposed to deal with the Acts of discovery and occupation by British subjects, and others, with the evidence of maps, &c.

Respectfully submitted,

W. F. KING,  
*Chief Astronomer.*

## 2. Memorandum from L.C. Christie, Legal Adviser, to Prime Minister, Ottawa, Exploration and Occupation of the Northern Arctic Islands, 28 October 1920

Library and Archives Canada (LAC), Manuscript Group (MG) 26, I (Arthur Meighen Fonds), vol. 13, file 7

### EXPLORATION AND OCCUPATION OF THE NORTHERN ARCTIC ISLANDS

1. The necessity for taking concrete steps to confirm the Canadian assertion of sovereignty over the northern arctic islands has now become more urgent; for information has been received that the Government of Denmark, instead of merely contemplating an expedition next year to settle Ellesmere Island as previously reported, have actually sent their expedition; indeed it is understood that it reached the scene of action in the summer of 1920. The Department of the Interior have information concerning this.

2. Practically the question concerns the islands north of Lancaster Sound; that is to say, Ellesmere Island, Heiberg Island, North Devon, Bathurst Island, the Ringnes Islands, Melville Island, Prince Patrick Island, and the islands discovered by the Stefansson Canadian Arctic Expedition of 1913-18, not to speak of any as yet undiscovered islands that may exist in this region. South of Lancaster Sound there is nothing, so far as our information goes, to indicate any likelihood that our claim will be disputed; and for the present at all events no special action seems called for in that quarter.

3. The position is that we have at various times asserted a claim of sovereignty broad enough to cover these islands; that in respect of some of them our case on grounds of discovery and exploration seems better than that of other nations, but that in respect of a number of them other nations could probably make a better case on these grounds than we could. But the important point is that mere discovery and exploration, even accompanied by a formal assertion of sovereignty, are not enough, without more, to create a permanent perfect title. At best such acts give rise only to what is described in international law as an inchoate or imperfect title. To complete this title action must be taken amounting to what is known as occupation. When a state does some act with reference to unappropriated territory which amounts to an actual taking of possession, and at the same time indicates an intention to keep the territory seized, it is held that a right is gained as against other states, which are bound to recognize the intention to acquire title, accompanied by the fact of possession, as a sufficient ground of proprietary right. The title thus obtained, called title by occupation, being based solely upon the fact of appropriation would in strictness

come into existence with the commencement of effective control, and would last only while it continued, unless the territory occupied had been held so long that title by occupation had been merged in title by prescription.

4. An inchoate title acts as a temporary bar to occupation by another state, but it must either be converted into a definitive title within reasonable time by planting settlements or military posts, or it must at least be kept alive by repeated local acts showing an intention of continual claim. What acts are sufficient for the latter purpose, and what constitutes a reasonable time, cannot well be catalogued. Each case must be judged in the light of its circumstances as a whole. It should be noted however that a modern tendency has arisen to exact that more solid grounds of title shall be shown than used to be accepted as sufficient.

5. The best discussion of the whole subject may be found in Hall's International Law, Part II. Chapter 2. The question has been considered by Canadian Governments in the past. Thus, in the confidential Report made in 1904 by Dr. W.F. King, Chief Astronomer of the Department of the Interior, upon the title of Canada to the islands north of the mainland, the following opinion by the Hon. David Mills is cited (p.22):

“...It will not be difficult to show that title according to the usages of nations, cannot be based upon discovery made at some period long past. There must be, besides discovery, such acts of occupation or settlement, accompanying the act of discovery or following it within a reasonable time, as will serve to show that the authority of the sovereign has had a potential existence over the territory so claimed.”

6. According to our geographical authorities Denmark has had nothing to do with the discovery or exploration of these islands. In this sphere the only rivals of British explorers have been Norwegians and Americans, but so far as appears, neither the Norwegian nor the American Government has shown any intention of making an effective occupation. In relation to Denmark therefore we appear to be in a stronger position so far as the question of inchoate title is concerned.

Possibly the Danish Government feel that they have a case on the score of the contiguity of Ellesmere and some of the other islands to Greenland. Ellesmere is indeed nearer to Greenland than to the mainland of Canada. But contiguity gives no title. If we ever allowed the whole question to come before an international tribunal or council, this factor might in certain circumstances be considered in the minds of statesmen. But it need not concern us at present.

Another consideration may be suggested here. Denmark is a European power. Extensions of European power in the Western Hemisphere are presumably in conflict with the American Munroe Doctrine. Conceivably, if the question ever came to an issue we might secure American support on this score. Canada however could scarcely afford to make such an appeal. But what might be worth considering would be to

announce a similar doctrine of our own and then to base our claim and action in respect of the northern islands partly upon that ground.

7. In view of the reported Danish action it is apparent that the most important immediate point toward which any Canadian action should be directed is Ellesmere Island. Action there seems urgent; action elsewhere seems necessary but not so urgent.

8. The question then arises as to the concrete steps we might take that would amount to occupation and so perfect our inchoate title. As already seen this is a question in law to be judged by the light of the circumstances of each case. The peculiar present conditions of arctic communication and habitation would undoubtedly be factors in this question. What might reasonably be required to establish the fact of occupation in a temperate zone country might well be unreasonable in the arctic zone. For example while in the temperate zone it might be reasonable to require permanent settlement or police posts continuously in existence, it would seem reasonably sufficient in the arctic that there should be only periodical sojourns, say, during the summer months.

Occupation must be kept alive by repeated local acts showing an intention of continual claim. In the arctic it could hardly be insisted that the interval between these local acts should be as short as in the case of a country where communication was easy. A year or even two years, depending on circumstances, might be enough.

9. To meet the case for the present, therefore, some such practical program as the following, or some variation of it, might be considered;

- (a) A Canadian Government Arctic Expedition to be despatched as soon as possible to complete the mapping of lands already known and to discover any lands not now known. This expedition should be regarded and announced as a continuation of the Stefansson Expedition of 1913-18, and the Bernier Expedition, since those expeditions were designed and announced as an integral part of the policy of making good the Canadian claim to the northern islands (See the Orders in Council). Thus striking notice of the continuity of our policy in this respect would be given the world — an important point.
- (b) Steps to be taken at the same time and in conjunction with (a) to establish our customs, game law, and possibly police administration at strategically selected points.
- (c) The operations under (a) and (b) to be combined. The ship conveying the exploratory expedition could be classed as a revenue cutter, and could carry north customs, game law and perhaps police officers as well as the others. After establishing and administering appropriate posts and stations these officers could return with the ship at the end of the navigation season,

leaving the exploration party to continue in other ways. The ship could return every summer or every other summer according to circumstances.

- (d) For the exploration work the name of Mr. Vilhjalmur Stefansson suggests itself, both because of his connection with the previous expedition, and because of the economical method of arctic exploration and travel which he has developed. It is understood that Mr. Stefansson would be prepared to undertake such work for the Government, but his lecture engagements are such that an understanding should be reached with him by the end of January, 1921; otherwise he will not be available.

10. These suggestions have been outlined for the purpose of illustrating what in law would amount to an occupation. The drawing up of a detailed program should presumably be referred to the departments concerned in conjunction with the explorer to be selected.

11. A further question that might with advantage be referred at the same time to the technical departments concerned is the feasibility of encouraging the quiet, unostentatious settlement of Wrangel Island by some Canadian development company, such as the Hudson's Bay Company. This if done would establish a basis for a subsequent assertion of Canadian title to the island; an asset that might prove of value in the future.

12. It is also submitted that in the future we should refrain in official or public documents from admitting that the 141st meridian north of Alaska constitutes the Western boundary of the Canadian domain. Official documents in the past have implied such an admission. There is no need for this. The treaty defining the Alaska boundary carried the 141st meridian only "to the frozen ocean".

L. C. CHRISTIE

### 3. Memorandum, J.B. Harkin to W.W. Cory, Deputy Minister, Department of the Interior, 7 April 1921 [excerpt]

LAC, MG 30 B-57 (J.D. Craig Papers), vol.1 Despatches 1874-1923

In view of the present situation regarding the proposed Northern Islands Expedition, I think it would be well to summarize the situation.

Under International Law Canada undoubtedly at present has only an inchoate title. She has certain claims based on discovery by British subjects but she has not made these good, as required by International Law, by occupation and administration. Any other power at any time would be quite within International Law if it established possession and administration in these areas. Canada can ensure her sovereignty claims only by occupation and administration. The proposed expedition [of C.G.S. Arctic] is for this purpose.

The first consideration in connection with the Northern Islands is the great danger possession of these by any foreign country would mean to Canada. This country cannot afford to have any contemporary in occupation there. Such a condition would have always been undesirable but it would be particularly so now in view of the development of aircraft and submarines. The importance attached by Great Britain to northern territory is shown by the fact that when the Allies last Autumn were recognizing Danish sovereignty over the whole of Greenland Great Britain asked that as a condition to her consent in this matter that she should have first option to the acquisition of Greenland should Denmark at any time be prepared to dispose of it. This condition however was not inserted because of the opposition offered to it by the United States.

Apart from consideration of national safety there is ample evidence to indicate that there are many valuable resources in the Northern Islands. ...

There are grounds for suspicion that Denmark contemplates making an effort to occupy Ellesmere Island.

It is felt that if the United States realized how incomplete the Canadian title is she also might take steps to establish sovereignty among the northern islands. This is specially likely to occur if she ever realizes the potentialities of these islands because the most important economic problems of the United States today concerns her future oil supply....

Referring back specifically to Ellesmere Island it might be pointed out that a number of maps have been issued in the United States colouring this island as part of the United States. This presumably was done in view of occupation from time to time by the Peary, Greely and other expeditions.

#### 4. H.R. Holmden to A.G. Doughty, Memo re the Arctic Islands, 26 April 1921

LAC, MG 30 B-57, vol.1 Despatches 1874-1923

Confidential

MEMO re THE ARCTIC ISLANDS

To A.G. Doughty, Esq., C.M.G.,

Deputy Minister and Dominion Archivist.

Having carefully examined documents in this office and in that of the Governor General's Secretary, concerning the title and ownership of the islands lying to the North of Canada, and also Dr. King's report thereon, I beg to submit the following report, in answer to Mr. J. D. Craig's letter of January 21st last.

In that letter Mr. Craig asks five definite questions,

1<sup>st</sup> – Precisely what did Great Britain in 1880 consider as British Territory in North America not already included in the Dominion of Canada?

2<sup>nd</sup> – Was the Imperial Order in Council of 1880, intentionally indefinite and if so, why?

3<sup>rd</sup> – What does “adjacent” mean?

4<sup>th</sup> – Is there any reason to differ from Dr. King's interpretation of the intention of the parties to the transfer of 1880?

5<sup>th</sup> - Can Canada of itself, that is without specific instructions from the Imperial Government, take any effective action regarding the sovereignty of lands which may be regarded by other nations as outside of Canada?

These questions might be answered without any preface, but to understand the justification for the answer it is necessary to review the history of the transfer, and the correspondence which culminated in the Imperial Order in Council of 31<sup>st</sup> July 1880, the point at which Dr. King commenced his consideration.

On the 10<sup>th</sup> February 1874 Lt. Wm. A. Mentzer, of the Corps of Engineers of the U.S. Navy, addressed an application for a grant of land in Cumberland Inlet 20 sq. miles in extent to Geo. Crump, Acting British consult at Philadelphia.

On the 20<sup>th</sup> February 1874, Mr. Crump forwarded this application to Lord Granville, Foreign Secretary, who sent it to the Colonial Office, over which Lord Carnarvon presided at that time.

On the 30<sup>th</sup> April 1874, Lord Carnarvon, enclosed this application to Lord Dufferin, Governor General of Canada and after stating what papers he enclosed, continued (par.3) “I request that you will communicate these papers confidentially to your Ministers for their observations.

4. It seems to me desirable in reference to this and similar questions to be informed whether your Government would desire that the territories adjacent to those of the Dominion on the North American Continent, which have been taken possession of in the name of this Country, but not hitherto annexed to any Colony or any of them should now be formally annexed to the Dominion of Canada.

5. Her Majesty's Government of course reserve for future consideration the course that should be taken in any such case, but they are disposed to think that it would not be desirable for them to authorize settlement in any unoccupied British Territory near Canada, unless the Dominion Government and Legislature are prepared to assume the responsibility of exercising such surveillance over it as may be necessary to prevent the occurrence of lawless sets or other abuses incidental to such a condition of things."

Accompanying the application Lord Carnarvon sent a report from Frederick George Evans, Hydrographer to the Admiralty, dated 20<sup>th</sup> April, 1874, which contains an historical review of the territory of Cumberland Inlet, and says "Our knowledge of the geography and resources of this region is very imperfect: according to Admiralty Charts much of the area above applied for is on the seas, although it is to be presumed from the precision with which the application marks out the requirements that he must have some certain local knowledge. Cumberland Gulf is occasionally visited by English and American Whaling and Sealing ships, and it is understood that summer fishing stations are established - not very far from the locality applied for - by the mercantile enterprise from Newfoundland." The report concludes with reference to another application of a similar nature from a British subject.

On August 26<sup>th</sup> 1874, Lord Carnarvon, wrote Lord Dufferin enclosing the application of Mr. W.A. Harvey for a grant of land for fishing and mining purposes, and concludes: "I should be glad to receive an expression of the opinion of yourself and of your ministers in regard to this application as well as on the similar one referred to in my despatch above mentioned." (that of the 30<sup>th</sup> of April).

Mr. Harvey's application, commences with the question "Can you inform me whether the land known as Cumberland on the West side of Davis Straits belongs to Great Britain and if it does, is it under the Government of the Dominion of Canada?"

To which (under date 16<sup>th</sup> January 1874) Sir H.T. Holland replies, that he is directed by the Earl of Kimberley "to inform you that the Land in question was not comprised in the Territories of the Hudson's Bay Company recently transferred to Canada, as it did not come under the Charter of the Hudson's Bay Company, nor does it appear to have formed part of Canada before the Confederation. His Lordship would suggest that you should enquire of the Board of Admiralty as to whether the Land has ever been taken possession of on behalf of the Crown. Lord Kimberley

regrets that he was not able to give you an earlier answer, but a reference to the Hudson's Bay Company was found to be necessary on the subject of your enquiry."

On 13<sup>th</sup> August 1874, Mr. Harvey, who has moved from London to Saint John's, Newfoundland, writes renewing his former application, and concludes "I now enclose the documents from the Admiralty and respectfully request that your Lordship will grant me the right to the fishing in Kingewa Fiord and also one square mile of land for the erection of buildings, stores &c, and also the right to work any mines or minerals which I may find on Cumberland Island."

On 26<sup>th</sup> August, Mr. R.G.M. Herbert, Under-Secretary for the Colonies acknowledged Mr. Harvey's application, and stated, "Lord Carnarvon desires me to state that he must consult the Governor General of Canada on your application in the first instance, but he is not at present prepared to hold out hope that the Concessions for which you apply can be granted."

On 4<sup>th</sup> Nov. 1874, Lord Dufferin wrote Lord Carnarvon answering his despatches marked secret of April and August, and said: "I have the honour to enclose a Copy of an approved report of a Committee of the Privy Council respecting such British Territories on this continent as have not hitherto been annexed to any Colony.

"The Government of Canada is desirous of including within the Boundaries of the Dominion the territories referred to with the Islands adjacent."

There was a discarded draught of this despatch the second paragraph of which read:

"The opinion is expressed in this Minute that it is necessary that Governmental surveillance should be exercised over those remote Territories and that they should be included within the Boundaries of the Dominion."

This order in Council, dated Oct. 9<sup>th</sup> 1874 is not with the other papers, but in all probability, it was nothing more than Lord Dufferin's despatch intimates, and as Lord Carnarvon's next despatch confirms, an expression of the Privy Council's desire to include within the Boundaries of the Dominion all those Territories on the North American Continent with the Islands adjacent thereto which though taken possession of in the name of the British Empire have not hitherto been annexed to any Colony."

This ends the first part of the correspondence alluded to in paragraph 4, of the Address of the Senate and House of Commons of Canada of May 1878.

So far it shows that the application of an American officer for a grant of land in Cumberland Island prompted the offer of the Imperial Government to transfer all of the Territories "adjacent" to those of the Dominion to the Canadian government, or in other words to annex them to Canada, if Canada was willing and "prepared to assume the responsibility of exercising such surveillance over it as may be necessary &c"; and also that Canada was willing to receive the Territories as annexed and undertake the responsibilities. It is also clearly shown that even the Board of

Admiralty had very hazy ideas to what territories north of the Dominion were British. As the correspondence proceeds the features become more marked.”

Lord Carnarvon’s next despatch, dated 6 January 1875: (1) acknowledges receipt of Lord Dufferin’s and the enclosed Order-in-Council; (2) transmits a Report by the Admiralty-Hydrographer containing all the information in the possession of that Department with regard to those Territories; (3) a copy of a Minute drawn up (19<sup>th</sup> December 1874) in his own department (Colonial Office); (4) his deduction that,

“From this minute it appears that the Boundaries of the Dominion towards the North, North East and North West are at present entirely undefined, and that it is impossible to say what British Territories on the North American Continent are not already annexed to Canada under the Order-in-Council of the 23<sup>rd</sup> June, 1870, which incorporated the whole of the Territories of the Hudson’s Bay Company, as well as the North Western Territory in the Dominion.

(5) In these circumstances the despatch proceeds,

“I should therefore be glad before taking any further steps in the matter to be furnished with the opinion of your Ministers on the subject and with regard to the form in which the proposed annexation should be made.

(6) I should also wish to be informed whether they would consider an act of Parliament annexing to the Dominion all British Territories on the North American Continent with the Islands adjacent thereto, which have not hitherto been annexed to any Colony, and within certain limits which I should wish your Ministers to specify, would be sufficiently definite for the purpose.”

This despatch, which contains the first suggestion of an Act of Parliament to annex those Territories is the first of the second part of the correspondence, and it for the first time contains the admission from a British Minister that it was "impossible to say" what British Territory on the North American continent had not been already annexed to Canada. This indefiniteness continues to the end and is purposely embodied in the Order-in-Council of 31st July 1880.

The Report by the Admiralty Hydrographer, endorsed by Lord Carnarvon, contains very little information, as it deals largely with the Labrador Coast, only remarking that Cumberland Sound or Gulf is frequented by "Whaling and sealing vessels from Northern Scottish Ports, and also I believe by American vessels" and that they winter there.

The Minute prepared by the Colonial Office opens with the sarcastic remark: "The Hydrographer of the Admiralty does not give us much information as to the British Territories in North America not hitherto annexed to any Colony, and I apprehend that he is in error in supposing that it is only those Districts which are adjacent to Canada which it is now proposed should be annexed to the Dominion. So far as I have been able to ascertain the Boundaries of Canada towards the northward are, at the present time, entirely undefined, the whole of the Territories of

the Hudson's Bay Company having been annexed to the Dominion in 1870, and the limits of those Territories appear to have been quite uncertain." The Minute proceeds to quote the Hudson's Bay Company's charter of May 2<sup>nd</sup> 1670 as to the territory granted, and proceeds to point out that in addition to all this it further granted the Company "the whole trade and traffic, not only of the territories granted them, but also that from all havens, bays, creeks, rivers, lakes, and seas into which they shall find entrance and passage by water or land out of the Territories, limits or places aforesaid; and to and with all the natives and people inhabiting, or which shall inhabit within the Territories, Limits or Places aforesaid and to and with all other nations inhabiting any of the Coasts adjacent to the said Territories &c, which are not already possessed as aforesaid or whereof the sole liberty or privilege of Trade and Traffick is not granted to my other of His Majesty's Subjects."

It recites that in 1750 the Company defined the "Limits or Boundaries of the Lands and Countries lying round the Bay" (Hudson's) comprised as they conceived within their grant as follows: "All the Land lying on the East side or Coast of the said Bay Eastward to the Atlantic Ocean, and Davis Straits; and the line hereafter mentioned as the East and South Eastward Boundaries, and towards the North, all the Lands that lie on the North and or on the North side or Coast of the said Bay Northwards to the utmost limits of the lands then towards the North Pole; but where or how those Lands terminate, is at present unknown; and towards the West, all the lands that lie on the West side or Coast of the said Bay, and extending from the Bay Westward to the utmost limits of these Lands, but when, or how these Lands terminate to the Westward is also unknown, though probably it will be found they terminate in the Great South Sea." And again in 1837 the Governor of the Hudson's Bay Company stated before a Committee of the House of Commons that the power of the Company extends all the way from the Boundaries of Upper and Lower Canada away to the North Pole, as far as the Land goes, and from the Labrador Coast all the way to the Pacific Ocean, though he afterwards explained that the Company claimed in fee simple all the lands the waters from which ran into Hudson's Bay.

In 1849 the Hudson's Bay Company were again called upon to furnish a statement of the Territories &c claimed by them, and their reply is printed in House of Commons' Paper 542 of July 12<sup>th</sup> 1850 together with a Map sent in by them on which the Territories claimed under their charter are colour[ed] Green - see also Map printed in appendices to House of Commons Report 1857.

These Territories would appear to agree more nearly with the Territories of which the Company claimed the fee simple in 1837, than with their former claims. The validity of the charter of Charles 2<sup>nd</sup>, and the rights claimed under it by the Hudson's Bay Company appear to have been repeatedly called in question, and/ especially by the Government of Canada, but no decision appears at any time to have given against them, the Law officers indeed inclining to the opinion that the rights of the Company were well founded.

The Minute goes on to review the transfer of the Hudson's Bay Company's title to the Dominion of Canada, and continues: "The Order-in-Council issued under the above Act (No.105 of 1868) and under the British North America Act, 1867 (No. 3 of 1867, sec. 146) admitted the North Western Territory as well as Rupert's Land into the Dominion, but without giving any definition as to Boundaries. It would therefore seem impossible to say what British Territories on the North American Continent are not already annexed to Canada.

"At the present time the Boundaries of Canada appear to be settled only on the South and West," and the Minute proceeds to deal at length with the line on the South, and points out that the 3<sup>rd</sup> and 4<sup>th</sup> Articles of the Convention between Great Britain and Russia of February 28/16 1825, (which are binding on the United States) define the Western Boundary which from the 56° North Lat. is the 141° West Longitude quoting the Articles of the Convention (Nos. III & IV) stating that the U.S. Government agreed to the line being surveyed and finally settled. (This has since the writing of the Minute been done, the 141° Meridian W. Long. being the line).

To the East the British Territories might perhaps be defined to be bounded by the Atlantic Ocean, Davis Straits, Baffin Bay, Smith Sound and Kennedy Channel. But even this definition would exclude the extreme North West of Greenland, which is marked on some maps as British Territory, I suppose from having been discovered by British subjects.

"To the north, to use the words of the Hudson's Bay Company in 1750, the Boundaries might perhaps be "the utmost limits of the Lands towards the North Pole." If the annexation of the unknown Territories to Canada is decided upon I should think it would be advisable to consult the Canadian Government as to the definition of the Boundaries of the Dominion that they would wish to be inserted in the Act of Parliament."

The Minute is unsigned, but dated Dec. 19<sup>th</sup> 1874.

On 27<sup>th</sup> March 1875 Lord Carnarvon wrote asking for an answer to the next above despatch, and on May 1<sup>st</sup> 1875, Lord Dufferin wrote enclosing a copy of an approved Order-in-Council, dated 30<sup>th</sup> April 1875, "which contains the views of my Government on the subject of the proposed extension of the Boundaries of Canada to the Northward."

The Order-in-Council of 30<sup>th</sup> April 1875, acknowledges the receipt of the despatch of Lord Carnarvon of 6<sup>th</sup> January, which despatch and enclosures the Privy Council has taken into consideration, and they agree with the proposed Boundaries "substantially" and it continues: "To avoid all doubt it would be desirable that an Act of the Imperial Parliament should be passed defining the Boundaries East and North as follows.

"Bounded on the East by the Atlantic Ocean, and passing towards the North by Davis Straits, Baffin's Bay, Smith's Straits and Kennedy Channel, including such portions of the North West Coast of Greenland as may belong to Great Britain by

right of discovery or otherwise. On the North by the utmost Northerly limit of the continent of America including the islands appertaining thereto.”

The Order-in-Council concludes with a request that as the acquisition of the territory will entail a charge upon the revenue, and it should therefore receive the sanction of the Canadian Parliament, no motion be taken until after the next session of the Canadian Parliament.

Under date 1<sup>st</sup> June, 1875 Lord Carnarvon acknowledges receipt of this Order-in-Council, and agrees to comply with the request for delay.

No action was taken, but on 13th September 1876, Lord Carnarvon, wrote in allusion to correspondence which had taken place between his office and the Honourable Edward Blake, the Canadian Minister of Justice, "respecting the fitting out of an expedition by the United States for the purpose of mining and exploration in Cumberland Inlet.

"In view of the probable annexation within a short time of this and other Northern Territories to Canada, Her Majesty's Government do not propose to take any action in reference to this Expedition unless expressly asked to do by the Dominion Government."

The correspondence with Mr. Blake is attached, in the course of which Lord Carnarvon calls Mr. Blake's attention to the O. in C. of 30<sup>th</sup> April 1875, and asks what has been done further to which Mr. Blake on the 23<sup>rd</sup> August 1876, replies that his is not aware that anything has been done, but will look into the matter on his return to Canada. (He was then in England).

This is followed by a despatch from Lord Carnarvon to Lord Dufferin, dated 1<sup>st</sup> November 1876, calling attention to his despatch of 13<sup>th</sup> of September 1873, and enclosing a cutting from the "Times" newspaper of the 27<sup>th</sup> October. The cutting contains an account, taken from the "New York Times" of an expedition to Cumberland Inlet organised by Lieut. Mentzner (the former applicant for a grant there), which resulted in the obtaining [of] 15 tons of mica (worth from \$5. to \$12. a lb.) besides graphite and other things. (The mica was stated by Mr. Smith, Selkirk, afterwards Lord Strathcona, to be worth \$120,000. This was stated during the debate on the resolutions, 3 May 1878.)

An application to the Admiralty made on 29<sup>th</sup> August, 1877, for information respecting the Geography of the northern part of the Continent, to aid in the compilation of a map of the Dominion, resulted in the sending, under date of 8<sup>th</sup> October 1877, of 13 published Charts, and 6 charts prepared at the Admiralty to illustrate the results of the late Arctic expedition, "as the Lords consider that these charts will meet, as far as the Admiralty are in a position to do so, the want expressed by the Canadian Government."

No action was taken and on the 23<sup>rd</sup> October 1877 Lord Carnarvon called Lord Dufferin's attention to the despatches which are here dealt with, and said: "From reports which have appeared in the Newspapers I have observed that the attention of Citizens of the United States has from time to time been drawn to these territories

and that private expeditions have been sent out to explore certain portions of them, and I need hardly point out to you that should it be the wish of the Canadian people that they should be included in the Dominion great difficulty in effecting this may easily arise unless steps are speedily taken to place the title of Canada to these territories upon a clear and unmistakable footing.

“I have therefore to request that you will move your Ministers to again take into their consideration the question of inclusion of these territories within the boundaries of the Dominion, and that you will state to them that I shall be glad to be informed with as little further delay as may be possible, of the steps which they prepare to take in the matter.”

Finally on 1<sup>st</sup> December 1877, Lord Dufferin sent Lord Carnarvon, the following despatch: “With reference to your Despatch ‘Secret’ of the 23<sup>rd</sup> ultimo, I have the honour to inform your Lordship, that I duly called the attention of my Ministers to the subject of the inclusion within the boundaries of the Dominion of Canada of certain territories with adjacent Islands on the North American Continent which have not hitherto been annexed to any Colony; and I transmit herewith a copy of a Minute of the Privy Council of Canada recommending that resolutions be submitted to Parliament in the forth coming session to authorize the acceptance by Canada of these territories.”

The Order-in-Council, or [Minute in Council] as it is termed in the Despatch..., commences by alluding to Lord Carnarvon’s despatch, and the Report of the Privy Council of the 30<sup>th</sup> April 1875, and concludes: “The subject was, however, subsequently allowed to remain in abeyance as there did not seem at that time any pressing necessity for taking action in the premises. As the reasons for coming to a definite conclusion now appear urgent the Committee recommend that the subject be brought up at the next meeting of the Dominion Parliament and that resolutions be submitted authorizing the acceptance of those Territories by Canada, and that a copy of this Minute when approved be forwarded to the Right Honourable the Secretary of State for the Colonies.”

The resolutions were moved in the House by Honourable David Mills on the 3<sup>rd</sup> of May 1878, certain of the correspondence above dealt with having been secretly submitted to Sir John Macdonald, then leader of the opposition, the day before. They were vigorously opposed by Hon. Peter Mitchell, on the ground of expense, and were supported by both sides of the House. It is needless to refer further to them here, as Dr. King has already quoted them.

It is now possible in the light thrown upon the whole transaction by this secret correspondence, alluded to in the Address to Her Majesty, to deal with the five questions in Mr. Craig’s letter, thus:-

(1) Precisely what did Great Britain in 1880 consider as British Territory in North America not already included in the Dominion? “All the British Territory on the continent of North America, not hitherto annexed to any Colony,” but as it was, (as Lord Carnarvon, and the Report of the Colonial Office stated) “impossible to

state what British possessions on the North American Continent had not already been annexed to Canada," it evidently follows that it was equally impossible to make a schedule of such possessions.

(2) Was the Imperial Order-in-Council of 1880, intentionally indefinite, and if so, why? There can be no doubt, that the answer to this is emphatically "yes." The Imperial Government did not know what they were transferring, and on the other hand the Canadian Government had no idea what they were receiving. The Report prepared in the Colonial Office deals with this, and after citing all that could be quoted as to the Canadian boundaries, proposed the annexation of that which Great Britain had power to annex, within certain limits, on the East and North. All through the correspondence the language is ambiguous, and even the writer of the C.O. report, after suggesting the limits, has to refer to the territories to be transferred, as "these unknown Territories." They could not define, that which in their own minds was indefinite, and hence the language and character of the Order-in-Council!

(3) What does "adjacent" mean (Dr. King's memo, p.5)? The word seems to have been regularly used in the same way throughout the correspondence as well as in diplomacy. It means "appertaining to" or "of rights belonging to," and geographically applied to islands "lying within, or washed by territorial waters," and it appears to me, in some cases to be applied to islands to reach which territorial waters must be traversed.

(4) Is there any reason to differ from Dr. King's interpretation of the intention of the parties to the transfer of 1880? Dr. King appears to have had some difficulty in arriving at a satisfactory conclusion as to the intention of the Imperial authorities in the matter, judging from a comparison of p. 6 and 8 of his "Report," but there does not appear to be any reason for dissenting from his opinion on page 8. The whole of the correspondence, access to which Dr. King had not, shows that there was from the first voluntary offer of the Territory to Canada, an earnest desire on the part of the British Government to make the transfer most full and complete.

Canada did not ask for annexation in the first place, and as Lord Carnarvon points out, it was the application for a concession to an American officer which originated the idea of transferring these territories to Canada for her own protection. It is true as has been pointed out that the one did not know what it had to give, and the other was ignorant of what it was offered, but the intention was evidently to make Canada the sole British power of this continent. The motive behind the desire to protect Canada, does not appear, nor is it certain that there was any, but it is quite possible that the astute minds of British statesmen may have assumed that if Canada were the proprietor of all the British possessions on this continent and made the laws, and regulations to govern them, the American Monroe doctrine, could be appealed to, for the peaceful settlement of any dispute which might arise with an European country.

Lord Carnarvon's last despatch shows that the Imperial authorities were actuated entirely by a firm desire to "place the title of Canada upon a clear and unmistakeable footing.

(5) Can Canada of herself, that is without specific instructions from the Imperial Government, take any affective action regarding the sovereignty of lands which may be regarded by other nations as outside of Canada?

This question appears to be answered partially by the action Canada has already taken in regard to Mr. Rasmussen's settlements, or activities in an effort to make settlements in part of the territory annexed to Canada, by Great Britain in 1880, and 1895. At the same time, whilst Canada's nationhood does not appear to be sufficiently acknowledged by other nations, that she is in a position to conduct diplomatic conversations without the assistance of the Imperial Minister Plenipotentiary; there would suggest itself a great deal that Canada could do. It is a question whether had the Canadian Government maintained the patrol initiated in 1904, the attempt of Mr. Rasmussen would ever have been made, and it is also a question whether Canada's participation in the war of 1914-1918 would not be considered as sufficient reason internationally for her not having prosecuted the assertion of her title in these premises. In case of arbitration it would appear that the Danish Government would find it very hard to justify their agents' actions in endeavouring to annex a portion of the Territory of friendly state, under the circumstances then existing. Canada can assert her title by establishing patrols, and by encouraging, if necessary by initiating settlements or Canadian Esquimaux, etc. on the lands; by commencing this exploitation of the mines and maintaining good order and lawful conduct in these regions. The question suggest itself here, that the United States has already recognised Canadian ownership by citing as evidence in support of their contention before the Alaska Boundary Tribunal, maps showing whole of those territories as British or in other words Canadian.

There is one curious feature in the correspondence, which deserves notice, especially in view of question No.2, above referred to. That feature is the change of front on the part of the Imperial Government, as regards the passing of an Act of Parliament to annex these territories.

1. The first suggestion of Parliamentary transfer was made by Lord Carnarvon in his secret despatch of January 6<sup>th</sup> 1875. The whole negotiations proceed with the full intention of passing an Act to annex these Territories to Canada, until July 17<sup>th</sup> 1878, when Sir Michael Hicks-Beach, writes the Earl of Dufferin: "I have the honor to acknowledge the receipt of your Lordship's Despatch No. 127, of the 10<sup>th</sup> of May, enclosing an Address to the Queen from the Senate and House of Commons of Canada, in which it is recommended that an Imperial Act should be passed with a view of including within the boundaries of Canada all the territories in North America and Islands adjacent thereto (with the exception of the Colony of Newfoundland) belonging to the Crown of Great Britain which are not already comprised within the Dominion.

2. I have been in communication with the Law officers of the Crown on this subject and I am advised that it is competent of Her Majesty to annex all such territories as to the Dominion by an Order-in-Council, but that if it is desired after the annexation has taken place to erect the territories to the territories thus newly annexed into Provinces and to provide that such Provinces shall be represented in the Dominion Parliament recourse must be had to an Imperial Act; since, as I am advised, the Crown is not competent to change the legislative scheme established by the British North American Act, 1867, (30 and 31 Vict. C.3)

3. I therefore propose to defer tendering to Her Majesty any advice upon the subject of the address of the Senate and House of Commons until I am informed whether it will meet the views of your Government that letters Patent be passed for annexing those territories to the Dominion leaving the question of Imperial legislation for future consideration, if it should be thought desirable to erect any such territories, not now belonging to the Dominion, into Provinces.

4. I have no reason to suppose that any difficulty is likely to arise in consequence of the indefinite nature of the boundaries between Rupert's Land and the North Western Territory and the territories which it is now proposed to annex to the Dominion, and no action appears to be required upon this part of the subject."

This letter was "sent to Council for report" July 29-78, and on the 8<sup>th</sup> of October 1878, Lord Dufferin sent despatch No.247, to Sir Michael, transmitting a copy of an approved Report of a Committee of the Privy Council concurring in a memo. appended by the Honourable the Minister of Justice relative to the inclusion within the boundaries of the Dominion of Canada of all the Territories in North America and Islands adjacent thereto, which formed the subject of the correspondence noted in the margin ( Note Gov. Genl. No. 127 May 10. C.O. No. 184, July 17). The next despatch is from Sir Michael Hicks Beach to Lord Lorne, date 18<sup>th</sup> April, 1879, and reads: "I duly received your Predecessors Despatch, No. 247 of the 8<sup>th</sup> of October last, enclosing an approved Report of a Committee of the Privy Council concurring in a Memorandum by the late minister of Justice relating to the inclusion within the boundaries of Canada of all the Territories in British North America, and the Islands adjacent thereto (with the exception of the Colony of Newfoundland and its dependencies), a matter which has formed the subject of previous correspondence between the Governor General and the Secretary of State.

2. I communicated a copy of the Earl of Dufferin's Despatch and enclosures to the Law Officers of the Crown, and having drawn their special attention to the arguments which led the late Government of Canada to consider that an Act of the Imperial Parliament was desirable for affecting the object in view. I requested their opinion, whether having regard to the provisions of the British North American Act, 1871, any further Imperial Legislation is necessary, or whether, if the annexation to Canada of the new territories proposed to be added to the Dominion is effected by Order of Council, the extended provisions of the Act 34 and 35 Victoria, Cap.28,

would after annexation, give to the Government and Parliament of Canada full executive and legislative authority over the territories and Islands in question.

3. The Law officers in reply, confirm the opinion expressed in a former Report, the substance of which I communicated to your Predecessor in my Despatch No. 184 of the 17<sup>th</sup> of July 1878, viz: “that Her Majesty may by Order in Council annex the territories in North America belonging to the Crown which are not included in the Dominion of Canada to the Dominion,” and I am advised by them that “if such annexation were effected the provisions of 34 and 35 Vic. Cap.28 ( to which their attention had not been drawn when they made their former Report) would give after annexation to the Governor and Parliament of Canada, full executive and legislative authority over the territories and Islands in question.”

4. I shall be prepared therefore, should your Government desire it, to take the necessary steps forthwith for effecting the annexation to Canada of the Territories in question by means of an Order of her Majesty in Council, but as Imperial legislation is not necessary for the purpose, it will of course not be advisable to have recourse to it.”

The clause referred to, on which the Law Officers of the Crown gave the above opinion, is evidently, clause 2 of the Act 34-35 Vict. C. As “The British North American Act, 1871” which reads:

“2. The Parliament of Canada may from time to time establish new Provinces in any Territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the Peace, order, and good government of such Province, and for its representation in the said Parliament.” Clause 3 provides for the alteration of limits of Provinces, but clause 4 affects this question. It is “4. The Parliament of Canada may from time to time provisions for the administration, peace, order, and good government of any territory not for the time being included in any Province.”

This last opinion appears to have convinced the Canadian Minister, and on the 5<sup>th</sup> November, 1879, Lord Lorne addressed a despatch to Sir M.S. Hicks-Beach: “With reference to your despatch No. 106 of the 18<sup>th</sup> April last and to previous correspondence relating to the inclusion within the boundaries of Canada of certain Territories, I have the honour of forwarding herewith a copy of a report of a Committee of the Privy Council embodying a memorandum by the Rt. Honbl. Sir J.A. Macdonald recommending that Her Majesty’s Government be requested to obtain an Order-in-Council for effecting the annexation to Canada of the Territory in question.”

On the 31<sup>st</sup> day of July 1880, the Imperial Order in Council was passed, and forwarded to the Marquis of Lorne on the 16<sup>th</sup> August 1880. This was received at Ottawa on the 2<sup>nd</sup> September, 1880, sent to the Privy Council the next day, and published in the Canada Gazette of the 9<sup>th</sup> of October.

A question upon which the correspondence examined throws no light as “why the Order-of-Council mentions no boundaries?” On the 6<sup>th</sup> of January 1875 Lord Carnarvon expresses a wish that the Canadian Ministers should specify “certain limits” within which the Territory to be annexed to Canada should lie, and in the Minute enclosed in that despatch, & prepared “in this department” certain limits are set out as suitable, whilst the suggestion is made that “it would be advisable to consult the Canadian Government as to the definition of the Boundaries of the Dominion they would wish to be inserted in the Act of Parliament.”

This suggestion is quoted in the Canadian Order in Council as the 30<sup>th</sup> April 1875, and certain limits, almost identical with these suggested in the Minute, are named for inclusion in the proposed Act of the Imperial Parliament. These limits are set out as follows: “Bounded on the East by the Atlantic Ocean, and passing towards the North by Davis Straits, Baffin’s Bay, Smith’s Straits and Kennedy Channel, including such portions of the North West Coast of Greenland as may belong to Great Britain by rights of discovery or otherwise.

“On the North by the utmost Northerly limit of the Continent of America including the islands appertaining there to.”

The address of the Senate and House of Commons of Canada, of the 3<sup>rd</sup> May 1878, also names boundaries, viz on the east the Atlantic Ocean, Davis Straits, Baffin’s Bay, Smith’s Straits and Kennedy Channel, on the north by the Atlantic Ocean, and on the west by the 143 parallel and the Alaskan Boundary. “

There the naming of boundaries ceases to appear. In the despatch acknowledging receipt of the Address the proposition is again recited as “the including within the boundaries of Canada all the territories in North America and Islands adjacent thereto (with the exception of the Colony of Newfoundland) belonging to the Crown of Great Britain which are not already comprised within the Dominion.”

Was there in this lack of definition any deeper reason than merely the fact that it “was impossible to say what British Territories in North America were already annexed to the Dominion of Canada?” Was there in the mind of the British Ministry an uncertainty as to title to any of these lands, if so why, and to what lands did the doubt apply? As has been already pointed out the correspondence throws no light on this point. The Canadian Government do not appear to have asked any question or entered any remonstrance, nor did they, as far as appears, ever petition for any list of what the British Authorities regarded as Territories belonging to the Crown of Great Britain lying on the North American Continent. Such a schedule of British possessions, whilst it would have necessarily included much that was already recognized as Canadian, would have served as a guide to what Canada owned after the passing of the Order-in-Council.

It is also noticeable that every speaker, save Hon. Peter Mitchell, who took part in the debate on the resolutions and Address in the Commons, took it for granted that the action they were asking for, that was, an Imperial Act defining the boundaries on the East, North East, North and West as set out in the Address, “would remove all

doubts with regard to our exact limits at the north and north-west” (Mr. Mills, Debates 1878, Vol. II.p. 2387).

The then Premier Hon. Alex. MacKenzie urged that it was “pressing that we should have a settlement of our northern boundaries.”

Hon. David Mills, in Committee “thought it was of the utmost consequence that all doubt on the subject of our northern boundaries should be removed.”

Sir John A. Macdonald pointed out that if Canada did not want this great country (defined in the Resolutions) England would probably abandon it, so that it would be open to adventurers from any country; and he specially alluded to the relations between Canada and the United States regarding the fisheries. The report continues: “In this country we had the game in our hands, if we passed these resolutions. All that was required was that there should be some two or three officers ostentatiously appointed as being officers of the Canadian Government, as seen as the Imperial Act was passed and the country transferred to Canada. Then the question of abandonment could not arise, there would be visible occupation, there would be the officers of the Canadian Government there, exercising their powers such: one or two men could do all the business.” The country was rich in mines of iron, copper, gold, silver and large deposits of mica which the Americans were now taking away in large quantities. If those sources of wealth were to be developed, we could surely afford to have officers there who would charge a royalty for any privilege to be given there. It would be unworthy of us, it would show we were unworthy to be founders of this Confederation were we throw away this charge. England would have a perfect right to say: “What interests have we in this country? It lies far to the north of us; it is a portion of your Country, if you will not take it, why should we trouble ourselves about it? We will let it go to the first adventurers of any Country to take possession of. These considerations pressed upon him strongly that he hoped these resolutions would be adopted without delay, and this Bill, if possible be obtained in the Imperial Parliament during the present Session.”

Notwithstanding the urgency of the matter dwelt on in the correspondence pointed out by Sir John A. Macdonald in this speech; notwithstanding that not only the suggestion but an offer of Imperial Act of Parliament had been made by the Imperial Government, more than two years was to elapse before the Address, and Resolutions of the Senate and House of Commons of Canada, was to be implemented in any way by the Imperial Authorities; and then an Order in Council was to be substituted for the proposed Act.

In this connection it may be well to consider how far the British North America Act, 1871, affected the situation as far as Canada was concerned.

The law officers of the Crown, being consulted in 1879, whether annexation would be by Order in Council of Letters Patent, “considering the extended provisions of the Act 34 and 35 Victoria Cap. 28 (The British North America Act, 1871) give the Government and Parliament of Canada full executive and legislative authority over the territories and Islands in question,” gave their opinion in the affirmative.

Upon this opinion the Canadian Government acted on the 4<sup>th</sup> November, 1879, and the next July the Order-in-Council was promulgated.

This opinion of the law officers of the Crown was given in diametric opposition to a former opinion of the same Law officers, because in preparing their first they had only considered the provisions of the “British North American Act, 1867”, and not taken the provisions of the Act of 1871 into consideration at all. Upon considering the latter Act they reversed the first decision.

As was pointed out by Dr. King the preamble of the Act of 1867 specifies the provinces to be united, whilst section 146 provides for the annexation to Canada, by Order in Council of three other Colonies, and the territories known as Rupert’s Land, and the North Western Territory, Section 147 provides for the complete absorption of these territories is so annexed. The Rupert’s Land Act of 1868 gave the Crown power to accept the surrender of the Territory. Dr. King states (p.3). All the requirements of these Acts in that behalf were complied with, and full title to these territories accordingly became vested in Canada. That is by the promulgation of the Order in Council of the 23<sup>rd</sup> of June 1870.

The Canadian Government, however, did not consider the annexation complete, notwithstanding the provisions of sec.146. of the British North America Act of 1867, and on Jan. 3<sup>rd</sup> 1871 Lord Lisgar, forwarded an approved minute of the Privy Council of Canada asking for the passage of an Imperial Act to (2) “Empower the Dominion Parliament from time to time to establish other Provinces in the North Western Territory with suitable constitutions and governments possessing powers not greater than those conferred on the Local Governments by the British North America Act 1867.”

On April 12<sup>th</sup> 1871, a resolution was passed through Committee of the Whole House respecting the draft of a Bill, which it was suggested should be sent to the Imperial Parliament, the Senate concurred and on April 18<sup>th</sup> the joint address and a draft bill were sent to the Earl of Kimberley by Lord Lisgar.

Previous to this, however, on the 2<sup>nd</sup> March 1871, Lord Lisgar had forwarded an approved minute of Council, of the 27<sup>th</sup> February 1871, and a draft bill “to remove doubts as to the Powers of the Parliament of Canada to establish Provinces, etc., etc., The letter of Lord Lisgar to the Earl of Kimberley of 18<sup>th</sup> April 1871, points out that “the Draft Bill recited in the Address differs from the Draft Bill transmitted to your Lordship in my despatch No. 53 of March 2<sup>nd</sup>. Of the second draft no copy accompanies the files, nor is the wording of the Address given in the Debates of the House.

A copy of a Draft Bill is on file, which commences: “Whereas doubts have been entertained respecting the Powers of the Parliament of Canada to establish Provinces in Territories admitted or which hereafter may be admitted into the Dominion of Canada, and to provide for the representation of such Provinces in the said Parliament. Be it enacted etc.” In this draft clause 3 provides “(3) The Parliament of Canada may from time to time establish new Provinces in the Territories admitted to

be part of the said Dominion by an order in Council of the 23<sup>rd</sup> June 1870, or in any other Territories which may hereafter be admitted into and form part of the said Dominion, and the said Parliament may from time to time make provision for the administration of any such Provinces, and for the passing of Laws for the peace, order, and good government thereof, and for the representation from time to time of such Provinces for any of them in the said Parliament of Canada.” The Imperial authorities did not accept this draft. They had a bill of their own drafted, which was finally adopted and is now the British North American Act 1871. The preamble remains, thus emphasising the doubt as to the efficacy of the Order in Council of the 23<sup>rd</sup> June 1870, clause 3 of the draft, becomes clause 2 of the bill, and is greatly modified, viz “Clause 2 The Parliament of Canada may from time to time establish in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment make provisions for the constitution and administration of any such Province, and for the passing of laws for the peace, order and good government of such Province, and for its representations in the said Parliament.” This clause played an important part in the correspondence concerning the annexation of the Polar Territories to Canada.

As has been noticed, the Address of the Senate and House of Commons of the 3<sup>rd</sup> May 1878, asked that the said Territories be annexed by an Act of the Imperial Parliament, and this was not by an offer of an Order-in-Council. On the 2<sup>nd</sup> October 1878, a Minute of Council was passed to which was annexed a report of the Minister of Justice. This report reviews the whole correspondence, and then continues:” As the Law Officers of the Crown in England are of opinion that it is competent for Her Majesty to annex the Territories in question to the Dominion by and Order in Council I will here point out the reasons which induced this Government to desire and Act of the Imperial Parliament, and why doubts as to the validity of an Order in Council for the purpose referred to exist.” It proceeds to cite sec. 146 of the British North American Act of 1867 and says “It is conceived therefore that except under the provisions of the 146 section no power exists whereby the limits of the Dominion of Canada can be extended so as to enable the Government of Canada and the Parliament of Canada respectively to exercise executive and legislative authority under the British North American Act 1867. If therefore the powers given by the 146 Section be exhausted, further Imperial legislation would seem to be necessary to enable Her Majesty by Order in Council to extend to limits of Canada so as to give the Government and Parliament the same powers in respect of the extended limits as they respectively possess in respect of the limits as defined or authorized by the British North American Act of 1867.

“Rupert’s Land and the North Western Territory have already been admitted into the Union pursuant to the 146 Section. If therefore Rupert’s Land and the North Western Territory as a matter of fact include all the territory and Islands asked by the address to be transferred to Canada nothing further is required. Inasmuch, however, as the boundaries of Rupert’s Land and the North Western Territory are unknown as

they may not be extensive as the boundaries mentioned the address, it was thought better “to avoid all doubt in the matter” that an Act of the Imperial Parliament should be obtained.” The report concludes by calling attention of the Law Officers to the Act of 1871. The Law Officers of the Crown, concluded that the “provisions of 34 and 35 Viz. Cap. 28 would give after annexation, to the Governor and Parliament of Canada, full executive and legislative authority over the territories and islands in question.” This opinion was conveyed to the Marquis of Lorne in despatch No. 106. 18<sup>th</sup> April 1879, and of the 3<sup>rd</sup> of November 1879 a Minutes of Council was adopted, embodying a Report by the Right Honorable John A. Macdonald, of the same date, in which he said the “opinion of the Law Officers of the Crown respecting the annexation of certain territory to Canada is in the highest degree satisfactory” and recommending that an Order in Council be obtained. Accordingly the Order in Council of the 31<sup>st</sup> of July 1880 was made.

Dr. King in his memo (p.8) says “Any doubts as to the legality of the transfer in 1880 were set at rest by Act of the Imperial Parliament in 1895.

“7. No Action was taken by Canada to accept or incorporate the added territory between 1880 and 1895.” This is true, but there seems no ground for believing that this inaction was due to any doubt of legality of the transfer. The Order in Council of 3<sup>rd</sup> of November 1879 with Sir John Macdonald’s acceptance of legal opinion of the British Law Officers was the last word on that subject. Nor is Dr. King correct when he states (p.6) “for light upon the understanding by Canada of the effect of this document we have to wait fifteen years. A search through the Canadian Statutes and Orders in Council fails to show any recognition even of the fact that these lands have been transferred to Canada, until 1895!” As has already been stated Dr. King had not access to all the papers connected with this transfer.

On the 23<sup>rd</sup> September 1882 the following Minute of Council was passed “The Committee of Council have had under consideration a Despatch dated 16<sup>th</sup> August 1880, No. 131 from the Earl of Kimberley, enclosing and Order of Her Majesty in Council, dated 31<sup>st</sup> of July, 1880, annexing to the Dominion of Canada from the 1st September 1880, such British possessions in North America (with the exception of the Colony of Newfoundland and its dependencies) as are not already included in the Dominion. The minister of Justice to whom the said Despatch was referred with a view to endeavour to obtain information regarding the occupants of the Country North and North-West of Hudson’s Bay, and their habits and pursuits, reports that immediately after reference he entered into a correspondence with the principal officer of the Hudson’s Bay Company on the subject and that gentleman very kindly caused circulars to be addressed to such Agents of the Company as were likely to be able to furnish information on the points under consideration. On the 22<sup>nd</sup> of July last the Chief Executive Officer of the Company Mr. James Grahame, addressed a letter to him, the Minister, informing him that the parties to who he had referred the enquiries were unable to furnish the required information.

“The Minister is not aware of any other source where such information as is desired may be sought, and he advises that no steps be taken with a view of legislation for the good government of the country until some influx of population or other circumstances shall occur to make such provision more imperative than it would at present seem to be.

The committee concur in the report of the Minister of Justice and advise that a copy of this Minute when approved be transmitted to Her Majesty’s Secretary of State for the Colonies.”

This Minute was approved and forwarded to the Earl of Kimberley in despatch No. 28 dated September 25<sup>th</sup> 1882. That Minute contains the whole reason of the inaction. The Canadian Government had accepted the charge and annexation of the Territory, and after nearly two years deliberation this is the conclusion that was arrived at, and the reason for the conclusion. From September 1882 to October 1895, matters seem to have remained as left by the above Minute of Council.

Between 1882 and the 6<sup>th</sup> July 1895 I have found no despatch or Minute of Council dealing in any way or even relating to the question of the extension of Canada’s boundaries towards the North and North-West until the circular letter addressed by the Rt. Honorable Joseph Chamberlain to the self governing Colonies, on the 6<sup>th</sup> July 1895 and the Imperial Colonial Boundaries Act of the same year. Although these documents were both of them sent to Canada, it is hard to believe, in the correspondence herein before noticed, that they were intended to apply to Canada. The Circular accompanying the Act (the Colonial Boundaries Act. 1895, 58 & 59 Vic. Ch. 34) reads:- “The Law Officers of the Crown having recently reported that where an Imperial Act has expressly defined the boundaries of a Colony, or has bestowed a Constitution on a Colony within certain boundaries, territories cannot be annexed to that Colony so as to be completely fused with it, as e.g. by being included in a previous or electoral division of it without statutory authority, it followed that certain annexations of territory to Colonies falling within the above category which had been effected by Order in Council and Letters Patent, accompanied by Acts of Colonial Legislature, were doubtful validity, and this Act has been passed to validate these annexations and to remove all doubts as to Her Majesty’s powers in future case.”

The Act is very short, practically there is no preamble and the enacting clauses read:

- 1) Where the boundaries of a Colony have, either before or after the passing of this Act, been altered by Her Majesty the Queen by Order in Council or Letters patent the boundaries as so altered shall be, and be deemed to have been from the date of the alteration, the boundaries of the Colony.
- 2) Provided that the consent of a self governing colony shall be required for the alteration of the boundaries thereof.
- 3) In the Act “self governing Colony” means any of the Colonies specified in the schedule to this Act.

This Act may be cited as the Colonial Boundaries Act 1895. Schedule, Self Governing Colonies, Canada, Newfoundland, New South Wales, Victoria, South Australia, Queensland, Western Australia, Tasmania, New Zealand, Cape of Good Hope, Natal.

The annexation to Canada had been made, the Law Officers of the Crown had given their opinion that the Government and Parliament of Canada, had, virtue of the British North America Act, 1871, full executive and legislative powers, and the Premier of Canada had reported to the Canadian Privy Council that their decision was “in the highest degree satisfactory.”, on this the Council had asked for and obtained the Order in Council of 1880, which order had been considered by the Council with a view to legislative, and legislation postponed.

The great difficulty then appears to be the difficulty now, that the boundaries of Rupert’s Land and the North-Western Territories were never defined, and the fact more than once mentioned “that it was impossible to say what British possessions in North America were not included in the Dominion” by the order in Council of 31<sup>st</sup> July 1880. This probably accounts for the fact noticed by Dr. King (p.6) that: “The Northwest Territories, by the revised statutes of 1886, comprise Rupert’s Land and the North-West Territories, excluding Manitoba and Keewatin. No amendment to this North-West Territory Act, so as to include the northern territories appears to have been enacted up to the present time” (1904).

What was the cause of the Order in Council of 1895? And the division of these territories into districts? Was there any common inspiration leading to the issuing by Rt. Hon. Joseph Chamberlain of his circular letter to the Governors of the Self Governing Colonies, and a Report to Council by Hon. T.M. Daly, Minister of the Interior on the same day, the 26<sup>th</sup> July 1895?

On the 28<sup>th</sup> May 1894, Hon. David Mills, member for Bothwell, moved in the House for “Copies of all correspondence since 1867, between the Government of Canada and the Imperial Government in reference to Her Majesty’s Exclusive sovereignty over Hudson Bay” and it seems probable that this called attention to the Canada’s possessions in the far north. It is certain that no inspiration of that kind came from the Imperial Government, because on the 24<sup>th</sup> July 1905, the Earl of Elgin sent a code cable to Lord Grey in which he states, referring to the “fisheries Act 1906” – “I shall be glad to have a report embodying in detail the ground on which your Ministers now rely to establish the British Status of the Bay notwithstanding, that they had received through Lord Minto Dr. King’s reports made in 1904. Leaving this question of the Fisheries Act for a further notice, I turn to Mr. Mills motion for a return. The motion was agreed to, and was brought down, but it cannot now be dealt with, as it was destroyed in the burning of the Parliament House, 1916, and though it might be possible to reconstruct it, yet as it was composed of contributions from several departments, it would take considerable time, and then possibly not be complete. On the absence of the return, the remarks made in the House on the motion, throw light on the view take at that time.

Mr. Mills "This Mr. Speaker is a matter of very considerable importance. The Government, of course know right well that Hudson's Bay has always been claimed by Great Britain as part of the sovereignty of the Crown ever since the discovery of that bay. It was a matter of dispute for some time, during a former century, between Great Britain and France as to whom this bay of right, belonged; but that question was settled in favour of the British contention by the Treaty of Utrecht in 1713, and since then I believe it has been recognized as between Great Britain and France, and acquiesced generally by Christendom that this is a portion of the British possessions in North America. I understand, Mr. Speaker that lately American vessels have been going in there, engaged in whale, porpoise and other fishing operations, and I do not understand that any steps have been taken by the Government to assert the jurisdiction of Canadian over those waters. Now the whole coast of Hudson's Bay lies within British territory. The Bay is a land-locked bay, only connected with the high seas by the narrow passage of water called the Hudson's Straits. But, sir, if the ships of foreign countries are allowed to go into these waters without question, and without taking out any license, to engage in fishing operations there, it might very well be, at no distant day, according to the rules of acquiescence, that the parties whose ships so engaged might claim to go there as a matter of right, regarding these waters as part of the high seas. I think it is important to know how far there has been any departure from the long and continuous contention that these are British waters. Under the modern doctrine there has been a disposition to limit the rights of states to waters within their own territory and upon their own coasts, and it is important to know whether any correspondence had taken place between the Government of Canada, and the Government of the United Kingdom with reference to our sovereignty over these waters as part of the territory of Canada. I am not going to detain this House with any statement of the elementary principles of International law applicable to the case. These are generally well known. What it is important to know is what steps the Government have taken to assert their authority and to prevent any rights or pretensions of rights being acquired by any other people or community on the ground of acquiescence and because of our indifference with regards to these matters. There is no difference in point of law, between the rule of acquiescence as applicable between private individuals and between states. It is therefore of consequence that we should not, by our indifference, permit any loss to be sustained by the Canadian people, and for this reason I move for this correspondence. I assume that the Government have not been indifferent to the rights of the people of Canada; I assume that the Government have not, by negligence or by sleeping upon their rights, permitted rights of other parties to spring up. It is true that it may involve some expense to this country to exercise proper police supervision over the waters of the Hudson's Bay. It seems to me, however, that on account of the narrowness of this strait which connect this bay with the Atlantic, that rights should be very easily exercised, and at no great expense to the country. But whether that expense be more or less, I think it is important that it should be incurred for the purpose of

maintaining our rights; and I am sure that the House and the public would not be indifferent to the maintenance of the sovereignty of Canada over these waters. I am told that they are valuable at the present time, that the whale fisheries and porpoise fisheries are both extensive, and that the hair seal fisheries in the vicinity are also extensive, and have of late years greatly increased. This being so, and it being probable that at no distant date the bay will be connected with the settled portions of Canada by communication, it is highly important that our exclusive jurisdiction over those waters should not be lost, and for those reasons I move the motion now in your hands.”

Sir Charles Hibbert Tupper. “The importance of this question is fully recognized by the government. The Hon. Gentleman has referred to the fisheries of Hudson’s Bay and the Canadian interests in those waters, and it is perhaps only right that I should say in advance of the return being brought down, that the question has received due attention and its importance is fully recognized. The hon. Gentleman has referred to the invasion of our territorial rights by the fishing and hunting that are carried on in Canadian waters in Hudson’s Bay by foreign fishing vessels. I may say that from time to time rumours of that character have reached me. The remoteness of the region, however, has made it extremely difficult to ascertain with any degree of accuracy the correctness of these rumours. Some steps have been taken through the agency of the Department of Marine and Fisheries, to publish notices that the laws of Canada apply in those waters; but it is only fair to say that since we are not as yet familiar with either the time that those vessels are likely to arrive or the portions of the bay where they may be found at any time, these notices have been to a great extent formal. Nevertheless, so far as the records of my department show, there has been no inaction in that connection that would in the slightest degree prejudice the rights of Canada over this region. On one or two occasions we have, through the agency of the Hudson’s Bay Company, and through the Indian Department, endeavoured to obtain full information in regard to the illicit trading which is said to have been carried on by small foreign vessels going there possibly to hunt, or engage in the whale or porpoise fishery, but the result of those effort so far has not been such as to give us much definite information. Even the Hudson’s Bay Company officials themselves, though they believe and assert that a good deal of smuggling is carried on in violation of our revenue laws, have not been able, up to date, to furnish such information as would enable us to take definite action. However, the whole subject and the importance interests that are there involved, have been under consideration for some time with the object of ascertaining what definite course should now be taken in regard to the various propositions for protecting such rights as we think should be conserved, for instance, the vary question of jurisdiction to which the hon. gentleman has referred, and propositions relating to the establishment of a revenue ship for the purpose of maintaining those rights. There would be ample opportunity to assert exclusive sovereignty over those waters because of the narrow approaches to the great waters of the bay. Most of the channels are under six miles in width, and

all, I think are outside the main entrance of the Hudson's Bay itself. So that when it becomes necessary actively to assert such rights as we possess, there would be, as the hon. gentleman's motion." (Hansard, 3276 to 3278). That ended the incident. I have referred to this at great length, because it shows the reason of the awakened interest in our northern possessions, and whilst Hudson Bay alone is specifically referred to, the remarks on both sides are applicable, almost entirely, to the whole of northern Canada.

The next year came Mr. Chamberlain's circular and Mr. Daly's report to Council, both dated the 26<sup>th</sup> July 1895. The Act to which Dr. King attributes the Order in Council is dated the 6<sup>th</sup> July 1895. There is nothing in the Order in Council to show that it was prompted by the passage of the Imperial Act. The Order commences: "On a Report, dated the 26<sup>th</sup> July 1895, from the Minister of the Interior, submitting that it is expedient for the convenience of settlers in the unorganized and unnamed districts of the North-west Territories, and for postal purposes, that the whole of such territories should be divided into provisional districts, and recommending that four such districts be established to be named Ungava, Franklin, Mackenzie and Yukon." Then comes the description and definition of the districts, whilst the last clause reads: "The Minister adds that should the foregoing recommendations be adopted, the whole of the unorganized and unnamed portions of Canada will have been divided into provisional districts, a plan of which is hereto attached." It is fair reasoning to argue from the wording that the events leading to the discussion in Parliament of the previous year, and not the Imperial Act caused the Report to be made.

It is worthy of note that this Order in Council is the first attempt in any document of legislative character to define the boundaries of Canada on the northeast, north and northwest, unless the Address of the Senate and House of Commons of Canada of the 3<sup>rd</sup> of May 1878 can be considered as of a similar character. The limits named in the Address, were named in response to a request from the Imperial Authorities, who even suggested almost of the same boundaries in the Minute drafted in the Colonial Office, and enclosed in Lord Carnarvon's despatch of 6<sup>th</sup> January 1875. Had the limits Named in the two last documents been retained in the Order of Council, the errors that Dr. King points out would have been unnecessary.

On the 13<sup>th</sup> of August, 1903, a Minute of Council was passed appointing Mr. Albert P. Low, officer in charge of an expedition to "Hudson Bay and northward thereof" and he was to be accompanied by Superintendent J.D. Moodie of the Royal North West Mounted Police.

The instructions to M.A.P. Low, who was a member of the staff of the Geological Survey, contain little which affects the object of this memo; it being apparent from the second paragraph that the majority of his instructions had been verbal. The paragraph reads: "You already know the purposes and intents of this expedition." Later he is notified: "You will pass through Hudson Strait and meet at Lady Job Harbour on or about the 25<sup>th</sup> July, 1904, a supply ship bringing you necessary coal

and provisions. From there you will proceed northward to Kennedy Channel and Lancaster Sound, and visit as much territory as the state of the ice will permit. Returning south, you will endeavour to follow the west coast of Baffin's Bay, and visit the establishment at Cumberland, and Frobisher Bays." Mr Low's instructions from the Geological Department had references to their work entirely. The instructions given by Col. Fred White, Comptroller North West Mounted Police to Supt. J.D. Moodie, are very distinct, and are worth quoting. They are: "The Government of Canada having decided that the time has arrived when some system of supervision and control should be established over the coast and islands in the northern parts of the Dominion, a vessel has been selected and is now being equipped for the purpose of patrolling, exploring and establishing the authority of the Government of Canada in the waters and islands of Hudson's Bay and north thereof." In addition to the crew, this vessel will carry representatives of the Geological Survey, the Survey of Marine and Fisheries, the North West Mounted Police and other Departments of the public service."

Any work which had to be done in the way of boarding vessels which may be met, establishing ports on the mainland or the islands, and the introduction of the system of Government Control such as prevails in the organized portion of Canada, has been assigned to the Mounted Police, and you have been selected as the officer to take charge of that branch of the expedition. You will have placed at your disposal a sergeant and four constables; you will be given the additional powers of a Commissioner under the Police Act of Canada, and you will also be authorised to act for the Department of Customs."

"Mr. Low, the Geologist, the Captain on command of the vessel and yourself will be constituted a Board to consult and decide upon any matters which may arise requiring consideration and joint action."

The knowledge of this far northern portion of Canada is not sufficient to enable definite instructions to be given you as to where a landing should be made, or a Police Port established; decision in that respect is to be left to the board of three above mentioned, and wherever it is decided to land you will erect huts and communicates as widely as possible the fact that you are there as representative of the Canadian Government to administer and enforce Canadian Laws, and that a patrol vessel will visit the district annually or more frequently.

It may happen that no suitable location for a post will be found, in which case you will return with the vessel, but you will understand that it is a desire of the Government that, if at all possible some spot shall be chosen where a small force representing the authority of the Canadian Government can be stationed and exercise jurisdiction over the surrounding waters and territory. It is not the wish of the Government that any harsh or hurried enforcement of the laws of Canada shall be made. Your first duty will be to impress upon the captains of whaling and trading vessels, and the natives, the fact that after reasonable notice and warning the laws will be enforced as in other parts of Canada.

You will keep a diary and forward, wherever opportunity offers, full and explicit reports on all matters coming under your observation in any way affecting the establishment of a system of Government and the administration of the laws of Canada.”

On the 18<sup>th</sup> March 1904, Mr. Lyttleton sent the following code cable message to Lord Minto: “His Majesty’s Government have received a telegram from His Majesty’s Ambassador at Washington enquiring whether His Majesty’s Government regard Hudson’s Bay Straits as “part of Canada.” Ambassador states that United States Government has not shown any interest in voyages of the “Neptune”, but intimates that assertion of Canadian authority over those waters may not improbably arouse popular feeling in the United States and he would like to be sure of position in advance. The Ambassador further remarks that there might be trouble about some of the Islands and waters to the North of Hudson’s Bay Strait’s but that the main point is the status quo (?) of the Straits and Hudson’s Bay. Please send by earlier mail a full statement of the views of your advisors. (sd) Lyttleton.”

On 21<sup>st</sup> March 1904, Lord Minto answered by cypher cable: “referring to your telegram of the 18<sup>th</sup> instant, regarding His Majesty’s claim to the Straits of Hudson’s Bay as “part of Canada” the subject being a very important one, a memo, is being prepared on the same, which will be forwarded at an early day. (sd) Minto.”

On the 14<sup>th</sup> June Mr. Alfred Lyttleton wrote asking when the memo would be ready and his despatch is endorsed (in cypher) “Telegram went to-day saying Memo, being sent by to-day’s mail A.F.S..24.6.04.”

The memo, sent was that prepared for this purpose by Dr. King, and printed, for confidential circulation, under the title of “Report upon the Title of Canada to the Islands North of the Mainland of Canada,” The Order in Council, 21<sup>st</sup> June, 1904, is follows:—“On a Report dated 20<sup>th</sup> May 1904, from the Minister of the Interior, submitting a copy of a report upon the title to the Islands, and waters north of the Canadian Mainland By Mr. W.F. King, Chief Astronomer of the Department of the Interior. The Minister recommends that a copy of the said report with accompanying maps and appendix be transmitted to His Majesty’s Government, and that His Majesty’s Government be advised that in the view of the Canadian Government the Waters of Hudson’s Strait are territorial waters appertaining to Canada.

The committee advise that the Governor General be moved to forward a copy of this minute and its enclosures to the Right Honourable the Secretary of State for the Colonies.”

On the 16<sup>th</sup> of December 1904, Mr. Low made his report on the voyage in the “Neptune.” It is observable that in his summary of work there is no word of any act which might assert the sovereignty of Canada (pp. 135-136) on p.126 he speaks of being at Cape Sabine and records that “a copy of the Proclamation, taking formally possession of Ellesmere island was tacked on to the side of the house (Parray’s House, formerly the deck house of Windward).

On the same page he records: "We landed at Cape Hershell (this is not marked on the Admiralty Charts, or maps, but presumably is on the coast of Hershell Bay) where we hoisted the Canadian Flag: read the Proclamation taking formal possession of Ellesmere Island, and adjacent islands in the name of the King for the Dominion, and a copy of the Proclamation was deposited in a large cairn, on the extreme point of the cape. The Canadian flag was hoisted and the proclamation read, to take possession of North Devon (p.128) the same thing was done not North Somerset, but that was apparently all.

"A very important despatch was sent by the Earl of Elgin to Governor Earl Grey, at 12,5 p.m. 26 July 1906 which shows how clearly the Imperial Government saw the situation, and how closely they were watching it. It may be well to mention that they had on one or two occasions asked to be kept posted from time to time on Canada's action to maintain the sovereignty of those regions." The despatch in question reads: "Secret. "Times" if 5 July contains Ottawa telegram stating that Bill has been adopted by Canadian Parliament declaring that Hudson's Bay is wholly within territorial waters of Canada and imposing annual license fee for privilege of whaling in the Bay. If this is correct, please send home copy of Act as soon as possible. We have Lord Minto's confidential despatch of 23<sup>rd</sup> June 1904, but your Ministers have no doubt since that date made further investigation into the various aspects, geographical, historical and legal of questions of the status of the Bay and Straits and with the Act I shall be glad to have a report embodying in detail the ground on which your Ministers now rely to establish the British Status of the Bay, in order that we may be in a position to return an early and authoritative answer to the representations which United States Government in view of the long period during which their vessels have whaled in the Bay without interference, may be excepted to make. In particular I should like the Report to deal with any argument which United States Government may have based on second paragraph of letter of United States negotiators of Convention of 1818 printed in State Papers Volume7, 1819-1820 page 167, and on Canadian Order in Council of 2<sup>nd</sup> October 1895 which would appear no doubt unintentionally to have treated the Bay on footing of open sea by including in Ungava all islands within limit of 3 miles from shores."

The paragraph referred to by Lord Elgin is in despatch No. 50 Messrs. Gallatin and Rush to Mr. Adams and is dated London, 20<sup>th</sup> October 1818. It reads as follows: "I Fisheries. We succeeded in securing, besides the rights of taking and curing Fish, within the limits designated by our instructions as a sine qua non, the liberty of fishing on the Coasts of the Magdalen Islands, and of the Western Coast of Newfoundland, and the privilege of entering for shelter, wood and water in all British Harbours of North America. Both were suggested as important to our Fishermen, in the communications on that subject, which were transmitted to us with our Instructions. To the exception of the exclusive rights of the Hudson's Bay Company, we did not object, as it was virtually implied in the Treaty of 1783, and we never, any more than the British Subjects, enjoyed any right there, the charter of that Company

having been granted in the year 1670. The exception applies only to the Coasts and their Harbors, and does not affect the right of Fishing in Hudson's Bay, beyond 3 miles from shores, a right which could not exclusively belong to, or be granted by, any Nation."

This interpretation of the Charter is open to question. The charter states: "We have given, granted, and confirmed, any by these presents, for us, our heirs and successors, do give, grant and confirm, unto to the said Governor and Company and their successors, the sole trade, and Commerce of all those seas, straits, bays, rivers, lakes, creeks and sounds, in whatsoever latitude that 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 or granted to any of our subjects, or possessed by the subjects of any other Christian Prince or State, with the fishing of all sorts of fish, whales, sturgeons and all other royal fishes in the seas, bays, inlets and rivers within the premises, and the fish therein taken together with the royalty of the sea upon the coasts within the limits aforesaid."

The Act referred to is "An Act to amend the Fisheries Act, assented to 13<sup>th</sup> July, 1906, 6 Edward VII, chap.13. and the special reference called in question is contained in the words "and, inasmuch as Hudson's Bay is wholly territorial water of Canada, the requirements of this section as to licensing and as to the fee payable therefor, shall apply to every vessel or boat engaged in the whale fishery, etc."

On the 15<sup>th</sup> April, 1907, an Order-in-council was approved, defining Canada's claim, and was forwarded to Lord Elgin. The Order-in-Council based the claim mostly upon the charter of Charles II and the terms of Article 10 of the Treaty of Utrecht in 1713. Sufficient evidence of the claim to the sovereignty of the whole Bay can be gleaned from the Lord Crewe's reply, which I quote in extenso as the opinions therein contained affect the whole question of the sovereignty of the northern territories. It reads:- "Canada. Secret. Downing Street, 25<sup>th</sup> June 1908. My Lord, - His Majesty's Government have had under their consideration the arguments of the Canadian Government on the subject of the territoriality of Hudson's Bay, forwarded in Your Excellency's despatch Secret of the 22 of April 1907.

2. His Majesty's Government recognize to the full the importance of maintaining the claim to British sovereignty over the waters of the Bay.

3. At the same time His Majesty's Government feel bound to point out that the claim is one which they are advised that it would be difficult to sustain before an arbitral tribunal, while its nature is such as to render reference to such a tribunal practically inevitable should such reference be desired by any Power questioning the Canadian claim. That claim rests primarily on the Charter of Charles II in 1670 and on the terms of Article 10 of the Treaty of Utrecht in 1715, nor can it be denied that the Charter and the Treaty alike purport to treat as wasted in His Majesty's the sovereignty over the Bay. But the claims made to maritime jurisdiction in the 17<sup>th</sup> and 18<sup>th</sup> centuries have steadily been curtailed by the operation of International Law

in the 19<sup>th</sup> Century. In 1674 only four years after the date of the Charter the treaty of Westminster recognized that the British seas extended from Finisterre to Stadland in Norway, and there is a strong prima facie argument that the one claim is just as much or as little defensible as the other. The reference to the exclusive rights of the Hudson's Bay Company in the treaty of 1818 does not specify these rights and the only quasi contemporaneous exposition of the rights is that of Messrs. Rush and Gallatin and it is directly opposed to the British contention that exposition was not addressed to or accepted by His Majesty's Government, but the United States would appeal to it, and taken in conjunction with the modern rules of International Law, it would doubtless have great weight with an arbitral tribunal, which would be inclined to rank the British claim to Hudson's Bay as the same character as that of the United States to Behring Sea.

4. Nor is the argument from the case of Delaware and Chesapeake Bays conclusive as against the United States. For both those bays are much more truly bays than Hudson's Bay and in neither case does the width of the opening approach 29 miles, the apparent width of the entrance to Hudson's Bay from East Digges Island to Nettingham Inland.

5. His Majesty's Government have no desire to under-estimate the force of the arguments from the actual configuration of the Bay, and the fact that its shores are everywhere exclusively Canadian territory, but they doubt whether these facts would outweigh the general inclination of Jurists to restrict narrowly the limits of territorial waters – an inclination which His Majesty's Government share on grounds probably well known to your Ministers. They trust, however, that the question of the status of the Bay may not be raised, and they will be glad to be informed from time to time of the steps taken to assert British sovereignty therein and on the adjacent island and coasts.

6. In a numbered despatch of even date, I am intimating that His Majesty will not be advised to disallow the Act 6 Ed. VII C. 13 (sd) Crewe).

The despatch containing the intimation that the Act will not be vetoed is No. 370 of 25 June 1908. Copies of both those despatches were sent to the Canadian Privy Council, and a copy of the former to His Excellency Earl Grey.

In the meantime the Government had despatched an expedition under Mr. A.P. Low to the polar territories. The work of this and succeeding expeditions, as well as some discussions affecting the question in the Senate and House of Commons remain to be reviewed.

The Imperial Government appear to have become acutely sensible to the critical condition of the British tenure, and to have aroused the Canadian Government to action. The nature and results of this action will be now considered. Hon. D. Ferguson (Queen's P.E.I.) made a motion in the Senate, on the 6<sup>th</sup> February 1907, regarding the navigability of Hudson's Bay and Straits, and the Hansard Report of the Debate thereon was forwarded to the Colonial Secretary for his information. A careful perusal of the motion and the debate fails to show any reason for its having

been introduced into this correspondence. It did not touch upon the sovereignty of the regions, or upon what Canada was doing to assert and maintain that sovereignty. It centred wholly on the question of the navigability of the bay, and its value as an outlet for the wheat of the prairies, affording an opportunity to the western senators for booming their country, of which they did not fail to avail themselves.

On February 20<sup>th</sup>, 1907, Hon. P. Poirier, (Acadie) moved; "That it be resolved that the Senate is of 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." He drew attention to the proceedings of American whaler captains, and others, and especially to the fact of the U.S. flag being raised here and there by these men, and a declaration of taking possession in the name of the United States. He expressed his belief in the British title to all these lands, saying: "That question of title will, some day, be brought up in one way or other, and it is I believe, proper that we should precede our friends to the south, and assert in as public a manner as possible our dominion over these lands. Now is the proper time to do so." He also said: "England can well establish her sovereignty over all the lands that lie to the north of this continent by right of discovery." After dealing with various acts of discovery he continued: "True, our ex-colleague, Hon. David Mills, in the "Boundaries of Ontario" somewhat challenges the right of England to possession of our northern regions of the ground of non-occupancy, maintaining that settlement and tilling of the ground must actually take place. That applies, no doubt, to countries with a temperate climate where agricultural settlement is possible; but in the case of 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 and its (sic) authority over Hudson Bay and the lands and islands lying to the north of it has remained unchallenged for all that period of time. Russia during the discussion arising out of Alaska boundaries laid down the doctrine that fifty years of uncontested possession gave sovereignty over Arctic regions. From the time of Cabot to the actual establishment of the Hudson Bay Company, to which I shall refer later, 170 years elapsed of unchallenged peaceful occupation of the lands and islands lying north of Hudson Bay. Therefore on that ground the title of England to the Arctic regions seems to be perfect." He proceeded to deal with the Act of 1746, Mr. Clure's voyage and discovery, and the disputes between France and Great Britain as to the possession of the Bay and its environs. In dealing with the rival Companies the Hudson Bay Company, and the Company of New France, he disproved his contention of undisputed possessions and sovereignty on the part of Great Britain, at least as far as the Bay and the surrounding territory was concerned: showing that "by the Treaty of Ryswick, the English forts which practically constituted the whole of

the settlement round Hudson Bay, were left to the French. He passed on reviewing the Treaty of Utrecht slightly, and the 1763 Treaty of Paris, by which France “surrendered to England all the rights that France then had, or ever had in those northern regions, making, therefore, the title of England absolutely complete. Continuing his historical review to recent years, he proceeded to deal shortly with the geological conditions and arguing from legends of past settlements in the Arctic regions foreshadowed the possibility of there being flourishing cities there in years to come; concluding by urging that the Government secure the due recognition of their rights and title without delay. This speech was sent to the Colonial Office, but for some reason or other, not at present ascertainable, the reply by Hon. Sir Richard Cartright [*sic*] was not.

Sir Richard was inclined to think that to the Vikings belonged the credit of the first discovery of North America. He continued: “There is no doubt, I think, that Canada has a very reasonable good ground to regard Hudson bay as a mare clausum, and as belonging to it, that everything there may be considered as pertaining thereto. Touching the other point, my hon. friend has raised, whether we, or whether any other nation is entitled to extend its territory to the north pole. I would like to reserve my opinion. I am not aware that there have been any original discoveries as yet who can assert a claim to the north pole, and I do not know that it would be of any great practical advantage to us, or to any other country, to assert jurisdiction quite so far north as that. However, I may state to my hon. friend that the importance of having the boundary of Canada defined to the northward has not all escaped the attention of the governments. 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 out just rights in that quarter. I would think, however, that it was scarcely expedient for us, bearing in mind that a conference is now going on, to enter into any formal declaration, either on the part of this body, or the House of Commons as to the exact limits that we possess thereabouts. I think my hon. friend my rely upon the government will take all reasonable precaution to guard against any territory being wrested from us; even if it does appear at present to be of a rather unproductive character. As the hon. gentleman says, nobody can tell what may found in some of the northern regions. Very few persons ever believed that such discoveries as have taken place in the Klondike, in Alaska, and in other similar regions of late years, could by any possibility have occurred, and it is quite within the limits of possibility that further exploration in the Hudson Bay and northward of that, may reveal mineral deposits of very considerable value and importance. The only point to which I would direct his attention is this: That while negotiations are going on, and while the government are exerting themselves, it may not be the part of policy to formally proclaim any special limitation, or attempt to make delimitation of our rights there;

and therefore, although I can assure the hon. gentlemen that due attention will be paid to the matter he has brought before the Senate, and that due precautions will be taken to protect and enforce our rights, I think he will do well not to press this motion, and unless other hon. gentlemen wish to enlighten the House on this subject, I would move that the debate be adjourned for the present.”

The commons debates were confined almost entirely to the Hudson Bay Railway construction, and the amount of license to be collected under the Fisheries Act 1906.

The debate in the Senate calls for little comment, it being evident that whilst Sir Richard Cartwright did not accept Lord Crewe’s opinion as to Canada’s title, he on behalf of the Government desired to ward off public discussion at that time.

Turning to the voyages made the Arctic Ocean since Canada received the title to the lands conveyed by the Order-in-Council of 1880, there have been many made at the instigation of the Canadian Government.

The first on record was made under Commander Gordon in 1884, which as confined to the making of observation in Hudson Bay and Strait. The same commander undertook a second voyage in 1885, but delayed by an accident to his vessel which occurred at Resolution Island. This voyage was confined to observation in the Bay and Strait. A similar voyage also under Commander Gordon took place in 1886.

Commander Wakeham, was chosen to command the fourth voyage, which again was aimed especially at acquiring information as to the navigability of the bay and especially the strait.

The fifth voyage in 1897 was again under Commander Wakeham, and was extended to Kekerton Island in Cumberland Gulf.

In 1903 Mr. A.P. Low, Geologist was appointed by an order of the Canadian Privy Council, officer in command of an expedition, the goings of which were afterwards recorded in the report entitled the “Cruise of Neptune.” This expedition called at Cumberland gulf, and then went to Fullerton harbour at the south western portion of Roes Welcome where the expedition wintered. Next year they proceeded through Davis Straits and Baffin’s Bay to Cape Sabine, the most northerly point reached. On the return voyage, the commander Mr. Low raised the flag at Cape Herschel. The ceremony is thus described by him (p.48 “Cruise of Neptune”): “At Cape Herschel a document taking formal possession in the name of King Edward VII for the Dominion, was read and the Canadian flag was raised and saluted. A copy of the document was placed in a large cairn built of rocks at the end of the cape.” The southward trip included Lancaster Sound, North Devon, Beechy Island, North Somerset Island, Leopold Island, and Cape Clarence at the mouth of Prince Regent Inlet, Ponds inlet, and Cumberland Gulf. This expedition returned late in 1905.

An expedition was organized for 1906 of which Captain Bernier was the commander, the report of which states: “The jurisdiction of Canada was established over the territories annexed, and the territorial waters, licenses for fishing were issued, and whalers and others were informed that regulations in regard to fishing would be

enforced and Canadian customs duties, upon imported goods to be disposed of in trading with the natives would be collected.” (“Cruise of the Arctic”, pp. 331-2). This expedition left the St. Lawrence in July 1906, and the lands visited and seas traversed were: “Lancaster Sound, Barrow strait, Port Leopold, Cornwallis Island, Griffith’s Island, Bathurst Island, Byam Martin Island, and Melville Island which were taken formal possession of, as well as Prince Patrick Island, and the whole Parry group. Arctic point on Melville Island was the most westerly point reached.

Another expedition under Capt. Bernier was sent north in the year 1905. This expedition aimed more at finding the Northwest Passage than at discovery. The waters patrolled were, Davis Strait, Baffin Bay, Melville Bay, Smith Sound, Barrow Strait, Melville Sound, McClure Strait, Banks and Victoria Islands were annexed.

The lands annexed by the Order-in-Council of 1880 include: Baffin Island and Bylot Island: North Devon, 300 miles by 75 miles, Ellesmere Land, 475 miles long, lying north of Jones Sound, Cornwallis Island, Rignes [*sic*] Island, North Cornwallis Island, Kent Island, Graham Island, Findlay Island; Bathurst Island, Ryan Martin Island, Melville Island, and Prince Patrick Island, lying west of Ellesmere land, Banks Island, 260 by 100 miles, and Victoria Island, 400 by 190 miles, south of McClure Strait, Prince of Wales Island, south of Barrow Strait. Brodeur peninsula lies south of Lancaster Sound.

Looking at a map showing the flags of the various countries, claiming or having possible claims by right of discovery, one finds the following records marked:- Dease Strait, the British Flag, 1909, Victoria land, at the eastern entrance to McClintock [*sic*] Channel, British 1851, on the north shore of Victoria land, there are 4 Norwegian flags raised in 1905.

Banks Island and west end of Prince Albert Land, 3 British flags raised in 1850, 2 on the North East Coast, 1909;

At Bay Garry Island at the mouth of the Mackenzie River, a British flag of discovery was hoisted and a cairn made in 1825.

There is no flag marked on Herschel Island, but for many years there was a Royal North West Mounted Police patrol to this island from fort Macpherson, to maintain order with the whalers. This may continue to this day.

Prince Patrick Island shows no flag.

Melville Island, flags of possession 1906 and 1909, flags of discovery and cairns, 1819, 1852, 1853, 1906, 1907 and 1909.

Bathurst Island, flag of possession 1906, of discovery and a cairn, 1907 and 1909.

Cornwallis Island, discovery and possession, 1907;

Rignes Island, American flag, 1916;

King Christian Island, American flag, 1916;

North Cornwall Island, British, 1852, American, 1916;

First Land, British, 1915;

Second Land, British, 1916;

Axel Heiberg Land, American, 1907 and 1916, Norwegian, 1899.

North Devon, North Somerset, and Cockburn Islands, all British.

King William Land, American 1879, Norwegian, 1909.

Boothia, British from 1825 to 1854, Norwegian, 1905.

Ellesmere Land, on the south part: King

King Oscar Land, 5 Norwegian flags, 1901, on N. Kent Island,

British 1853; at Tennyson, British 1907.

Coburg Island, British 1907; at Cape Herschel near Cape Sabine, British, 1905, North of Cape Sabine, American flag at Archer fiord, 1861; at Mount Archer, 1882, at [Lake] Hazen, 1882; of the north coast 4 British flags of discovery and cairns between cape Hecla and Black cape, all of 1875, a little west of Cape Hecla at Cape Columbia, an American flag, 1907, on the west coast, a British flag of discovery and cairn at Cape Alfred Ernest, 1876; a little of this 2 American flags, 1907; and Norwegian flag of 1901, with an American, 1907 at the most westerly cape.

At Frobisher Bay, which was supposedly within the Hudson Bay Co's limits according to Arrowsmith's map are 2 American flags, 1861.

How far those expeditions asserted or preserved Canada's sovereignty in those regions is open to question, but these being no 'occupation' it would seem that they could only establish an inchoate title. Hall in his International Law quoted by Dr. King (p.21) says: "Formal annexation with subsequent occupation supersedes a claim by discovery, but if the formal act of annexation is not followed by further sets of ownership, the claim of a discoverer to exclude other is looked upon with more respect than that of mere appropriator."

"When discovery is made by persons competent to act as agents of a state for the purpose of annexation the presumption is that they have used their powers, so that indirectly discovery alone confers an inchoate title.

An inchoate title acts as a temporary bar to occupation by other state, but it must either be converted into a definite title within a reasonable time by planting settlements or military posts, or it must be at least be kept alive by repeated local acts showing an intention of continual claim."

The patrols of Capt. Bernier, as well as the work done by Major Moodie of the Royal North West Mounted Police in collecting revenue and issuing the notices of fishery regulations amongst the whalers all show "an intention of continual claim," as well as the rehoisting of the British flag, and the burying on cairns of proclamation.

Thereis, however, one thing to be considered very seriously in this connection, and that is that Hall makes grave distinction between acts of possession by colonists, and commissioned officers. Dr. King quotes him, saying: "If Colonists establish themselves, and declare the colony to belong to their state, a simple adoption by the state of their act is sufficient." Both Mr. Low and Capt. Bernier had commissions from the Canadian government, and therefore could only take possession in the name of Canada, such taking possession requiring recognition by the Imperial authorities, but the last quotation in speaking of the "colonist establishing themselves," and the adoption of the Colony, by the State, evidently held that there was continuous

occupation, or settlement. The Proclamation used by Mr. Low, read as follows: taking that used in Ellesmereland as a sample: "In the name of his Most Gracious Majesty King Edward VII and on behalf of the Government of the Dominion of Canada, I have this day taken possession of the Island of Ellesmereland, and all the smaller islands adjoining it. And in token of such formal possession have caused the Flag of the Dominion of Canada to be hoisted upon the land of Ellesmereland, and have deposited a Copy of this Document, sealed in a Metal Box, in a Cairn erected on the conspicuous Headland of Cape Isabella."

The question of Ellesmereland has been dealt with at length by the Advisory Technical Board, but I would compare the above proclamation and the fact of its having been placed in a cairn in Cape Isabella, with the following quotation from Hall: "When territory has been duly annexed and the fact has either been published, or has been recorded by monuments or inscription on the spot, a good title has always been held to have been acquired as against a state making settlements within such time as, allowing for accidental circumstances or moderate negligence, might elapse before a force or colony were sent out to some part of the land intended to be occupied." (Dr. King. P.21). The acts of taking possession were performed by Mr. Low in 1904, and in 1914 the great war broke out, and Canada was fully engaged in men and ships till 1919. It would mean that this would be fair excuse for not having followed up the act of taking possession at least for the five war years, but there seems not to have been any action taken for ten years preceding the war. The fact remains, however, that there has not been continuous occupation. But Denmark has a far more serious objection to its occupation to overcome in the Monroe doctrine as laid down by the author. It is a principle in which the rights and interests of the United States of America are involved that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not be considered as subjects for colonization by any European power. With the existing colonies and dependencies of any European power we have not interfered and we shall not interfere, but with the governments who have declared their independence and maintained it, and whose independence we have on great consideration and on just principle acknowledged, we could not view any interposition for the purpose of oppressing them or controlling in any other manner their destiny, by European power in any other light than as the manifestation of an unfriendly disposition towards the United States of America."

That Americans have spent money and time in Ellesmereland is undoubted, and whilst Canada's claim may be older, it is certainly better than that of Denmark, whose settlement is made at a time when both the older claimants have their attention diverted by the circumstances of the war. This has been dealt with at such length by the Advisory Technical Board that no more need to be said here.

Reverting for a moment to the question in Mr. Craig's letter to you of January 21<sup>st</sup> last, I would point out that the further study of the correspondence and the record of discoveries emphasises the answer already given to Nos. 1 and 2. It was

impossible to say what a British territory in North America not already included in the Dominion of Canada in 1880; and there can be no doubt that the Imperial Order in Council of 1880 was intentionally indefinite; not only for the reason given about but also as a study of the dates at which flags have been raised by different nationalities shows, any assertion by Great Britain of sovereignty over many of the islands might have caused question.

The answers to the other questions are in no way affected by the further consideration.

I would point out that many maps issued by the Dominion Government as maps of the Dominion of Canada, do not include the territory as far north as the Arctic sea; and might therefore be brought before an Arbitral Tribunal as corroborative evidence in support of a plea that the Government of Canada did not recognize their claims to the northern territory. Also that Canada's claim to these northern territories is adversely prejudiced by such a leaded subhead as occurs on p.320 of the "Cruise of the Arctic" Government Printing Bureau, 1910 and which reads: "Approximate length and width of the Main Islands is in Territory Annexed to Canada during the Expedition of the "Arctic in 1906-7, and 1908-9." Canada's title must be held under the Order in Council of 1880, possibly re-inforced by the Imperial Act of 1895.

As an appendix I will forward to you, a list of maps which may affect the question, which are not in the Archives Collection, and a synopsis of the maps we have.

I have endeavoured not to go beyond the requirements of the papers which you submitted to me, and not to trespass on the ground covered by those papers, my great object being to give a review of the correspondence etc., upon this question, a work that has never been done, and to answer the queries submitted by Mr. Craig.

I am, Sir, Your obedient servant,

(Sgd) Hensley R. Holmden

In charge of the Maps Division

Map Room, 26<sup>th</sup> April, 1921.

**5. James White, Technical Adviser, to O.D. Skelton, Under Secretary of State for External Affairs, Memorandum Respecting MacMillan Expedition to the Canadian Arctic, 25 May 1925 (with corrections dated 29 May 1925)**

**LAC, Record Group (RG) 25, vol. 4252, file 9057-40 pt.1**

MEMORANDUM RESPECTING MACMILLAN EXPEDITION  
TO THE CANADIAN ARCTIC

The projected Arctic expedition, commanded by Dr. D. B. MacMillan and financed in whole, or in its large part, by the National Geographic Society is a matter of concern to the Government of Canada. In addition to the fact that Dr. MacMillan apparently proposes to ignore the laws and regulations of the Dominion of Canada, there is the further consideration that press reports indicate that the United States Department of the Navy is not only furnishing planes, but is also supplying pilots and mechanics who are officers and employees of that Department. This Governmental co-operation gives the expedition a semi-official character which may, later, form the basis of a claim to new lands discovered to the west of Ellesmere island and east of the 141st meridian - the eastern boundary of Alaska - and also to Ellesmere island itself.

The Government of Canada fears that Dr. MacMillan proposes to fly from the west coast of Greenland over the portion of the east coast of Ellesmere island first discovered by the United States explorers Kane and Hayes; thence, over the west coast which was first explored by Sverdrup, a Norwegian, to Axel Heiberg island which was discovered by Sverdrup. MacMillan has announced that he will establish his depot of supplies on Heiberg island.

The Government of Canada assumes that such action would be based upon the contention that the coast explored by Kane and Hayes is United States territory and that Heiberg island is Norwegian; that he will not be operating on Canadian territory nor fly over it and that, as his planes are operated by United States officers and employees, he will be empowered to formally annex any new lands on behalf of the United States.

There is the further consideration that Macmillan may be formally commissioned on behalf of the United States and empowered to make such annexation.

Having set forth the material facts of the case, as known to the Government of Canada, it now remains to state the position of Canada and the more pertinent bases of her claim.

The Government of Canada claims as its "hinterland" the area bounded on the east by a line passing midway between Greenland and Baffin, Devon and Ellesmere islands, and, thence, northward to the Pole. On the west, Canada claims, as her

western boundary, the 141st meridian from the mainland of North America northward, without limitation.

There is at least one precedent for the claim to the 141st meridian; namely, the Russian-United States Treaty of 30th March 1867, whereby the present territory of Alaska was ceded to the United States. It provides that:

"The western limit, within which the territories and dominion conveyed [to the United States] are contained, passes through a point in Behring's straits on the parallel of sixty degrees thirty minutes north latitude...and proceeds due north, without limitation, into the Frozen [Arctic] Ocean".

This, in terms, is a claim by the United States that the western boundary of Alaska is a due north line passing through the middle of Bering strait and thence due north to the North Pole.

In 1867, this contention received the recognition and support of the Russian Government and, so far as the Government of Canada is aware, it has never been protested by any other Power, nor has the United States ever indicated that she does not propose to maintain it in its entirety.

Inferentially, the United States would make a similar contention respecting its eastern boundary - the 141st meridian. Such claim, if formulated, will receive the support of the Government of Canada.

All standard authorities on international law are agreed that "the bare fact of discovery is an insufficient ground of proprietary right" (Hall); that, discovery and appropriation without settlement only constitute an inchoate title.

The only claim that the United States can put forward respecting any of the Arctic islands to the north of the mainland of Canada is with reference to Ellesmere island.

### **Discovery and Exploration**

In 1616, Bylot and Baffin, English navigators, discovered Ellesmere Island. They mapped Smith Sound to the east and James around the south of it.

In 1818, an official expedition, formally commissioned by Great Britain and commanded by Capt. John Ross, R. N., surveyed the southeastern portion of Ellesmere island.

In 1852, Commander Inglefield, R. N. commanding one of the Franklin Relief vessels despatched by the British Admiralty, surveyed the south shore to longitude 84°W and the eastern shore to Princess Marie bay in latitude 79° 30'.

In 1853-1855 and 1860-1861, two citizens of the United States, Kane and Hayes, explored the shore of Ellesmere island from Princess Marie Bay northward to latitude 81° 70'.

In 1871, Hall, also a citizen of the United States, explored a small portion of the north-eastern coast of Ellesmere island between latitudes 81° 45'N. and 82° 30'N.

In 1875-1876, Capt. Nares, R. N., commanding an expedition despatched by the British Admiralty, surveyed accurately and in detail the coasts explored by Kane,

Hayes and Hall, which, in large part, had been so inaccurately mapped that it was difficult to recognise many of the salient points indicated on their plans.

Nares also explored the northern and western coasts from Hall's "farthest" to cape Alfred Ernest in Latitude 82°N.

In 1881-1884, Lieut. A. W. Greely, U. S. N., commanded an International Circumpolar station "for the purpose of scientific observation", particularly in developing meteorology and extending the knowledge of terrestrial magnetism. Greely crossed Ellesmere island and explored the shores of Greely fiord, an inlet in the west coast.

In 1900-1902, Sverdrup, commanding an expedition which was financed, in large part, by citizens of Norway, explored nearly all the remainder of the southwestern and western coasts of Ellesmere island and also discovered Axel Heiberg, Amund Ringnes, Ellef Ringnes and King Christian islands.

In 1913-1918, Vilhjalmur Stefansson, commanding an expedition formally commissioned by the Dominion of Canada, made further explorations in the Canadian Archipelago. He discovered Meighen, Borden, Brock and some smaller islands and made further surveys of Amund Ringnes, Ellef Ringnes and King Christian islands. He found that the last named, instead of being the northern portion of Findlay island, as Sverdrup supposed, was a separate island.

To illustrate the result of the foregoing a map, copy of which herewith, has been prepared, which shows in red, blue and yellow, the areas explored by nationals of Great Britain, the United States, and Norway, respectively.

The exact extent of the coasts discovered or explored by nationals of these countries are indicated on the "Explorations in Northern Canada" map which also accompanies this memorandum.

The foregoing demonstrates that Ellesmere island was DISCOVERED over three centuries ago by an English expedition; that a century ago, part of the shore-line was surveyed by a British naval Expedition and that three-quarters of a century ago another officer of the British Navy EXPLORED and SURVEYED 330 miles of its shore-line.

By progressive steps the remainder of the shore-line of Ellesmere island was SURVEYED between 1853 and 1902 by British, United States and Norwegian explorers but it is to be noted that, with the exception of the Greely expedition, which accomplished but little in the way of exploration, neither the United States expeditions nor the Norwegian were commissioned by their respective Governments.

At this point, it seems pertinent to state that there can only be one discovery of an island. Subsequent individuals or expeditions can only explore or survey, though they may claim to have discovered specific topographical features such as capes, bays, mountains, rivers, etc.

The fact of discovery, therefore, was completed when Bylot and Baffin discovered it 309 years ago.

While Great Britain has never conceded such sweeping claims, it is noteworthy that, in 1827, during the Oregon Territory negotiations, the United States plenipotentiaries claimed all the country between the 42nd and 49th parallels of latitude, basing their claim upon the mere entrance into the mouth of the Columbia by a private citizen of the United States. Further, these extraordinary pretensions were put forward although it was a matter of common knowledge that British commissioned officers Cook and Vancouver had taken possession of or touched at various points of this portion of the mainland.

Had the United States subsequently occupied portions of the coast of Ellesmere island which had been discovered by citizens of that country, such occupation would have formed the basis of a strong claim but upon the facts, as set forth above, it is evident that she has no claim except such attenuated claim as could be founded upon exploration by her nationals upon part of the coast of an island discovered by an English expedition, two and a half centuries earlier and surveyed to the extent of 300 miles by officers of the Royal Navy prior to the advent of any citizen of the United States.

Against any claims by the United States or Norway to territory in the Arctic archipelago, it may be urged that, collectively, these islands form a geographical entity and that discoveries by the nationals of other nations of hitherto unknown units in this entity do not impair the title of Canada. Canada would not necessarily regard the undertaking of such explorations with disfavour any more than she would so regard explorations made on the mainland of Canada, in areas that are still unexplored, provided that they be undertaken in snob a way as to form an acknowledgment of her sovereignty.

But Canada does contend that nationals of other nations should conform to the regulations and laws of Canada particularly as such conforming does not impose any hardship upon such nationals.

The portions of the coast of Ellesmere island which were first explored by citizens of the United States have been coloured as United States territory by some map-makers in that country, and the coast-line first sighted by the Sverdrup expedition has been coloured as Norwegian though, so far as known, neither the Government of the United States nor the Government of Norway has made a "public assertion of ownership" of the areas explored by their nationals, and, in the case of the United States, the lapse of a half-century should bar such claim at the present time.

Similarly, in the case of Norway, the lapse of over twenty years should also bar any claim by that nation.

Again, Kane, Hayes, Hall and Sverdrup were uncommissioned navigators. The money appropriated for the Greely expedition was for "observation and exploration in the Arctic seas" but, so far as known, neither he nor Kane, Hayes nor Hall was commissioned to take possession of lands in the name of the United States. Nor was Sverdrup similarly commissioned on behalf of Norway.

Hall says that: "If an uncommissioned navigator takes possession of lands in the name of his sovereign, and then sails away without forming a settlement, the fact of possession has ceased, and a confirmation of his act only amounts to a bare assertion of intention to possess, which, being neither declared upon the spot nor supported by local acts, is of no legal value."

This clearly negatives any claim by the United States or Norway which is based upon discovery by their respective nationals.

### **Control.**

The decision of the arbitrators respecting the boundary between British Guiana and Venezuela recognised a principle which materially strengthens the claims of Canada. In this case, British Guiana was awarded the larger portion of the area in dispute because the British and their predecessors in title, the Dutch, had exercised a control over the native inhabitants of that area. The same principle was also recognised in determining the boundary between British Guiana and Brazil which was in dispute for many years.

The awards in each case recognised the principle that such control constitutes effective occupation.

Similarly, Great Britain and Canada have exercised control over the natives of the mainland of Canada and of the Arctic islands between Greenland and the 141st parallel. It is true that Ellesmere, Heiberg and the Ringnes islands are not inhabited by natives or white men but it is highly probable that they were so occupied by the Eskimo even in historic times and, since then, have not been occupied by any one else.

With the exception of Heiberg, Ringnes, Meighen, Borden, Brock and some smaller islands, all the known insular areas in the Canadian Arctic archipelago were discovered and formally taken possession of by British commissioned navigators from a century to three-quarters of a century ago and such acts of possession were formally announced to the world in British Government blue-books. Of these islands, Meighen, Borden and Brock were discovered and formally annexed by a Canadian expedition in 1914-1917.

In 1880 Great Britain, by Imperial Order in Council of 31st July 1880, transferred the Arctic archipelago to Canada. The Order provided that "all British territories and possessions in North America and the islands adjacent to such territories and possessions, which are not already included in the Dominion of Canada, should (with the exception of the colony of Newfoundland and its dependencies) be annexed to and form part of the said Dominion".

In 1670, King Charles II granted a charter to the Hudson's Bay Company. By virtue thereof the Company for two centuries exercised a proprietary [*sic*] government over the area covered by its charter and established posts throughout the Arctic drainage basin of the mainland.

Since the sale of its rights and privileges to the British crown and the transfer thereof to Canada over a half-century ago, the Hudson's Bay Company and other fur-trading companies have extended their operations to the Arctic islands and have established posts therein, thus exercising a control over practically the whole of the native population.

The Canadian Government has established police posts on Ellesmere, Devon and Baffin islands in the eastern portion of the archipelago and at other points in the western portion of the area, these posts being so placed as to dominate the whole of the archipelago, thus furnishing all the control required to maintain its title.

### **Contiguity.**

Sir Travers Twiss (quoted by Westlake in "International Law", Part I, 1910, pp. 117-118) says: "When a nation has discovered a country and notified its discovery, it is presumed to intend to take possession of the whole country within those natural boundaries which are essential to the independence and security of its settlement." And the same authority says that "where the control of a district left unoccupied is necessary for the security of a state and not essential to that of another, the principle of vicinitas would be overruled by higher considerations, as it would interfere with the perfect enjoyment of existing rights of established domain".

In 1824, Mr. Rush, United States Minister at London, wrote: "It will not be denied that the extent of contiguous territory to which an actual settlement gives a prior right must depend in a considerable degree on the magnitude and population of that settlement, and on the facility with which the vacant adjoining land may within a short time be occupied, settled, and cultivated by such population, as compared with the probability of its being thus occupied and settled from another quarter". (quoted by Westlake, I, pp. 116-117).

In 1844, Mr. Calhoun, U. S. Secretary of State, wrote Mr. Pakenham, British Minister at Washington: "That continuity furnishes a just foundation for a claim of territory, in connection with those of discovery and occupation would seem unquestionable. It is admitted by all, that neither of them is limited by the precise spot discovered or occupied. It is evident that, in order to make either available, it must extend at least some distance beyond that actually discovered or occupied; but how far, as an abstract question, is a matter of uncertainty...How far the claim of continuity may extend...can be settled only by reference to the circumstances attending each."

The term "Sphere of Influence" has no very definite meaning as yet, but indicates "the regions which geographically are adjacent to or politically group themselves" naturally with the possessions of the power claiming such sphere.

Canada's possessory rights in her Arctic islands are, of course, much greater and more definite than those indicated by the term "Sphere of Influence" but the principles of law set forth in the above definition materially strengthen the claim of Canada.

In 1826, Mr. Gallatin, negotiator on behalf of the United States, said:

"The actual possession and populous settlements of the valley of the Mississippi, including Louisiana, and now under one sovereignty, constitute a strong claim to the westwardly extension of that province over the contiguous vacant territory, and to the occupation and sovereignty of the country as far as the Pacific Ocean.

"It will not be denied that the extent of contiguous territory, to which an actual settlement gives a prior right must depend, in a considerable degree, on the magnitude and population of that settlement, and on the facility with which the vacant adjoining land may, within a short time, be occupied, settled, and cultivated by such population, as compared with the probability of its being thus occupied and settled from another quarter".

As to the relative probability of settlement or control by the United States or Norway - as compared with Canada - there can be no question. Further, when the difficulties of control in the Arctic, as compared with temperate and torrid regions, are considered and when due weight has been given to such considerations, Canada's title may be claimed to be, if not unquestionable, at least much superior to that of any other nation.

The islands discovered by Sverdrup, namely Axel Heiberg, Amund Ringnes and Ellef Ringnes, are six, eight and twenty-five miles distant, respectively, from islands which have been acknowledged as British for three-quarters of a century. In addition, they are, as already stated, simply portions of the geographical entity, known as the Canadian Arctic archipelago.

### **Prescription.**

Oppenheim says ("International Law", second edition, 1912, vol. I, pp.294-295): "No rule of the Law of Nations exists which makes notification of occupation to other Powers a necessary condition of its validity. But as regards all future occupations on the African coast, the Powers assembled at the Berlin Congo Conference in 1884-1885 have by article 34 of the General Act of this conference stipulated that occupation shall be notified to one another, so that such notification is now a condition of the validity of certain occupations in Africa. And there is no doubt that in time this rule will either by custom or by treaty be extended from occupations on the African coast to occupations everywhere else."

With reference to Melville, Cornwallis and other islands of the Canadian Arctic archipelago, such taking possession was formally notified to the world and, for three-quarters of a century and more, has been unopposed.

In this connection, it is pertinent to point out that, in the British Guiana-Venezuela arbitration, it was decided that unopposed occupation for 50 years constituted a valid title.

Oppenheim says (p. 295) that "the extent of an occupation ought only to reach over so much territory as is effectively occupied". He then recites that, in the past,

"interested States have neither in the past nor in the present acted in conformity with such a rule; on the contrary, they have always tried to attribute to their occupation a much wider area". After stating national contentions for the wider view, he continues:

"In truth, no general rule can be laid down beyond the above, that occupation reaches as far as it is effective ... the fact that flying columns of the military or police sweep, when necessary, remote spots, and many other facts, can show how far round the settlements the possessor is really able to assert the established authority. But it will always be difficult to make exactly in this way the boundary of an effective occupation, since naturally the tendency prevails to extend the sway constantly and gradually over a wider area. It is, therefore, a well-known fact that disputes concerning the boundaries of occupations can only rarely be decided on the basis of strict law." (p. 296).

As to the area affected by an act of occupation, Hall says that: "A settlement is entitled not only to the banks actually inhabited or brought under its immediate control, but to all those which may be needed for its security, and to the territory which may fairly be considered to be attendant upon them.

"Title by prescription arises out of a long-continued possession, where no original source of proprietary right can be shown to exist.... The principle upon which it rests is essentially the same as that of the doctrine of prescription which finds a place in every municipal law, although in its application to beings for whose disputes no tribunals are open, some modifications are necessarily introduced.... The object of prescription as between states is mainly to assist in creating a stability of international order which is of more practical advantage than the bare possibility of an ultimate victory of right."

Wheaton says that "The uninterrupted possession of territory, or other property for a certain length of time, by one state, excludes the claim of every other; in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question."

Lord Salisbury, in a dispatch bearing date 18 March, 1896, says: "There is no enactment or usage or accepted doctrine which lays down the length of time required for international prescription, and no full definition of the degree of control which will confer territorial property on a nation, has been attempted. It certainly does not depend solely on occupation or the exercise of any clearly defined acts. All the great nations in both hemispheres claim, and are prepared to defend, their rights to vast tracts of territory which they have in no sense occupied, and often have not fully explored. The modern doctrine of "Hinterland", with its inevitable contradictions, indicates the unformed and unstable condition of international law as applied to territorial claims resting on constructive occupation or control".

In the Venezuela Boundary case, it was agreed that:

"(a) Adverse holding or prescription during the period of fifty years shall make a good title. The arbitrators may deem exclusive political control of a district, as

well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.

"(b) The arbitrators may recognise and give effect to rights and claims resting on any ground whatever, valid according to international law, and on any principles of international law which the arbitrators may deem to be applicable to the case and which are not in contravention of the foregoing rule".

In 1904, the Government of Canada published a map showing "Explorations in Northern Canada". On that map, copy of which herewith, the boundary of the Canadian Arctic archipelago on the east, is delineated by a line passing through the middle of Robeson channel—waters separating the Canadian islands from Greenland—and thence northward to the Pole, and, on the west, by the 141st meridian from the mainland northward to the Pole.

This official map was published twenty-one years ago and obviously, a tacit acquiescence, during over a fifth of a century, on the part of Norway and all other nations, bars their claim to protest the Canadian claim.

In conclusion, it should be pointed out that it is obvious that the specific rules of international law that are considered by the best authorities to be applicable to the torrid and temperate zones are, in such cases as the Canadian Arctic archipelago, not applicable with the same strictness. The effect of measures of control, of contiguity and of settlement must be given very much greater weight than would normally be attached to similar measures in more temperate and habitable regions.

## 6. Governor General Byng to His Excellency, The Right Honourable Sir Esme Howard, 4 June 1925

### LAC, RG 25, vol. 2156, file 30, Arctic Claims

With further reference to my Secret Despatch, No. 103, of even date, on the subject of the MacMillan Arctic expedition, it has been considered advisable to set forth some of the ground which have caused the Canadian Government apprehension as to the purposes of the expedition and also the grounds of its claims to certain Arctic territory which may be questioned.

The expedition is under the leadership of Dr. MacMillan, a Newfoundlander by birth but now a citizen of the United States, who is widely experienced in Arctic exploration. In his earlier expeditions he was disposed to work closely with the Canadian Government, and when giving evidence before the Canadian Royal Commission on the Musk Ox and Reindeer Industries, in 1920, he advised that explorers going into Canadian Arctic territory be required to secure licenses. Of late, perhaps because of the exigencies of popular lecture tours in the United States and campaigns there for financing his new expedition, he has tended to emphasize the advantages to the United States of the discoveries he may make in the Arctic and also to ignore the Canadian authorities. The Director of the North West Territories and Yukon Branch of the Department of the Interior wrote him in June, 1923, prior to his last trip north, asking for information as to his plans and calling his attention to the hunting and trading license requirements. The letter, though received, was not acknowledged. On MacMillan's return, the Director wrote again in October, 1924, calling attention to press reports of killing musk ox on Ellesmere Island. MacMillan replied stating that the objects of the expedition were properly scientific, and adding that "nothing in Canadian territory was trapped or killed or traded for by me or by a single member of my personnel, else you would have received notice hunting and trading licenses", a reply which was considered in the light of Royal Canadian Mounted Police reports as to killing of musk ox, at least, evasive.

On January 14<sup>th</sup>, 1925, the Director wrote MacMillan calling attention to press reports of the new expedition, enclosing copies of Game Act and other regulations, and suggesting that application be made for a migratory game permit. No answer has been received to this letter.

The United States Department of the Navy, to judge by the "Shenandoah" and other incidents, is not averse to securing whatever prestige may attach to adding territory and possibly air bases in the North. It is providing planes and also lending pilots and mechanics. No intimation whatever as to the expedition has been received from the United States Government.

Given this persistent ignoring of Canadian authority, special significance attached to the reported route of the expedition. While it is proposed to make airplane exploration through Baffin Land, as to which no question of sovereignty could

possibl[y] be raised, this is apparently to be left to the return trip and is not an essential feature. On the northward journey, the expedition, after coaling at a Canadian port, and possibly touching at a Labrador port, is to coast along Greenland to Etah; permission to make use of Etah as a base and make certain scientific inquiries there has been sought and secured from the Danish Government. From Etah the planes are to fly across Ellesmere Island to the Northern end of Axel Heiberg Island, there to establish a base for exploring the large unknown area to the north eastward. As it happens that the two portions of Canadian territory thus to be visited or flown over, Ellesmere Island and Axel Heiberg, are precisely the two areas in the North as to which some question as to our sovereignty might be raised (by the United States and Norway respectively), it is apprehended that this choice of route is not wholly accidental or based wholly on technical grounds, and that it may foreshadow claims not merely to any new territory discovered to the eastward but to part or all of Ellesmere Island itself.

The grounds upon which Canada rests her claim to these as well as to the other Arctic islands north of her mainland territory may be summarized briefly.

In 1880, Great Britain, by Imperial Order in Council of 31st July, 1880, transferred the Arctic archipelago to Canada. The Order provided that "all British territories and possession in North America and the islands adjacent to such territories and possessions, which are not already included in the Dominion of Canada, should (with the exception of the colony of Newfoundland and its dependencies) be annexed to and form part of the said Dominion". The Dominion of Canada claims as its hinterland the area bounded on the east by a line passing midway between Greenland and Baffin, Devon and Ellesmere islands and, thence northward to the Pole. On the west, Canada claims, as her western boundary, the 141<sup>st</sup> meridian from the mainland of North America indefinitely northward "without limitation".<sup>1</sup>

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<sup>1</sup> There is at least one precedent for the claim to the 141<sup>st</sup> meridian; namely, the Russian-United States Treaty of 30th March, 1867, whereby the present territory of Alaska was ceded to the United States. It provides that: "The western limit, within which the territories and dominion conveyed (to the United States) are contained, passes through a point in Behring's Straits on the parallel of sixty degrees thirty minutes north latitude...and proceeds due north, without limitation, into the Frozen (Arctic) Ocean."

This, in terms, is a claim by the United States that the western boundary of Alaska is a due north line passing through the middle of Bering strait and thence due north to the North Pole. In 1867, this contention received the recognition and support of the Russian Government and, so far as the Government of Canada is aware, it has never been protested by any other power, nor has the United States ever indicated that she does not propose to maintain it in its entirety.

Inferentially, the United States would make a similar contention respecting its eastern boundary – the 141<sup>st</sup> meridian. Such claim, if formulated, would, of course, receive the support of the Government of Canada.

## 1. Discovery

So far a discovery goes, the title of Great Britain, and thus of Canada, to the whole Arctic Archipelago is beyond question, except possibly in the case of certain Ellesmere and Axel Heiberg areas. With the exception of Heiberg, Ringnes, Meighen, Borden, Brock and some smaller islands, all the known insular areas in the Canadian Arctic archipelago were discovered and formally taken possession of by British commissioned navigators from a century to three quarters of a century ago and such acts of possession were formally announced to the world in British Government Blue-books. Of these islands, Meighen, Borden and Brock were discovered and formally taken possession of by a Canadian expedition in 1914-1917. Consideration will therefore be confined to the areas why may be questioned.

In 1616, Bylot and Baffin, English navigators, discovered Ellesmere Island and named Smith Sound to the east of it and Jones Sound to the south.

In 1818, an official expedition, formally commissioned by Great Britain and commanded by Captain John Ross, R.N., explored the southeastern portion of Ellesmere Island.

In 1852, Commander Inglefield, R.N., commanding one of the Franklin Relief vessels, dispatched by the British Admiralty surveyed the south shore to longitude 84°W and the eastern shore to Princess Marie bay in latitude 79° 30'.

In 1853-1855 and 1860-61, two citizens of the United States, Kane and Hayes, explored the shore of Ellesmere Island from Princess Marie Bay northward to latitude 81° 30'. In 1871, Hall, also a citizen of the United States explored a small portion of the north-eastern coast of Ellesmere Island between latitudes 81° 45'N and 82° 30'N.

In 1875-1876, Captain Nares, R.N. commanding an expedition despatched by the British Admiralty, surveyed accurately and in detail the coasts explored by Kane, Hayes and Hall, which, in large part, had been so inaccurately mapped that it was difficult to recognize many of the salient points indicated on their plans. Nares also explored the northern and western coasts from Hall's 'farthest' to cape Alfred Ernest in latitude 82°N.

In 1881-1884, Lieutenant A.W. Greely, U.S.N., commanded an International Circumpolar station "for the purpose of scientific observation", particularly in developing meteorology and extending the knowledge of terrestrial magnetism. Greely crossed Ellesmere island and explored the shores of Greely fiord, an inlet in the west coast.

In 1900-1902, Sverdrup, commanding an expedition which was financed, in large part, by citizens of Norway, explored nearly all the remainder of the southwestern and western coasts of Ellesmere Island and also discovered Axel Heiberg, Amund Ringnes, Ellef Ringnes and King Christian islands.

In 1913-1918, Vilhjalmur Stefansson, commanding an expedition, formally commissioned by the Dominion of Canada, made further explorations in the Canadian Arctic archipelago. He discovered Meighen, Borden, Brock and some smaller islands and made further surveys of Amund Ringnes, Ellef Ringnes and King

Christian islands. He found that the last named, instead of being the northern portion of Findlay island, as Sverdrup supposes, was a separate island.

To illustrate the result of the foregoing a map, copy of which herewith, has been prepared, which shows in red, blue and yellow, the areas explored by British, United States and Norwegian nationals respectively.

The exact extent of the coasts discovered or explored by nationals of these countries is indicated on the "Explorations in Northern Canada" map which also accompanies this despatch.

It is thus clear that this island was DISCOVERED over three centuries ago by an English expedition; that a century ago, part of the shore-line was surveyed by a British naval Expedition and that three-quarters of a century ago another officer of the British Navy EXPLORED and SURVEYED 300 miles of its shoreline.

By progressive steps the remainder of the shoreline of Ellesmere Island was SURVEYED between 1853 and 1902 by British, United States and Norwegian explorers, but it is not to be noted that, with the exception of the Greely expedition, which accomplished but little in the way of exploration, neither the United States expeditions nor the Norwegian were commissioned by their respective Governments.

At this point, it seems pertinent to state that there can only be one discovery of an island. Subsequent individuals or expeditions can only explore or survey, though they may claim to have discovered specific topographical features such as capes, bays, mountains, rivers, etc.<sup>2</sup>

The fact of discovery, therefore, was completed when Bylot and Baffin discovered it 309 years ago.

Had the United States subsequently occupied portions of the coast of Ellesmere Island which had been discovered by citizens of that country, such occupation would have formed the basis of a strong claim but upon the facts, as set forth above, it is evident that she has no claim except such attenuated claims as could be founded upon exploration by her nations upon part of the coast of an island discovered by the English expedition two and one-half centuries earlier, and surveyed to the extent of 300 miles by officers of the Royal Navy, prior to the advent of any citizen of the United States.

The portions of the coast of Ellesmere Island which were first explored by citizens of the United States have been coloured as United States territory by some mapmakers in that country, and the coast-line first sighted by the Sverdrup expedition has been coloured as Norwegian though, so far as known, neither the

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<sup>2</sup> While Great Britain has never conceded such sweeping claims, it is noteworthy that, in 1827, during the Oregon territory negotiations, the United States plenipotentiaries claimed all the country between the 42<sup>nd</sup> and 49<sup>th</sup> parallels of latitude, basing their claim upon the mere entrance into the mouth of the Columbia by a private citizen of the United States. Further, these extraordinary pretensions were put forward although it was a matter of common knowledge that Cook and Vancouver took possession or touched at various points of this portion of the mainland.

Government of the United States nor the Government of Norway has made a “public assertion of ownership” of the areas explored by their nationals, and, in the case of the United States, the lapse of a half-century should bar such a claim at the present time.

Similarly in the case of Norway, the lapse of over twenty years should also bar any claim by that nation.

Again, Kane, Hayes, Hall and Sverdrup were uncommissioned navigators. The money appropriated for the Greely expedition was for “observation and exploration in the Arctic seas” but neither he nor Kane, Hayes or Hall was commissioned to take possession of lands in the name of the United States. Nor was Sverdrup similarly commissioned on behalf of Norway.

This clearly negatives any claim by the United States or Norway which is based upon discovery by their respective nationals.

Hall says that: “If an uncommissioned navigator takes possession of lands in the name of his sovereign, and then sails away without forming a settlement, the fact of possession has ceased, and a confirmation of his act only amounts to a bare assertion of intention to possess, which, being neither declared upon the spot nor supported by local acts, is not legal value.”

## 2. Contiguity

The importance of the principle of contiguity and its applicability to the present situation, may appropriately be indicated by quotations from United States authorities:

In 1824, Mr. Rush, the United States Minister at London wrote: "It will not be denied that the extent of contiguous territory to which an actual settlement gives a prior right must depend in a considerable degree on the magnitude and population of that settlement, and on the facility with which the vacant adjoining land may within a short time be occupied, settled, and cultivated by such population, as compared with the probability of its being thus occupied and settled from another quarter". (quoted by Westlake, I, pp. 116-117).

In 1844, Mr. Calhoun, U. S. Secretary of State, wrote Mr. Pakenham, British Minister at Washington: "That continuity furnishes a just foundation for a claim of territory, in connection with those of discovery and occupation would seem unquestionable. It is admitted by all, that neither of them is limited by the precise spot discovered or occupied. It is evident that, in order to make either available, it must extend at least some distance beyond that actually discovered or occupied; but how far, as an abstract question, is a matter of uncertainty.... How far the claim of continuity may extend... can be settled only by reference to the circumstances attending each."

In 1826, Mr. Gallatin, negotiator on behalf of the United States, said: “The actual possession and populous settlements of the valley of the Mississippi, including Louisiana, and now under one sovereignty constitutes a strong claim to the

westwardly extension of that province over the contiguous vacant territory, and to the occupation and sovereignty of the country as far as the Pacific Ocean.

“It will not be denied that the extent of contiguous territory, to which an actual settlement gives a prior right must depend, in a considerable degree, on the magnitude and population of that settlement, and on the facility with which the vacant adjoining land may, within a short time, be occupied, settled, and cultivated by such population, as compared with the probability of its being thus occupied and settled from another quarter.”

As to the relative probability of settlement or control by the United States or Norway – as compared with Canada – there can be no question. Further, when the difficulties of control in the Arctic, as compared with temperate and torrid regions, are considered and when due weight has been given to such considerations, Canada’s title may be claimed to be, if not unquestionable at least much superior to that of any other nation.

The islands discovered by Sverdrup, namely Axel Heiberg, Amung Ringnes and Ellef Ringnes, are six, eight, and twenty-five miles distant from islands which have been acknowledged as British for three-quarters of a century. In addition, they are, as already stated, simply portions of the geographical entity, known as the Canadian Arctic archipelago.

### 3. Occupation and Control

The decision of the arbitrators respecting the boundary between British Guiana and Venezuela recognised a principle which materially strengthens the claims of Canada. In this case, British Guiana was awarded the larger portion of the area in dispute because the British and their predecessors in title, the Dutch, had exercised a control over the native inhabitants of that area. The same principle was also recognised in determining the boundary between British Guiana and Brazil which was in dispute for many years.

The awards in each case recognised the principle that such control constitutes effective occupation.

Similarly, Great Britain and Canada have exercised control over the natives of the mainland of Canada and of the Arctic islands between Greenland and the 141st parallel. It is true that Ellesmere, Heiberg and the Ringnes islands are not inhabited by natives or white men but it is highly probable that they were so occupied by the Eskimo even in historic times and, since then, have not been occupied by any one else.

In 1670, King Charles II granted a charter to the Hudson's Bay Company. By virtue thereof the Company for two centuries exercised a proprietary [*sic*] government over the area covered by its charter and established posts throughout the Arctic drainage basin of the mainland.

Since the sale of its rights and privileges to the British crown and the transfer thereof to Canada over a half-century ago, the Hudson's Bay Company and other

fur-trading companies have extended their operations to the Arctic islands and have established posts therein, thus exercising a control over practically the whole of the native population.

The Canadian Government has established police posts on Ellesmere, Devon and Baffin islands in the eastern portion of the archipelago and at other points in the western portion of the area, these posts being so placed as to dominate the whole of the archipelago, thus furnishing all the control required to maintain its title.

#### 4. Prescription

The taking possession of Melville, Cornwallis and other islands of the Canadian Arctic archipelago was formally notified to the world, and for three-quarters of a century and more has been unopposed.

Reference may be made to a dispatch of Lord Salisbury, of March 18, 1896: "There is no enactment or usage or accepted doctrine which lays down the length of time required for international prescription, and no full definition of the degree of control which will confer territorial property on a nation, has been attempted. It certainly does not depend solely on occupation or the exercise of any clearly defined acts. All the great nations in both hemispheres claim, and are prepared to defend, their rights to vast tracts of territory which they have in no sense occupied, and often have not fully explored. The modern doctrine of "Hinterland", with its inevitable contradictions, indicates the unformed and unstable condition of international law as applied to territorial claims resting on constructive occupation or control."

In 1904, the Government of Canada published a map showing "Explorations in Northern Canada". On that map, (copy enclosed) the boundary of the Canadian Arctic archipelago, on the east, is delineated by a line passing through the middle of Robeson channel—waters separating the Canadian islands from Greenland—and thence northward to the Pole, and, on the west, by the 141st meridian from the mainland northward to the Pole.

This official map was published twenty-one years ago and obviously, a tacit acquiescence, during over a fifth of a century, on the part of Norway and all other nations, bars their claim to protest the Canadian claim.

In conclusion, it should be pointed out that it is obvious that the specific rules of international law that are considered by the best authorities to be applicable to the torrid and temperate zones are, in such cases as the Canadian Arctic archipelago, not applicable with the same strictness. The effect of measures of control, of contiguity and of settlement must be given very much greater weight than would normally be attached to similar measures in more temperate and habitable regions.

Against any claims by the United States or Norway to territory in the Arctic archipelago, it may be urged that, collectively, these islands form a geographic entity and that discoveries by the nationals or other nations of hitherto unknown units in this entity do not impair the title of Canada. Canada would not necessarily regard the undertaking of such explorations with disfavour any more than she would so

regard explorations made on the mainland of Canada in areas that are still unexplored, provided that they be undertaken in such a way as to form an acknowledgement of her sovereignty. But Canada does contend that the nationals of other nations should conform to the regulations and law of Canada, particularly as such conforming does not impose any hardship upon such nationals.

The following summary of the various regulations in force in Canada applicable to explorers and others visiting northern Canadian territory has been compiled by the Department of Interior:

1. Customs Laws and Regulations: Foreign Expeditions visiting Canadian Territory are subject to the usual provisions of the Customs Laws and Regulations.

- a) Before landing supplies at a place other than Canadian Customs ports of entry, all foreign goods should be reported and entered at Customs port short of destination, i.e. – Sydney, Cape Breton.
- b) Coasting regulations – clearance from one Canadian port to another.

2. Air Regulations: Foreign Expeditions bringing Air Craft into Canada are subject to the regulations of the Royal Canadian Air Force.

- a) Application must be made for permission to enter Canada.
- b) Detailed information concerning the nature of the expedition.
- c) Plans and other information dealing with the machine, showing strength, etc., for the purpose of providing certificates of air worthiness.
- d) Name and qualifications of the pilot. Registration and markings painted on the machine, etc.

3. Immigration: Section 33 of the Immigration Act requires that every passenger or other person seeking entry to Canada shall first appear before and make application to, an Immigration officer at a port of entry, and shall answer truly all questions put to him by any immigration officer. Foreign scientists and explorers may not be migrants but the Act does not exempt non-immigrants from the necessity of examination on entry and it is within the power of the Immigration Department to compel foreign explorers to apply for entry (Extract from letter – Assistant Deputy Minister Immigration, 29<sup>th</sup> May 1925 –file 4427)

4. Importation of Intoxicants under the N.W.T. Act:

- a) Special permission in writing from the Commissioner must first be obtained before intoxicants can be manufactured, compounded, or imported into the North West Territories.
- b) Such intoxicants are subject to the Customs and Excise Laws of Canada.
- c) The penalties of such manufacture or importation are set out in part 3, chapter 62, R.S.C. – 1906 (Northwest Territories Act).

5. Game Regulations: Under the Northwest Territories Game Act and Regulations.
- a) No person except a bona fide resident of the North West Territories shall hunt or trap game with securing a license.
  - b) No person shall engage in the business of trading or trafficking in game in the North West Territories without first securing a license.
  - c) Game license holders are subject to the provisions of the North West Game Act and regulations thereunder.

6. Permits Under the Migratory Birds Convention Act: Migratory game, migratory insectivorous or migratory non-game birds or parts thereof or their eggs or nests may be taken, bought, sold, shipped, transported or possessed for scientific purposes, but only on the issue of a permit by the Minister of the Interior, or by any person duly authorized by him. Such permits may, upon application, be granted to recognized museums, or scientific societies, and to any person furnishing written testimonials from two, well-known ornithologists. A return of specimens taken under such a permit shall be made to the Minister of the Interior upon the expiration of the permit.

7. Licenses or permits required by foreign scientists and explorers before entering the North West Territories: An amendment by adding the following paragraph after paragraph (p) of Section 8, of the North West Territories Act has passed the Commons and is now (4<sup>th</sup> June 1925) before the Senate:

- a) The issuing of the licenses or permits to scientists or explorers who wish to enter the said Territories and prescribing of the conditions under which such licenses or permits may be granted in each case, and the penalties for infractions of such conditions.

This paragraph is intended to make it necessary for foreign scientists and explorers to obtain a permit or license from the Commissioner in Council before entering the North West Territories.

I have the honour to be,  
Sir,  
Your Excellency's most obedient, humble servant,  
Byng of Vimy.

## 7. Governor General Lord Byng to British Chargé d'Affaires in United States, Telegram 73A, 12 June 1925

*Documents on Canadian External Relations (DCER) 3 (1919-25) no.542.*

SECRET. With reference to my despatch June 4th, No. 103, Secret, my Ministers represent that the Hon. Charles Stewart, Minister of the Interior, is to-day giving an interview to the press on the subject of the title to the Arctic Islands in the terms noted in the following statement.

Begins. He stated that Canada's northern territory includes the area bounded on the east by a line passing midway between Greenland and Baffin, Devon and Ellesmere Islands to the 60th meridian of longitude, following this meridian to the Pole; and on the west by the 141st meridian of longitude following this meridian to the Pole, as indicated for example by the official map published in 1904, showing "Explorations in Northern Canada". Mr. Stewart emphasized the fact that no new claims are being advanced on Canada's behalf, and that the present policy of the Government was simply a continuation of methods followed for many years past in administering the northern territories of the Dominion. For years, he continued, the Canadian Government has been sending out expeditions and at much expense has established posts on Ellesmere, Devon and other islands.

Mr. Stewart also pointed out that in 1880 Great Britain, by Imperial Order-in-Council transferred the Arctic Archipelago to Canada. The Order provided that "all British territories and possessions in North America and the islands adjacent to such territories and possessions, which are not already included in the Dominion of Canada, should (with the exception of the Colony of Newfoundland and its dependencies) be annexed to and form part of the said Dominion".

So far as discovery goes, Mr. Stewart pointed out that the title of Great Britain and thus of Canada, to the northern islands is beyond question. With few exceptions all the known insular areas in the Canadian Arctic were discovered and formally taken possession of by British commissioned navigators from a century to three-quarters of a century ago, and such acts of possession were formally announced to the world in British Government blue-books. A list of English navigators would include Bylot and Baffin, who discovered Ellesmere Island in 1616, Captain John Ross, R.N., Sir John Franklin, Commander Inglefield, R.N., Captain Nares, R.N., and many others.

In 1670 King Charles II, granted a charter to the Hudson's Bay Company, by virtue of which the company, for two centuries exercised a proprietary government over the area covered by its charter and established posts throughout the Arctic drainage basin of the mainland. Since the sale of its rights and privileges to the British Crown and the transfer thereof to Canada, over a half century ago, the Hudson's Bay Company,

and other fur trading companies have extended their operations to the Arctic Islands and have established posts therein, thus exercising a control over practically the whole of the native population.

This was followed up by occupation and control on the part of Great Britain and Canada as regards the natives both of the Mainland and of the Arctic Islands between Greenland and the 141st Meridian. Canadian Government has sent many expeditions to the archipelago and formal proclamations have been made reaffirming British sovereignty. Police posts and customs houses have been established at various points, detachments of the Royal Canadian Mounted Police make extensive patrols every year, and a general administration of the law and of the game regulations has been maintained. Duty has been collected on whalers' and traders' outfits entering the archipelago. Game licenses have been issued and other acts of administration have been performed. The welfare of the natives is being looked after and an attempt is being made to have them adjust themselves to the whiteman's law as adapted to their special circumstances and conditions. Ends.

My Ministers also indicated that in view of fact that the MacMillan expedition is stated by the press to be leaving Boston on June 17th, and Wiscasset on June 20th, and the further fact that no communication on the subject has yet been received either from the Government of the United States or from the directors of the expedition, it is requested that the attention of the Secretary of State may be drawn to this circumstance, and to the readiness of the Government of Canada, as previously indicated, to furnish all permits required for exploring and scientific expeditions entering the northern territory of Canada, including air permits for flying over Baffin, Ellesmere and the adjoining islands within the boundaries of Canada, and its readiness also to afford any assistance that can be given by the Royal Canadian Mounted Police and other Canadian officers in the North.

BYNG

## 8. Charles Cheney Hyde, Office of the Solicitor, to the Secretary of State, 18 June 1925

National Archives and Record Administration (NARA), Washington, RG 59, CDF 1910-1929, Box 7156, File 800.014/Arctic 6

Dear Mr. Secretary:

The attached note from the British Charge d'Affaires is answered by the proposed letter also attached hereto.

The British note, however, raises a point which either now or later requires decision by this Government on a matter of singular importance. I call it to your attention at this time without intimating, however, that a decision should necessarily precede transmission of the letter addressed to Mr. Chilton.

As a matter of law this Government takes the correct position that no act of a discoverer in the Polar regions, as by a formal taking of possession of previously unknown lands, establishes a basis for a just claim of sovereignty. In a broad sense, Polar regions may be open to assertions of Sovereignty therein by any state which occupies and establishes settlements therein. Thus far, as you know, climatic conditions and other considerations appear to have offered a complete barrier against settlement over large portions of the Polar regions, which are understood to remain practically uninhabited. The purpose of the attached note to the British Chargé thus is partly to ascertain whether there has been in fact any British occupation of specified Polar regions; for it would be logical to apply the normal test to Great Britain in determining whether there is a basis for a British claim of sovereignty which the United States should respect.

The foregoing is, however, merely preliminary to another question which is the purpose of this memorandum. It is this: Can the United States without essentially modifying its own interpretation of the Monroe Doctrine consent to the acquisition of sovereignty by any non-American state over any Polar regions in the Western Hemisphere? As you are aware, the United States asserts the right to oppose the acquisition by any non-American power of any territorial control over American soil by any process. This is true regardless of the will of the people or of the government of the area concerned. It is based primarily on the defensive requirements of the United States. It is possible that in Latin America increasing efforts may be made by particular territorial sovereigns to defy the United States in this regard, and to assert the right as independent sovereigns to permit such lodgment within their limits to non-American states as may be deemed expedient. The question arises, therefore, whether if the United States modifies its position with respect to the Polar regions, it would give an opening wedge which would render more difficult today the assertion of the right of opposition which it now makes.

Again, the question arises whether this Government should make an exception with respect to Canadian explorations and settlements. It is understood that the British Parliament has conceded to Canada all British rights in the northern

unexplored regions. If we were to admit that subject to the requirement calling for occupation and settlement as the basis of the establishment of a right of sovereignty, the Arctic regions in the Western Hemisphere were not subject to acquisition by nations other than Canada and the United States, our problem would be simplified and there would be no apparent violation of the principles of the Monroe Doctrine noted above. Canada is to all intents and purposes an American nation and is already understood to be accorded the rights which perhaps give it the status of a person in international law. By a liberal application of the doctrines of continuity and of constructive occupation, it would not be difficult to harmonize Canadian aggrandisement through the normal process of occupation in the Arctic regions with the Monroe Doctrine. There would thus seem to be a basis for a distinction between Canadian acts assertive of dominion and those made in behalf of European and Asiatic states.

Accordingly, it is suggested that you consider whether the solution of the question noted at the outset would not best be brought about by taking the stand that the Polar regions in the Western Hemisphere which now remain unexplored or unoccupied are open to assertions of claims of sovereignty solely by the United States or Canada, the right of sovereignty to be determined upon which state does in fact settle and occupy the particular region concerned.

C.C.H.

9. Irving N. Linnell, *Canada's Territorial Claims in Arctic Ocean*,  
Department of State, Division of Western European Affairs, 13 July  
1925

NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014/Arctic 8

CANADA'S TERRITORIAL CLAIMS IN ARCTIC OCEAN

It seems to me that no final reply should be made to the attached Notes from the British Embassy concerning Canada's claims to ownership of Arctic lands until the results of the MacMillan Expedition are known, since discoveries of new land by that expedition may affect the position which this country would wish to take.

There are certain general considerations, however, which I think should be borne in mind.

It appears to be the commonly accepted rule of International Law that land to be owned by any country must be occupied by that country. The question which does not appear to have been with any definiteness is, what would constitute an effective occupation of Polar lands, although it would seem reasonable that the same extent of occupation should not be required as in the case of lands better suited to the maintenance of human life.

The second consideration, is the application of the Monroe Doctrine under which this Government has for many years maintained that no new acquisitions or extensions of territory in the Western hemisphere by other than nations of North and South America could be permitted.

It would seem to follow from these considerations that no Polar lands in this hemisphere, no matter by whom they were discovered, could now be allowed to be occupied or owned by any nation of the Eastern hemisphere unless effective occupation had been established in the past and maintained to the present time.

The question would then arise whether Canada can be considered a separate American nation to an extent sufficient to make an occupation of lands in this hemisphere an occupation by an American nation rather than an occupation by Great Britain. In this connection it is noted that Great Britain has, by Act of Parliament, definitely given to Canada all her right and title to the lands in question.

As a practical matter, assuming that Canada is an American nation independent of Great Britain to an extent sufficient to allow her to acquire new lands in the Western hemisphere without infringing the Monroe Doctrine, extensions of territory in the Arctic would seem to be possible only by the United States and Canada, and it seems to me that this Government should be sympathetic with Canada in her efforts to extend the rule of law into the far North and to secure fuller information concerning, and make more use of, the resources of the Arctic lands in the Western Hemisphere.

It would seem to follow that if this country took the position that an acquisition of territory by Canada was an acquisition by Great Britain, the United States, in defense of the Monroe Doctrine, would have to insist that Canada could not now occupy new territories in the Arctic and that her recent extensions of territory by establishment of posts must be abandoned.

Having these considerations in mind and assuming that Canada has a sufficient status, the question as to ownership of Polar lands by Canada would seem to resolve itself into the question of whether Canada has already effectively occupied, or may from time to time so occupy, and maintain occupation of, these lands.

It would greatly assist this Government to come to a determination of the ownership of North Polar lands if it could be informed of the opinion of the Canadian Government as to the exact territories in question which it considers to be effectively occupied, and, in general, what extent of territory the Canadian Government considers is effectively occupied by a post of the Royal Canadian Mounted Police.

**Handwritten marginal note:**

I understand that this question of interpretation of the Monroe Doctrine has arisen in the Department. But hope it may go no further. I can imagine nothing that could lead to more feeling in Canada, bringing about strained relations for years to come. William Castle, Chief of the Division of Western European Affairs.

## 10. Suggested Draft Note to the British Embassy, Department of State, Division of Western European Affairs, 16 September 1925

NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014

I beg to refer to your note No. 627, dated 15 June, 1925, concerning the MacMillan expedition to the Arctic, in which the claim of the Canadian Government to certain Arctic lands and islands was set forth, and to your note No.676 dated 2 July, 1925, which gave particulars of the Royal Canadian Mounted Police posts established therein.

It is the understanding of this Government that Canada claims, as a part of her northern territories, all lands, discovered or undiscovered, lying north of the Canadian mainland and between a line drawn, on the east, through Davis Strait, Baffin Bay, Kennedy Channel, etc., to the 60th degree longitude, thence on that degree to the North Pole, and a line on the west following the 141st degree longitude from the Alaska-Yukon boundary to the North Pole.

The Government of the United States has given careful consideration to these territorial claims and is in full accord and sympathy with the endeavors of the Canadian Government to extend the rule of law and order to, and to develop the resources of, the lands in question.

It believes, however, that the recognized rules of international law require the establishment and maintenance of an effective occupation of news lands as a prerequisite to the acquisition of sovereignty and it is not understood that such occupation has been effected by Canada in some of the islands within the limits referred to above.

### **Attached Note, Irving N. Linnell, Division of Western European Affairs:**

The attached draft of a note to the British Embassy concerning the claims of Canada to Arctic Lands is suggested as a possible form for use in continuing the correspondence on this subject. It would appear, however, that no note should be sent until some further communication has been received from the Canadian authorities, since the present request is for an answer concerning the desire of Canada to issue a licence to the MacMillan expedition and this is no longer a pertinent question.

A note to the British Embassy on this subject would probably begin a controversy which might be avoided by refraining from sending any note until that mission raises the question again.

## 11. Department of State, Division of Western European Affairs, Territorial Sovereignty in the Polar Regions, 6 August 1926

NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014

### TERRITORIAL SOVEREIGNTY IN THE POLAR REGIONS

The monograph herewith presented is based upon a systematic search through the diplomatic archives for the years 1870 to 1906, inclusive, the leads which were found therein having been developed through the relevant consular and miscellaneous archives.

The files from 1906 to 1910 were not completely searched but were drawn upon for those particular cases which were considered of interest. A complete search was made through the pertinent brief sheets covering the archives from 1910 to the present time, all sheets the 800.014 and 800.0144 series having been investigated.

It was found, however, that but a very small part of the mass of material examined was of even casual interest in connection with the subject of the investigation. That part of the archives dealing with Polar Expeditions carried out by American citizens, even when sponsored by this Government, was particularly unenlightening.

While the monograph does not attempt to quote all of the pertinent material found, an effort has been made to select all of that material which present any point of policy upholding international usages or presenting any new of different ideas.

#### PART I.

#### DEVELOPMENT OF INTERNATIONAL USAGES REGARDING TERRITORIAL SOVEREIGNTY THROUGH DISCOVERY, OCCUPATION, ETC.

Lacking an established practice regarding newly discovered lands, certain nations turned, in the earlier years of the Age of Discovery to the Roman Law and sought a solution in the principle of res nullius.

The principle of res nullius was predicated upon the completion of the acquisition of an article and depended upon the ability of the possessor to assume absolute dominion over it. It referred to the first person who appropriated, not necessarily the first person who found, an article.

In the 15<sup>th</sup> and 16<sup>th</sup> centuries the Spanish and Portuguese claims to new lands went so far as to include those still undiscovered, a position strenuously objected to by the English in particular. Henry VII sponsored the Cabots in open defiance to the Spanish pretensions and later, Elizabeth, in reply to Spanish protests against Drake's plundering stated to the Spanish envoy that:

"The Spaniards by their hard dealing against the English, whom they had prohibited Commerce contrary to the Law of Nations, had drawne these

mischiefs upon themselves. That Drake should be forthcoming to answer in Law and right, if he might be convict by any certaine evidence and testimonie to have committed anything against Law and right. That those goods were layed up to that purpose, that satisfaction might be made to the Spaniard, though the Queene had spent a greater summe of money than Drake had brought in against the Rebels, whom the Spaniard had excited in Ireland and England. Moreover, she understood not, why hers and other Princes subjects should be barred from the Indies, which she could not perswade herselfe the Spaniard had any rightful title to by the Byshop of Rome's donation, in whom she acknowledged no prerogative, much less authority in such causes, that he should bind Princes which owe him no obedience, or infeoffe as it were the Spaniard in that New World and invest him with the possession thereof; nor yet by any other title then that the Spaniards had arrived here and there, built Cottages and given names to a River or a Cape; which things cannot purchase any propertie. So as this donation of that which is anothers, which in right is nothing worth, and this imaginary property, cannot let, but that other Princes may trade in those Countries, and without breach of the Law of Nations, transport Colonies thither, where the Spaniards inhabite not, for as much as prescription without possession is little worth; and may also freely navigate that vast Ocean, seeing the use of the Sea and Ayre is common to all. Neither can any title to the Ocean belong to any people, or private man; forasmuch as neither Nature, nor regard of the publike use, permitteth any possession there."

Thus, there was in succeeding centuries a gradual acceptance of the doctrine that the act of discovery alone is insufficient to establish sovereignty; that discovery begets an inchoate right which must be sustained by subsequent acts of sovereignty, preferably effective occupation of the territory.

Claims of discovery are moreover often conflicting and difficult to establish wherefore the inconvenience of vesting rights upon mere discovery has caused more distinct forms of occupation or annexation to be preferred to it.

In modern times the right of sovereignty by discovery is generally recognized as requiring continuous acts of sovereignty or actual settlement before a good title is held to have been acquired.

While the foregoing outlines the general trend of international usage, practice regarding many related points remains less definitely established. Some unanswered questions are:

What constitutes effective occupation?

When does a claim to title through mere discovery lapse?

How great an extent of land may be considered to be occupied by a single colony or military post?

To what extent does an unratified act of annexation by a discoverer vest an inchoate title of sovereignty in the Government of which he is a national?

These questions have thus far been settled as expediency dictated, and are insufficient in number and constancy of decision to form a background of fixed policies.

The British, Canadian, and Russian Governments in appropriating uninhabited and underexplored sectors in the Arctic and Antarctic regions have raised anew the question regarding the validity of title claimed over unknown lands, and project that question into regions where effective occupation is in great part impossible to civilization as now constituted.

### OPINIONS OF STUDENTS OF INTERNATIONAL LAW.<sup>3</sup>

#### Formal annexation and occupation a requisite to title.

On the whole, some kind of formal annexation of new territory is now regarded as the best source of title. Prior discovery, if established, may, however, give legal importance to acts and signs otherwise ambiguous or without validity. All discovery is now disregarded unless it be followed by acts showing an intention to hold the country, the most conclusive act being the planting of some civil or military settlement. (Maine, International Law, page 67).

In the Oregon case, Great Britain refused to acknowledge the claim of unratified discovery and occupation by private individuals. (Moore, Vol. I, Sec. 90).

“Formal annexation, without more, is not therefore a root to title, though the fact of such previous occupation may lend a different color to later acts, which if they stood alone, would be indifferent or indecisive.” (Smith, International Law, 5th Ed. p. 102)

When territory has been duly annexed, and the fact has either been published or has been recorded by monuments or inscriptions on the spot, a good title is always held to have been acquired as against a state making settlements within such time as allowing for accidental circumstances, or moderate negligence, might elapse before a force or colony were sent out to some part of the land intended to be occupied; but that in the course of a few years the presumption of permanent intention afforded by such acts has died away, if they stood alone, and that more continuous acts or actual settlement by another power became stronger root to title. (Hall, International Law, 7th Ed. p. 105)

#### Title by possession or occupation.

The Delagoa Bay dispute between England and Portugal established the principle that, when the power to control is never lost, occasional acts of sovereignty are sufficient to keep alive a title by occupation. (Smith, International Law, p. 104)

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<sup>3</sup> A very complete resume of opinions will be found in file 861.0144/56, in view of which no attempt has been made completely to cover the ground herein.

It is generally conceded by students of international law that occupation of an island in order to maintain sovereignty thereover, does not require more than one or two portions of settlement (although it does not appear that the United States has ever enunciated a policy in this regard. It has been the policy of the United States, however, that the hinterland of a colonized coastline is included within the sovereignty of the colonized portion).

## PART II. POLICY OF THE UNITED STATES

### Title by right of prior discovery.

In general the United States may be said to have maintained a passive attitude in the presence of the extension of territorial sovereignty by other nations to new or previously unclaimed lands, excepting where some very special and active interest has directed a contrary policy.

The question with Russia over Russian claims on this continent leading to the treaty of April 17, 1824, the controversy with Great Britain over the Oregon Territory, and other territorial disputes in the earlier days of the functioning of the United States Government give opportunity for occasional glimpses of its earlier policies.

It was held that discovery gave prior right of occupation, but that such occupation must follow within a reasonable period of time. (Mr. Gallatin to Mr. Addington, Dec. 19, 1826, For. Rel. VI 667; also Mr. Fish to Mr. Preston, Dec. 31, 1872, Notes to Haiti, I. 125,126, Moore I, p. 260).

However, on October 9, 1842 Mr. Upshur, the Secretary of State, instructed the Minister in London to inform the British Government that:

How far the mere discovery of a territory which is either unsettled, or settled only by savages, gives a right to it, is a question which neither the law nor the usages of nations has yet definitely settled. The opinions of mankind upon this point have undergone very great changes with the progress of knowledge and civilization. Yet it will scarcely be denied that rights acquired by the general consent of civilized nations, even under the erroneous views of an unenlightened age, are protected against the changes of opinion resulting merely from the more liberal, or the more just, views of after times. The right of nations to countries discovered in the sixteenth century is to be determined by the law of nations as understood at that time, and not by the improved and enlightened opinion of three centuries later."

and continuing he stated that:

"The ground taken by the British Government that a discovery made by private individual in the prosecution of a private enterprise gives no right, cannot be allowed. There is nothing to support it, either in the reason of the case or in the law and usage of nations. To say the least of it, if a discovery so made confers

no right, it prevents any other nation from acquiring a right by subsequent discovery, although made under the authority of Government, and with an express view to that object. in no just acceptance of the term can a country be said to be 'discovered,' after its existence has been previously ascertained by actual sight. This is a mere question of fact, which a private person can settle as well as a public agent.

"Now, mere lapse of time, independent of legislation or positive agreement, cannot of itself either give or destroy title. It gives title only so far as it creates a presumption, equivalent to proof that a title exists, derived from higher sources. It destroys title only because it creates a like presumption that, whatever the title may have been, it has been transferred or abandoned." (Wharton I, page 5)

In a communication from Mr. Fish, Secretary of State, to Mr. Preston, on December 31, 1872, (Wharton I, page 7) it appears that "discovery alone is not enough to give dominion and jurisdiction to the sovereign or Government of the nation to which the discover belongs; such discovery must be followed by possession."

In more recent times this policy was reiterated by Secretary Hughes in a note to the Norwegian Legation on April 2, 1924, in which he stated:

"In my opinion rights similar to those which early centuries were based upon the acts of a discoverer followed by occupation or settlement consummated at long and uncertain periods thereafter, are not capable of being acquired at the present time. Today, if an explorer is able to ascertain the existence of lands still unknown to civilization, his act of so-called discovery, coupled with a formal taking of possession would have no significance, save as he may herald the advent of the settler; and where for climatic or other reasons actual settlement would be an impossibility, as in the case of the Polar regions, such conduct on his part would afford fail support for a reasonable claim of sovereignty. I am therefore compelled to state, without now averting to other considerations, that this Government cannot admit that such taking of possession as a discoverer...could establish the basis of the rights of sovereignty in the Polar regions."

#### Sovereignty by Proclamation or Occupation

It would appear from the foregoing that the United States is committed to a policy of the right of title through effective occupation. How far this policy led at one time<sup>4</sup> is indicated in an instruction from Mr. Foster to the American Minister in London, who in his No. 951 of November 5, 1892 instructed the Minister to inform the British Government that

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<sup>4</sup> Following the occupation of the Gilbert Islands, and the declaration of a protectorate thereover, by the British.

“As I have already said, the germs of civilization were planted in the Gilbert Group by the zealous endeavor of American citizens more than half a century ago. The result of this work carried on by American citizens and money, has been, in fact, to change the naked barbarism of the island natives into enlightened communities and to lay the foundations of the trade and commerce which has given those islands importance in the eyes of Europe today. Wrought by the agents of a colonising power, this development would have naturally led to a paramount claim to protection, control, or annexation, as policy might dictate. This country, however, has slept upon its rights to reap the benefits of the development produced by the efforts of its citizens; but it cannot forego its inalienable privilege to protect its citizens in the vested rights they have built up by half a century of sacrifice and Christian endeavor.

“This Government believes that it has a right to expect that the rights and interests of the American citizens established in the Gilbert Islands will be as fully respected and confirmed under her Majesty’s Protectorate as they could have been had the United States accepted the office of protection not long since solicited by the rulers of those Islands.”

Although specifically requested by the Hawaiian Government to obtain the abstention of the European Powers from any further interference with the independence of the Pacific Islands and groups (see Hawaii notes, March 15, 1886, Mr. Carter to the Secretary of State), no action appears to have been taken. A memorandum appears attached to the correspondence which reads in part “File, no case appearing for our action”.

The Department took no action upon receipt of Legation despatch No. 219 of November 19, 1888 from Hawaii, informing of the establishment of a British Protectorate over Cooks Islands, other than to forward a copy of the Minister’s despatch to the Secretary of the Navy “for his information”. (See instruction No. 112 to Hawaii, dated January 3, 1889).

In an instruction to Spain (No. 25, February 11, 1889) the Department recited certain pertinent statements received from the United States Consul at Manila regarding public discussions then existing of the possibility of the abandonment by Spain of the Caroline Islands.

The following appears in the despatch:

“The abandonment correspondence on the subject, on file in your Legation shows that the only interest this Government can have in the administrative control of the Caroline group, arises from the old-established and practically vested rights of American citizens in those islands. To their enterprise and devoted labors through a long series of years, these islands owe much of what they possess of modern enlightenment and progress. When the controversy occurred with Germany as to the title to the islands, it was thought proper to acquaint both the contestants with our expectations that American rights therein should be

scrupulously respected, and efficiently protected; and gratifying assurances were received from both Germany and Spain, that our view was acceptable.”

It is interesting to note that the Department stated to the Spanish Legation in Washington, upon the settlement of the question between Germany and Spain regarding the sovereignty of the Caroline Islands, that this Government has never contested the Spanish claim to sovereignty. The German Government claimed that Spain had never effectively occupied the islands and there is evident reason to believe that a genuinely effective occupation never was accomplished.

### PART III

#### A.

#### Attitude in Past of Nations Towards Polar Lands.

From the time of the specially organized polar expeditions of the middle nineteenth century until 1924, there appears no utterance on the party of any Secretary of State or any communication emanating from the Department, indicating that the United States Government lays claim to or objects to any other Government laying claim to any Polar lands<sup>5</sup>, whether discovered originally, or later explored, by Americans, even when the expeditions of discovery or exploration have been under the auspices of this Government. During that period, American citizens played important roles in Polar expeditions whether for discovery or scientific research. The expeditions were carried out more in spirit of adventure or of the romance of a successful journey to one of the Poles, or as a means of scientific research, rather than for the possible acquisition of territory for political or other reasons. This attitude of complacency in regard to regions so remote (in popular esteem) will no doubt be easily understood if it is remembered that only in 1867 did we acquire our first territorial possession outside what is commonly referred to as “Continental United States” and not until 1898 did the United States acquire any possessions outside the North American continent or adjacent islands.

On April 2, 1924 Secretary Hughes informed the Norwegian Government (see page 9) that the taking of possession as a discoverer could not be admitted by this Government to establish the basis of the rights of sovereignty in the Polar regions.

European Governments were, however, more active in extending their sovereignty within the Arctic Circle. Denmark early in the nineteenth century assumed the previous Norwegian title to Greenland, while later various claims were put forth by Sweden, Norway, and other Governments for sovereignty over the Spitzbergen Archipelago, which had been occupied intermittently by the nationals of various countries during several centuries.

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<sup>5</sup> Excepting, of course, Alaska, which lies partly within the Arctic Circle.

In regard to these various claims, it is of particular interest, however, to note that in each case the claim to sovereignty was coupled with an actual occupation by nationals of the claiming Governments, of some part of the territory at a period not remote from the time of the claim, and that some active economic interest was invariably the motive for occupation.

With the exception of the two cases mentioned, and that of Canada which is discussed elsewhere, the explorers or discoverers of new Polar regions, following the custom of centuries, perfunctorily claimed the new lands in the names of their respective sovereigns but no efforts were made to follow up the original set of annexation by possession which might have rendered such inchoate claims finally effective.

B.

Recently Changed Attitude and Reasons Therefor.

Within very recent years the doctrine of prior discovery and/or occupation has suddenly been thrust aside by Canada, Great Britain and Russia, and an exaggerated doctrine of contiguity invoked, paralleling in a sense the “division of the world” between Spain and Portugal in the late fifteenth century, which act, as has been previously noted, brought forth no uncertain protests from England. The analogy between the ancient and modern doctrines is found in the declaration of sovereignty over as yet unknown lands and unexplored territory.

For some years past it has been predicted that the discoverer and explorer of the past century with his difficulties of travel has given away to the air pilot. The academic mootings as to whether or not undiscovered lands lie within the unexplored areas of the north polar region have given way in navel, military and economic circles to discussions of probable landing fields and the use of trans-polar or trans-arctic routes in air transportation.

Within the space of comparatively few years more than one third of the area within the Antarctic Circle and two thirds of that within the Arctic Circle have been annexed by proclamation of various foreign Governments, that is, one half of the total area of the polar regions has been annexed without any physical act of occupation to perfect title.

The method has been the same in each case<sup>6</sup>: the meridians of the westernmost and easternmost boundaries of previously owned lands have been projected north or south, as the case may have been, to the respective poles, and the land contained in the areas of the resultant sectors proclaimed national territory.

No economic necessity of immediate importance has been evident as a motive for the annexations, nor has any been put forward to explain the acts. Likewise no pressing administrative problems have appeared as a basis, although such have been

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<sup>6</sup> In the Arctic

offered as a reason. The reasons would therefore appear to lie in political considerations, sponsored probably by visions of potential values given to as yet undiscovered or, with presently known methods, unavailable economic resources. Protection of previously existing boundaries has no doubt in some cases played its part in the expansion, while “land hunger” may be suspicioned to have been an ever present motive.

(see map)

### C.

#### Canadian Claims

“From and after the first day of September 1880, all British territories and Possessions in North America, not already included within the Dominion of Canada, and all Islands adjacent to any such Territory or Possessions, shall (with the exception of the Colony of Newfoundland and its dependencies) become and be annexed to and from part of the said Dominion of Canada.” (Imperial Order in Council, July 31, 1880, see British State Papers).

An unverified statement appearing in the British “NATURE” for August 29, 1925 indicates that in 1886 Canada applied to Arctic lands the principle that they should be administered by the most closely adjacent civilized Government.

By an Order in Council of October 2, 1895 (Statutes of Canada, 7th Parliament, 59th Victoria, Vol. 1 - 2, 1896 p. xlvii) the District of Franklin was defined so as to include within the Canadian territorial boundaries all known land north of continental Canada, and west of Greenland as far as longitude 125° 30' west. (also see file 842.014/18).

On December 18, 1897 the District of Franklin (Order in Council, December 18, 1897, Canada Gazette, No. xxxi, p. 2613) was defined as follows:

“The District of Franklin (situated inside of the grey border on the map herewith<sup>7</sup>) comprising Melville and Boothia Peninsulas, Baffin, North Devon, Ellesmere, Grant; North Somerset, Prince of Wales, Victoria, Wollaston, Prince Albert and Banks Lands, the Perry Islands and all those lands and islands comprised between the one hundred and forty first meridian<sup>8</sup> of longitude west of Greenwich on the west and Davis Strait, Baffin Bay, Smith Sound, Kennedy Channel and Robeson Channel on the east which are not included in any other provisional district.”

By an Order in Council dated March 16, 1918 (file 842.014/6 with map attached thereto) the Order of December 18, 1897 was revoked, however, the boundary of the

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<sup>7</sup> It does not appear that the Department has ever been in possession of such a map.

<sup>8</sup> i.e. The Canadian-Alaskan boundary. The extension of territory from 125° 30' west to 141° west longitude should be noted. Underlined by writer.

District of Franklin was reaffirmed to include all lands lying east of the 141st West Meridian, and west of the Straits and Bays mentioned in the previous Order.

On June 19, 1925 the Department addressed the British Government to learn what had been accomplished by the Canadian Government toward effective occupation by the northern lands claimed by it (file 810.014). A reply was received dated July 2, 1925 in which a "mounted police post" is described and a list given of those established on Baffin, Devon and Ellesmere Islands. The duties of the Royal Mounted Police in the Arctic regions are outlined in that communication. The northernmost posts are stated to be Craig Harbour (South of the island (Ellesmere)) and Rice's Strait (near Cape Sabine). The Rice's Strait post is explained to be a provision depot only, pending the arrival of buildings for a permanent post and personnel. (Rice Strait post: Latitude 78° 46' on eastern shore of Ellesmere Island). In his article "Political Rights in the Arctic" (See Bibliography, page c). David H. Miller states that the Canadian budget for Government of the Northwest Territories was but \$4,000 in 1920 and over \$300,000 in 1924 and "doubtless is still larger this year" (1925). This article is likewise responsible for the statement that the Canadian Government instructed Stefansson in 1913 to reaffirm any "British" rights at points which his expedition might touch; also that the Danish Government was informed in 1921 by Canada that any discovery by Rasmussen would not affect Canadian claims.

The embryonic Canadian Claim to Wrangel Island is mentioned under "Russian Claims".

#### Macmillan Expedition

The recent history of the MacMillan expedition may be briefly stated as follows:

The Canadian Government on June 15, 1925 "volunteered" to this Government to furnish a license to MacMillan "for the purpose of exploring and flying over Baffin, Ellesmere, Axel Heiberg and certain other islands within the northern territories of the Dominion".

The Department replied that MacMillan did not intend to fly over "Baffin Island" but that he would proceed to Etah, Greenland from whence he would fly over Ellesmere Island to Axel Heiberg Land where he would establish a base. (810.014 Polar Regions 1).

Subsequently the MacMillan party encountered a Canadian patrol at Etah, Greenland and misunderstandings arose regarding whether or not MacMillan had obtained a Canadian license to fly over Ellesmere Island. The Canadian Government attempted a discussion of the license question with the Department (031.11 M 221), however the discussion was avoided by a non-committal reply.

D.

British Claims

By an Act of Parliament of September 16, 1887 the British Government enabled “Her Majesty to provide for the Government of her Possessions acquired by Settlement”.

By Letters Patent of July 21, 1908, the British Government declared to be part of its Dominions, that territory known as Graham’s Land lying south of the 50th parallel South Latitude, and between the 20th and 80th degrees of West Longitude. (British State Papers. Vol. 101, page 76).

By and Order in Council of July 30, 1923 (which refers specifically to the above mentioned Act of September 16, 1887) all lands lying south of the 60th degree of South Latitude and comprised between the 160th degree of East Longitude and the 150th degree of West Longitude, were declared to be a British settlement, named the Ross Dependency, and placed under Dominion of New Zealand. (London GAZETTE, July 31, 1923, p. 5211).

The Department is not informed of the extent to which occupation of these regions may have been effected by the British, or of any plans for making such occupation effective.

There has been no communication on the part of this Government with the British or any other Government relative to the British Antarctic claims.

Christmas Island – A Precedent Where the British Government Recognized Title  
By Occupation as Against Title by Discovery.

In a note from the British Legation to the Department dated January 29, 1879, it was set forth that Christmas Island was discovered by the British in 1777 and that in 1865 certain British subjects made application to their Government for the lease of that island amongst certain other islands for the purpose of the export of guano. An investigation carried out by the British Government led to the conclusion that it might be “considered as accruing to the Crown”. A license was therefore issued but was not used and a new license was granted on June 9, 1871 for a term of nine years. In July, 1872 the license discovered upon his arrival at Christmas Island that a few days previously it had been taken formal possession of by the U.S.S. NARRAGANSETT, as was evidenced by a notice affixed on the shore. The island was at that time in the occupation of three persons employed by a Mr. Williams of Honolulu (It is not stated whether Mr. Williams or the three men were American citizens).

The British Government “although it is considered that it had exercised sufficient possessorial rights to support its claim to the sovereignty of the island” cancelled the lease previously issued by it. The British Government “now learns that Mr. Williams has given up the occupation of the island” but before issuing a new license to British subjects it is desired to know “with a view to avoiding any questions as to the right of

sovereignty over Christmas Island, whether the Government of the United States has finally abandoned and withdrawn its claim”.

E.

Russian Claims

In September 1916 the Imperial Russian Government notified the allied and friendly Governments, including the United States, that Russia considered the following islands: General Wilkitze’s Island, Emperor Nicolas’ two islands, Tsesarevich Alexei, Starokadomski, Novopashemi, Henrietta, Jeanette, Bennett, Herold and Quedineie, together with Wrangel and others lying near the Asiatic shore of Russia, to be Russian territory.

It does not appear that the United States Government replied to the above notification.

On November 12, 1924 the Union of the Socialistic Sovereign Republics confirmed, in a telegram to this Government, the position taken by the Czarist Government in 1916 and, in addition, referred to the Russian-United States Treaty of 1867 which delineated the territory of Alaska on the western boundary by a line of longitude proceeding north (from Bering Strait) on the parallel of 65° 30’, without limitation, until it loses itself in the frozen ocean. The Russian telegram states that the United States undertook to prefer no claim to territory west of that boundary. No reply was made to this notification.

On April 15, 1926 the U.S.S.R. proclaimed dominion over all territory lying between longitudes 32 deg. 4 min. 35 sec. and 168d. 49m. 30sec. west, and north of “the coast of the Union”, to the North Pole.

The only action thus far taken upon the Russian claim has been in the nature of conversations between the Norwegian Minister and the Department (file 861.014/74, 75) in which it was indicated that the Department would maintain the policy enunciated by Secretary Hughes regarding Amundsen’s discoveries (page 9).

Wrangel Island.

An extensive file exists in the Department’s archives on the question of the sovereignty of Wrangel Island.

The existence of this island was first known to a Russian was later seen by a Britisher, still later by an American, and only in 1881 was any landing of which any authentic record exists made thereon. This was by an American naval officer during an official expedition, at which time possession was taken in the name of the United States. It does not appear that Congress ever ratified the possession.

Subsequently Vilhjalmur Stefansson occupied the island (1921) with a small company and it is alleged that a Canadian member of the company immediately took possession in the name of Canada, also that the American members of the party declared possession on behalf of the United States.

A public statement on May 12, 1922 by the Canadian Minister of Militia and Defense before the Canadian House of Commons, that Canada “has” Wrangel Island and proposes to retain it, followed Stefansson’s activities.

British and Canadian claims were not pressed however, and the United States Government refrained from any act or utterance when the Russian Government later deported from the island a party of American esquimaux sent to hold possession by an Alaskan Company to whom Stefansson sold his “rights”.

There appears nothing in the archives to substantiate the Soviet statement that the United States has undertaken to prefer no claim to territory west of the Alaskan boundary delineation.

#### Herald Island

Herald Island lies within the Arctic sector claimed by Russia and is situation close to the meridian marking the eastern boundary of that sector.

It was discovered by a British naval officer in 1849 and taken possession of in the name of Queen Victoria. (Geog. Jour. V. 42, 1923, p. 441-442). It has never been occupied effectively by any Government.

It is specifically mentioned in the list of islands claimed by the Russian Government on November 13, 1916 (page 28).

On September 27, 1924 one P. P. Land took possession of the island in the name of the United States (file 861.014/71). This has never been ratified and the Department on May 4, 1926 stated (file 861.014/70) that it “is not prepared at this time to make any statement with respect to the international status of Herald Island”.

#### F.

#### French Claims

The Journal Officiel de la Republique Française of March 29, 1924, carries a Decree dated March 27, 1924, to the effect that mining, hunting and fishing rights in the territorial waters of the Crozet Archipelago and of “Adelie or Wilkes” Land are reserved to the French Government.

The Crozet Islands were discovered by Marion du Fresne, a Frenchman, in 1772. Wilkes Land was discovered by Lieutenant Charles Wilkes, during an official expedition of the United States Navy in 1840. It does not appear that any of these lands are inhabited.

By a Decree of November 21, 1924, the islands of Saint Paul and Amsterdam, the Kerguelen and Crozet Archipelagos, and Adelie Land, were placed under the jurisdiction of the Government of Madagascar. (Journal Officiel de Madagascar et Dépendances, January 24, 1925). In submitting the Decree for signature the Minister of Colonies stated that France has long since acquired sovereign rights in these archipelagos and the portion of the Antarctic Continent discovered by French mariners; that scientific missions had found these lands offer “very precious”

resources, and that preliminary fishing and hunting enterprises have proved successful.

By a subsequent Decree of December 30, 1924, those lands mentioned in the Decree of November 21, 1924, were declared to be a national park "for the preservation of species of all sorts which frequent" the lands.

The extent of the park upon the Antarctic mainland is described as the coast between Doigt-de-Sainte-Anne and Port-aux-Lapins, to a depth of 1,000 meters extending from high water mark. (Journal Officiel, January 3, 1925).

The American Embassy in Paris reported (Despatch No. 4665, December 19, 1924, file 851.0144/1) that on April 16, 1912 the French Government drew the attention of the British Embassy in Paris to "the fact that Dumont-d'Urville had taken possession in the form in use at the time, of that portion of Wilkes Land known as Adelie Land. This claim to sovereignty has also been published at various times, especially in the Sydney Herald, (Australia), of March 18, 1840, also in the Moniteur. (the Journal Officiel of the time); in the Annales Maritimes et Coloniales and in a brochure entitled 'Voyage au Pole Sud', published by order of Louis-Philippe."

#### Navy Department considers Wilkes Land to be under Sovereignty of United States

The Decree of March 27, 1924 was informally brought to the attention of the Departments of War and Navy (Chief Letters of October 20, 1924). On December 12, 1924 the Director of Naval Intelligence replied, in part, that "this Department is generally interested in the sovereignty of outlying areas on which American sovereignty has been established, particularly in view of the possibility of the discovery and development of fuel and other deposits".

#### Department of State reluctant to declare Sovereignty over Wilkes Land

In a letter of February 2, 1924 the Secretary of the Republican Publicity Association requested to be informed whether "the United States has valid claim to Wilkes Land by right of discovery, whether that claim has every been proclaimed, and if not, what the objections may be in law or policy to annexing the territory to this country". (File 811.014/99, 101).

The Department replied by referring to an Act of Congress, approved May 14, 1836; one of August 26, 1842 (Statutes at Large, Vol. 5, p. 534); a Resolution of February 20, 1845 (Statutes at Large, Vol. 5, p. 797), and a Resolution of July 15, 1846 (Statutes at Large, Vol. 9, p. 111) providing for the expedition undertaken by lieutenant Wilkes, during the course of which Palmer Land and Wilkes Land were discovered, and the subsequent publication of the account of the discoveries.

Further reference was made to the Navy General Order of June 22, 1838 which included the following statement:

“The objects which it is destined to promote being altogether scientific and useful, intended for the benefit equally of the United States, and of all commercial nations of the world.”

Continuing, the Department stated that it is of the opinion that the “discovery of lands unknown to civilization, even coupled with a formal taking of possession, does not support a valid claim of sovereignty unless the discovery is followed by an actual settlement of the discovered country. In the absence of an Act of Congress assertative in a domestic sense of dominion over Wilkes Land this Department would be reluctant to declare that the United States possessed a right of sovereignty over that territory”.

The terms Adelie Land and Wilkes Land do not appear to represent precise areas of territory, excepting that Wilkes Land is defined by the American Geographical Society as extending between 96 and 155 degrees of East Longitude.

The Department has taken no action upon the French claim and thus far refrained from any discussion with the French Government in reference thereto.

#### G. Norwegian Claims.

The Spitsbergen controversy, settled by the Treaty signed at Paris February 9, 1920, offers an interesting study, but since it now appears to be a closed question it will not be discussed in this memorandum.

##### Bibliography:

An extensive I<sup>B</sup> file in the Department.

Int. Law Journal October 1917.

It may be noted that the area of the Spitzbergen archipelago as assigned to Norway by the above mentioned treaty extends between meridians 10° and 55° East, and Parallels 74° and 81° North, while the Soviet Decree of April 15, 1926 establishes the Western boundary of the Russian Arctic sector on a line of longitude at 32°, 4', 35" East, thus overlapping the Norwegian area by 2°, 55', 25".

Although the island of Axel Heiberg lies within the Canadian “Arctic Sector” designated by the Order in Council of December 18, 1897 (page 20), it is understood that Norway has indicated a claim to the island through its discovery by Sverdrup in 1900. It was explored by Peary a few years later, and no effort has ever been made by any nation to occupy the island. It was on this island that MacMillan expected to establish his base in 1925, the Canadian Government offering to furnish a license to explore and fly over it.

Jan Mayen

(Consult Department file 857.014/2 to 29).

The question of the sovereignty of the Island Jan Mayen appears first to have come to the attention of the Department in a note from the Norwegian Legation dated February 9, 1920, in which it was stated that a Norwegian citizen, Christoffer Evensen Ruud had "occupied the island Jan Mayen ... August 1917, and that he intended to prospect for ore and minerals, to establish a station for catch of animals, to start seal-oil manufacturing and ore washing" and had "asked that his occupation of the Island be notified to the United States Government".

On April 21, 1922, the Norwegian Legation informed the Department that one Hagbard Ekeroll had reported to the Norwegian Foreign Office that he had annexed in the name of the Norwegian Meteorological Institute, with a view to permanent occupation, "A territory of the unowned and up until now uninhabited Island of Jan Mayen". The note further states that the whole of the annexed territory had been occupied as from November 12, 1921, and that during 1921 a wireless station was erected on the territory. It does not appear that this Department acknowledged the note in question. However, the Legation at Christiania was instructed on November 9, 1922, as follows:

"The question of the nationality of this Island has recently been considered by the Department, but the information in its possession has not permitted a definite decision in the matter. You are accordingly requisitioned to make discreet inquiries whether the Norwegian Government in fact claims the ownership of the Island, and if so, you will submit to the Department, if possible, a complete statement of the facts on which its claim to ownership is based."

With its No. 244 of July 5, 1923, the American Legation at Christiania transmitted a copy of a note received from the Norwegian Foreign Office dated June 30, 1923, in the translation of which the following statements appear:

"In conformity with the general view relative to the international status of the Island the Norwegian Government is of the opinion that it should be considered as terra nullius. It has so stated in a note of April 21, 1922, communicated to the Secretary of State of the United States through the Norwegian Minister at Washington, in connection with the occupation of Jan Mayen in the Fall of 1921 by the Norwegian Government Institution: The Norwegian Meteorological Institute. It has also been expressed its views in its notes to other Governments on that occasion.

"On the other hand the Norwegian Government assumes that there cannot arise any question of the annexation of the Island by any other Power, inasmuch as no other country has even approximately as great interests to safeguard there as Norway."

These interests are then stated to be the fact that the Norwegian Meteorological Institute has established a wireless station on the Island and that warnings of storms

are transmitted from that station; also that the Island possesses great value for Norwegian whalers in their operations.

In a subsequent despatch No. 489 of September 23, 1924, the Legation at Christiania informed the Department of a report to the effect that said Ruud had sold his alleged rights in the Island of Jan Mayen to an American citizen and that thenceforth the Island was to be considered as American, according to the view of Mr. Ruud and the American purchaser. From enclosures submitted with that despatch it appears (note to Foreign Office dated September 15, 1924) that the Norwegian Government had heard a similar report whereupon the following statement was made to the American Legation by the Minister for Foreign Affairs:

“I have not verified this report, but I beg to point out, extuto, that the main portion of said Island, on which a wireless station for weather forecasting was erected in the Summer and Fall of 1921, has been annexed, with a view to permanent occupation, by Engineer Akerold, on behalf of the Norwegian Meteorological Institute, a Norwegian Government Institution which claims that the ’occupation is effective relative to all other occupations. I also wish to call attention to the fact that some time ago the Norwegian Minister at Washington notified your Government of this annexation.”

On May 17, 1926, the Norwegian Legation informed the Department that “The Norwegian Meteorological Institute has, with a view to permanent occupation, extended its annexation on the Arctic Island Jan Mayen so that the annexation of the Institute is now comprising the entire Island of Jan Mayen.”

## H.

### Monroe Doctrine

To what extent the Monroe Doctrine might be considered as applying to the acquisition of Polar territory is an interesting question which has recently been mentioned by private writers.

The British claim to the Antarctic lands know by them as the Falkland Dependency covers, with the exception of a small area on the western boundary, all of and more than the sector produced by projecting the extremes of longitude of the South American continent to the South Pole. (Map, page 25a)

The entire North American continent with the exception of Alaska and a small section of the eastern part of Labrador lies between the meridians of longitude bounding the Arctic sector claimed by the Canadians. (Map page 25B)

Upon what theories are these projections of sovereignty based? Territorial propinquity? Contiguity? Discovery? Occupation? Formal annexation?

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<sup>9</sup> Underlined by present writer.

Only that last theory can be applied as yet to the claims of the British, Canadian, Russian and French as a group. (the French claim could not be affected by the Monroe Doctrine as the lands lie entirely within the Eastern Hemisphere).

It would be difficult to reach a conclusion regarding the operation of the Monroe Doctrine in favor of or against Canadian acquisition of lands in the Western Hemisphere so long as the operation of the Monroe Doctrine in general relation to Canada itself remains as vague as it now is in actuality.

It may be remarked also that the Canadian claim to the Arctic Sector, while founded upon a rather backhanded degree of annexation, is supported by the doctrines of contiguity or propinquity, in part by discovery, and what appears to be an early stage of effective northward occupation of the eastern fringe of the territory which is claimed.

Regarding the British claims, however, the entire area lies in the Western hemisphere, in fact the meridians of longitude demarcating the Eastern and Western Hemispheres are used to bound the lands claimed by the British.

Original discovery and exploration in the areas claimed have been predominately British.

Thus the British claim founded upon formal annexation might be supported by the theory of original discovery, although at a remote date and unsupported by acts of sovereignty until recently. Contiguity or propinquity can scarcely be invoked, in fact, if these theories are accepted the Falkland Dependency would appear to fall principally under the dominion of Brazil, Chile and the Argentine.

To what extent does the British annexation of lands in the Western Hemisphere conflict, with the Monroe Doctrine, particularly regarding those lands lying below the South American continent; if based upon discoveries of many decades since, and unsupported by acts of possession within a reasonable period after discovery?

If this new theory of projection of sovereignty into unexplored territories, by means of sectors, is to be accepted (the Canadian and Russian precedents to be accepted as basic), do not the Antarctic sectors lying between 30° and 80° West Longitude properly fall to the corresponding South American Republics?

Should the United States declare any lands lying within the Arctic sector corresponding to Alaska to be American territory?

The claim now put forward by the Russians to an Arctic sector includes an area lying between meridians 160° and 168° 49' 30" West Longitude, lying within the Western Hemisphere. The sector includes Wrangel and Herald Islands.

Under the terms of the treaty with Denmark for the purchase of the Virgin Islands the United States has agreed to voice no objection to Denmark's territorial claims in Greenland. Would the United States therefore acquiesce in a "Danish sector" projected between the 20th and 60th West Meridians?

These are but a few of the questions which appear in the drive for annexation by "sectors", wherein policies peculiar to the Western Hemisphere may be brought into play.

## CONCLUSION

What shall be the attitude of the United States in view of the rapid absorption of polar areas by other powers? Shall it remain inert, and allow the foreign expansion to become finally recognized, or possibly to proceed; shall an effort be made to forestall further absorption, including possibly the relinquishment of claims which have not, or through physical reasons cannot, become effective by occupation, or shall it adopt the policy of "sector projection" and declare sovereignty over the area between 141° and 168° 49' 30" west longitude, that is, the sector lying north of Alaska?

With the present organization of civilization the polar areas are not susceptible of the same "effective occupation" as are more temperate areas. Failure of the United States to protest against the proclamation by other powers of sovereignty over such areas, with or without such effective occupation as may be possible in the polar latitudes, would remain a vantage point for those powers in any possible future discussions. On the other hand the burden of "effectively occupying" the areas annexed falls upon the proclaiming Governments, as does the modification of any generally accepted ideas regarding the nature of "effective occupation". However, the failure of international usage to establish a norm for "effective occupation" operates to the advantage of the countries claiming the areas that there is no clearly specified or decisive manner in which "occupation" becomes "effective", even in the temperate regions. If occasional administrative acts and the retention of power to control (see page 6) may be considered sufficient then any presently existing claims may be validated through lapse of time without great effort and with little or no colonization.

Lack of knowledge of any steps taken by England, Russia or France towards occupying the areas over which they have proclaimed sovereignty prevents a proper consideration of the situation. So far as the Department is aware, Canada is the only nation attempting anything approaching "effective occupation" and that only by a slender line of patrol posts extending along the eastern boundary of the territory claimed. However, it should be noted that the line of occupation controls the entrance offering the least natural physical resistance, to the remainder of the Canadian sector. Canada has already attempted to use that line of occupation as an inhibition to further exploration in the sector, excepting with Canadian permission. (See page 22).

The strongest argument which may be brought at present against the system of "sector projection" appears to be that it disposes of large expanses of unexplored and possibly as yet undiscovered lands. The theory of sovereignty over lands not yet discovered is still less tenable than the theory of lands discovered and never attempted to be occupied, although proclamations of sovereignty thereover may have been made.

It is believed advisable to obtain as soon as possible such information as may be available regarding the activities of various nations in effectively occupying the areas

claimed by them. In this regard it might be advisable to investigate as discreetly as possible in order not to disturb any present tranquility of occupational activity.

Whether or not the United States should proclaim sovereignty over the Alaskan sector depends entirely upon general policy regarding polar territory. Any such declaration would alienate the right to object to any subsequent projection of sectors by other powers and would be a tacit acknowledgement of the present Russian and Canadian claims and to part of the British Antarctic claims. Conversely, an objection on the part of this Government to the theory of contiguous sectors would effectually estop any United States claim to the sector lying north of Alaska.

It would appear that a careful evaluation of values is necessary before any decision can properly be reached. As a preliminary to further consideration it is suggested that instructions be sent to the diplomatic missions in London and Paris, and possibly to the consulate at Tananarive, to investigate and report upon the activities of the British and French Governments, respectively, regarding the manner in which effective occupation is being undertaken in the areas claimed by those Governments in the Antarctic Zone.

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Consult also Hyde and Moore, and others quoted in the text hereof

Political Rights in the Arctic, Miller, Foreign Affairs, October 19145, p. 47.

## 12. Hydrographic Department, Admiralty, Notes on the Governor-General's Despatch to Washington, No. 104 of June 4th 1925

National Archives (NA), Kew, United Kingdom, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927

Excerpt.

So far as the title conferred by discovery goes, it is probably true that the great majority of the islands forming the Archipelago should be British, and hence Canadian. But it may be pointed out that while, for example, Baffin undoubtedly sighted part of the N.E. coast of Ellesmere I. in 1616, it does not convey a quite correct impression to state that he discovered Ellesmere I. in that year. Its configuration and extent – even the fact that it was an island – were not fully known until over two and a half centuries later. As regards the actual extent of its coastline explored by other navigators, both America and Norway have claims comparable to that of this country.

In any case, claims based upon discovery only are of little force compared with those based upon occupation or control. It is thought that the establishment by Canada of posts upon Ellesmere I. and others of the Archipelago constitutes a much more effective claim to their ownership, and (here contiguity may reasonably be pleaded) to that of the remainder, than any number of arguments based upon prior discovery only.

### 13. Rough Draft, Annexation of Territories in the Polar Region: Memorandum Prepared for the Committee of Foreign Policy and Defence by the Admiralty, 1926 [Excerpts]

#### NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927

Consideration of the sweeping claim recently advanced by Russia to various Arctic territories has tended to reopen the question of this country's attitude towards such claims in general, a matter which, with special reference to the French claim to Adélie Land, in the Antarctic, was recently examined at an inter-departmental conference, whose suggestions are embodied in "British Policy in the Antarctic" (I.C.(F.P.D) 13 May 1926). It appears very necessary, without delay, finally to decide upon (a) a consistent policy to be pursued by this country with regard to the claims which it intends to advance, or may in the future require to advance, to various areas in the Polar regions, and (b) the degree of recognition, if any, to be acceded to the Russian decree now in question and to any claims of similar character which may henceforth be put forward by other Powers.

The various points at issue may be roughly summarized thus:

1. The islands now claimed by Russia are unimportant in themselves, but the attitude to be adopted by this country towards the principle involved in this claim – that of annexing undiscovered and isolated territories – will necessarily, whether it takes the form of acceptance or rejection, have an important bearing upon this country's own territorial claims, both in the Arctic and the Antarctic.
2. In the Arctic it is understood that the Canadian Government is desirous of making, although it had not yet publicly asserted a very similar claim, in principle, to that now made by Russia.
3. In the Antarctic, claims have in the past been officially put forward by this country whose application, as regards undiscovered land, is somewhat uncertain, but which might be construed as to some extent, sanctioning and applying the principle now in question. This view has been stressed, by the Soviet Press as affording a precedent in support of the Russian decree.
4. It has recently been strongly urged, by the Australian Government, that this country should put forward a claim to the "Australian Sector" of the Antarctic continent, the only considerable portion of the known area of that Continent which has not already been annexed by this country. There is, however, a superior French claim to at least part of this region, and the only feasible method of barring its further extension (which might be held, ultimately, to include not only the whole of the "Australian Sector" but also the greater portion of the Antarctic Continent as at

present know) appears to be to decline altogether the right of any nation - at least not immediately contiguous territories – to lay claim to territories to which it has not a clear title by actual discovery (in absence of effective occupation, which, in the Polar regions, is seldom feasible)

5. The commercial value of this country's Antarctic territories is, at present, far greater than the probable value of any further territorial acquisitions which, if recognizing the principle contended for by Russia, it might make in the Arctic. It is, therefore, important that no policy should be adopted which might weaken our present tenure of them, or allow another Power to obtain an extended foothold on the Antarctic continent.

In order to assist the Committee of Foreign Policy and Defence, as far as possible to arrive at a decision as to the policy to be recommended for this country, short statements are subjoined of the principal facts in connection with

- a) The Russian claim in the Arctic
- b) The Canadian claim in the Arctic
- c) British claims in the Antarctic
- d) The French claim in the Antarctic
- e) Miscellaneous Polar claims

[...]

b) The Canadian Claims in the Arctic

These claims, in their entirety, do not appear to have been promulgated in such a fashion as to bring them, officially, to the notice of other Powers, although there is no doubt that the U.S. Government, for instance, is fully aware, as the result both of diplomatic correspondence and of semi-official intercourse of their extent. This has, moreover, been signified in several indirect ways: e.g. by a map showing the limits of the Canadian N.W. Territories published by the Department of the Interior in 1924, and by the tenour of various debates in the Canadian Senate.<sup>10</sup>

Briefly, Canada wishes to claim as Canadian territory all land, known or unknown, situated within a sector bounded by on the south by the coastline of the Canadian mainland, on the east and west by the meridians of 141°W (bounded between Canada and Alaska) and 60°W (passing through the N. entrance to Smith Sound) respectively and on the north by the North Pole.

There is, therefore, a striking resemblance, both in principle and detail, between the Russian and the Canadian claims: and it is obvious that if this country were to decline to recognise the Russian claim it could not, with any appearance of

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<sup>10</sup> The Canadian claims in the Arctic were expressed in considerable detail in the Canadian Senate as early as 1907, and the limits of the claims shown on an official map (Explorations in Northern Canada) published in 1904.

consistency, subsequently propound a similar claim on behalf of Canada: on the other hand, if the principle underlying the Russian claim were to be endorsed, tacitly or openly, by this country, our hand, as regards the prosecution of the Canadian claim, whenever such action appeared desirable, would be greatly strengthened. The essential difference between the Canadian and Russian claims lies in the fact that while the known islands in the Russian sector are scattered over a very wide area, and form detached groups which may or may not be the nuclei of other archipelagos as yet undiscovered, the Canadian archipelago forms, so far as is known, one homogenous whole, and it is therefore a fair assumption that any further discoveries of land in this region would be found to form northward extensions of the present "hinterland."

It is by no means improbable that new land not, indeed, continental in dimensions, but including, possibly, islands of considerable size exists in the sectors claimed by Russia and by Canada. The North Polar basin is still largely unexplored. To quote even the most salient of instances, there is, in the Russian sector, considerable evidence for the existence of (at present) undiscovered land N.E. ward and W. ward of Wrangell I. and N. ward of Franz Josef Land, while the northern extensions of Emperor Nicholas II Land is at present undetermined;<sup>11</sup> and in the Canadian sector land, whose existence has not yet been definitely disproved, has been reported both by Peary and Cook in about 83°-84°N, 104°W. While there is a certain amount of evidence pointing to the existence of land in the unexplored Beaufort Sea, although it must be admitted that upon this point there is considerable difference of opinion.

The grounds on which the Canadian claim is based have been set out in a dispatch (June 4, 1925) from the Governor-General to H.M. Ambassador, Washington. Briefly, it may be taken that Canada claims the known land of Canadian Arctic Archipelago (i.e. the islands lying roughly within the triangle Banks Island-Ellesmere Land-Baffin Island) on the joint grounds of discovery, contiguity, and occupation and/or control, while she bases her claim to any land which may hereafter be discovered within the sector previously referred to upon prescription (as evidence by the 1904 map) and on the ground that the archipelago forms a geographic entity to the whole of which Canada's title could not be affected by the future discovery of outlying portions.

It must undoubtedly be admitted that our knowledge of the topography of this region is very largely due to the work of British explorers, and that the only considerable discoveries made by a foreign expedition – Axel Heiberg, Ellef Rignes and Amund Rignes Is. – lie between and among islands already British by discovery,

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<sup>11</sup> It may be noted that the existence of this land, situated only some sixty miles from the mainland of Siberia, was unsuspected until 1913, although several vessels had traversed the strait dividing it from the matter: while Stefansson's Borden I which is larger than Cyprus, was not discovered until 1915, although it is actually in sight from "Ireland's Eye," an islet discovered by McClintock in 1853.

as do also the islands – Brock, Borden, Meighen and Lougheed Is – more recently discovered by the Canadian Arctic Expedition of 1913-1917 under Stefansson. Canada, also, has gone a considerable way towards establishing an effective control of these territories. From geographical considerations, moreover, it appears unlikely that territory of any size will be hereafter discovered in the Canadian sector which cannot be regarded as part of the archipelago, unless it is situated near or westward of the reported positions of “Crocker Land” and “Bradley Land.”<sup>12</sup> The Canadian claim, therefore, as previously stated, thus differs in some respects from the Russian, in which there is no such presumption that present and future discoveries will ultimately form a geographical whole.

On the other hand, the prescriptive right to undiscovered territories asserted in the despatch referred to is somewhat in conflict with the fact that in 1907 and subsequent years the Canadian Government dispatched various expeditions to annex various known territories in the archipelago, which had been transferred to it by the Imperial Order in Council of July 31<sup>st</sup>, 1880. It is, moreover, actually based chiefly upon considerations of contiguity which might, in turn, be quoted against the Canadian Government by other countries – Ellesmere Land, for example, is only ten miles distant from Greenland (Danish territory) – and which, as pointed out later, might also operate greatly to the disadvantage of this country’s much more valuable claims in the Antarctic. Furthermore, the principle of ‘staking our claim’ by national proclamation, to any territory which may thereafter be discovered anywhere within a large and totally unexplored area of ocean can, it is thought, reasonably be argued to be one which is not only contrary to accepted principles of international law, but also totally at variance with the doctrine, so long upheld by this country, of the freedom of the seas.

It appears not unlikely that, if Canada continues her present policy of exploring and policing the North West Territories, thus further and further extending her effective control over the Canadian Arctic Archipelago, this “peaceful penetration” will ultimately result in her de facto sovereignty over the whole of this region being so generally admitted as to render it unnecessary for any formal publication of her claim, as at present adumbrated, ever to be made.

[...]

#### e) Miscellaneous Polar Claims

[...]

It may be pointed out that it appears very possible that the whole theory of defining the Polar territories of a Power by meridians meeting at the Pole has had its

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<sup>12</sup> Crocker Land, reported by Peary in 1906, was unsuccessfully searched for in 1914 by MacMillan, but this negative result is not regarded as being altogether conclusive. Bradley Land was stated by Cook to have been seen in 1908: this report has not been either verified or disproved.

origin in a misconception of the terms of the Anglo-Russian Convention of 1825, in which a meridian, was used as the Boundary between Canada and Alaska (then Russian) and prolonged “until reaching the Frozen Ocean” simply for the reason that the coastline of that ocean was practically unknown, and therefore no fixed point on it could be specified.

Summary.

The general state of territorial claims in the Polar regions having thus been examined, it remains to be considered what attitude should, now or hereafter, be adopted by this country towards the claim now put forward by Russia, and also that effect this attitude may be expected to have upon the prospective Canadian claim in the Arctic and upon our present and prospective claim in the Antarctic.

As regards the Russian claim, the broad alternatives with which this country appears to be faced are as follows:

(a) To accept it (thus obtaining liberty to prosecute the Canadian claim in and when necessary and a consistent basis on which to oppose any future claims based upon discoveries made by another Power, within the limits of the Antarctic Dependencies)

(b) To decline to recognize it, either

1. As a whole (which in view of our own actions in the past, and of the fact that the majority of the islands in question are undoubtedly Russian, might be difficult to justify.
2. As regards islands whose ownership is disputable.
3. As regards future discoveries.

(c) To ignore it (which would, in effect, be to afford it tacit recognition, and have all the disadvantages of (a) with no counterbalancing advantages.

Upon this point the views of the Admiralty and the Dominions Office are somewhat divergent.

The Admiralty are of opinion that this country’s policy should be based on (b)2 and (b)3 above: i.e. that we should decline to recognize Russian ownership of islands to which she has not a clear title, and should, in any event, decline to countenance any general claim to the ownership of islands yet to be discovered. The considerations which have led them to this decision are:

A. That the principle embodied in the Russian decree is indefensible in international law, and entirely at variance with the doctrine of the freedom of the seas.

B. That its recognition would imply a complete reversal of this country’s recently evolved policy with regard to our territorial claims in the Antarctic, and would probably involve us in serious difficulties both with France and with the Commonwealth Government.

C. That, even on a commercial basis, it would be a very poor bargain for this country to obtain the right to claim a few more totally barren and unproductive islands in the

Arctic regions at the risk of losing its present commanding position in the Antarctic and the large present and possible future revenue which it derives from its whaling rights therein.

They therefore consider that our reply to Russia should take the line indicated above: that we should decline to recognize the Russian Decree as it stands, and should intimate that we cannot in any event assent to the annexation of Franz Josef Land or to the creation by Russia of an oceanic enclave in which she has prescriptive rights over all land, known or unknown. They are of opinion that, as stated in "British Policy in the Antarctic," the adoption of this policy would not prejudice the rights of Canada in the Arctic: and, as previously indicated, they consider that perfectly adequate and unobjectionable means are already available by which Canada can assert those rights.

The Dominions Office, on the other hand, is of the opinion that as regards known land the Russian claims, as embodied in the present decree, are superior to those of any other Power, except possibly in the case of Franz Josef Land (and Gilles I.). They do not consider that there is any real conflict between the Russian (and Canadian) policies in the Arctic and our proposed policy in the Antarctic: and they are of opinion that by the terms of the Letters Patent of 1917 relating to the Falkland Islands Dependency we are already committed, *de facto*, to the principle of advancing and recognising claims to undiscovered territories.

## 14. Document A: To Be Circulated to Members of Antarctic Committee at Imperial Conference, Prepared by Dominions Office [Excerpts]

### NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927.

A memorandum on the subject of British policy in the Antarctic has been circulated to the Imperial Conference as your paper E. 101. In the preparation of this Memorandum the claims of Canada in the Arctic regions were borne in mind. The Soviet Government have communicated officially to His Majesty's Government a decree dated the 15th April 1926 defining their claims in the Arctic regions, and it becomes necessary to consider the attitude which His Majesty's Government should adopt with regard to this communication. Before coming to any conclusion on the subject His Majesty's Government would wish to consult the Governments of the Dominions interested in the Polar Regions, and it is accordingly thought that it would be useful if the Decree could be considered by the Committee of the Imperial Conference which is considering British Policy in the Antarctic. The facts in connection with the Russian claims are therefore set out in this memorandum for the information of the Committee.

In 1916, the Russian Ambassador wrote to the Foreign Office forwarding a memorandum asserting the claim of Russia to certain Islands in the Arctic. In 1924, the Soviet Chargé d'Affaires addressed a Note to the Foreign Office communicating a memorandum specifying in detail the Arctic territories claimed by the Soviet Government. The reply of the Foreign Office was to the effect that the contents of the Note had been noted. This correspondence and a subsequent Note from the Soviet Chargé d'Affaires on the same subject are annexed to this memorandum as Appendix B. In the course of the negotiations with the Soviet Government in 1924, His Majesty's Government informed the Soviet delegation, after previous consultation with the Canadian Government, that "His Majesty's Government lay no claim to Wrangell Island."

It will be noticed that the Decree of the 16th April, 1926, does not refer to any territory by name but claims in general terms as Russian territory all islands and lands, known or unknown, lying in that sector of the Arctic Ocean which is bounded on the southward by the Russo-Siberian coast and on the east and west by meridians drawn from the North Pole to Bering Strait and to the Russo-Norwegian boundary (at Vaida Bay) respectively [...]

It will be noticed that the Soviet memorandum of 1924 supported the Russian claim to the territories specified therein by an appeal to the Russo-American treaty of 1867, which "définit les limites à l'ouest esuelles les Etats-Unis d'Amerique se sont. Engages de ne formuler aucune revendication."

No importance seems to have been attached to this argument when the status of Wrangell Island was under consideration after Stefansson's annexation, but further attention has been drawn to the Treaty position by the reference to the Russo-

American Treaty of 1867 in the despatch from the Governor General of Canada printed as Appendix V to the paper E.101.

The facts set out in this note suggest that it is at least doubtful whether any British claim to Wrangell Island and Herald Island could have been maintained consistently with the terms of the Anglo-Russian Convention of 1825, or any American claim consistently with the terms of the Russo-American Treaty of 1867. Equally they make it doubtful whether, at any rate for some distance along the Russian mainland, the Soviet claim to all land up to the North Pole that may be discovered in the future could be resisted by His Majesty's Government or by the United States Government. None of the known territories now claimed, disputably or otherwise, can be regarded as important territorial acquisitions, since their value, whether considered from a commercial, strategical or political standpoint is practically negligible. The claim to territories remaining to be discovered within the limits mentioned in the Decree could not be questioned consistently with the claims of Canada in the Arctic regions, nor, if any distinction could be drawn between the two claims, without stimulating the Soviet Government to dispute the claim of Canada. It is further to be apprehended that even if the Soviet claim could be considered by itself, i.e. without regard to the claim of Canada, it could not be contested without reopening the position of the validity of our action in the Falkland Islands Dependencies, or affecting the extension of the Ross Sea Dependency to the North Pole and the proposal to deal with the other British sectors of the Antarctic mainland in the same manner. It will be seen from Appendix I to Paper E.101 that the Norwegian Government have raised the question whether the limits of the Ross Sea Dependency, as laid down in the Order-in-Council, included only known islands, and that the point was evaded in the reply of His Majesty's Government. This was done in order not to have to embark on a discussion involving the position of Canada in the Arctic.

In the despatch of the 4<sup>th</sup> June 1925, from the Governor General to His Majesty's Ambassador at Washington, the Canadian Government adduce in support of the claim of Canada that her western boundary is "the 141<sup>st</sup> Meridian from the mainland of North America indefinitely northward without limitation" the fact that in the Treaty between Russia and the United States of the 30<sup>th</sup> March, 1867, whereby Alaska was ceded to the United States, it was provided:

"The western limit within which the territories and dominion conveyed (to the United States) are contained, passes through a point in the Behring's Straits on the parallel of sixty degrees thirty minutes North Latitude...and proceeds due North without limitation, into the Frozen (Arctic) Ocean."

The Canadian Government observe:

"This in terms is a claim by the United States that the western boundary of Alaska is a due North line passing through the middle of Behring Strait and

thence due North to the North Pole...Inferentially, the United States would make a similar contention respecting its Eastern Boundary, the 141st Meridian. Such a claim if formulated would, of course, receive the support of the Government of Canada.”

The view of the Canadian Government as to the western limit between the possessions of Russia and the United States laid down by the Treaty of 1867 was adopted by His Majesty’s Government before the Behring Sea Arbitration Tribunal. In the British case (pp. 98-99 Parliamentary Paper United States No.1 1893) it was observed:

“That the line drawn through Behring Sea between Russian and United States’ possessions was thus intended and regarded merely as a ready and definite mode of indicating which of the numerous islands in a partially explored sea should belong to either Power, is further shown by a consideration of the northern portion of the same line, which is the portion first defined in the Treaty. From the initial point in Behring Strait, which is carefully described as the ‘*limite occidentale*’ of territories ceded to the United States ‘*remonte en ligne directe, sans limitation, vers le nord, jusqu’a ce qu’elle se perd dans la Mar Glaciale,*’ or, in the United States’ official translation ‘*proceeds due north without limitation into the same Frozen Ocean.*’

“The ‘*geographical limit*’ in this the northern part of its length runs through an ocean which had at no time been surrounded by Russian territory, and which had never been claimed as reserved by Russia in any way, to which, on the contrary, special stipulations for access had been made in connection with the Anglo-Russian Convention of 1825, and which since 1848 or 1849 had been frequented by whalers and walrus-hunters of various nations, while no single fur seal has ever been found within it. It is therefore very clear that the geographical limit thus projected towards the north could have been intended only to define the ownership of such islands, if any, as might subsequently be discovered in this imperfectly explored ocean: and when, therefore, the Treaty proceeded to define the course of ‘*the same western limit*’ (*cette limite occidentale*) from the initial point in Behring Strait, it is obvious that it continued to possess the same character and value.”

In his speech before the Tribunal on 1st June, 1893, Sir Richard Webster (proceedings page 1283) said in the same connexion:

“Would you let me run the pointer along that line, Mr. President? It goes over 20 degrees of latitude right up to the North Pole. They have got all the islands on the right side of that line. If there are islands on the East of that line, whatever they are, the United States have got them.”

The Treaty between Russia and the United States of the 20th March, 1867, adopted as the Eastern limit the line of demarcation between the Russian and British possessions in North America as laid down in the Treaty between Great Britain and Russia of 28th February, 1825, the northern portion of which was described as follows: “la meme ligne méridienne du 141 degré dans sa prolongement jusqu’à la Mer Glaciale.”

This limit must obviously be interpreted in the same manner as the western limit. It provided for the allocation of islands as well as of the mainland, being described in the following terms:

“The line of demarcation between the possessions of the High Contracting Parties upon the coast of the Continent and the Islands of America to the North West.”

It may also be mentioned that in his note of the 17th December, 1890, (c. 6253) Mr. Blaine, the United States Secretary of State, speaking of the provisions in the 1825 Treaty regarding the 141<sup>st</sup> Meridian, said (page 45) that the British negotiators might have described their attitude as follows:

“As to the body of the Continent above the point of intersection at the 141<sup>st</sup> degree of longitude, we know nothing, nor do you. It is a vast unexplored wilderness. We have no settlements there and you have none. We have therefore no conflicting interests with your Government. The simplest division of that territory is to accept the prolongation of the 141<sup>st</sup> degree of longitude to the Arctic Ocean as the boundary. East of it the territory shall be British. West of it the territory shall be Russian.”

It was the intention of the Treaty to assign definite limits for all time to Russian territorial pretensions in North America, and it was specifically provided that “no establishment shall be formed by either of the two parties within the limits assigned by the two preceding Articles to the possessions of the other; consequently British subjects shall not form any establishment either upon the coast or upon the border of the Continent comprised within the limits of the Russian possessions as designated in the two preceding Articles; and in like manner, no establishment shall be formed by Russian subjects beyond the said limits.”

There are no similar Treaty provisions relating to the North Eastern Boundary of Canada, but it may be observed that the United States negotiators of the Treaty of 1818 insisted on obtaining a liberty to fish on the coast of Labrador indefinitely northwards, thereby implying that the British jurisdiction on the Eastern part of the North American Continent had a similar extent. The whole history of the boundary between Canada and the United States is in fact inconsistent with any idea of a new boundary with the United States being set up to the North.

## 15. Document B: Confidential Document for Use of His Majesty's Government, Prepared by Dominions Office, 1926 [Excerpts]

### NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927

The importance of the question which has arisen in connection with the Russian territorial claim in the Arctic lies chiefly in its bearing upon

- (1) The Canadian claim in the Arctic.
- (2) the British and French claims in the Antarctic.

It will, therefore, be convenient to set out briefly the considerations which arise under these two heads.

#### 1. The Canadian Claims in the Arctic

These claims, in their entirety, do not appear to have been promulgated in such a fashion as to bring them officially, to the notice of other Powers, although there is not doubt that the U.S. Government, for instance, is fully aware from official Canadian maps, official statements in the Canadian Parliament of their nature and extent.

Briefly, Canada claims as Canadian territory all land, known or unknown, situated within a sector bounded on the south by the coastline of the Canadian mainland, on the east and west by the meridians 141 degrees W. (bounded between Canada and Alaska) and 60 degrees W. (passing through the N. entrance to Smith South) respectively and on the north by the North Pole.

There is, therefore, a resemblance, both in principle and detail, between the Russian and the Canadian claims, but it may be pointed out, while the known islands in the Russian sector are scattered over a very wide area, and form detached groups which may or may not be the nuclei of other archipelagos as yet undiscovered, the Canadian Arctic Archipelago forms, so far as is known, one homogeneous whole, and it is therefore a fair assumption that any further discoveries of land in this region would be found to from northward extensions of the present 'hinterland.'

It is by no means improbable that new land not, indeed, continental in dimensions, but including, possibly, islands of considerable size, exists in the sectors claimed both by Russia and by Canada. The North Polar basin is still largely unexplored. It is by no means improbable that new land not, indeed, continental in dimensions, but including, possibly, islands of considerable size exists in the sectors claimed by Russia and by Canada. The North Polar basin is still largely unexplored. To quote even the most salient of instances, there is, in the Russian sector, considerable evidence for the existence of (at present) undiscovered land N.E. ward and W. ward of Wrangell I. and N. ward of Franz Josef Land, while the northern extensions of Emperor Nicholas II Land is at present undetermined;<sup>13</sup> and in the

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<sup>13</sup> It may be noted that the existence of this land, situated only some sixty miles from the mainland of Siberia, was unsuspected until 1913, although several vessels had traversed the

Canadian sector land, whose existence has not yet been definitely disproved, has been reported both by Peary and Cook in about 83°-84°N, 104°W. While there is a certain amount of evidence pointing to the existence of land in the unexplored Beaufort Sea, although it must be admitted that upon this point there is considerable difference of opinion.

The grounds on which the Canadian claim is based have been set out in a dispatch (June 4, 1925) from the Governor-General to H.M. Ambassador, Washington. Briefly, it may be taken that Canada claims the known land of Canadian Arctic Archipelago (i.e. the islands lying roughly within the triangle Banks Island-Ellesmere Land-Baffin Island) on the joint grounds of discovery, contiguity, and occupation and/or control, while she bases her claim to any land which may hereafter be discovered within the sector previously referred to upon prescription (as evidence by the 1904 map) and on the ground that the archipelago forms a geographic entity, to the whole of which Canada's title could not be affected by the future discovery of outlying portions and upon the territorial arrangements embodied in the Russo-American Treaty of 1867. It will be observed from the Appendix to the Memorandum circulated to the Committee that the Russian claim is also based on the Treaty of 1867.

Our knowledge of the topography of this region is very largely due to the work of British explorers, and that the only considerable discoveries made by a foreign expedition – Axel Heiberg, Ellef Rignes and Amund Rignes Is. – lie between and among islands already British by discovery, as do also the islands – Brock, Borden, Meighen and Lougheed Is – more recently discovered by the Canadian Arctic Expedition of 1913-1917 under Stefansson, Canada, also, has gone a considerable way towards establishing an effective control of these territories. From geographical considerations, moreover, it appears unlikely that territory of any size will be hereafter discovered in the Canadian sector which cannot be regarded as part of the archipelago, unless it is situated near or westward of the reported positions of “Crocker Land” and “Bradley Land.”<sup>14</sup> The Canadian claim, therefore, as previously stated, thus differs in some respects from the Russian, in which there is no such presumption that present and future discoveries will ultimately form a geographical whole.

The only Powers which in present circumstances might dispute the Canadian claims are the United States and Norway. How far the United States Government would seriously dispute the claims is doubtful and, if they did, there is, as indicated in

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strait dividing it from the matter: while Stefansson's Borden I which is larger than Cyprus, was not discovered until 1915, although it is actually in sight from “Ireland's Rye,” an islet discovered by McClintock in 1853.

<sup>14</sup> Crocker Land, reported by Peary in 1906, was unsuccessfully searched for in 1914 by MacMillan, but this negative result is not regarded as being altogether conclusive. Bradley Land was stated by Cook to have been seen in 1908: this report has not been either verified or disproved.

the Note appended to the memorial circulated to the Committee material of a diplomatic character which Canada could affectively use in defense of her claims.

Any claim which Norway might, on grounds of discovery, put forward to the so called Otto Sverdrup Islands (Axel Heiberg, Ellef Rignes and Amund Ringes Islands) and the west coast of Ellesmere Land could in the circumstances hardly be pressed with any degree of seriousness and it should be mentioned as regards the Otto Sverdrup Islands, that in September 1924 the Norwegian Minister informed Sir Eyre Crowe in a private and confidential letter that

“It is not the intention of my Government to claim sovereignty over these Islands, but they probably would like to be informed by Canada on what basis they base their rights, a demarche similar to the one made by Dr. Nansen vis-à-vis His Britannic Majesty’s Government on March the 4th, 1907, with regard to South Orkney, South Shetland and Graham Land. Should Canada maintain their special right I think my Government would desire to point out that in regard to the discovery and work of Captain Sverdrup Norwegians should meet with no difficulty in the future if they desire to pursue some material interests in these Islands.

As my Government will not claim the sovereignty but only reserve a possible material interest, I think it would be best to avoid a formal diplomatic procedure, and that our Consul General at Montreal should lay before the Canadian Government, with whom the decision will rest, the Norwegian point of view. I should however be very grateful to hear whether this meets with your approval.”

The Norwegian Minister made it clear that in making this communication he was not acting under instructions from his Government, but his statement appears to afford evidence that the Norwegian Government do not propose to contest any claim which Canada may make in respect of these islands.

A few words may be inserted here as to the attitude of Denmark, whose sovereignty over the whole of Greenland has now been generally recognised.

In 1925 an official request was made to the Danish Government for permission to land in Greenland supplies for the Canadian police post in Ellesmere Land, and no question was raised by the Danish Government as to Canadian sovereignty over that territory. It is true that in 1920, when the Canadian Government had raised a question as to the taking of measures to prevent Esquimaux from Greenland crossing into Ellesmere Land for the purpose of killing musk oxen the wording of the Danish Government’s reply was such as to suggest that they did not recognize Canada’s claim to exclusive jurisdiction over Ellesmere Land, and in the following year, when Mr. K. Rasmussen desired to conduct an expedition into the Arctic, the Canadian Government were at first disposed to think that the object of the expedition might be

to dispute the Canadian claim to sovereignty over the Arctic islands. They were, however, assured by the Danish Government officially that the expedition had no political aim and they therefore agreed to raise no objection to the expedition on the understanding that in landing on any territory in the region to which it was bound it did not dispute on behalf of Denmark or any other Government Canada's sovereignty thereover.

In any case, if Canada continues her present policy of exploring and policing the North West territories, thus further and further extending her effective control over the Canadian Arctic Archipelago this 'peaceful penetration' will in all probability result in her sovereignty over the whole of this region being placed outside the region of debate.

## 16. Admiralty Remarks on Dominion Office Draft, Memoranda A and B, 1926

NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927

### Draft A. Reference Letter.

a. “except upon the principle of prolonging meridians of longitude to the Pole.”

This wording is misleading, since it implies that this principle is a recognised one, instead of having its origin in a misconception of the terms of the 1825 and 1867 treaties. If it is retained, suggest amending ‘principle’ to ‘theory.’

b. The draft implies that this quotation comes from the 1867 treaty. Actually, it is the Soviet Government’s phraseology, and is incorrect. There is no clause in the Treaty binding the U.S. Government to make no claim westward of the Bering Strait boundary.

c. As stated later, the “facts” referred to in this paragraph as being set out in the Appendix are highly disputable, as also are the conclusions drawn from them and given in this passage.

d. These statements as to the Russian and Canadian claims standing or falling together are correct, although the Admiralty, in the original draft indicated that they were not in all respects similar. The statement, however, as to the impossibility of contesting the Russian claim without the question of re-opening our ownership of the Falkland Islands Dependencies seems unwarranted. It is still doubtful whether we have actually claimed undiscovered lands in that Dependency, and it is at any time open for a nation to change its policy. As already stated in Admiralty letter to F.O. it is not considered that our title to that Dependency could, at this distance of time, be seriously challenged.

e. “extension of the Ross Sea Dependency to the North Pole....”

This should, of course, be “South Pole.”

f. “...proceeds due North, without limitation, into the Frozen (Arctic) Ocean.”

This quotation is correct, but it is from the U.S. translation of the 1867 treaty. The French text (which is quoted on the following page of the D.O. memorandum, runs:

“remonte en ligne directe, sans limitation, vers le nord, jusqu’a ce qu’elle se perd dans la Mer Glaciale...”

The omission is of importance, since the original text clearly indicates that the boundary (which is entirely a land-boundary) should be regarded as terminating when it arrives at the Arctic Ocean, and not as proceeding 1200 miles further to the Pole.

g. As indicated above, this contention is not warranted by the facts.

h. This is French text of the 1867 treaty, referred to above.

i. This contention is subject to the same observations as the preceding. It is to be noted that the Tribunal did not endorse this reading of the treaty.

j. This quotation from the 1825 treaty similarly shows that the boundary in question was intended to terminate upon the shore of the Arctic Ocean, and not to extend to the Pole.

k. It provided for the allocation of islands as well as of the mainland, being described in the following terms...

Although true in itself, this statement contains a misleading inference. The islands in question, as can be seen by consulting the text of the treaty, were these on the N.W. coast of America, south of Bering Strait – not those on the northern coast of Canada, which were then (1825) practically unknown.

The fallacy underlying this theory of extending the boundaries defined in the 1825 and 1867 treaties to the North Pole was noted in the original Admiralty draft memorandum.

l. “to the Arctic Ocean...”

This term indicates the construction placed by U.S. in 1891 upon the terms of the 1867 treaty, which agrees with that here put forward – namely that the boundary terminated at the shores of the Arctic Ocean.

m. “upon the coast or upon the border of the Continent”

This quotation from the 1867 treaty, also, supports the view outlined above.

n. The purport of this passage seems somewhat obscure. The boundaries between U.S. and Canada appear to is quite adequately defined, and if a new boundary were ever required, it could not be “to the North,” but would be to the S., E., or W.

### **Draft B.**

a. As indicated above, this statement appears to be somewhat questionable.

b. As previously indicated, this statement goes rather beyond the facts. The F.O. legal advisers have given an opinion that it might be held that we had claimed undiscovered land in the area constituting the Falkland Islands Dependency, but it is somewhat premature and, it is thought, unnecessary for H.M. Government to assert so definitely we have actually done so.

c. This statement, it is suggested, is entirely unwarranted.

d. This assertion, also, it is considered, goes far beyond the facts, and embodies a principle which is entirely novel and quite incompatible with received notions as to the extent of the High Seas.

17. General Staff [Lieutenant-Colonel H.D.G. Crerar], Department of National Defence, Canadian Political Rights in the Arctic, 28 January 1930

H.Q.C. 4850, on file LAC, RG 25, vol. 4252, file 9057-40, pt. 2

CANADIAN POLITICAL RIGHTS IN THE ARCTIC

1. Importance to Canada of Arctic Territory.

To appreciate the importance of establishing and maintaining the political rights of Canada to certain Arctic territory, it is first of all necessary to determine just what benefits, actual or potential, are to be derived by Canada from the possession of such rights. As the attitude of other nations towards this same Arctic territory provides illuminating evidence, it is proposed to quote certain foreign authorities on this subject:

Extracts from U.S. Congressional Record, Friday, July 21, 1922.

Senator Robinson - "Mr. President, I ask leave to have printed in the Record a statement by Mr. Edwin Fairfax Naulty concerning the strategical importance to the United States of Arctic flight routes. The statement is of great historical value, and I believe it is reliable."

Extracts from Mr. Naulty' s. statement:-

"But there is another reason, and that is flight routes across the Arctic. From the head of Cumberland Sound, at the mouth of Davis Strait, to Collinson Gulf, at the Southwest of Beaufort Sea, is 1,500 miles, and with any 1922 model seaplane it can be flown in 15 hours, with some in ten hours. On Cumberland Sound, across Nettilling Lake, Foxe Channel, through Frozen Strait - not as bad as its name indicates -, or Fury and Hecla Strait to Committee Bay; that is, to Boothia Isthmus and across to Rae Strait, and on through Simpson Strait to Franklin Strait, to Collinson Gulf and Beaufort Sea, in ten hours, over water or smooth ice all the way, with ample supply stations easily established en route, and oil and coal on the route.... I will not enlarge on the various flight routes across the Arctic above the Arctic Circle further than to again write that there are over fifty routes chartered by my son and myself.

"Using the delta of the Mackenzie River as a basis, and being permitted to claim and occupy the American territory of Wrangel Island, Canada, far-sighted and progressive as she has shown herself to be, would have control of all the Siberian trading. I am not a commercial man, but I know that there is more fossil ivory on one

Island in the Arctic than there is of other ivory in all the world. Aeroplanes are now built capable of carrying a load of 2 tons. Two tons of ivory would be a valuable cargo. Two tons of Siberian furs, brought from the Siberian coast by aeroplane via Wrangel Island, could be landed in St. John, Montreal or Quebec easily within four days from the time they were loaded aboard in Siberia.”

Extract from letter of Vilhjalmur Stefansson to Deputy Minister, Department of Interior (Canada), dated October 30th, 1920. (Confidential file 1076-1-2, Naval Service.)

“It is easy to show that the northern lands contain resources that we value today. It appears to me, however, unnecessary to go into that discussion. It is simpler and safer to merely remind ourselves that it has been the universal course of history up to the present that the lands considered worthless in one age are considered valuable in the next, and the spread of value in land will, therefore, probably continue to the remotest corners of the earth.”

Extracts from plans of the International Society for the Exploration of the Arctic regions during the Spring of 1930 with the Airship Graf Zeppelin. (H.Q.C 4850).

“In the Spring of 1930 there will be undertaken a systematical, extended, scientific exploration of the Arctic regions by means of the Airship Graf Zeppelin, under the leadership of the doyen of Polar exploration work, Professor Dr. Fridtjof Nansen, with the participation of a large staff of international scientists. The International Society for the Exploration of the Arctic Regions by aircraft (the Aero Arctic) includes groups of members in twenty different countries, U.S.A. among the number, comprising leading scientists in the domain of such sciences as are interested in the exploration of the Earth.

... “As soon as the Airship will meet with leads on its flight - and according to Sir Hubert Wilkins' report such are to be found at about every 20 miles - she will drop the apparatus into the water and sound the depths according to the usual methods of sounding, by echo apparatus. In this way a great number of soundings may be carried out along the Canadian shelf-ridge. It will be possible to establish how far the as yet unknown shelf-ridge penetrates into the region between Alaska and the North Pole, and whether there is any possibility of hitherto undiscovered land to be found there. The Airship will not follow a definitely outlined course, she will follow during the soundings the course which corresponds with the line of the shelf-ridge. After the expedition will have thoroughly sounded the Canadian Shelf-ridge, the Airship will fly over Point Barrow to Nome.

“A precise knowledge of the at present but scarcely known conditions in the Arctic, a daily observation of all occurrences by means of wireless, will be of the greatest advantage for weather forecasts, and for all magnetic, electric,

oceanographical, biological and aerological conditions in the inhabited latitudes of the Northern hemisphere. Agriculture and all communications by land, by water or by air will benefit greatly by such systematic permanent observation work in the Arctic regions.”

Extract from letter of Mr. Eivind Bordiwick to the Prime Minister of Canada, dated December 13th, 1929, with reference to Commander Sverdrup’s discoveries of Axel Heiberg, Ringnes and King Christian Islands

“I conclude with a strong appeal to the highest authority of justice in Canada, Minister Lapointe, as a member of the Canadian Cabinet, to induce his Government to pay Commander Sverdrup a reward in accordance with a correct valuation of his achievement.

“I consider it reasonable that the Canadian Government should refund the cost of the expedition, as it was equipped and sent out as a national enterprise, with the idea of securing advantages for the Norwegian nation. In the event of Canada securing the sovereign rights, the advantages accrue to Canada and not to Norway.”

In corroboration of the views expressed above, the following extract from “Canada’s Arctic Islands, Log of Canadian Expedition, 1922,” report of Department of Interior, is submitted:

“As the information which the general public has regarding the north country is at least one hundred years old, the impression prevails that the North West Territories are just mounds of snow and ice sticking up above the polar sea. If one read only books of such a date regarding the parts of Canada we know, especially the Prairie Provinces, he would get an impression very different from fact. The natural resources lie there unknown and just as the railway hastened the development of Western Canada so may aircraft aid in the north.

“It may surprise many people to realise that two thousand miles north of Ottawa the general climate of the winter season is no more severe than in many of the more northerly settled parts of Saskatchewan and Manitoba, and that there are hundreds upon hundreds of square miles of land bare of snow in summer, covered with beautiful flowers, grass and moss supporting innumerable animals including caribou, musk-ox and foxes, while there are immense areas of coal and indications of many other minerals.

“As the interior of the islands is practically unknown and even the coastline only very roughly sketched in the Charts, aircraft can serve a very useful purpose in connection with surveying and exploring the country. Its other uses will be in the transportation of men and material, where other

means would entail much time, expenses and hardship. Aircraft may also be used to great advantage as an assistance to marine navigation in locating open water and ice fields.”

## 2. What Constituted Political Rights.

It is evidently of importance to Canada's national development that control should be established and maintained over Arctic territories adjacent to her Northern mainland. But before indicating the extent of Canada's claims in this matter it is desirable to outline the bases on which political rights to these territories may be established.

In early days, the “discovery” of unknown lands was regarded as the primary source of national title. “Discovery,” in its strongest form, entailed the landing of a properly commissioned navigator, a formal announcement in the presence of witnesses that possession has been taken in the name of sovereign or government, coupled with the hauling of the national flag, and, finally, sufficient exploration and survey to describe and identify the land in question. The absence of any or all of these qualifying factors did not necessarily deter nations or individuals from claiming title by discovery. In fact, there does not appear to have been any minimum condition required before a claim on this basis could be put forward.

The indefinite scope of “discovery” as a title brought about a further understanding in such international matters that “effective occupation” or “settlement” must follow before a continuing basis of sovereignty could be established. And in later years (Venezuela Boundary Dispute), the claim of title under “occupation” was extended by the acceptance of the principle that “control” constitutes effective occupation.

A further principle which became established, and one particularly and naturally favoured during the last century by the United States in its march to the Pacific Coast, was that of “contiguity.” In the words of Mr. Calhoun, United States Secretary of State, in writing in 1844 to the British Minister at Washington, “That contiguity furnishes a just foundation for a claim of territory in connection with those of discovery and occupation would seem unquestionable ... How far the claim of contiguity may extend ... can be settled only by reference to the circumstances attending each.”

And finally, in more recent years, a further element of national title has come to be regarded as almost necessary, and that is “notification of the fact,” or, to put it more briefly, “prescription.” It might be assumed that as “discovery” must precede “occupation,” it would naturally follow that “prescription” must follow “discovery,” but such an assumption would not be correct. Lord Salisbury, in a despatch of March 18th, 1896, says, “All the great nations in both hemispheres claim, and are prepared to defend their rights to vast tracts of territory which they have in no sense occupied, and often have not fully explored. The modern doctrine of “hinterland,” with its

inevitable contradictions, indicates the unformed and unstable condition of international law as applied to territorial claims resting on constructive occupation or control.”

In brief, then, the sources of national title to lands acquired by peaceful means - or lands acquired by force from uncivilised peoples or unrecognised civilisations - lie in “discovery,” “effective occupation,” “control,” “contiguity” or/and “prescription.” Any or all of these may form a claim to possession. But in the final analysis, the strength of any title lies in the determination of the claimant to preserve it, coupled with an understanding by other countries that the maintenance of such an attitude, though of importance to the nation concerned, is not a menace to others.

### 3. Arctic Territory claimed by Canada.

The Dominion of Canada claims as its “hinterland” in the Arctic Archipelago the area bounded on the East by a line passing midway between Greenland and Baffin, Devon and Ellesmere Islands, through Robeson Channel, and thence along the 60th Meridian to the Pole. On the West, Canada claims as her boundary the 141st Meridian from the Pole to Demarcation Point on the mainland. And the creation of national title to such lands is to be found in the Imperial Order-in-Council of 31st July, 1880, whereby Great Britain agreed that “all British territories and possessions in North America, and the Islands adjacent to such territories and possessions which are not already 'included in the Dominion of Canada, should (with the exception of the Colony of Newfoundland and its Dependencies) be annexed to and form part of the said Dominion.”

Having outlined the Canadian claim in the Arctic Archipelago, it is now necessary to investigate the bases for such title.

#### Discovery.

So far as discovery goes, the title of Great Britain, and thus Canada, to the whole Arctic Archipelago is without question, with the possible exception of Heiberg, the Ringnes, Meighen, Borden, Brock and some smaller Islands. With these exceptions, all the known insular areas in the Canadian Arctic Archipelago were discovered and formally taken possession of by British commissioned navigators from a century to three-quarters of a century ago, and such acts of possession were formally announced to the world in British Government Blue Books. Of the exceptions named, Meighen, Borden and Brock were rediscovered and formally taken possession of by Canadian expedition in 1914-17.

It was in 1900-02 that Sverdrup, commanding an expedition, which was financed in large part by citizens of Norway, claimed discovery of the Islands mentioned in the previous paragraph. It is to be noted that Sverdrup was not a commissioned navigator, and any Norwegian claim to title must, in consequence, rest on weak ground. However, it is in order to eliminate even the possibility of such a situation

that negotiations are now under way whereby Sverdrup's rights, if any, in consideration of a financial compensation, are to be transferred to the Dominion of Canada.(See Para. 1.)

Effective Occupation.

“Occupation” or “settlement” of territories must vary in degree in accordance with conditions. A bare measure of settlement in a temperate zone might be considered as gross overcrowding in the Arctic Archipelago. However, whatever the degree of settlement of the Arctic lands in question, their occupation was originally British, and is now maintained by the Government of Canada, working through its Department of the Interior. No other nation has any basis for title under this particular heading.

Control.

“Control” may rest on an extension of actual occupation or it may be argued as an obvious, even though unexercised, power which geographical propinquity and natural communications confer. Whatever virtue rests in this source of title may be utilised to the full by Canada in her claim to Arctic territories. Certainly, no other nation is in a position to put it forward.

Contiguity.

In 1824, Mr. Rush, United States Minister at London, wrote, “It will not be denied that the extent of contiguous territory to which an actual settlement gives a prior right must depend in a considerable degree on the magnitude and population of that settlement, and on the facility with which the vacant adjoining land may within a short time be occupied, settled and cultivated by such population, as compared with the probability of its being thus occupied and settled from another quarter.” In 1826, Mr. Callatin, negotiator on behalf of the United States, re-affirmed this statement of principle.

A very brief consideration of the map and of Canada's relationship to that portion of the Arctic under discussion is sufficient to substantiate the Canadian claim under this heading alone.

Prescription.

In 1904, the Government of Canada published a map showing “Explorations in Northern Canada.” On that map the boundary of the Canadian Arctic Archipelago on the East is delineated by a line passing through the middle of Robeson Channel (waters separating the Canadian Islands from Greenland), and thence northward along the 60th Meridian to the Pole, and on the West by the 141st Meridian from the mainland northward to the Pole. This official map was published twenty-six years ago, and obviously a tacit acquiescence during over a quarter of a century on the part

of Norway, the United States and of other nations bars their right to protect [*sic*: protest] the Canadian claim.

In June, 1925, certain Debates on Arctic exploration and sovereignty took place in the Canadian House of Commons. The following are extracts from the official reports concerned:-

“Hon. CHARLES STEWART (Minister of the Interior) moved the second reading of Bill No.15/1, to amend the Northwest Territories Act.

...

Mr. STEWART (Argenteuil): ... Here we are getting after men like MacMillan and Doctor Amundsen, men who are going in presumably for exploration purposes, but possibly there may arise a question as to the sovereignty over some land they may discover in the northern portion of Canada, and we claim all that portion.

Mr. BROWN: We claim right up to the North Pole.

Mr. STEWART (Argenteuil): Yes, right up to the North Pole.

Mr. MANION: May I ask what is the position of the whole Wrangel Island question at the present time?

Mr. STEWART (Argenteuil): We have no interest in Wrangel Island, and the British government have expressed themselves to the same effect. We will be very glad to bring down all the papers that we can on the subject.

Hon. H.H.STEVENS (Vancouver Centre): Mr. Speaker, I have in my hand a newspaper despatch from Washington to the New York Times dealing with a matter of very considerable importance to Canada. The despatch is rather lengthy and refers to what is known as the MacMillan-Byrd scientific expedition into the Arctic regions this summer by hydroplane. Two important questions are propounded, one being whether Canada has a valid claim to certain lands lying north of the mainland. Then there is this reference:

High officials in Washington reiterated today that the Canadian Government has not yet raised the question or discussed with this government the matter of claiming, all land between Canada and the pole. It is learned, however, that in a recent in a recent informal conversation between Lieutenant Commander Byrd and the Canadian commission here; the latter informally asked whether he had obtained a “permit” to land on Axel Heiberg land. To ask Canada for a permit

for Commander Byrd's planes to land on Axel Heiberg land would, of course, imply recognition by America of the Canadian claim of sovereignty over that land, and seems to necessitate decision by this Government – That is the United States government. - as to whether it considers that Canada has a valid claim to that region.

Has the Prime Minister any information to furnish as to whether the government of Canada has made any representations to the government of the United States on the subject? If no action has been taken, is there not a grave danger that the right of Canada to large areas in the north - at present not teemed very valuable, but which in the future may be so - will be jeopardised?

Hon. CHARLES STEWART (Minister of the Interior): Mr. Speaker, this government has been very much alive to what we claim to be the possessions of Canada in the northern territory adjacent to the Dominion. Indeed, I made the statement in the House the other evening that we claimed all the territory lying between meridians 60 and 142. This afternoon when dealing with the estimates of the Department of the Interior I propose to bring down a map to make it clear what precautions we are taking to establish ourselves in that territory and to notify the nationals of foreign countries passing over it that we think Canada should be advised of their plans and that they should ask for permits from the Canadian government. That is the extent to which we have gone at the moment. I might say further to my hon. friend from Vancouver Centre that some considerable time ago a despatch dealing with the subject was sent to Washington, to which we have had no reply.”

In view of the above, it may be stated that Canada has fully exercised the basis of prescription as a source of title. Although individual and press comment in other countries, particularly in the United States, has queried Canada's rights to her Arctic Archipelago, no foreign government has officially repudiated the claim of Canada in this respect.

While, for a quarter of a century, Canada's reasonable claims to Arctic territory, based on one or several of the sources to national title, have been politically clarified on the definite basis of “prescription,” it is important to note the dangers which accompany a divergence from this sound position. In 1914, the ship “Karluk” of the Canadian Arctic expedition, (organised under Canadian Government arrangements), was wrecked in the vicinity of Wrangel Island, which lies in longitude 180 and some 115 miles off the North shore of Siberia. In 1921, Stefansson, this time without Government assistance, organised a further expedition, which, it later turned out, had the definite object of annexing Wrangel Island on the basis of “occupation” in the

name of H.M. the King, and presumably with the idea that the Canadian Government would support this claim. It is not proposed to discuss the political rights which other countries had previously established to the possession of Wrangel Island other than to say that, in general, the better claim lay with Russia. But it is desired to emphasise that if Canada had officially supported Stefansson's action the result would have been to jettison the established and satisfactory claim which, reinforced by "contiguity," had been summed up by "prescription," and open up the Canadian Arctic Archipelago indefinitely to claims by various nations on the bases of "discovery" and "occupation."

#### 4. The Position of other Powers in connection with Canada's Claims in the Arctic.

So far as can be determined, the countries mainly interested in the Canadian Arctic Archipelago have not officially accepted the boundaries prescribed by Canada in 1904, and re-affirmed in 1925. On the other hand, silence can reasonably be accepted as acquiescence.

There are, however, Treaties between the United States, Russia and Denmark which reinforce the Canadian position, and the attitude of Norway may be interpreted by its dissociation from the claims put forward by its national, Sverdrup, under the title of "discovery."

#### Eastern Boundary, Canada's Arctic Archipelago.

"The suggestion that the U.S.A. may wish to claim Greenland need not now be considered, as Denmark has obtained practically general recognition of her sovereignty over the whole of Greenland." (Appendix to Despatch, Canada Secret 2, dated 20th October, 1925, from [Secretary of State] for Dominions to [His Excellency] the Governor-General.)

"The United States has never officially made any claim to any known Arctic lands outside of our well recognised territories. The sole declaration we have made regarding Arctic regions is the renunciation of any possible rights, based on discovery or otherwise, in Greenland." (Foreign Affairs, October 1925, page 54.)

From the above statements, it may be said that although a Canadian boundary is not defined or agreed to, yet a Danish one corresponding to it as far North as the mouth of the Robeson Channel has been generally accepted.

#### Western Boundary, Canada's Arctic Archipelago.

In the Treaty of 1825 between Great Britain and Russia, the 141st meridian was agreed to as a boundary. In describing the boundary between the possessions of the two countries, "sur la cote du continent et les isles d'Amerique nord-ouest," the provisions of the Treaty here material in its original text, read thus: "La meme ligne meridienne du 141eme degre formera dans son prolongement jusqu'a la ?der Glaciale la limite entre les Possessions Russes et Britanniques sur le continent de l'Amerique nord-ouest."

In 1867, by Treaty with Russia, the United States purchased Alaska for \$7,200,00, and succeeded to the rights of Russia under the Treaty of 1825. The expression above quoted from the Treaty of 1825 was incorporated in the French text of the Treaty of 1867.

In the quotation, the French words may be translated, "in its prolongation as far as the Frozen Ocean" or "to the Frozen Ocean." But, whatever the choice of words, it is, at least, arguable that the line runs as far as the 141st meridian itself runs. Weight to such argument is given by the wording in the same Treaty, (1867), which, in laying down the U.S. western boundary, states that it "proceeds North without limitation into the same Frozen Ocean."

As regards Canada's western boundary in the Arctic, therefore, there appear to be well established Treaty rights.

##### 5. Summary.

In conclusion, it is submitted that ownership by Canada of contiguous Arctic lands is already of very great importance, and that future developments will tend to accentuate that situation. As regards that portion of the Arctic Archipelago bounded by Baffin Bay, Smith Sound, Kennedy and Robeson Channels, and thence the 60th Meridian on the East, and the 141st meridian on the West, Canada has sound title to possession on the basis of several or all the recognised sources. The claim of Sverdrup to right by discovery of the Axel-Heiberg and Ringnes Islands is that of an uncommissioned explorer, is open to refutation on the grounds of "control," "contiguity" and "prescription," and, in any event, will probably be inconspicuously disposed of by direct financial adjustment.

It is to be hoped that eventually Canada will obtain stated recognition by other Powers of the validity of her prescribed claims. In the meantime, it is of vital importance that no weakening of Canada's position should be permitted, either by allowing unrestricted entry within the claimed territory by nationals of other countries, or, what is even more dangerous, by shifting from the reasonable position maintained for twenty-five years, and thus opening up the entire question by encouraging Canadian nationals to claim territory lying outside our declared boundaries.

January 28<sup>th</sup> 1930.

General Staff,  
Department of National Defence.

##### References:

- File H.Q.D. 4850, "Extent of Arctic Territory claimed by Canada."
- File, Naval Service, Confidential, 1076-1-2, "Data relating to Wrangel Island."
- "Canada's Arctic Islands - Log of Canadian Expedition, 1923."
- Official Reports, House of Commons Debates, Nos.78 and 84,1925.
- "Foreign Affairs," October 1925.

## 18. Laurence Collier, Memorandum Respecting Territorial Claims in the Arctic to 1930, 10 February 1930

### NA, DO 35/167/7, Territorial Claims in the Arctic

The most recent history of territorial claims in the Arctic is really the history of the development of what is now known as the 'Sector Principle' and of the opposition to that principle, at present entirely Norwegian. It will, therefore, be convenient to divide this memorandum into two parts, dealing respectively with the origin and development of the Sector Principle, and with the origin and development of the Norwegian claims in opposition to that principle.

#### (1.) *The Origin and Development of the Sector Principle.*

2. The origin of the principle can be traced back to the Anglo-Russian convention of the 28<sup>th</sup> February, 1825, defining the boundary between Canada and Russian America (afterwards known as Alaska), though the framers of that instrument were doubtless ignorant of its implications and consequences. After stating that part of the boundary in the known or southern portion of the region in dispute shall be the meridian 141° west, the Convention proceeds to define the northern portion of "la ligne de demarcation entre les possessions des hautes Parties contractantes sur la côte du Continent et îles de l'Amérique nord-ouest" as "la meme ligne méridienne du 141 degré dans sa prolongement jusqu'à la Mer Glaciale." This definition might possibly have been interpreted as referring only to the land boundary and to the islands on the Pacific coast; but when Russia ceded Alaska to the United States by the treaty of the 30th March, 1867, it was stated in that treaty that the western limit (of the territory) "passes through a point in Behring Strait on the parallel of 60° 30' north longitude...and proceeds due north, without limitation into the Frozen (Arctic) Ocean," which implied, inferentially, a similar extension of the eastern limit.

3. This view was adopted by the United States Secretary of State, Mr. Blaine, in his note on 17 December, 1896, regarding the Behring Sea controversy. Speaking of the 1825 Convention regarding the 141st meridian, he said that the British negotiators might have described their attitude as follows: "as to the body of the continent above the point of intersection at the 141st degree of longitude, we know nothing, nor do you. It is a vast unexplored wilderness. We have no settlements there and you have none. We have, therefore, no conflicting interests with your Government. The simplest division of that territory is to accept the prolongation of the 141st degree of longitude to the Arctic Ocean as the boundary. East of the territory shall be British, west of it the territory shall be Russian"; and he proceeded to use this argument to support the United States contention to jurisdiction over the Behring Sea, in view of the analogous provisions of the treaty of 1867 regarding the western limit of Alaska.

4. The British case before the Behring Sea Arbitration Tribunal in 1893, which was ultimately upheld by the tribunal, adopted the same view of the treaty of 1867, though it deduced therefrom that United States sovereignty was not extended over the sea east of the line drawn by the treaty as the western limit of Alaska, but merely over any islands in that sea which might afterwards be discovered. The gist of the argument is contained in the following passage (pp. 98, 99, Parliamentary Paper, United States No. 1, 1893), where it is observed –

“That the line drawn through Behring Sea between Russian and United States possessions was thus intended and regarded merely as a ready and definite mode of indicating which of the numerous islands in a partially explored sea should belong to either Power, is further shown by a consideration of the northern portion of the same line, which is the portion first defined in the treaty. From the initial point in Behring Strait, which is carefully described, the ‘*limite occidentale*’ of territories ceded to the United States ‘*remonte en ligne directe, sans limitation, vers le nord, jusqu’à ce qu’elle se perd dans le Mer Glaciale,*’ or, in the United States official translation, proceeds due north without limitation into the same Frozen Ocean.’

“The ‘*geographical limit*’ in this the northern part of its length through an ocean which had at not time been surrounded by Russian territory and which had never been claimed as reserved by Russia in any way; to which, on the contrary, special stipulations for access had been made in connexion with the Anglo-Russian Convention of 1825, and which since 1848 or 1849 had been frequented by whalers and walrus-hunters of various nations, while no single fur seal has ever been found in it. It is, therefore, very clear that the geographical limit thus projected towards the north could have been intended only to define the ownership of such islands, if any, as might subsequently be discovered in this imperfectly explored ocean; and when, therefore, the treaty proceeded to define the course of ‘*the same western limit*’ (‘*cette limite occidentale*’) from the initial point in Behring Strait, it is obvious that it continued to possess the same character and value.”

Moreover, in his speech before the tribunal on 1st June 1893, Sir Richard Webster (“*Proceedings,*” p. 1283) said in the same connexion: -

“Would you let me run the pointer along that line, Mr. President? It goes over 20° of latitude right up to the North Pole. They have got all the islands on the right-hand side of that line. If there are islands on the east of that line, whatever they are, the United States have got them.”

5. The principle thus recognised in the case of Alaska was tacitly assumed in the case of the neighbouring countries of Canada and Siberia, as can be seen from any map of

that period, until the exploration of Sverdrup's Norwegian expedition at the beginning of the 20th century, and the controversy over Wrangel Island in the years 1922 to 1924. His Majesty's Government in Canada have interpreted in this sense the Order in Council of the 31st July, 1880, annexing to the Dominion "all British territories or possessions in North America not already included with the Dominion of Canada, and all islands adjacent to any of such territories or possessions," while the Russian Government have never made any secret of their view that all land discovered to the north of Siberia must be regarded as Russian; and on the 23rd October, 1916, the Russian Ambassador in London sent in a note announcing the annexation of certain islands to the north of the Taimyr Peninsula in Siberia discovered by Captain Wilkitski in 1913 and 1914, and adding that his Government regarded the other islands in the Arctic Ocean north of Siberia as "faisant partie intégrante de l'Empire," on the ground that they formed "une extension vers le nord de la plate-forme continentale de la Sibérie." No official reply, other than a formal acknowledgement, was returned to this note, but in the following year (after the first Russian revolution) a semi-official letter was sent to the representative of the Kerensky Government in London, enquiring, on behalf of the Royal Geographical Society, whether there was any change on the nomenclature of the islands mentioned in the note. As several of these islands, including Wrangel Island, were not Russian by discovery, the tacit appearance of the note by His Majesty's Government in the United Kingdom had an important bearing on their subsequent attitude in the Wrangel Island controversy.

6. This controversy arose from the proceedings of the Canadian explorer, Stefansson, who had been a member of the crew of the Canadian Government survey vessel "Karluk," which was wrecked near the island in 1914, the crew being marooned there until rescued by an American vessel. Stefansson himself was not on board the vessel at the time of the disaster, and does not appear to have landed on the island at any time; but the survivors of the wreck raised the British flag on the 1st July, 1914, the expedition having authority from His Majesty's Government in Canada to discover and take possession of new land. These proceedings were generally forgotten during the war, and the Russian note of 1916 makes no reference to them, Wrangel Island being mentioned therein by name, apparently because it had been occupied in 1913 by the Wilkitski expedition, though this was not stated in the note. Mr. Stefansson, however, had not forgotten the island; and in 1921 he organized with great secrecy, an expedition under another Canadian, Mr. Crawford, who landed on the island from an American vessel and hoisted the British flag. In the following year, 1922, Mr. Stefansson fitted out an expedition for the relief of Mr. Crawford's party, but was unable to approach the island owing to ice conditions, and next year the party were found to have perished.

7. Before this was known, however, the Soviet Government protested against their action, and reiterated the Russian claim to the island in a series of notes

culminating in a communication of the 25th May, 1923, which ended with the threat that the Soviet Government were “adopting measures for the prevention in future of the violation of their sovereignty over the island in question”; and in one of these notes, presented on the 24th May, 1922, the Russian claim was supported not only on the ground of the occupation by Captain Wilkitski, but on the further ground that the island “was discovered by the Russian naval officer F. Wrangel,” which seems to show that the Soviet Government had some doubt of the validity of a claim based only on geographical proximity or on the Sector Principle.

8. The claim to discovery by Wrangel is shown by all available evidence to be unfounded, since Wrangel’s own account of his expedition to North-East Siberia in the years 1821-24 states that, though he had heard from natives of the possible existence of land in the position of the island, he had never actually sighted it. The island was first sighted in 1849 by a British naval officer, Captain Kellet, while the first recorded landing on it was made by Captain Hooper in the American revenue cutter “Corwin” in 1881, who took formal possession of the island in the name of the United States Government. The Government, however, when they heard of Mr. Stefansson’s expedition, confined their official action to notes representing that, in view of the press reports that the Canadian Government intended to annex the island, the question of its ownership was one requiring consideration. As regards the attitude of His Majesty’s Government in Canada though the Canadian Prime Minister, Mr. Mackenzie King, stated in the House of Commons at Ottawa on the 12th May, 1922, that “the Government certainly maintains the position that Wrangel Island is part of the property of this country,” apparently on the ground that a Canadian expedition was at the time in occupation of the island, his Government, after giving Mr. Stefansson a hearing, finally reached the conclusion in 1923 that “for various reasons it would not, at the present time, be advisable to press the claim on behalf of Canada.” They advised Mr. Stefansson, however, to lay his views before His Majesty’s Government in the United Kingdom, and he was afforded a hearing before an inter-departmental committee, which met at the Foreign Office on the 13th June of that year, under the chairmanship of Sir Cecil Hurst. The conclusions reached, after considering the report of this committee, were the same as those of the Canadian Government – that the Russian claim was not a strong one on any grounds other than those of the Sector Principle, but that, in view of the position elsewhere, and particularly of the position in the Canadian Arctic regions, it was not desirable to press the claim; and this view was strengthened when it was learnt that the Canadian occupiers of the island were no longer alive. Accordingly, advantage was taken of the Anglo-Soviet negotiations in 1924 to declare, at the meeting of the Anglo-Soviet conference on the 6th August of that year, that “His Majesty’s Government lay no claim to the Island of Wrangel.”

9. The controversy, however, had evidently convinced the Soviet Government of the advisability of making a general and definite assertion of their claims, and they accordingly (on the 17th November, 1924) communicated to His Majesty's Government and other Powers concerned a note stating that, in view of the frequent violation of their territorial rights over the islands to the north of Siberia, they were obliged to draw attention to their predecessors' note of 1916 (see paragraph 5), to confirm that the islands named therein belonged to the R.S.D.S.R. (i.e) the Russian Federated Republic of the U.S.S.R.) and at the same time point out that "les îles et terres mentionnées situées dans les eaux baignant les côtes septentrionales de la Sibérie, sont situées à l'ouest de la ligne qui en vertu de l'article premier de la Convention de Washington entre la Russie et les Etats-Unis d'Amérique en date du 18/30 Mars 1867 définit les limites à l'ouest desquelles les Etats-Unis d'Amérique se sont engagés de ne formuler aucune revendication." They added that they expected the Governments concerned to take the necessary measures to prevent infractions of Soviet sovereignty over these territories on the part of their citizens, and that they would demand satisfaction from any Governments who supported such infractions or allowed them to take place contrary to the general principles of international law and to their treaty obligations. This note, which was formally acknowledged but not otherwise answered, did not, apart from its bellicose wording, differ in substance from the previous Russian notes on this question; but, on the 15th April, 1926, the Soviet Government took a further step by issuing a decree (a copy of which was afterwards communicated to His Majesty's Government in the United Kingdom in a note of the 2nd September, 1926, from the Soviet Chargé d'Affaires in London) declaring –

"All discovered lands and islands, as well as those that may be discovered in the future, which are not at the moment of publication of this decree recognised by the Government of the U.S.S.R. as territory of some foreign Power are declared to be territories belonging to the U.S.S.R., within the following limits: -

In the Northern Arctic Ocean, from the northern coast of the U.S.S.R. up to the North Pole, between the meridian 32° 4' 35" east longitude from Greenwich, passing along the eastern side of Vaida Bay through the triangulation mark on Kekursk Cape, and meridian 168° 49' 30" west longitude from Greenwich, passing through the middle of the strait which separates Ratmonov and Kruzenstern Islands of the Diomedé Group of islands in the Behring Straits."

10. "This decree states the Sector Principle in its most explicit form, viz., that of claim to any land that might exist, either known or unknown, within the triangle formed by two meridians of longitude starting from the eastern and western boundaries of territory already held by the Power concerned, and continuing until they meet at the Pole." Within the area claimed by this decree, moreover, there were two territories north of, but very far from, the mainland of European Russia, to which the Soviet Government could advance no claim either on grounds of discovery

or on those of territorial contiguity. The first of these, Gilles Land or East Spitsbergen, which comes just within the western limit claimed, is an integral part of Spitsbergen, and as such had been recognised as Norwegian territory by the Spitsbergen Treaty of the 9th February, 1920; and it appears that the Soviet Government are prepared not to contest the Norwegian title to this island, since their decree excludes lands which are "recognised by the Government of the U.S.S.R. as territory of some foreign Power." The other land is the extensive archipelago known as Franz Josef Land, which is Austrian by discovery, as its name implies, having been first sighted in 1873 by the Austrian Payer-Weyprecht expedition, explored later by the British Leigh-Smith and Jackson-Harmsworth expeditions, and since visited, when at all, only by Norwegian hunters. It resembles Spitsbergen, though less extensive and nearer to the Pole, and, like Spitsbergen before the treaty of 1920, had been regarded as possession the status of a "No Man's Land." The subsequent developments of the controversy over Franz Josef Land are detailed in the second section of this memorandum, as they are almost exclusively concerned with the Norwegian claims; but the assertion of Soviet sovereignty over such a country, which could only be justified by an extreme interpretation of the Sector Principle, was a most important factor compelling the various Governments of the British Empire, then about to meet at the Imperial Conference, to define their attitudes towards that principle. On the one hand, the Air Ministry, in view of the potential importance of Franz Josef Land and the other Arctic islands as landing places on long-distance air routes, were anxious to avoid any admission of the Soviet claims, and it was also feared in some quarters that such an admission might stimulate France and other Powers to use the Sector Principle for their benefit in the Antarctic regions, while on the other hand, it was urged that any challenge to the principle on the part of His Majesty's Government in the United Kingdom would have an unfavourable effect both on the Canadian claims in the sector to the north of Canada, and on the British position in the Antarctic, where the Sector Principle had recently been applied in the cases of the Ross Sea and Falkland Islands Dependencies. The final conclusion of the Imperial Conference (on the 19th November, 1926) was that, as no British claim could be made to Franz Josef Land or to any of the other lands claimed by the Soviet decree, apart from Wrangel Island, the claim to which had already been abandoned, and as it was advantageous to be able to treat the silence with which the annexation of the Falkland Islands and Ross Sea Dependencies in 1917 was received by foreign Powers as constituting acquiescence by those Powers, it was best to return no answer beyond a formal acknowledgement to M. Bogomoloff's note communicating a copy of the decree, which would imply a tacit recognition of the Soviet claim if it were not successfully challenged by some other Power.

11. One possible development of the Soviet interpretation of the Sector Principle deserves to be mentioned here, though it is not a necessary consequence of that principle, and is rather an aspect of the question of territorial waters. A pamphlet,

entitled "The Right to the Northern Polar Region," by W.L. Lakhtine, was published in Moscow in 1928 by the People's Commissariat for Foreign Affairs, with a preface, dated the 21st June, 1928, by Professor Sabanin – presumably the legal adviser to the Commissariat, who was present at the negotiations in London in 1924. It calls attention to the importance of establishing definite juridical rights in the Arctic regions, in view of the progress made in aviation and wireless telegraphy, and endeavours to show that the Soviet Government are entitled to extend their sovereignty not only over undiscovered land within the sector annexed by the decree of the 15th April, 1926, but also over the whole of the ice, sea and air within those boundaries and urges that the decree should be revised accordingly. In view of the notoriously extreme claims to territorial waters made by all Russian Governments – up to the cession of Alaska, the Tsar's Government had claimed sovereignty over the whole Pacific Ocean north of latitude 54° 40', the southern boundary of Alaska, on the ground that it was bordered exclusively by Russian territory – and of the official approval given to this publication, it might have been expected that the decree of 1926 would soon have been amended in the manner suggested; but, up to the present year (1930), no such action has been taken, and it is to be hoped that the Soviet Government have realised the hostility which would be aroused by any such step.

12. The attitudes towards the Sector Principle of the Soviet Government, of His Majesty's Government in the United Kingdom and of His Majesty's Government in Canada have now been explained, and before passing to a discussion of the Norwegian attitude it is only necessary to state briefly the position of the other two Governments concerned with the question in the Arctic – the United States Government and the Danish Government. The United States Government have recognised the Sector Principle to some extent, in view of the terms of the Alaska Treaty of 1867; but they have never committed themselves to a definite pronouncement on the lines of the Soviet decree. At various times, indeed, it was feared that they would endeavour to assert claims in certain parts of the Canadian sector on the strength of discoveries made by their citizens, the last occasion being in 1925, when the request of the Governor of Maine to the Macmillan expedition to claim for the United States any territory they might discover in this region (where they, fortunately, discovered nothing), led to a Government statement in the Canadian House of Commons, on the 10th June, 1925, that Canada claimed the whole sector up to the Pole; but they have, in fact, taken no such action, and at the present time the Canadian Government, as a result either of subsequent Canadian expeditions or of patrols by the North-West Police, are in effective occupation of all the islands of the Canadian Arctic archipelago, including the parts discovered by United States citizens, with the possible exception of the extreme northern parts of the most northerly island of that archipelago, known as Ellesmere Land or Grinnell Land, which was explored by various American expeditions between the years 1853 and 1902, and where the climate is so inhospitable that no effective occupation has

apparently yet taken place. As, however, the southern part of this island was explored by British expeditions, and is now in effective Canadian occupation, it is not likely that the United States Government would raise any claim to the northern part, particularly as portions only of that region have been explored by United States citizens, other parts having been explored at other times by British and Norwegian expeditions; and the possibility of such a claim has been further lessened by the admission by the United States Government of Danish sovereignty over the whole of Greenland in the Treaty of the 17th January, 1917, by which the United States acquired the Virgin Islands from Denmark, Grinnell Land being adjacent to the northern parts of Greenland explored by Peary's expeditions, so that an American claim by discovery to the whole of that region might have been formulated but for the Treaty.

13. The attitude of the Danish Government is similar to that of the United States Government in that both Governments have not so far specifically declared their adherence to the Sector Principle, but are more or less committed to it in practice. The Danish Government, as is well known, claim sovereignty over the whole of Greenland and its adjacent islands, on the ground of the essential unity of the whole region; and this claim was admitted by the United States Government in the above-mentioned Treaty of the 17th January, 1917, and by His Majesty's Government in the United Kingdom in the exchange of notes of the 6th September, 1920. It would thus be difficult for the Danish Government to resist with any show of logic the similar claim of His Majesty's Government in Canada to the whole of the Canadian Arctic archipelago; and, although in 1920 when the Canadian Government raised with them the question of taking measures to prevent Eskimo from Greenland crossing into Ellesmere Land for the purpose of killing musk oxen, the wording of their reply had been such as to suggest that they did not recognize Canadian jurisdiction over that territory, in the following year, when the Danish explorer, Rasmussen, desired to conduct an expedition into the same regions, they gave an official assurance to His Majesty's Government in Canada that the expedition had no political aim, and accepted the Canadian Government's reply, in which they agreed to raise no objection to the expedition on the understanding that, in landing on any territory in those regions, it did not dispute Canada's sovereignty thereover on behalf of the Danish or any other Government. In 1925, moreover, when an official request was made to the Danish Government for permission to land in Greenland supplies for the Canadian police post in Ellesmere Island, permission was granted without any question being raised as to Canada's sovereignty over that territory. It may, therefore, be assumed that the Danish Government are not in practice likely to contest the Sector Principle, at any rate in its application to the Canadian sector, especially as they are in need of foreign support for their claim to sovereignty over the whole of Greenland in view of their controversy with the Norwegian Government over the east

coast of that territory. The history and present position of that controversy are discussed in the following section of the memorandum.

### *Norwegian Claims*

14. The Norwegians have always regarded themselves as the pioneers of Arctic exploration and colonization. They have never forgotten that Iceland and Greenland were originally Norwegian colonies; and they maintain that Spitsbergen was known to the Norsemen in the early Middle Ages as Svalbard, which name they have now officially given to the archipelago (though it is doubtful whether the medieval Svalbard was not really a part of Greenland). When, in the Treaty of Kiel of the 14th January 1814, by which King Frderick VI of Denmark ceded to King Charles XIV, John (Bernadotte) of Sweden his rights over Norway, Greenland, Iceland and the Faroe Islands were excepted from the cession, the Norwegian Storting protested at the retention of those territories by Denmark on the grounds that they belonged to the Norwegian Crown; and though, in the further negotiations which took place under British mediation as a result of this protest, the Norwegian claim was dropped with a view to obtaining a settlement of other matters, and the feelings aroused by the transaction seemed to have abated with the course of time during the 19th century, the claims were revived in the general nationalist and expansionist movement after the restoration of Norwegian independence in 1905.

15. The claims to Iceland and the Faroe Islands obviously could not then be maintained, since the inhabitants of those countries no longer wished for reunion with Norway; but the claim to Greenland was on a different footing. That vast country contains only a few thousand Eskimo inhabitants, and its eastern coast is entirely uninhabited except for a few Eskimo settlements in its southern portion. Moreover, the Danish system of administration is a complete political and economic monopoly, with the ostensible object of protecting the Eskimo, and this monopoly was applied even to those parts of the eastern coast where there were no Eskimo to protect and where, according to the Norwegian contention, there were good prospects for Norwegian sealing and fishery enterprise. The Norwegians accordingly viewed with hostility the recognition, first by the United States, and then by this country, of Danish sovereignty over the whole of Greenland; and when, on the 19th December, 1922, a Bill providing for the government of the whole country and taking for granted the existence of Danish sovereignty was introduced into the Danish Parliament, considerable indignation was aroused in Norway, and the Norwegian Government appointed a parliamentary committee to enquire into the matter. Unfortunately, however, for the Norwegian contention, it was discovered that on the 22nd July, 1919, during the Spitsbergen negotiations, M. Ihen, the then Norwegian Minister for Foreign Affairs, in an unguarded moment, and no doubt with the object of securing Danish assent to Norwegian sovereignty over Spitsbergen,

had made an oral statement to the Danish Minister at Oslo that Norway had no objection to Danish sovereignty over Greenland. The Norwegian parliamentary committee accordingly found it necessary to take the line that while the Norwegian Government could not deny Danish sovereignty over the western coast of Greenland, they were not prepared for the time being to admit its extension over the whole country, since that would involve the corresponding extension of the Danish state monopoly to the detriment of Norwegian hunting, fishing and trading rights on the east coast; and they recommended that the Danish Government should be invited to discuss the problem *de novo* on this basis. The Danish Government accepted the invitation without prejudice to their claims, and the result of the negotiations was the signature on the 9th July, 1924, of the Danish-Norwegian Greenland Convention, which provided that "in East Greenland, by which it is understood that part of the east coast of Greenland, with its adjacent waters, which stretches from Lindenov Fjord (60° 27"N. latitude) to Nordostrundingen (81° N. latitude) with the exception of the district of Angmagsalik," there shall be free access for the ships of both parties, for hunting and fishing by the subjects of both parties, and for the occupation of land by those subjects for their own use. The rights accorded to Norwegians under this convention were subsequently extended to British subjects by the exchange of notes of the 4th June 1925, and to French citizens by the exchange of notes of the 19th October, 1925, in view of the most-favoured-nation clauses of the Treaties of Commerce between Denmark and Great Britain and Denmark and France respectively.

16. The Convention of the 9th July, 1924, removed any practical ground which might have justified the Norwegian attitude on this question; but the Norwegian Government and Norwegian public opinion have continued to assert the Norwegian claim to East Greenland, although the Danish position has since been strengthened by the establishment of two Eskimo colonies from West Greenland in the neighbourhood of Scoresby Sound, and although there can be no Norwegian claim by discovery to any part of this coast, most of which was first explored and surveyed by the British to any part of this coast, most of which was first explored and surveyed by the British expedition of Scoresby in 1822, and by the Danish expedition of Graab (1829-1830), Holm and Garde (1883-85), and Amdrup (1898-1900) in the south and Mylius Erichsen (1906-08) in the north. It is, indeed, important to realize that the present Norwegian attitude towards all Arctic claims is not based on logic at all, but on emotion engendered by that national exuberance and spirit of expansion which has been so prominent a feature in Norwegian life since the separation from Sweden in 1905, and in particular, since the close of the Great War.

17. The lack of logic in the Norwegian attitude is clearly shown in the history of the second great controversy by Norwegian claims – the Spitsbergen question. Whether or not the early Norsemen know Spitsbergen under the name of Svalbard,

the country was not known to their descendants in the later Middle Ages, and a claim to Spitsbergen on the basis of that discovery would be no more tenable than a claim to Labrador and Newfoundland on the ground of their discovery in the famous voyages of Leif the Lucky. The first recorded discoverers of the islands were the Dutch navigators, Barents and Heemskerke, in 1596, after which Holland, England and Denmark contested the sovereignty, the English Muscovy Company annexing the land in 1614 under a charter from James I, and its exploration proceeding throughout the 17th century mainly through the efforts of English whaling captains. In the 19th century the exploration was first British and then also Swedish and Russian; and in 1871, at the instigation of the Swedish explorer Nordenskjöld, the Swedish Government addressed the other Governments of Europe, asking each if they had any objection to the United Kingdom of Sweden and Norway taking possession of Spitsbergen. At this time the whaling and fishing grounds had long been worked out and abandoned, and the subsequent mineral discoveries had not yet been made, with the exception of a phosphate mine, in which Nordenskjöld was interested and which was the original cause of the Swedish Government's action. Spitsbergen was consequently regarded as practically worthless, and the only objection to the Swedish proposal was raised by Russia, on the ground that Spitsbergen had been known and occupied by Russian hunters in the 15th and 16th centuries, before its discovery by the Dutch. Though it appears very doubtful whether any such Russian discovery had in fact taken place, the Russian opposition was sufficient to deter the Swedish Government from taking further action, and the territory remained *terra nullius*, without any form of government. The practical inconveniences of this position, however, became serious with the discovery, at the end of the 19th century, of large deposits of good coal and other minerals in several parts of Spitsbergen, and the consequent scramble for mining claims by various nationalities, and in 1899 the Swedish Government suggested to the Russian Government that an international conference should be called to devise some form of government which should keep the peace between the various private claimants to land and mining rights. The reply, however, was unfavourable, and the matter was dropped owing to the growing differences between Sweden and Norway. After the separation from Sweden in 1905, the Norwegian Government revived the question, and in 1907 addressed a note to the British, French, Russian, Netherlands, Belgian, Swedish, Danish and German Governments, declaring that, while they themselves had no intention of altering the status of Spitsbergen as *terra nullius*, they desired some international agreement for its administration. The Powers addressed unanimously agreed to consider proposals for such administration, but progress was retarded by the mutual suspicions and jealousies of Norway, Russia and Germany, each of which countries had some reason for suspecting that the others intended to use the international agreement as a measure for securing their own predominance, and suspicions of Norwegian intentions were not allayed by a memorandum which the Norwegian Government submitted to the Powers concerned in 1909, suggesting

that they should charge one of their number, preferably Norway herself, with the duty of conferring on one of her own courts civil and criminal jurisdiction on matters arising in Spitsbergen. The Norwegian argument in this case was based simply on the geographical proximity which resulted in nearly all lines of communication with Spitsbergen passing through Norwegian ports; and this argument was so far admitted by the other Powers, particularly by Great Britain, that it was agreed that the Governments of the three countries nearest Spitsbergen, Norway, Sweden and Russia, should produce a draft scheme of administration to be submitted to an international conference, which, after several postponements, met at Christiania in June 1914. The proposed scheme provided that Spitsbergen should remain *terra nullius*, and should be administered by an international commission with certain limited powers in taxation, police and judicial matters; but it met with strong opposition, chiefly from the German Government, who claimed a far more prominent part in the administration than could be justified either by their interests or by their previous attitude; and the conference reached a deadlock, and adjourned on the eve of the outbreak of war.

18. At the end of the war, the attention of all parties was directed to Spitsbergen by a clause in the Treaty of Brest-Litovsk of the 3rd March, 1918, which appeared to indicate that Germany, with the support of the Soviet Government, was again attempting to secure the predominant position in Spitsbergen which she had failed to obtain in 1914; and the Allies accordingly determined to include Spitsbergen in the questions to be settled at the peace. The Norwegian Government at the same time began a vigorous agitation in favour of placing Spitsbergen under Norwegian sovereignty, and, by skilful lobbying of the peace delegations at Versailles, brought about a situation in which, in the words of Lord Curzon in his memorandum to the War Cabinet on the 25th August, 1919, "all the other Allied and Associated Powers with vicarious generosity, as they themselves have no interests in Spitsbergen, are prepared to give Norway full sovereignty over the islands." His Majesty's Government in the United Kingdom were in a different position from the other Powers, since they alone of the Allied Governments were responsible for considerable interests acquired by their nationals in Spitsbergen, the holdings of the two British coal companies there being more than twice as extensive as those of all the other companies, Russian, Swedish and Norwegian, combined, though the Norwegians, who had bought out the Americans in 1916, had the largest coal production. They were obliged to recognize, however, that a system of international control would probably be unsatisfactory in practice as compared with control by a single Power, and they accordingly agreed to accept Norwegian sovereignty subject to special safeguards for the rights of foreign subjects; and a treaty to this effect was accordingly signed in Paros on the 9th February, 1920, on behalf of the British Empire, United States, France, Italy, Japan, Norway, Sweden, Denmark and the Netherlands. The Soviet Government at first refused to recognize this treaty, but agreed to recognize

Norwegian sovereignty over Spitsbergen on the 16th February, 1924, in return for their own *de jure* recognition by Norway.

19. Norwegian sovereignty has thus been established over Spitsbergen, not because the Norwegians were the first discoverers or even the chief occupiers of that territory, but on grounds of practical convenience due to its geographical proximity to Norway. As, however, Spitsbergen is some 500 miles distant from the nearest point of the Norwegian coast, the argument from geographical proximity in this case can with difficulty be distinguished from the arguments in favour of the Sector Principle adduced by the Russian and Canadian Governments; and it might have been supposed that their position in Spitsbergen would have induced the Norwegian Government to avoid challenging the somewhat similar position of the Soviet Government in the neighbouring archipelago of Franz Josef Land. The recent history of the Franz Josef Land question, however, shows a very different state of affairs.

20. When the implications of the Soviet decree of the 15th April, 1926 (see paragraph 9), which the Soviet Minister at Oslo communicated to the Norwegian Government on the 6th May, 1926, were realised in Norway, a vigorous press campaign was started to emphasise Norwegian rights in Franz Josef Land. It was asserted that Norwegian sealers and other hunters had found good catches in the neighbourhood of the archipelago, which is most improbable; the "Greenland League of Norway" addressed a memorandum to the Norwegian Government maintaining that the Soviet decree was contrary to international law, which, in their opinion, required effective occupation as a condition necessary for annexation, and calling upon the Government to resist the Sector Principle, which endangered Norwegian interests in the Arctic Seas; the "Nationen" newspaper, the chief organ of the Peasant party, who represent the driving force in Norwegian nationalism, delivered in 1929 what His Majesty's Chargé d'Affaires at Oslo described as a "rather hysterical tirade against the Minister for Foreign Affairs and his Department" on account of their "ridiculous" passivity" in the face of Soviet activities in the Arctic, with special reference to Franz Josef Land; and in the same year an expedition was organized at Tromsø to erect a meteorological station in their territory. The Norwegian Government, meanwhile, had not been as idle as their critics supposed. In October 1928 they made an official protest to the Soviet Government against the annexation of Franz Josef Land, maintaining that it was used exclusively by Norwegian sealers, and should, therefore, continue to be regarded as *terra nullius*; and at the same time they endeavoured without success to enlist the support of the Czechoslovak Government, presumably regarding them as the successors to whatever rights might have accrued to Austria from the original Austrian discovery of Franz Josef Land. They made no public mention of their protest, presumably in the hope that the Soviet would come to terms before a public controversy became inevitable. The Soviet Government, however, made no reply to the Norwegian note, while it was

reported in the press the Soviet flag had been hoisted on Franz Josef Land by the ice-breaker "Krassin." Apparently in October 1928, and that in January 1929 the archipelago had been annexed to the Government of Archangel; and in September 1929 the official Tass Bureau at Moscow sent out messages to the effect that the Soviet Government expedition had opened meteorological and wireless stations on Franz Josef Land, and had left a permanent staff for their upkeep, the Norwegian expedition, which, as previously reported, had set out with the same purpose, having failed to reach Franz Josef Land, ostensibly owing to the severity of the ice conditions, but possibly as the result of a hint from the Norwegian Government, in fear of complications with Moscow. The Norwegian Government were thus forced to come out into the open; and, after a discussion of the whole question at a Cabinet meeting on the 8th November, 1929, M. Mowinkel, the Prime Minister, in a speech to his constituents at Bergen on the 9th November dealing with every aspect of the Government's policy, declared that Norway had special interest of an outstanding nature in Arctic and Antarctic water which did not always agree with those of other States. In accordance with those interests, she has assumed what he described as "the ordinary international point of view" that land not actually occupied by any nation should be considered no man's land, and had dissociated herself from the "so-called sectors" in the Polar Regions. "Norway," he asserted, "has the right freely and without hindrance to carry on her activities in those regions where her people have always indulged in whaling and fishing"; and, as regards Franz Josef Land, she claimed to exercise this right without the interference of any other State. Up to the time of writing this memorandum, the Soviet Government have made no reply to these claims; and, as they are now in effective occupation of Franz Josef Land, as far as that is possible, and the Norwegians are in no position to dislodge them, they will presumably continue to ignore Norwegian protests, and to enforce in practice the claims asserted in their decree of annexation.

21. The Norwegian Government have also have been fighting a losing battle in the similar controversy aroused by their claim to the Otto Sverdrup Islands in the Canadian Arctic Sector; for, while in this case they have a claim on grounds of discovery, which was lacking in the case of Franz Josef Land, His Majesty's Government in Canada have a better claim to these islands than the Soviet Government had to Franz Josef Land on grounds of territorial contiguity and occupation, and are in an even stronger position for enforcing their claim by continued occupancy. The Sverdrup Islands, as their name implies, were discovered by Captain Otto Sverdrup who continued Dr. Nansen's Polar exploration in the "Fram" as leader of the second Norwegian Polar expedition from 1898-1902, in the course of which he and his companions explored and mapped parts of Ellesmere Land (see paragraph 12), and discovered an archipelago adjacent to it on the west, including the large islands which they called Axel Heiberg, Ellef Ringnes and Amund Ringnes Islands, and of which, together with those parts of Ellesmere Land which

they had explored, they took formal possession in the name of the King of Norway. When this was disclosed by the publication of Sverdrup's account of his voyage, the Toronto branch of the Navy League, on the 3rd June, 1904, brought it to the attention of the Secretary of State at Ottawa. It was decided, however, to take no official notice of Captain Sverdrup's action in view of the absence of any formal claim by the Norwegian Government, but to proceed on the assumption of an unchallenged British claim to Ellesmere Land and its dependencies, based both on the original discovery of that territory by Commander Nares, who hoisted the British flag on it in four different places in 1876, and on the Order in Council of the 31st June, 1880 (see paragraph 5), and meanwhile to extend Canadian occupation by visits of Government exploring parties and patrols of the North-West Police, until it became effective over the whole area. This policy was pursued without objection from any quarter until, on 12th March, 1925, the Norwegian consul-general at Montreal, acting upon instructions from Oslo, sent to the Secretary of State for External Affairs at Ottawa a note stating that: "It has come to the notice of my Government that, in certain publication issued by the Canadian Government authorities, the Sverdrup Islands were referred to as Canadian"; and that the Norwegian Government therefore enquired whether the Canadian Government authorities claimed sovereignty over the islands, and, if so, on what grounds. (It will be observed that this note made no mention of the claim to part of Ellesmere Land, which, indeed, has not been mentioned throughout the subsequent negotiations, and may be regarded as abandoned.) His Majesty's Government in Canada returned no reply to this note, nor to several further notes on the same subject; and the consul-general, on the 26th March, 1928, finally sent in a note (a copy of which was communicated to the Foreign Office by the Norwegian Minister in London on the 23rd April, 1928) recapitulating his previous statements, and adding that he was instructed by his Government to state that "they reserve to Norway all rights coming to my country under international law in connexion with the said areas." Moreover, when in the Bouvet Island controversy in 1928, it was intimated to the Norwegian Minister in London that, if His Majesty's Government recognized the Norwegian claim in Bouvet Island, they expected the Norwegian Government to forgo other claims in the Antarctic, M. Vogt attempted to argue that, if there was to be any bargain over Bouvet Island, his Government could bring in the Sverdrup claims. He was informed that those claims could not be taken into account in this connexion; and a settlement of the Bouvet Island controversy was finally reached without further reference to them. But their revival in such circumstances showed that the Norwegian Government regarded them as a useful bargaining counter in negotiations on other questions.

22. In these circumstances an opportunity for disposing finally of the claims seemed to be afforded by the Norwegian annexation of Jan Mayen Island on the 8th May, 1929. This island, which lies between Iceland and Spitsbergen, to the north-

east of the former and the south-west of the latter, was the first discovered by Henry Hudson in the year 1607. It was again visited by an English expedition in 1611, and seems to have been regarded as a British possession in the early part of the 17th century; but later in the same century it became a resort of Dutch whalers and sealers, and is named after the Dutch navigator, Jan Mayen, whose claim to its discovery is, however, apocryphal. Throughout the 19th century it was regarded as *terra nullius*, but on the 21st January, 1920, the Norwegian Chargé d'Affaires in London notified His Majesty's Government that a Norwegian subject, Herr Ruud, had occupied the island, to which he had led an expedition in 1917. In 1921 the Norwegian Meteorological Institute established a wireless station on the island for the transmission of weather reports, and in the next year a dispute with Herr Ruud over this establishment led the Norwegian Government to ignore his claim, and to inform His Majesty's Government and other foreign Governments, without reference to it, that part of the island had been occupied on behalf of the institute. It was then decided, after investigating the history and value of the island, that no objection need be taken to this action, and an official acknowledgement of the announcement was accordingly sent to the Norwegian Minister in London, without any comment beyond an expression of His Majesty's Government's appreciation of the value of the institute's reports to British meteorology. In 1926 the Norwegian Government stated that the occupation announced in 1922 had been enlarged to comprise the whole island, and on the 22nd May, 1927, the Norwegian Prime Minister made the following declaration in reply to a parliamentary question:

“Jan Mayen is still considered as *terra nullius*, but we regard it as a Norwegian sphere of influence. The Norwegian Meteorological Institute has annexed the whole island. The interested Powers have been informed of this fact.” In 1928 Herr Ruud approached His Majesty's Legation at Oslo, offering to cede his rights to His Majesty's Government, but as it appeared doubtful whether it was possible in international law for a claim made originally by a subject of one State to be transferred to another State, and as, in any case, it had been previously decided that the island was of no value to His Majesty's Government, Sir F. Lindley was instructed to inform Herr Ruud that the British Government did not regard his proposal as feasible, taking care, however, not to commit them to any recognition of the Norwegian Government's claim that the island was a “Norwegian sphere of influence”; and there the matter rested until, on the 9th May, 1929, the Norwegian Minister in London announced the formal annexation of the island by Royal decree of the 8th May.

23. The attitude to be adopted towards this act of annexation was discussed by the Inter-Departmental “Antarctic” Committee of the 13th May, 1929, which recommended that, while there was no reason for objecting to the annexation itself, the opportunity should be taken to dispose of the Norwegian claim to the Sverdrup Islands, which was now rendered more illogical than ever, since in the case of Jan

Mayen, as in that of Bouvet Island, the Norwegian claim was based on the contention that prior discovery by one party could be nullified by subsequent occupation by another, whereas in the case of the Sverdrup Islands the Norwegian claim was based on the precisely opposite contention that prior discovery gave a better title than subsequent occupation; and it was accordingly decided to enquire from the Canadian Government the present position of the negotiations regarding the Sverdrup Islands. It was found that unofficial negotiations had been initiated for the abandonment of the Norwegian claim to the islands in return for monetary compensation to Captain Sverdrup, nominally on account of the expenses of his expedition, but that the amount claims – some 50,000 to 60,000 dollars – was considered too large by the Canadian Government, who would be glad of the additional bargaining power afforded by the offer to recognise the Norwegian claim to Jan Mayen Island. Finally, after further discussion with the Canadian Government, His Majesty's Minister at Oslo was instructed, in a despatch of the 22nd January, 1930, to make an oral communication to the Norwegian Prime Minister to the effect that His Majesty's Government in the United Kingdom were anxious that there should be a general settlement with the Norwegian Government of questions connected with the Arctic, and were therefore prepared to recognise the claim of Norway to Jan Mayen Island, though they could not admit the grounds on which the annexation of that island was based, provided that, on the other hand, the Norwegian Government recognised the claim of Canada to the Otto Sverdrup Islands. (The refusal to admit the grounds on which the annexation was based was necessitated by the Argentine Government's claim to the South Orkneys, an Antarctic dependency of the Falkland Island, on the similar grounds of the maintenance on one of them of an Argentine Government meteorological station.) Mr. Wingfield was instructed to inform the Norwegian Prime Minister at the same time that His Majesty's Government fully appreciated the anxiety of the Norwegian Government that Captain Sverdrup should be compensated for any personal claims which he might have, and that he had reason to believe that His Majesty's Government in Canada were making him a handsome offer in recognition of his services. At the same time the Canadian Government were to offer to Captain Sverdrup privately, as an *ex gratia* payment, not to be taken as a precedent a lump sum of 25,000 dollars with a life annuity of 2,500 dollars from the 1st April 1929, provided that he delivered his original maps, dairies, and other materials to the Canadian Government, and would be available if they wished to consult him, and further, that Canadian sovereignty over the islands would be recognised by the Norwegian Government. Mr. Wingfield accordingly, on the 30th January, 1930 made a communication in this sense to the Norwegian Prime Minister M. Mowinckel, who said that he personally was favorably disposed towards the proposed settlement if it satisfied Captain Sverdrup (who, in view of his advanced age, might prefer a lump sum in lieu of the annuity, but must consult the Cabinet and perhaps the Foreign Affairs Committee of the Norwegian Parliament before giving his answer).

24. After further negotiations between His Majesty's Government in Canada and Captain Sverdrup, the latter agreed to accept a lump sum of 67,000 dollars and Mr. Wingfield accordingly, on the 12th March, 1930, approached the Norwegian Prime Minister again, informing him of the agreement reached with Captain Sverdrup, and enquiring whether it would now be possible to expedite a settlement of the whole question.

25. In reply, M. Mowinckel stated that, if Captain Sverdrup was satisfied, and in return for recognition of Norwegian claims to Jan Mayen Island, the Norwegian Government would be prepared to recognise the claim of Canada to the Otto Sverdrup Islands, provided that the islands were mentioned by name, no recognition of any sector be involved, and that the Norwegians should retain the right to hunt and fish on the islands and in the surrounding waters. He thought the latter condition would be more or less a formality, since, in fact, no one did hunt or fish there.

26. This information was duly communicated to His Majesty's Government in Canada, who replied that they saw no objection to the Norwegian condition that the islands should be mentioned by name, but that they could not agree to the Norwegian stipulations as regards hunting and fishing. They were willing, however, to give an assurance of their readiness to afford at all times the utmost consideration to any Norwegian desiring to share in fishing or landing rights.

27. In reply to a communication in this sense, the Secretary-General of the Norwegian Ministry for Foreign Affairs states that he quite understood that any concession by His Majesty's Government in Canada might give rise to inconvenient claims to most-favoured-nation rights on the part of other countries, and he did not seem to attach much importance to the stipulation originally put forward by M. Mowinckel.

28. Agreement having been reached in principle, the question of procedure was next considered, and it was agreed that there should be two exchanges of notes, in one of which Norway would recognise His Majesty's sovereignty over the Otto Sverdrup Islands, while the other would announce the recognition of Norwegian sovereignty over Jan Mayen Island. The Norwegian Government were anxious that there should be an interval between them, so that the two matters should not appear to be closely connected, and, for their part, they were willing that the Norwegian note regarding the Otto Sverdrup Islands should be handed in first. It was further agreed that the notes should be published and that His Majesty's Government in Canada should pay the sum of 67,000 dollars direct to Captain Sverdrup, as soon as the note from the Norwegian Minister had been received and acknowledged.

29. Mr. Wingfield was accordingly instructed, on the 2nd August, 1930, to request that, if the Norwegian Government saw no objection, instructions might be issued forthwith to the Norwegian Minister in London, to address a note to the Secretary of State in the following terms:

“Acting on the instructions of the Norwegian Government, I have the honour to request you to inform His Majesty’s Government in Canada that the Norwegian Government withdraw all claim to the Otto Sverdrup Islands, and formally recognise the sovereignty of His Britannic Majesty over these islands.”

On the 8th August, however, the Norwegian Chargé d’Affaires, contrary to expectation, addressed two notes to Mr. Henderson, as follows:

1. “Acting on instructions from my Government, I have the honour to request you be good enough to inform his Majesty’s Government in Canada that the Norwegian Government, who do not as far as they are concerned claim sovereignty over the Sverdrup Islands, formally recognise the sovereignty of His Britannic Majesty over these islands.

“At the same time, my Government is anxious to emphasise that their recognizance of the sovereignty of His Britannic Majesty over these islands in no way based on any sanction whatever of what is named the “the sector principle.”

2. “With reference to my note of to-day in regard to my Government’s recognition of the sovereignty of His Britannic Majesty over the Sverdrup Islands, I have the honour, under instructions from my Government, to inform Norwegian Government that His Britannic Majesty’s Government in Canada fishing, hunting or industrial and trading activities in the areas which the recognition comprised.”

30. No objection was seen to the first of these notes, but the wording of the second note appeared to be such as would preclude His Majesty’s Government in Canada from imposing any conditions whatsoever (even conditions imposed on British subjects) on Norwegian subjects or companies in respect of fishing, hunting, industrial or trading activities in the area in question.

31. The position has now been considered by His Majesty’s Government in Canada, who have pointed out that it is impossible for them to give the required assurance, owing to the fact that, on order to preserve certain animals from extinction, and in the interest of Eskimos and Indians threatened with starvation, all other persons are forbidden by an Order in Council of the 19th July, 1926, to carry

on hunting and trapping in considerable portions of the Arctic regions, including the Otto Sverdrup Islands.

32. At the time of writing, correspondence on this point is still in progress, but there is no reason to doubt that a satisfactory settlement will shortly be reached with the Norwegian Government.

33. It will thus be seen that the "Sector Principle" is in a fair way to practical establishment throughout the Arctic, and it may be anticipated that in the course of time it will also secure recognition in theory even by the Norwegian Government, who have now little to lose, and, in view of their position in Spitsbergen and Jan Mayen Island, perhaps some to gain by such recognition.

*Foreign Office, August 31, 1930*

## 19. Note to File, Ellesmere, 14 November 1930

LAC, RG 25, vol. 4252, file 9057-40, pt. 2

F/S Nov.14/30

### E L L E S M E R E

Ellesmere Island was discovered in 1616 by the English navigators Bylot and Baffin who explored and named Smith Sound to the east and Jones Sound to the south.

In 1818 the southeastern coast was surveyed by an official expedition formally commissioned by the British Government and commanded by Captain John Ross, R.N.

In 1852, Commander Inglefield, R.N., in charge of one of the Franklin Relief vessels sent out by the British Admiralty surveyed the south coast as far as 84°W. and the east coast as far as Princess. Marie Bay, latitude 79°30'.

In 1833-55 and 1860-61, Kane and Hayes, citizens of the United States, explored the coast from Princess Marie Bay northward to latitude 81°30'. In 1871 Hall, another United States citizen, explored a small section of the north-eastern coast between latitudes 81°45' N. and 82°30' N.

In 1875-76, Capt. Nares, R.N., in charge of an expedition despatched by the British Admiralty, surveyed accurately and in detail the coasts previously explored by Kane, Hayes and Hall, which, to a large extent, had been very inaccurately mapped. Nares continued his exploration along the northern coast as far west as Cape Alfred Ernest in latitude 82°N.

In 1881-84 Lieut. Greely, U.S.N., in command of an expedition commissioned for scientific purposes by the United States Government, crossed Ellesmere and explored the western fiord which bears his name.

In 1898-1902 Otto Sverdrup, commanding a Norwegian expedition, explored the remainder of the coastline on the western and southwestern sides of the island. The fact that Norway made no claim to Ellesmere during the Sverdrup Islands negotiations may be regarded as recognition by Norway that no rights to the island were acquired by Sverdrup's explorations there. There was a commissioned exploration in 1903- 1904.

One significant feature regarding the United States expeditions is that not one of them was officially commissioned to take possession of lands in the name of that nation; and, furthermore, that there has been no subsequent declaration that these private activities have resulted in the extension of United States sovereignty over the explored areas.

However, according to generally accepted principles of international law, discovery of territory merely gives rise to an inchoate title which must be perfected by occupation within a reasonable time. Therefore, even if explorations of a previously

discovered island can be regarded as "discoveries", the inchoate titles of the United States and Norway to portions of Ellesmere have long since lapsed due to the passing of more than 46 and 28 years respectively since the last explorations without any attempt at settlement.

Meanwhile the Government of Canada has been active in taking all possible steps towards occupation. Although there can never be any "settlement", in its ordinary sense, of an island extending from latitude 76° to 83° N., two permanent posts of the Royal Canadian Mounted Police have been established upon the island.

At the posts established at Craig Harbor (latitude 76°10, N.) in 1922 and at Bache Peninsula (latitude 79°04t N.) in 1926, are located post offices and customs houses. In 1924 a building was erected on the west shore of Rice Strait (latitude 78° 46' N.) near Kane Basin, the intention being that the police at Craig Harbor should make a winter patrol to Kane Basin. Thousands of miles are covered each year in periodic patrols over the island. Since 1903 a Canadian Government ship has made an annual patrol of Ellesmere. In this way the Canadian laws are enforced and the welfare of the Eskimo is supervised.

Finally there remains the question as to whether occupation of Craig Harbor, Bache Peninsula and Rice Strait by the establishment of police posts constitutes occupation of the entire island.

Oppenheim (4th Ed. Vol.I, p.452) lays down the principle that "since an occupation is valid only if effective, it is obvious that the extent of an occupation ought only to extend over so much territory as is effectively occupied..... The payment of a tribute on the part of tribes settled far away, the fact that flying columns of the military or the police sweep, when necessary, remote spots, and many other facts can show how far round the settlements the possessor is really able to assert his established authority...."

Lindley (The Acquisition and Government of Backward Territory in International Law) concludes a discussion of the essential element in effective occupation with the following paragraph (page 141):

"There is now a general agreement that the essential point to look to is not whether there is present sufficient force to repel foreign intrusion, or whether the land is in fact being efficiently exploited, but whether there has been established over it a sufficient Governmental control to afford security to life and property there. "The taking of possession," says Bluntschli, "consists in the fact of organising politically the recently discovered country, joined with the intention of there exercising power in the future."

Moore (International Law Digest Vol.I, p.264) says: "In the case of an island, it has been usually maintained in practice to extend the claim of discovery or occupancy to the whole." It cannot be seriously maintained that Ellesmere is too large an island to come within the scope of this rule since the general recognition of Denmark's claim to sovereignty over Greenland (approximately ten times as large), although

there are only a few small settlements on the southern shore and the interior is an almost unexplored wilderness.

With the development of air navigation in the Arctic Canada will be able to increase her effective control and occupation of the island. In 1922 "a site sufficiently level and smooth for an aerodrome" was selected near the R.C.M.P. post at Craig Harbor.

However, it may confidently be asserted that even now the control over Ellesmere Island and its native population is sufficiently effective to vest sovereignty in Canada.

20. S.W. Boggs, Department of State, Office of the Historical Adviser, *The Polar Regions: Geographical and Historical Data in a Study of Claims to Sovereignty in the Arctic and Antarctic Regions*, 21 September 1933 [Excerpts]

NARA, RG 59, CDF 1930-39, Box 4522, File 800.014, Arctic/31

III. Special Problems Relating to Sovereignty in the Polar Regions

The peculiar characteristics of the polar regions as described above, and certain developments in exploration and in sovereignty claims, give rise to the special problems with reference to the establishment of sovereignty in the polar regions, which are outlined below.

The following paragraphs from the “Brief History of Polar Exploration since the introduction of flying,” by W.L.G. Joerg (2<sup>nd</sup> edit., 1930) will serve as an introduction to the enumeration of specific problems:

In the discussion of political sovereignty in the Polar Regions in the present booklet it has been the chief aim to record the developments of recent years. The principles of international law (at least in their strictly legal aspects) have not been dealt with because they are regarded as outside of the province of the geographer. The reader desiring information on this score is referred to a standard manual on the subject. However, in any consideration of these questions which aims to achieve an equitable result, the geographical factors must be taken into account.

This is especially important because physical conditions in the Polar Regions differ radically from those in temperate lands, where the principles of international law have in the main been formulated. (p. 77)

1. Uninhabitability – in relation to “effective occupation”

It is evident that regions which are permanently covered with ice can never be inhabited, nor continually occupied except by specially sustained parties such as the staff at a meteorological station. The exploitation of minerals in sufficiently rich deposits may make extended occupation practicable in exceptional areas. More than a dozen parties have spent an entire winter in the Antarctic, and several have wintered on the ice cap of Greenland.

It seems to the writer, however, that “effective occupation,” which is generally regarded as a condition requisite to the establishment of sovereignty, requires a special definition when applied to the inhospitable regions near the poles. They might perhaps be regarded as ice deserts analogous in important respects to the hot sandy deserts of Africa, and to both the hot and cold deserts of Asia. Large areas of such desert lands are not inhabited, but sovereignty is unchallenged; control of the points

of access and of the routes traversing them, together with notification of assumed jurisdiction, sometimes sufficing to establish unchallenged sovereignty. It is true now, however, that in most such areas, there are treaties defining boundaries between desert territories which are claimed and administered by the countries concerned.

Attention may be called to an article by V. Kenneth Johnston entitled "Canada's Title to the Arctic Islands" in the *Canadian Historical Review*, v. 14 (March 1933, pp. 24-41). In this well documented article the author maintains the following thesis:

In the case of the Arctic islands, discovery and notification were requirements for the acquisition of sovereignty with which it was relatively easy to comply; occupation in the usual sense of the term was, however, and still is, a much more difficult requirement, for the area consists of land, islands, open sea, and ice, and the climate is such as to prevent ordinary settlement. Occupation of the Arctic islands must, in fact, reduce itself to the question of the exercise of jurisdiction. If, therefore, British subjects discovered islands north of Canada's Arctic coast, if the government of Canada exercises jurisdiction in and over them, and if that discovery and that exercise of jurisdiction have been publicly declared, it can be safely assumed that the islands are British territory and within the boundaries of Canada. (p. 24)

[...]

#### 4. Discovery, exploration and making claims by air

Exploration and mapping by means of the airplane has introduced a new chapter in Antarctic explorations. The area seen is vastly greater than that visible to a land party. Vertical and oblique photographs provide accurate data for mapping large areas. Regions worth exploring on foot are quickly revealed, and land parties may receive some of their supplies by air, reducing transport difficulties. In some places, field parties may actually be transported by air. Every scientific expedition to the Antarctic in the last five years has used airplanes, and those now starting are to do their principal exploring by air.

The problem for the lawyer is further complicated by the fact that, in several recent instances, explorers in airplanes, authorized by governments and provided with special documents, have dropped flags and documents laying claims to land discovered and traversed without landing. This has been true for example of Sir Hubert Wilkins in the area south of Australia, and of the Norwegian, Riiser-Larsen, in the area south of the Indian Ocean. (See page 61 for the text of the document dropping by Wilkins.)

Since the air above the land, according to law, comprises part of the territory of a nation, an airplane on a journey of exploration traverses new territory. If seeing new territory on a land journey constitutes a basis for making a claim to sovereignty,

seeing and photographing from the air presumably gives at least as good a basis for making a claim.

## 5. Sector Claims

Claims to large blocks of territory bounded by meridians of longitude converging at one of the poles are very modern, and present rather peculiar problems in international law.

The writer suggests that these claims to pie-shaped areas may be regarded as analogous to claims made in the New World in the days of early exploration and settlement. In those days claims were frequently made which were bounded on the north and south by parallels of latitude extending from the explored coast sometimes to the map limits (the Pacific Ocean) – or at least to the Mississippi River. These parallels were simply the lines already found upon any map, regardless of the lack of geographical knowledge, and they were lines running generally in the direction of the approach by sea. In the polar regions, the approach toward the Arctic is from the south, and the approach toward Antarctica is from the north. The lines found upon the mapping running generally in the direction of the approach by sea are meridians of longitude, which converge at the poles. These are the limits within which claims have been made to two sectors in the Arctic, by Canada and Russia, and to three sectors in the Antarctic, by Great Britain.

The legal question is primarily that of the validity of the claim of any country to territory the existence of which is not known at the time the claim is made, which may be subsequently discovered within prescribed limits.

Norway has definitely opposed the idea of the sector claims, both in the Arctic and the Antarctic, and evidently desires to enlist the support of the United States in opposition to the theory of sector claims. Further information concerning the Norwegian opposition to specific sector claims is given in subsequent sections dealing with individual claims.

The land claimed by France in Antarctic (Adélie Land) comprises not a sector but a small quadrilateral on the Antarctic coast.

## 6. Lines in water as limits of claims.

It may be noted that the parallels and meridians which bound the sector claims in both polar regions traverse open water in large part. The claims, however, do not include the water but simply all land embraced within the sectors claimed, together with the normal three-mile belt of territorial waters.

## IV. Claims Made and Bases for Claims by Various Countries

[...]

In the discussion of all five sectors claims it is to be remembered that the country concerned claims territory which may yet be discovered, as well as that now known, within the pie-shaped sector.

[...]

(a) Sector claimed by Canada.

Canada claims the sector from 60° W. longitude to 141°W longitude, all the way to the North Pole.

The article on “Canada’s Title to the Arctic Islands” by V. Kenneth Johnston, in the Canadian Historical Review, vol. 14 (1933), pp. 24-41, to which reference has previously been made, merits study when the claims of Canada are being considered.

It is worthy of a special note that the Canadian government silenced any possible Norwegian claims to the Sverdrup Islands and part of Ellesmere Island (discovered and explored by Otto Sverdrup, 1898-1902), by paying to Dr. Sverdrup the sum of \$67,000 “for his services” (The Canadian Gazette, December 18, 1930). Norway then acquiesced in the claim of Canada, after an exchange of notes between the Norwegian and British Governments in 1920 (quoted in Ottawa cons. General dispatch No. 934 of October 9, 1931 - - file 841.014/38).

Norway declined to recognize the sector principle in the note in which it recognized British sovereignty over the Sverdrup Islands (Note of the Norwegian Legation at London, August 8, 1930, to the British Minister of Foreign Affairs).

...The Norwegian Government, who do not as far as they are concerned claim sovereignty over the Sverdrup Islands, formally recognize the sovereignty of His Britannic Majesty over these islands.

At the same time my Government is anxious to emphasize that their recognizance of the sovereignty of His Britannic Majesty over these islands is no now way based on any sanction for what is named “the sector principle.”

Possible bases for counterclaims.

American and Danish discoveries. Referring to an area in the Arctic islands north of Canada in which American citizens have made discoveries, Mr. Johnston, in the article cited, writes as follows:

The claim of the United States to certain eastern and central parts of Ellesmere Island, in that it is based on exploration in 1906-07, 1908-1909, and 1915-1918, has greater weight than that of Norway. Like the Norwegian claim, that of the United States is based only on discovery and not on occupation or exercise of jurisdiction, for at no time has the government of the United States performed any act whereby its jurisdiction or laws were enforced in Ellesmere

Islands. If Ellesmere was unoccupied territory, then annexation by the United States without occupation of parts of it in 1914-18, when Canada was at war, might equal, but could hardly supersede, the Canadian claim to title which was based on British discovery in 1818, 1852, 1875-78, and on Canadian occupation by exercise of jurisdiction from 1900 to the outbreak of war. (p. 36)

Mentioning Danish as well as American claims, in the same article, Mr. Johnston writes:

The title of Canada to the Arctic islands was recognized by Norway in 1920 and the claims of Denmark and of the United States have been nullified by Canadian occupation of the territory. No other nation has or could have any claim to the Canadian Arctic archipelago. (p. 40)

[Note Attached to Map of the Arctic]

#### Canadian claims

Canada claims sovereignty over islands either known or yet to be discovered within the sector between 60°W and 141° W on the basis of contiguity, notification of claims to other countries, payment of \$67,000 to Sverdrup (Norwegian) for islands he discovered and explored, and the exercise of effective jurisdiction over the known area. American discoveries in this sector include those in Ellesmere Island in 1906-1907, 1908-1909 and 1915-1918.

[...]

#### V. American Policy Relating to the Polar Regions

To facilitate a study of the policy of the United States, and a possible further development of that policy, citations are made below from important correspondence of the Department, and from certain recent publications.

#### Exchange of Diplomatic Notes with Norway

The Minister of Norway, in a note dated 25 February, 1924, writing with reference to the then projected trans-Arctic flight of the explorers Roald Amundsen, stated:

In order to avoid any misunderstanding I beg to add that possession of all land that Mr. Amundsen may discover will, of course, be taken in the name of His Majesty the King of Norway.

The Secretary of State, Mr. Hughes, replying on April 2, 1924 wrote as follows;

In the penultimate paragraph of your letter you state that, in order to avoid any misunderstanding, you would add that possession of all land which Mr. Amundsen may discover will, of course, be taken in the name of His Majesty, the King of Norway. In my opinion rights similar to those which in earlier centuries were based upon the acts of a discoverer, followed by occupation or settlement consummated at long and uncertain periods thereafter, are not capable of being acquired at the present time. Today, if an explorer is able to ascertain the existence of lands still unknown to civilization, his act of so-called discovery, coupled with a formal taking of possession, would have no significance, save as he might herald the advent of the settler; and where for climatic or other reasons actual settlement would be an impossibility, as in the case of the Polar regions, such conduct on his part would afford frail support for a reasonable claim of sovereignty. I am therefore compelled to state, without now adverting to other considerations, that this Government cannot admit that such taking of possession as a discoverer by Mr. Amundsen of areas explored by him could establish the basis of rights of sovereignty in the Polar regions, to which, it is understood, he is about to depart.”

#### Correspondence with Mr. A.W. Prescott.

Mr. A.W. Prescott, secretary of the Republican Publicity Association, Washington, D.C., wrote to the Department on February 2 and February 18, 1924, inquiring whether the United States has a valid claim to Wilkes Land by right of discovery, whether the claim has ever been proclaimed, and what might be the objections in law or policy to annexing that territory to this country.

The Secretary of State, in a 7-page reply to Mr. Prescott of May 13, 1924 wrote in his final paragraph as follows:

It is the opinion of the Department that the discovery of lands unknown to civilization, even when coupled with a formal taking of possession, does not support a valid claim of sovereignty unless the discovery is followed by an actual settlement of the discovered country. In the absence of an act of Congress assertative in a domestic sense of dominion over Wilkes Land this Department would be reluctant to declare that the United States possessed a right of sovereignty over that territory.

This last paragraph has been published, and has probably been more frequently quoted than any other statement of the Department with reference to the polar regions. It apparently accounts for the introduction of the Senate Resolution of 1930, quoted below. A memorandum of the Solicitor attached to the file is therefore of special interest:

The last sentence of the attached has been redrafted with a view simply to indicating in a negative way some excuse for not answering affirmatively the final question in the letter of February 2, 1924.

It is the viewpoint of the writer that discovery should be regarded as one of the bases for making a claim of sovereignty, and that under Antarctic conditions 'actual settlement' should not be made a condition of establishing sovereignty where it is evidently impracticable. Throughout this memorandum discovery has been cited as a basis of possible claims to various areas.

[...]

## VI. Summary and Conclusion

[...]

Canadian Arctic sector. Canadian jurisdiction is rather effectively established throughout the known islands within the sector claimed by Canada. Canada has recently paid for the extinction of Norwegian territorial claims. Similar American claims can not be presented, however, meritorious, if permitted to lapse much longer. This remark is made without intending to suggest that such claim should be capitalized, either by American citizens or by the United States Government.

[...]

It would appear that the Department has not sufficiently considered the peculiar conditions which prevail in the uninhabitable ice deserts, particularly in the Antarctic, and that undue consideration has perhaps been given to the idea of 'effective occupation.' It may be well to recall that in the case of an almost uninhabitable island, Clipperton, an arbitrator recently recognized sovereignty claims of France, in spite of these briefness of French occupation, long since discontinued[...]

The United States apparently has nothing to gain in the recognition of the 'sector principle' – the theory of the right to territory both known and yet to be discovered, within meridians of longitude claimed and notified to other governments. In the 'sector' between Alaska and the North Pole there are apparently no islands to be found, at least none of any consequence, comparable to the archipelagos north of Canada and Russia. On the basis of both legal theory and of American interest, it would appear to be good policy for the United States to challenge the sector principle, and to uphold the idea that sovereignty can be admitted only in relation to known territories, and perhaps small adjacent islands which may be subsequently discovered. In this matter American interests seem to dictate a policy similar to that

of Norway (see pages 37-38, 45, and the discussion of the two Arctic and three Antarctic sector claims).

[...]

The political and legal problems relating to the Antarctic and to some extent to Arctic as well will doubtless continue to be subject to diplomatic negotiations for years to come. Some of the problems can probably best be handled by international conference, perhaps agreeing to a division of rights and responsibilities among several countries somewhat similar to those recognized on behalf of Norway in relation to Spitsbergen in the nine-power treaty of 1920.

## 21. T.L. Cory, compiled for the Northwest Territories Council, British Sovereignty in the Arctic, 3 June 1936

LAC, RG 25, vol. 4253, file 9057-40 pt. 4

### BRITISH SOVEREIGNTY IN THE ARCTIC

Owing to the activity with regard to sovereignty in the Polar regions, on the part of several sovereign powers, and because of the appearance of articles in the press of recent date inquiring as to what action the Government of Canada is taking to safeguard her rights in the Arctic islands, it is considered expedient that an examination of Canada's position should be made and submitted to the North West Territories Council for consideration.

[To] better to understand the position of Canada with relation to the islands situated within the Arctic Circle to the north of the Dominion of Canada, over which Canada claims sovereignty, it may be well to review briefly the activities of the early explorers.

The early expeditions entering the northern waters to the north of the North American continent were led by Frobisher, an English navigator who was seeking a northwest passage to Cathay. He first entered these northern waters in 1576 and sailed north along the Labrador coast.

The following is a list of the expeditions into this northern region:-

1576-1616 - During this period there were nine English expeditions, each discovering some unknown land and taking possession of it for the British Crown.

1619 - One Danish expedition (no information regarding discovery of new land) hampered by ice passed through Hudson Strait to Chesterfield Inlet.

1619-1631 - No activity seems to be recorded.

1631-1850 - There were 27 British expeditions.

1850 - One American expedition.

1850-1853 - Nine British expeditions.

1853-1855 - Two American expeditions.

1855-1858 - Two British expeditions.

1860-1872 - Four American expeditions.

1875-1878 - Two British expeditions.

1878-1902 - Six American expeditions.

1898-1902 - One Norwegian expedition.

During the above period of discovery and exploration—1576-1902—there were 49 British expeditions, 13 American, 1 Danish, and 1 Norwegian. As can be plainly seen the majority of early explorers were British and they were in practically every case the original discoverers of the various northern islands and took possession of each for the British Crown.

The discovery of unclaimed land or territory and the taking of possession of it for some sovereign or state was, in the early days of discovery, considered sufficient to hold the new lands for that particular state. In accordance with this view, or ignoring the international view evolved in the 18th century that a state must follow discovery by occupation and be in real possession, the British Government at the request of the Canadian Government confirmed the transfer of all the Arctic islands lying adjacent to Northern Canada to the Dominion of Canada. The Order in Council confirming the transfer of these adjacent islands provides as follows:-

“At the Court at Osborne House, Isle of Night, the 31st day of July, 1880.

Present:

The Queen's Most Excellent Majesty, Lord President,

Lord Steward,

Lord Chamberlain,

“Whereas it is expedient that all British territories and possessions in North America, and the islands adjacent to such territories and possessions which are not already included in the Dominion of Canada, should with the exception of the Colony of Newfoundland and its dependencies) be annexed to and form part of the said Dominion.

“And whereas, the Senate and Commons of Canada in Parliament assembled, have, in and by an Address, dated May 3, 1878 represented to Her Majesty 'That it is desirable that the Parliament of Canada, on the transfer of the before-mentioned territories being completed, should have authority to legislate for their future welfare and good government, and the power to make all needful rules and regulations respecting them, the same as in the case of the other territories (of the Dominion); and that the Parliament of Canada expressed its willingness to assume the duties and obligations consequent thereon:'

“And whereas, Her Majesty is graciously pleased to accede to the desire expressed in and by the said Address:

“Now, therefore, it is hereby ordered and declared by Her Majesty, by, and with the advice of Her Most Honourable Privy Council, as follows:-

“From and after September 1, 1880, all British territories and possessions in North America) not already included within the Dominion of Canada, and all Islands adjacent to any of such territories or possessions, shall (with the exception of the Colony of Newfoundland and its dependencies) become and be annexed to and form part of the said Dominion of Canada; and become and be subject to the laws for the time being in force in the said Dominion, in so far as such laws may be applicable there-to.

(SGD) C.L. Peel.”

Subsequent to the above quoted Imperial Order in Council the Canadian

Government by Order in Council dated 2nd October, 1895, "submitting that it is expedient for the convenience of settlers in the unorganized and unnamed districts of the North-West Territories and for postal purposes, that the whole of such territories should be divided into provisional districts, and recommending that four such districts be established, to be named Ungava, Franklin, Mackenzie and Yukon, provided:

"2. Franklin - The district of Franklin of indefinite extent, to be bounded as follows:-

Beginning at Cape Best (now Hatton Headland on Resolution Island), at the entrance to Hudson Strait from the Atlantic; thence westerly through said Strait, Fox Channel, Gulf of Boothia, Franklin Strait, Ross Strait, Simpson Strait, Victoria Strait, Dease Strait, Coronation Gulf and Dolphin and Union Strait, to a point in the Arctic Sea, in longitude about 125° 30' west, and in latitude about 71° 0' north; thence northerly including Baring Land, Prince Patrick Island and the Polynea Islands; thence northeasterly to the 'farthest of Commander Markham's and Lieutenant Parr's sledge journey' in 1876, in longitude about 63° 2' west, and latitude about 83.5° north; thence southerly through Robeson Channel, Kennedy Channel, Smith Sound, Baffin Bay and Davis Strait to the place of beginning."

From the above it will be seen that Canada has considered all the islands to the north of the North American continent as belonging to her and has legislated specifically with regard to them as early as October 2, 1895.

Since the confirmation of the transfer by the Imperial Parliament of the northern adjacent islands in 1880 to Canada, a number of expeditions have been sent north by the Canadian Government for the purpose of exploration and scientific investigation. The dates of these expeditions with the names of the ships in which they sailed were as follows:-

1884 - "Neptune"

1885 and 1886 - "Alert"

1897 - "Diana"

1903-05 - "Neptune"

1906-07 - "C.G.S. Arctic"

1908-09 - "C.G.S. Arctic"

1910- "C.G.S. Arctic"

The above expeditions carried out investigations along scientific lines on practically all of the known Arctic islands up to that time. From 1910 until after the war government interest appeared to have waned and no expedition into the eastern Arctic was undertaken until 1921. There were, however, rather extensive studies made during this time in the Western Arctic covering a large area in which were

situated many of the northern islands. (Stefansson's expeditions 1913-18).

Referring back to early expeditions into the Arctic there was one foreign expedition that might be mentioned at this point which played rather an important part in Canada's claim to sovereignty. This expedition was under the command of Otto Sverdrup of Norway, 1898-1902. Sverdrup during his years of activity in the far north discovered and explored new land or islands of which he took possession in the name of the King of Norway. These islands became known later as the Sverdrup group and consist of Axel Heiberg, Ellef Ringnes, Amund Ringnes and King Christian islands, all west of Ellesmere island.<sup>15</sup> The discovery of these new islands in the area considered under Canadian jurisdiction and the taking possession of them for Norway, cast a cloud over what was considered a clear title to Canada's sovereignty in the Arctic islands adjacent to the Dominion on the north. This cloud to Canada's title, however, was in 1930 cleared away through the diplomatic channels upon Canada paying the expenses of Sverdrup's expedition and Norway withdrawing any claim to the islands in question.

In 1904 a map was published by the Department of the Interior, Canada, setting out practically all the activities of the early explorers and also showing the boundary of Canada on the west as the 141st Meridian of West Longitude extending northerly to the Pole and the boundary on the east as the 60th Meridian of West Longitude extending from just east of Ellesmere island, northerly to the Pole. This appears to be the first map that intimates that Canada claims sovereignty over the area extending north to the Pole, or indicating what has come to be known as the Canadian Polar Sector claim, (See exploration map attached as Ex. 1).

#### International Law relating to sovereignty of unoccupied Territory

The foregoing brief historical resume shows clearly that Canada's activities in the Arctic islands give her precedence in her claim for sovereignty over any other nation, but how far will Canada's claim carry her before an international court should the question of sovereignty ever arise? W.E. Hall, one of the outstanding English authorities on this subject, in his book on International Law, sixth edition, page 102 et seq. states as follows:

“In the early days of European exploration it was held, or at least every state maintained with respect to territories discovered by itself, that the discovery of previously unknown land conferred an absolute title to it upon the state by whose agents the discovery was made. But it has now been long settled that the bare fact of discovery is an insufficient ground of proprietary right. It is only so far useful that it gives additional value to acts in themselves doubtful or inadequate. Thus when an unoccupied country is formally annexed an inchoate title is required, whether it has or has not

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<sup>15</sup> See official statement in Natural Resources Canada, December 1930

been discovered by the state annexing it, but when the formal act of taking possession is not shortly succeeded by further acts of ownership, the claim of a discoverer to exclude other states is looked upon with more respect than that of a mere appropriator, and when discovery has been made by persons competent to act as agents of a state for the purpose of annexation, it will be presumed that they have used their powers, so that in an indirect manner discovery may be alone enough to set up an inchoate title.

“An inchoate title acts as a temporary bar to occupation by another state, but it must either be converted into a definite title within reasonable time by planting settlement or military posts, or it must at least be kept alive by repeated local acts showing an intention of continual claim. What acts are sufficient for the latter purpose, and what constitutes a reasonable time, it would be idle to attempt to determine. The effects of acts and of the lapse of time must be judged by the light of the circumstances of each case as a whole. It can only be said, in a broad way, that when territory has been duly annexed and the fact has either been published or has been recorded by monuments or inscriptions on the spot, a good title has always been held to have been acquired as against a state making settlements within such time as, allowing for accidental circumstances or moderate negligence, might elapse before a force or a colony were sent out to some part of the land intended to be occupied; but that in the course of a few years the presumption of permanent intention afforded by such acts has died away, if they stood alone, and that more continuous acts or actual settlement by another power became a stronger root of title. On the other hand, when discovery, coupled with the public assertion of ownership, has been followed up from time to time by further exploration or by temporary lodgements in the country, the existence of a continued interest in it is evident, and the extinction of a proprietary claim may be prevented over a long space of time, unless more definite acts of appropriation by another state are effected without protest or opposition.

“In order that occupation shall be legally effected it is necessary, either that the persons appropriating territory shall be furnished with a general or specific authority to take possession of unappropriated lands on behalf of the state, or else that the occupation shall subsequently be ratified by the state. In the latter case it would seem that something more than the mere act of taking possession must be done in the first instance by the unauthorized occupants. If for example, colonists establishing themselves in an unappropriated country declare it to belong to the state of which they are members, a simple adoption of their act by the state is enough to complete its title, because by such adoption the fact of possession and the assertion of intention to possess, upon which the right of property by occupation is grounded, are brought fully together. But if an

uncommissioned navigator takes possession of lands in the name of his sovereign, and then sails away without forming a settlement the fact of possession has ceased, and a confirmation of his act only amounts to a bare assertion of intention to possess, which, being neither declared upon the spot nor supported by local acts, is of no legal value. A declaration by a commissioned officer that he takes possession of territory for his state is a state act which shows at least a momentary conjunction of fact and intention; where land is occupied by unauthorized colonists, ratification, as has been seen, is able permanently to unite the two; but the act of the uncommissioned navigator is not a state act at the moment of performance, and not being permanent in its local effects it cannot be made one afterwards, so that the two conditions of the existence of property by occupation, the presence of both of which is necessary in some degree, can never co-exist.”

Reference - On the conditions of effective occupation; see Vattel, liv.1 ch. XVIII, par 207,208; De Martens, *Precis* par 37; Phillimore, 1. ccxxvLviii; Twiss 1. par 111, 114, 120.

Mr. Hall further states:-

“A settlement is entitled, not only to the lands actually inhabited or brought under its immediate control, but to all those which may be needed for its security, and to the territory which may fairly be considered to be attendant upon them. When an island of moderate size is in question it is not difficult to see that this rule involves the attribution of property over the whole to a state taking possession of any one part.”

As is well known during the period of the World War all nations as well as Canada had little time to devote to anything but the matter in hand and, as has been stated above, little attention was paid to our vast regions to the north. After the war the Canadian Government once again turned its attention to our northern islands and went into the question of sovereignty as fully as its resources would permit. After a thorough investigation of the question the Government authorities realized that some further action, than that taken in the past, was necessary to promote Canada's claim to sovereignty and make it more secure before the eyes of the world.

In 1921 the Dominion Government established a Royal Canadian Mounted Police post at Pond Inlet situated at the northern end of Baffin island.

In 1922 the Dominion Government inaugurated a yearly patrol, sending a ship into the Northern Arctic islands and establishing Royal Canadian Mounted Police posts at various strategic points with government administrative authority over the districts covered by their patrols.

The Craig Harbor post at the southern extremity of Ellesmere island was established in 1922.

The Pangnirtung post situated on the north side of Cumberland Sound was established in 1923.

The Dundas Harbor post situated on the south side of Devon island was established in 1924. The Police detachment was withdrawn in 1933, buildings temporarily unoccupied.

The Bache Peninsula post situated about the middle of Ellesmere island on the east coast was established in 1926; police detachment transferred to Craig Harbor in 1933. Buildings and small quantity of supplies remain intact for future use.

The Lake Harbor post situated on the north side of Hudson strait on Baffin island was established in 1927.

A radio direction finding station was established in 1928 by the Department of Marine on Resolution island at the eastern entrance to Hudson strait.

The Cambridge bay post on Victoria island north of Dease strait was established during the period of open navigation 1926. This post is in the western sphere of the Arctic islands and extends its jurisdiction by patrol over a large area of surrounding country.

The government patrol boat has made extended trips into the Arctic island region regularly each year since its inception in 1922 and has carried government officials (including medical men and scientists) and officers and constables of the Royal Canadian Mounted Police, to maintain and extend Canadian authority in the far north. The expeditions have in addition carried Canadian administrative authority into many out-of-the-way places and visited many of our islands from time to time where no police post has been established.

The action taken by Canada namely of sending a patrol ship into the Eastern Arctic each year has, as far as it goes, substantiated Canada's claim to sovereignty in that region. However, as a cursory examination of the map will disclose, the posts established by Canada are situated along the eastern fringe of Canada's vast Arctic claim and the question at once arises; What about all the unoccupied islands lying to the west and within the Canadian Arctic sector? International law, while not definitely setting forth what is necessary to constitute absolute sovereignty in the Arctic islands, does state that discovery is not sufficient to maintain a claim to sovereignty nor are periodic visits by explorers or scientific expeditions sufficient to uphold such a claim.

In 1925, the Honourable Charles Stewart, then Minister of the Interior, upon being questioned in Parliament, stated definitely that Canada claimed all lands discovered and undiscovered within the polar sector bounded on the south by the mainland of Canada, on the west by the 141st meridian of West Longitude to the North Pole and on the east by a line extending midway between Greenland and Ellesmere island to the northern limit of Ellesmere island thence northerly along the 60th meridian of West Longitude to the North Pole. (See map attached here as Ex.II.)

The Canadian Government has passed legislation making the laws applicable to

the Northwest Territories equally applicable to the Arctic islands over which she claims sovereignty and through the medium of her police posts and periodic patrols has assumed the obligation of seeing that the said laws and regulations are complied with by those living or entering into the northern regions.

With further regard as to the question of sovereignty it is interesting to examine the views of other countries and foreign authorities relating to sovereignty in the northern regions and in particular Canada's claim to sovereignty over the vast number of islands to the north of the Dominion of Canada.

I have been able to obtain certain documents from the Department of External Affairs setting forth views of other countries. These documents are of an utmost confidential and secret character and as they are not readily accessible I shall set forth the parts relating to Canada and her problem of sovereignty rather fully.

In a book entitled "Acquisition of Sovereignty Over Polar Areas" by Gustav Smedal, edited by the Norwegian Government at Oslo in 1931, the extracts of immediate interest to the department are as follows:-

"Interest in the polar regions, whether it be due to practical or to scientific reasons, has during the last 25 years manifested itself politically very strongly. Thus, it may be mentioned that Denmark claims the whole of Greenland, although she has only taken possession of a comparatively small part of that enormous country. Canada holds that, on account of her geographical position, she has a right to the whole archipelago between her northern coast and the North Pole. Russia claims on the same basis all territories and islands between her Arctic coasts and the Pole. In Antarctica the British Empire has raised claims which, if justified, would make a material part of that continent a British dependency." ....

"By sovereignty over a territory is meant the authority of the State to have control of, or to rule over, the territory and the persons and objects present there. Within the territory the State exercises its legislative power, its administration of justice, and its administrative authority. As a rule it has also the right to oppose to authority of foreign States on the territory.<sup>16</sup> The State has to a considerable degree the right to control access to the territory,<sup>17</sup> and it generally, has the right to reserve to itself and its citizens the use and exploitation of it. The control of the territorial sea is somewhat less comprehensive. Thus, foreign merchant ships have the right of innocent passage through it.<sup>18</sup>

"The right conferred by territorial sovereignty, however, carries with it an obligation, namely the obligation to protect within the territory the rights of other States, and rights which citizens of these States may have there.

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<sup>16</sup> Cp. v. Verdross, 1925, p. 605.

<sup>17</sup> Cp. v. Liszt, 1925, p. 126-27.

<sup>18</sup> Cp. Conference pour la Codification du Droit International, 1929, p. 71 and 75, Raestad, 1930.

“Sovereignty can only be exercised by a State, not by private persons or companies, e.g. colonization companies. This fact has not always been clearly recognized.<sup>19</sup> Colonists may, however, form their own State, and this State can then exercise sovereignty.

“In former times sovereignty over a territory was frequently confused with right of dominion over it; and this confusion is sometimes still met with. These rights have, however, nothing to do with each other. As just mentioned, sovereignty is the right of the State to control or rule the territory. It is not necessary for the State to own land property; but this is not infrequently the case, and the State is then the landed proprietor in the same ways as are municipalities, companies, and private persons. A State may also own real property within the territory of another State.<sup>20</sup>

“Sovereignty over a territory may be acquired in different ways. Thus, an area already subject to sovereignty may be transferred by treaty. In such cases it has been said that the sovereignty is made over by one State to the other. This is not correct. A State always exercises solely its own sovereignty. In such a case the sovereignty has given way to a new right of sovereignty, but it has not been transferred.<sup>21</sup>

“An illustration of the acquisition of sovereignty by treaty is the passing over of Alaska from Russia to the United States in 1867. The compensation was \$7,200,000. Mr. Stewart, the American Secretary of State, carried the matter through in spite of the gibes of his countrymen, They did not understand why their government wanted this desert of earth and stone.<sup>22</sup> As all the world knows, Alaska has proved to be a most valuable land. In American quarters it has recently been stated, in connection with the discussions on the importance of Antarctica that up to the end of 1928 the value of the production of gold, silver, and copper in Alaska was 630,731,014 dollars.<sup>23</sup>

“Sovereignty may also be acquired over areas which are No-man's-land. It may, for instance, be effected by all the Powers interested agreeing that an area shall belong to one of the claimants. Such was the case with the Svalbard group of islands.<sup>24</sup> Op. the Svalbard Treaty of 9th February 1920, especially Articles 1 and 10. The interested Powers recognized the sovereignty of Norway. Russia, who at that time had no opportunity of ratifying the treaty,

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<sup>19</sup> Heimburger 1888; p. 44-77; Salomon, 1889, p. 163-88; Raestad, 1925, p. 128.

<sup>20</sup> Bluntschli, 1878, Sec. 277; Westlake, 1910, p. 86-89.

<sup>21</sup> Schatzel, 1924, p. 366.

<sup>22</sup> Fleischmann, 1924, p. 22-23; A Hearing on House Resolution 149, Contemplated Flight of the “Shenandoah” to the North Polar Regions. Committee on Naval Affairs, House of Representatives, Washington, 1924, p. 452.

<sup>23</sup> “Times,” New York City, 22nd June 1929.

<sup>24</sup> Wheaton, 1929, p. 338.

has since declared that she recognized the sovereignty of Norway.

“The most important way in which sovereignty may be acquired over No-man's-land is by occupation. The principles applying to occupation are found in international law. Very few of them have been determined by convention. Most of them are to be found in the customary law of the community of nations. Customary law is used here in the sense of all the legal convictions prevailing in the community of nations and having no title in treaties.<sup>25</sup>

“The doctrine of occupation raises many difficult questions, and it cannot be denied that it would have been an advantage if the principles had been laid down by treaty to a greater extent than is now the case. For instance, difficulties may be involved in ascertaining what is customary law in any particular case. One difficulty arises because States are apt to make more rigorous demands upon other States than they make upon themselves in cases where certain conditions have to be fulfilled.<sup>26</sup> To some extent it may also be said that international law lacks definite rules for the solution of various questions arising in the case of occupation. With regard to polar lands the opinion has been argued that there are grounds for making allowances in the requirements which are otherwise made in the case of occupation in order that it shall hold good against foreign States.

“Of the different ways in which sovereignty may be acquired over polar lands only the most important will be dealt with here viz: Occupation. We would at once point out that, in our opinion, it is, broadly speaking, not the case that other rules than those applying to occupation in other parts of the world apply to occupation in polar regions. When the rules are to be applied in polar regions, however, questions of a special nature may arise. Our aim is to give a brief account of the general rules of occupation, laying particular stress upon the questions arising in connection with occupation in polar regions. Questions of minor importance to occupation of polar lands will either be mentioned in passing or left out altogether.”

### Occupation.

#### A short historical review.

Here follows a review of the earliest actions taken with regard to sovereignty of what is referred to as No-man's-land.

Owing to the doubt and uncertainty existing in very early times the Papacy came to play a prominent part. The Pope asserted the doctrine that the whole earth was the property of God, and that mankind only held it in usufruct. The Pope, being the representative of God, had the right of the disposal of those parts of the globe which

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<sup>25</sup> Gjelsvik, 1915, p. 47-48

<sup>26</sup> Cp. Wheaton, 1929, p. VIII.

had not yet been taken possession of. The Pope conferred sovereignty by bull on whomever he pleased which in most cases was the country of which the discoverer was a national. Sovereignty was, however, dispensed in this way not only over land already discovered. By a bull of January 7th, 1454, Pope Nicholas V, conferred on the King of Portugal all the areas which had been discovered, or which in future might be discovered, on the west coast of Africa. Other similar cases even more far reaching are cited by Smedal as follows:-

“The papal bulls may seem more irrational today than was the case when they were issued. At that time legal rules of occupation did not exist, and the need of obtaining peace and security when important discoveries had been made was gratified by the papal decisions, which in the beginning were respected.”...

“It may be said that from the sixteenth century a new view on these matters began to prevail. It was no longer the papal bulls; but discovery, to which importance was attached., Opinions differ as to what rights discovery gave.<sup>27</sup> The general opinion is that discovery under certain conditions could be taken as a basis of sovereignty.”...

“It is a question whether the discovery was not also required to be accompanied by an act of appropriation in order to furnish adequate proof of sovereignty. At any rate, it is certain that the States in case of conflicts, fortified their title to discovered lands, by saying that they had taken possession of them.<sup>28</sup> The jurists of that time displayed great activity in this direction; they sought an argument in favour of occupation in the doctrine of Roman law relating to possession. The stipulation which, in case of occupation, was made as regards possession, was, however, a modest one. A real or effective possession was not demanded; a fictitious or formal act of appropriation was sufficient. For instance, the royal ensign was displayed, or a cross, beacon, or other monument was raised on the shore as a proof of discovery. The ensign and the monument were proof both of the discovery and of the intention of the discoverer to acquire sovereignty for his king over the surrounding areas.<sup>29</sup> It was not demanded that the discoverer had been ashore at the discovered places. Some States claimed sovereignty over enormous areas, along the coast of which their ships had sailed, but where their mariners had not been ashore.

“When occupation is based on discovery and an entirely fictitious act of appropriation, it is very difficult to state the boundaries of the areas occupied. It has at all times been a temptation for occupying, to make great claims on a basis which does not justify such claims.<sup>30</sup> A good illustration of this was

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<sup>27</sup> See Visser, 1929, p. 741-42 and p. 753.

<sup>28</sup> Fauchille, 1925, p. 687.

<sup>29</sup> Salomon, 1889, p. 74-75.

<sup>30</sup> Cp. Wheaton, 1929, p. 352.

England's claim of sovereignty to North America, which was based on the fact that Caboto in 1497 had sailed along the American coast from 56° to n° N., although he had only been ashore at a few places.<sup>31</sup>

“The view on occupation prevailing in this second period of which we are now speaking, largely facilitated the presentation of exaggerated territorial claims. This was a great disadvantage of the system of the period. Both in this and the preceding period the rule was that all areas not belonging to Christian princes could be occupied.

“In the eighteenth century the theory of occupation was brought a great step forward. It was denied that discovery and fictitious appropriation could prove sovereignty. In order that a State could be entitled to exclude other States from a territory it was required that it should have taken the territory into effective and real possession. Vattel wrote in 1758 the words afterwards so frequently quoted:

“Hence the Law of Nations will only recognize the ownership and sovereignty of a Nation over unoccupied lands when the Nation is in actual occupation of them (*reellement et de fait*) when it forms a settlement upon them (*forme un etablissement*), or makes some actual use of them. In fact, when explorers have discovered uninhabited lands through which the explorers of other Nations have passed, leaving some sign of their having taken possession, they have no more troubled themselves over such empty forms than over the regulations of Popes, who divided a large part of the world between the crowns of Castile and Portugal.”<sup>32</sup>

Many disputes as to sovereignty between states arose in the succeeding years, and conferences were held endeavoring to lay down some fundamental rule that would apply in all cases. [Smedal wrote:]

“This appeared clearly at the meeting of the Institut de Droit International at Lausanne in 1888, where the problems of occupation were discussed. Prominent jurists from different countries agreed on a recommendation that rules similar to those adopted by the African Conference should apply in all cases of occupation without regard to where they took place. The Institute adopted more resolutions on occupation. The main resolution, Article 1, was this:

‘Occupation of a territory in order to acquire sovereignty cannot be recognized as effective unless it complies with the following conditions.

- ‘1. Appropriation made in the Government's name of a territory encompassed by certain limits (*enferme dans certaines limites*).
- ‘2. Official notification of the act of appropriation.’

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<sup>31</sup> Cp. Fauchille, 1925, p. 687-88.

<sup>32</sup> Vattel, 1758, Volume I, Sec. 208.

“The appropriation shall be made by the establishment of a responsible local authority furnished with sufficient means for the maintenance of order and for securing a regular exercise of its control within the boundaries of the occupied territory.

“The notification of the appropriation may be made by publication in the form usually adopted in each State for the notification of official acts, as well as by the diplomatic means. It shall contain an approximate settlement of the limits of the occupied territory.”<sup>33</sup>

“As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. 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. International law in the nineteenth century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the eighteenth century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective - that is offer certain guarantees to other states and their nationals.”<sup>34</sup> ...

“It will be seen from the above account that the opinion, which had been advanced in the eighteenth century, to the effect that an effective appropriation of a territory shall be a condition of its acquisition by occupation, has been accepted by the States belonging to the community of nations. The proof of this is found in international conventions, in statements of jurists, in contentions and arguments applied by States in their legal disputes and in arbitration awards.”

### Smedal. “WHO CAN OCCUPY AND WHAT TERRITORIES CAN BE OCCUPIED?”

“I. In the Introduction it was-stated that States alone can exercise sovereignty. The consequence is that only States, by occupation, can acquire sovereignty. By occupation, sovereignty is extended over territories which were formerly not subject to it.”<sup>35</sup>

“Each State has a right to expand its territory by occupation. Whether the State be Christian, civilized, or a member of the community of nations,’

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<sup>33</sup> Annuaire, 1889, p. 201-02.

<sup>34</sup> Arbitral Award, Palmas, 1928, p. 26 and p. 27.

<sup>35</sup> Heilborn, 1924, a, p. 343.

is in this respect immaterial.<sup>36</sup> When we say States, we mean here independent States. The question whether so-called semi-sovereign States can make occupations shall not be dealt with here. It is not every form of Settlement that constitutes a State. A State presupposes a nation, a territory and a power in the State. This is, however, not the place to detail the conditions to be fulfilled in order to accomplish the creation of a State.

“II. We shall now deal with the question as to what territories can be occupied. These may be said to be territories that fulfil two conditions: 1. They must be unoccupied, and 2. International law must permit of their occupation.

“Re 1. As a contrast to the rule that each State has a right to occupy, there is the rule that territories belonging to a State cannot be made the object of occupation. Each State has, without regard to the religion or the state of development of its citizens, a right to see its territory respected. A country inhabited by people who have not yet created any State can be occupied. It is immaterial whether these people are nomadic natives or European colonists who, for instance, have settled in a polar land.<sup>37</sup>

“If a State renounces forever the exercise of sovereignty over a territory without this being transferred to any other State, the territory becomes No-man's-land and it can be occupied (dereliction). Display of State authority over a territory is, indeed, not only necessary in order to acquire sovereignty by occupation, but also in order to maintain an acquired sovereignty.<sup>38</sup> Without regard to the manner in which sovereignty over a territory has arisen, it will be forfeited if the State ceases to exercise authority over the territory; e.g if it withdraws its military power, its police inspection, or it discontinues the legal and administrative institutions which had formerly existed within the territory. The case is clearest if there is also a declaration of abandonment, but such a declaration is not necessary.<sup>39</sup> In the arbitration award mentioned above relating to the dispute between the United States and the Netherlands as to sovereignty over the Island of Palmas (or Miangas), it is stated:

‘...The growing insistence with which international law, ever since the middle of the eighteenth century, has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right. If the effectiveness has, above all, been insisted on in regard to occupation, this is because the question rarely, arises in connection with territories in which

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<sup>36</sup> Salomon, 1889, p. 21-25.

<sup>37</sup> Heilborn, 1924 a, p. 343; Fauchille, 1925; p. 697; Oppenheim, 1928, p. 449.

<sup>38</sup> Salomon, 1889 p. 249; Fauchille, 1925, p. 718, Oppenheim, 1928, p. 456.

<sup>39</sup> Heilborn, 1924 c, p. 229.

there is already an established order of things. Just as before the rise of international law, boundaries of lands were necessarily determined by the fact that the power of a State was exercised within them, so too, under the reign of international law, the fact of peaceful and continuous display is still one of the most important considerations in establishing boundaries between States.’<sup>40</sup>

“An example of dereliction was Great Britain's abandonment of the Falkland Islands in 1774. The British Military force here was recalled. Before the British officials departed, an inscription was placed on the fortress wall stating that the Falkland Islands rightly belonged to the King of Great Britain As a proof hereof, it was further stated, this plate has been fitted and the ensign of his Britannic Majesty has been left flying as a sign of possession.<sup>41</sup> As will be understood, this is meant to express that Great Britain intended to preserve her sovereignty over the islands. When a State, in fact, resigns from exercising sovereignty over a territory, it loses the sovereignty even if it deserves its intention to preserve it. This case can be compared with the dispute mentioned above between the United States and Russia in 1824, where the former country stated that 'the dominion cannot be acquired but by a real occupation and possession, and an intention (“animus”) to establish it is by no means sufficient.”...

“Re 2. The high sea cannot be the subject of sovereignty, and the sea is therefore free. Different grounds have been given for this rule. Some authors have, for instance, said that sovereignty is precluded because the substance of the sea is elusive and evades possession.<sup>42</sup> This line of argument, however, leads too far, because it follows therefrom that a State Cannot have sovereignty over sea territory either. All States however are agreed that sea territory is subject to sovereignty.<sup>43</sup> The whole tenor of this view is moreover, false; for when speaking in international law of a State's possession of an area, one does not think of the substance of the area, but of the State's control over it.”<sup>44</sup>...

“In the polar regions the sea is frequently covered with ice and the question then arises whether this ice can be occupied. The question has often been discussed.

“It might be said that as the ice covers the sea and is composed of water, the ice should be submitted to the same principle as applies to the sea, and that it can, therefore, not be the object of a State's sovereignty. To decide the matter in this way, however, is a little too one-sided. It cannot be denied that

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<sup>40</sup> Arbitral Award, Palmas, 1928, p. 17; cp. Visscher, 1929, p. 740-41, and p. 754-58.

<sup>41</sup> Goebel. 1927, p. 410; Cp. Langhans-Ratzeburg, 1929, p. 1198-99.

<sup>42</sup> Jeze, 1896, p. 60-61.

<sup>43</sup> Conference pour la Codification du droit international 1929, p. 17.

<sup>44</sup> Heimburger, 1888, p. 94-95; Westlake, 1910, p. 165, note 1.

ice is different from water, and the considerations that have caused the open sea to be excepted from acquisition of sovereignty do not apply in the same degree as regards all ice areas. There is reason to take into consideration the character of the ice area when the question arises.”...

“On the basis of what is stated above regarding the character of the ice which partly covers the Arctic Ocean, we are of opinion that this ice can not be rendered susceptible of sovereignty. It is not natural to compare this ice-cover to solid land. If, for instance, we look at the photograph which was taken of the North Pole from the airship ‘Norge’ on the 12th May 1926, we see without a doubt that the photograph represents sea and not land.<sup>45</sup>

“The view that the ice covering the Arctic Ocean cannot be occupied, has been expressed by States having interest in these regions. When Peary, in 1909, returned from his last expedition and telegraphed to President Taft; ‘I have the honour to place the North Pole at your disposal’, the United States advanced no claim of sovereignty over the Pole. The reason for this was that they were of opinion that the Pole, being situated in the sea, could not be the subject of sovereignty.<sup>46</sup>

“Before Roald Amundsen made his polar flights in 1925 and 1926, he was authorized to take into possession on behalf of Norway any land he might discover, but not areas of ice in the Polar Sea.

“In the famous Decree of the Soviet Union of 15th April 1926, ‘all lands and islands’ situated in the Arctic Sea between the coasts of the Soviet Union and the North Pole, were declared to belong to the Soviet Union. Some Russian authors have made an attempt to interpret the term “lands and island” in such a manner as to include also ice areas.<sup>47</sup> This is however, an entirely incorrect interpretation.

“In this connection it should also be mentioned that the proposal made by Poirier, the Canadian Senator, in 1907, was to the effect that Canada should declare that it took into possession the ‘lands and islands’ lying between its northern coast and the North Pole;<sup>48</sup> nor can statements on this question which have since been made in Canadian quarters be rightly interpreted to mean that Canada claims areas of ice in the sea.

“The reasons why sovereignty over the ice in the Arctic Sea cannot be admitted, are making themselves felt in the same degree with regard to corresponding formations of ice in the Antarctic regions. Moreover, floating ice is here sometimes met with so far north, and under such conditions, that the question of sovereignty can hardly be raised.”

“The question whether ice areas covering the sea can be occupied has often

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<sup>45</sup> The photograph is also reproduced in *Problems of Polar Research*, 1928, p. 94.

<sup>46</sup> Regarding this incident, see Waultrin, 1909, p. 652-54.

<sup>47</sup> See Lakhtine, 1928, p. 37.

<sup>48</sup> *Debates of the Senate of the Dominion of Canada 1906-7, 1907*, p. 266.

been dealt with in the literature of international law.

“Rolland maintains, for instance that a permanent surface of ice extending from the coast out towards the sea should be considered a continuation of the land and can be submitted to sovereignty.<sup>49</sup> Waultrin and Balch are of the opinion that sovereignty can be acquired over immobile ice.<sup>50</sup> Scott holds that a floating field of ice is not capable of being submitted to sovereignty, but he does not seem to have thought of the barriers.<sup>51</sup> Lindley does not find any reason for excepting from occupation the regions around the two Poles.<sup>52</sup> Clute is of opinion that even if large areas of the Arctic Sea are frozen up, it must still be regarded as an open sea and cannot be submitted to sovereignty.<sup>53</sup> Oppenheim mentions the question whether the North Pole can be occupied. In his opinion it must be answered in the negative 'as there is no land on the North Pole.<sup>54</sup> Breitfuss suggests the division of the Arctic Ocean between five polar States and recommends that their sovereignty shall not only include the land and islands lying there, but also to a certain extent - to be decided by international agreement - “the areas of the sea which are covered with ice fields.<sup>55</sup>“ Lakhtine, who also gives an opinion especially on the Arctic Sea, says that the sea areas covered with more or less immobile ice fall within the sovereignty of the polar States.<sup>56</sup>

“Pearce Higgins who has published the latest edition of Hall's book: 'A Treatise on International Law', and also Fauchille, hold the view that, as it is impossible to settle permanently in the polar regions proper, sovereignty cannot be acquired over them.<sup>57</sup> The opinion that the areas in the polar regions cannot be submitted to sovereignty is, however, without any foundation. The fictitious occupations made by several States in Antarctica is a proof hereof. That it may be difficult to settle permanently in the immediate vicinity of the South Pole, is a case apart. It may also be difficult to settle permanently in the Sahara or in the upper parts of the high chains of mountains in Asia or South America, but it is not denied for that reason that a State may possess sovereignty over this desert and these mountain tracts.”

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<sup>49</sup> Rolland, 1904, p. 340-42.

<sup>50</sup> Waultrin, 1909, p. 655-56; Balch, 1910, p. 434-35.

<sup>51</sup> Scott, 1909, p. 938.

<sup>52</sup> Lindlay, 1926, p. 6.

<sup>53</sup> Clute, 1927, p. 21.

<sup>54</sup> Oppenheim, 1928, p. 450.

<sup>55</sup> Breitfuss, 1928, p. 27.

<sup>56</sup> Lakhtine, 1928, p. 40.

<sup>57</sup> Hall, 1924, p. 125, note 1; Fauchille 1925, p. 658.

Smedal.

“Effective Possession.”

“By occupation a state aims at the reservation, to a greater or lesser extent, of an area for itself and its subjects.’ It wants in a corresponding degree to exclude others. It is, however, unreasonable that this should be permitted to a State, except in a territory where it really has established International law has, therefore, laid down the rule that a State must take effective possession of a territory when it wants to occupy it, that is to say, it must bring the territory under its control and administration. It must be willing to maintain, order, organization, and administration of justice.<sup>58</sup> Subjects of other States may enter the territory and require legal protection during their stay. As their own State is not allowed to exercise authority in the territory, it is reasonable to demand of the occupying State that it maintains an orderly state of things. This is what Germany, for instance, required of Great Britain in 1883, during a controversy with reference to a considerable area in Africa over which the latter country claimed sovereignty.<sup>59</sup>

“If a State wishes to acquire sovereignty over a territory it cannot evade the obligations involved.<sup>60</sup>

“If no State is willing to undertake the control of a territory and of those living there, the territory ought to remain a No-man’s-land. Generally speaking, all nations will then have the same right to use it and to exploit it, and the persons living there will be under the protection of their own country.<sup>61</sup>

“It has been stated with regard, to occupation of polar areas, that it is not justifiable to maintain the demand for effective possession.<sup>62</sup> In such cases there should be reason to be content with a more moderate demand. The French jurist, Waultrin, states for instance:

‘Discovery and notification to the Powers would appear to constitute for a long period sufficient legitimation of acquisition of polar lands. Effective occupation should only be added in cases where persons belonging to another nation than the subjects of the state having the sovereignty, make objections or request exploitation.<sup>63</sup>

“What is here stated in the first sentence is undoubtedly invalidated in the second. An occupation which cannot be maintained when objections are made, is indeed no valid occupation. The statements of Waultrin are not very clear, but it appears to be his opinion that in polar regions the demand for

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<sup>58</sup> Raestad, 1925, p. 129.

<sup>59</sup> Lindley, 1926, p. 143; cp. Salomon, 1889, p. 332;

<sup>60</sup> Westlake, 1910, p. 111; Oppenheim, 1928, p. 456; Arbitral Award, Palmas, 1928, p. 17.

<sup>61</sup> Heilborn, 1924, a, p. 344.

<sup>62</sup> Lakhtine, 1928, p. 32.

<sup>63</sup> Waultrin, 1909, p. 658.

effective possession should be waived, and that in the main, discovery and notification should be sufficient.

“There is every reason to dissociate oneself altogether from this opinion, which lacks foundation in international law. The demand for effective possession is one which must be made by occupation in all latitudes. The polar regions are not excepted from the rule.<sup>64</sup> Waultrin supports his opinion by saying *inter alia* that the polar regions are in the initial stage of their colonization and that man, in relation to them is at the same stage 'where our ancestors were when competition for the colonies began.' This, however, cannot justify the application of rules which resemble those which were in force in respect of occupation at the time of the great discoveries. The progress made by international law since then must, of course, be insisted upon.

“When, therefore, effective possession is rightly demanded also in polar regions as a condition of occupation it should be realized that the remedies necessary for submitting a territory to the control of a State, will not be the same in all cases.<sup>65</sup> The remedies can be adapted to the circumstances at each place. It is significant that it is said in the preamble of the convention of Saint-Germain-en-Laye that the territories in question, now 'are provided with administrative institutions suitable to the local conditions.’<sup>66</sup> ...

“For occupation in polar regions there will not at present be any question of using military force. These regions are so sparsely peopled that orderly conditions can be maintained by much more simple measures. It should be noted that, in respect of effectiveness, it is never required of the occupying State that it should be able to exclude others from the territory by force. The use of military force is of importance only for the maintenance of civil order.<sup>67</sup>

“Nor will it be necessary in polar regions to make use of so great a civil administration as is required in densely peopled regions. In this respect, however all polar regions cannot be treated alike. If, for instance, people settle in large numbers around valuable mineral occurrences, more men in charge will be necessary at such places than in uninhabited regions.<sup>68</sup>

“As a rule, a State wishing to occupy a polar territory must be required to establish a local authority within the territory. It will, only as a mere exception, be possible to exercise efficient control over a polar territory from a country situated in the temperate zone. In certain cases a polar land can be controlled by an authority established in a neighboring polar land. In this connection it should be observed that if a State takes efficient possession of a polar island which is generally regarded as belonging to a group of islands, it does not

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<sup>64</sup> Balch, 1910, p. 441; Heilborn, 1925, p. 278-79.

<sup>65</sup> Jeze, 1896, p. 237.

<sup>66</sup> Societe-des Nations, *Receuil des Traités*, Volume VIII, 1922, p. 26.

<sup>67</sup> Lindley, 1926, p.140-41.

<sup>68</sup> Westlake, 1910, p. 111.

follow that the State, on that account, acquires sovereignty also over the other islands in this group. Its sovereignty is limited to areas over which it exercises control.<sup>69</sup> However, here as elsewhere, regard must be paid to the fact that it is not necessary for the State to be able to make its authority felt at any time and at any place within the territory.<sup>70</sup> It may be asked whether it is not sufficient that the State holds supervision over a polar land, now and then, for instance, during certain summer months, assuming that the physical conditions bar access to the land during the other seasons of the year. The question should be answered in the negative. One thing is that it is unnecessary for State authority to be asserted without interruption in all parts of the land. Another thing is that the State is not represented in the territory during the greater part of the year/ and that it is then totally debarred from exercising supervision.

“The demand for efficiency must not be impaired so as to become more a matter of form than of reality. If a Polar land is to be occupied, it must, here as elsewhere be required that the land is controlled permanently and efficiently by the occupying State., If this is not the case, other States are not bound to respect the so-called ‘occupation.’

“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. In 1922, the Canadian government sent an expedition to these regions under the leadership of J.D. Craig. In his report on the expedition, Craig says that:

‘ . . . The Department of the Interior, through its North West Territories Branch, organized an expedition in 1922, and the result was the establishment of police posts, customs houses, and post offices at various points throughout the North, the intention being to establish additional similar posts from year to year until there is assurance that Canadian Laws and regulations will be well administered in the regions controlled by these outposts of civilization.’<sup>71</sup>

“In 1922 two posts were established, one in Craig Harbour on the south side of Ellesmere Island, and another at Pond Inlet on Baffin Island. The staff at the former post consisted of seven men under the command of a police inspector, and at the other of four men under the command of a police official of lower rank.<sup>72</sup> In the summer of 1924 a new house was built farther north on Ellesmere Island at Kane Basin. It was intended that the police from Craig Harbour should use it when they inspected the land northwards to Kane Basin. In 1926 a post was established still further north on the same island at

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<sup>69</sup> Arbitral Award, Palmas, 1928, p. 39-40, and Visscher, 1929, p. 745-46.

<sup>70</sup> Westlake, 1910, p. 110-111; Arbitral Award, Palmas, 1928, p. 18.

<sup>71</sup> Craig, 1923, p. 8.

<sup>72</sup> Craig, 1923, p. 23.

Flagler Bay, at 79° 4' N and 76° 18' W. At the same time plans were made for setting up similar posts on Melville Island and Bathurst Island.<sup>73</sup> These plans have not yet been carried into effect; but a police post has been established in Dundas Harbour on Devon Island and one at Cambridge Bay on Victoria Island. In addition, two police posts have been established on the southern part of Baffin Island.<sup>74</sup> Canada not only exercises control from the permanent land stations, but has also to some extent, carried out supervision by means of a patrol vessel. Craig mentions, as an interesting instance, that a crime committed in these regions had been cleared up by Canadian police, that the offenders had been arrested, and that they would be sentenced by a Canadian court of justice which it was intended to send northwards in the summer of 1923.<sup>75</sup> There is no reason to deny Canadian sovereignty over the territories which Canada has in this way really brought under its control and jurisdiction. The sovereignty does not, however, extend to the neighbouring territories, which are not submitted to control.

“In Russian quarters it has been said that the Soviet Union exercises supervision equal to that of Canada over certain islands lying to the north of its continent.<sup>76</sup> If that be the case, there is no obvious reason to dispute the sovereignty of the Soviet Union either....

Another question has also been raised, namely, whether settling in a territory should not form a condition for the right to occupy it. As previously stated, it is not absolutely necessary that the persons who are in charge of a territory on behalf of a State are living within its boundaries. However, the immediate fact in one's mind when speaking about settling is that colonists established themselves in the territory. On this question the Secretary of State of the United States, Mr. Hughes, made a statement in 1924, which is of considerable interest. Captain Nilkes, of the U.S. Navy, had in 1840 discovered a considerable coastal tract of the Antarctic Continent; and this tract has been named Wilkes Land after him. In 1924 the question was raised in private quarters whether the State Department of the United States would not declare Wilkes Land to be Americana Hughes answered, among other things, that:

‘It is the opinion of this Department that the discovery of lands unknown to civilization, even when coupled with a formal taking of possession, does not support a valid claim of sovereignty, unless the discovery is followed by an actual settlement of the discovered country.’<sup>77</sup>

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<sup>73</sup> Miller, 1928, p. 238; cp. Craig, 1923, p. 24.

<sup>74</sup> Map of the Northwest Territories, Department of the Interior, Canada, 1929.

<sup>75</sup> Craig, p. 19-20.

<sup>76</sup> Lakhtine, 1928, p. 25.

<sup>77</sup> Miller, 1928, p. 249-50.

‘Under the existing conditions the State Department refused to declare “that the United States had sovereignty over this island.”’

“We do not think it justified to require that settling or colonization shall form a condition of occupation, It is quite another matter that, if colonists have settled in a territory- for instance, a polar land - this will be of great importance when the question of occupation of the land arises. If the colonists are subjects of the State wanting occupation this will be greatly facilitated; for the colonists may then be counted upon to at once respect the sovereignty of the State. Should there be any question as to how great a part of the land is occupied, the extent of the colonization will be a good starting point or the decision. If, on the other hand, the colonists are subjects of another State, they will be in a position to put obstacles in the way of an occupation. They may refuse, for instance, to obey the authority which is established in the territory, and perhaps from a State of their own.

“In the course of time colonization by individual persons or companies has played a considerable part in occupation. The fact that the subjects of the State established themselves in a No-man’s-land, does not give the State sovereignty over the land; but, as already mentioned, it acquires good terms if it wants to take possession of the land.<sup>78</sup>

“A State does not gain sovereignty over a No-man’s-land by sending scientific expeditions to the land; nor by establishing wireless stations or scientific posts in the land. Such acts on the part of the State are, however, of importance if it wishes to acquire sovereignty. A wireless station is, for instance an excellent point of support to a colonization. If its staff is given police authority it will be able, on behalf of the State, to control the area around the station and in that way to bring the latter under the authority of the State. Scientific expeditions may yield a knowledge of the country which will stimulate and facilitate a colonization. Also acts which do not form an expression of sovereignty over the territory may become of importance in a dispute on sovereignty, because the court be of opinion that weight should be attached to them 'or the sake of equity. This specially applies when the court is not bound in its decision to existing law, but is free to seek the most reasonable solution.<sup>79</sup> In a sovereignty dispute it will therefore be in the interest of the State to be able to demonstrate the highest degree of activity in the disputed territory.

“Formerly it was very strongly emphasized that an occupation should not be made secretly. <sup>80</sup> It should be made known. This demand had its particular

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<sup>78</sup> Bluntschli, 1878, p. 169; Westlake, 1910, p. 102; Opet, 1924, p. 696.

<sup>79</sup> Cp. Arbitral Award 23rd October 1909, in the so-called Griseba Case between Norway and Sweden. Agreements with foreign States, 1909, No. 7, p. 302-22.

<sup>80</sup> Phillimore, 1879, p. 331-32; Westlake, 1910, p. 102-03.

significance at a time when sovereignty might be acquired by discovery and a merely formal act of appropriation. In modern times, when the State wanting to occupy a territory is required to exercise governing acts there and place it under its control, it is practically impossible to keep the occupation secret.<sup>81</sup> It is, however, a good rule that when a State has resolved to incorporate a No-man's-land in its territory, it ought to express its will in an official declaration.<sup>82</sup>

“This rule has been followed by Norway, for instance. The royal resolutions about the annexation of Bouvet Island and Jan Mayen under Norwegian sovereignty have been notified.”

Smedal. “Notification.”

“When a State occupies a territory, the occupation should be notified as soon as possible) The African Conference used the term that occupation should be accompanied by a notification.’ This demand for expedition does not mean, however, that a late notification is without legal effect. Lindley mentions that Great Britain has allowed the following periods to elapse between the date of taking possession, or of establishing a protectorate, and the date of notification: Six days, eight weeks, ten weeks, twenty-four weeks, eighteen months.<sup>83</sup> Norway’s occupation of Jan Mayen was notified to foreign Powers immediately after it had taken place. On the other hand, the notification as regards Bouvet Island did not take place until ten months after the island had been submitted to Norwegian sovereignty.<sup>84</sup>

“A notification must be made direct to the governments concerned.”...

“The notification should describe the geographical situation and the boundaries of the occupied territories.”...

“The attitude of the Powers receiving a notification may vary. If receipt is acknowledged without any reservation, this must generally be understood to mean that no objection will be made.

“If a Power preserves silence, it cannot, when a certain period has elapsed, protest against the occupation.”...

Smedal. “Extent of an Occupation.”

“By occupation a State acquires sovereignty only over the territory of which it has taken effective possession.<sup>85</sup> To this rule one exception is made. When a coast is occupied the occupying State obtains, without further

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<sup>81</sup> Cp. Arbitral Award, Palmas 1928, p. 59.

<sup>82</sup> Cp. Schatzel, 1924, p. 366.

<sup>83</sup> Lindley, 1926, p. 296.

<sup>84</sup> Lovtidende, 1928, p. 544-45.

<sup>85</sup> Salomon, 1889, p. 328; Heilborn, 1924 a, p. 344; Fauchille, 1925, p. 733; Oppenheim, 1928, p. 453.



by other States.”

“This doctrine has been supported especially by Anglo-Saxon jurists.<sup>92</sup> On the European Continent it has been received more reservedly.<sup>93</sup> It has been flatly denied that the doctrine has any foundation in international law;<sup>94</sup> but it has its adherents also in those quarters.”<sup>95</sup>...

“In the dispute between Norway and Great Britain concerning Bouvet Island, Great Britain claimed a right to the island on the basis of a 'discovery' more than 100 years old. It was stated that the island, which had been discovered in 1739 by the Frenchman, Lozier Bouvet, had been rediscovered in December 1825 by the British Captain, George Norris, who had gone ashore and had possession of it in the name of King George IV.<sup>96</sup> Since that time nothing had been done on the part of Great Britain to occupy the island. As will be known, Great Britain waived her claim. It is, however, not without interest that the claim was raised.”...

Smedal.

“The Sector Principle.”

General Remarks on the Sector Principle.

“A sector in plane geometry signifies a part of the plane limited by a curve line and two straight lines proceeding from one point (the angular point) to the extreme points of the curve line. A special instance of this general definition is the sector of a circle which is a portion of the circle plane limited by two radii and the intercepted arc.

“In spherical geometry, a sector is a part of the surface of a sphere limited by a piece of curve line and two great circles crossing each other and drawn through the extreme points of the curve line. When applied to the surface of the globe, a polar sector is a special instance of this general definition, limited by a piece of curve line, e.g. a coast line, and the meridians through the extreme points of the curve line. It is in this meaning that the word 'sector' is applied in the conception of the sector principles. This principle is to the effect that, in certain cases, States' are entitled to sovereignty over polar sectors.

“The man generally credited with having called attention to this principle

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<sup>92</sup> Phillimore 1879 p. 329-30, Basset Moore, 1906, p. 258; Scott, 1909, p. 939; Westlake, 1910, p. 105; Hall, 1924, p. 126-27; Oppenheim, 1928, p. 451-52.

<sup>93</sup> Salomon, 1889, p. 283; Fauchille, 1925, p. 718-21.

<sup>94</sup> Heilborn, 1924, p. 366

<sup>95</sup> Visscher, 1929, p. 742-43.

<sup>96</sup> Cp. Rabot, 1828, p.388; as regards the history of the Island, see the chapter “Bouvetøens Historie” (the History of the Bouvet Island) of Bjarne Aagaard’s work “Fangst og Forskning i Sydshavet” (Whaling and Research Work in the Antarctic) published in 1930; cp. Aagaard, 1928 and 1929, p. 65-81.

for the first time, is P. Poirier, a Canadian Senator. When on the 20th February 1907 he recommended in the Canadian Senate that Canada should declare it had taken possession of the lands and islands lying between its northern coast and the Pole, he accompanied his recommendation with a speech,<sup>97</sup> in the course of which he said:

'We can establish a fourth ground for ownership for 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 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 to-day 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 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.'

'Poirier then dealt with the sectors which fell to 'Norway and Sweden', Russia, the United States; and Canada. He did not give Denmark any sector, presumably because Denmark does not extend to the Arctic circle and, therefore, in his opinion could not be regarded as a polar State. After having made this apportionment he continued:

'This partition of the polar regions seems 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.'

'The idea expressed, by Poirier has recently been followed in certain important acts of State. This will be dealt with in the next chapter. In literature the idea has so far not been much discussed. Poirier did not go particularly deeply into it. A more detailed exposition of the sector principle seemed to be appropriate now that the principle had begun to play an important part in the polar policy of the States. V.L. Lakatine, a Russian author, has delivered such an exposition in his treatise: 'The Title to the Arctic

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<sup>97</sup> Debates of the Senate of the Dominion of Canada, 1906-07, 1907, p. 266-73.

Polar territories'. He has, however, not succeeded in motivating [*sic*] the sector principle in a satisfactory manner. Like Poirier, he deals with the principle with a particular view to the Arctic regions.

“Before dealing with the reasons given in favour of the principle, it is natural to explain more closely the meaning of it. Poirier stated in his recommendation that Canada should declare that it had taken possession of lands and islands between its northern coast and the Pole. No difference was made between Known and Unknown territories. Thus, land areas not yet discovered at that time should also fall to the sovereignty of Canada. Also in the acts of State based on the principle no difference is made between discovered and undiscovered regions. The British Declaration about the Falkland Sector of 28th March 1917, relates to 'all islands and territories whatsoever' in the sector. In the corresponding provisions regarding the Ross Sector of 30th July 1923, there is the term: “all the islands and territories”. The decree of the Soviet Union dated 15th April 1926, expressly states that also undiscovered land and islands lying in the sector of the Soviet Union are claimed in future. (Toutes terres et îles découvertes ou qui pourraient être découvertes à l'avenir).

“It seems justified to assume that the said acts of State deal only with land territories in the respective sectors. In this respect the decree of the Soviet Union is quite clear, because the words lands and islands are used. The British Declarations of 1917 and 1923 used the word 'territory'. By the term “islands and territories” must be meant islands and land territories. It was also in this meaning that the word was used in the Canadian House of Commons debates on the 1st and 10th June 1925, when a proposal to alter the legislation for the territories north of Canada, i.e. the Canadian sector, was under discussion.<sup>98</sup>

“Some Russian authors have urged that the sovereignty of the Soviet Union also includes the ice areas in the sector of the Union.<sup>99</sup> As previously mentioned, however, it is not correct to place this construction on the Decree of 15th April 1926. Presumably the same authors will also give other sector States sovereignty over ice areas. Lakhtine goes to the length of giving the sector State the right to control hunting and fishing, even in the ice-free high seas of a sector.<sup>100</sup>

“In this connection we may mention the British Regulations as regards control of Whaling in the Ross Sector. The Regulations now in force are dated 24th October 1929 ('Ross Dependency Whaling Regulations, 1929).<sup>101</sup> Whaling must not be carried on without a licence from the New Zealand Government, and a tax must be paid for the licence. Those infringing the

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<sup>98</sup> Canada. House of Commons Debates, 1925, p. 3925-26, and p. 4237-38.

<sup>99</sup> Lakhtine, 1928, p. 37, 38, 40 and 46; Breitfuss, 1928, p. 27.

<sup>100</sup> Lakhtine, 1928, p. 39.

<sup>101</sup> “The New Zealand Gazette”, 31st October 1929.

Regulations are liable to heavy fines. According to the wording the Regulations of 1929 relate to the whole of the sea in the Ross Sector; but Norway with its paramount economic interests in these regions, has received the assurance from Great Britain that the Regulations will only be applied to whaling in the territorial waters of the Ross Sector, the breadth of which is three nautical miles.<sup>102</sup> Moreover, Great Britain has recently made a declaration to the League of Nations to the effect that the breadth of the territorial sea subject to the sovereignty of the coastal State should be three nautical miles, and that the British Government does not claim any rights to the high seas beyond the limits of territorial waters, New Zealand has subscribed to this declaration.<sup>103</sup>

“If a land lying in a sector was already subject to the sovereignty of another State at the time when the resolution respecting the sector was made, it may be taken that the sector State will not try, more than previously, to dispute this sovereignty. The Soviet Union Decree of 15th April 1926 says:

‘As being territory of the Soviet Union are declared all lands and islands discovered, as well as those which may be discovered in future, and which at the time of the publication of this decree have not been recognized by the Government of the Soviet Union as the territory of a third State...’<sup>104</sup>

“A small portion of the Svalbard Archipelago is situated in the Russian sector. The Soviet Union recognizes, however, the sovereignty of Norway also to this part of the Archipelago.

“The sector State claims sovereignty over the lands lying in the sector and not belonging to other States, without regard to whether these lands have been taken effective possession of. Lakhtine has expressed this idea in the following terms:

‘This investigation has made it clear that, independent of a de facto discovery of some polar land made by an expedition of one nationality or another, these lands actually belong, at the moment, to the polar States in the gravitation sectors of which these islands are situated, without regard to the fact that their occupation is effective...

‘The conclusion just come to shows even in respect of the discovered polar areas, and in consequence of their climatic peculiarities, that the doctrine of gravitation districts holds good, excluding the doctrine of appropriation and, therefore, not requiring occupation.’<sup>105</sup>

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<sup>102</sup> “Tidens Tegn”, 19th November 1929.

<sup>103</sup> Conference pour la codification du droit international, 1929, p. 28 and 31; cp. p. 22.

<sup>104</sup> Lakhtine, 1928, p. 31.

<sup>105</sup> Lakhtine, 1928, p. 33 and 34.

“Now, which States shall be entitled to enjoy the privilege of a sector State? As previously mentioned, Poirier would assign this right to the States whose territories are cut by the polar circle. Russian authors, e.g. Breitfuss and Lakhtine, will furthermore assign a sector to Denmark on account of its colonies in Greenland. The sector States in the Arctic region would then be the United States, Canada, Denmark, Norway, Finland, and the Soviet Union.<sup>106</sup> In defining the sector, Poirier was of opinion that its straight lines should be drawn from the extreme eastern and western points of the territory to the Pole. Canada and the Soviet Union have in this manner defined the sectors they claim. This principle has also been made the basis of the entirely private proposals of a sector division of the Arctic regions, which have been made by Breitfuss and Lakhtine. Certain deviations from the principle have, however, been made.

“Turning now to the Antarctic regions, we find that no State has a territory continuing so far to the south that it is cut by the polar circle; nor is there, so far to the south, any territory effectively taken possession of by any State. It should therefore not be possible to make a sector claim, if it be based on the same foundation as used in the Arctic regions.

“The two sectors claimed by Great Britain are nominally attached to the Falkland Islands and New Zealand. Both these lands are to their full extent, lying in the temperate zone. In the definition of the sectors no consideration has been taken to the eastern and western limits of the Falkland Islands and New Zealand. If that had been the case, the sectors should have been made considerably narrower, and they would not then have included the territories over which it has evidently been the object to acquire sovereignty by this procedure. The two sectors have a detached position, without any geographical connection with the Falkland Islands and New Zealand. That maybe referred to by Great Britain is discoveries in certain parts of the sectors. It therefore seems as if Great Britain has held the view that discoveries are a sufficient foundation for sector claims in these regions of the globe.

“Different attempts have been made to justify the sector principle. Some authors have interpreted a sector as being a kind of Hinterland.<sup>107</sup> Hinterland is generally understood to mean the land behind a coast, and not areas stretching from the continent towards the sea. As it cannot be admitted that a State having the sovereignty of a coast should thereby, without further ceremony, acquire the sovereignty of a 'Hinterland', this view gives, in fact, no justification for the sector principle.

“Miller, the American author, is of opinion that the title of the sector State to lands lying in the sector, is more correctly justified by the doctrine of

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<sup>106</sup> Breitfuss, 1928, p. 28; Lakhtine, 1928, p. 44-45.

<sup>107</sup> See Lindley, 1926, p. 5-6 and p. 235.

contiguity or propinquity, than by the doctrine of Hinterland.<sup>108</sup> He admits, however, that also this justification is not a strong one. It is this doctrine which forms the basis of the Russian declaration of 29th September 1916. It is stated in the declaration that several islands north of Siberia are considered to belong to the Russian Empire, because they form 'the northern continuation of the Siberian continental shelf.'<sup>109</sup> The Soviet Union expresses itself in a somewhat similar manner in a memorandum dated 4th November 1924, relating to the same islands.<sup>110</sup>

"We have mentioned before that there is no rule of international law to the effect that islands or lands lying outside territorial waters shall belong to a State, on account of the mere fact that they are situated near its territory. As previously stated, the frequently quoted decision in the *Palmas or Miangas*) case, dissociates itself very strongly from the doctrine that lands on account of their geographical situation shall be subject to a certain State. This award contains the following passage, which would seem to be intended particularly for those who maintain that a State can acquire sovereignty over a land without taking *de facto* control of it:

'The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one State rather than to another, either by agreement between the Parties, or by a decision not necessarily based on law; but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this 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.'<sup>111</sup>

"Besides, the doctrine of contiguity is so vague that it is totally unfit to form the basis of territorial claims. What does contiguity mean? Franz Josef Land lies 360 km. (186 + mi.) from Novaya Zemlya, 1250 km. (776 + mi. from Russia (Cape Kanin) and 800 km. (497 + mi) from Siberia (Cape Skura Tova). Nevertheless, the Soviet Union claims that group of islands. If lands existed in the sector of the Soviet Union lying still farther from its coasts these lands also would have been claimed, as the Soviet Union demands all lands and islands 'up to the North Pole'. Also Canada claims all islands lying north of her territory and up to the Pole. As for the Antarctic regions, Great Britain has, as already pointed out, claimed lands lying, in part, some thousands of

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<sup>108</sup> Miller, 1925, p. 56; 1928, p. 244; cp. Lakhtine, 1928, p. 34.

<sup>109</sup> Lakhtine 1928, p. 29 and p. 50-51; Breitfuss, 1928, p. 26; Miller, 1928, p. 241; Cp. Geogr. Journal, London, 1923, Vol. 62, p. 442-43.

<sup>110</sup> Lakhtine, 1928, p. 30 and p. 51-52.

<sup>111</sup> Arbitral Award, *Palmas*, 1928, p. 39.

kilometers from the places to which the Falkland Sector and the Ross Sector have been given judicial attachment.

“It appears to us that the doctrine of contiguity cannot be applied, without irony, in support of the extensive claims hidden in the sector principle.”

“The main argument of Lakhtine in favour of the sector principle seems to be that an effective appropriation cannot be made in the polar regions.<sup>112</sup> Also Poirier mentioned the difficulties thus involved.<sup>113</sup> The fact of the matter is that effective appropriation has been performed at several places in the polar regions. Thus, Denmark has under its control and administration certain portions of Greenland. In the same way Norway has acquired Jan Mayen, and Canada portions of the Archipelago north of its coasts. Lakhtine himself points out that the Soviet Union exercises a regular control over some polar islands.<sup>114</sup>

“The fact that it may be difficult, or in some cases perhaps impossible, at present to take effective possession of a polar land, does not warrant a disregard of the rule in international law relating to occupation. The land must, in that event, continue to be unoccupied. No stipulations exist to the effect that every land shall be submitted to sovereignty, and neither is there any need for such stipulations.

“Lakhtine points to the fact that Great Britain and France have set aside the rule governing effective possession in Antarctica.<sup>115</sup> The fact that a rule of law has been contravened by attempts to evade it does not, however, justify the conclusion that such a rule does not exist.

“A very frequent argument is that the sector principle is practical.<sup>116</sup> In deciding that question it is not sufficient to have regard to the fact that some States consider it practical or advantageous. These two terms may, in this case, be taken to amount to the same thing. The conclusive point is whether it is the opinion of the great majority of States. No one will be astonished at Canada and the Soviet Union being content with the system. They enjoy every advantage of it on account of their extensive coasts along the Arctic Sea. As regards the United States and Norway the case is different; for these countries have a relatively short boundary along the Arctic, and the sectors intended for them are therefore comparatively modest ones. According to the sector division proposed by Lakhtine, the sector of the United States will have a breadth of 28 degrees of longitude, that of Norway a breadth of 21 degrees, while the sector of Canada will make 81, and that of the Soviet Union 159

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<sup>112</sup> Lakhtine, 1928, p. 18-19 and p. 32-34.

<sup>113</sup> Debates of the Senate of the Dominion of Canada, 1906-07, 1907, p. 268.

<sup>114</sup> Lakhtine, 1928, p. 29.

<sup>115</sup> Lakhtine, 1928, p. 19.

<sup>116</sup> Miller, 1925, p. 59-60; 1928, 'p. 247; Lindley, 1926, p. 5-6, and p. 235; Breitfuss, 1928, p. 28.

degrees of longitude. In the framing of the sector principle in the Arctic region, no account has been taken of the fact that the coast of a State bordering the Arctic is no gauge of its Arctic interests. Norway, for instance, has an extensive hunting (fishing) industry with great capabilities of development, and which would no doubt suffer considerably if the principle were to be carried into effect.

“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.<sup>117</sup> 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.”<sup>118</sup> 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.

“We have so far regarded the question of the practicability of the sector principle with reference to the Arctic regions. In the Antarctic regions the basis of sector claims, as previously mentioned, is not clear. If we assume discoveries to be a sufficient basis and let the States that can refer to discoveries plot their respective sectors on the map, we shall undoubtedly soon realize that the principle is not practical; for the sectors will, in part, cover each other. A territory may lie in more than one sector. Those States which have no discoveries to fall back upon, and which will be excluded from this sharing of Antarctica, will of a certainty also be of opinion that the sector principle is not a practical one.

“Lakhtine urges that only the States bordering the polar regions have at their disposal sufficient experience to enable them to operate in these uninviting regions of the globe.<sup>119</sup> Actually, this line of argument would result in the exploitation of polar regions being left to these States on an equal footing. As an example of how little other States are capable of operating in these regions he refers to the catastrophe of the Italian airship 'Italia'. Lakhtine's view of the question is too one-sided. States which cannot be called polar States have also played a very creditable part in the exploration of both polar regions. We need only mention the meritorious work done by France and Germany. Names such as Bouvet, Kerguelen-Tremarec, Dumont d'Urville, Oharcot and Koldewey, Drygalski and Filchner, will forever be

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<sup>117</sup> Waultrin, 1928, p. 417.

<sup>118</sup> Lakhtine, 1928, p. 33 and 36.

<sup>119</sup> Lakhtine, 1928, p. 47.

identified with the exploration of these regions. On the other hand, when it is a question of the practical exploitation of polar regions, people living near these regions will naturally possess experience and knowledge frequently lacking with other people. There is, however, no reason why this advantage should be made still greater by means of a sector system.

“In British quarters - Lindley - it has been said that the assignment of the Svalbard Archipelago to Norway is in conformity with the sector principle.<sup>120</sup> This view is not correct. The greater part of the Archipelago is lying in a Norwegian sector; but parts of it are in a Finnish and a Russian sector; nor does the Svalbard Treaty contain anything in support of Lindley's view. It does not indicate why the Powers were agreed that the Archipelago ought to belong to Norway. Presumably it was good enough reason that Norway had the greatest economic interests in Svalbard, that most of the people living there were Norwegians, and that in the exploration of the Archipelago Norway had done better service than any other State. If any weight has been placed upon the location of Svalbard in relation to Norway, it must have been as a consideration of equity. It transpires both from the history of the Svalbard problem and from the wording of the Svalbard Treaty, that the opinion was not held that Norway had a legal claim to Svalbard on account of its location.

“The sector principle is not a principle having a title in the law of nations. This is partly admitted by those who uphold it.<sup>121</sup> Nor should the principle be embodied in international law, for one reason because it aims at a monopoly which will doubtless delay, and partly prevent, an exploitation of the polar regions.

“It is of interest to observe how States that claim sovereignty in sector areas nevertheless attempt to take charge of lands lying in these areas by effective occupation. By so doing they show they fully realize that a territorial sovereignty which they must rightly require to be respected by foreign States, must be based on a more solid foundation than the sector principle.

“In the theory and practice of international law it is laid down that sovereignty over a No-man's-land must be acquired by occupation, if all the interested Powers are not agreed to place such a land under the sovereignty of a single State.<sup>122</sup> As mentioned several times before, there is no valid reason for departing from this rule in the polar regions. In fact, it cannot be dispensed with, for it cannot be replaced by any other rule to which the comity of nations is willing to adhere. There can be no doubt that the States are unwilling to renounce in the polar regions the rule of occupation in favour of the sector principle.

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<sup>120</sup> Lindley, 1926, p. 5; cp. Joerg, 1930, p. 33.

<sup>121</sup> Lindley, 1926, p. 235; Miller, 1928, p. 244, cp. p. 247.

<sup>122</sup> Cp. Professor Frede Castberg; “Retten til Polarlandene” (The title-to Polar Territories). “Aftenposten”, 14th March 1929.

“Fauchille has tried to improve the sector principle by a recommendation to the effect that sectors should not be allotted to States, but to continents.<sup>123</sup> The Arctic region ought, in his opinion, to be divided into an American, an Asiatic, and a European sector. He will reserve the exploitation of each sector to the States lying in that part of the world to which the sector belongs. By this recommendation the artificial and arbitrary feature of the sector principle is still further emphasized.”

Smedal.

“Sector Claims.”

Arctic Regions.

1. Canada.

“The previously mentioned proposal made by Poirier was not adopted. On behalf of the Canadian Government Mr. Cartwright, Minister of the Interior [*sic*], dissociated himself from it.<sup>124</sup> He did not believe, he stated, that it would be of any advantage to Canada or any other country ‘to assert jurisdiction’ so far northwards. It was also clear from other statements that Cartwright was of opinion that Canada could not claim sovereignty over the regions between its northern coast and the Pole, without being willing at the same time to take over the control of these regions.<sup>125</sup>

“The point of view represented by Cartwright has not won the day. It is true that Canada has not claimed a sector by any official declaration, such as the Russian Decree of 15th April 1926, and the British Declarations of 1917 and 1923, relating to the Falkland sector and the Ross sector. Nevertheless, there can be no doubt that Canada claims sovereignty over the islands lying in the sector between its northern coast and the meridians of 600 and 1410 W. The Canadian Sector claim has been made in different ways and on several occasions. What is mentioned below will be sufficient to show that Canada is among the States claiming a sector.

“In 1908-09, an official Canadian expedition was working under the leadership of Captain Bernier in the regions north of Canada.<sup>126</sup> On that occasion, Canadian sovereignty was proclaimed over the whole Archipelago between 60° and 141° and up to the Pole. A report of it was engraved on a copper plate mounted at the winter quarters of the expedition on Melville Island.<sup>127</sup> Although this ‘formal appropriation’ did not give Canada the

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<sup>123</sup> Fauchille, 1925, p. 659.

<sup>124</sup> Sir Richard Cartwright, Senator – not Minister of the Interior.

<sup>125</sup> Debates of the Senate of the Dominion of Canada, 1906-07, 1907, p. 273-74.

<sup>126</sup> Report on the Dominion of Canada Government expedition to the Arctic Islands and Hudson Strait on board the D.G.S. “Arctic”, Ottawa, 1910.

<sup>127</sup> Geogr. Journal, London, 1910, Vol. 35: cp. Markham, 1921, p. 362.

sovereignty, it is of interest as reflecting a Canadian sector claim.

“In 1921, Canada informed the Government of Denmark that any discoveries which Knud Rasmussen might make on his journey in regions north of Canada, would not be recognized as a basis of any territorial claims made by Denmark.<sup>128</sup> On a map published in 1923 by the Canadian Ministry of the Interior of 'North West Territories' and “Yukon Territory”, all islands north of Canada are designated Canadian territory. The map is annexed to Craig's report on the above-mentioned Canadian Expedition in 1921.

“In Canada there is an institution named ‘The Geographic Board of Canada’. Its object is to report on all questions relating to geographical names in the Dominion of Canada. Reports on the work of the Institution are made public. A report from 1924 contains a list of geographical names in the Archipelago north of Canada.<sup>129</sup>

“On 1st June 1925, The Canadian House of Commons discussed a Bill providing that scientists and explorers wishing to work in the Northwest Territories must have a Canadian permit. 'The Northwest Territories' include also the so-called District of Franklin where the Arctic islands are situated. The Bill was passed. The Minister of the Interior Mr. Stewart supported it thus:

‘What we want to do is to assert our sovereignty. We want to make it clear that this is Canadian territory and that if foreigners want to go in there, they must have permission in the form of a license.<sup>130</sup>

“During the discussion of the Bill one of the members of the House stated:

'We claim right up to the North Pole.'

'Mr. Stewart replied: 'Yes, right up to the North Pole.'<sup>131</sup>

“The statements of the Canadian Minister of the Interior were commented on in the press of the United States. It appeared from the comments that the opinion in the United States was that the Canadian claim of sovereignty over all islands between Alaska and Greenland was not justified.<sup>132</sup>

“Some days afterwards - on 10th June - Mr. Stewart defined in greater detail in the House of Commons the area claimed by Canada. 'We claim', he said ‘the whole area lying between 60° and 142°W.’<sup>133</sup> The figure 142 must be due to a misunderstanding, it being the meridian 141° W which forms the

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<sup>128</sup> Miller, 1925, p. 50; 1928, p. 238; Lakhtine, 1928, p. 23.

<sup>129</sup> Eighteenth report of the Geographic Board of Canada, 1924; cp. Nineteenth report, 1928, of the same Institution.

<sup>130</sup> Canada, House of Common Debates, 1925, p. 3926.

<sup>131</sup> Canada. House of Commons Debates, 1925, p. 3925.

<sup>132</sup> See, for instance “New York Herald” and “Washington Post”, 3rd June 1925.

<sup>133</sup> Canada. House of Commons Debates, 1925, p. 4238; cp. Keith, 1928, p. 335.

frontier between Alaska and Canada. A portion of Northern Greenland lies west of 60° W. Canada, however, does not claim any part of Greenland. With this qualification the Canadian sector claim refers to the area between 60° and 141° W.<sup>134</sup>

“In certain parts of 'The Northwest Territories' hunting and fishing are reserved to Eskimos, Indians, and half-breeds. One of the areas reserved to these people is the so-called “Arctic Islands Preserve” which approximately coincides with the District of Franklin and includes the islands north of Canada. ‘Arctic Islands Preserve’ was established by an Order in Council of 19th July 1926. The regulations now in force with regard to hunting and fishing within this preserve are found in an Order in Council of 15th May 1929.

“In favour of the Canadian sector claim, a special reason has been stated which does not apply to sector claims generally. Reference has been made to the Treaty between Russia and Great Britain of 1825 relating to the boundary line between Alaska and Canada, where the expression is used that the meridian 141°W shall be the boundary line ‘right up to the Arctic’ (jusqu’à la Mer Glacial).<sup>135</sup> Whether this term mean “to where the Arctic begins”, or, “as far as the Arctic Extends”, is perhaps not quite clear; but the former interpretation seems to be the right one. If the term is understood to mean that a division of Arctic regions was made by the Treaty, the division was in that event a matter between Great Britain and Russia which foreign States are not bound to respect if they have not consented to it.

“In American quarters it has been suggested that the Monroe Doctrine would stand in the way of, for instance, European States acquiring sovereignty over islands north of Canada. We shall not go into this question. It has at the same time been stated that it is natural to consider Canada as an American Power, although it is a member of the British Empire.<sup>136</sup>

“As mentioned before, Canada endeavours, without regard to the sector principle, to take charge of the islands north of its coast by effective occupation. It has been pointed out that, while in 1920 4,000 dollars was put down in the estimates of Canada for administration of 'The Northwest Territories', this item had increased to 300,000 dollars in the estimates for 1924.<sup>137</sup> This increase is certainly partly due to a greater interest in the Arctic Islands.<sup>138</sup>

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<sup>134</sup> Cp. Order in Council of 15th May 1929, regarding Regulations for the Protection of Game in Northwest Territories, Sec. 39, “The Canada Gazette”, 25th May 1929.

<sup>135</sup> Miller, 1925, p. 58; 1928, p. 245-47.

<sup>136</sup> Miller, 1925, p. 51; 1928, p. 239-40.

<sup>137</sup> Miller, 1928, p. 237; Lakhtine, 1928, p. 22.

<sup>138</sup> Cp. Keith, 1928, p. 582.

## “2. The United States of America.”

“The United States has not claimed any sector. It has never claimed sovereignty over such land territories as may exist north of Alaska.<sup>139</sup> As previously mentioned, the sector principle does not give the United States any advantage. No land has yet been discovered between Alaska and the North Pole. It may also be assumed that it is not in the interest of the United States to recognize the sector principle in Antarctica.

“With regard to Antarctica there is the statement previously quoted, made by Mr. Hughes, when he was the American Secretary of State. It appears from this pronouncement that the United States lays down rigorous demands as regards occupation of polar areas. This pronouncement is of importance beyond the particular case to which it refers, Mr. Hughes being one of the most highly reputed and influential jurists of the United States. He was formerly a member of the Permanent International Court at the Hague, and is now the President of the High Court of Justice of the United States.”...

## “3. The Soviet Union.”

“As we have seen, it was by a Decree issued by the Presidency of the Central Executive Committee of the Soviet Union dated the 15th April 1926 that the Soviet Union expressed itself in favour of the sector principle. In this Decree it is stated that lands and islands are considered to be the territory of the Soviet Union when they are 'lying between the north coast of the Soviet Union and the North Pole in the region limited by the meridian 32° 4' 35" E. (of Greenwich) cutting the east side of the Vaidaguba through the triangular mark on Cape Kekursty, and by the meridian 168° 49' 30" W (of Greenwich) cutting the middle of the sound separating the Ratmanov and the Krusenstern Islands, both of which belongs to the Diomedes Archipelago lying in Bering Strait...'<sup>140</sup>

“It may be said that this Decree had been prepared by the previously mentioned declarations of the 29th September 1916, and the 4th November 1924. It has been said by Russian authorities that, in claiming a sector, the Soviet Union merely followed the example of Great Britain in the Antarctic regions.<sup>141</sup>

“As a special argument in favour of the sector claim of the Soviet Union, reference has been made to the treaty between the United States and Russia of 1867. In this treaty it was stipulated that the boundary between the two States shall be the aforesaid meridian between the Islands of Ratmanov and

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<sup>139</sup> Miller, 1925, p. 54; 1928, p. 242-43.

<sup>140</sup> Breitfuss, 1928, p. 27.

<sup>141</sup> Breitfuss, 1928, p. 27

Krusenstern in the Bering Strait, and it is stated with regard to this boundary that it 'continues to the north in a straight line without limitation until it disappears in the Arctic'<sup>142</sup> (et remonte en ligne direct, sans limitation, vers le Nord, jusqu'a ce qu'elle se perde dans la Mer Glacial). If this quotation is to be understood to mean that the two States on this occasion divided Arctic regions between them, this division is only binding upon the parties themselves. The somewhat similar stipulation in the Treaty of 1825 between Russia and Great Britain has already been mentioned.

"The Soviet Union notified foreign Powers of the Decree of the 15th April 1926.<sup>143</sup> The notification received by Norway is dated 6th May 1926. We do not know what replies the Powers may have given. Norway's reply was sent on the 19th December 1928. It must be assumed that reservation has been made against the sector claim made by the Soviet.<sup>144</sup> It is probable that a special reservation has been made with regard to Franz Josef Land."...

#### "4. Finland."

"By the Treaty of Dorpat, dated 14th October 1920, Finland was given an Arctic frontier, but this is a very short one. In a Finnish sector there is no land other than a small part of Svalbard belonging to Norway. As far as we know, Finland has made no sector claim. An eventual Finnish sector would lie between 32° 4' 35" E and about 31° E.<sup>145</sup>

#### "5. Denmark and Norway."

"The area left for a Danish and a Norwegian sector lies between about 31° E and 60° W. Neither of the two States has claimed a sector. It has, however, been mentioned how the area would, in such event, have to be divided between them. Lakhtine is of opinion that the sector between 31° E and 10° E should be allotted to Norway. The latter meridian cuts Norway a little west of Trondheim. Almost the whole of the Norwegian Sea would, with such a partition, lie in a Danish sector. To Norway such a boundary would be altogether unsatisfactory."...

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<sup>142</sup> Miller, 1928, p. 246-47; Lakhtine, 1928, p. 28.

<sup>143</sup> Lakhtine, 1928, p. 31.

<sup>144</sup> "Dagbladet", 11th November 1929. (Speech made by Mr. Mowinckel, the Norwegian Prime Minister.)

<sup>145</sup> Lakhtine, 1928, p. 44.

“Antarctic Regions.”

“In the Falkland Sector and the Ross Sector, Great Britain has sovereignty only over the lands of which it has taken effective possession. That this view is not strange to British reasoning, is obvious. This is exemplified in a leader in the Scotch newspaper 'Dundee Courier and Advertiser' for 6th April 1929. First it states that a valid title to No-man's-land is acquired by “effective occupation”, and in the following paragraph:

‘How much of the Antarctic has Great Britain effectively occupied? To the best of our knowledge there is, on the Continent (not counting islands), only one spot of which this can be said.’

“The same article touches upon the disputes in Antarctica between the United States and Great Britain. It is held that if these disputes were brought before the Permanent International Court at the Hague, there would be 'good ground to suspect that the lawyer would make hash of all but a minute fraction of the claims on both sides'.

“One of those possessing the most comprehensive knowledge of Antarctic conditions, Gordon Hayes, the Englishman, also expresses doubt as to whether the British sector claims can be maintained. He states:

‘But if an unfriendly Power required, for example, Graham Land, we should have difficulty in convincing an international court that we had occupied it, within the meaning of the law, by the Norwegian settlements on South Georgia or Deception Island.’<sup>146</sup>

“Then, dealing with the problem more generally, he states:

‘And some of the geographical boundaries of these dependencies, as they are now fixed, offer extremely thorny possibilities.’<sup>147</sup>

“Gordon Hayes further points out that due regard does not appear to have been taken to international courtesy when the boundaries of the two sectors were fixed. In this connection he mentions that in the Falkland Sector there are lands discovered by Frenchmen, Norwegians, and Swedes, and that the Ross Sector includes, as British territories, nearly all Captain Amundsen 's discoveries.<sup>148</sup> We shall not go into the matter of Gordon Hayes' criticism, seeing that he deals here with questions that are not of a legal nature.

“We will now submit a few remarks about each of the two sectors:

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<sup>146</sup> Gordon Hayes, 1928, p. 360.

<sup>147</sup> Gordon Hayes, 1928, p. 361.

<sup>148</sup> Gordon Hayes, 1928, p. 361-64.

## “1. The Falkland Sector.”

“By Letters Patent of 21st July 1908, South Georgia, the South Orkneys, South Shetland, the Sandwich Islands, and Graham Land were made dependencies of the Falkland Islands. In Letters Patent of 28th March 1917, it is stated that as doubt has been expressed about the boundaries of these dependencies, they 'shall be deemed to include, and to have included, all islands and territories whatsoever' between Long. 20° and 50° W, south of Lat. 50° S; and between 50° and 80° W, south of Lat. 58° S.

“In the seas of the Falkland Sector, very remunerative whaling has for years been carried on, especially by Norwegians. In order to obtain a right to operate from land, or within the territorial limit, whaling companies have been obliged to have a British licence. The dues which have been paid have amounted to a very considerable sum. We must, however, not overlook the fact that British authorities have also had for their aim the preservation of the whale stock.”<sup>149</sup>

## “2. The Ross Sector.”

“By Order in Council of 30th July 1923, it was laid down that this sector should include all islands and territories between Long. 160° E and 150° W south of Lat. 60° S.

“There is reason to believe that this resolution, like the one concerning the Falkland Sector, has in part been occasioned by a desire to control Norwegian whaling in Antarctic waters.<sup>150</sup> We have previously mentioned the British regulations concerning whaling in the seas of the Ross Sector (Ross Dependency Whaling Regulations). These Regulations are issued by the Governor General of New Zealand. Their validity has been doubted, it being stated that the Governor General had no authority to issue them.<sup>151</sup>

“Since 1923 regular whaling has been carried on in Ross Sea. It was Captain C.A. Larsen, the well-known Norwegian whaler, who initiated the operations. At present, one British and three Norwegian companies are at work there. One of the Norwegian companies, Rosshavet Ltd., has a British concession.<sup>152</sup> Ross Sea must be considered to be part of the high sea, and it is not necessary to have a concession in order to carry on whaling there. We are also of opinion that whaling must be free within a distance of three miles from land, because Great Britain cannot rightly claim sovereignty over the lands bordering Ross Sea.

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<sup>149</sup> Risting, 1928, p. 346-47.

<sup>150</sup> Rudmose Brown, 1927, p. 177; Breitfuss, 1928, p. 26; Hoel, 1928, p. 79.

<sup>151</sup> Charteris, 1929, p. 228-31; cp. Keith, 1928, p. 792, p. 1039-40, and p. XLVII.

<sup>152</sup> Risting, 1929, p. 108-31.

“Sometimes we meet with the term the ‘Australian Sector.’<sup>153</sup> It has been stated that this designation means the portions of Antarctica lying south of Australia and extending from Ross Sea to Enderby Land.<sup>154</sup> This sector includes also Adelie Land claimed by France. As far as we know, neither Great Britain nor Australia has made any official claim to such a sector.”

Mr. David Hunter Miller in his treatise “Political Rights in the Arctic” places Canada's position before the authorities from the angle of his country, the United States. Mr. Miller is an international authority and a specialist in International Law. The treatise above mentioned is to be found in the United States Foreign Affairs papers, Vol. 4, 1925. The first part of this treatise was published in modified form by the American Geographical Society 1928 in a series of papers entitled 'Problems of Polar Research, Special Publication, No. 7.'

The pertinent quotations from Mr. Miller's treatise relating to Canada's claim to sovereignty are as follows:

“The area of the earth's surface north of the Arctic Circle (66° 30' as usually drawn; strictly it is 66° 31 2/3') comprises over eight million square miles. That States have sovereignty over this vast region? To what countries are we to assign the known and the unknown?”...

“If we look at the map we see that the countries now having important possessions north of the Arctic Circle are Canada, the United States, Russia, Denmark, and Norway.<sup>155</sup>

“Denmark's Arctic possession is the Island of Greenland, with its enormous area of over 800,000 square miles, though part of this is south of the Arctic Circle, the Island extending south to latitude 60°. There are some settlements at various points along the coasts of Greenland. But the interior is uninhabited, partly unexplored, and the island has been crossed from one side to the other only six or seven times by explorers such as Nansen and Peary, and more recently by Rasmussen and Koch. With an area thrice the size of Texas, the population is not more than fifteen thousand, mostly Eskimo. The island is under Danish administration and the title of Denmark, in part at least, is ancient and is now unquestioned. (Norwegian rights on portions of the east coast were adjusted by the Treaty of 1924.) The world generally, and the United States in particular, recognize that Greenland is a Danish land. In 1916 our Government formally declared, in connection with the treaty for the cession of the Virgin Islands, that it 'will not object to the Danish Government extending their political and economic interests to the whole of Greenland.'

“Spitsbergen (including Bear Island), with its valuable coal and other mineral deposits, is Norwegian. The history of this archipelago is instructive.

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<sup>153</sup> Charteris, 1929, p. 226; cp- Lindley, 1926, p. 5.

<sup>154</sup> Australian Expedition, 1929

<sup>155</sup> Sweden and Finland are partly within the Arctic Circle. Iceland lies just south of the line.

Discovered as far back as 1596, the subject of the many conflicting claims and much diplomatic correspondence in the seventeenth century, it came to be recognized as *terra nullius* and was formally so described in the Protocol of 1912 drawn up by representatives of Norway, Sweden and Russia. Still more formally, Norwegian sovereignty was recognized by the Treaty of 1920, a Treaty which the United States ratified in 1924. While Russia is not yet a party to that Treaty, the Norwegian Government is in effective occupation of the region, and there can be almost no doubt that her title is perfect to 'all the lands situated between 10° and 35° longitude east of Greenwich and between 74° and 81° latitude north.' It is reported that Norway, in a note to Canada, has made some claim to Axel Heiberg Land and perhaps one or two other islands) based on the discoveries of Sverdrup. Now Axel Heiberg, while unoccupied by any one, is within the region claimed by Canada. Its northern tip, Cape Thomas Hubbard, was chosen for the airplane base of the MacMillan Expedition. The possibility of Norwegian title to land in this region becoming a reality is highly remote.

"Future territorial expansion in the Arctic seems to be open only to the Canadians, the Russians and ourselves. All three Governments at this time are showing active interest in the situation.

"The Government of Canada in recent years, particularly since 1919, has been devoting much attention to its northern lands and to the possibilities that lie still farther north. The Canadian Budget item for the 'Government of the North West Territories' was less than \$4,000 in 1920; it was over \$300,000 in 1924; and it doubtless is still larger this year. In 1920 there were elaborate official investigations conducted by the so-called Reindeer and Musk-ox Commission. In 1922, a Canadian expedition on the ship Arctic established a police post, post-office and customs house at Craig Harbor on Ellesmere Island, with a personnel of seven men headed by an inspector of police. This post, in latitude 76° 10' north and longitude 81° 20' west, is one of the most northerly official stations in the world, being less than a thousand miles from the Pole. It is interesting to note that the 1922 expedition selected near the post 'a site sufficiently level and smooth for an aerodrome.'

"Indeed, Canada has now established a periodic ship patrol of Ellesmere Island and neighboring lands. In the summer of 1924 a building was erected on the west shore of Rice Strait, near Kane Basin, north of Craig Harbor, in latitude 78° 46'. The intention is that the police at Craig Harbor shall make a patrol to Kane Basin during the winter. A second permanent post was opened on Devon Island and there is also one at Ponds Inlet on the North coast of Baffin Island, where the Hudson's Bay Company has a station. This year the annual voyage of the ship Arctic commenced about July 1 as usual, and still other posts are to be established in this region. Melville and Bathurst Islands are mentioned as possibilities. A glance at the map will show that Ellesmere

Island and Devon Island, with Baffin Island and Bylot Island to the south, form the eastern fringe of the Arctic Islands of Canada.

“The Canadian Government has also been careful to preserve its rights in the matter of explorations, both positively and negatively. The Stefansson Expedition of 1913 received instructions to reaffirm any British rights at points which the Expedition might touch. Both Rasmussen and the Danish Government were formally notified by Canada in 1921 that any discovery of Rasmussen would not affect Canadian claims.

“No relevant diplomatic correspondence between the United States Government and the Canadian Government has been published. However, the Prime Minister of Canada said in the House of Commons on May 11,<sup>156</sup> when asked for the papers about Wrangel Island, that some of the correspondence might be regarded as confidential by the Government of the United States indicating that on that question at least there had been some correspondence, and on June 10, in speaking of the Canadian claims in the Arctic generally, Mr. Stewart, Minister of the Interior, said: 'A dispatch dealing with the subject was sent to Washington, to which we have had no reply.'

“The Canadian claims in the Arctic deserve special attention. They have very recently been definitely and officially stated by Mr. Stewart,<sup>157</sup> and are outlined on a map laid on the table of the Canadian House of Commons. They include everything, known and unknown, west of Davis Strait and longitude 60°, east of the meridian which divides Alaska from Canada (141°), and north of the Canadian mainland up to the Pole.

“What is to be said as to the Canadian title to the islands now on the map within these lines, islands having an area of say 500,000 square miles? There is of course no doubt of the perfect jurisdiction of Canada over these lands under Canadian law. Statutes and Orders in Council include within the Dominion all of these territories; the national act and the national assumption of jurisdiction are complete; but we are thinking of their status internationally.

“Baffin Island, the largest of all, with 200,000 square miles, is as certainly Canadian as is Ontario; and we may take for granted Canadian ownership of the other islands directly adjacent to the mainland. As Halleck says; 'The ownership and occupation of the mainland includes the adjacent islands, even though no positive acts of ownership may have been exercised over them.'

“As to the rest, there are various shades of doubt - the doubt increasing generally with the latitude. We have seen that Ellesmere Island and Devon Island have each at least once officially established and maintained police post; that is actual, even if it is to be deemed only partial, possession. The other

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<sup>156</sup> 1925.

<sup>157</sup> They were foreshadowed almost in their present terms in the Canadian Senate in 1907.

islands north of 74° are unoccupied, are generally uninhabited, and indeed have rarely - and some of them never - been seen or visited except by explorers of various nationalities. The very existence of the more remote of them was unknown a generation ago.

“On the other hand, whereas Canada makes a precise and definite claim of sovereignty, no other country (aside from the rather shadowy 'discovery' rights of Norway to one or two islands) has announced any claim whatever. Furthermore, the appearance of these islands on the map as a seeming northern extension of the Canadian mainland is a visible sign of an important reality - namely, that many of them are quite inaccessible except from or over some Canadian base. With her claim of sovereignty before the world, Canada is gradually extending her actual rule and occupation over the entire area in question.

“It has been suggested that the Monroe Doctrine has a bearing upon lands in the Arctic. Speaking very generally, this is no doubt true. Historically, the Monroe Doctrine at its original enunciation was aimed in part against the extension of territorial claims by Russia in the north. It is well to remember, however, that the geographical extent of the Monroe Doctrine has never been precisely delimited. Monroe spoke of 'the American Continents' or in other words, North and South America. Does this wholly exclude Antarctica, and if not, what part of that region is included? Further, and more material here, what are the precise northern boundaries of the Continent of North America?”...

“Assuming, however, that the Monroe Doctrine may be invoked in relation to Arctic islands, may it, or should it, be invoked as against Canadian claims east of 141° west longitude?

“In answering this question we should think of realities. The Monroe Doctrine is a national policy established primarily for the benefit of the United States. It doubtless will remain unlimited by any precise geographical formula and undefined by any particular form of words. In more than one sense, Ottawa is very near to Washington. The international frontier between the two countries means more a tariff than it does anything else. To interpret the Monroe Doctrine as meaning that Canada could not extend her domains to the north would be to say that acquisition by Mexico of Axel Heiberg Land would be regarded by the United States with complaisance and Canadian sovereignty thereover with opposition. The absurdity of the conclusion demonstrates the falsity of the premises.

“As to the islands now known and lying north of the Canadian mainland, the average American would have no objection to the Canadian title. Certainly we would prefer Canadian ownership to any other ownership. We do not regard Canada as a 'European Power' despite her membership in the British Empire, - a much looser tie to London than it was even a generation

ago. The only other possibilities would be something in the nature of terra nullius, an unsatisfactory sort of ownership by everybody, or else ownership by the United States. No public sentiment here would favor either, as against Canada.

“So 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.

“The undiscovered lands are another story. We can make up our minds about them when we know what they are.

“Russian claims in the Arctic have not been so precisely set forth. However, in 1916 Russia notified the Governments of Great Britain and the United States and doubtless other countries that it considered various islands near the Arctic coast of the Empire as forming an integral part thereof. These included the Henrietta Islands, Jeanette, Bennet, the islands of New Siberia and also, of particular interest in view of recent history, Wrangel Island and Herald Island. It is clear that the British Government now makes no objection to any of these claims. The attempt by Mr. Stefansson to make Wrangel Island British did not receive official support in London; the British have obviously decided to claim no Arctic lands west of 141°. The Russians took active steps to end the most recent occupation of Wrangel Island, and it is now unoccupied.

“Wrangel Island lies about 80 miles from the Siberian coast and is perhaps of some value and habitable. Its early history is summed up by a leading authority as follows: 'A Russian heard of it in 1824 but never saw it; an Englishman saw it in 1849 but never landed on it; an American landed on it in 1881 and claimed it for the United States.' Except for Herald Island, which is a few square miles of barren rock, Wrangel Island is much nearer Alaska than any other island in the Russian Arctic. Possibly the United States may be interested in the future of Wrangel Island; but probably no country is concerned with the other Russian claims north of the mainland of Russia, so far as they have been disclosed; they are to be thought of chiefly in their bearing on future air routes.

“The only known land in the Arctic which is not now the subject of a positive claim by some government seems to be Franz Josef Land,<sup>158</sup> a group of islands - uninhabited and of unknown value - lying just north of 80° and, generally speaking, east of Spitsbergen and north of Nova Zambia. From their location we must assume that they will be claimed by Russia, for they are in about the same latitude as the Russian claims some 300 miles to the east.

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<sup>158</sup> Before the World War, because of “discovery”, it would have been necessary to think of Austria-Hungary as a possible sovereign, but hardly now.

“Recent dispatches indicate that the present Russian Government is pursuing its rights. It seems that the Soviet Government is making plans for a Polar expedition by air to explore the areas directly north of Russian territory, in accordance with a program drafted by Dr. Nansen; and also that an expedition is to be sent to the region that has been known as Nicholas Land, but now to be called Vladimir Lenin Land, on the 80th parallel and at about 100° east longitude.

“We cannot say that the sovereignty of all the known lands in the Arctic is definitely settled in internationally. We can say, however, that the sovereignty of substantially all of these territories is now either definitely known or definitely claimed. The next few years will bring some sort of occupation of most lands hitherto unvisited except by occupational explorers. And the probability is that few of the claims thus far made to lands hitherto discovered will be questioned.

“More doubtful, of course, is the status of the unknown.

“The United States have never officially made any claim to any known Arctic lands outside of our well recognized territory. The sole declaration we have made regarding Arctic regions is the renunciation of any possible rights based on discovery or otherwise in Greenland. As to the unknown territories, there likewise is no official statement; but there is significant action.

“The MacMillan expedition must be regarded as in effect an official expedition of our Government. True, it was largely financed by the National Geographic Society; but it was mostly composed of Navy personnel, it was supplied with Navy airplanes and with Navy wireless, and it was as indubitably governed by instructions from the Secretary of Navy as it was bidden Godspeed by his representative. Nothing was lacking to give the party official character, national duties and international rights.

“The announced purpose of the MacMillan expedition was to explore the unknown area of the Arctic, the 'white spot' on the map; and there can be no doubt that behind all this preparation and action will be found a national policy, to be announced publicly in due courses. This great unexplored region of the Arctic lies, generally speaking, north, northwest and northeast of Alaska. The area of this 'white spot' on the map is something more than 1,000,000 square miles - more than the area of Greenland.

“This is another way of saying that the Arctic Continent, long believed in and long sought, does not exist. Even if all this unknown area were land, it would not be a continent; at the utmost it would be a large island, one-fourth to one-third the size of Australia. But though unexplored, it would be going too far to say that this area is totally unknown; and inferences regarding it, based on known facts, almost forbid the idea that it is all land. The Pole and its immediate surroundings are water and not land; and soundings made in that vicinity show that the water is very deep water, suggesting that no great

land area is adjacent. On the other hand, data from observations of the currents, the tides and the ice lead some scientists to think it unlikely that there is no land in this region. It may well be that the 'white spot' contains more or less land in the form of islands.

“If the methods of exploration previously used were the only ones available, it would perhaps be some generations before such a vast surface could be even approximately charted; but with the airplane or the dirigible (and perhaps the submarine) the possibility is quite otherwise. The question is now more one of expense than anything else. With proper preparation and airplane bases, the difficulties involved in obtaining the necessary information - and these difficulties are still great - could be overcome in the course of a few years.

“If the political situation in the unknown Arctic finally results in agreement among the British Empire (Canada), Russia and the United States, the legal aspects of the problem will become unimportant. In the meantime, however, they are very interesting and in some of their features novel.

“In the early days, the discovery of unknown lands-was regarded as the primary source of national title, But the impossibility that discovery, without anything more, should constitute a continuing basis of sovereignty soon became obvious and 'effective occupation or 'settlement' became a requisite. In recent years a third element of title has come to be thought of internationally as almost necessary, and that is what Lord Stowell called 'notification of the facts,' usually by an express communication to other Powers.

“Of course, no formula or statement yet devised has solved or can solve all the difficulties connected with sovereignty over newly discovered lands. If effective occupation or settlement is to be deemed the real test, certainly 'settlement' in Arctic regions can hardly be regarded as precisely synonymous with settlement elsewhere. Greenland is admittedly Danish, but I do not suppose that any one would say that the whole of Greenland is settled at this time. But clearly (if sufficient money is available) there may be effective occupation of a few posts, here and there, with airplane and radio communications, without there being much “settlement” in the ordinary sense of that word.

“In speaking of 'the occupation which is sufficient to give a State title to territory' Mr. Olney, as Secretary of State, wrote in 1896: “The only possession required is such as is reasonable under all circumstances- in view of the extent of the territory claimed, its nature and the uses to which it is adapted and is put while mere constructive occupation is kept within bounds by the doctrine of contiguity.” While these words were not written about the Arctic, they seem very applicable to that region, where - doubtless for some time to come- no possession will be more than 'reasonable' and occupation

will be very largely “constructive.”

“In thinking of these three elements of title we are apt to conceive that their order in time is naturally, first, discovery, then occupation or settlement, and finally notice. Obviously, occupation cannot precede discovery by some one; and it seems generally to have been considered, as by the Institute of International Law, that the International notice required was a notice of possession. By the official Canadian claim, so far as it relates to the unknown, is in the nature of a notice before discovery and before occupation. What Canada says is that if Arctic lands be found- found by any one - east of the 141° and west of the 60° (west longitude) and Davis Strait, they are Canadian or will be.

“It cannot be said, however, that such a claim as this is wholly without foundation or precedent. It bears some analogy to the ‘back country’ or ‘hinterlands’ theory regarding territory stretching away from the past. More accurately, it may be said to rest partly on the notion of ‘territorial propinquity’ which the United States on one famous occasion recognized as creating “special relations between countries.” Claims to unoccupied territory on the ground of contiguity are not unknown, although it cannot be said that there is any well defined or clearly settled principle to support them.

“Very naturally, Canada thinks of the islands on the map north of her mainland as contiguous territory, natural geographical extension of the country. Discovered to a great extent (not wholly) by British explorers, separated from the more southern area and from each other by comparatively narrow straits, though largely unoccupied in any sense, these lands seem to the Canadians a geographical entity are clearly parts of one dominion, their own. To project this sentiment still farther north, perhaps across a considerable extent of Arctic sea or ice, is less logical but seems equally natural.

“However, assuming as we must, that the Canadian claim even to the unknown rests partly on the principle of contiguity, there is another feature of the Arctic map, as Canada would draw it, which is of peculiar interest to us. A definite western line to the Pole is fixed, as far as Canada can fix it, and that line is the 141st west meridian. Of course, to claim up to that meridian is to renounce anything beyond it. In other words, the British now say that they now admit the rights of the United States to all unknown lands north of Alaska. This proposed line of division certainly does not rest entirely on any principle of contiguity; however that principle may be described or limited, it does not favor any one point of the compass as against any other; northwest or northeast may be as well 'contiguous' as north. Nor does the line rest on any agreement between Ottawa and Washington, or we would know of it. It may accordingly be supposed that the suggestion of this line has as its foundation some legal theory, and that it is not merely an arbitrary continuation of the Alaskan boundary north from Demarcation Point to the Pole.

“It appears probable that the Canadian theory of the line of the 141st meridian up to the Pole is based somewhat on the history and the provisions of former treaties. Going back a century, to about 1820, the various territorial pretensions of Russia, Great Britain and the United States in the vast northwest were not accurately defined and to some extent were overlapping. In 1821 a famous Ukase was issued by Russia. This asserted sovereign rights over the waters of Bering's Sea and a large portion of the North Pacific and also claimed land on the west coast as far south as 51°. Protests against the terms of this Ukase were promptly made by both Great Britain and the United States.

“Following these protests the United States and Russia signed a treaty, in 1824, by which Russia substantially abandoned any claim to sovereignty over 'any part of the Great Ocean' (although this was by no means the last heard of such a claim). The two countries reciprocally agreed that their citizens should not form “any establishment” to the north and south of 54° 40', Russia renouncing to the south and the United States to the north of that subsequently famous line. It may be said that the effect of this was to leave territorial questions north of 54° 40' to Russia and Great Britain, and south thereof to Great Britain and the United States.

“The Treaty of 1825 between Great Britain and Russia followed. We now know that the British cared comparatively little about the boundary; they were thinking of navigation and fishing and trade in the Pacific. The frontier clauses were the excuse and the mask for the rest of the treaty. Indeed, the British, if pressed, would have conceded 135° west longitude as the eastern boundary of Russian America, a concession which if made, would have left all the Canadian Klondike within the United States some generations later. But the 141st meridian was agreed to, and in describing the boundary between the possessions of the two countries, 'sur la cote du Continent et les Iles de l'Amerique Nord-Ouest,' the provisions of the treaty here material, in its original text, read thus: “La meme ligne meridienne du 141me degre formera, dans son prolongement jusqu'a la Mer Glaciale, la limite entre les Possessions Russes et Britanniques sur le Continent de l'Amerique Nord-Quest.”

“It is to be remembered not only that in 1825, when this treaty was written, the northern part at least) of the boundary fixed was a matter of little concern to the parties or to any one else, but also that the two countries were dealing to some extent with the unknown. A considerable length of the northern mainland coast, both east and west of what is now Demarcation Point, was unexplored in 1825 and was put down on the maps of that time by guess. Bering's Strait and its vicinity had been charted for half a century; but Point Barrow was not reached till 1826.

“In 1867 by our treaty with Russia, we purchased Alaska for \$7,200,000 and succeeded to the rights of Russia under the Treaty of 1825. The expression above quoted from the Treaty of 1825 was incorporated in the

French text of our Treaty of 1867; and in the English text it is imperfectly translated as 'the said meridian line of the 141st degree, in its prolongation as far as the Frozen Ocean.'

"How far is 'as far as the Frozen Ocean,' or "la Mer Glaciale" of the treaty of 1825? That the 'Frozen Ocean' meant what come to be called the "Arctic Ocean" may be assumed; in the negotiations the words 'Polar Sea' were used at least once, but this does not answer our question as to the extent of the line. What lands, if any, lay between the northern coast and the North Pole was not known in 1825, for it is not known now. Certainly if there had been islands adjacent to that coast they too, although then unknown, would have been subject to the same line. We now know that there are no such adjacent islands; there may be islands to the north, but if so they are some hundreds of miles toward the Pole. Indeed, the expression "as far as the Frozen Ocean" is vague enough (taking into account the previous Treaty of 1824) to make it at least arguable that the line runs as far as the 141st meridian itself runs, and that means to the North Pole (for the continuation of that line beyond the Pole is not the 141st but the 39th meridian).

"It is also of interest here to notice what the Russian Treaty of 1867 says about our boundary to the west. The treaty ceded 'All the territory and dominion now possessed by his said Majesty (the Emperor of All the Russians) on the Continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth'; and the western limit subsequently set forth in the text runs from a point in Bering's Strait on the meridian (approximately 169°) which passes midway between certain named islands "and proceeds north without limitation, into the same Frozen Ocean." (The Treaty French of this phrase is also worth quoting - 'et remonte en ligne directs, sans limitation, vers le Nord, jusqu'a ce qu'elle se perde dans la Mer Glaciale.') These words 'without limitation' are pretty strong words. They come very near to fixing the territorial rights of Russia and the United States, so far as those two countries could then fix them, up to the Pole.

"So I think we may say that the Canadian theory is, in part at least based on the history of these treaties. It comes to this: the areas round the North Pole, whatever they may be, form three or four great cone-shaped sectors - the Canadian sector from 60° west to 141° west; the American sector from 141° west to 169° west; and the great Russian sector running from 169° west to some undefined line in the neighborhood of 30° or 40° east longitude. The remainder of the circle, from say 40° east to 60° west, would, so far as this theory goes, be unassigned, but, very fittingly, that remainder seems to contain no land at all north of Spitsbergen and Greenland. Possibly a few islands close to the north Greenland coast are exceptions to this statement.

"Whatever may be said by way of argument against this Canadian theory, it is certainly a highly convenient one. All unknown territory in the Arctic is

appropriated by three Great Powers and divided among them on the basis of the more southerly status quo. Certainly if these three Powers are satisfied with such a partition, the rest of the world will have to be.

“Looking at the matter from another point of view, the Canadian theory would give the United States (if we wanted it) a very large portion of the present unknown area. What this would mean in terms of territory we cannot now say; perhaps nothing; perhaps a frozen empire. We shall know more about it very soon.”

Dr. Leonid Breitfuss an international German authority in an article entitled Territorial Division of the Arctic, 1928, “deals with the Arctic situation from the standpoint of its future value with regard to airways to different parts of the world.” Dr. Breitfuss looks forward to the time when air travel will cross the North Pole or the northern arctic regions and deals with the value of the northern islands as possible future aerodromes and radio stations for the guidance of airships en route. In dealing with the sovereignty of these northern islands Dr. Breitfuss endorses the sector principle and states:-

“According to my opinion,<sup>159</sup> the whole Arctic region, that is to say, the circular expanse which one strikes with a radius of 23-½° around the Pole should be divided into five sectors, according to the number, of the five northern Polar lands. On account of its insignificant size, I should like to attach the Finnish sector to the Norwegian.

“Within each of these sectors, all known lands as well as all undiscovered lands and islands must be placed under the sovereignty of the Government concerned, and sovereignty is to be exercised not only on the dry land, but also in a certain measure, still to be determined internationally, upon the waters, covered with ice-fields, which touch these lands and islands, and upon the air space above the sector. These sectors are the following:

- “1. Norwegian-Finnish sector, of perhaps 42° of longitude (from longitude 10° West of Greenwich to the western boundary of U.S.S.R.)
- “2. Soviet Russia sector, of perhaps 158 of longitude (from longitude 32° 4' 35' East to 168° 49' 30" West of Greenwich). In this sector falls also the terra nullius, Franz Josef Land, where already for some years the building of a radio weather-station has been decided upon by Russia.
- “3. Alaskan sector, of perhaps 29° of longitude (from the east border of the U.S.S.R. as far as longitude 141° West of Greenwich).
- “4. Canadian Sector, of perhaps 81° of longitude (from longitude 60°

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<sup>159</sup> This plan was published by the author under the title, Die Einteilung des noerdlichen Polargebiets (“The Division of the North Polar Region”) in the Morskoi Sbornik, Leningrad, January number, 1927 (Russian).

to 141° West of Greenwich).

“5. Greenlandic sector, of perhaps 50° of longitude (from longitude 10° to 60° West of Greenwich).

“All known lands and lands perhaps still undiscovered falling in these sectors, must be placed under the jurisdiction of the Governments concerned.

“Such a division would be not only practical for the future air connections across the Arctic, but also useful for future discoveries since uncertainty is thereby avoided, which, as already mentioned, is to be expected in the case of further discoveries in the Canadian and Siberian sectors.

“As outcome of the territorial sovereignty, enactments will take place particularly in respect to the practice of hunting, fishing, and mining prohibitions against the erection of buildings. Instructions will have to be arranged especially to control the activity of the radio and weather stations in the service of air travel.

“At the same time, as far as the limit of sovereignty on the sea is concerned, the teachings of Grotius and van Bynkershoek, according to which the territorial boundaries do not depend on the miles, but relatively, on the measurement of their usability, which depends on the range of artillery, can no longer be fully recognized.

“In the practice of civilized nations today, this varies between 3 and 20 nautical miles (1 nautical mile - 1.852 kilometers). Although the Institut de droit international in 1894 recommended the 6-nautical-mile zone, at the same time it demanded for neutral states the right to extend the zone up to the distance of a cannon-shot when they wish to forbid operations of war for the district. The same Institute has established fundamentally a zone of 12 nautical miles for bays and inlets. These decisions, however, do not correspond to the needs of maritime affairs.

“As an example, where the territorial limit is far overstepped in spite of these circumstances, the position of Hudson Bay in international law may be considered. In spite of the fact that Hudson Strait, which leads into this great inland sea, has a breadth of not less than 50 nautical miles, Hudson Bay, as is well known, is Canadian territory in its whole extent for the questions of neutral rights. In practice, the Canadian Government demands certain declarations from North American ships for the right to pursue the whaling industry.

“At a conference in Petersburg in 1907 in regard to territorial questions of the Russian European North, the author pointed out<sup>160</sup> that the interests of sea-fishing imperatively demanded that these boundaries be not defined relatively, but by reason of the physical-geographical conditions. At that time

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<sup>160</sup> L. Breitfuss: “Über die Grenzen der territorialen Gewässer des Europäischen Russlands in Nordpolarezen.” *Russkoje Sudohodstwo*, Petersburg, April, 1907 (Russian).

the territorial limit for the Murman coast was measured at twenty nautical miles; for the southeastern coast region of Barents Sea, with its shallow bottom, where during the greater part of the year the sea is covered with ice, the wish was expressed that the boundaries of this district must be established according to quite other points of view than for the seas which know no ice.

“In consideration of the interests mentioned, the Soviet Government, in the decree of 24th May, 1921, declared a strip of coast twelve nautical miles wide in Barents Sea under Russian sovereignty, although this boundary is not yet recognized by other Governments, and not a few conflicts arise with the fish-trawlers because of it.

“From this fleeting review of the marine territorial limits of sovereignty we see that it is imperatively necessary to arrange the solution of this problem in an international way.

“If the ice conditions are taken into consideration in the determination of territorial marine limits, then for the seas of the Polar region we could make still other proposals, which must be weighed still more carefully.

“We already know that the upper surface of the Arctic Ocean is in great part covered with ice, and is therefore inaccessible for ship travel. Accessible only up to a certain degree are the Northern districts of the Atlantic Ocean, that is to say, the Greenland Sea, Barents Sea, Kara Sea, Davis Strait, and Baffin Bay; on the Pacific Ocean side, the parts of the sea northwards from Bering Strait, Beaufort Sea, and East Siberian Sea.

“Since Kara Sea is connected with Barents Sea only by relatively narrow straits”<sup>161</sup> - Yugor Strait, Kara Strait and Matochkin Strait - the route around the northern point of Novaya Zemlya is mostly blocked by the ice, this sea must therefore be regarded as inland sea (*mare clausum*).

“For the same reason also the so-called “American route” to the Polar Sea through Davis Strait, Baffin Bay, and Smith Sound, as well as the waters lying westwards and eastwards above Bering Strait should be regarded as Danish-Canadian and Russian-American territories respectively.

“From the basis of our experience we may assume with certainty that during our geological period we can never count on a transit route by ship either by the Northeast or the Northwest Passage.

“In the case of the Northeast Passage, a route only would come into consideration from Europe, to be sure, into the mouths of the Ob and Yenesei respectively, and from Bering Strait into the mouths of the Kolima and Lena. For this reason, these last two routes, important from a trade and political standpoint will remain a purely Russian concern. The Northwest Passage, which likewise has no transit importance) but only local significance, would in

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<sup>161</sup> Kara Strait is noticeably narrower than Hudson Strait, and Kara Sea is smaller than Hudson Bay.- The Author.

conformity with this fall under the jurisdiction of Canada.”

The following diplomatic communications between New Zealand and the United States, with relation to British sovereignty in the even more remote Antarctic region, set forth the views held by New Zealand regarding the British claim of sovereignty over the Ross Sector. It is common knowledge that, while British claims certain Antarctic sectors to the South Pole, and an endeavor is made to administer certain British laws and regulations in these remote regions, these Antarctic sectors are by no means under administration and occupation as compared to the Northern Arctic sector as claimed by Canada.

“(Extract from British Blueprint entitled, United States Annual Report, 1934, Confidential, (14631). No. A.1309/653/45). Pages 11 and 12.)

#### New Zealand.

The Antarctic.

The Embassy addressed a note to the State Department on the 29th January, containing a communication to the United States Government from His Majesty's Government in New Zealand regarding the expedition to the Antarctic led by Admiral Byrd. This communication referred to Admiral Byrd's reported intention to establish a post office at his base in the Ross Dependency and to the issue by the United States Government of special stamps to be used to frank letters posted at the base, and went on to point out that if such acts were committed without permission from the sovereign Power, they could not be regarded otherwise than as infringing British sovereignty and New Zealand's administrative rights in the Dependency as well as the laws there in force. With reference to the operation of a wireless station in the Dependency and to the carrying out of flights, the note stated that, since on his previous expedition Admiral Byrd had established a wireless station and had imported aircraft and was not required to obtain a licence or formal permission, he may have thought it unnecessary to do so on the present occasion. The New Zealand Government were indeed willing to regard their offer of facilities as covering, as on the previous expedition, permission for the wireless telegraph station and for the flights, but they would, nevertheless, point out that they would have preferred prior application to have been made to the competent authorities in accordance with the relevant legislation in force. The note concluded with an expression of hope that the United States Government would bear the points mentioned in mind in the case of any United States expeditions under official auspices which may proceed in future to territory under New Zealand administration.

The terms of this communication were carefully drafted so as to place on record the attitude of the New Zealand Government without, at the same time, putting the United States Government into the position of having to

reply and thus involve a risk of controversy.

A reply was, however, received, dated the 24th February, which ran in part as follows:

“I desire to assure you that any facilities given to the expedition by the New Zealand authorities are greatly appreciated. It does not seem necessary at this time to enter into a discussion of the interesting questions which are set forth in your note. However, I reserve all rights which the United States or its citizens may have with respect to this matter.”

The next stage in this question was the publication on the 27th October of a Post Office Department communique stating that “in order to provide an even better philatelic service than has heretofore been accorded stamp collectors at the Little America Post Office of the Byrd Antarctic Expedition,” the Postmaster-General had the previous evening designated a Mr. Charles F. Anderson as “cancellation expert” of the Post Office Department to proceed to the Little America Post Office on the 7th November.

The Embassy were then instructed to approach the State Department informally and to request an explanation, in the light of the note of the 29th January, of what appeared to be official recognition of the establishment of a United States Post Office in British territory under New Zealand administration. The reply to these enquiries came in the shape of a letter from the Secretary of State on the 14th November. The substantive part of this communication is important enough to be quoted in full:

“It is understood that His Majesty's Government in New Zealand bases its claim of sovereignty, on the discovery of a portion of the region in question. While it is unnecessary to enter into any detailed discussion of the subject at this time, nevertheless, in order to avoid misapprehension, it is proper for me to say, in the light of long-established principles of international law, that I cannot admit that sovereignty accrues from mere discovery unaccompanied by occupancy and use.”

On behalf of His Majesty's Government in New Zealand, His Majesty's Ambassador returned a reply to this note on the 27th December, informing the Secretary of State that the supposition, that the British claim to sovereignty over the Ross Dependency was founded on discovery alone, was based on a misapprehension of the facts of the situation. Sir Ronald Lindsay's note concluded with the statement that while the New Zealand Government had no objection to the proposed visit of Mr. Anderson, they must place it on record that had his mission appeared to them to be designed as an assertion of United States sovereignty over any part of the Ross Dependency, or as a

challenge to British sovereignty therein, they would have been compelled to make a protest.”

Referring to the above quoted authority on international law and those eminent international authorities applying the principles of international law to the Northern Arctic islands it is readily seen that while British sovereignty in the Arctic islands as claimed through Canada is the best claim advanced today to those islands.

*[Sections of pages 66-69 of original document exempted pursuant to the Canadian Access to Information Act]*

This post is accessible, so far as is known, every year during the summer months by boat. Superimposed on the map are one-hundred-mile circles with Dundas Harbor as the central point. These circles clearly show the distances up to one thousand miles from Dundas Harbor.

It is suggested for the consideration of the North West Territories Council that Dundas Harbor might be a central point from which government administrative parties could operate.

It is realized that the cost of the proposed project will have to be investigated and that this will to a very great extent be the governing factor. Against this cost will have to be set the amount of money now expended each year in the northern patrol. This patrol while helpful is not extending Canada's sovereignty in the Arctic nor is it a substantial factor in maintaining the claim already established other than relieving officials in the district and carrying in supplies.

At Dundas Harbor a central base could be established consisting of permanent buildings, (viz. housing accommodation for police and government officials, warehouses sufficient to store supplies for at least a two-year period, etc., hospital accommodation, office accommodation for scientific personnel) and a radio station of sufficient strength to reach another radio station to keep up communication with the outside world, say, a thousand mile range.

The personnel of such a base might consist of an administrative officer in charge and a number of scientists, geologists, surveyors, etc., who could be detailed to certain out-of-the-way districts. These parties would be equipped with a portable radio set to enable them to keep in daily touch with the base, Dundas Harbor. In order to place these parties in the field the station would be equipped with at least two aeroplanes.

There is a great difference of opinion among the Arctic authorities as to the efficiency of aeroplanes in the Arctic regions. The ice conditions of the far northern areas are rough and humpy and while looking smooth and level from the air are disastrous to the under-carriage of a plane fitted with skiffs, pontoons or wheels. In landing, such a plane requires quite a long level landing area and the unlevel, rough conditions would endanger the lives of the occupants and also the possibility of the plane ever being able to again rise from the landing place.

Amundsen and Ellsworth who were forced down on the Arctic ice, in their endeavour to fly from Spitzbergen to the North Pole in 1925, express the opinion that it is too dangerous for aeroplanes to operate in the far north owing to the uncertainty of being able to land and take off. They considered themselves very lucky that they were able to accomplish the act with one of their planes after a long period of arduous labour.

It might be well to consider here the opinions expressed by a few of the outstanding Arctic explorers, as to the possibility or practicability of aeroplanes landing on the ice, etc., in the Northern Arctic regions.

Admiral Richard E. Byrd, U.S.N., in an article published in *World's Work Magazine*, May 1926 at page 83, after a period of flying from Etah, Greenland, over Ellesmere island and surrounding district, states:-

“I have written about conditions as they were around Etah during a month which, we admit, is one of the most stormy and foggy months of the year - and we had learned much about Arctic flying. We had seen from the planes 30,000 square miles of that region.

“Scarcity of landing places over both land and water forms one of the chief dangers to the flyer. A forced landing means a crash and the possibility that the crew will not be able to walk away from the wreck.”

V. Stefansson, Arctic explorer, in an article entitled “The Airplane and the Arctic,” published in *Harpers Monthly Magazine*, October 1927, at page 601 et seq. makes the following comments:-

“The Arctic ranks at least as high above the North Atlantic for flying as do the tropics, and an Arctic route between points in the North Temperate Zone that are far apart will usually save fuel and time. Cold, as such, is no handicap to airplanes, for passengers and pilots will be in compartments heated from the exhaust. Cold will be a great advantage for airships, for the lifting power of the gas bag increases when the temperature of the air drops. But there remains the problem of landing places, over which the authorities have disagreed till recently. Before citing the striking testimony that has just come to hand, we will go briefly into the theory.

“The Atlantic is far wider than the Arctic, and in that sense more difficult to 'hop over.' The Pacific is wider still. Furthermore, there are more islands in the Arctic than in any other ocean, and these will eventually be used as way stations. But it has been said not only by laymen but also by some of the professionals, that landing places for flying boats, such as Amundsen-Ellsworth used in 1925, are rare in winter (which is admitted), and that planes with wheels or skids can land only with practically suicidal danger. Amundsen describes, for instance, on pages 138 and 139 of *The First Crossing of the Polar Sea*, what he saw in looking down from a dirigible and emphasizes the conclusions he had reached in his flying boat the previous year:

“The ice conditions seemed exactly the same now as in 1925. We did not see a single landing place on the long way from Svalbard(Spitsbergen) to Alaska. . . . In spite of Byrd's fine flight our advice is: Do not fly over these ice fields before aeroplanes have become so perfect that one can be quite sure of not having to make a forced landing.

“These conclusions as to the moving winter pack-ice of the Polar Sea were based by Amundsen solely on what he had seen from aloft, for his own landing had been with a boat in a lead and he had never been on winter pack-ice on any of his previous expeditions. Byrd, who also had never been afoot on winter pack-ice judged wholly from looking down while flying, and he was inclined to take a position somewhat nearer Amundsen's pessimistic opinion than the optimistic view of Wilkins, who maintained that there would seldom be five miles on the winter pack without a reasonably safe landing with good visibility conditions. In other words, if you were flying high when your engine stopped you could usually glide to a safe landing. This view Wilkins based on extensive flying experience both in peace and war and on the knowledge of winter pack-ice which he had gained in three years, 1913-16 when he was second-in-command of the northern section of my 1913-18 expedition.

“Since frequency of landing places is one of the chief demands of heavier-than-air flying, the difference in opinion between Amundsen and Wilkins was crucial. If Amundsen were right, the Arctic, despite favorable air conditions, would be a dangerous place for airplanes; if Wilkins were right, it would be the safest region in the world for the commercial use of the flying-machine.”...

“And now to the story of the Wilkins flights which' throw light on the one question which remains in dispute, whether the Arctic deep sea pack-ice is specially dangerous to fly over because of few landing places, or comparatively safe because of many.

“As a preliminary to their deep sea work in 1926, Wilkins and his pilot Eielson of the Detroit Arctic Expedition flew more than 4,000 miles back and forth between Fairbanks in Alaska, just south of the Arctic Circle, and Barrow, which is about three hundred miles within the Arctic, crossing five times in winter and spring a range of mountains' one hundred miles wide with peaks 10,000 feet high, Landing places were numerous on rivers and lakes, except in these mountains, and they utilized some of them. The air in winter was the smoothest in which they had ever flown, not a bump or air pocket in 4,000 miles. (No such record could be made for five crossings of 10,000 foot mountains in the Tropical or Temperate Zones.) They also made a three hundred mile reconnaissance over deep sea pack-ice and came back of the opinion, as they had been before, that landing places for wheels or skids were

numerous. But in 1926 they proved nothing in this regard, for they did not come down except on land, or river ice, or on sea lagoon ice.

“The critical flight which gave us all the experimental knowledge we as yet have about the safety of landing on the polar pack was made when the fickle daily press had turned from the Arctic flying of 1926 to the Atlantic flying of 1927. We tell its story here more fully than any of the preceding, for unless you read the *Detroit News*, which financed the expedition you have never heard, perhaps, that there was such a flight - or unless, again, you read *Science*, in which Commander Richard E. Byrd and I published a jointly written statement calling attention to what we thought was one of the most remarkable of Arctic expeditions, then being strangely neglected.

“On March 29, 1927, Wilkins and Eielson, in a land plane mounted on skids and with gas for fourteen hours, started from Barrow, Alaska, three hundred miles north of the Arctic circle, on an intended triangular exploration flight of six hundred miles somewhat north of west, two hundred miles southwest, and then back to Barrow. They flew steadily for more than five hours, about five hundred and fifty miles. Then engine trouble developed, and a landing had to be made. Wilkins selected a spot he thought safe, and Eielson made a perfect landing. While Eielson worked on the engine, Wilkins made two holes in the ice for the use of the sonic depth finder. The ice was three feet thick and the water beneath it proved to be about three miles deep.

“During the flight the weather, fair at the start, had begun to turn cloudy, and a wind was increasing, blowing off the land. For winds do blow in the Arctic, though not so often as in the Temperate Zone, nor so violently on the average. With daylight lost in making repairs and fuel lost in taking off, Wilkins decided to head straight back to shore. The trip was already fruitful. They had flown three hundred miles beyond the limit of previous exploration had disproved the view of those who believed land existed within five hundred miles northwest of Barrow, and had proved the ocean so deep that the probability of land even far off in that direction is greatly lessened. And they had made one safe landing on the pack with skids - an accomplishment of value in the face of the controversy, for at least you cannot say that no landing can be made after one has been made.

“The take-off proved as safe and easy as the landing and they flew straight back over their course, but with diminished speed, for the force of the head wind was increasing and the engine was not working well. In about ten minutes it got so bad that they had to come down. Again Wilkins picked what he thought was a safe spot, and again Eielson made a perfect landing. This time Wilkins took no sounding and both worked at the repairs, for the day was getting short, the wind had increased to a blizzard; and clouds had hidden the sun. The new-fallen snow, too, was a little soft and they had to make five attempts before the plane finally took the air. This used up precious daylight

and more precious fuel, so that when finally under way Wilkins calculated that light would fail them two hundred miles, and the gasoline probably one hundred miles, before reaching shore. He consulted Eielson. Should they make a safe landing in daylight or fly through the dark till the gas gave out, on the chance that it might after all last them back to land? Their calculations as to distance were very uncertain as they did not know the force of the wind and how much it was delaying them. If the wind dropped, they might make land. Eielson voted for taking that chance.

“Night was on, and they had been flying for two hours without seeing the ice below, the horizon in the distance, or any star or sign of moon in the sky above, when suddenly the engine stopped. Their fuel was all gone. Only from his instruments could Eielson fudge how far below them was the ice. Through the dark of night and the murk of the blizzard they came to a third landing. Their machine stayed right side up, but a snag of ice broke one of the wings. Then, in the thick of the blizzard, Wilkins and Eielson got out their bedding and slept the night in fair comfort.

“We in civilized countries fear the Arctic which we do not know, and think indifferently of the Atlantic and the southerly oceans, for we know them. But do we really know them to be anything except merciless, especially in a storm? On what sea but the Arctic could you make two safe Landings, repair your machinery, take off again twice, fly till your fuel is gone, and then land, go to bed and sleep the night dry and comfortable a hundred miles from the nearest land? On what other sea could you spend five days preparing a travelling outfit, as Wilkins and Eielson did, and then walk ten miles a day for ten days as they did, to a safe landing at a calculated spot? On no other sea could you do it, except possibly the Antarctic.”

From the above opinions the weight of evidence appears to be that, while there is a certain amount of risk, landing spots are not infrequent and are as safe and as sure as in other outlying parts of the world. I should recommend, in view of the doubt that does exist[,] that the suggested planes attached to the central base be augmented by a first-class high speed autogiro. This machine from its performance requires very little space in which to take off and can land by coming almost straight down with only a level spot on which to land. When a proposed expedition is intended the autogiro could be used as a reconnaissance plane to select a spot sufficiently safe for a regular load-carrying plane to land. The autogiro crew could then notify the central base by radio, giving location, and also marking the spot sufficiently to safeguard the regular plane against disaster.

If such a suggestion were considered parties could be placed in several different outlying districts doing valuable scientific research as well as surveying, and keep in constant touch with the main central base. The planes would in most cases be within a few flying hours of all parties and could meet their wants and supplies readily upon request. In this way parties could remain in outlying districts many months at a time

without fear of being lost or perishing from lack of food and supplies. Assistance could also be readily rendered in case of accident or illness.

Following the above idea a step further, substations could be established on outlying islands and in time the planes and autogiro might be able to work from this new point and carry on valuable exploration work into the present unknown areas.

Should some such plan meet with approval, Baillie island might be taken tentatively as the base in the Western Arctic. This base is accessible yearly and the same methods as described for Dundas Harbor could be used in working from this point. With Baillie island as a central western point, I have superimposed on the map in red, dotted lines radiating one hundred miles into the Arctic regions north of the mainland.

Such an arrangement, with the several parties empowered to administer the laws of Canada, would carry active jurisdiction into many of our outlying Western islands where before no active administration existed. Furthermore these parties would extend actually Canada's occupation of such outlying points. These parties though not in the real sense being in permanent occupation would greatly enhance British sovereignty and the central post at Dundas Harbor with its permanent buildings and radio station would be actual permanent occupation. This would put beyond question British sovereignty in the Arctic in the Canadian sector and would extinguish all of the doubts in the minds of foreign governments.

A word might be said in closing with reference to the possibility of obtaining the services of suitable Canadian pilots for flying in Arctic Regions. In this regard I am informed that Canadian pilots are as efficient and probably better qualified than any in the world. This appears to be amply borne out by the fact that Lincoln Ellsworth recently selected a Canadian pilot to fly his machine in the Antarctic. One or more Canadian air pilots have been selected almost invariably, in late years, to accompany expeditions into the Arctic and Antarctic regions. Admiral Byrd's chief pilot, Bert Balken [*sic*: Balchen], was a Canadian.

Since the above research I have discussed the feasibility of flying in the Arctic with Mr. A.M. Narraway, Chief Aerial Survey Engineer, of the Topographical and Air Survey Bureau, Department of the Interior. On going over the suggestions made on the attached maps, Mr. Narraway suggested that especially in the Western Arctic the centre from which to work into the Arctic might be more suitable should a point on Coronation Gulf be selected instead of that at Bailey Island. Mr. Narraway further informed me that there would be no difficulty whatsoever in carrying out the suggestions made as regards the taking off and landing areas, as the flying conditions in the Western Arctic were excellent except for a very short period during freeze-up and break-up. Mr. Narraway supported his statements by showing a number of aerial pictures taken on Victoria Island and Banks Island and other places to the north of the North American Continent.

I am informed that the topography of the Arctic islands lying to the north of the Dominion of Canada on the east consists of a rather rugged and high range of

mountains extending up through Labrador, Baffin Island and Ellesmere Island, making landing places for fliers somewhat scarce. All the islands to the west of this range taper down and become somewhat less rugged and level and are dotted with numerous inland lakes that are in summer free from floating Arctic ice or when frozen, free from pressure ice, which makes landing by an airplane easy and safe.

While Mr. Narraway made one or two suggestions that would necessitate changing the location of the western flying base, I felt that the suggestions pictured on the attached maps were only suggestions to illustrate a possible method of approach that would extend British Sovereignty in the Arctic islands, and that these stations could be varied or eliminated by the officers studying the proposition, upon receipt of the best [advice] of experts having accurate knowledge of existing conditions. I would recommend that should members of the Northwest Territories Council consider the suggestions set out in the foregoing memorandum, Mr. Narraway and any others whose expert opinion is desired be called to express their views.

T. L. CORY

## 22. Under Secretary of State for External Affairs to the Deputy Minister of Transport, 4 May 1946

DCER (1946) no.907; original

I enclose two copies of a memorandum left with this Department on May 1st by Mr. Lewis Clark, Counselor of the United States Embassy, proposing the establishment of Arctic weather stations. The immediate objectives are:

- (a) In 1946, or as early as practicable, a weather station central to the western Canadian Arctic archipelago.
- (b) In 1947, or as early as practicable, three weather stations on islands along the western portion of the Canadian Arctic archipelago.

In amplifying this memorandum, Mr. Clark explained that while the United States Government would be prepared to establish, maintain and operate these stations independently (and, indeed, were making such a proposal to the Danish Government with regard to a station in Greenland) they assumed that this would not be desired by the Canadian Government in view of its general policy of retaining control of establishments in Canadian territory. The United States Government would therefore be glad to cooperate along either of the following lines:

- (a) The United States to establish and to assist in maintaining the stations which would be under Canadian operation.
- (b) Canada to establish, operate and maintain the Stations.

In either case, the United States would expect that Canadian technical standards would meet United States requirements and that United States personnel could be posted to the stations to acquire experience.

Mr. Clark emphasized that his Government wished to work out a programme on a fully cooperative basis and had no thought of interfering in any way with Canadian sovereignty. In view of the need for arriving at an early decision to permit of arrangements being made for supplies and personnel, he asked that the matter be treated as one of urgency. Finally, he said that technical representatives of the United States Departments concerned could come to Canada at short notice to discuss details of these proposals.

It appears to this Department that it would be unwise to allow these stations to be set up entirely under the control of the United States and that, on the other hand, the Canadian Government would not be justified in assuming the whole cost of the programme. Consequently, it appears desirable to work out a compromise under which Canada would retain operational control and make a contribution to the programme, while the United States would provide equipment, supplies and personnel. Before any final decision can be reached, however, it seems, essential to have a meeting of technical officers from both countries.

I would suggest that the United States Embassy be informed that the Canadian authorities are prepared to give favourable consideration to these proposals but, before submitting the question to the Government, would like to have a meeting in Canada at an early date with United States officials. I should be glad to have your views and, if you agree, I should like to know the earliest date at which officials of the meteorological service could meet a group from the United States.

N. A. ROBERTSON

## 23. Memorandum from Head, Third Political Division, to Legal Division, Sovereignty in the Arctic, 6-8 May 1946

DCER(1946) no.908 & 909

### SOVEREIGNTY IN THE ARCTIC

A recent paper which has come to our attention prepared by an interdepartmental committee in Washington (the Air Coordinating Committee) indicates the interest displayed in some circles about establishing United States claims to sovereignty in the Arctic. The following extracts are from the report of the Standing Subcommittee on the Arctic:

(a) *"Region west of Grant's Land.* The region north of Prince Patrick Island and west of Grant's Land is largely unexplored, but several Arctic authorities believe that if any undiscovered islands exist - north of Canada they lie in this area. Sir Hubert Wilkins, in searching by air for Levanevsky in March, 1937, reported 'ice islands' about 300 miles northwest of Prince Patrick Island and 'paleocrystic ice' - at about latitude 84', longitude 130°, with a lead 150 miles long in the ice, as evidence of nearby land. Reconnaissance flights from Alaska to these regions could doubtless settle the question.

A primary weather station on any newly discovered island in this vicinity would be a valuable source of information "because of its proximity to the North Pole and it would serve as a communication point for trans-polar flights. It would, however, be very difficult to establish and maintain. Surface vessels have never reached this area and aircraft would have to fly comparatively long distances. Employment of gliders to establish and service the base would be desirable.

The sovereignty of newly discovered land in this area would require careful consideration by the State Department. Mr. Stewart, on June 10, 1925, in speaking before the Canadian House of Commons, definitely and officially stated the Canadian claims to include everything, known and unknown, west of the Davis Strait-Baffin Bay-Smith Sound-Robeson Channel-60<sup>th</sup> Meridian, east of the meridian that divides Alaska from Canada (141°W), and north of the Canadian mainland up to the Pole. The U.S. may not have recognized these claims."

(b) In discussing aircraft flights from Alaska-Canada-Greenland quadrant, it is stated that the following could be accomplished inter alia :

"Afford opportunity for experienced Arctic observers to study the condition of Arctic ice floes for possible evidence of undiscovered land . Only men who have walked over the ice, as well as flown over it, are qualified to obtain adequate data in this manner."

(c) The following recommendation is put forward:

*"Weather Station on possible Undiscovered Land in Canadian quadrant.*

*It is recommended* that the ACC ask the State Department whether reported Canadian claims of sovereignty over all known islands and lands that may be discovered in the sector west of Greenland and east of meridian 141 W. northward to the pole, have been officially asserted by that government and, if so, whether the official position of the United States would be to support any claims by this country if land is discovered and occupied by the United States west of Grant's Land, site '(d)' of recommendation #1.

If it is the policy of the United States to support such claims, *it is recommended* that the Army make flights over the unexplored area west and north-west of Grant's Land to determine whether (as many Arctic authorities believe) islands exist which might be claimed by the United States. In case new claimable land is found, *it is recommended* that the proper agencies of the Department of Commerce take action to establish a primary weather and magnetic station."

Obviously we shall have to examine carefully the whole question of Arctic sovereignty. In the meantime, it seems to me that two problems require immediate consideration and I should be grateful for your opinions:

(1) We are discussing with the United States the establishment of weather stations in the Western Arctic Archipelago. In view of the discussion mentioned above of whether the United States could claim sovereignty to newly discovered land in this region; I should like your view as to whether, if such land were newly discovered by a United States party, the United States could put forward a valid claim to it.

(2) We have been asked for permission for flights of U.S. Army aircraft between Iceland and Alaska. In view of the discussion mentioned above about looking for possible evidence of undiscovered land, should our permission be qualified in any way to rule out claims based on exploration? (The same question, of course, applies to (1) above.)

Arctic problems are coming more and more to the forefront and it can be anticipated that within the next few years there will be extensive programmes of northern exploration and development in which the United States will either be participating with Canada or will have been given permission to act independently.

I am wondering whether, at the outset, we ought not to discuss the sovereignty question with the United States and endeavour to secure their agreement to our claims about Canadian sovereignty.

R. M[ACDONNELL]

## 24. Memorandum from Head, Third Political Division, to Associate Under-Secretary of State for External Affairs, [c. 6-8 May 1946]

*DCER* (1946) no.913

There is attached a paper which the Army has done on sovereignty in the Arctic. I understand that it is largely the work of General Spry. This paper is to be considered by Cabinet Committee when the question of Arctic weather stations is discussed along with the paper prepared by this Department.

I am in agreement with the conclusions in paragraphs 27 and 28, although I am afraid that the Government may regard them more as "ideal" than as "working" solutions. If Canada provides the real, estate, the fixed installations and the administration of northern defence projects, leaving to the United States the provision of equipment and supplies, it will give us some voice in the course of events. Otherwise, we will be faced with very strong pressure from United States to allow them to move in and do as they please.

Unfortunately, even the relatively modest "recommended working solution" is likely to involve heavy expenditures which will increase as the years go by unless the international situation improves. The decision is essentially a political one, but I should say that the Government's wartime policy (which dates from about the beginning of 1944) of accepting financial and other responsibility for United States defence projects in Canada has met with general approval.

R. M[ACDONNELL]

*Memorandum from Department of National Defence to Cabinet Defence Committee*

### SOVEREIGNTY IN THE CANADIAN ARCTIC IN RELATION TO JOINT DEFENCE UNDERTAKINGS

#### INTRODUCTORY

The United States Government have recently requested Canadian approval for an Arctic Weather Station program which they have put forward. This and other US proposals in connection with defense may involve the question of Canada's claim to sovereignty over territories lying within the "Canadian sector" of the Arctic.

The various proposals which have to date been advanced fall into two distinct categories, i.e., Establishment in the Arctic or Sub-Arctic of static installations. These include installations such as those contemplated in the Weather Station program, or installations such as might be developed in conjunction with the proposed Arctic Experimental Station based on Churchill.

Proposals to carry out maneuvers or training exercises by United States troops on Canadian territory.

Permission has been requested for 500 US Army troops to conduct a training exercise during the coming winter under sub-Arctic conditions in some training area similar to Shilo. The most recent request is for a clearance to permit the landing of a party of approximately 28 US Marines for a period of about one month during the summer of 1946 in the vicinity of North Devon Island, in connection with Operation NANOOK.

#### OBJECT OF THIS PAPER

This paper briefly considers the possible effect of such proposals on Canadian sovereignty over her Arctic Territories, in order to determine how United States requirements in the Arctic may best be met without consequent infringement of sovereignty.

#### NATURE OF SOVEREIGNTY CLAIMED

Sovereignty itself may be roughly defined as power, right or authority over a clearly defined and delimited area. In the case of the Canadian Arctic definite sovereignty is asserted, in right of Canada, over all known land masses and islands within the "Canadian sector" of the Arctic. However these claims are largely based either on contiguity to continental Canada, or on original discovery and exploration, (principally by British explorers). Due to the desolate nature of the areas in question, these claims have little support on the grounds of effective occupation, settlement or development. Thus, while Canada's claims to sovereignty to these regions have not heretofore been seriously challenged, they are at best somewhat tenuous and weak.

#### POSSIBILITIES OF FOREIGN INTRUSION

However, the fact that these claims have not been seriously challenged in the past does not mean that this fortunate situation will continue indefinitely into the future. In the past these regions represented little but empty space, and their very isolation preserved them from any significant intrusion. Today they have become suddenly transferred into regions of strategic importance, not to Canada alone but to such great powers as have frontiers within the Arctic circle. At the same time it should be borne in mind that the Canadian Arctic represents only a relatively small sector of the entire Arctic regions. The larger part of the remaining area lies within a "sector" based on the continental land mass of one other great power.

Moreover, the strategic importance which these regions have assumed is not of a purely military nature alone. The Arctic seems destined to become a crossroads of strategic international civil air routes, which may in itself stimulate the commercial exploitation of latent resources in this area.

From the military standpoint, the strategic value of the Canadian Arctic is not significant only from the standpoint of the defense of the North American continent.

Its strategic value would certainly be given full recognition in any designs which may be made by a great power developing hostile intentions against this continent. It is not unreasonable, therefore, to anticipate that, even in peace-time, attempts may be made by foreign interest to gain foot-holds (perhaps on a commercial basis) within this region, or to secure information of military value.

Thus commercial developments consequent upon civil aviation activities may lead to foreign intrusion. For to the extent that commercial flying over this area increases, and commercial development is stimulated, so will there be a corresponding requirement for the establishment of facilities of one sort or another in these hitherto neglected regions. It is not outside the range of possibility that the growing need for such facilities might be seized upon by a foreign power as a pretext for making demands for right of entrance into the Canadian Arctic or for the establishment of settlements or for other concessions. While ostensibly such undertakings would be for purely civil or commercial purposes, once they were established they could readily be exploited for military purposes connected with possible offensive designs.

A further possibility of foreign intrusion lies in the fact that although Canadian sovereignty is assumed over the entire "Canadian sector" of the Arctic considerable portions of this theoretical "sector" remain totally unexplored. With the development of Arctic aviation and the employment of radar search methods there is a possibility that hitherto unknown islands may be discovered within the Canadian sector by a foreign power, and claim laid to them by right of discovery and primary occupation. Canada might, in this case, find it most difficult to successfully contest such claims.

Moreover, even in the case of islands in the Canadian Arctic Archipelago already discovered and at least partially charted, it cannot be assumed that Canada's claims to sovereignty will continue to go unchallenged. It is true that the United States tacitly acknowledges Canadian sovereignty over these discovered islands, as implied by the considered and consistent practice of the United States Government in employing, in official correspondence with the Canadian Government, such terminology as "the Canadian Arctic Archipelago".

However, it does not follow from this that another great power possessing strategic interest in Polar regions would under all circumstances necessarily accept Canada's claims. Any step which would constitute a clear-cut and initial compromise of Canadian sovereignty in the Arctic, such as a real intrusion of the United States might be made the occasion of similar claims or demands by another great power.

Thus it is of great importance that Canada should carefully safeguard her sovereignty in the Arctic at all points and at all times, lest the acceptance of an initial infringement of her sovereignty invalidate her entire claim, and open the way to the intrusion of foreign interests of a nature which might create an ultimate threat to national security. At the same time it should not be forgotten that the Canadian Arctic is an integral part of the North American continent and her exclusive claims to sovereignty must be fitted into the overall requirements of continental security and

defense. This Arctic area is considered as vital to the United States as a defense frontier as to Canada, and its military security requires closely coordinated action.

It follows from this that essential facilities must be permitted to the United States to enable them to practice during peace-time the tasks which it may be jointly agreed they would undertake in war. Such facilities involve not only the establishment of static installations of a military or quasi-military type, but also the conduct of military exercises and maneuvers on Canadian territory in the Arctic.

However, careful attention should be given to the form in which such permission is granted and to the manner in which such undertakings are carried out. The introduction of foreign permanent establishments (even those of the United States) would be attended by a consequent weakening of Canada's sovereignty,—a contingency which cannot be accepted in view of the corresponding weakness of military security which would result.

The problem is thus seen to devolve into finding a suitable *modus operandi*. This must permit the granting of essential facilities and rights to the United States, without any consequent infringement of Canadian sovereignty of a nature which would give an opening to another power (not associated with Canada in the defense of the North American continent) to make similar demands.

The solution appears to lie in the application of the principle of regional defense, in consonance with the spirit of the UNO Charter, to such concessions as may be granted to the United States. At the same time Canada should retain title and control of all military establishments on her own soil, and the "joint" nature of all cooperative undertakings should be given due emphasis at all times. This should effectively debar similar demands which might be preferred by another power, as the fundamental basis of agreed arrangements with the United States in North American continental defense, which is by its nature exclusive.

It must, however, be admitted that joint defense undertakings for the purpose of regional defense may impose a heavy financial burden upon Canada. The United States will not easily be deterred from putting forward demands for the establishment of whatever military installations she deems necessary in the interest of her own vital security, on a scale more suited to her vast resources and scale of operations than to Canada's. It can therefore be anticipated, that in the interest of maintaining friendly relationships with the United States, and thus safeguarding her own sovereignty, Canada will be forced by gradually increasing pressure to accept financial and manpower commitments which may be considerably above the scale of what is considered to be necessary from the standpoint of Canadian defense alone.

#### FUNDAMENTAL PRINCIPLES FOR MAINTAINING CANADIAN SOVEREIGNTY

To summarize the foregoing argument:—it may be laid down as a general principle, that; if continuance of Canadian sovereignty over her Arctic territories is to

be guaranteed, no foreign military or quasi-military installations should be established in peace-time within such territories.

In view of the weakness of Canadian claims to this region, this principle should be applied consistently even to a power with which Canada may share relationships of a most friendly and enduring nature, such as the United States: In any concessions which may be made the greatest care should be taken to fully safeguard Canadian sovereignty, as otherwise another great power may be presented with sufficient and justifiable grounds for pressing similar demands.

However, Canada can no longer reasonably expect to maintain her Arctic territories in state of vacuum, and hope at the same time to preserve her sovereignty over them in absentia. If her somewhat tenuous claims to these territories is to be guaranteed in the face of the direct and urgent interest which the United States has expressed in the development of facilities in this region considered by her to be essential, then it follows that she must be prepared to carry out such development by herself or with a calculated degree of assistance. In brief, Canada must now either herself provide essential facilities and services in her Arctic territories or provide them cooperatively, or abandon almost all substantial basis to her claims upon them.

#### THE THEORETICALLY IDEAL SOLUTION

A continued guarantee of Canadian sovereignty over her Arctic territories may thus entail the satisfaction of legitimate demands for the development in these regions of essential facilities and services. In as far as probable United States requirements are concerned, it may be safely anticipated that these will involve weather stations, early-warning systems, and possibly military air bases.

The Canadian Government has already indicated that it desires to be presented with a coordinated picture of United States requirements in the Far North. This is being compiled in the form of a schedule of tasks and annexes now being developed by the Canadian-United States Joint Planners. This plan, if and when it is approved by the two governments concerned, will then represent those developments considered as "essential".

However, it may well be that the provision of such essential facilities in Canada will be so heavy a burden as to be literally beyond purely Canadian resources.

If such is the case, the ideal solution, as outlined above will not be feasible.

#### RECOMMENDED WORKING SOLUTION

This raises the question of the extent to which a compromise with the ideal may be possible, which being based on a cooperative undertaking would still eliminate any actual foreign intrusion of a nature which would constitute an invasion or infringement of Canadian sovereignty, and would at the same time offset possible demands by a power other than the United States.

If United States requirements are to be effectively met on the basis of cooperative undertakings this should be done in the form of joint defense measures. The nature

of certain of the proposals already made, (and those anticipated) precludes the possibility of maintaining the fiction that they are purely "scientific" or "research" programs.

It is suggested that measures such as those proposed should be frankly carried out as part of a Canada-United States Joint Defense undertaking constituting a regional defense arrangement within the framework of the United Nations Organization. To this end, an appropriate statement based on Recommendation Thirty-Five of the Permanent Joint Defense Board (when ultimately approved) should be tabled with the Security Council of the UNO. This would make it clear that such Joint Defense measures were intended as a contribution to world peace and were being placed under the aegis of the UNO.

However, at the same time, Canadian sovereignty in the Arctic should be carefully safeguarded by the adoption of the following principles and their consistent practice.

(a) In the case of Static Installations

Should any base or military or quasi-military establishment be set up in the Canadian Arctic at the request of the United States, full title and control should be retained by Canada, and this fact should be well publicized.

While acceptance of United States facilities and equipment and the assistance of United States technical personnel might be necessary in order to establish and develop such projects, a majority of the personnel employed should be Canadian.

(b) In the case of Troop Maneuvers and Exercises

Before any body of United States Army, Navy or Marine Forces are allowed to conduct maneuvers or training exercises or given right of transit upon or through Canadian territory, specific permission should be obtained of the Canadian Government in every instance.

Such exercises should, in every case, be of a joint nature even though Canadian representation is largely in token form.

(iii) Due emphasis should be paid in public statements to their "joint" nature.

In the specific case of the Arctic Weather Station program, for which approval is now requested by the United States, it may be necessary in the initial stages to make very considerable use both of United States facilities and equipment and United States technical personnel in order to establish them. However, from the very first a certain number of Canadian personnel should be included, and United States personnel should be gradually replaced by Canadian personnel until United States personnel represent a minority.

## 25. Ambassador in United States, Washington, to Acting Under-Secretary of State for External Affairs, 5 June 1946

*DCER* (1946) no. 916

Dear Mr. Wrong,

I have received your letter of June 1st with the memorandum for the Cabinet Defence Committee on the United States proposals for an Arctic weather station programme, which I have read with much interest.

From every political point of view I should think it would be desirable that the Canadian Government construct, finance and maintain all meteorological stations on its territory which it considers to be required. The memorandum states that the great expense involved would appear to make this impracticable. I am unable to comment on this because there are no figures in the memorandum as to what this amount would be. All that is given is an estimate that \$465,000 would be required annually to finance the project; that is, I suppose, to maintain the stations when they are constructed. No amount for capital cost is suggested.

I think that the preoccupation of the Canadian authorities with the effect on Canadian sovereignty in the area in question of a programme carried out by the United States, or even jointly by the two 'governments, is wise and understandable. I am wondering whether we could not take advantage of the present situation to secure from the United States Government public recognition of our sovereignty of the total area above our northern coasts, based on the sector principle. The memorandum feels that this is not necessary, and even possibly inadvisable, because insistence on a formal assurance of respect for Canadian sovereignty might indicate doubt on our side of the validity of our claim to such sovereignty. Without attempting to insist on anything, I think we might persuade the United States authorities that it would be in their own interest at this time to reinforce our claim to the area under the sector principle. Their hesitations in the past have been inspired, no doubt, by a feeling that they might conceivably wish at some future time to occupy some of this area themselves, or at least to establish certain facilities thereon, which would be more difficult if our sovereignty had been formally recognized by them. Nevertheless, it might be pointed out to them that, as long as this question remains undetermined in international law, there is always the possibility of some other country, notably Russia, establishing meteorological and other stations in that area on islands that have not been used or occupied by any other country. An open and formal statement on some suitable occasion by the United States that Canada's sovereignty over this area is recognized might remove the possibility of such a contingency, or at least make it more difficult to bring it about. The deterrent effect that this would have on other states would, it could be argued, be of much greater value to the United States than keeping the position uncertain because of a possible desire on its own part to exploit

that uncertainty in the future. I feel that if I were authorized to mention this matter informally to the State Department there would be a good possibility of prevailing on them to adopt this view and take the necessary action. If you agree, therefore, I would be glad to try this on an entirely exploratory and informal basis. If it were done in this way, I do not see that we would have anything to lose and there might be something to gain.

Yours sincerely,

L. B. PEARSON

## 26. Memorandum from Associate Under-Secretary of State for External Affairs to Secretary to the Cabinet, 24 June 1946

*DCER* (1946) no. 921

I hope that the U.S. request concerning the establishment of Arctic weather stations this summer will be considered by Cabinet this week as they are using a number of different channels in an effort to extract a prompt and favourable decision. I think myself that we should agree to the request under the conditions mentioned in the Cabinet Defence Committee. If the discussion in Cabinet gives rise to argument over Canadian sovereignty in the unoccupied islands, it might be well to point out that our refusal to cooperate might have the effect of stimulating some challenge to our sovereignty. The present position, it seems to me, can be summed up by saying that Canadian sovereignty in all territories in the Canadian sector is unchallenged but not unchallengeable. We, therefore, must bear in mind two risks which appear to be rather contradictory—(1) if we allow the U.S. to operate in these islands the presence of U.S. establishments (or even possibly of joint establishments) may be construed in some quarters as indicating that our sovereignty is not complete; (2) if we refuse cooperation with the U.S. in establishing posts to which they attach a high degree of importance, they may seek to obtain their ends eventually by claiming sovereignty themselves and treating some of the islands—especially those far from police and trading posts and not covered by Canadian patrols—as their own territory by right of occupation.

27. James H. Brewster, Report on the Arctic, Atlantic Division Air Transport Command, Headquarters, Atlantic-Division Air Transport Command, Report on the Arctic, 1946 [Excerpts]

NARA, RG 319, Entry 82 (A1), Box 2975

I. International Law and the Arctic

The Legal Basis of Sovereignty Over Unclaimed Territory

The international rules of law regarding the acquisition of sovereignty over unoccupied and unclaimed territory have undergone a gradual and continuous evolution during the past five centuries. Even today it is useless to pretend that the currently accepted legal principles on this subject have crystallized into unchangeable laws, now longer subject to questioning. International law is composed chiefly of a body of customary rules and practices, supplemented by conventions or treaties to which the great majority of civilized states have subscribed. In the absence of a supranational legislature competent to enact binding laws, the test of the validity of an international rule of conduct is the fact of its general acceptance. As the practice of nations changes, so does the law. Thus the content of the international legal system is permanently in a state of flux, and the uncertainty as to the actual meaning of the law at any given time is increased by the lack of any official organ of interpretation whose dictum is binding upon all states. It follows, then, that there is no unanimity among the authorities as to the correct statement of the international rules governing the establishment of sovereignty over Polar regions. This confusion is heightened by the tendency of many writers to champion the interpretation which, under the circumstances, affords maximum benefit to the states of which they happen to be citizens. This memorandum, therefore, makes no pretense of giving a definitive account of the legal status of the Polar areas which would be acceptable to all jurists. It is merely an attempt to elucidate the problems arising in connection with the establishment of sovereignty over the Arctic regions, to describe the relevant legal theories and to offer tentative conclusions as to their probable validity within the context of present-day international law.

Prior to the sixteenth century it was generally believed that all undiscovered regions were the possessions of God, and hence subject to the disposition of His representative, the Pope. In practice the Pope granted these lands to the nation on whose behalf they had been discovered, but not content with dispensing the territories that had actually been explored, he ceded the entire New World, dividing it between Portugal and Spain. The theory of papal dispensation crumbled in the sixteenth century owing to the pressure of rising Western nations which had not been favored by generous grants of territory, and to the increasing prevalence of the

opinion that under certain conditions discovery brought with it a valid title to sovereignty. According to the latter theory, no actual possession of the territory in question was required. A formal act of appropriation fixed sovereignty, even when unaccompanied by any physical exercise of authority over the major sector of the land claimed. The eighteenth century saw the beginning of a theory which denied that discovery and fictitious appropriation could yield a title to sovereignty unless followed by real and effective possession. Early in the nineteenth century it was possible to say that this concept had become embedded in the structure of the law of nations.<sup>162</sup>

Today it is generally agreed that there are two principal methods whereby sovereignty can be acquired over areas that are *terra nullius*. This first is agreement on the part of all interested powers that the region is the possession of one of them.<sup>163</sup> Occupation constitutes the second and most commonly employed method. In order to take effective possession the state must maintain order, administer justice, and guarantee protection to foreign nationals within the area in question. It has sometimes been held that discovery gives rise to an inchoate right which acts as a temporary bar to occupation by another state. If, after the lapse of a reasonable period of time, the first state has failed to take effective possession of the territory, it reverts to its original status. It is doubtful, however, that this theory has received sufficiently general recognition to render it an accepted rule of international law.<sup>164</sup>

Title to sovereignty may be lost either by abandonment, intentional or factual, or by the acquisition of a contrary prescriptive right on the part of another state. A continuous display of authority over a territory is necessary to maintain sovereignty as well as acquire it. A merely passing discontinuance of state authority does not imply, however, that sovereignty has lapsed.

Sovereignty can be established only over areas which international law permits to fall within the domain of national states. The most notable region over which sovereignty cannot be acquired is, of course, the open sea. This does not, however, preclude states from exercising sovereignty over the three mile maritime belt and over such areas as land-locked bays and inlets. When an area is not susceptible to sovereignty or when it has not been the subject of national claims, all states are free to make any use of it that they may desire. Thus a state may set up scientific or military

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<sup>162</sup> The requirement of effective possession before a claim to sovereignty can be maintained was confirmed at the Berlin African Conference in 1884 and at a meeting of the Institut de Droit International at Lausanne in 1888. It was further borne out by Mr. Huber's decision of the *Island of Palmas* case in 1928. In this instance the United States and the Netherlands contested sovereignty over *Palmas*, the United States basing her rights on prior discovery by Spain from whom she had inherited her claim, and the Netherlands founding her title on the fact of effective occupation since 1700. *Palmas* was awarded to the Netherlands.

<sup>163</sup> This was illustrated by the Svalbard Treaty, 9 February 1920, by which the interested powers recognized Norway's sovereignty over Spitsbergen.

<sup>164</sup> M. Huber seems to subscribe to this theory in his *Island of Palmas* decision. Oppenheim accepts it, as do Scott, Hall and Balch. Smedal believes that it is not an accepted rule.

stations upon an unclaimed area, and its nationals may exploit the wealth of the territory in any manner that they see fit. No state, however, is legally entitled to exclude another from an area over which it does not exercise jurisdiction.

### Sovereignty Over Polar Areas

Special factors complicate the problem of acquisition of sovereignty over Polar areas. In the first place, international laws of territorial acquisition have in the past had little occasion to be applied to the Arctic and Antarctic regions and have not been developed with a view to the climate and terrain characterizing these locations. The principal difficulty springs from the inability of states to establish a political and administrative control over the Polar regions of a nature comparable to that which international law demands as a prerequisite to the assumption of sovereignty in temperate zones. Thus some writers have believed that the Polar regions, because of their inability to sustain any substantial permanent settlement, are not susceptible to the acquisition of sovereignty by occupation.<sup>165</sup> It is now generally accepted, however, that the Polar lands may be subjected to the rights of sovereignty.<sup>166</sup>

In view of the increased interest in Arctic regions that has been manifested in recent years, attempts have been made to circumvent the difficulties resulting from an apparent inability to establish extensive Arctic colonization. There are two principal solutions to this problem. One of them consists of the abolition of existing international rules on acquisition of sovereignty insofar as the Polar regions are concerned. This solution, the so-called sector theory, is discussed below. The second comprises the gradual relaxation of the requirements for effective occupation of Arctic areas, until they have been lowered to a level which it is possible to comply with in a given zone in a practical way. There is considerable evidence to suggest that the last years have witnessed a development of this nature and the current trend in international law is in the direction of demanding progressively less display of state authority over uninhabitable territory.<sup>167</sup> In a sense, there has been a partial return to the 16<sup>th</sup> century theory that a formal assumption of domain unaccompanied by a display of administrative authority is sufficient to yield a title to sovereignty.

The instrument that has been employed to work this transformation in the law of territorial acquisition is the rule which stipulates that the type of administrative machinery established in a newly claimed area shall be adapted to local conditions and shall be sufficient to meet local requirements. The decision of the Palmas case in 1928 recognizes that “although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ accordingly as inhabited or uninhabited regions are involved...” The Clipperton Island decision in 1931 goes even further in recognizing the flexibility of the effective

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<sup>165</sup> Hall, W.E., Treatise on International Law, 8<sup>th</sup> Ed., p. 126.

<sup>166</sup> Hyde, C. International Law. Vol. I, pp. 347-348.

<sup>167</sup> Hyde, op. cit., Vol. I, p. 348.

occupation requirement. That opinion, while pointing out that the establishment of a political organization is the usual method of taking possession, states: "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."

The decision of the Permanent Court of International Justice in 1933 settling the legal status of Eastern Greenland, which had been the subject of a dispute between Norway and Denmark, indicates that henceforth a very small degree of actual exercise of authority will be required over polar areas as a prerequisite to a sovereignty claim. The Court concluded that Denmark had displayed sufficient authority over parts of Greenland to enable that country to claim the entire area as its possession, despite the fact that its jurisdiction had been manifested solely by Danish legislative acts which could not possibly have been enforced in more than a very small fraction of the territory in question.

On the basis of recent international decisions and writings, we are justified in concluding that while a bare claim of dominion is not sufficient to fix sovereignty, very little administrative control will in the future be necessary to validate such a claim. If a state has given formal notification of its intention to annex a polar territory, and especially if this assertion has been recognized by other interested powers, it need implement its claim only by promulgating some legislative enactment providing for the government of the region, and by stationing at some points in the territory a few of its nations, vested with police power and equipped to deal with infringements of the law.<sup>168</sup> It is not required that the state people the region with its own nationals, nor that it engage in exploitation of whatever natural resources are located there. On the other hand, the mere dispatch of scientific expeditions and the construction of wireless or weather stations is probably not sufficient to establish sovereignty unless the members of the expedition are clothed with the power to act as officers of the law. In the light of the East Greenland decision, it is likely that control exercised from neighboring lands would be regarded as permissible, providing that there is a reasonable possibility of communication and travel between the adjacent area.

The United States has in the past adhered to a strict interpretation of the requirement of effective occupation, holding that actual colonization of the area was an essential element in the acquisition of sovereignty. In 1934, Secretary of State Hull stated that "in light of long established principles of international law...I cannot admit that sovereignty accrues from mere discovery accompanied by occupancy and

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<sup>168</sup> Some writers have maintained that permanent police posts are not necessary if the state has the power to dispatch its officers to the area in question whenever this may become necessary.

use.”<sup>169</sup> Recently, however, the Government of the United States has become aware that, according to the norms accepted by the majority of nations, it would be in a position to put forth sovereignty claims, particularly in the Antarctic, were it to supplement the American explorations with some degree of administrative control. It has accordingly begun to take steps to reserve its rights.<sup>170</sup>

A special problem of great importance pertaining to the Arctic regions revolves about the possibility of establishing sovereignty over ice floes and fields of ice which rests upon the water. Part of the significance of this issue results from the fact that a state permitted to acquire sovereignty over an ice region would automatically enjoy jurisdiction over a three-mile belt of sea area surrounding it. There is considerable disagreement among the authorities on international law as to whether ice should be treated as constituting a part of the high seas, and therefore permanently relegated to the status of *territoria nullius* or whether it should be regarded as a land area over which national sovereignty may be legally exercised. It has been contended that ice, because it is composed of the same substance as the sea, is necessarily subject to identical principles. There seems to be no *a priori* reason, however, why the character of the substance or its lack of connection with *terra firma* should be decisive of its susceptibility to sovereignty. Most authorities are inclined to make a decision on the basis of the characteristics of the particular ice field in question, rather than to lay down a blanket rule. There is a considerable body of opinion holding that in a case where an ice field is relatively immobile, possessing a sufficiently solid surface to permit the pursuance of human occupation thereon, and serves as a barrier to navigation, it should be treated as a land area over which sovereignty may be acquired.<sup>171</sup> The consensus, however, seems to be that there are no known ice areas in the Arctic which meet the qualifications necessary to render them susceptible to sovereignty. There are three principal types of Arctic ice: (1) fast-ice, which freezes out from the shore in the winter and melts in the summer, (2) drift-ice, which breaks off from the fast-ice and floats in the region between the central Arctic Pack and the fast-ice, and (3) the Arctic Pack, whose mass occupies about seventy percent of the entire Arctic Sea. Only the last named could be considered as subject to sovereignty. Even the Arctic Pack, however, is highly mobile, drifting sometimes at an estimated

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<sup>169</sup> The United has, on the whole, not availed itself of the acts of its explorers to acquire sovereignty over polar regions. It made no claim to Wrangel Island on the ground of its discovery and formal assumption of possession by a United States naval officer. It asserted no sovereignty over Wilkes Land, despite the 1840 expedition of an American citizen, nor have the achievements of Peary, Byrd and Ellsworth been made the basis of a claim to the areas contiguous to the North and South Poles.

<sup>170</sup> Thus, on 6 January 1939, the American embassies in England and France were instructed to reserve the rights of the United States regarding aerial navigation and territorial sovereignty in the Antarctic.

<sup>171</sup> In this category would be placed the Ross Barrier in the Antarctic, which is a solid cap of immobile ice resting partly upon the land but extending into the open sea.

rate of 100 miles per week. Nor is it a completely solid mass since it contains water channels large enough to permit a ship to penetrate, and since during the summer it may contain a water area as great as ten per cent of its entire surface.<sup>172</sup> On the basis of these facts, it may be concluded that the known ice regions in the Arctic must, according to the precepts of international law, remain in the status of terra nullius. This does not preclude their utilization for the establishment of landing grounds, refueling stations, or weather installations, but it means no state is legally entitled to bar another from their occupation and use. If at some future time Arctic ice fields should be discovered which display more stable characteristics, it would probably be possible to assert national dominion over them.

### The Sector Principle of Sovereignty

The difficulties encountered when an attempt was made to apply the classic precepts of international law to the acquisition of sovereignty in the Arctic areas and the attempt to solve this problem by the gradual relaxation of the requirements for effective possession have already been discussed. It remains to examine a theory regarding the allocation of Arctic sovereignty which would dispense with the traditional formulas and substitute for them an entirely different approach to the acquisition of dominion over polar regions. The substance of the new thesis is found in the contention that “a country whose possession goes up to the Arctic regions has a right to all lands found in the waters between a line extending from its eastern extremity north and another line from its western extremity north.”<sup>173</sup> Another version of the theory, which has received support from Russian writers, would accord to the polar states sovereignty over the entire Arctic regions, including ice, sea and air, falling within their respective sectors.

The juristic argument for the sector theory rests upon the doctrine of contiguity and upon the closely allied concept of the hinterland. The contiguity doctrine, however, while justifying assumption of sovereignty over islands adjacent to an occupied coast, can hardly form the basis of a claim to lands so remote from the continental mainland as are many of the Arctic territories. Quite aside from this consideration, the doctrine of contiguity, which was flatly rejected in the Palmas decision, has itself very little standing in international law. The concept of the hinterland, that is, the automatic extension of state sovereignty over the continental interior adjacent to the occupied portion of the coast, likewise is hardly applicable to the Arctic claims which relate to distant islands and continents rather than to the interior of the mainland. In any case, the hinterland theory, like the contiguity doctrine, enjoys no recognized status as a rule of international law.

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<sup>172</sup> This was the figure given by the Russian Admiral Maharov who made surveys of the Arctic Pack in August 1899. It is possible that his estimate places the ratio of water to ice within the Pack at too high a percentage.

<sup>173</sup> Smedal, Gustav, *Acquisition of Sovereignty Over Polar Areas*, p. 54.

The sector principle is primarily based upon the pragmatic argument that no other theory can afford an equally satisfactory division of the polar regions. Proponents of the sector theory point to the simplicity with which it permits Arctic boundaries to be drawn. While alleging the impossibility of establishing sovereignty over these territories by means of effective occupation, they maintain that the sector theory has the added advantage of reducing the number of eligible national claims to the Arctic and thereby eliminating potential causes of conflict. There might be some substance to this argument, were it not for the fact that the various national claims to the polar regions already exist, and an attempt to eliminate some of them on the basis of an arbitrary principle in this time would probably be more productive of friction than their continuance would. In justifying the sector principle, Russian authors have contended that only the states adjacent to polar regions have the experience necessary to equip them for Arctic work. The Soviets have also suggested that the Arctic interest of a non-polar state must be imperialistic in their nature, and therefore do not merit consideration.

Soviet jurists, the foremost legal exponents of the sector principle, are in disagreement with one another concerning the extent of the rights accruing to the owners of the Arctic sectors. Some of them<sup>174</sup> contend that the sovereignty of the polar state extends over the entire sectoral region, including sea areas and the air space above them. The effect of this doctrine is to remove the Arctic Ocean from the category in which international law places other oceans which are recognized as free to all nations. Lakhtine, one of the most prominent of the Russian authors, advocates a complicated system by which the sector state exercised graded degrees of sovereignty over land, ice, and open water in the Arctic. He recommends, first of all, that "floating ice should be assimilated legally to the open polar seas, whilst ice formations that are more or less immovable should enjoy a legal status equivalent to polar territory."<sup>175</sup> Besides exercising full sovereignty over the land and ice areas, the polar state wields a similar jurisdiction over its maritime belt,<sup>176</sup> limited only by the right of innocent passage which is universally accorded to foreign ships. A more restricted sovereignty attaches to the ice-free sea regions of the Arctic Ocean, which, although likewise limited by the right of innocent passage, is not confined by hunting and fishing rights of foreign nationals. Sector states possess dominion over the air space superjacent to the ice-free sea, as well as to the air above the land areas. In practice, it seems that Lakhtine would accord the polar states a jurisdiction over the open sea approximately equal to that which is generally exercised over the maritime belt. When, in addition, it is remembered that he assimilates ice formations, accounting

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<sup>174</sup> Korovin and Sigrist, for example.

<sup>175</sup> Lakhtine, W. *Rights Over the Arctic*, 24 A.J.I.L. (1930), p. 709.

<sup>176</sup> It is worth noting that the Soviet Union maintains that the maritime belt is twelve miles in width, contrary to the more usual practice of recognizing a three-mile strip of maritime jurisdiction. The Russian Government also contends that the waters between the islands of archipelago are included in the concept of the marginal seas, regardless of their physical extent.

for the major portion of the Arctic area, to the legal status of terra firma, it becomes clear that the effect of his hierarchical system is to accord sector states virtually unlimited rights over the entire area of their respective polar regions. Lakhtine is subject to criticism on the score of the vagueness of his geographical terms. For example, it is difficult to know whether the Arctic Pack is subsumed under the heading, 'floating ice' or whether it should be treated a "more or less immovable ice." It is presumed that Lakhtine intends to place it in the latter category, but an objective criterion by which its status may be determined is lacking. Lakhtine also believes that sovereignty extends over "land-locked seas," apparently referring to seas enclosed by ice. Often, however, these water areas are only blocked by ice during certain seasons, and to contend that their status changes during the course of the year is to create an impossible legal situation. A similar problem arises in connection with immobile ice along the coasts, treated as terra firma by Lakhtine, when it breaks up and melts during the summer. Lakhtine is probably in error when he assumes that the existing rules on maritime domain are affected by changes in the physical composition of the elements involved.<sup>177</sup> Probably the most damaging criticism which may be leveled against Lakhtine's theory is the vast complication of the problem of Arctic sovereignty that it entails. Instead of simplifying the issue, a sector theory thus defined creates innumerable new problems to take the place of those it seeks to eliminate.

By drawing hypothetical straight lines from the extreme eastern and western points of territory facing on the polar circle, it is discovered that the Arctic sector states are the United States (on the basis of Alaska), Canada, Denmark (on the basis of Greenland), Norway, Finland and the Soviet Union. The Danish sphere includes the whole of Greenland and the Norwegian sector embraces Spitzbergen, Bear Island, and Jan Mayen Island. No lands have been discovered in the extremely small Finnish sector. The Canadian sphere contains all of the vast territories of the Canadian Arctic lying west of Davis Strait, longitude 60°, and east of the meridian 141° which divides Alaska from Canada. There are no islands of any importance in that part of the Arctic north of Alaska which constitutes the United States zone. Within the Russian sector, whose limits have been defined in the meridian of longitude 32° 44' 35" east from Greenwich and the meridian of longitude 168° 49' 30" west of Greenwich, lie Kolgueff and Vaigate Islands, Novaya Zemlya, Franz Joseph Land, Sverdrong Island, Quidinenie Island, the Archipelago of Tagmir, Sannitkoff Land, the islands of New Siberia, Henriette Island, Jeannette Island, Bear Island, Wrangel Island, and Herald Island. Because of their enormous polar coast lines, Russia and Canada both stand to benefit from an application of the sector principle, and it follows that they have been the most ardent protagonists of the theory. With the possible exception of Norway, other states are likely to oppose the theory. Incorporation of the sector theory into international law would militate against states not possessing Arctic frontiers, but desiring to explore or to exploit these regions. Giving the polar states a monopoly

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<sup>177</sup> For these and other criticisms, cf. Tarocouzio, T.A., *Soviets in the Arctic*, pp. 352-360.

over the entire Arctic area, independent of discovery or use, would constitute an arbitrary exclusion of the rest of the world from legitimate interests and activities.

### Sector Claims

Although Canada has never published an official declaration laying claim to an Arctic sector, her actions nevertheless make it clear that such a claim is maintained. The sector theory was first proposed by the Canadian Senator Poirier in 1909. In 1925, Mr. Stewart, Canadian Minister of Interior, stated that Canada claimed all the territory "right up to the Pole." In 1925, an amendment to the Northwest Territories Act was passed providing that all persons desiring to enter the Canadian Arctic must obtain permits from the government. This law was supplemented by a 1926 Order-in-Council. Canadian sector claims are based in part upon the provisions of the 1825 Treaty between Great Britain and Russia. Here the 141st meridian was agreed to as the boundary between the two countries "dans son prolongement jusqu'à la Mer Glaciale." This expression was incorporated into the Treaty of 1867 by which Russia ceded Alaska to the United States. The same treaty fixes the western boundary between Russia and the United States as a line on the meridian of 164° "jusqu'à ce qu'elle se perde dans la Mer Glaciale," and in the English text "without limitation." Both the Soviet and Canada rely upon these treaty provisions to prove that the division of the Arctic among polar states has already been the subject of a binding international agreement. American authorities, on the other hand, seem to be of the opinion that the United States would not be obliged to construe these words as an official approval of the sector system.<sup>178</sup> In any case, a treaty of this nature would not be sufficient proof that the sector principle had become a part of the customary law of nations. The United States has claimed no Arctic sector either directly or by implication. In September 1929, the Navy Department criticized the sector principle as an illegal attempt to divide a large part of the world's area between a few powers.

The Soviet Union has gone further than any other state in formally promulgating an official claim to the Arctic regions north of her continental coast. In 1916, the Russian Empire gave notification of the annexation of several islands located near the North Siberian coast. On 15 April 1926 the Soviet Union issued a decree adopting the sector thesis, claiming all lands between the north coast of Russia and the North Pole within meridian 32° 4' 35" east of Greenwich and meridian 168° 49' 30" west of Greenwich. The decree stated that a claim would not be advanced to lands already subject to the sovereignty of another state. This applied to Spitzbergen, part of which lay within the Soviet sector, but which belonged to Norway. Arctic islands and seas above the European section of Russia, and the area north of 62° north above the Asiatic part of the country, were placed under Soviet administration by a statute of

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<sup>178</sup> Hyde, op, cit., Vol. I, p. 399

1936. In the summer of 1937 the USSR claimed to have annexed the area surrounding the North Pole by virtue of the activities of her explorers.<sup>179</sup>

Finland has made no sector claim. There is no land within her sphere, except a small part of Spitzbergen, belonging to Norway. Neither Denmark nor Norway have claimed a sector.<sup>180</sup>

Although many authorities, American as well as Canadian and Russian, believe that adoption of the sector principle would constitute the most practical solution of the problem of polar sovereignty, it is generally agreed that at the present time the sector doctrine has no title in international law. This is, in a sense, recognized even by the states who most warmly support it, since they hasten to buttress their theoretical claims with actual occupation. In order to become part of international law, the great majority of states or at least of the interested powers would need to accept the sector thesis. This has not yet transpired, and the necessary consent probably will not be forthcoming in the immediate future. At present, the sector principle derives whatever validity it may possess from comity and not from international law. Occupation by one state of territory falling within the sector of another might be regarded as unfriendly, but it is unlikely that an international tribunal would regard it as illegal, if the polar state was unable to demonstrate that it had supported its sector claim by discovery and occupation. The dictates of political expediency, however, may well forbid encroachment upon the sector of another state, particularly since the military significance of the Arctic has become so strikingly evident.

#### Probable Status of Disputed Arctic Territories

Franz Josef Land: Russian. Disputed by Norway.

Wrangel Island: Russian. At one time claimed by Great Britain and United States.

Herald Island: Russian. At one time claimed by United States.

Sverdrup Islands: Canadian. At one time claimed by Norway.

Ellesmere: Canadian. Claim based on sector principle and on occupation at two points by Canadian Mounted Police. These stations now abandoned. Canada's claim probably cannot be challenged.

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<sup>179</sup> According to Lakhtine, the USSR regards the following as foreign encroachments upon her sovereignty: (1) Macmillan's 1922 expedition, during which he attempted to explore a part of the Arctic allegedly belonging to the Soviet Union; (2) the landing of Canadian huntsmen on Wrangel Island 1922-23; (3) the hoisting of the American flag on Herald Island in 1924; and (4) the General Nobile Expedition in the region of the Franz Joseph Archipelago.

<sup>180</sup> In March 1920, the Norwegian Foreign Minister informed the United States Representative that Norway would object to applying the sector principle to the South Pole. In recognizing Canada's sovereignty over the Sverdrup Islands in 1930, Norway stated that her approval was not based upon the sector principle.

Spitsbergen: Norwegian. Spitsbergen and Bear Island ceded to Norway by Treaty of 1920, signed by all interested powers, except Russia who subsequently recognized Norwegian sovereignty. Large number of Russian miners domiciled on Spitzbergen. Russian military forces occupied island during the war; believed to be still stationed there. Possible that Russia may attempt to annex this territory.

Jan Mayen: Russian.

North Pole and Surrounding Ice Regions: Claimed by Russia in 1937. Since there is no land here, this claim is probably unfounded in international law.

## II. Economic, Political and Military Developments in the Arctic

### Introduction

The Russians, appreciating the intimate relationship between the maintenance of effective sovereignty over their Arctic regions and systematic exploration, the establishment of polar stations, as well as the maintenance of regular land, air, and sea patrols connecting these outposts, and keenly aware of the economic and military significance of the polar regions, have, since the inception of the Soviet regime, devoted considerable effort to the planned development of the Arctic Ocean. Facing this formidable ring of Soviet polar outposts, meteorological and radio stations, military and air bases across the Arctic, where due to technological advances distances are rapidly shrinking, lies the little-known, only incompletely explored, and inadequately administered and patrolled Canadian Arctic. Political expediency and economic retrenchment, together with an imperfect conception of the strategic and economic importance of the Arctic regions, has in the past meant that the development of the Canadian North has been left largely to chance, to private whim, and has been regulated by the recent discovery and exploitation of natural resources. While the war with Japan dictated relative military preparedness in Alaska, and although the achievement of this aim coupled with the discoveries of oil and radium in Canada's Northwest resulted in the opening up of Canada's Western Arctic, Canada's Eastern Arctic Archipelago, which, with the exception of the Seward peninsula in Alaska extends closer to Soviet territory than any part of Canadian or United States territory, has remained a relatively neglected area. Although United States bases were established on Baffin Island, in Labrador, and in Northern Quebec, no need was felt to extend this network to the northernmost islands of the Canadian Arctic archipelago, a region susceptible to foreign penetration. With increasing pressure being brought to bear upon the United States to evacuate her Iceland and Greenland bases, these islands, and particularly Melville, Ellesmere and Prince Patrick, which lie athwart any future air routes between North America, Europe, and Asia, assume a new importance. The islands of Canada's Eastern Arctic, depending upon the further emergence of, or the absence of, a joint United States-Canadian policy, may in the future represent either a potential spearhead pointed at Europe, as

well as a valuable base on transpolar airbases, or, on the other hand, and especially vulnerable area, a possible spring-board for a foreign assault on the North American continent.

[...]

### The Canadian Arctic

The Canadian Arctic, and particularly its Eastern Arctic Archipelago, presents a picture of development in striking contrast to that of the Soviet Arctic. Unlike the Soviets, until recently Canadian officials have done relatively little to further any scheme for a planned and coordinated exploration and development of these regions. In many instances they have actively resisted this development. Official intransigence has stemmed also from a reluctance to accept the unpleasant political consequences of interference with powerful interests in the Canadian North, which include the deeply entrenched Hudson's Bay Company monopoly, from the depression of the 30's which necessitated severe budget slashing, and, in some cases, from the belief that the extension of the frontier northward should be a gradual process, a process which should be permitted to occur only after Canada's vast West was thoroughly settled. Since 1870, when Britain by an Imperial Order in Council couched in vague terms transferred to the Dominion sovereignty over "her adjacent possessions in North America known as Rupert's Land, and the Northwestern Territory," stipulating that the combined area be known as "The Northwest Territories," and by a second Imperial Order in Council issued in 1880 confirming the transfer to Canada of all Great Britain's islands in the North American Arctic Archipelago, Canadians have, with the exception of the last few years, been content to devote little attention or money to the development of this region which comprises two-fifths of the total area of the Dominion.

Exploration of the Eastern Arctic Archipelago under official Canadian auspices have been notably sporadic, and, in comparison with Russian achievements, "effective occupation" would be considered to be almost non-existent in large sections of the Northeastern Islands. The initial official exploratory efforts came in 1903 with the dispatch of the "Neptune" Expedition whose Commander, A.P. Low, was charged with "patrolling the waters of Hudson Bay and those adjacent to the Eastern Arctic islands; also to aid in the establishment on adjoining shores of permanent stations for the collection of customs, the administration of justice, and the enforcement of law as in other parts of the Dominion." In 1904, the Government obtained its own vessel, the "Arctic," captained by Joseph Bernier. Bernier in his extensive patrols in the Canadian Arctic, patrols which he continued annually through the 20's, compensated to some extent for official indifference, since Bernier took formal possession for Canada of the islands he visited, leaving countless plaques, cairns and beacons throughout the Arctic and particularly in the Eastern Arctic, on his own initiative. The most ambitious expedition sponsored by the Dominion Government in this

region was the Canadian Arctic Expedition of 1913-1918 led by Vilhjalmur Stefansson. Borden, Meighen, Lougheed, and Perley Islands were added to the map of Canada, and Stefansson's party ranged over the relatively untouched North central and eastern Arctic Archipelago, penetrating to the West and to the North of Prince Patrick Island.

A brief but significant outburst of Canadian activity in the Eastern Arctic following the conclusion of World War I was destined to be shortlived. In the decade between 1920 and 1930 the Royal Canadian Mounted Police was charged with the task of bringing Canadian law to the Canadian Arctic. Small police detachments were established at Port Burwell, Lake Harbor, (Baffin Island) Pangnirtung (Baffin Island), Craig Harbour (Southeastern Ellesmere Island) and in 1926 farther north at Bache Peninsula (Eastern Ellesmere Island). RCMP detachments were more numerous and long-lived in the Western Arctic, however. Although long and arduous patrols were made by members of these outpost detachments to the little explored surrounding islands, and despite the officially held theory that these detachments and patrols represented "a reasonably close check on a very large region by a comparatively small body of men," in view of Russian accomplishments in this field, this contention, and the label "control of the North" applied to these operations in official reports seems optimistic and misleading. In the face of Soviet achievements, a total of 20 RCMP men reported to be assigned to cover the vast Eastern Arctic Archipelago, in 1931, the peak year, and the number of Mounted Policemen reported to be stationed in the entire Arctic and sub-Arctic (116), although apparently sufficient at that time, now seems inadequate. The year 1930 brought a change in Canada's administration, and the consequent merger of the Department of the Interior, of which the Northwest Territories and Yukon Branch, charged with administering Canada's Arctic, was a part, with the Department of Mines. The emergence of the Department of Mines and Resources which included a depleted remnant of the NWT and Y Branch, to be known as The Bureau of Northwest Territories and Yukon Affairs, together with the initial symptoms of the depression brought a sudden halt to the progress made between 1920 and 1930. The key members of the old NWT & Y branch whose experience was just beginning to show results in the Arctic were dismissed, being replaced with officials with little or no direct experience in the North. Economy forced a lowering of Government prestige in the North; no longer able to afford their own ship, officials were forced to travel as tenants, their activities considerably curtailed, on ships owned by the Hudson Bay Company on their annual inspection tours. This was symptomatic of Government policy in the Eastern Arctic for in 1933 the RCMP was obliged to retreat from its "Farthest North," the Bache Peninsula post, and in 1940 the Craig Harbour detachment was withdrawn.

Development of air routes and aerial exploration has similarly been confined largely to the Western Arctic, being regulated chiefly by the demand created by mining interests, although the islands of the Northeast Canadian Arctic represent

potentially important bases on future transpolar flights, and despite the rapidly increasing vulnerability of these unpatrolled areas to covert foreign operations. Even the awakening of official interest in the technique of Arctic warfare during the past war and in the early postwar period, as manifested in Operations Eskimo, Polar Bear, Lemming and Muskoix, have been concentrated on the Arctic and Western Arctic regions.

Canada's inadequate and retrogressive policy toward her Arctic native population is in sharp contrast to the progressive policy of the Soviet Union. Well-informed Canadian Arctic experts have deplored this policy, strongly recommending that the Dominion Government take a leaf from the Soviet book, or imitate some phases of United States Indian and Eskimo policy, in the attempt to revive these people, transforming them into human assets instead of allowing them to remain liabilities. Canadian native policy, which leaves native education, health, and general welfare to missions competing for Government subsidies, the Hudson Bay Company, and Mounted Policemen inadequately trained for this job, is singled out for sharp censure.

Wireless and meteorological stations were installed throughout the Northwest Territories under the auspices of the Dominion Departments of National Defense, and Transport, and private corporations as well, and although available reports of the number of distribution of these outposts are outdated and incomplete, present indications are that the Canadian network, notwithstanding the differences in the size of the areas covered, would, according to Soviet standards, be insufficient.

The uneasy position of the United States and Canada *vis-à-vis* the Soviet Union, in the face of the possible loss of Greenland and Iceland bases and the existence of an exposed and vulnerable flank in the form of the Northeastern and Northcentral Canadian Arctic Archipelago seems to demand immediate joint action on the part of the United States to neutralize this flank. Such action might take the form of coordinated and continuous land, sea and air patrols of these islands intended to frustrate foreign penetration and to complete exploration, together with the establishment of a network of polar meteorological, radio, and administrative stations and airbases, designed to follow up the projected Nanook and Polaris missions and to cover adequately the entire Arctic Archipelago in such a way as to constitute "effective occupation." In this undertaking the United States and Canada would do well to profit by Soviet experience, imitating certain phases of Soviet control of the Arctic, especially the development of an efficient ice breaker fleet, the development of the technique of Arctic navigation and the building up of a polar air fleet with specially trained pilots, crewmen, and ground crews, as well as specially designed aircraft and the establishment of regular air routes through the Arctic. Such an undertaking, in view of the vast technical and financial resources required, could only be attempted jointly by the United States and Canada. Further centralization of Canada's Arctic activities, if accomplished, would serve immeasurably to accelerate and enhance the efficiency of these operations.

### III. Applicability of the Monroe Doctrine to the Arctic

The Monroe doctrine was originally enunciated in response to two specific threats against the security of the United States. One of these was the danger that the Holy Alliance powers might attempt to crush the successful South American revolutionaries. The attempt by Tsarist Russia to extend its possession on the Northwest coast of America constituted the second menace. The famous non-colonization principle was invoked in response to the Russian expansion: "...the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers." This principle was founded upon the assumption that independent states possessed rights of sovereignty over the entire area of the American continents, and that consequently there remained available no territory which might be acquired by means of occupation.<sup>181</sup> The words used by President Monroe to delimit the area in which colonization is prohibited are "The American continents" and "this hemisphere." It seems highly unlikely that he intended to include Greenland, Iceland or the Arctic areas within its scope, although it is probable that the Doctrine was intended to embrace Canada.

The Monroe Doctrine is a unilateral declaration of policy on the part of the United States directed solely, in its original form, against European intervention on the American continents of a nature that might undermine the national security of the United States. It is not a principle of international law, and other states are not legally obliged to accept it, except insofar as they have previously indicated that they will regard it as binding. Many European states, however, have expressly recognized the validity of the Monroe Doctrine, and it is doubtful if they are now free to maintain that application of its principles is illegal.

The Monroe Doctrine, both in its original form and its later developments, has been motivated by considerations of national defense. While not a part of international law, it is founded on an international legal principle, the supreme right of self-defense.<sup>182</sup> The Monroe Doctrine neither expands nor contracts the scope of this right, which is enjoyed by the United States equally with other nations. Nor is the Doctrine equivalent to an assertion of the entire domain of self-preservation. It serves, rather, to demarcate a specific portion of this right and forewarn European powers that encroachment thereon will be regarded by the United States as inimical to its safety.

By their very nature, the requirements of self-defense are not capable of precise definition, since they must continually shift under the circumstances. Protection of the Arctic areas was not an integral part of the American security system in 1823, but

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<sup>181</sup> Hyde, *op. cit.*, vol. I, pp. 281-287.

<sup>182</sup> "The Right of Self-Preservation is the first law of nations...No nation has a right to prescribe to another what these means shall be, or to require any account of her conduct in this respect." Phillimore, International Law, 3<sup>rd</sup> ed., vol. I, p. 312.

in the light of modern technological advances it may well be so today. The failure of the original Monroe Doctrine to include these areas within its scope does not in any sense bar the United States from extending its protection to these regions at the present time. Whether such action can be regarded as an application of the Monroe Doctrine is largely a terminological issue, dependent on a broad interpretation of the meaning of the Doctrine. If the Doctrine must be confined to the areas contemplated by its original author, its extension to the Arctic regions is probably unjustified. On the other hand, if it is believed that the essence of the Doctrine is found in the application of the principle of non-colonization to all areas in the Western Hemisphere bearing a relation to the continental defense of the United States, inclusion of the Arctic within its scope may well be regarded as no departure from the spirit and the letter of Monroe's principles.

The history of the past century indicates that it is the latter interpretation which had prevailed in the minds of American statesmen. The Monroe Doctrine has already been applied to many situations that had not been contemplated at the time of its promulgation, and principles have been derived therefrom that were certainly not contained in the original document. The fact that the Monroe Doctrine was conceived to apply only to territories over which American states possessed some rights of sovereignty may appear to prevent its application to the polar regions. However, "opposition of the United States to territorial aggrandizement has long ceased to be based on the theory that the American continents contain no land not subjected to rights of sovereignty and so not open to occupation as a technical mode of creating or perfecting rights of property and control therein. Objections to acquisitions by non-American states rest simply upon the ground that they jeopardize the safety of the United States."<sup>183</sup> The remoteness of the polar regions from the continental United States and the fact that the Monroe Doctrine had not in the past been applied to these areas may be urged against the extension of the Monroe principles to the Arctic at this time. If it is accepted, however, that the Doctrine embraces all areas in the Western Hemisphere essential to the defense of this country, the assumption is warranted that it should be specifically applied to territories that have just recently come to be subsumed under this category, regardless of their physical remoteness.

Recent statements indicate that the Government of the United States holds the Monroe Doctrine applicable to the Arctic areas. In 1920 the United States protested to Denmark over the British request that the United Kingdom be granted a right of preemption in the event of Denmark's wishing to dispose of Greenland. In a note to the Government of Denmark, the United States said: "Owing to the importance of its geographic location, this government would not be disposed to recognize the existence in a third government of the right of preemption to acquire the interests of the Danish Government in this territory should the latter desire to transfer them."

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<sup>183</sup> Hyde, *op. cit.* pp. 289-290.

On 19 June 1940, the United States presented notes to the German and Italian Governments stating that this Government would not recognize any transfer, and would not acquiesce in any attempt to transfer any geographic region of the Western Hemisphere from one non-American power to another non-American power. This statement was endorsed at a meeting of the Foreign Ministers of the American republics in Havana in July, 1940 and implemented by the resolution that the American states might set up a regime of provisional administration for territories in the Americas which seemed likely to undergo a change of sovereignty. The text of the American note to Germany and Italy was subsequently incorporated almost verbatim in a Joint Senate-House Resolution. On 7 April 1941 the State Department, in a note to the Danish Minister in Washington, proposed a program for the defense of Greenland, saying, "Greenland is within the area embraced by the Monroe Doctrine and the Act of Havana...its defense against attack by a non-American power is plainly essential to the preservation of the peace and security of the American continent, and of the traditional policies of this Government in regard to the Western Hemisphere." In announcing the Defense of Greenland Agreement on 10 April 1941, the State Department again said, "Greenland...has been recognized as being within the area of the Monroe Doctrine." In a letter to the Prime Minister of Iceland arranging the American military occupation of this country, President Roosevelt stated, "In the opinion of this Government, it is imperative that the integrity and independence of Iceland should be preserved because of the fact that any occupation of Iceland by a power whose only too apparent plans for world conquest include the domination of the peoples of the New World would at once directly menace the security of the entire Western Hemisphere."

In view of the repeated references to the Western Hemisphere as the area in which the Monroe Doctrine is conceived to function, it is necessary to examine closely the precise meaning of this geographic concept. According to Dr. S.W. Boggs, geographer of the State Department, its limits are "defined neither by nature nor by command agreement." It is impossible to draw mathematically equal Eastern and Western Hemispheres that retain any meaning, since Eurasia covers an area larger than half of the globe. Boggs concludes that it is more reasonable to dispense with the notion of mathematical hemispheres and to admit frankly that the Western Hemisphere is a political, not a geographic concept. He would consider the Western Hemisphere as comprising "North America (including Central America, the West Indies, and also Greenland) and South America, together with all islands pertaining to the two continents." It is not clear from this statement whether or not the Arctic and Antarctic are intended to be included in this area. Lawrence Martin, another geographer of repute, concurs in the necessity of rendering the Western Hemisphere a purely political concept, consequently subject to revision in case of a change in the international situation. He conceives of the eastern limit of the hemisphere as the meridian of 20° west of Greenwich; the western limit as the international date line. He would adjust these limits so as to exclude from the Western Hemisphere the

Azores, the Cape Verde Islands and Western Samoa. The Arctic areas bounded by these meridians he includes as part of the hemisphere. "Greenland, as all geographers agree, is a part of the Western, or American, Hemisphere; its northeast cape (12°W.) is further east than easternmost Iceland (13° 25' W)...Iceland is a part of the Western Hemisphere. Few geographers have said they think so, but no geographer has denied it."

It seems clear that the whole of Greenland is now officially considered to be a part of the Western Hemisphere and subject to the principle of the Monroe Doctrine. The status of Iceland is more doubtful. It has been officially declared essential to the safety of the United States, and therefore could logically be brought under the scope of the Doctrine, if that document is interpreted as covering all areas bearing such a relation to the national defense of the United States. Geographers appear to be in disagreement concerning its inclusion in the Western Hemisphere. Since the Monroe Doctrine extends over Canadian territory, it is logical to believe that it applies equally to the Canadian Arctic Islands. There seems to be general recognition today that the Arctic area north and east of Greenland comprise part of the Western Hemisphere. When this fact is coupled with the importance to the defense of the United States that they have assumed, it appears justifiable to conclude that they may be brought under the aegis of the Monroe Doctrine. Even should a narrow interpretation of that document forbid its extension to the Arctic regions, there is no doubt that the United States may legally refuse to allow non-American states to occupy this area on the ground that such an action would conflict with its international right for self-defense. Although it will not be illegal for other powers to refuse to accept this interpretation of American defense requirements, such action as the United States may take to enforce its prohibition cannot be condemned as a violation of international law.

James Brewster  
Lt. Colonel, GSC,  
Asst Chief of Staff  
Intelligence

## 28. Department of State, Polar Regions, Policy and Information Statement, 1 July 1946 [Excerpts]

NARA, RG 59, CDF 1945-49, Box 4073, File 800.014, Antarctic/7-146

### I. ARCTIC REGION

#### A. CURRENT US POLICY

1. *General Political and Territorial.* The United States has had for a long time an interest in the territorial and political situation in the Arctic. The purchase of Alaska in 1867 and the interest of the then Secretary of State, Mr. Seward, in the acquisition of Greenland and Iceland marked the high point of US territorial interest in that region during the nineteenth century. The activities of US citizens who carried on extensive explorations and made new discoveries in the Arctic region, particularly to the north of Canada and of European Russia and Siberia, were not followed up by formal US claim to any of the territories explored or discovered. Although it is known that an American was the first to land on Wrangel Island off the Northeast Coast of Siberia, and that Americans were also among the first to visit Herald Island in the same vicinity, the US Government has never advanced a claim to those islands. On the other hand the US Government has not recognized the Czarist, and later Soviet, claim to the islands, nor has it admitted the validity of the so-called Russian "sector" as set forth in the Soviet decree of April 15, 1926. In a telegram sent from Moscow directly to Secretary Hughes on November 12, 1924 the Soviet Foreign Minister complained of US and other violations of the territorial rights of the Soviet Union in the region of the northern coast of Siberia, and alleged in effect that by Article I of the Treaty of March 18/30, 1867 by which Russia ceded Alaska to the United States the United States was estopped from making territorial claims west of the boundary set forth in that Treaty as the dividing line between Russia on the west and Alaska on the east. Since the United States had no diplomatic relations with the USSR at that time, no reply was made to this communication, but the Department has taken the position that Article I of the Treaty of 1867 marked the extent of territory ceded to the United States "then possessed" by Russia, and in no way restricted the United States from participation in any future discoveries which might be made by it beyond the boundary indicated in the Treaty.

Although the United States has not formally recognized Canadian claims within any alleged "sector", nor recognized Canadian title to specific islands within the Canadian Arctic zone, there has been no evident inclination to challenge Canadian claims to jurisdiction over those areas in which the Canadian Government is exercising control. It is significant, in this connection, that both the Canadian and Soviet Governments in recent years have shown increased interest and activity within their respective Arctic zones and that if rival claims should be asserted by the United

States or other Governments the Soviet and Canadian Governments would be in a position to support their claims to superior title by concrete evidence of acts of possession and control exercised without challenge for a considerable period. It may be, therefore, that an international court would, in the face of such evidence, consider that those Governments have a valid title, even without reference to so-called “sector principles”. The question of title to lands within the claimed sectors which might be discovered in the future is an entirely different matter. It is assumed that the United States would not acquiesce in a claim to such lands by any State merely on the basis of the application of a “sector principle”. The US Government also assumed that the Arctic seas and the air spaces above them, being outside of normal territorial limits, are not subject to exclusive territorial control of any State and are, therefore, open to commerce and navigation in the same degree as other open seas.

The claims of Norway to Spitsbergen and Bear Island, as well as Jan Mayen, and the Danish claim to Greenland have, as noted above, been recognized by the United States. Since neither Norway nor Denmark have propounded any “sector” claim in the Arctic it is assumed that the acquisition of new territories which may be discovered to the North of the Spitsbergen-Greenland zone will be treated in accordance with the general principles governing acquisition of *terra nullius*.

The security interest of the United States in the Arctic region, particularly in the zone Alaska-Canada-Greenland-Iceland has been indicated in a concrete measure by the military measures taken by the United States during the war on its own territory in Alaska and in conjunction with the local governments in Canada, Greenland and Iceland. This interest has been stated by the Joint Chiefs of Staff to be a long range interest, and efforts are, therefore, being made to secure the necessary cooperation and rights from the Governments controlling those areas (Canada, Denmark, Iceland)....

## B. PROBLEMS AND ISSUES

### 3. *Territorial Problems...*

*Canada.* The Canadian Government during the course of the past thirty years has made clear its claim to all islands lying to the north of continental Canada within the sector bounded on the east by the 60th meridian and on the west by the 141st meridian, with the exception of that portion of Greenland which lies within the sector. The Canadian claim was discussed by a member of the Canadian Senate on February 20, 1907 and was publicly stated in the course of a parliamentary debate by Mr. Stewart, Minister of the Interior in 1925, who stated that “The Dominion of Canada...takes in the whole Arctic Archipelago between Davis Strait and connecting waters northward to the 60th meridian on the east and the 141st meridian...Northward it extends to the North Pole”. This statement was later supported by the Prime Minister.

[...]

The territorial problem in the Arctic arises from actual and potential disagreement among interested Governments as to the legal principles applicable to the acquisition of Arctic territory. The disagreement may concern what is acquirable territory, as well as how such rights may be acquired. Potentially fruitful of controversy are present claims to lands as yet undiscovered and suggestions advanced by publicists in some countries that national claims might be extended so as to include large sectors of Arctic open seas and the air spaces above them. It is with reference to these latter areas that the implications of the so-called "sector principles" acquire importance. Official Russian and Canadian claims using the "sector" method of definition have thus far been confined to claims to land territory. Therefore, the determination of the status of areas covered by floating ice, of the open seas and of the air spaces above these areas may be made independently and without acceptance or rejection of a "sector principle" (e.g., as that principle was implied in the Soviet Decree of April 5, 1926).

It will be noted that many of the territorial claims in the Arctic remain unchallenged and present no problem. This is particularly true of the claims maintained by Norway and Denmark; and since there appears to be no reason to anticipate new land discoveries within the sector containing the Norwegian and Danish possession (roughly between 32° 4'35" east to 60° west longitude) and since neither State claims territorial rights extending beyond customary limits of land and territorial waters, the conclusions would seem justified that no special territorial problems will arise within this sector.

Within the Arctic areas north of Canada and Soviet Russia the status of territorial claims is somewhat less clear. The USSR has claimed title to all land and islands "discovered and yet to be discovered" within its "sector" as defined by specific meridians of longitude. It is not clear whether the Canadian "sector" claim also includes islands yet to be discovered, but that would seem to be the logical implication of the statements made by Canadian officials. The international validity of the Soviet and Canadian "sector" claims has not been universally recognized and potential claims are known to exist. Citizens of the United States, for example, have explored areas within both the Canadian and Soviet sectors. A possible Norwegian claim within the Soviet sector has already been noted, and explorations in this region, including some discoveries, have been made by nationals of other States, including the Netherlands, Austria, Sweden, and the United Kingdom.

If, in addition, to their claims to lands and islands within the respective Arctic "sectors", the Soviet and Canadian Government should also interpret the "sector principle" so as to give them national claims to the areas covered by floating ices and of the air spaces above these areas, additional and serious problems would arise. Such claims would open fields of controversy respective both the international legality and the practical desirability of such action. In connection with such possible claims to sovereignty over Arctic seas and air spaces, it may be of significance that the

development of Arctic trans-Polar aviation may be affected as seriously, or more seriously, by assertions of such national jurisdictional rights as by claims to territorial sovereignty. The latter are in fact important chiefly because they lie at the basis of claims to jurisdictional rights. Such special jurisdictional claims have not, however, as yet been advanced.

29. Office of the PC/S Intelligence, US Army Air Force (USAAF),  
Problems of Canadian-United States Cooperation in the Arctic, 29  
October 1946

NARA, RG 59, PJBD series, vol. 10, file "Correspondence-1946"

*PROBLEMS OF CANADIAN-UNITED STATES COOPERATION  
IN THE ARCTIC*

**I THE PROBLEM**

The physical facts of geographical juxtaposition and joint occupation of the North American continent have at all times carried the implication that the defense of Canada and the defense of the United States cannot be artificially divorced. Recent technological developments rendering the Canadian Arctic vulnerable to attack and thereby exposing both Canada and the United States to the threat of invasion and aerial assault across the northernmost reaches of the continent have greatly heightened the compulsion to regard the defense of the two countries as a single problem. The need to provide adequate safeguards for the protection of the Canadian Arctic is equally imperative for Canada and the United States. Since neither nation can undertake this project without the assistance of the other, the situation clearly dictates a program of joint planning and continuous interstate cooperation.

The possibility that American bases in Greenland may prove politically untenable within the foreseeable future lends urgency to the need for the development of the military potentialities of the Canadian Arctic. The loss of North Atlantic bases occupied by American forces during the war would deprive this country of an advanced Arctic bridgehead, that could, if necessary, be utilized for offensive strategy, and would simultaneously weaken the defensive position of the Canadian Arctic. The United States would be compelled to develop a substitute area in which experimentation with the conditions of Arctic warfare, weather and meteorological observations could be fully exploited. Since the Canadian Arctic, Grant Land, and Ellesmere Island in particular, are the only regions which may be considered as possible replacements for the Greenland bases, Canadian willingness to permit American participation in the military development of the polar areas is essential to the success of any program for the defense of the United States.

Nevertheless, although many of Canada's ranking military advisors acknowledge this interdependence, a formidable section of Canadian opinion is either hesitant toward or openly opposed to the idea of active participation by the United States in military projects involving Canada's Arctic or sub-Arctic territory in time of peace. This hesitancy has already delayed joint military ventures in the past; inevitably it will delay them in the future, possibly with results fatal to hemispheric defense.

If it is generally accepted that the United States will not again be allowed a period of grace in which to prepare itself for another war, it is an obvious corollary that steps should be taken immediately and continually to remove every obstacle lying in the way of Canadian-United States military cooperation. In view of the present sensitive attitude of sections of the Canadian electorate toward joint action, the reasons for that opposition must be analyzed, and Canadian prejudice overcome at the earliest possible moment. It is the purpose of this estimate first to examine the sources of this antagonism, and secondly, to recommend means by which it may be eradicated or at least neutralized.

## II THE SITUATION

If the roots of the Dominion's unwillingness to associate itself closely with the United States are to be fully understood, it must be remembered that the much-heralded friendship between the two peoples has concealed a considerable amount of less advertised friction, particularly on the Canadian side. The frequent annexationist scares during the nineteenth century and the frontier adjustments which Canada feels were made at her expense have left a mark which even today it is not easy to eradicate. The occurrences, together with systematic attempts to foster anti-Americanism by certain Canadian business interests seeking to establish an economic empire independent of New York, produced a striking hostility toward the United States that until 1930 showed no signs of abatement. British ties were artificially emphasized in order to widen the gulf between the Dominion and its southern neighbor, and the focal point of the slowly developing Canadian nationalism became the alleged necessity of saving the country from the acquisitiveness of the United States.

Opposition to closer ties with the United States traditionally has been centered in South Central Ontario, and especially in Toronto, which was originally settled by pro-British refugees from the United States at the time of the American revolutionary war. In this area the United Empire loyalist tradition and British imperial connections are still sufficiently strong to engender unyielding antagonism toward any scheme providing for a closer defensive union between Canada and America which might conceivably lessen the cohesion between the Dominion and Great Britain. In the past, French Quebec has constituted another obstacle to closer cooperation with America. Peopled almost entirely by Roman Catholics, Quebec's foreign allegiance is to the Vatican rather than to France. Intense resentment of Great Britain and English Canada crystallized into isolationism and anti-Anglo-Americanism. During the last war these attitudes assumed the form of persistent efforts to restrict Canada's aid to the Allies and to safeguard the right of French Canadians to refrain from participation in the nation's war effort. Fear that Canada's closer integration in the North American framework might spell encroachment upon its cultural and religious rights has impelled Quebec to resist collaboration with the United States and Latin-America. As

late as June 1941 the magazine *L'ACTION NATIONALE* felt it necessary to devote an entire issue to the presentation of objections against Canada's annexation to the United States. There are some qualified observers, however, who believe that the attitude of the French Canadians is now undergoing modification in this respect. The hostility between Rome and Moscow has been productive of a greater affinity between Quebec and the Anglo-American bloc than that which has hitherto existed and the potentialities of closer cultural links with Catholic Latin America has engendered a friendlier attitude toward inter-American cooperation on the part of French Canada.

With the exception of the strongly pro-British elements in South Central Ontario, and possibly French Quebec, the Canadian attitude toward close cooperation with the United States has undergone a profound change since the outbreak of the Second World War. The crisis facing England in the summer of 1940 did more than any other single event to bind Canada to the United States. In that period the Dominion came to realize that within the near future she might be forced to provide for her own defense with whatever help could be secured from the remainder of the Western Hemisphere. Canada, while continuing to render all possible aid to the mother country, at that time virtually abandoned the British Commonwealth pattern of defense in favor of a reorientation in terms of North American regional unity. Canada's economic as well as her military dependence upon the United States became much more pronounced than had formerly been the case: time-honored Canadian hostility to the Americans was tempered by the common danger.

Foremost among the determinants of Canadian policy toward the United States requests for installations in the Arctic Archipelago is the sentiment of national pride, which may be analyzed into three components. The first is the belief that the existence of areas under foreign control within the Canadian borders would constitute a violation of Canada's sovereignty and a breach of its territorial integrity. It is sometimes thought that accession to the current American proposals may place the Dominion so far in the power of the United States that further and more extensive requests of the same nature would be impossible to refuse. In the second place, those groups which have most actively sought to foster the growth of a distinct Canadian nationalism predict that the Dominion may easily become little more than a satellite of the United States unless a firm stand against "American encroachments" is assumed. Since Canada must in any case permanently occupy the position of the weaker partner in relation to America, it is feared that cooperation with the United States in matters of foreign policy and defense will in actuality spell Canadian acceptance of her neighbor's dictates to a degree which will void the Dominion's independence as far as external affairs are concerned. Within the last few years Canadian publications have not infrequently carried statements conveying the impression that American imperialism seeks to include Canada as the forty-ninth state. There is a danger that American requests for bases in the Canadian Arctic may produce a renaissance of the annexationist fears that for so long troubled the Dominion's relations with the United States. Canada's general anxiety concerning the possible long-range consequences of United States military

activity upon her territory is sharpened by the specific fear, voiced loudly in some quarters even though it may fail to command widespread credence, that United States activity in the Arctic Archipelago may culminate in annexation of a portion of those undeveloped territories to which the Dominion has already laid claim.

Another major obstacle to the further integration of Canadian and American defense systems is the widespread belief in Canada that closer union with the United States must entail a loosening of the bonds connecting the Dominion with Great Britain and with the other Commonwealth nations. With the exception of French-speaking groups, most Canadians feel that their primary loyalty is to the British Commonwealth, and they hesitate to participate in a secondary alliance. It is significant that Southern Ontario, which feels itself more closely wedded to England than any other section of the country, is the region most opposed to broadening the scope of the present Canadian-United States relationship. The Dominion's traditional attachment to Great Britain has a particularly adverse effect upon that phase of cooperation with the United States which involves the standardization of Canadian and American weapons, industrial equipment and military organization, because in these cases affiliation with the American system necessarily entails an abridgement of Empire unity in matters pertaining to defense.

Also affecting the Canadian Government's attitude toward joint defense of the Arctic is the fear of causing a further deterioration in Canadian—Russian relations by intensifying Soviet suspicions that Canada and the United States are preparing the American Arctic as an offensive bridgehead for possible aerial and land attacks upon the USSR. The Soviet press in publicizing the American maneuvers of Canadian and American experimental task forces has already stated that the scientific mission which these expeditions fulfilled is merely an attempt to screen the fact that they are in reality the prelude to major strategic operations directed against the Soviet Union.<sup>184</sup> The Government may also take into consideration the increased possibility that Canada would be an object of attack in the hypothetical Russian—United States conflict if a network of American military installations was actually functioning on Canadian soil. Regardless of its will, the Dominion would find it impossible to maintain neutrality were the United States to utilize Canada's territory as a base of operations against an enemy state.

Before recommendations can be made as to the course United States policy should take to neutralize this sensitiveness of Canadian national pride, one further issue requires clarification: whether the United States, either by pleading military necessity, or by establishing a legal claim to one or more Arctic areas, could justify undertaking a program of polar defense without the consent of Canada. In view of Canada's apparent reluctance to cooperate with us to the extent we now consider necessary, in view of Denmark's manifest intent to free Greenland sooner or later from American

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<sup>184</sup> Canadian circles, also, have expressed concern that military activity in the Arctic might interfere with the development of its natural resources.

occupancy, and in view of the deterioration of the international picture towards the sharply-divided Eastern and Western axes, it is necessary to ascertain what authority the United States could invoke if it were faced with the decision of whether or not to occupy and control polar regions generally conceded to be part of the Dominion.

Sovereignty over uninhabited areas may be acquired by agreement on the part of the interested power, by effective occupation, by contiguity, and, recently, by the application of the sector theory,<sup>185</sup> Although Canada has never published an official international declaration laying claim to the American Archipelago directly north of its borders, its actions, nevertheless, make it clear that such a claim is maintained both on the ground of the sector principle and on the basis of actual exploration and occupation. In the eyes of Canadian law, the Dominion entertains perfect jurisdiction: it has been exercised by the Canadian Parliament in the passage of legislation applying directly to the whole of the Canadian Arctic. The United States has neither recognized nor denied the validity of the Canadian claim, although it has always been clear that Canadian activities in the Arctic were not upon a scale enabling the Dominion to meet the rigid standards which the American Government has steadfastly maintained were a prerequisite to the assumption of sovereignty over uninhabited areas. As far as is known, no other countries have acknowledged the existence of Canadian sovereignty over the entire American Arctic, although Norway, while expressly denying the validity of the sector theory, recognized that the Sverdrup Islands were Dominion possessions. It is probable, however, that the Soviet Union would readily recognize Canadian sovereignty over the entire region, since the USSR is itself wholly committed to the sector theory. Great Britain, too, would almost certainly support the Dominion's claim.

Canada could base its claim to the American Arctic upon three principal grounds. First of all, the Dominion could invoke the sector doctrine. That theory, however, is not considered to form a part of the law of nations, and it is unlikely that this plea would be sufficient to establish Canadian sovereignty in the eyes of an international tribunal. Secondly, Canada might rely upon the provisions of the 1867 Treaty, by which Russia ceded Alaska to the United States, as proof that the American Government had committed itself to the sector principle as the basis for division of polar lands. That treaty fixes the western boundary between Russia and the United States as a line on the meridian of 164° "jusqu'à ce qu'elle se perde dans la Mer Glacial," in the English text "without limitation," thus seeming to imply the allocation of unexplored and uninhabited Arctic territories according to the sector tenet. American authorities, however, are confident that these words would not be construed as binding the United States to approval of the sector system.

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<sup>185</sup> For a detailed discussion of these four principles see "Report on the Arctic," Part I, published by the Office of the AC/S, Intelligence, Hq., ATLD-ATC, June, 1946.

Canada's most important legal defense of its sovereignty over the American Arctic would almost certainly be grounded upon the actual exploration, occupation, and administration that have been undertaken in that area on behalf of the Dominion Government. The Canadian Parliament has passed certain laws which are technically in force throughout the entire Arctic region. In 1925, an amendment to the Northwest Territories Act was passed providing that all persons desiring to enter the Canadian Arctic must obtain permits from the Government, and this law was supplemented by a 1926 Order-in-Council. Since that time the Government has promulgated other legislation and administrative rules bearing upon the polar territories. Until the present war, however, when with the collaboration of the United States, the development of the Canadian Arctic was greatly accelerated, actual Canadian exploration and occupation of the regions in question, particularly the East Arctic, has been meagre and sporadic. In the 20's, small police detachments were established at Port Burwell, Lake Harbor (Baffin Island), Pangnirtung (Baffin Island), Craig Harbor (Southeastern Ellesmere Island) and at Bache Peninsula (Eastern Ellesmere Island). The stations at Bache Peninsula and at Craig Harbor were subsequently abandoned. RCMP patrols through the southern portion of Baffin Island, Axel Heiberg, a segment of Ellesmere Island, Amund Ringnes, Ellef Ringnes, a small sector of Borden Island's coastline, the lower portion of Melville Island, Bathurst Island and Devon Island. Although Canadian-sponsored exploring parties have passed through or by Grant Land, Prince Patrick Island and Banks Island, these areas have remained virtually untouched insofar as the establishment of local administrative agencies or the maintenance of a regular patrolling system are concerned.

It may be said with considerable certainty that the United States could find little legal justification for the unilateral occupation of areas in whose general vicinity the Dominion Government has established police posts with authority to enforce Canadian law. Although Canada's claim to have effectively occupied regions annually patrolled by the RCMP but not equipped with permanent stations is less surely grounded, it now seems probable that an international tribunal would accept even this slight activity as sufficient to fix sovereignty. It follows, therefore, that the United States would be excluded from operations in Ellesmere Island, Baffin Island, Axel Heiberg, Ellef Ringnes, Amund Ringnes, Borden Island, Melville Island, Bathurst Island and Devon Island unless Canadian approval were previously secured.

Prince Patrick Island, Banks Island, and Grant Land remain as the only locations which the American Government could occupy with the hope of making a legal defense of its action. Canada would attempt to support its claim to these areas on two counts. First it might endeavor to maintain that according to the doctrine of contiguity, Canada, exercising sovereignty over the Northwest Territories and the major part of the Arctic Archipelago, automatically held title to all islands adjacent to the mainland and forming a part of the Archipelago which it controls,

although a particular island might remain entirely unoccupied. It is not likely that the Canadian case would be sustained on this ground, since recent decisions of international tribunals have tended to deny *in toto* the validity of the contiguity principle.

Secondly, the Dominion would probably claim that the passage of legislation by its Parliament which theoretically applied to the islands in question was sufficient evidence of the exercise of state authority to enable Canada to claim these territories as its exclusive possessions. It is difficult to determine in advance the decision that would be reached by an international court in this instance. Until recently, the orthodox interpretation of international territorial laws demanded a more extensive display of governmental authority than that afforded by the mere promulgation of legislation that could under no circumstances be enforced. In 1933, however, the permanent Court of International Justice conceded that Denmark held undisputed title to all of Greenland, principally because of the existence of similar legislative enactments, although Danish authorities were able to enforce the law only in a fraction of the land.

In the light of the latter decision, we are forced to conclude that the Canadian claim to sovereignty over the entire American Arctic would be sustained by an international judicial body. In any case, however, the United States could present a fairly well documented legal defense in support of any action its Government desired to take in Melville Island, Prince Patrick Island, and Grant Land, particularly since the American Government has consistently maintained that sovereignty cannot be claimed without a degree of effective occupation, colonization and use that until the present has not been achieved in the Canadian Arctic.

It should not be overlooked, however, that any action on the part of the United States which could be interpreted as an usurpation of Canadian territorial rights would be followed by political consequences so grave that, except in the case of a very serious emergency, they could scarcely be justified even in terms of short-run expediency. The breach in Canadian-American relations might be sufficiently wide to put an end to all possibility of continued political and military cooperation between the two countries, and would probably be a greater blow to the American security system than a failure to obtain Arctic bases. A rupture between Canada and the United States would, furthermore, have unfavorable repercussions upon the relationship between Great Britain and the United States, and might alienate from this country lesser Powers who would otherwise have been willing to lend it support in case of hostilities.

Although the United States may be unable or unwilling to invalidate the Canadian title to the islands of the American Arctic, it does not follow that this country would be compelled to remain idle if it seemed probable that penetration of this area was threatened by a potential enemy. The right of self-protection, a keystone of present-day international law, permits a state to take any measures it

may deem necessary in order to preserve its existence, even though these may extend beyond its territorial limits.<sup>186</sup>

If the American Government had good reason to believe that invasion or occupation of the Canadian Arctic by a foreign nation were imminent, it would be justified in taking suitable counter measures, with or without Dominion consent, on the grounds that the security of the United States was directly endangered. Occupation of Canadian territory by American forces, however, could be justified only for the duration of the immediate danger and would in no way entitle this country to challenge Canadian sovereignty over the region in question.

### III RECOMMENDATIONS

Since the weight of opinion, then, points inevitably to the conclusion that the United States could not, except in the event of indisputable emergency, undertake a program of polar defense without Canadian consent, it remains to suggest methods by which Canada's pronounced national sensitivity regarding her territorial integrity and independence can be overcome. The following recommendations are made:

a. First, and most important, the United States should make it unequivocally clear that this country entertains no possessive design upon the polar territories to which Canada lays claim. To this end, any agreement providing for joint military exploitation and defense of the Arctic should be accompanied by an official recognition on the part of the United States that Canadian sovereignty extends over the entire American Arctic excluding only the Alaska sector. Although the Canadian claim to these territories has never been specifically contested by this government, neither has it ever received formal recognition, and Canada's occupation of the region has as yet failed to meet the rigid standards that the United States has traditionally set for the promulgation of a sovereignty claim over uninhabited areas. A declaration of this nature, therefore, might assuage Canadian anxiety that the United States will use occupation of the Arctic by its military forces as an instrument to set up an opposing sovereignty claim of its own over those areas.

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<sup>186</sup> Elihu Root writes, "It is well understood that the exercise of the right of self-protection may, and frequently does, extend in the effect beyond the limits of the territorial jurisdiction of the state exercising it. ... The most common exercise of the right of self-protection outside a state's own territory and in time of peace is the interposition of objection to the occupation of territory or points of strategic, military, or maritime advantage." He also refers to "the right of every sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself." Reference is also made to "*REPORT ON THE ARCTIC*," pages 24 ff, published by the Office of the AC/S, Intelligence, Hq., Atlantic Division, ATC.

b. Since Canada will undoubtedly find itself unable to bear exclusive financial responsibility for an extensive Arctic program, the United States Government should offer to share the burden upon an equitable basis. Under no circumstances, however, should this Government attempt to finance the entire amount of the expenditure itself, since many sectors of Canadian opinion appear to interpret the presence of United States-financed projects on Canadian territory as equivalent to annexation of the areas in question.

c. The arrangement providing for joint Canadian and American action to secure the defense of the North should make it perfectly clear that the Dominion retains unimpaired sovereignty over all areas in which United States personnel and equipment are utilized. While the agreement should legally entitle the United States, at least for a stated period of time, to full use of the facilities which will be developed as a result of the coordinated activities of the two states, it should also guarantee Canada's eventual right to make whatever disposition of these installations it may desire.

d. The United States should give full assurance that the presence of American military forces will in no way interfere with the peaceful development of Arctic resources and industrial potential by Canadian nationals. On the contrary, it should be pointed out that the construction of a defensive network throughout the Canadian North will involve the building of a communications and weather system which would be of great assistance to a program of industrial development, and invaluable especially to civil aviation.

A program for joint defense of the Arctic conceived along these general lines would probably eliminate the major psychological obstacles presently restraining Canadian public opinion from full cooperation with the United States. It would assure the Dominion that the presence of American forces on its territory would not threaten Canadian independence. It would provide a means of lessening the economic strain imposed by the construction of a northern defensive network. There is the further consideration that Soviet suspicion concerning American activities in the Arctic might be more effectively countered were Canada itself to take the initiative in that region than if the Dominion permitted the United States to embark alone upon an Arctic military program.

Because of the political, military, and sentimental ties connecting Canada with England, it will prove impossible for the United States to enter into partnership with the Dominion without at the same time drawing into an even closer association with Great Britain. It has already been pointed out that Canada's fear that full cooperation with the United States might alienate her from the British Commonwealth is one of the factors causing the Dominion Government to be hesitant about current American overtures. British sanction of the North American defense arrangements is a necessary preliminary to Canadian consent and cooperation. Now it has become apparent that Great Britain, Canada, and the United States are in general agreement concerning the fundamental

objectives of their respective foreign policies. Cooperation has already made material progress, but until the present it has been organized almost entirely upon a bipartite basis. There is no reason why the three countries should not now maintain direct consultation and planning upon a tripartite basis concerning political and military problems in which they all have an interest.<sup>187</sup> Eventually, an arrangement paralleling this triple relationship may be worked out for other Dominions, Australia and New Zealand, for example, which possess a legitimate security interest in areas where the United States desires to retain a foothold. In effect, this scheme would involve the creation of several regional defense groupings in which the United States and Great Britain would both participate. It is to be remembered that American consent to a system of multilateral control for the Pacific bases would have favourable repercussions upon the Canadian scene. If Great Britain and Canada are convinced that the United States is, in effect, a participant in the system of Commonwealth defense, they are far more likely to satisfy American wishes in regard to military rights in the Canadian Arctic than they would be if they believed the interests of this country were not coincident with their own. It is quite possible that under these circumstances Great Britain would actively favor even more extensive forms of Canadian-American cooperation than those entailed by the Arctic project. Realizing that the total scheme of Anglo-American defense requires especially close relations between the two North American states, Great Britain might withdraw her present objections to the further integration of the Dominion's military establishment into that of the United States. With Britain's consent, it would be possible to secure Canadian military collaboration with the United States on a scale that otherwise would almost certainly have been condemned by large sections of Dominion public opinion.

The United States should work toward the ultimate objective of a hemisphere-wide defense arrangement with provision for interchangeability of weapons, coordination of military establishments, reciprocal use of air and naval bases and a common obligation to aid any American state that becomes the object of foreign attack. There is no compelling reason why Canada should not participate. For the present, however, there is no need to force Canada in advance of its will into a formal military agreement with Pan-America. The immediate need is the achievement of full Canadian—United States cooperation. That cooperation, in the final analysis, must stem from an assurance to Canada that the United States has no intention, now or in the future, of claiming sovereignty over any section of the Canadian Arctic.

Fort Totten, Long Island 29 October 1946

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<sup>187</sup> The basis for cooperation might be expanded to include Newfoundland, at least in a limited capacity, if that country chooses independence or dominion status in its forthcoming plebiscite.

## 30. E.R. Hopkins, Legal Adviser for External Affairs, Legal Aspects of Sovereignty in the Canadian Arctic, 22 January 1949

LAC, RG 2, vol. 122, file A-25

### LEGAL ASPECTS OF SOVEREIGNTY IN THE CANADIAN ARCTIC

#### FOREWORD

This memorandum has been written as a guide in the preparation of an authoritative article governing the Canadian position on sovereignty in the Arctic. The Advisory Committee on Northern Development, at a meeting held on June 1, 1948, decided that this article should be considered in two aspects; the first giving the history of Canadian activity in the Arctic, to be prepared by the Department of Mines and Resources, the second indicating the position in international law to be prepared by the Department of External Affairs. A consolidation of the two documents (relating the law to the facts) is to be undertaken later.

The need for such a paper has arisen several times in the recent past; on the occasion, for example, of an enquiry from PICAQ [the Provisional International Civil Aviation Organization] concerning Canadian sovereignty in the Arctic, and of a request for material for an Arctic encyclopedia.

The growing importance of the Canadian Arctic, under present circumstances, is an additional and more urgent reason why this article should be prepared. The sovereignty of Canada over a territory considered vital from the point of view of defence should be established as firmly as possible.

At least since 1925, the Canadian government has been considering as Canadian the zone situated north of the Arctic circle, between the 60° and 141° West Longitude, up to the North Pole. Mr. Stewart (the then Minister of the Interior in the Government of Canada), speaking on June 10, 1925, in the House of Commons, officially and definitely stated that the Canadian claim to the region included "everything known and unknown".

Canadian sovereignty in the Arctic has not been successfully challenged by any other state. On the other hand, no foreign state has as yet officially and expressly recognized the Canadian claim. It is, therefore, essential to know the legal arguments with which Canada might support its claim should it be suddenly challenged.

The present attitude of the Canadian Government on sovereignty in the Canadian Arctic is not entirely clear: on the one hand, there is the "*état de fait*" that Canada has claimed as its national territory the region described above; and on the other hand, this "*état de fait*" has at least by implication been accepted by foreign states apparently because no foreign state has felt a sufficient interest in the question or has thought that it could lay claim to the region by presenting stronger legal arguments than those that Canada could offer.

The purpose of this memorandum is, therefore, to review the possible legal arguments bearing on the question, in order to find out those under which our position is strongest, and so that Canada may definitely establish the position it will take on the question.

It has not been possible to keep the issues of fact and of law entirely distinct. Thus, the present paper does reach some conclusions of fact, and to that extent touches on the field covered by the paper prepared by Mines and Resources. It should be possible however, in the consolidation, to cover the whole field without repetition or inconsistency.

Finally, it has seemed desirable to go into each of the legal bases for Canadian sovereignty in considerable detail. It may prove possible to shorten the various chapters of this paper when the consolidation is undertaken.

[*E.R. Hopkins*]

Legal Adviser

Ottawa, January 22, 1949.

## CHAPTER I DISCOVERY

“Discovery” presupposes that the lands subject to it were, prior to the discovery, unknown to the community of nations. We may take for granted that the Polar region was originally terra nullius, or No-man's land, and as such unknown to the international community.

The great discoveries of the 14th and 15th centuries raised the problem of “occupation”. It was not clear what action was necessary in order to acquire and support sovereignty in “No-man's land”. Because of the existing uncertainty, the Papacy came to play a prominent part. Thus, the Pope issued a bull on May 4, 1493, dividing the then-known colonial world between Portugal and Spain. From the 16th century on, a new view was introduced. It was now “discovery” to which importance was attached. Opinions differed as to the rights conferred by discovery. But the general opinion was that discovery, under certain conditions, could be taken as a basis for sovereignty.

However, in the 18th century, it was denied that mere discovery or fictitious appropriation (the taking of possession in the nature of a mere symbolic act) could establish sovereignty. For a state to be entitled to exclude other states from a territory, it was required that it should have taken the territory into effective and real possession. Vattel expressed this opinion in 1758.<sup>188</sup> Later the principle that an

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<sup>188</sup> Vattel, 1758, Vol. I, Sec. 208: as quoted in Smedal.

effective appropriation is necessary was accepted, and, from the beginning of the 19th century on, was generally applied by states.

On the other hand, several well-known Anglo-Saxon jurists (Oppenheim,<sup>189</sup> Moore,<sup>190</sup> Hall,<sup>191</sup> Scott,<sup>192</sup> Westlake<sup>193</sup>) still are of the opinion that discovery would confer an inchoate title which would last for a short time but then lapse unless the next step - effective occupation or annexation - were duly taken. This opinion is rejected by Smedal<sup>194</sup> and (according to him) by Salomon, Fauchille and Heilborn, as well as by other European writers of the Continent.

Thus, Oppenheim<sup>195</sup> and Hall<sup>196</sup> write that discovery is not without importance in that it gives to the state in whose interest it was made an inchoate title; discovery, they add, would act as a temporary bar to occupation by another state for a period reasonably sufficient for an effective occupation of the discovered territory. If the period lapses without any attempt by the discovering state to convert its inchoate title into a real title by occupation, the inchoate title is extinguished and any other state can acquire the territory by means of effective occupation.

Norway, when communicating with the United States<sup>197</sup> Government in 1924, said that the discovery by Amundsen and the taking of possession by him of territory in the name of the King of Norway, only meant that Norway had a right to priority in acquiring, subsequently, the sovereignty by settlement or other procedure sanctioned by International Law. Norway repeated the same statement later in 1929.<sup>198</sup> Smedal<sup>199</sup> writes that, so far as he is aware, there is no international decision of such a character that it may be said to establish, in a binding manner, that the discovery of land gives the state on behalf of which the discovery has been made a prior right to appropriate the land. Since International Law does not in any event fix the period during which a right of priority can be enforced, it would seem reasonable to deny the existence of the right itself. This is the opinion expressed by Gustav Smedal.<sup>200</sup>

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<sup>189</sup> L. Oppenheim, *International Law, A Treatise*, 6th ed., 1947, p. 510.

<sup>190</sup> G.B. Moore, *Digest of International Law*, Vol. I, p.258-261.

<sup>191</sup> W.E. Hall, *A Treatise on International Law*, 1924, p. 126.

<sup>192</sup> G.B. Scott, *Arctic Exploration and International Law*, *Am. Journal of International Law*, Vol. III, 1909, p. 105; as quoted in Smedal, p. 48.

<sup>193</sup> John Westlake, *International Law*, 1910, II Ed., p. 105; as quoted in Smedal, p. 48.

<sup>194</sup> Gustav Smedal, *Acquisition of Sovereignty over Polar Areas*, Oslo, 1931, p. 49 ff.

<sup>195</sup> Oppenheim, *op. cit.*, p. 510-511.

<sup>196</sup> Hall, *op. cit.*, p. 127.

<sup>197</sup> Secret statement, in 1946, by Foreign Office Legal Adviser on the necessity of physical occupation as a means of securing sovereignty in the polar regions; on External file 9057-40C, Part IV.

<sup>198</sup> *Idem*, p. 5.

<sup>199</sup> Smedal, *op. cit.* p. 52.

<sup>200</sup> *Idem*.

It is the opinion of Hackworth,<sup>201</sup> and of the Foreign Office Legal Adviser in 1946<sup>202</sup> that it is no longer accurate to refer to discovery apart from annexation.

International Law is not static. In particular, it is clear that certain developments have taken place which are relevant to the matter under discussion. One of these developments is that little or no weight now attaches to discovery as such. Hackworth's Digest<sup>203</sup> quotes Lindley as follows: "New methods of occupation have been introduced to meet the altered conditions. Some rules such as those connected with discoveries have sunk into the background".

In the case of the Canadian Arctic territories, it is suggested that the Canadian Government should take the utmost care in making use of arguments based on "discovery". The majority of islands of the Canadian Arctic Archipelago have been discovered either by British or Canadian explorers; but there are still a certain number of islands which have yet to go through that preliminary process. As recently as on September 24, 1948, two new islands of an area of more than 5,000 square miles were reported as having been discovered by Canada.

As regards islands already discovered, which the Government of Canada has officially annexed to the territory of Canada, the argument of "discovery" might be taken advantage of, should Canadian sovereignty over these islands be challenged. The argument of discovery would then be simply added to other and perhaps better arguments referred to later, such as effective control and administration. In any case, it should be first ascertained that these islands were really discovered by a British or Canadian explorer. The U.S. Government has not so far made claims on the basis of American discoveries in the Canadian Arctic. The important and northern-most island of Ellesmere was, however, partly discovered by an American.

On the other hand, there is no doubt that the argument of discovery, if applied by Canada to islands hitherto unknown and eventually discovered by Canada, say, west of Ellesmere Island, would be most dangerous. It might indeed, open the way for foreign discoveries, in future, of unknown territories located in the zone which Canada now considers as Canadian. Moreover, it might possibly give rise to foreign claims based on past discoveries.

Russia has recently provided an example of the adaptation of legal argument to changing circumstances. In the case of islands situated north of the Taimy's Peninsula in Siberia, some of which had not been discovered by Russians, Russia based its claim on the ground that these islands formed "une extension vers le nord de la plateforme continentale de la Sibirie."<sup>204</sup> However, in the Wrangel Island dispute in 1923<sup>205</sup>

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<sup>201</sup> Hackworth, as quoted in Foreign Office Statement of 1946.

<sup>202</sup> Foreign Office Statement of 1946, p. 5.

<sup>203</sup> Hackworth, Digest of International Law, p. 396; as quoted in Foreign Office Statement in 1946.

<sup>204</sup> Foreign Office Memorandum respecting Territorial Claims in the Arctic to 1930, p. 2, (to be found on External file 9057-40C, Part IV).

<sup>205</sup> Idem, p. 3.

Russia did not hesitate to claim the island as having been discovered by a Russian naval officer.

Finally, it is necessary to add that if it is deemed advisable to make use of the argument of discovery, the year of each particular discovery should be taken into consideration since, as explained above, the importance of discovery as a legal argument, has diminished since the first discoveries in the Arctic.

## CHAPTER II OCCUPATION

The Department of Mines and Resources has dealt with the facts of the Canadian occupation, and has prepared a detailed history of Canadian Government-sponsored activity in the Arctic,<sup>206</sup> which will support Canada's claims to sovereignty on the principle of effective control and actual administration. It is intended here to analyze this principle from the point of view of International Law. The reference is, of course, to real or effective occupation, and not to fictitious occupation or mere discovery.

Occupation is an act of effective appropriation, by a state or for a state, through which the state intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another state; this refers either to a terra nullius (a territory, uninhabited or inhabited only by aboriginals, which is not considered a state) or to a territory which once belonged to a state but has since been abandoned. Actually, the Polar regions are the only possible object of occupation today.

It was not until the 19th century that the community of nations recognized in practice the necessity of effective occupation. The principle was first maintained at the beginning of the 19th century and became increasingly established as the century advanced. It was, in fact, applied in several arbitration awards.<sup>207</sup> The Berlin African Conference of 1884-1885<sup>208</sup> confirmed and enlarged the principle; so did the Institut de Droit International meeting at Lausanne in 1888.<sup>209</sup> The Institut declared that the appropriation of territory shall be made by the establishment of a responsible local authority furnished with sufficient means for the maintenance of order and for securing a regular exercise of its control within the boundaries of the occupied territory.

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<sup>206</sup> cf. Recent memorandum from Mines & Resources referred to in the first part of our forward.

<sup>207</sup> Statements extracted from eight important cases quoted in Smedal: (a) U.S.-Russia negotiation re North-West America, 1824, (b) U.S.-Peru dispute re Lobos Islands, 1852, (c) U.S.-Haiti case re Navassa Island, 1872, (d) Italy-Switzerland dispute re Alpe Cravairola, 1873, (e) Portugal-Great Britain dispute re Delagoa Bay, 1870's, (f) Great Britain-Portugal dispute re Central Africa, 1877, (g) Great Britain-Germany vs. Spain re Sulu Islands, 1885.

<sup>208</sup> Various articles quoted in Smedal, p. 18ff.

<sup>209</sup> Various articles quoted in Smedal, p. 20.

The views expressed by the Berlin Conference and the Institut were adhered to internationally in the solution of a number of disputes subsequently submitted to arbitration.<sup>210</sup> The Convention of Saint-Germain-en-Laye of 1919 revised between the Great Powers the stipulations adopted at Berlin.<sup>211</sup> As in the case of the African Conference, although the rules adopted at Saint-Germain were to apply only to occupation in Africa, they were construed as reflecting the exigencies concerning occupation then imposed by International Law. The Palmas Island case in 1928 gave a further confirmation of the principle.<sup>212</sup>

There does not seem to be, therefore, any doubt left today that as regards terra nullius and abandoned land, sovereignty is acquired initially by occupation and that an effective appropriation of such territories is a condition of their acquisition by occupation. International Conventions, statements of jurists and arbitration awards furnish proofs of this. More precisely, International Law requires that occupation, in order to establish sovereignty, must be (a) effective, (b) permanent, (c) appropriate.

Occupation is valid only if it is effective, and the consequences of valid occupation are that, as soon as a territory has been occupied by a member of the Family of Nations no other power can acquire it thereafter through occupation, except in the two following classes of case: when the occupying state has intentionally withdrawn from it, or has been driven away by the inhabitants without attempting or being able to re-occupy it, the Polar regions are not excepted from the rules of effective occupation. Two essential elements constitute an effective occupation, (a) a regular taking of possession, (b) an established administration.

The occupying state must take possession of the territory which is acquired in the name of or for that state. This taking possession or annexation is constituted by two basic elements, the factum and the animus.

The factum consists of the actual and physical taking possession by which the occupying state puts the territory under its control. Oppenheim<sup>213</sup> maintains that this can only be done by a settlement on the occupied territory, accompanied by some formal act (a proclamation or the hoisting of a flag) which announces both the taking possession of the territory and the intention of the possessor to keep it under its Sovereignty. This settlement, which should be left on the territory, he adds, would be required in order to establish effective occupation as distinct from mere fictitious occupation or discovery.

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<sup>210</sup> The following cases are enumerated in Smedal, p. 21-221: (a) Spain-Germany dispute re Caroline and Palaos Islands, (b) Portugal-Great Britain re Central Africa, (c) Venezuela-Great Britain re boundary between British Guiana and Venezuela, (d) Brazil-Great Britain re boundary between British Guiana and Brazil.

<sup>211</sup> Oppenheim, op. cit. p. 511.

<sup>212</sup> Hudson's Cases on International Law, 1929, p. 378-387.

<sup>213</sup> Oppenheim, op. cit., p. 509.

On the other hand, in a statement from the Legal Adviser to the United Kingdom Foreign Office in 1946,<sup>214</sup> it is declared that for climatic reasons such a permanent settlement is not always required in polar regions, if the occupying Power can furnish other proof that it holds the territory in question. Hackworth's Digest of International Law<sup>215</sup> quotes a communication from the United States Secretary of State in 1924 to the effect that, on account of the rigour of climatic conditions in the polar regions "actual settlement is not required as a necessary condition for the perfecting of the right of sovereignty. This, he writes, provided that a claimant state may establish that by some other process it is in a position to exercise control over what it claims as its own...." In any event, if actual settlement is not required, effective control certainly is.

The initial physical taking possession through a settlement would not be essential, the important point being for the claimant state to demonstrate that it, in fact, exercises an effective control over the territories it claims. This, and the degree of control required will be discussed hereafter under the heading "administration".

This view seems sensible, and no doubt should be maintained by Canada. It corresponds to the action taken by Canada in the case, at least, of the two most recently discovered islands which were immediately annexed to our national territory. We did not then establish a settlement. However, a Canadian aircraft landed on these islands and later made a reconnaissance marking them on the map and photographing them from the air.

The animus or intention, requires an official and clear expression of the intention of the occupying Power to acquire sovereignty over the territory in question and to hold it as its own. International jurists disagree on whether or not it is necessary for the occupying state to notify other states of its acquisition. However, Oppenheim<sup>216</sup> writes that "no rule of the law of nations exists which makes notification of occupation to other Powers a necessary condition of its validity".

Smedal,<sup>217</sup> on the other hand, writes that "when a state occupies a territory, the occupation should be notified as soon as possible....A notification must be made direct to the governments concerned". This, he adds, is an invitation to the powers to lodge any objection they may have. Smedal bases his theory on Article 34 of the General Act of the African Conference<sup>218</sup> which states that any power intending to occupy a territory "shall accompany the respective Act with a notification ... to the other signatory power ... in order to enable them, if need be, to make good any claims of their own"; and on a resolution adopted by the Institut de Droit International at Lausanne<sup>219</sup> to the effect that an official notification of the act of

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<sup>214</sup> Foreign Office Statement of 1946, p. 20.

<sup>215</sup> *Idem*, p. 1-2.

<sup>216</sup> Oppenheim, *op. cit.* p. 511.

<sup>217</sup> Smedal, *op. cit.* p. 40, 41, 42.

<sup>218</sup> *cf.* Article 34, as quoted in Smedal, p. 19.

<sup>219</sup> Smedal, *op. cit.* p. 41.

appropriation is necessary, this notification being possible by publication in the form usually adopted in each state for the notification of official acts, as well as by diplomatic means. It is true that the Berlin Act was revised by the Treaty of St. Germain-en-Laye of 1919 but it is not clear whether or not the latter abrogated the rule here discussed. Moreover, Smedal mentions several jurists and precedents which lend weight to his theory.

It seems advisable for the Canadian Government to maintain, on this point, the opinion of Oppenheim, since only on a very few occasions has Canada in the past notified, directly or officially, foreign states of its intention to acquire sovereignty over new territories. It is also suggested that the Canadian Government might adopt the view that official notifications, published locally by the Governments of the occupying states, are sufficient to indicate the intention of these states to acquire sovereignty over new territories. Thus, the intention of Canada in the past to occupy new territories should be well established by several public documents, of which excerpts have been collected on our file<sup>220</sup> under the date of March 4, 1948.

In order that occupation may be considered effective, an official administration must exercise a proper control over the territory of which possession has been taken. This administration must necessarily be established within a reasonable time after the taking of possession; otherwise, occupation would not be effective, since no sovereignty would then be exercised by any state. The administration should moreover be sufficient to maintain civil order and to provide for the organization and administration of justice in the territory in question. The maintenance of police posts, custom houses, post offices, schools and hospitals, scientific posts, wireless stations, and weather stations, are the customary form of administration in Arctic lands.

A local administration is not always required; regular official visits and patrol-vessels are other means of exercising actual jurisdiction over Arctic lands. However, police forces should be available, if only distantly, in order that they may intervene when necessary and ensure that the laws are complied with by those living in or entering Arctic regions.

The organization of administration will necessarily vary from one case to the other, according to local circumstances and the physical conditions of each Arctic territory. However, in all cases, at least some kind of administration should exist and it should be sufficient to demonstrate that the claimed territories are really and not fictitiously governed by the possessors. The doctrine of administration or effective control is a solid and unquestionable basis in International Law for establishing sovereignty. A full historical and factual account of all the efforts expended by Canada to establish control and administration in the Canadian Arctic Zone is, therefore, required. The Department of Mines and Resources has prepared such an

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<sup>220</sup> cf. External File 9057-40C, Part IV, under said date.

article. At this stage it seems that it is on this ground that the Canadian position is strongest.

As mentioned above, in order to establish sovereignty, International Law requires not only that occupation must be effective but also that it be permanent and appropriate. The sovereignty of a State is limited to the areas over which it actually exercises sufficient control. However, it is not necessary for the state to be able to make its authority felt at any time nor at any place within its territory. And it should be realized that the means necessary for submitting a territory in the polar region to the control of a state will not be the same in all cases. As a rule, the means can be adapted to the circumstances. It is significantly stated in the preamble to the Convention of St. Germain-en-Laye<sup>221</sup> that the territories in question now “are provided with administrative institutions suitable to the local conditions”.

It is in this sense only that permanency and appropriateness are considered as necessary elements of occupation. Georges Scelle<sup>222</sup> writes that the necessity of these elements is in direct relation to the normal use of the territory and to the interest in it taken by the occupying power and by the international community. It is generally agreed that the degree of permanency and the nature and extent of occupation will vary according to various considerations, especially the following:

#### 1. The population:

More is required for exercising control in densely peopled areas than in territories sparsely inhabited or uninhabited. It is true that the African Conference in 1884-85<sup>223</sup> and the Institut de Droit International in 1886<sup>224</sup> declared that a relatively elaborate local administration was necessary but they had particularly in view territories with a great native population. The polar regions are so sparsely populated that orderly conditions can be maintained by much more simple measures.

Moreover it should be noted that, in respect of effectiveness, it is never required of the occupying state that it be able to exclude others from the territory by force. The use of military force is of importance only for the maintenance of civil order. The fact that flying columns of the military or the police may control, when necessary, remote spots, suffices to maintain order and in this way to occupy effectively a polar territory.

It will, therefore, be possible for a state to exercise effective control over a polar territory without establishing a local authority within the limits of this territory. Thus, control may be exercised, exceptionally, from a point located either in the temperate zone or in another polar territory. However, in this respect Smedal points out that all polar regions cannot be treated alike.<sup>225</sup> If, for instance, people settle in

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<sup>221</sup> League of Nations, Recueil des Traités, Vol. VIII, 1922, p. 26.

<sup>222</sup> Georges Scelle, *Precis de Droit des Gens*, p. 108.

<sup>223</sup> As quoted in Smedal, *op. cit.* p. 33.

<sup>224</sup> *Idem.*

<sup>225</sup> *Idem.*, p. 32-40.

large numbers around valuable mineral sites, more men in charge would be necessary at such place than in uninhabited regions.

2. Means of Access:

Should the occupying power control exclusively the means of access to the territory claimed, there would be little need for an elaborate occupation of the territory. This stems from the fact that foreign powers must receive permission from the claimant state to use the means of access, in order to reach the polar region. This seeking of permission is in itself a tacit recognition of the effectiveness of the control exercised by the claimant state over the polar area. It is true that to a great extent Canada does control the physical means of access to the Canadian Arctic zone, the Canadian main territory being adjacent to the supposedly disputed area.

Control of the means of access implies, of course, that the regions are not easily accessible from the High Seas.

3. Nearly impassable regions:

Should the physical conditions of a polar territory be such that they make it nearly impassable, the same rule may apply: a minimum of control would then be required. The presence of mountain ranges, of perpetually frozen soil or of frequent storms in the vicinity are examples of conditions which render a territory impassable. Patrol-vessels have never reached such areas and aircraft would have to fly comparatively long distances under difficult conditions.

4. Climate:

In respect of polar regions where the climate is very severe, as in the northern part of the Canadian Arctic, the following principle is commonly accepted: It is sufficient that administrative control be exercised only when the climate or weather conditions permit the inhabitants to travel. It is unnecessary for state authority to be asserted without interruption in all parts of the land all year round. The physical conditions in several cases permit access to such lands only during certain summer months, barring it the rest of the year. The Department of Mines and Resources, for that matter, takes advantage of the summer season to send up to the northernmost regions various occupying parties which contribute to the maintenance of the Canadian sovereignty over vast Arctic regions.

5. Groups of Islands:

It is generally admitted, according to the 1946 memorandum from the Foreign Office,<sup>226</sup> that it is not necessary to occupy every one of a group of islands, provided that from the occupied islands or places what is happening on all the others can be duly supervised. This principle is extremely important from the Canadian point of

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<sup>226</sup> Foreign Office Memorandum of 1946, p. 8.

view since administrative control over several islands of the Canadian Arctic Archipelago is often exercised from distant points.

6. Importance of location:

It is generally agreed in International Law that regions located or enclosed within territories in which the sovereignty of a state is incontestable are subject to the same State's sovereignty. A recent application of this principle may be found in relation to the two islands discovered last September by Canada in a region where Canadian sovereignty is undeniable. These islands lie close together in Foxe Basin off the west coast of Baffin Island, north of Hudson Bay.

7. Whether or not the title is disputed:

If no foreign power objects to a claim to a certain polar territory, and if this condition lasts during a sufficient period of time, the claim becomes implicitly recognized. Whenever a title is thus undisputed, it is obvious that a minimum of administrative control is required from the occupying power, at least as long as no controversy arises over the area. The occupying power is then more free to apply the kind of occupation it deems appropriate to the area, provided that it constantly considers it as a part of its territory.

A state's position is safer where it claims sovereignty over a polar region which it has annexed, for which only a paper administration may have been provided, and which is visited officially at regular intervals, if, no adverse claim is made and no visits are made by anybody, except with its explicit licence. The length of time necessary for the prescription of foreign claims will be considered below.

8. The nature or extent of foreign claims:

The extent to which sovereignty over a territory is claimed by some other Powers will also determine the degree of occupation which is required. It is largely a question of finding which of two claims is stronger. Very little effective occupation will be necessary as long as the other claimant's position is weaker than yours. Physical possession need continuously be maintained only to the extent that it gives a good title against anyone who cannot prove a better one. The longer the physical possession, the stronger the juridical title. The degree of effective occupation necessary to confer authority will, therefore, also depend upon the seriousness with which other states put forward their claims.

Thus, in the dispute between Denmark and Norway concerning the status of eastern Greenland, decided by the Permanent Court of International Justice, in 1933,<sup>227</sup> the Court attached considerable importance to the fact that, until 1931, there had been no claim by any power other than Denmark to sovereignty over Greenland. This is the most important case on the subject of occupation and

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<sup>227</sup> *Idem*, p. 9.

conflicting claims over polar regions. As far as Canada is concerned however, there is no indication, at the present time, of any official foreign claim of any nature or extent, to territory which Canada considers as its own. As already explained the purpose of this analysis is to prevent such claims from arising, and to meet them if they should arise.

The various activities displayed by the Canadian Government (and mentioned above in relation to the question of administration) seem sufficient to fulfil the requirements of International Law in respect of the permanency, nature and extent of effective occupation in polar regions. Smedal, in fact, cites the handling by Canada of its Arctic territories as a good precedent of how to take effective possession of polar regions.<sup>228</sup> And he adds that there is no reason to deny Canadian sovereignty over the territories which Canada has in this way really brought under its control and jurisdiction.

The detailed account of Canadian activities prepared by the Department of Mines and Resources indicates that Canada has fulfilled the various requirements imposed by International Law under the principle of effective control and administration. This will probably constitute a solid and unquestionable argument in favour of Canada's sovereignty over the Canadian Arctic.

### CHAPTER III SECTOR PRINCIPLE

Canada's claim to sovereignty in the Arctic regions may rest upon what has been called the "Sector Principle". Under this principle, Canadian sovereignty would extend to all areas to the north of Canada in a sector subtended from the North Pole. This sector, having the form of a triangle pointed on the North Pole, is demarcated by the 141° west longitude to the west, by the Arctic Circle or possibly by the coastline of the Canadian mainland to the south, and by the 60° west longitude to the east, with the exception of the portion of Greenland to the west of 60° west longitude.

Senator Poirier is generally credited with having first called attention to the Sector Principle when in 1907<sup>229</sup> he recommended in the Canadian Senate that Canada should declare that it had taken possession of the lands and islands lying between its northern coast and the Pole. The idea expressed by Senator Poirier has been followed internationally in certain important acts of state to be discussed briefly hereunder. However, in the literature of international law the idea has not so far been seriously discussed.

On the whole, it seems justified to assume that the abovementioned acts of state, official United Kingdom, Canadian and Russian declarations, and authors' comments

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<sup>228</sup> Smedal, *op. cit.* p. 35.

<sup>229</sup> *Idem*, p. 54; also cf. several Departmental memoranda on External file 9057-400, such as the memorandum dated 4 March, 1948, on page 2.

(except for a few Russian ones) deal only with land territories, excluding the ice areas, and make no difference between known and unknown (that is, not-yet-discovered) territories. This is perhaps what Senator Poirier had in mind when he suggested that every country bordering on the Arctic regions should extend its possessions up to the North Pole. In other words, the sector state claims sovereignty over the lands lying in the sector and not belonging to other states, without regard to whether these lands have been taken effective possession of. This right would belong to the states whose territories are cut by the Arctic Circle: the United States, Canada, Denmark, Iceland, Norway and the Soviet Union. The sector of the latter has been enlarged by the addition of the Finnish sector at the last Peace Treaty with Finland.<sup>230</sup>

The following is a summary of the position taken by interested states towards the Sector Principle as applied to the Arctic regions:

#### 1. Canada:

The proposal of Senator Poirier was not adopted. However, Canada is often considered internationally as claiming a sector although it never did so by any direct declaration. The Canadian claim has been made indirectly in different ways and on several occasions of which here are a few examples:

- (a) The interpretation which the Canadian Government gave to the Order-in-Council of July 31, 1880, annexing to Canada "all British territories or possessions in North America not already included with the Dominion of Canada and all islands adjacent to any such territories or possessions".<sup>231</sup>
- (b) On the occasion of the official Canadian expedition led by Captain Bernier in 1908-09.<sup>232</sup>
- (c) The Canadian Note to Denmark in 1921 objecting to Danish discoveries in the Canadian Sector.<sup>233</sup>
- (d) Mr. King, after having stated in the House of Commons on May 12, 1922, that Wrangel Island which is located north of Siberia was part of Canadian territory, later found it desirable not to press the claim on behalf of Canada in order to avoid similar claims in the Canadian Sector.<sup>234</sup>
- (e) The publication in 1923 by the Canadian Department of the Interior of a map of the Northwest Territories.
- (f) The adoption in 1925 of a Bill providing that scientists and explorers wishing to work in the Northwest Territories must have a Canadian permit,

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<sup>230</sup> As a result of the cession to Russia of the Petsamo Territory: Peace Treaty with Finland, C.T.S., 1947, No. 7.

<sup>231</sup> Quoted in Departmental memorandum of 4th March, 1948, and in Foreign Office memorandum of 1930 on p. 2.

<sup>232</sup> Departmental memorandum of 2 February, 1946, on 'External File 9057-40C, Part III.

<sup>233</sup> Idem; and Foreign Office memo of 1930, p. 6; various dept's memoranda on External file 9057-40C (all parts).

<sup>234</sup> Foreign Office memo of 1930, p. 3; and various dept's memoranda.

and the accompanying declarations of Mr. Stewart, Minister of the Interior<sup>235</sup> (declarations which were objected to in the United States press).

Some arguments in favour of the Canadian Sector claim may be found in the Treaty between Russia and Great Britain of 1825<sup>236</sup> and in a United States Note of 1896.<sup>237</sup> In referring to the boundary line between Canada and Alaska the Treaty of 1825 said that the Meridian 141° West shall be the boundary line “right up to the Arctic” (jusqu'a la mer glacial). If the term was understood to mean that a division of the Arctic regions was made by the Treaty (and it seems that this was not the case) the division was a matter between Great Britain and Russia which foreign states are not bound to respect if they have not consented to it.

The Note of United States Secretary of State Mr. Blain of December 17, 1896, to the United Kingdom Government concerning the Behring Sea Controversy suggested that “the simplest division of that territory is to accept the prolongation of the 141° of longitude to the Arctic Ocean, as the boundary. East of it, the territory shall be British, west of it the territory shall be Russian”.

## 2. United Kingdom:

The United Kingdom has claimed the Sector Principle by official declarations in 1917, 1923 and in 1929. These declarations were related to the Falkland Sector and to the Ross Sector.<sup>238</sup>

In 1916 the United Kingdom tacitly accepted a Russian claim to some islands located north of the Taimyr Peninsula in Siberia on the ground of geographical continuity.<sup>239</sup>

The United Kingdom had admitted the claim by Denmark on September. 6, 1920 to the whole of Greenland in an Exchange of Notes.<sup>240</sup> Moreover it was decided at the Imperial Conference of 1926 and 1930 tacitly to recognize the Soviet Sector.<sup>241</sup>

## 3. Soviet Union:

Since the 19th Century, the Russians have never made any secret of their view that all islands discovered to the north of Siberia must be regarded as Russian. By a Decree of April 15, 1926, the Soviet Union recognized officially the Sector Principle as far as it is concerned, in claiming as Soviet territory all the so-called Russian Sector, that extends from the American Sector to the Norwegian Sector. This Decree was

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<sup>235</sup> Quoted in several documents, namely in External memo of 4th March, 1948, p. 2.

<sup>236</sup> Smedal, op. cit. p. 66 and 67; Foreign Office memo of 1930, p. 1, 2 and 5.

<sup>237</sup> Foreign Office memo of 1930, p. 1 and 5.

<sup>238</sup> Idem, p. 4; Smedal op. cit. p. 55, 58, 59, 60, 75 and 76.

<sup>239</sup> Foreign Office memo of 1930, p. 2.

<sup>240</sup> Idem, p. 6.

<sup>241</sup> Idem, p. 4.

brought to the attention of foreign powers;<sup>242</sup> it was based on official declarations made on September 29, 1916,<sup>243</sup> and November 4, 1924.<sup>244</sup>

An argument favouring the Russian Sector may be found in the United States-Russia Treaty of 1867,<sup>245</sup> a clause of which delimited the boundary in the Behring Strait in such a way that it could have meant that the two States on this occasion divided Arctic regions between them. This doubtful division would only bind upon the parties themselves. As far as Norway is concerned, Smedal wrote in 1931<sup>246</sup> that despite the Decree it continues to consider that it has some rights over Franz Josef Land.

It seems clear that Russia could not object to the assertion by Canada of the Sector Principle.

#### 4. United States of America:

The United States Government is obliged, according to a Foreign Office Memorandum of 1930,<sup>247</sup> to recognize the Sector Principle at least in part by the terms of the Alaska Treaty of 1867.<sup>248</sup> But it has never committed itself to a definite pronouncement on the lines of the Soviet Decree, the United States never claimed a Sector (presumably because this would not give them any advantage, no land having yet been discovered between Alaska and the North Pole). This attitude has been confirmed by various official statements made by American authorities. By the Treaty of January 17, 1917,<sup>249</sup> however, the United States admitted Danish sovereignty over the whole of Greenland.

There has never been any American claim to Canadian islands on the basis of American discoveries. Occupation has been generally put forward by the United States as the basis for sovereignty in polar regions. However, the United States Government has recently proposed that the Antarctic continent should be internationalized.<sup>250</sup> This certainly means that it does not consider the Sector Principle as acceptable. The United States proposal has been rejected by Argentina, Chile and apparently by Norway, Canada having decided to abstain from taking any position.

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<sup>242</sup> *Idem*, p. 4; Smedal *op. cit.* p. 69 and 70.

<sup>243</sup> Foreign Office memo of 1930, p. 2 and 3; Smedal *op. cit.* p. 60 and 69.

<sup>244</sup> *Idem*.

<sup>245</sup> Foreign Office Memo of 1930, p. 1-5; Smedal *op. cit.* p. 69.

<sup>246</sup> Foreign Office memo 1930, p. 9.

<sup>247</sup> *Idem*, p. 5.

<sup>248</sup> *Idem*.

<sup>249</sup> *Idem*.

<sup>250</sup> *cf.* External files re Antarctic problems; also A.P. communiqué dated 23rd November, 1948 (on External file 9057-40C, Part IV).

#### 5. Denmark:

The Danish Government had not up to 1930 specifically declared its adherence to the Sector Principle. But it is more or less committed to it in practice since it claims all Greenland on the ground of the essential unity of the whole region. This claim was admitted in 1917<sup>251</sup> in the Treaty by which the United States acquired the Virgin Islands from Denmark and by the United Kingdom in 1920.<sup>252</sup> Denmark cannot, therefore, logically resist the corresponding claim of the Canadian Government to the whole of the Canadian Archipelago.

In 1925, Denmark recognized tacitly Canada's jurisdiction over Ellesmere Island by granting permission to land in Greenland supplies for the Canadian police posts on Ellesmere Island.<sup>253</sup> It may, therefore, be assumed that in practice the Danish Government will not contest the Sector Principle at any rate in its application to the Canadian Sector, especially as the Danish Government is in need of foreign support for its claim to sovereignty over all of Greenland.

#### 6. Norway:

Norway never has claimed a sector. In the course of an Exchange of Notes with Canada in 1930, settling its claim to the Sverdrup Islands ... [*Sections exempted pursuant to section 15(1) of the Canadian Access to Information Act*]<sup>254,255</sup>

### CHAPTER IV GEOGRAPHICAL DEPENDENCY

The possible arguments under this heading have little foundation, in themselves, under International Law. However, they are worth noting in that they might help to determine, in a contentious case, which of two cases is the stronger.

#### (a) Contiguity:

It has from time to time been suggested by international jurists that sovereignty over uninhabited areas might be claimed on the basis of contiguity, i.e. that a State can claim uninhabited territories on the ground that the uninhabited region lay nearer to it than it does to any other state.

Miller, the American author, is a partisan of this doctrine,<sup>256</sup> which also formed the basis of the Russian declarations of 1916 and 1924. Contiguity is one of the

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<sup>251</sup> Foreign Office memo of 1930, p. 5.

<sup>252</sup> *Idem*, p. 6.

<sup>253</sup> *Idem*, p. 6; and also various dept'l memoranda and other documents on file.

<sup>254</sup> Exchange of Notes re the recognition by Norway of the sovereignty of Canada over Sverdrup Islands, C.T.S. 1930, No. 17.

<sup>255</sup> Smedal, *op. cit.* p. 64.

<sup>256</sup> Miller 1925, p. 56; 1928, p. 244: quoted in Smedal on p. 60.

grounds on which Argentina claims the Falkland Islands and Graham Land. Chile also claims Graham Land on the basis of contiguity, apart from another ground to be mentioned hereafter.

However, there is no rule of International Law to the effect that islands or lands lying outside territorial waters belong to a State by the mere fact that they are situated near its territory. The only possible use of the theory of contiguity is suggested by the decision in the Palmas case which stated “the principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one State rather than to another, either by Agreement between the parties, or by a decision not necessarily based on law”.

(b) Access:

The importance and possible use of this argument was studied above under the heading “occupation”. It need only be repeated here that the Canadian Arctic zone cannot be easily and normally reached nor controlled except through or from Canadian territory.

(c) Physical dependency:

Russia claimed certain islands near the Taymir Peninsula in Siberia on the ground that they formed “une extension vers le nord de la plateforme continentale de la Sibérie”.

Chile and Argentina also claimed the Graham Land and the adjacent islands on the ground that they are a continuation of the South American continent.

This argument does not have much foundation in International Law and nothing can be said about it other than it may help in determining which of two conflicting claims is stronger, a consideration not necessarily juridical.

(d) Natural boundary:

A look at the map of the northern hemisphere suggests that the only possible Canadian frontier to the north should include in Canada all the northern Arctic Archipelago, especially in view of the fact that it is uninhabited, unclaimed officially by any other State, and in view of the long Canadian interest in it. What other northern boundary could be suggested?

This argument, if added to the other arguments just mentioned could, we think, lend weight to the Canadian case.

## CHAPTER V PRESCRIPTION

Prescription is a means of obtaining title to a territory under International Law. It used to be a debatable matter among the authors, and still is to a minor extent. Some

writers still oppose prescription as a means of acquiring territory.<sup>257</sup> Others maintain that it requires possession from time immemorial,<sup>258</sup> and still others,<sup>259</sup> among whom is Oppenheim,<sup>260</sup> write that undisturbed continuous possession can under certain conditions produce a title for the possessor, if the possession has lasted for some length of time. This opinion, points out Oppenheim, would indeed seem to be correct, because it recognizes theoretically what actually goes on in the practice of the family of nations.

Prescription is recognized by the law of nations, both where the state is in a bona fide possession and where it is not. The basis of prescription in International Law is the general recognition of an established fact on the part of the members of the family of nations.

We can, therefore, adopt Oppenheim's definition of prescription as the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such period as is necessary to create, under the influence of historical developments, the general conviction that the present condition of things is in conformity with International order. The rational basis for prescription in International Law is the same as in municipal law namely, the creation of stability and order. The mere physical possession continuously maintained gives a good title against anyone who cannot prove a better one.

Prescription is similar to occupation in that both require an animus and a factum. These elements were studied above. However prescription differs from occupation in various ways. First, occupation tends to acquire a terra nullius, whereas prescription may also be used to acquire a territory which originally belonged to somebody but whose title is destroyed for lack of maintained possession. Secondly, occupation starts as soon as the animus and the factum are established, whereas some time is required for prescription. Finally, as regards the factum more is required for prescription than for occupation, depending always upon the facts of the case.

Prescription in International Law possesses at the same time an acquisitive and an extinctive character, in the sense that it simultaneously gives a title to a territory under International Law, and destroys the rights which the opponent states may formerly have had on that territory.

There exists no general rules on the length of time and other circumstances necessary to create a title by prescription. And Oppenheim<sup>261</sup> adds that as long as other Powers keep up protests and claims, the actual exercise of sovereignty is not undisturbed, nor is there the required general conviction that the present condition of things is in conformity with international order. But after such protests and claims, if

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<sup>257</sup> Martens, p. 71; Kluber, p. 6 and 125; Holtzendorff II, p. 255, Ullmann, p. 92; Liszt, 30 III (1): all quoted in Oppenheim, p. 526.

<sup>258</sup> Grotius II, Ch. 4, p. 1, 7 and 9: quoted in Oppenheim, p. 526.

<sup>259</sup> Vattel, Wheaton, Phillimore, Hall and many others: all quoted in Oppenheim, p. 526.

<sup>260</sup> Oppenheim, op. cit. p. 525-529.

<sup>261</sup> Idem, p. 527.

any, cease to be repeated, the actual possession ceases to be disturbed, and sovereignty may become clearly established.

The question of what time and in what circumstances a title arises by prescription is essentially one, not of law, but of fact. In the Boundary Arbitration between Great Britain and Venezuela in 1899, a period of 50 years was required to make a good title through prescription.<sup>262</sup> Historical and political circumstances and influences are always at work to create the general conviction that the condition is in conformity with international order. Since they differ from one case to the other, the lapse of time necessary for prescription will likewise differ.

Applying these principles to the Canadian problem, it seems that Canada has duly fulfilled all the requirements imposed by International Law and practice. Indeed, Canada has for several years exercised sovereignty over the Arctic Archipelago, as far as the discovered islands are concerned, in a continuous and undisturbed manner. We have analysed already the meaning of continuity and pointed out that it must take into consideration the interruptions [*sic*] imposed by climatic conditions. On the other hand, no foreign states have opposed the Canadian claim for years; the last dispute, , in 1930, related to the Sverdrup Islands and has been settled satisfactorily, Norway relinquishing its claim in the course of an Exchange of Notes.<sup>263</sup>

Apart from the Sverdrup case, the last dispute or disagreement concerning our sovereignty in the Arctic occurred in 1920.<sup>264</sup> In that year, Canada protested to Denmark against the killing of musk-ox on Ellesmere Island by Greenland natives. The Danish Government replied that it considered this island as a No-man's land but did not repeat this claim after Great Britain recognized Danish sovereignty over Greenland in September 1920. In 1921, the Canadian Government informed the Government of Denmark that, should the Rasmussen expedition discover islands and lands in the sector between Canada and the North Pole, these would be regarded as under Canadian sovereignty.

In view of the circumstances and of the absence for many years of official claims opposing Canada's claim, it seems probable that, should a conflict concerning the Canadian Arctic arise and be settled by an International Court of Justice, it would be decided that Canada has fulfilled the requirements imposed by International Law concerning the undisturbed length of time necessary for prescription.

The last element required for prescription by Canada would be the general conviction that the present condition is in conformity with international order. This conviction, should be easy to establish since it stems from what has just been said as regards the absence of foreign claims.

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<sup>262</sup> Lindley, p. 152: quoted in foot-note in Oppenheim op. cit. p. 528.

<sup>263</sup> Exchange of Notes re the recognition by Norway of the sovereignty of Canada over Sverdrup Islands, C.T.S. 1930, No. 17.

<sup>264</sup> This conclusion has been arrived at by reading carefully External file 9057-40C.

CHAPTER VI  
UNIVERSAL RECOGNITION

As a rule, writes Oppenheim,<sup>265</sup> states may acquire new territorial rights by unilateral acts, such as discovery or annexation, or by treaty, without recognition on the part of third states being required for their validity. The position is different, however, when the act alleged to be creative of a new right is in violation of international law or practice. In such cases recognition, to the extent to which it is given, amounts to an express waiver of claims conflicting with the right thus recognized.

Recognition can be either express or implied. Express recognition takes place by a formal notification or declaration clearly announcing the intention of recognition, such as a note addressed to a foreign state or government. Implied or tacit recognition takes place through acts which, although not referring expressly to recognition, leave no doubt as to the intention to grant it.

Canada has not acquired any right by annexation of its Arctic territories in violation of international law. We cannot recall any mention of such a violation but only that the few disputes which related to Canadian sovereignty in the Arctic have been settled to the satisfaction of both parties. Consequently, express recognition on the part of foreign powers is not required for the validity of the Canadian rights in the Arctic. The fact that these rights have been universally recognized to a great extent strengthens the Canadian case, since it furnishes an extra ground which is not actually required. It also furnishes the basis needed for prescription, since it creates the general conviction that the Canadian exercise of sovereignty is in conformity with international order.

The extent of this universal recognition is deduced from a variety of facts. There is no express recognition of the Canadian position. However, the attitude of all foreign powers demonstrates sufficiently that they recognize at least implicitly the present state of affairs in the Canadian Arctic zone.

The extent of the Canadian claim based on recognition may be considered in two parts (A) General and (B) by states especially interested in the Arctic:

A – General

1. The absence of any official claims for several years.

It is generally agreed in international law, that, should no foreign state oppose your claim to a certain territory and this condition last during a sufficient period of time, your claim may be implicitly recognized.

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<sup>265</sup> Oppenheim op. cit. p. 136.

As already mentioned, there does not exist at the present time, any claim on the part of foreign states to Canadian-held Arctic territories, and the last disputes were settled a long time ago.

It does not appear likely, moreover, that there will be in the future any such claims; the position of any claimant foreign state becomes increasingly weak in relation to the Canadian position as time goes on.

## 2. Universal Recognition through Maps:

Maps published in all countries over the world indicate as Canadian territory the various islands of the Canadian Arctic Archipelago. There does not exist, at the present time, any exception to this general action, according to the information available here.

Should some foreign power in which maps are published have objections to the indication of the Arctic regions as Canadian, no doubt the Governments of these powers would impede the publication of these maps; this has never taken place to our knowledge. The only objections formulated to such mapping came from a few American newspapers some twenty years ago, and these objections have never been repeated. Cartography supports the Canadian position.

## 3. General opinion newspaper articles, etc:

All over the world, in school manuals, newspaper articles, press communiqués, at international conferences and meetings, every time there is need to refer to the Canadian Arctic Archipelago, it is done without implying any doubt as to the Canadian sovereignty.

There has been lately a growing interest in the Arctic regions in view of their strategic importance and no objection has ever been reported.

### B - States especially interested in the Arctic

Foreign states that are primarily interested in the Arctic, have recognized our position as follows:

#### 1. Denmark:

The Danish Government remained silent following the Canadian protest in 1920 against the killing of musk-ox by Greenland natives.

In 1921, it did not object to the notification by Canada that lands to be discovered by the Rasmussen Expedition were to be considered Canadian.

In 1925, Denmark recognized tacitly Canadian jurisdiction over Ellesmere Island by permitting to land in Greenland supplies for the Canadian police posts at Ellesmere Island. For several years, Denmark has always granted permission to Canadian expeditions, navigators, and explorers who wished to land in Greenland ports while en route to the northern regions of Canada.

Finally, for the reasons already mentioned, future claims by Denmark to Canadian territory are most unlikely.

## 2. Norway:

The only possible ground of dispute with Norway as to Canadian sovereignty in the whole Canadian Arctic Sector was removed by the Norwegian Government's express recognition in 1930 of the Canadian title to the Sverdrup Islands. There has not been since any indication of a possible controversy with Norway. The possibility of such a new controversy is, at the present time, as remote as it can be, in view, among other motives, of the present position of Norway in the Arctic in relation to Russia, especially as regards Spitzbergen.

## 3. Russia:

Russia is the only country that has officially recognized the Sector Principle. Indeed it has made it part of its domestic law by a decree in 1926. Russia based its decree more particularly on the theory of geographical contiguity.

In view of Russia's attitude with regard to its own Arctic Sector it could not and cannot, with any show of logic, oppose the application of the Sector Principle elsewhere in the Arctic regions.

Actually, Russia has never shown any such opposition. On the contrary, Soviet writers such as Lakhtine and Sabanine have proposed in official Russian publications,<sup>266</sup> that definite juridical rights in the Arctic regions be established on the basis of the Sector Principle.

Finally, when, in 1945, a Russian flying expedition wished to fly across Canada via the north pole to California, and later, prior to the loss of other Russian flyers, while en route also to California, the Russian Government applied in the two cases to the Canadian Government for permission, which should be considered as formal recognition of our rights in this region.

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<sup>266</sup> "The Title to the Arctic Polar Territories" 1928, referred to several times in Smedal; "The Right to the Northern Polar Regions" 1928, published in Moscow by the People's Commissariat for Foreign Affairs, referred to in Foreign Office memo of 1930, p. 5; also consult "Rights Over the Arctic" by W. Laktine, *American Journal of International Law*, p. 703-717 (several references are made to Soviet publications including those of Professor A. W. Sabanine. This article is of special importance, for being written necessarily with official approval it summarizes the Soviet point of view. Laktine ends it by suggesting that the North Pole, since it is the intersection of meridian lines of the different sectors, be represented by a post on the sides of which might be painted the national colours of the states of the corresponding sectors).

#### 4. The U.S.A.:

The U.S. Government has, at least tacitly, recognized Canadian Sovereignty over the Canadian Arctic, on several occasions and in various manners, of which here are some important examples:

- (a) There is not at present time and there has never been any official claim to Canadian territory in the Arctic on the part of the U.S. Government. Friction has occasionally taken place and newspaper articles in the U.S. objected twenty-five years ago to the extension of Canadian sovereignty over islands discovered by Americans. These protests were not official but of a strictly private nature and have not been repeated for several years.
- (b) Between 1940 and 1945, four Arctic manuals were published by or with the consent of the U.S. War Department<sup>267</sup> and in each of them the Islands north of the mainland of Canada are referred to as the Canadian Arctic Archipelago. One of the manuals even contains the following statement: "In the American and Canadian Sectors of the Arctic Ocean, tidal ranges are generally slight."<sup>268</sup>
- (c) Additional arguments supporting Canada's claim may be extracted from files of the Permanent Joint Board of Defence; as an example, let us mention the U.S. request for the Canadian Government's permission to install weather and emergency stations on Baffin Island.<sup>269</sup> The various agreements concluded with the U.S.A. through the P.J.B.D. [Permanent Joint Board on Defence] also refer to the Canadian Arctic Islands as Canadian territory. No reservations have been made by the U.S. Government on this subject. On the contrary, the Canadian Government always takes care to safeguard Canadian sovereignty over the referred regions.
- (d) In a U.S. Navy confidential document entitled "Annex I to Commander Task Force 80-Operation Plan No.I-48- Intelligence Plan", may be found the following statement "Canada's claim of sovereignty over the lands in this archipelago is based on the sector principle. This Canadian sovereignty has been recognized as far as lands already discovered are concerned." (sic)<sup>270</sup>
- (e) The Department of State Bulletin of October 10, 1948, published a communiqué released jointly with Canada to the press of both countries, which contained several references to the Canadian Arctic Regions, more particularly to the northernmost areas. In each instance, the references were made in such terms as "Canadian Arctic Waters" ... "this area in the extreme north of Canada."

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<sup>267</sup> cf. Mr. Read'd letter dated November 12, 1945, on External file 9057-400, Part III.

<sup>268</sup> External memo of February 2, 1946, p. 5.

<sup>269</sup> *Idem.*

<sup>270</sup> The document is to be found on External file 9057-40C, Part IV.

## 31. Vincent C. Macdonald, *Canadian Sovereignty in the Arctic*, March 1950

Department of National Defence, Directorate of History and Heritage (DHH),  
file 122.3M2.009 (D248)

### CANADIAN SOVEREIGNTY IN THE ARCTIC

Vincent C. MacDonald, K.C.

#### PREFACE

This memorandum has been compiled from the materials contained in a memorandum prepared by the Department of External Affairs entitled "Legal Aspects of Sovereignty in the Canadian Arctic" and a lengthy document prepared by the Department of Mines and Resources, entitled "Factual Record Supporting Canadian Sovereignty in the Arctic" (hereinafter referred to as the "Factual Record" or "F.R.").

The compilation of this memorandum, however, has led to the consideration by the undersigned of authorities additional to those cited in the previous memorandum on Legal Aspects; and to the revision and amplification of certain parts of the original Factual Record. In effect the present Memorandum takes the form of a presentation of Canada's legal claim to sovereignty with summaries of, and cross-references to, the matters of fact set forth in the various chapters of the Factual Record, which thus constitutes an Appendix to the legal "Case."

It may be well to record the fact that, though so largely based on the research of the Government Departments concerned, this Memorandum was prepared by the undersigned without interference, and with the simple instruction to present the Canadian case "in its most effective and persuasive form."

(sgd) [*Vincent C. MacDonald*]  
Vincent C. MacDonald, K.C.

#### INTRODUCTION

The main purpose of this memorandum is to stress those considerations of law and fact which relate to sovereignty over the Canadian Arctic as a whole and as forming part of the territorial possessions of Canada as a State. Incidental mention will be made of other considerations relevant to the purpose of asserting or repelling claims as to particular areas included in or forming units of the Canadian Arctic, e.g. claims to a particular island on the basis of discovery and/or occupation. But the mention of such particular considerations, or of matters concerning particular areas,

should not be taken as exhaustive of Canada's claim in respect thereof, any more than the failure to make such mention should be taken as suggesting that there should be an abandonment of claim thereto upon whatever grounds may appear appropriate.

In short the main purpose is, to examine the claim of Canadian Sovereignty to the Arctic in the light of certain great principles of International Law, and to discuss certain other principles - real or assumed which may also be relevant to that claim.

### The Canadian Arctic

Briefly put the claim here examined is that Canada has a demonstrable claim to territorial sovereignty in respect of the land areas, and marginal waters, included in the zone situated north of the Arctic Circle (i.e. the parallel of 66°30' North Latitude) lying between 60° and 141° West Longitude (with the exception of the portion of Greenland, and its Territorial Waters, which lie to the West of 60° West Longitude) up to the North Pole.

This zone (hereinafter called the Canadian Arctic) thus includes that part of the Canadian Mainland, and the whole of the Arctic Archipelago, lying north of the Arctic Circle. In terms of Canadian administration the mainland portion falls within the Yukon Territory administered under the Yukon Act of Canada; and the Districts of Mackenzie and Keewatin to the East; whilst the Canadian Arctic Archipelago (including the Boothia and Melville Peninsulas) falls within the District of Franklin, which together with the Districts of Mackenzie and Keewatin comprise the present residue of the former Northwest Territories and are administered under the Northwest Territories Act of Canada.<sup>271</sup> Accordingly it is the Archipelago area to which the ensuing examination is chiefly directed; for Canada's claim to her own mainland is, of course, incontestable.

Various physical characteristics of the Canadian Arctic are indicated in Ch. 2 of the Factual Record (cited herein as F.R.) but it may be useful to describe the Archipelago briefly in terms of geography. In general, (as presently known) it extends from the mainland in a great triangle with Ellesmere Island as its apex. It contains a great number of islands, of which 17 exceed 1,000 square miles in area and 40 exceed 100 square miles. The chief islands are Baffin (201,600 square miles), Victoria (80,000 square miles), and Ellesmere (75,000 square miles). These various arctic islands are separated by straits, sounds and channels which vary in width from a few miles to over 100 miles.<sup>272</sup>

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<sup>271</sup> See F.R. Appendix 4, No. 5.

<sup>272</sup> For an account of the geographical features of the Canadian Arctic region and its subdivisions see F.R. Chapter 2, Section 4.

I.

CANADIAN SOVEREIGNTY IN THE ARCTIC

Chapter 1

The Canadian Arctic and its Inhabitants.

In Chapters 2 and 3 of the Factual Record will be found matter descriptive of the geographical, topographical, climatic and ice conditions of the Arctic; and of the population (200 Whites, 8,374 Eskimos) and its geographical distribution, habits of living and means of subsistence, e.g. sealing, hunting and fishing, etc.

Such matters will receive their proper mention herein in subsequent chapters. In a preliminary way, however, it may be pointed out that such climatic, geographical and populational [*sic*] conditions do greatly impair the ability of Canada to attain such a kind and degree of control over Arctic regions as is normally regarded as essential in respect of non-Arctic areas. Moreover, as a glance at the map of the Arctic will reveal, the Canadian Arctic Archipelago is not only contiguous to the Canadian Mainland but constitutes a natural or geographical prolongation or extension of it; that the normal access to it lies through, or over, undoubted Canadian territory; that no natural northern boundary of Canada can be drawn without including the Arctic Archipelago; and that if it is to be effectively controlled and administered as a unit by any country (as seems desirable in the interests of international stability) Canada is the only country which can do so.

Chapter 2

Discovery and Settlement.

A. The Record.

Chapter I of the Factual Record contains a brief statement of the broad sweeps of early European exploration in America from which it will be noted that as regards the Arctic the efforts came mainly from the British, and from the French, which amounted to the same thing for present purposes because of the Treaty of Utrecht 1713 and the Treaty of Paris 1763 under which Britain acquired all the rights of the French in respect of Canada.

Chapters 4 and 6 of the Factual Record set forth the chronological record of sea, land, and combined sea-land explorations in the Canadian Arctic by British and Canadian Government expeditions respectively. Reference to these Chapters, and the Maps and Documents in Appendices 3 and 5, make very clear the routes followed, the landings made, the settlements established, the surveys and mapping done, and the symbolical declarations and acts of possession made and done in the attempt to annex the places and areas affected by right (real or assumed) or prior discovery. In particular F.R. Ch. 6 reveals the Canadian Government Patrols from 1884-1948

which resulted in the discovery of, and/or formal acts of possession on behalf of Canada, of the following islands (and others adjacent thereto); Ellesmere, North Devon and Somerset in 1904; Bylot, Griffith, Cornwallis, Bathurst, Byam Martin, Melville, Lowther, Russell and Beleoil in 1906; Coburg and Cone in 1906; Victoria, Banks and King William in 1909; Brock in 1914; and Meighen, Perley, Edmund Talker and Loughheed Islands in 1916.<sup>273</sup> Chapters 7-11 of the Factual Record also contain accounts of other Canadian Government parties and the investigations conducted by them in the course of their work as administrative agencies.

As appears more fully, *infra*, Great Britain by Order in Council of June 23rd, 1870, annexed to Canada all its Northern possessions then comprised in Rupert's Land and the North Western Territory; and in 1871 by Statute authorized the Canadian Parliament "to establish now Provinces in any territories forming part of the Dominion of Canada, but not included in any Province thereof."

Further by Imperial Order in Council in 1880 any doubt as to the inclusiveness of the transfer of British Territories effected in 1870 was set at rest; for it transferred to Canada "all British Territories and possessions in North America, not already included in the Dominion of Canada, and all islands adjacent to any of such territories or possessions." (The exception of Newfoundland and its dependencies is not material to the claims here discussed; in any event Newfoundland is now part of Canada). The validity of the Order in Council of 1880 was ensured in 1895 by the passage of the Colonial Boundaries Act.

It thus appears that Canada is vested with whatever territorial sovereignty in the Canadian Arctic was possessed by France and Great Britain under International Law by virtue of the acts of exploration and discovery done by their agents (including those of the Hudson's Bay Company in the vast region surrendered by it in 1869) and transferred by Britain in 1870; and also by virtue of acts of exploration and discovery by agents of the Canadian Government since that time.<sup>274</sup>

## B. The Law relating to Discovery

The first relevant principle is that whatever effect is to be given to acts of discovery and symbolical possession must be determined by reference to the state of international law at the date of such acts and not as of the date of any controversy arising as to the effect of those acts.<sup>275</sup>

The doctrines relating to the acquisition of Territorial Sovereignty have conceded varying effect to Discovery of lands hitherto unknown to the community of nations,

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<sup>273</sup> See particularly F.R. Appendix 5 for Documents of Possession deposited by these expeditions.

<sup>274</sup> Generally see F.R., Chapter 5.

<sup>275</sup> Westlake, *International Law*, 2nd Ed. p. 114; *The Island of Palmas Arbitration* (1928) 22 A.J.I.L. p. 867; of Hyde, *Int. Law*, 2nd Ed. p. 320.

i.e., to territory uninhabited or inhabited by aborigines and regarded as terra nullius or No-State's land.

Until the 16th Century there was little settled law on the point; but by that time it began to appear that under certain conditions Discovery could be a basis for sovereignty, and many claims were made by States that such discoveries when made by their agents (and particularly when accompanied by symbolic acts of annexation) conferred an absolute title.<sup>276</sup> Later this gave way to the idea that there must be more than discovery and fictitious possession; there must be real possession. "However it was not until the 18th century that the writers on the Law of Nations postulated an effective occupation, or until the 19th century that the practice of the States accorded with this postulate."<sup>277</sup>

As Hall says (p. 126) "it has now been long settled that the bare fact of discovery is an insufficient ground of proprietary right. It is only so far useful that it gives an additional value to acts in themselves doubtful or inadequate." Thus discovery has had attributed to it the effect of creating an inchoate title.

Accordingly, Oppenheim and Hall and other jurists believe that discovery is not without importance in that it gives to the state in whose interest it was made an inchoate title; discovery, they add, would act as a temporary bar to occupation by another state for a period reasonably sufficient for an effective occupation of the discovered territory. If the period lapses without any attempt by the discovering state to convert its inchoate title into a real title by occupation, the inchoate title is extinguished and any other state can acquire the territory by means of effective occupation.<sup>278</sup> This view has received some support in practice.<sup>279</sup>

This opinion is, however, rejected by Smedal and (according to him) by Salomon, Fauchile and Heilborn, as well as by other European writers of the Continent.<sup>280</sup>

Smedal believes that, there is no international decision of such a character that it may be said to establish, in a binding manner, that the discovery of land gives the

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<sup>276</sup> Hall, p. 126; see Hyde p. 321 et seq as to symbolic acts.

<sup>277</sup> Oppenheim, International Law, 7th ed., p. 510; for a summary of the concepts of discovery and occupation in different periods see Heydte (1935) A.J.I.L. 448; of Hill, Claims to Territory in International Law, 1945 Ch. 10.

<sup>278</sup> L. Oppenheim, International Law, A Treatise, 7th ed., 1948, p. 510-11. B.Noore, Digest of International Law, Vol. I, p. 258-261; W.E.Hall, A Treatise on International Law, 1924, 8th ed., p. 126.-7; G.B. Scott, Arctic Exploration and International Law, Am. Journal of International Law, Vol. III, 1909, p. 105; as quoted in Smedal, p. 48.

<sup>279</sup> Thus Norway, when communicating with the United States Government in 1924, said that the discovery by Amundsen and the taking of possession by him of territory in the name of the King of Norway, only meant that Norway had a right to priority in acquiring, subsequently, the sovereignty by settlement or other procedure sanctioned by International Law. Norway repeated the same statement later in 1929. Secret statement, in 1946, by Foreign Office Legal Adviser on the necessity of physical occupation as a means of securing sovereignty in the polar regions, on External file 9057-40C, Part IV; and see further Oppenheim p. 511 note.

<sup>280</sup> Gustav Smedal, Acquisition of Sovereignty over Polar Areas, Oslo, 1931, p. 49 ff.

state on behalf of which the discovery has been made a prior right to appropriate the land. Since International Law does not in any event fix the period during which a right of priority can be enforced, it would seem reasonable, he says, to deny the existence of the right itself. And there is other authority for the view that little or no weight now attached to discovery as such.<sup>281</sup>

In any event it clearly appears that title by discovery alone cannot prevail against a later display of sovereignty by another state sufficient to found title by occupation, i.e. by acts substantially continuous though marked by some intermittency.<sup>282</sup>

Reference to the Island of Palmas Arbitration and to the Eastern Greenland case, *infra*, makes clear on what slight grounds discovery as a source of title may be superseded by relatively slight acts of settlement and occupation by another state particularly having necessary regard to the character of the Arctic.

If it were necessary to base Canada's title on acts of discovery and symbolic possession done in the long ago it may well be that successful resort could be had to the record of explorations mentioned in Section A of this Chapter considered in the light of the then contemporary state of international law as establishing title or repelling adverse claims to title to territories of non-recent discovery

However, it seems unnecessary to consider any such record or contention in the present connection for Canada's claims rest on surer foundations, e.g. Effective Occupation,

As to territories recently discovered, however, e.g. the islands discovered by Canada in Foxe Basin in 1948<sup>283</sup> a claim founded on discovery alone would be of little effect under the modern law; except so far as the doctrine of inchoate title might operate to give a temporary bar to occupation by some adverse claimant sufficient to allow of more significant acts by way of an effective display of sovereignty by public declarations, mapping, etc., on the part of Canada.

Indeed, there is no doubt that the argument of discovery, if applied by Canada to islands hitherto unknown and eventually discovered by Canada, say, west of Ellesmere Island, would be dangerous, and might open the way for foreign discoveries, in future, of unknown territories located in the zone which Canada now considers as Canadian. Moreover, it might possibly give rise to foreign claims based on past discoveries. The recent incidents pertaining to the discovery of the Sverdrup Islands<sup>284</sup> should be a vivid reminder of the potential danger of foreign discoveries and of foreign claims based thereon which may arise in respect of areas within the Canadian Arctic and which may not be so capable of solution.

### C. The Conclusion.

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<sup>281</sup> Foreign Office Statement of 1946, p. 5; Hackworth, *Digest of International Law*, vol. I, p. 396; as quoted in Foreign Office Statement in 1946.

<sup>282</sup> Island of Palmas Arbitration, *infra*.

<sup>283</sup> See F.R. Appendix 5.

<sup>284</sup> See *infra*.

The foregoing is not intended to suggest that a formidable claim to the Canadian Arctic could not be made on the basis of past discovery and derivative transfers and subsequent symbolic acts; for considering the geographical and climatic nature of the region and its scattered and backward population, and the comprehensive coverage and penetration by exploratory and government missions such a claim might be substantiated to some considerable degree. Rather the conclusion which emerges is that a claim so based might fail as to certain areas; is unnecessary; and in its application to modern and future discoveries might prove dangerous. Accordingly it is thought that except as preliminary to, or as partial support for, other contentions in respect of the Arctic-as-a-whole it should be left in abeyance, without prejudice to its application when necessary in respect of claims to individual areas or sections.

### Chapter 3 Title by Effective Occupation.

#### I. The Law.

##### The General Rule.

“Theory and practice agree nowadays upon the rule that occupation is effected through taking possession of, and establishing an administration over, the territory in the name of, and for the acquiring State. Occupation thus effected is real occupation, and, in contradistinction to fictitious occupation is named effective occupation. Possession and administration are the two essential facts that constitute an effective occupation.”<sup>285</sup>

There does not seem to be any doubt that as regards terra nullius and abandoned land, sovereignty is acquired initially by occupation and that an effective appropriation of such territories is a condition of their acquisition by occupation. International Conventions, statements of jurists and arbitration awards furnish proofs of this.<sup>286</sup>

The nature of this rule and also its relation to Discovery as a source of title appear from a consideration of two recent and leading cases, The Island of Palmas Arbitration,<sup>287</sup> and the Eastern Greenland Case<sup>288</sup> decided by the Permanent Court of International Justice.

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<sup>285</sup> Oppenheim, *International Law*, 7th Ed., Vol. I, p. 509; Hall p. 125; I Hackworth, *Digest* Sec. 59; Hill, *op cit* Ch. 10; Hyde, *op cit.*, pp. 300 et seq.

<sup>286</sup> For reference see Smedal, *passim*; for the historical developments see von der Heydte, *Discovery and Annexation in International Law* (1935) 29 *A.J.I.L.* 448; Hyde, *International Law*, 2nd Ed. S 99.

<sup>287</sup> See (1928) 22 *A.J./ .L.* 867 for Text.

In the Palmas Case the claim to the Island was between the United States, as successor to Spain, on the basis of its discovery in the 16th century, and that of Holland on the basis of long exercise of sovereign authority.

...The arbitrator held that even if the international law of that century recognized mere discovery as giving a title to territory (though there is very little reason for thinking that it did), such a title could not survive today, when it is certain that discovery alone, without any subsequent act, does not establish sovereignty; whilst if the title originally acquired was 'inchoate' it had not been turned into a definite title by an actual and durable taking of possession within a reasonable time, It could not therefore on either view prevail over the continuous and peaceful and public display of authority which the evidence satisfied him had been exercised by Holland.

In his widely quoted award M. Huber reviewing the law as to the acquisition of territorial sovereignty by discovery and occupation made the following observations germane to the present inquiry:

...If a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title -- cession, conquest, occupation, etc. -- superior to that which the other States might possibly bring forward against it. However, if the contestation is based on the fact that the other Party has actually displayed sovereignty it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical, This demonstration consists in the actual display of State activities, such as belongs only to the territorial sovereign.

So true is this, that practice, as well as doctrine, recognizes -- though under different legal formulae and with certain differences as to the conditions required -- that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title...

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions

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<sup>288</sup> P.C.I.J. Series A/B No. 53.

enclosed within territories in which sovereignty is incontestably displayed, or again regions accessible from for instance, the high seas...

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 and as yet partly unsubdued.

In the Eastern Greenland Case the claim of Norway in 1931 to certain parts of East Greenland (which were outside the settled areas) founded on alleged occupation was disputed by that of Denmark to title to the whole of Denmark by virtue of "the peaceful and continuous display of State authority over the Island." The Court held that Denmark had established a valid title to sovereignty over the whole island and not merely to those portions which it had actively Colonized. The Courts pointed out that this conclusion was based largely upon the considerations that there was an absence of any claim to sovereignty by another power, and the inaccessible character of the uncolonized parts of the country.

The Court said, in part:

Before proceeding to consider in detail the evidence submitted to the Court, it may be well to state that a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist; the intention and will to act as sovereign, and some actual exercise or display of such authority.... One of the peculiar features of the present case is that up to 1931 there was no claim by any Power other than Denmark to the sovereignty over Greenland. Indeed, up till 1921, no Power disputed the Danish claim to sovereignty.

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 severely' 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.

And, having referred to Danish legislation in 1925 relating to hunting and fishing, and the division of Greenland into provinces etc., the Court continued:

These acts, coupled with the activities of the Danish hunting expeditions which were supported by the Danish government, the increase in the number of scientific expeditions engaged in mapping

and exploring the country with the authorization and encouragement of the Government, even though the expeditions may have been organized by non-official institutions, the occasions on which the Godthaab, a vessel belonging to the State and placed at one time under the command of a naval officer, 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.”

(cf the comment of Hyde, (1933) 27 A.J.I.L. p. 732 that the judgment reveals “a readiness to accept as tests of the limits of territorial pretensions over a vast area remaining unoccupied even in the twentieth century, something other and less than actual administrative control throughout the same.”<sup>289</sup>)

#### Elements of the Rule.

1. Taking of possession by an agent of the State with the intent to acquire sovereignty. (factum et animus)
2. Actual display of sovereign authority in respect of the territory in such a continuous way and by such means as are appropriate to the character of the territory, i.e., subjection of the territory to State administration.

#### 1. (a) Possession or Annexation.

The factum consists of the actual and physical taking possession by which the occupying state puts the territory under its control. Oppenheim (p.509) maintains that this can only be done by a settlement on the occupied territory, accompanied by some formal act (a proclamation or the hoisting of a flag) which announces both the taking possession of the territory and the intention of the possessor to keep it under its Sovereignty.<sup>290</sup> There is, however, high authority for the view that such actual settlement is not essential in polar regions because of climatic conditions provided the claimant can furnish proof that possession was taken and that it is in a position to

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<sup>289</sup> For further comment on this case see Hyde, S 101A.

<sup>290</sup> As to the effect of such symbolic acts see cit. p. 149; Hyde, op. cit., S. 99.

exercise control over what it claims.<sup>291</sup>

This appears to be a necessary relaxation of the normal rule in the case of the Arctic. At all events Canada acted on this basis in relation to two islands discovered in Foxe Basin in 1948 when without attempting settlement it marked them on the map and made aerial photographs thereof.<sup>292</sup>

### 1. (b) Intent to Occupy

The animus or intention, requires an official and clear expression of the intention of the occupying Power to acquire sovereignty over the territory in question and to hold it as its own. International jurists disagree on whether or not it is necessary for the occupying state to notify other states of its acquisition. However, Oppenheim writes that “no rule of the law of nations exists which makes notification of occupation to other Powers a necessary condition of its validity” and this seems the present state of the law apart from contractual engagements to the contrary.<sup>293</sup>

Probably what is required is not express notification so much as the manifestation in official publications of the occupying State of the intent to acquire sovereignty.<sup>294</sup>

### 2. Display of State Authority - Administrative Acts

#### (a) Administrative Control - Degree

As Hall says the rule of effectiveness requires that “the possessor must establish some kind of administration thereon which shows that the territory is really governed by the now possessor” (p. 510). Thus an official administration must exercise a proper control over the territory of which possession has been taken and within a reasonable time thereafter. The administration must moreover be sufficient to maintain civil order and to provide for the organization and administration of justice in the territory in question. The maintenance of police posts, custom houses, post offices, schools and hospitals, scientific posts, wireless stations, and weather stations, are the customary form of administration in Arctic lands.

A local administration is not always required; regular official visits and patrol-vessels are other means of exercising actual jurisdiction over Arctic lands, as well as the availability of police forces for the enforcement of law and the apprehension of

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<sup>291</sup> Statement of Legal Adviser to United Kingdom Foreign Office 1946 and authorities quoted; Lindley, *Acquisition and Government of Backward Territory*, 1926, pp. 6 ff; Von der Heyde, *op. cit.*; Hyde, *op. cit.* S 104A - “Acquisition of Sovereignty over Polar Regions.”

<sup>292</sup> See F.P. Chapter 6, Appendix 5.

<sup>293</sup> Oppenheim, *op. cit.* p. 511; Hall pp. 139-40 agrees. See also the *Palmas Case* to the same effect. Smedal, *op. cit.*, p. 40, 41, 42 for a contrary view.

<sup>294</sup> E.G. see External File 9057-40 C., Part IV under date of March 4, 1948, for excerpts from public documents as to Canada’s intention in certain cases.

offenders. Similarly the exercise of administrative control may vary with such conditions as geography, climate, accessibility, distribution of population etc.<sup>295</sup>

When it is said that there must be a continuous display of authority what is meant is that such display must have continued for some period prior to the crucial date in controversy, and with whatever continuity is reasonable in view of local conditions. It is not meant that State activity must extend at all times or in relation to all area. Thus as was said in the Palmas Case “although continuous in principle, sovereignty cannot be exercised in feet at every moment on every point of Territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, etc.”

See also the importance attributed in the Eastern Greenland case to such discontinuous-acts as hunting and scientific expeditions, inspections by a government vessel, and the issuance of permits, etc.

The foregoing applies equally to the means of occupation; their effectiveness likewise must be considered relatively, in the sense of what is reasonably appropriate to the nature of the territories involved.

In terms of the degree of continuity and appropriateness of state activity it has been held that the following considerations indicate how little may be necessary in abnormal situations such as obtain in the Canadian Arctic:<sup>296</sup>

#### 1. The population:

More is required for exercising control in densely peopled areas than in territories sparsely inhabited or uninhabited. The polar regions are so sparsely populated that orderly conditions can be maintained by relatively simple measures.

It is never required of the occupying state that it be able to exclude others from the territory by force. The fact that flying columns of the military or the police may control, when necessary, remote spots, suffices to maintain order and in this way to occupy effectively a polar territory.

It will, therefore, be possible for a state to exercise effective control over a polar territory without establishing a local authority within the limits of this territory. Thus, control may be exercised, exceptionally, from a point located either in the temperate zone or in another polar territory. However, in this respect Smedal (p. 35) points out that all polar regions cannot be treated alike. If, for instance, people settle in large numbers around valuable mineral sites, more men in charge would be necessary at such places than in uninhabited regions.

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<sup>295</sup> See the Palmas and Eastern Greenland cases, *supra*. As Hyde says (p. 331) “it is the fact of control rather than the method which is the chief concern.”

<sup>296</sup> See generally 1946 statement by Foreign Office Legal Adviser; Smedal p. 33, of Hyde pp. 347, 354.

2. Means of access:

Should the occupying power control exclusively the means of access to the territory claimed, there would be little need for an elaborate occupation of the territory. This stems from the fact that foreign powers must receive permission from the claimant state to use the means of access, in order to reach the polar region. This seeking of permission is in itself a tacit recognition of the effectiveness of the control exercised by the claimant state over the polar area. Thus to a great extent Canada does control the physical means of access to the Canadian Arctic zone, which cannot be easily reached except from the Canadian main territory.

3. Nearly impassable regions:

Should the physical conditions of a polar territory be such that they make it nearly impassable, the same rule may apply: a minimum of control would then be required. The presence of mountain ranges, of perpetually frozen soil or of frequent storms in the vicinity are examples of conditions which render a territory impassable.

4. Climate:

In respect of polar regions where the climate is very severe, as in the northern part of the Canadian Arctic, it is sufficient that administrative control be exercised only when the climate or weather conditions permit travel. It is unnecessary for state authority to be asserted without interruption in all parts of the land all year round.<sup>297</sup>

5. Groups of Islands:

It is generally admitted<sup>298</sup> that it is not necessary to occupy every one of a group of islands, provided that from the occupied islands or places what is happening on all the others can be duly supervised, e.g. administrative control over several islands of the Canadian Arctic Archipelago is often exercised from distant points.

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<sup>297</sup> Eastern Greenland Case, *supra.*; and see Hyde's remark (p. 347) that "the acquisition of rights of sovereignty over polar areas is complicated by the existing inability of a claimant State, by reason of climatic conditions, to attain such a kind and degree of control over a polar region as is acknowledged to be essential for the perfecting of a right of sovereignty over an area in nonpolar regions."

<sup>298</sup> Foreign Office Memorandum, 1946, ID. 8.

## 6. Location:

It is generally agreed that regions located or enclosed within territories in which the sovereignty of a state is incontestable are subject to the same State's sovereignty.

### (b) Administrative Control - Area

The present law on this point has been stated by Brierly<sup>299</sup> as follows:

“On principle the area to which the legal effects of an occupation extend should be simply the area effectively occupied and this is a question of fact. But politically a strict adherence to this principle is impracticable; a state which has effectively occupied a certain area may reasonably intend to extend it, or it may be that the security of the area occupied would be threatened if another state should occupy adjacent unoccupied territory. Hence states have usually claimed title to an area greater than that effectively occupied, and though the claims have often been extravagant the law recognizes some extension as reasonable. Mr. Hall's statement on this matter is as definite as it can safely be made, when he says (International Law, 8th ed., p. 129) that ‘a settlement is entitled, not only to the lands actually inhabited and brought under its immediate control, but to all those which may be needed for its security, and to the territory which may fairly be considered to be attendant upon them.’”

Oppenheim (pp. 512) says “that in truth no general rule can be laid down beyond the above, that occupation reaches as far as it is effective. How far it is effective is a question in each particular case.... The fact that flying columns of the Military or the police sweep, when necessary, remote spots, the conclusion of treaties relating to the territory in question, and many other facts, can show how far around the settlements the possessor is really able to assert his established authority.”<sup>300</sup>

Reference to the Eastern Greenland Case supra<sup>301</sup> will illustrate what slight and intermittent exercises of authority from settled parts may suffice to found a conclusion that vast and remote areas have thus been brought within the limits of effective occupation.<sup>302</sup>

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<sup>299</sup> The Law of Nations, 2nd ed. p. 122.

<sup>300</sup> For references to some of the “other facts” e.g. scientific expeditions, wireless stations, etc., which tend to prove occupation see I Hackworth, Digest p. 405-6; and see the facts mentioned in the last excerpt from the Eastern Greenland award quoted supra; and generally see von der Heydte's article cited supra.

<sup>301</sup> Cf Hyde, S. 101A and at p. 340.

<sup>302</sup> “Effective occupation as generally required does not imply its extension to every nook and corner,” Von der Heydte, op. cit.

### (c) Competing Claims

It is clear law that the display of state authority required to prove effective occupation in a given case varies:

- (a) according to the strength of an adverse claimants own title (e.g. as in the Palmas Case), and
- (b) according to whether or not there is any adverse claimant.

Thus (a) in the Eastern Greenland Case the Court observed 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 title”; and (b) based its decision, in part, on the feature that up to 1931, there was no claim by any power other than Denmark to sovereignty over Greenland as a whole.

These are important considerations in the present case for, as will be discussed later, Canada’s title to sovereignty though long asserted has been called in question as to any area therein in only one instance in recent years (i.e. by Norway in 1930 re the Sverdrup Islands); and no notice of any present or impending claim has been received. On the contrary, there have been acts of recognition of her title including acquiescence in her requirement of permits for expeditions to the Canadian Arctic.

The detailed account of Canadian activities contained in the Factual Record and discussed *infra*, it is submitted, shows that Canada has fulfilled the various requirements imposed by International Law under the principle of effective control and administration, particularly as applicable to Arctic regions. Indeed, the leading authority on the subject, Smedal,<sup>303</sup> cites the handling by Canada of its Arctic territories as a good precedent of how to take effective possession of polar regions, and adds that there is no reason to deny Canadian sovereignty over the territories which Canada has in this way really brought under its control and jurisdiction.

Finally in considering the sovereignty of such a vast area as the Canadian Arctic with its scattered land units and sparse population, and the impediments which its geographical and climatic features oppose to travel and organization, regard may well be had to the observation in the Palmas Case “that in the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space ... particularly in the case of colonial territories, partly uninhabited or as yet partly subdued. Each case must be appreciated in accordance with the particular circumstances.”

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<sup>303</sup> *Op. cit.* p. 35.

## II.

### CANADIAN ADMINISTRATION OF THE ARCTIC

#### 1. In General

In this section attention is called to some of the matters relating to the origin and development of government in the Canadian North in the sense of indicating the general framework of government established therein from time to time. For this purpose reference is had chiefly to the material set out in the Factual Record, Chapter 5, entitled "Administration of the Northwest Territories 1868-1949," and Chapter 16 entitled "Administrative System 1949."

##### (a) The Assumption of Jurisdiction

By virtue of Rupert's Land Act 1869, of the surrender by the Hudson's Bay Company in 1869 of all its rights, lands, etc., in Rupert's Land in other parts of British North America known as the North-Western Territories, and of an Imperial Order-in-Council passed on June 23rd, 1870, under authority of Section 146 of the British North America Act, 1867, the vast unorganized Territory known as Rupert's Land and the North-Western Territory became part of Canada and subject to the jurisdiction of the Canadian Parliament. Later the Imperial Parliament was to clear up any doubt as to the territory so transferred and annexed to Canada, by an Order-in-Council in 1880 transferring "all British Territories and possessions in North America not already included in the Dominion of Canada and all islands adjacent thereto." It is in conformity with the foregoing that the Northwest Territories are now defined by Parliament in the North-West Territories Act,<sup>304</sup> as comprising "the territories formerly known as Rupert's Land and the North-western Territory....together with all British territories and possessions in North America and all islands adjacent thereto."

In anticipation of the consummation of the transfer of these British Territories the Canadian Parliament in 1869, and again in 1870, enacted legislation for their temporary government when so united with Canada; including provisions for the administration of justice, the continuance of existing laws and the enactment of new laws, etc. Such legislation was confirmed by the B.N.A. Act of 1871 which also authorized the Canadian Parliament (by Section 4) to make provision for the administration of any territory not for the time being included in any Province, and (by Section 2) to establish new Provinces in any such territory. It is by virtue of these latter provisions that (1) territories have been withdrawn from the Northwest Territories from time to time in the form of accretions to other Provinces, e.g. Ontario and Quebec, or of the creation of parts thereof as new Provinces as in the

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<sup>304</sup> R.S. 1927, c. 142.

case of Manitoba in 1870, and Alberta and Saskatchewan in 1905, or as the Yukon Territory in 1898; and (2) that the Government of the Territories has been, and is today, exercised by the Parliament of Canada.

Thus, however augmented by discovery and occupation or reduced by transfer or withdrawals, there has been complete continuity of governmental authority over the Northwestern Territories of Canada vested since 1869 in the Parliament of Canada.

(b) Law in Force

In particular there has been continuous provision by Parliament as to the law in force in the Territories, however constituted from time to time. Thus by the Canadian Act of 1869 the law theretofore in force - that of England as of 1670 and ordinances lawfully made by the Hudson's Bay Company under its charter - was continued; and in 1886 Canada further continued the same (subject to intervening changes by statute or ordinances), and also introduced into the Territories all Dominion statutes applicable thereto. Accordingly since 1869 the law in force in the Territories has existed by virtue of enactments of the Canadian Parliament whether made directly by it or by some authority (e.g. a Governor in Council, or a Legislative Assembly, or Commissioner) empowered by it to make derivative ordinances, etc. Similarly, whatever the form of local government might be and the extent of the administrative or law-making autonomy conceded to it from time to time, it is clear that the exclusive power to administer and to make laws for the Territories has always resided - as it resides today - in the Parliament and Government of Canada.

Apart from the application of general laws to the Territories, Canada has provided by statutes or derivative ordinances, laws of particular concern to its Arctic regions, e.g. for the preservation of game, establishing closed seasons and game preserves and sanctuaries, regulating the export of furs, etc.; and for the conservation of reindeer and the development of reindeer herds as a source of sustenance.<sup>305</sup>

(c) Continuity of Administration

It is enough to say here that by a series of enactments culminating in the present Northwest Territories Act Parliament has exercised continuous jurisdiction in relation to the administration of justice, such as the creation of courts, the apprehension and punishment of offenders, etc.; the creation and grants of powers to local units of government; the establishment of administrative districts, etc.; and that in general the Canadian Government has administered the affairs of the Territories in much the same way as they would be administered if they constituted a Province (albeit by different organs).

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<sup>305</sup> See F.R. Ch. 5, Sec. 3.

Their administration from Ottawa has taken different forms, as has the local apparatus of political institutions and administration. Thus, for example, administration by a resident Governor and his Council, and later by a Legislative Assembly (1888 to 1905) was superseded by that of a non-resident Commissioner (and an advisory Council) with power to make ordinances, etc. From 1905-1920 this Commissioner was the Comptroller of the [Royal North West Mounted Police]. Since that time the Commissioner has been the Deputy Minister of the Interior, and later - as now - the Deputy Minister of Mines and Resources with an advisory Council.<sup>306</sup>

None of these changes in the method or organs of administration is of importance; what is significant is that the Territories annexed in 1870 have been subjected continuously to the exercise of Canadian legislative, judicial, and executive power.

#### (d) Creation of District of Franklin

The Dominion has on various occasions divided the Territories into, or created, Districts for administrative purposes. In the present connection it is important to note that by the Order-in-Council made in 1897 the North-most area was established as "The District of Franklin, comprising Melville and Boothia Peninsulas, Baffin, North Devon, Ellesmere, Grant, North Somerset, Prince of Wales, Victoria, Wollaston, Prince Alberta and Banks Lands, the Parry Islands and all those lands and islands comprised between the one hundred and forty-first meridian of longitude west of Greenwich on the west and Davis Strait, Baffin Bay, Smith Sound, Kennedy Channel and Robeson Channel on the east which are not included in any other provisional districts."<sup>307</sup>

This constituted a formal step by the Canadian Government to declare the extent of Canadian territory north of the mainland to which it claimed title. If this territory is blocked off on the map of the District in its present form as it appears on Maps 1 and 5 of Appendix 4 of the Factual Record, it will be seen how largely inclusive this declaration was as regards the Arctic Archipelago as now known; and how significant it must be that this extensive assertion of Canadian title met with no contemporaneous challenge. With this may be compared Canada's assertion since 1925 of its right to require all explorers and scientists to secure a permit to travel or conduct investigations in the Canadian Arctic and the submission thereto of the nationals of many countries.<sup>308</sup>

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<sup>306</sup> See F.R. Chapter 16.

<sup>307</sup> See F.R. Appendix 4, No. 3.

<sup>308</sup> See *infra*.

## 2. Particular aspects of Administration

The assertion of Canadian jurisdiction over the whole Arctic Region since 1869; its subjection to laws made or derived from the Parliament of Canada; and the continuous administration of its affairs by the Canadian Government or other bodies exercising executive powers delegated by it were outlined above.

These evidences of Canada's continuous "display of sovereignty" in relation to the Arctic as a whole may be supplemented by mention of some of the varied activities of the Canadian Government which in their sum demonstrate that Canada's occupation thereof has been real and effective.

These governmental activities are set forth in detail in Chapters 6 to 14 of the Factual Record.

The probative value of this material (comprising over 160 pages) can only be appreciated fully by close reading and constant consultation of maps. Nor does it lend itself to easy abbreviation; for its strength lies in its very detail. For the present purpose, however, all that is needed is sufficient indication of the nature and reach of governmental activity, of the ways in which, and the physical extent to which, the hand of government has busied itself with the areas and peoples concerned. Accordingly what follows consists of references to classes of acts of government.

Chapter 6 of the Factual Record consists of the accounts of seine scores of expeditions sent into the Arctic by the Canadian Government and whose routes of travel are marked on the maps in Appendix 5 which also sets forth copies of the Documents of Possession deposited in the Archipelago by the several expeditions.

In terms of personnel these expeditions have embraced medical men, dentists, geologists, historians, geographers, naturalists, police officers, cinematographers, botanists, meteorologists, archaeologists, surveyors, entomologists and many other kinds of scientist.

In addition to discovering and/or laying formal claim to many islands<sup>309</sup> these expeditions engaged in coastal and other surveying and mapping activities; established Hudson's Bay Company and R.C.M.P. Posts; conducted criminal investigations and trials; ministered to the health of the inhabitants by preventive and curative measures; collected custom duties; and engaged in many types of scientific investigations. Moreover, these expeditions soon ceased to be sporadic or ad hoc and became annual affairs or matters of government routine. Reference to the maps in Appendix 5 will also show how very comprehensive they were in terms of areas covered and places visited.

F.R. Chapter 7 (pp. 101-56) indicates in detail the police and other activities of the R.C.M.P. in the Arctic; and in particular the annual and special patrols made since 1900 by detachments located at Chesterfield Inlet, Herschel Island, Coppermine, Pond Inlet, Craig Harbour, Aklavik, Dundas Harbour, Pangnirtung,

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<sup>309</sup> See footnote 3 supra and F.R. pp. 61-72.

Cambridge Bay, Lake Harbour, Frobisher Bay and Resolute Harbour; and also the voyages of the floating detachment, the "St. Roch," since 1928. The comprehensive territorial range of these patrols and voyages is vividly depicted on the maps in Appendix 6.

The activities of the R.C.M.P. have included the investigation of alleged violations of law, the pursuit and apprehension of alleged offenders, (e.g. F.R., p. 107); the transportation of special judicial missions sent to the Arctic to conduct criminal trials (e.g. pp. 115-6, 125); the collection of customs duties from whalers and other vessels (e.g. p. 114); the making of surveys; the giving of aid to destitute Eskimos; inquiries as to health of natives; compiling of census and other statistics; the delivery of mail; acting as Justices of the Peace (e.g. 124); constant visits to native encampments and individual Eskimos; inspection of game conditions (e.g. p. 128); establishment of post offices (e.g. p. 131); collection of game license fees; instruction of Eskimos as to game regulations etc.

The activities of the Department of Mines and Resources (and its predecessors) in the Arctic have included geographical surveys and mapping (F.R. pp. 157-61); hydrographic surveys (pp. 161-3); topographical surveys and mapping (pp. 163-4); geodetic surveys (pp. 164-5); magnetic surveys (pp. 166-7); air photography (pp. 167-8); since 1904, the compilation and publication of official maps (pp. 168-178) showing not merely territorial areas but also many other aspects of the Arctic, such as their geology, topography, forests, natural resources, game preserves, airways, hydrography, etc. (Pp. 168-178); anthropological investigations (pp. 178-82); since 1884 biological investigations (pp. 182-3) and geographical surveys (p.184); and many important sea and land trips made by officers of the Territorial Administration (pp. 190) to survey economic, health and other conditions.

These activities have not been confined to a few areas but have ranged widely throughout the whole Arctic Region (see Maps in Appendix 7).

The Department (or its predecessors) has distributed many sums of money for the relief of destitute Eskimos (F.R. p. 184) and for the aid of Mission Schools; has provided medical officers, nurses and medical supplies and services (p. 187); has supervised, the payment of Family Allowances to Eskimos; and has taken various measures for their education (pp. 192-3); has controlled the use of liquor, and the export of Air.

Moreover, since 1926 under an "Ordinance respecting Scientists and Explorers" made by the Commissioner in Council, entry into the Northwestern Territories "for scientific or exploratory purposes" has only been had under license, upon conditions requiring such persons to report the information secured, specimens taken, localities visited etc., and such provisions have been observed by the nationals of many countries, including those of countries particularly concerned in the Arctic (F.R. pp. 53-4).

Since 1893, by Statute and Ordinances, extensive provision was made for the preservation of game and the development of the reindeer industry (pp. 55-60) and

the establishment of preserves and sanctuaries (Appendix 4, Map 2).

F.R. Ch. 16 outlines some other current activities of the Northwest Administration and other government Departments and private agencies in respect of such matters as water and air transportation, radio communications, postal services, law enforcement, and the control of trading posts. The location of the settlements, police and scientific establishments, etc., and administrative agencies in the Arctic are shown on Map 2, Appendix 12; and as noted before in other connections these likewise are of wide-spread distribution throughout the Arctic Region.

Canada has required the payment of license-fees for vessels engaged in whaling in its northern waters; and has regulated the killing of walrus by Eskimos as to quantity, and has established a license system for the killing of walrus and the export of tusks by other persons "in Hudson Bay and Strait and the Canadian waters north thereof." (F.R. Ch. 9).

Canada has established and operates Weather Stations at the wide-spread locations shown on Map 1, Appendix 8; and has established and operates a radio communication system and aerial search and rescue service in the Arctic. (F.R. Ch. 11).

Canada has established post offices in the Arctic as shown on Map 1, Appendix 10.

Provision has been made for the receipt of applications for citizenship or naturalization from persons in the Arctic and their disposition by officials therein. (F.R. Ch. 13).

Canada has manifested great interest in the health of the inhabitants of its Arctic Regions by conducting investigatory patrols; by the establishment of hospitals and financial aid to mission hospitals; by the appointment of resident medical officers; by regular inoculations against disease; by an organized system for the distribution of medical supplies; and by flying patients from the Arctic to outside centres for treatment when necessary. (F.R. Ch. 14).

III.

### THE CONCLUSION

As indicated in section I hereof the general principle of International Law is that title may be acquired by a country which takes possession of unoccupied territory and manifests sovereignty over it by subjecting it to actual State Administration by means and to a degree appropriate to the character of the Territory; that it is not necessary that the display of authority extend into every place in that Territory if the fair inference is that the occupying power has assumed administration of the territory as a whole; and finally, that the title claimed by occupation depends largely upon whether there is a competing claimant and, if so, the strength of his adverse claim.

Moreover, it has appeared that relatively little will suffice to establish title by occupation in the case of Arctic regions because of the agreed necessity of moderating the rigor of the general principle in view of such elements as remoteness, geography, climate, population, etc.

Canada fell heir to the rights of France and Great Britain and began providing for the administration of the Canadian Arctic in the [1860s]; and by statutes, orders in council, and ordinances has continuously and progressively asserted its administrative authority over the whole of the Arctic Regions, as it has likewise since 1904 by the publication of many official maps depicting its limits.<sup>310</sup> Apart from this assumption and continued assertion of Canadian sovereignty, Canada has reduced the region into possession by supplying for it a complete frame work of laws, and of law-making and law-enforcing organs, and of executive authority; and has engaged progressively in detailed acts of administration, i.e., “the actual display of State activities such as belongs only to the territorial sovereign.”<sup>311</sup>

The acts of administration outlined in the section above are so numerous and so varied and so wide-flung that, it is submitted, they would satisfy the requirements of the law in its most absolute terms if that were required. A fortiori they amount to effective occupation in the terms of the law relative to Arctic Regions. For relatively to the physical and climatic conditions which obtain in those regions they provide a convincing demonstration that Canada has occupied them in as effective a manner as could possibly be accomplished. The record shows not mere declarations or symbolic acts of possession or sporadic expeditions or occasional visits of government officials or locally circumscribed displays of activity such as have sufficed in other cases: but rather the complete incorporation of the whole region into the realm of Canadian law and administration, and the gradual and systematic penetration of the arm of Canadian Government into all the component parts of the region, and the extension to the inhabitants of the normal benefits of Canadian citizenship, and numerous provisions for their special needs.

To these considerations may be added the absence of challenge of Canada’s title by other countries, their submission to Canadian legislation requiring travel and exploration permits, and other evidences of tacit recognition mentioned in a later Chapter.

Accordingly the conclusion appears inevitable that Canada has made so many displays of sovereignty, in so many respects, in so many places, for so long a period, and with so little challenge, as to establish its title to the whole of the Canadian Arctic region by effective occupation in conformity with international law.

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<sup>310</sup> F.R. pp. 168-78.

<sup>311</sup> Palmas Case supra.

Chapter 4  
Title by the Sector Principle.

This alleged principle may be mentioned here because it has special reference to polar regions. "Nations asserting sovereignty in Arctic and Antarctic regions by reference to the sector principle claim territories defined by the coast line and the meridians drawn from extreme points of that line."<sup>312</sup> As applied to the Arctic the principle means that States bordering on the Arctic have a valid claim to all land-territories which are bounded by their northern coasts and lines projected from the extreme east and western limits thereof to the North Pole. The principle is restricted apparently in that it applies only to land-areas; but is inclusive in the sense that it applies to all such areas whether presently known or unknown and without regard to whether or not they have been "occupied."<sup>313</sup>

Under this principle, Canadian sovereignty would extend to all areas to the north of Canada in a sector subtended from the North Pole. This sector, having the form of a triangle pointed on the North Pole, is demarcated by the 141° west longitude to the west, by the Arctic Circle or possibly by the coastline of the Canadian mainland to the south, and by the 60° west longitude to the east, with the exception of the portion of Greenland to the west of 60° west longitude.

It will be seen that so far as Canada is concerned this involves a claim to precisely the region which can be claimed successfully by right of effective occupation.

It is a weaker source of title than occupation as it concerns the Arctic at least; for it rests upon relatively few instances in which it has been asserted. Smedal (p.64) says "it is not a legal principle having title in the law of nations" and as he points out this is partly admitted by those who uphold it; for "States that claim sovereignty in sector areas nevertheless attempt to take charge of lands lying in these areas by effective operation." Thus Hyde (p.350) remarks that though Canada is understood to approve of the Sector principle "it appears to deem it necessary to fortify its position by other processes, and to endeavour in fact to exert a degree of administrative control over adjacent polar areas which it claims as its own." The only considerable reason assigned for such a principle is the assertion that an effective appropriation cannot be made in the polar regions. But, as Smedal notes, that is not true in fact; for effective appropriation has been performed at various places in the Arctic and indeed Canada's record in this regard (Chapter 3 supra) is proof of this. There are grave objections in terms of principle to this doctrine, which as Hyde (p.349) says "is primarily a method of measuring the geographical extent of a claim regardless of its

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<sup>312</sup> Oppenheim p. 508 (n).

<sup>313</sup> See Smedal, op. cit. pp. 54-76 for a discussion of this principle and the instances in which it has been asserted as a basis of title, See also 1 Hackworth pp. 461-5; also of. several Departmental memoranda on External file 9057-40C, such as the memorandum dated 4 March, 1948, page 2, and discussion in Hyde pp. 349 et seq; and McKitterick in (1939) 21 J.C.L. 89.

legal value. The use of it marks indifference as to the nature of the surface of the area concerned - whether it be land, or ice or water and reveals, moreover, indifference whether through symbolic or other acts committed within that area there has been any appropriate assertion of dominion. It purports to reserve from the application of commonly accepted principles of international law, special areas deemed to possess a unique or convenient geographical relationship with the claimant State.” There is point in McKitterick’s observation that “the sector theory is the last survivor of the old ‘hinterland’ principle as applied to continents, and appears to have no stronger basis in international law than that now discarded theory.”

In the case of Canada reliance on this principle so-called, could be necessary only in two cases: (1) as regards land within the claimed territorial limits not yet discovered, and (2) lands therein so remote from settled areas as might be argued are outside the ambit of our effective occupation.

It seems reasonably clear, however, that Canada’s title to both types can be rested successfully on the basis of our occupation of the Arctic region as a whole (Chapter 3 supra) or as included in a region to which our title has been established by Recognition. (Chapter 6 infra).

Moreover it is impossible to predict what exact form this principle will assume if it should become established, nor to what qualifications it may become subject, nor how far its application to Arctic regions may be affected by the outcome of its assertion in relation to the Antarctic.

Accordingly it seems enough for present purposes to note what attitudes have so far been taken by States interested in the Arctic to what at the moment is but a pseudo-principle.

#### 1. Canada:

Canada has never claimed a sector by any direct declaration. The Canadian claim has been made indirectly in different ways and on several occasions of which these are a few examples:

- (a) The interpretation which the Canadian Government gave to the Order-in-Council of July 31st, 1880, annexing to Canada “all British territories or possessions in North America not already included with the Dominion of Canada and all islands adjacent to any such territories or possessions.”<sup>314</sup>
- (b) On the occasion of the official Canadian expedition led by Captain Bernier in 1908-09.<sup>315</sup>
- (c) The Canadian Note to Denmark in 1921 refusing to recognize any discoveries

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<sup>314</sup> Quoted in Departmental memorandum of 4th March, 1948, and in Foreign Office memorandum of 1930 on p. 2.

<sup>315</sup> Departmental memorandum of 2 February, 1946, on External File 9057-400, Part III ; but semble this was a claim based on annexation not on the Sector Principle - see Appendix 5.

Rasmussen might make.<sup>316</sup>

- (d) [William Lyon Mackenzie] King, after having stated in the House of Commons on May 12, 1922, that Wrangel Island which is located north of Siberia was part of Canadian territory, later found it desirable not to press the claim on behalf of Canada in order to avoid similar claims in the Canadian Sector.<sup>317</sup>
- (e) The publication in 1923 by the Canadian Department of the Interior of a map of the Northwest Territories showing all areas north of Canada as Canadian territory; and that of subsequent maps listed in P.R. 172-187.
- (f) The adoption in 1925 of an amendment to the Northwest Territories Act enabling the Commissioner in Council to make ordinances for the issuance of permits to Scientists and explorers to enter the Northwest Territories and the accompanying declarations of Mr. Stewart Minister of the Interior in Parliament that Canada claimed as Canadian all territory “right up to the North Pole.”<sup>318</sup>

Some arguments in favour of the Canadian Sector claim may be found in the Treaty between Russia and Great Britain of 1825<sup>319</sup> and in a United States Note of 1896.<sup>320</sup> In referring to the boundary line between Canada and Alaska, the Treaty of 1825 said that the Meridian 141° West shall be the boundary line “right up to the Arctic” (*jusqu’à la mer glaciale*). If the term was understood to mean that a division of the Arctic regions was made by the Treaty (and it seems that this was not the case) the division was a matter between Great Britain and Russia which foreign states are not bound to respect if they have not consented to it.

The Note of United States Secretary of State Mr. Blain of December 17, 1896, to the United Kingdom Government concerning the Behring Sea Controversy suggested that “the simplest division of that territory is to accept the prolongation of the 141° of longitude to the Arctic Ocean, as the boundary. East of it, the territory shall be British, West of it the territory shall be Russian.”

## 2. United Kingdom:

The United Kingdom has claimed the Sector Principle by official declarations in 1917, 1923, and in 1925. These declarations were related to the Falkland Sector and to the Ross Sector.<sup>321</sup>

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<sup>316</sup> Idem; and Foreign Office memo of 1930, p. 6; various dept’s memoranda on External file 9057-400 (all parts).

<sup>317</sup> Foreign Office Memo of 1930, p. 3.

<sup>318</sup> External Memo 1930 p. 3; 1 Hackworth p. 463.

<sup>319</sup> Smedal, op.cit. p. 66 and 67; Foreign Office memo of 1930, p. 1, 2 and 5.

<sup>320</sup> Foreign Office memo of 1930, p. 1 and 5.

<sup>321</sup> Foreign Office Memo, 1930, p. 4; Smedal op.cit. p. 55, 58, 59, 60, 75 and 76.

In 1916 the United Kingdom tacitly accepted a Russian Claim to some islands located north of the Taimyr Peninsula in Siberia on the ground of geographical continuity.<sup>322</sup>

The United Kingdom had admitted the claim by Denmark on September 6, 1920, to the whole of Greenland in an Exchange of Notes. Moreover it was decided at the Imperial Conferences of 1926 and 1930 tacitly to recognize the Soviet Sector.<sup>323</sup>

### 3. Soviet Union:

Since the 19th Century, the Russians have never made any secret of their view that all islands discovered to the north of Siberia must be regarded as Russian. By a Decree of April 15, 1926, and communicated to other powers the Soviet Union recognized officially the Sector Principle as far as it is concerned, in claiming as Soviet territory "all lands and islands discovered or which may be discovered" lying in its northern Sector.<sup>324</sup>

It appears that Russia could not reasonably object to the assertion by Canada of the Sector Principle.

### 4. United States of America:

The United States Government is obliged, according to a Foreign Office Memorandum of 1930, to recognize the Sector Principle at least in part by the terms of the Alaska Treaty of 1867. But it has never committed itself to a definite pronouncement on the lines of the Soviet Decree; the United States never claimed a Sector (presumably because this would not give them any advantage, no land having yet been discovered between Alaska and the North Pole). This attitude has been confirmed by various official statements made by American authorities. By the Treaty of January 17, 1917, however, the United States admitted Danish sovereignty over the whole of Greenland.<sup>325</sup>

There has never been any American claim to Canadian islands on the basis of American discoveries. Occupation has been generally put forward by the United States as the basis for sovereignty in polar regions. However, the United States Government has recently proposed that the Antarctic continent should be

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<sup>322</sup> Foreign Office memo of 1930, p. 2.

<sup>323</sup> *Idem*, pp. 4 and 6.

<sup>324</sup> An argument favouring the Russian Sector may be found in the United States-Russia Treaty of 1867, a clause of which delimited the boundary in the Behring Strait in such a way that it could have meant that the two States on this occasion divided Arctic regions between them. This doubtful division would only bind upon the parties themselves. As far as Norway is concerned, Smedal (p. 59) wrote in 1931 that despite the Decree it continues to consider that it has some rights over Franz Josef Land.

<sup>325</sup> As to the Sector Principle and the U.S.A. see Hyde, p. 349 ff.

internationalized.<sup>326</sup> This certainly means that it does not consider the Sector Principle as acceptable. The United States proposal has been rejected by Argentina, Chile and apparently by Norway, Canada having decided to abstain from taking any position.

#### 5. Denmark:

The Danish Government had not up to 1930 specifically declared its adherence to the Sector Principle. But it is more or less committed to it in practice since it claims all Greenland on the ground of the essential unity of the whole region. This claim was admitted in 1917 in the Treaty by which the United States acquired the Virgin Islands from Denmark and by the United Kingdom in 1920.<sup>327</sup>

Denmark cannot, therefore, logically resist the corresponding claim of the Canadian Government to the whole of the Canadian Archipelago.

In 1925, Denmark recognized tacitly Canada's jurisdiction over Ellesmere Island by granting permission to land in Greenland supplies for the Canadian police posts on Ellesmere Island.<sup>328</sup> It may, therefore, be assumed that in practice the Danish Government will not contest the Sector Principle in its application to the Canadian Sector, especially as the Danish Government is in need of foreign support for its claim to sovereignty over all Greenland.

#### 6. Norway:

Norway never has claimed a sector, In the course of an Exchange of Notes with Canada in 1930, settling its claim to the Sverdrup Islands, Norway stated expressly that while formally recognizing Canadian sovereignty over these Islands, such recognition was in "no way based on any sanction whatever of what is named the Sector Principle."<sup>329</sup>

The Norwegian Royal Proclamation in 1940, declaring to be under Norwegian sovereignty the part of the mainland coast of the Antarctic between the limits of the Falkland Islands dependencies and the Australian Antarctic dependency, is another indication that Norway does not and cannot accept the Sector Principle as a basis to sovereignty in polar regions.

Smedal is of the opinion that the rule that No-Man's land must be acquired by occupation, in polar regions as elsewhere, cannot be dispensed with, for it cannot be replaced by any other rule, and that "there can be no doubt that states are unwilling to renounce in the polar regions the rule of occupation in favour of the Sector Principle." The action taken in the past by all states interested in Arctic and Antarctic

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<sup>326</sup> Cf. External files re Antarctic problems; also A.P. communique dated 23rd November, 1948 (on External file 9057-40C, Part IV.

<sup>327</sup> Foreign Office Memo (1930) pp. 5 -6.

<sup>328</sup> *Idem*, p. 6,

<sup>329</sup> Exchange of Notes re the recognition by Norway of the sovereignty of Canada over Sverdrup Islands, C.T.S. 1930, No. 17. See 1 Hackworth p. 465; (1933) 27 A.J.I.L. 93.

activities is illustrative of this attitude. The recent American proposal that the Antarctic continent be internationalized is evidence of this.

Conclusion:

It is, therefore, questionable whether the Sector Principle, although propounded to some extent by Canadian statesmen and incorporated in the domestic law of the USSR, constitutes an argument which it would be wise for Canada to urge in support of its claim to sovereignty in the Arctic. Not only has the Sector Principle a weak foundation under International Law, but the United States would probably find it impossible to accept an argument based on the Sector Principle in the Arctic, as it is opposed to the application of the Sector Principle in the Antarctic.

Accordingly, it should be used, if at all, only where our claim to important areas in the Arctic may be regarded as not yet encompassed by the march towards the demonstrable effectiveness of our occupation of the whole region.

Meanwhile it may be noted that the limits of the region which might be covered by an assertion of title by the Sector Principle are the same as those which may be claimed under the doctrine of Effective Occupation.<sup>330</sup>

## Chapter 5

### Title by Prescription

“Prescription as a title to territory in international law is so vague that some writers deny its recognition altogether. Certainly no rules exist as to the length of possession necessary to create a title; but ... the law in the interests of general international order must recognize facts; it must and does accept the long-continued definitive possession of territory as a good root of title, without regard to its origin, as municipal law does by statutes of limitation.”<sup>331</sup>

“There can be no doubt that long-continued possession of territory gives a good title to it when no other ground can be clearly shown, and even in cases where possession was originally acquired by illegal and wrongful acts.”<sup>332</sup>

The majority view, shared by Oppenheim, is that “undisturbed continuous possession can under certain conditions produce a title for the possessor, if the possession has lasted for some length of time. This opinion, would indeed seem to be correct, because it recognizes theoretically what actually goes on in practice.”<sup>333</sup>

Proscription is recognized by the law of nations, both where the state is in a bona fide possession and where it is not. The basis of prescription in International Law is the general recognition of an established fact on the part of the members of the family of nations.

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<sup>330</sup> See Order in Council ff 1898 describing the District of Franklin (F.R. Appendix 4, No. 3).

<sup>331</sup> Brierly, *Law of Nations*, 2nd Edition, p. 126.

<sup>332</sup> Lawrence, *International Law*, 1928, p. 160.

<sup>333</sup> Oppenheim, *op.cit.*, p. 526.

Oppenheim defines prescription as “the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such period as is necessary to create, under the influence of historical developments, the general conviction that the present condition of things is in conformity with International order.” The rational basis for prescription in International Law is the same as in municipal law namely, the creation of stability of order.<sup>334</sup>

There exist no general rules on the length of time and other circumstances necessary to create a title by prescription. And Oppenheim (p.527) adds that as long as other Powers keep up protests and claims, the actual exercise of sovereignty is not undisturbed, nor is there the required general conviction that the present condition of things is in conformity with international order. But after such protests and claims, if any, cease to be repeated, the actual possession ceases to be disturbed, and sovereignty may become clearly established.

The question of at what time and in what circumstances a title arises by prescription is essentially one of fact. Historical and political circumstances and influences are always at work to create the general conviction that the condition is in conformity with international order. Since they differ from one case to the other, the lapse of time necessary for prescription will likewise differ.

Applying these principles to the Canadian problem, it would seem that Canada has fulfilled all the requirements imposed by International Law and practice. Indeed, Canada has for many years exercised sovereignty over the Arctic Archipelago, as far as the discovered islands are concerned, in a continuous and undisturbed manner. (See Chapter 3 supra). On the other hand, no foreign states have opposed the Canadian claim for years; the last dispute, in 1930, related to the Sverdrup Islands and has been settled satisfactorily, Norway relinquishing its claim in the course of an Exchange of Notes.<sup>335</sup> Apart from the Sverdrup case, the last dispute or disagreement concerning our sovereignty in the Arctic occurred in 1920.<sup>336</sup> In that year, Canada protested to Denmark against the killing of musk-ox on Ellesmere Island by Greenland natives. The Danish Government replied that it considered this island as a No-man’s land but did not repeat this claim after Great Britain recognized Danish sovereignty over Greenland in September, 1920. In 1921, the Canadian Government informed the Government of Denmark that, should the Rasmussen expedition discover islands and lands in the sector between Canada and the North Pole, these would be regarded as under Canadian sovereignty.<sup>337</sup>

In view of these circumstances and of the absence for many years of official claims opposing Canada’s claim, it seems probable that, should a conflict concerning the Canadian Arctic arise it would be decided that Canada has fulfilled the requirements

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<sup>334</sup> Hill, op. cit., p. 156.

<sup>335</sup> C.T.S. 1930, No. 17.

<sup>336</sup> Cf. External File 9057 - 40C.

<sup>337</sup> Smedal, op. cit. p. 65.

imposed by International Law concerning the undisturbed length of time necessary for prescription.

The last element required for prescription by Canada would be “the general conviction that the present condition is in conformity with international order.” This conviction should be easy to establish since it stems from what has just been said as regards the absence of foreign claims, and what follows in Chapter 6.

Conclusion:

It seems unnecessary to rest Canada’s title on this principle of vague application; since it is not required to validate claims in their inception invalids and since that title can be based more surely on positive Occupation (Chapter 3) and tacit Recognition (Chapter 6 *infra*). Moreover the applicability of this principle to the Canadian Arctic may lead to the grave objection that prescription “is applicable only when a right of sovereignty is already in existence (for) prescription is not a mode by which rights of property and control come into being, and therefore no instance of it is forthcoming when dominion is asserted over an area to be regarded at the time as *res nullius*.”<sup>338</sup>

Chapter 6  
Recognition of Canada’s Title

A title defective under the preceding rules may be validated by express recognition of other nations which amounting to a waiver of claims conflicting with the right so recognized.<sup>339</sup> No such express recognition has been accorded the Canadian title as a whole; for it was not acquired by violation of international law and the few disputes relating to Canadian sovereignty have been amicably settled.

Nevertheless there have been various acts by the nations immediately concerned which amount to a tacit recognition of Canada’s long-asserted title to the whole of the Canadian Arctic region. These instances (unnecessary though they be) may be regarded (1) as establishing the general conviction that her claim is in conformity with law within the meaning of the doctrine of Prescription; and (2) as confirming the title claimed on the basis of Effective Occupation.

The extent of the Canadian claim based on recognition may be considered under two heads: (A) General and (B) by states especially interested in the Arctic.

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<sup>338</sup> Hyde, 2nd ed. p. 386.

<sup>339</sup> Oppenheim, pp. 136-7.

## A – General

### 1. The absence of any official claims for several years.

As already mentioned, there does not exist at the present time, any claim on the part of foreign states to Canadian-held Arctic territories, and the last disputes were settled a long time ago.

This is to be considered in light of the fact that Canada's title was asserted in 1869 and the limits of the Arctic Archipelago were definitely stated in an Order in Council in 1897 defining the provisional district of Franklin; and in successive enactments of what is now the Northwest Territories Act<sup>340</sup>; and that since 1926 Canada has imposed a licensing system upon visitors to its Arctic regions and that nationals of many nations have submitted thereto without official protest on their behalf.

### 2. Universal Recognition through Maps:

Maps published in all countries over the world for many years have indicated as Canadian territory the various islands of the Canadian Arctic Archipelago. There does not exist, at the present time, any exception to this general action, according to the information available here.

Should some foreign power in which maps are published have objections to the indication of the Arctic regions as Canadian, no doubt the Governments of these powers would impede the publication of these maps; this has never taken place to our knowledge. Cartography supports the Canadian position.<sup>341</sup>

### 3. General opinion, newspaper articles, etc:

All over the world, in school manuals, newspaper articles, press communiques, at international conferences and meetings, every time there is need to refer to the Canadian Arctic Archipelago, it is done without implying any doubt as to the Canadian sovereignty notwithstanding the growing interest in the Arctic regions in view of their strategic importance.

## B - States especially interested in the Arctic.

Foreign states, that are primarily interested in the Arctic, have recognized our position as follows:

### 1. Denmark:

The Danish Government remained silent following the Canadian protest in 1920 against the killing of Musk-ox by Greenland natives.

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<sup>340</sup> R.S.C. 1927, a. 142, S. 2 (k).

<sup>341</sup> As to the extensive publication of official Canadian Maps see F.R. 168-78.

In 1921, it did not object to the notification by Canada that lands to be discovered by the Rasmussen Expedition were to be considered Canadian.

In 1925, Denmark recognized, tacitly, Canadian jurisdiction over Ellesmere Island by permitting to land in Greenland supplies for the Canadian police posts at Ellesmere Island. For several years, Denmark has always granted permission to Canadian expeditions, navigators, and explorers who wished to land in Greenland ports while en route to the northern regions of Canada.

Finally, for the reasons already mentioned, future claims by Denmark to Canadian territory are most unlikely.

## 2. Norway:

The only possible ground of dispute with Norway as to Canadian sovereignty in the whole Canadian Arctic region was removed by the Norwegian Government's express recognition in 1930 of the Canadian title to the Sverdrup Islands. There has not been since any indication of a possible controversy with Norway. The possibility of such a new controversy is, at the present time, as remote as it can be, in view, among other motives, of the present position of Norway in the Arctic in relation to Russia, especially as regards Spitzbergen.

## 3. Russia:

Russia is the only country that has officially recognized the Sector Principle. Indeed it has made it part of its domestic law by a decree in 1926. Russia based its decree more particularly on the theory of geographical contiguity,

In view of Russia's attitude with regard to its own Arctic Sector it could not and cannot, with any show of logic, oppose the application of the Sector Principle elsewhere in the Arctic regions.

Actually, Russia has never shown any such opposition. On the contrary, Soviet writers such as Lakhtine and Sabanine have proposed in official Russian publications, that definite juridical rights in the Arctic regions be established on the basis of the Sector Principle.<sup>342</sup>

Finally, when, in 1945, a Russian flying expedition wished to fly across Canada via the north pole to California, and later, prior to the loss of other Russian flyers, while on route also to California, the Russian Government applied in the two cases to the Canadian Government for permission, which should be considered as formal recognition of our rights in this region

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<sup>342</sup> "The Title to the Arctic Polar Territories" 1928, referred to several times in Smedal; "The Right to the Northern Polar Regions" 1928, published in Moscow by the People's Commissariat for Foreign Affairs, referred to in Foreign Office memo of 1930, p. 5; also consult "Rights over the Arctic" by VT. Laktine, 24 American Journal of International Law, p. 703-717, (several references are made to Soviet publications including those of Professor A.W. Sabanine. This article is of special importance, for being written necessarily with official approval it summarises the Soviet point of view).

#### 4. The U.S.A.:

The U.S. Government has, at least tacitly, recognized Canadian Sovereignty over the Canadian Arctic, on several occasions and in various manners, of which these are some examples:

- (a) There is not now and there has never been any official claim to Canadian territory in the Arctic on the part of the U.S. Government.
- (b) Between 1940 and 1945, four Arctic manuals were published by or with the consent of the U.S. War Department<sup>343</sup>; and in each of them the Islands north of the mainland of Canada are referred to as the Canadian Arctic Archipelago. One of the manuals even contains the following statement: "In the American and Canadian Sectors of the Arctic Ocean, tidal ranges are generally slight."<sup>344</sup>
- (c) Additional arguments supporting Canada's claim may be extracted from files of the Permanent Joint Board of Defence, e.g., the U.S. request for the Canadian Government's permission to install weather and emergency stations on Baffin Island.<sup>345</sup> The various agreements concluded with the U.S.A. through the P.J.B.D. also refer to the Canadian Arctic Islands as Canadian territory. No reservations have been made by the U.S. Government on this subject. On the contrary, the Canadian Government always takes care to safeguard Canadian sovereignty over the referred regions.
- (d) In a U.S. Navy confidential document entitled "Annex I to Commander Task Force 80-Operation Plan No. 1-48 Intelligence Plan," may be found the following statement: "Canada's claim of sovereignty over the lands in this archipelago is based on the sector principle. This Canadian sovereignty has been recognized as far as lands already discovered are concerned."<sup>346</sup>
- (e) The Department of State Bulletin of October 10, 1948, published a communique released jointly with Canada to the press of both countries, which contained several references to the Canadian Arctic Regions, more particularly to the northernmost areas. In each instance, the references were made in such terms as "Canadian Arctic Waters" ... "this area in the extreme north of Canada."

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<sup>343</sup> External File 9057-40C, Part III.

<sup>344</sup> External Memo, Feb. 2, 1946, p. 5.

<sup>345</sup> *Idem*.

<sup>346</sup> External File 9057-40C, Part IV.

## CONCLUSION

The ultimate conclusion of this study is that Canada's title to the Canadian Arctic regions as a whole may safely be asserted on the basis of Effective Occupation (and the support which it derives from Discovery [aided by symbolic acts of possession] in general, and as to any particular area therein allegedly not reduced into effective possession); and upon the Tacit Recognition by the nations concerned and their acquiescence in Canada's long continued and oft-repeated claim of title; and (to the extent that it may be valid in relation to the Arctic) upon the so-called Sector Principle; and may be asserted, with less confidence, upon the doctrine of Prescription.

In sum, however, it appears that considerations of policy should lead to the maintenance of Canada's title upon the ground of Effective Occupation alone as the chief and most satisfactory ground of reliance, to which the other doctrines discussed are merely supplementary.

(sgd) *Vincent C. MacDonald*  
Vincent C. MacDonald, K.C.

## 32. Department of State, Policy Statement: Polar Regions, 1 July 1951

NARA, RG 59, CDF 1950-54, Box 3066, File 702.022/7-151

### I. ARCTIC REGION

#### *U.S. Interest*

Aside from our immediate interest in the Arctic, resulting from possession of Alaska, the U.S. is deeply concerned with the strategic significance of the lands surrounding the Arctic basin, in part at least because of the proximity of Canada, Greenland, and Iceland along Arctic or sub-Arctic invasion routes from the Soviet Union. It is vital to the safety of the United States and the Western Hemisphere that international planning for Arctic defense continue. Planning for Arctic defense as part of the defense of the U.S., and in accordance with existing treaty obligations, should therefore be pursued in conjunction with other interested nations and through international organizations as appropriate. In many cases the NATO affords an excellent framework within which to deal with defense requirements.

U.S. interest in the Arctic goes beyond considerations of defense, however. Even in normal times, the areas where the great circle routes cross the Arctic and sub-Arctic between the great Northern Hemisphere population centers are important to air and sea travel and radio communications. Magnetic and ionospheric data from the Arctic are needed in connection with these and other communications. Weather information from a network of stations within the area is essential for purposes of commercial and military aviation and shipping, as well as for weather forecasting in the Temperate Zone. Radio navigation systems in the area provide added safety for air and sea travel. In some Arctic localities, in addition to Alaska, exploitation of minerals may have some significance.

#### *Policy Objectives*

U.S. policy in the Arctic aims (1) to safeguard our strategic interests in the area (2) to facilitate the establishment and maintenance in the area of installations required for commercial transportation, communications and weather services, and (3) to avoid, so far as possible, any action tending to support the so-called "sector principle" in the Arctic.

#### *Problems*

The United States seeks to maintain adequate base and communications facilities in the Arctic area to complement facilities established on U.S. territory. In cooperation with other countries, particularly Denmark, Iceland and Canada, it seeks to maintain and improve the network of Arctic weather and communications facilities. Specific problems in United States relations with each area bordering the Arctic are discussed in the appropriate country policy statements (Canada, Iceland,

Denmark, Norway, USSR). These statements should also be consulted for policy evaluations concerning Arctic problems.

### *Background*

The purchase of Alaska in 1867, and the activities of U.S. citizens who carried on explorations and made new discoveries in the Arctic region, gave the United States a prominent place in the development of the area. This U.S. position has never been used to assert formal claim to any of the new territories explored or discovered. On the other hand, the U.S. Government does not recognize the sector claims of the Soviet Union and Canada in the areas north of their accepted territorial limits.

The Soviet sector claim was announced in a Soviet decree of April 15, 1926. The Soviet Union had earlier (in a telegram of November 12, 1924 to Secretary Hughes) complained of U.S. and other violations of Soviet territory in the region of the northern coast of Siberia. It was alleged that the United States, in the Convention of 1867 by which Russia ceded Alaska to the United States, forfeited any rights to claim territory west of the Treaty boundary dividing Russian and Alaskan territory. On this question the Department has taken the position that the Treaty boundary merely marked the territory ceded to the U.S. which was "then possessed" by Russia and in no way restricted the U.S. from participation in further exploration and discoveries west of that boundary.

The U.S. has not recognized Canadian claims based on sector delimitation alone. However, we have not been inclined to challenge Canadian claims to jurisdiction over those areas which the Canadian Government is exercising control. Thus, we have not challenged Canadian control over certain islands, in connection with the Joint Canadian-U.S. Weather Station Program.

Interest and activity by both the Canadian and Soviet Government within their respective Arctic sectors have increased significantly in recent years. This would place them in a strong position, in the event rival claims were advanced, to support their claims to superior title by concrete evidence of acts of possession and control exercised without challenge over a considerable period. An international court might therefore uphold the validity of their claims to certain areas, even without reference to the so-called "sector principle."

The question of title to lands which might be discovered within the claimed sectors in the future is an entirely different matter. Our main objection to application of the sector principle in the Arctic results from the implication that claims can be defined in terms of areas which may include land not yet discovered, much less occupied, by the claimant countries. Thus, we would not acquiesce in a claim to lands merely on the basis of the sector principle. Nor could the Arctic seas, in our view, be made subject to "territorial" sovereignty of any state even though they might contain ice areas having some characteristics of land. The United States position is that the Arctic seas and the air spaces above them, insofar as they are outside of accepted territorial limits, are open to commerce and navigation in the same degree as other open seas...

### 33. K.J. Burbridge, Legal Division to Acting Undersecretary, External Affairs, 23 February 1954

LAC, RG 25, file 9057-40, pt. 4.

#### Queen Elizabeth Islands: Notification to Foreign Missions in Ottawa

You asked for my comments on the attached memorandum of February 15, addressed to you by American Division. After reconsidering this whole matter, I strongly recommend that no notes be sent to specific missions in Ottawa which might have some interest in the Arctic. Neither do I recommend the alternative of sending a circular note to all foreign missions in Ottawa.

2. These recommendations are based on the following considerations:

a) Canada's claim to sovereignty over this entire group of islands has been repeatedly and I think adequately asserted on many occasions over the past fifty years. Our intention and will to act as sovereign in this area, therefore, requires no demonstration along the lines now proposed; what is needed is the continuance of our effective and peaceful display of actual Canadian authority over this area.

b) There does not seem to be any particular reason to select the naming of the Queen Elizabeth Islands as a matter for formal announcement to foreign governments. The naming of the Islands, in itself, is evidence of the exercise of state authority by Canada. The public announcement in Parliament by the responsible Minister and the wide press coverage constitutes, in our view, ample notice to other governments and the world at large. Relatively speaking, this type of action is less significant in asserting sovereignty than effective occupation and control such as the establishment of government posts and the fact that foreign nationals are not to visit this area except with our explicit leave and permission.

c) It seems most unlikely that the proposed notification would produce a reply which could be considered as a formal admission of Canadian sovereignty over this area. I don't think it would add anything to the announcement already publicized. On the other hand, such action might unnecessarily expose the government to the danger of provoking replies which might express doubt or even contest our right to name such islands or exercise sovereignty over them. In other words, upon receiving such a Note a government, particularly one that has an interest in the Arctic, might feel obliged, as a precautionary measure, to protest lest this action on our part might in some indirect way infringe on their rights in this general area. Such a reply would, of course, prejudice foreign recognition of our sovereignty over the area.

d) Blacked Out

e) In order to establish our unquestioned sovereignty over this area, it is not necessary to solicit formal admissions of our sovereignty from other governments. In fact, such solicitation carries an implication that we may have some doubts regarding our sovereignty in the absence of formal recognition by foreign states. Since our intention has already been sufficiently demonstrated, Canadian sovereignty over Arctic areas only remains to be perfected by the continuous and actual exercise of state activity in this region. In time, this will be sufficient to confer an absolute title in international law.

f) From our point of view, it would seem to be desirable and advisable to rely on this peaceful and effective method of perfecting our claim to sovereignty over the whole of our Arctic region and avoiding any possibility of provoking communications from foreign governments which might deliberately refuse, for reason which might not be clearly known to them, to recognize our formal claim to sovereignty over the whole or part of this region. I don't think it should be overlooked that our display of authority up to the present has been peaceful. We claim title by occupation and not necessarily by prescription. We could not, of course, accept any denial of our sovereignty in this area, but it would seem to be unwise on our part to assert such a denial or register a reservation with respect to our claim.

3. You may wish to have further word about this with the Minister on his return.

### 34. External Affairs, The Sector Theory and Floating Ice Islands in the Arctic, 30 August 1954

LAC, RG 25, vol. 4253, file 9057-40, pt. 4FP

#### THE SECTOR THEORY AND FLOATING ICE ISLANDS IN THE ARCTIC

This memorandum is an examination of the legal validity of the sector principle in present day international law with particular reference to the question of floating ice islands. The essential problem is whether Canada is entitled to exercise jurisdiction over such islands, as and when required, from the mere fact of their presence in the Canadian Sector of the Arctic.

#### THE SECTOR THEORY

The origin of the sector principle can be traced back to the Anglo-Russian Convention of February 28, 1825, defining the boundary between Canada and Alaska, which provided that the line of demarcation between the territories of the contracting parties should be the meridian line 141° West “dans son prolongement jusqu'à la Mer Glaciale.” This definition could be interpreted as referring only to the land boundary. However, when Russia ceded Alaska to the United States in 1867 the treaty stated that the western limit of the territory “passes through a point in Behring Strait on the parallel of 60°31 North Longitude ... and proceeds due north, without limitation, into the Frozen (Arctic) Ocean” and inferentially, a similar extension of the eastern limit was implied.

*[section removed under Canadian Access to Information Act, section 15(1)]*

The principle of allocation thus recognized in the case of Alaska was tacitly assumed in the case of the neighbouring territories of Canada and Siberia. The Canadian Government interpreted in this sense the Order in Council of July 31, 1880, annexing to Canada “all British territories or possessions in North America not already included with the Dominion of Canada and all islands adjacent to any of such territories or possessions.” In 1907 Senator Poirier, in a speech before the Canadian Senate, advocated polar sectors for states with territories bordering on the Arctic. In 1916 the Russian Ambassador in London sent a Note to the U.K. Government announcing the annexation of certain islands in the Arctic Ocean north of Siberia as forming an integral, part of the Russian Empire because they constituted a northern extension of the continental land mass of Siberia.

In the later dispute concerning Wrangel Island, north of Siberia, the Canadian Government originally maintained that this island was part of Canadian territory on

the basis of occupation. However it was later decided not to press the Canadian claim in order to avoid similar claims in the Canadian sector.

Canada has never claimed a sector by any express declaration. The Canadian claim to the sector from 60°W to 141°W has been indicated in many ways, however, from the publication of maps showing this sector as Canadian to the 1925 statement to the House of Commons by the Hon. Charles Stewart, Minister of the Interior, that Canada claimed as Canadian all territory “right up to the North Pole.” This was followed in 1926 by Order in Council P.C. 1146 of July 19 which created various Arctic Preserves bounded by these sector limits and required trading companies, prospectors and trappers to obtain permission of the R.C.M.P. before engaging in any commercial activity in these regions.

The Russian Government in its decree of April 15, 1926, formally claimed as Soviet territory all lands and islands, discovered or to be discovered, lying between the northern coast of the U.S.S.R. and the North Pole between 32°4' 35"E. and 168°49'30"W. which were not at that date recognized as belonging to a foreign state. This decree states the sector principle in its most explicit form - that of a claim to any land that may exist, known or unknown, within the triangle of two meridians of longitude at the eastern and western extremities of territory already held by the Power concerned and continuing to the Pole.

The two other countries concerned with the question in the Arctic 7 the United States and Denmark— have never specifically declared their adherence to the sector principle.

In the Antarctic, sectors have been claimed by the United Kingdom, Australia, New Zealand, France, Norway, Chile and the Argentine.

The validity of the sector principle as a mode of acquiring sovereignty over territory in polar regions has never been tested before an international tribunal. Arctic sectors are usually justified as being northerly extensions of continental land masses which project into the Arctic circle. In essence they are applications of the principle of geographical proximity and contiguity of territory. Lakhtine, in supporting the legality of the Soviet sector, uses the phrase, “a region of attraction.”

It is very doubtful if the sector theory can by itself be a sufficient legal root of title at the present time. Even when the sector claims of Canada and the U.S.S.R. were first formulated effective occupation was considered to be necessary in order to acquire sovereignty over uninhabited or very sparsely inhabited territory. Nor does the later development of the law relating to title to territory afford any support for a claim to title based on the sector principle alone. The three leading decisions, the Island of Palmas Case (1928), the Eastern Greenland Case (1931) and the Clipperton Island Case (1932) are in harmony in holding that the true tests of sovereignty by effective occupation are the intention and will to act as sovereign plus some actual exercise or display of state authority in relation to the region. In the Island of Palmas Case Judge Huber stated flatly that the title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law. Contiguity, in his

view, when invoked as a justification for territorial claims apart from effective occupation, is devoid of legal basis and is at bottom a political claim of the sphere of interest type.

*[section removed under Canadian Access to Information Act, section 15(1)]*

... In fact, however, as Dean MacDonald points out, a claim to sovereignty under the sector principle “would involve a claim to precisely the region which can be claimed successfully by right of effective occupation.” The recent unanimous judgment of the International Court of Justice in the Minquiers and Ecrehos Case, declaring that sovereignty over these channel islets belonged to the United Kingdom in virtue of its long and continuous display of state functions over the group, upholds and applies the principles laid down in the previous cases dealing with Eastern Greenland and the Palmas and Clipperton Islands. These judgments, which have placed the law relating to title to territory on a firmer basis than almost any other branch of customary international law, confirm the wisdom of Dean MacDonald's final recommendation that Canada's title to its Arctic territories should be asserted and maintained “upon the ground of effective occupation alone as the chief and most satisfactory ground of reliance.”

Professor Waldock of Oxford University, in his valuable study of Disputed Sovereignty in the Falkland Islands Dependencies (1948 British Yearbook of International Law), examines the legal basis for sector claims in both the Arctic and Antarctic and reaches the firm conclusion that sector claims have no legal significance as a basis of title independently of an exercise of state activity in regard to the sector areas. Within the principle of effective occupation, Professor Waldock believes proximity may nevertheless operate to raise a presumption of fact that a state is exercising sovereignty over-outlying territory in which there is no noticeable impact of its state activity. In his view, when there is a clear intention to exercise sovereignty over a geographical area evidenced by a display of sovereignty, the contiguity of the outlying territories, by raising a presumption of an actual intention and ability to control those outlying areas, operates to give the claimant state the benefit of the rule that effective occupation need not make an impact in every nook and cranny of the territory.

### FLOATING ICE ISLANDS

The floating ice islands which have been discovered in the Arctic are composed of ice so hard and thick that they retain their shape and general appearance for years. T-3, for example, is about 31 miles in circumference and 5 miles across at its narrowest part. Holes which were bored into the island in 1952 revealed many separate layers of dirt. Ice islands, like icebergs, follow the currents of the ocean and are not to be confused with ice floes, which are moved by wind pressure.

Thus far international law has not recognized the right of a state to establish sovereignty over ice islands whether floating or permanently fixed. Such areas have generally been regarded as solidified portions of the high seas and not capable of effective occupation. With the increasing ability of states to establish and maintain control over such ice masses international law may in time recognize the ability to acquire sovereignty over them. A fixed ice mass, for example, which is permanently above high water mark and on which installations can be built and continuously maintained would seem to partake of the nature of territory. The case of floating ice islands is more doubtful. In recent years there have been suggestions that artificial structures erected on piles driven into the seabed should be regarded as subject to state jurisdiction but these proposals have never included floating works. The International Law Commission's draft articles on the Continental Shelf would give the coastal state the right to construct and maintain on its continental shelf installations necessary for the exploration and exploitations of natural resources. The draft articles specifically provide, however, that "such installations, though under the jurisdiction of the coastal state, do not possess the status of islands." Thus while they would not be of the true nature of territory the installations would be under the coastal state's jurisdiction for the purpose of maintaining order and of the civil and criminal competence of its courts.

The chief defect of floating ice islands, from the point of view of their occupation and use, is their relative lack of permanence and transitory movement. An island which is here today and gone tomorrow is not of the nature of territory and cannot be subjected to the control which is possible over a structure erected on piles driven into the sea-bed. At the present time, therefore, it is very doubtful whether floating ice islands can be appropriated and subjected to sovereignty. If, as is suggested, such islands are not capable of appropriation under existing international law, the Soviet aircraft which recently flew over T-3 did not violate Canadian airspace by flying over the island and did not infringe any rules of international aerial navigation. Likewise, the movement of an ice island with a Soviet scientific establishment into the Canadian sector of the Arctic would not entitle Canada to exercise jurisdiction over the island simply because such islands cannot be considered to be the object of sovereign claims by any state as the law now stands.

## CONCLUSIONS

This review of the sector theory indicates that while the principle was of considerable value to Canada as the original basis of our claim to control all the land areas north of the Canadian mainland to the Pole, the need for reliance on this doctrine has progressively diminished as our effective occupation of these northern territories became more and more firmly established. At the present time it is believed that the Canadian title to all, or nearly all, of our Arctic territories can be asserted on the basis of effective occupation, both in respect to intention and in the actual display of sovereignty over these regions.

Nevertheless the sector theory may be still of value to Canada in the following ways:

- (a) It is a clear indication of Canada's intention to exercise sovereignty over any territories susceptible of occupation north of the Canadian mainland between 60°W. and 141°W. Our intention to act as sovereign in this regard has been demonstrated in official statements, maps, orders in council and other forms' of state activity.
- (b) By affording a convenient geographical area within which our intention to exercise sovereignty over territory is evident to all and the actual display of Canadian sovereignty increasingly effective, the sector theory operates to give Canada the benefit of the rule that effective occupation need not be felt in every nook and cranny of the territories claimed.
- (c) If permanently fixed or floating ice masses are ever recognized as capable of appropriation the sector principle would afford evidence of our intention to exercise sovereignty over any such ice masses within the Canadian sector.

The sector theory was originally developed as a method of allocating territories, ... [section removed under Canadian Access to Information Act, section 15(1)]. It is true that for purposes of game conservation Canada has in the past established Arctic preserves coextensive with the entire area of the Canadian sector-- However, such jurisdiction and control has been claimed only for purposes of conservation and did not purport to change the character of the waters as high seas. It seems most unlikely that any claims to sovereignty over portions of the polar seas based on the sector principle would be recognized at the present time. Nor would Canada wish to assert a claim which would be at variance with the general principle of the freedom of the high seas which we support.

Under existing international law it is very doubtful if floating ice islands can be subjected to the sovereignty of any state. The solution of this problem, as in the case of artificial structures erected on the continental shelf, lies in international regulation. Until some international rules are established in this regard Canada's right to exercise exclusive jurisdiction over floating ice islands from the mere fact of their presence in the Canadian sector of the Arctic cannot be firmly grounded in law. Instead of attempting to assert a legal title to these ice islands it would appear preferable to exercise constant surveillance over them by aircraft, set up Canadian stations on some of them, T-3 for example, and, if necessary, reaffirm our intention to claim sovereignty over any territories within our sector, whatever their nature, which are capable of appropriation, now or in the future.

Department of External Affairs, August 30, 1954.

**35. Foreign Service Despatch, U.S. Embassy, Ottawa, to the Department of State, Washington, Canadian Sovereignty in the Arctic Archipelago by Jean R. Tartter, Third Secretary, 10 March 1955**

**NARA, RG 59, CDF 1955-59, Box 2777, File 702.022, Oct. 1959, Antarctic**

CANADIAN SOVEREIGNTY IN THE ARCTIC ARCHIPELAGO

SUMMARY

By 1880, Great Britain had transferred to Canada all her territorial claims in the Arctic above the mainland of Canada. These were based on discovery by British explorers and partial occupation. Until 1903, when Canada began efforts at effective occupation of the Arctic islands, her claims in several areas were weak on account of Norwegian discoveries and United States discoveries, exploration and occupation. From 1922 onwards, Canada attempted to maintain order in the area through the establishment of permanent Royal Canadian Mounted Police stations at several points and RCMP patrols covering most of the islands. However, the northern or Queen Elizabeth group still has almost no inhabitants except the personnel of the five weather stations, who are both United States and Canadian citizens.

Although an official representative of the Canadian Government in 1909 laid claim to all the territory within a Canadian sector up to the North Pole, the Canadian Government did not officially adopt this view until 1925. In 1954, evidently reluctant to risk any controversy with the USSR, Canadian officials ceased referring to a Canadian sector, and early in 1955 stated that Canadian sovereignty went only as far north as the northern tip of Ellesmere.

After World War II, several Canadian officials indicated that Canada would claim jurisdiction of polar ice in the Canadian sector north of the Arctic islands. But in statements in early 1955, the Canadians clearly backed away from this position. Whether Canada intends to claim jurisdiction of the straits more than six miles wide between the Arctic island has not been made plain.

British Title

Canada assumed sovereignty over the Arctic Archipelago by the transfer of British claims in the region to Canada during the last half of the nineteenth century. Therefore, it is necessary first to examine the British claims, all of which were based on discovery and partial occupation.

Discovery of the Arctic Islands took place in the Seventeenth Century during the search for the Northwest Passage, and again in the Nineteenth Century during a period of geographical curiosity and the desire to annex new areas. British explorers predominated, discovering and naming all the islands except the Ringnes Islands and

Axel Heiberg which were discovered by Norwegian explorers at the end of the 19th Century. For convenience in examining claims, the Archipelago is divided into four groups:

Group I (Melville Peninsula and Baffin Island): First discovered by Frobisher in 1577; British whaling stations were established on Cumberland Sound (1840) and Pond Inlet (1860). The United States had two whaling stations on Cumberland Sound in 1859 but these were sold to Scottish interests in 1894. In the last half of the 19th Century, United States interests extensively mined graphite and mica on Baffin, and several expeditions traveled in the area searching for Sir John Franklin.

Group II (Banks, Victoria, North Somerset, Prince of Whales and King William): Between 1825 and 1854, British Government explorers were active in this group, taking formal possession at various points.

Group III (North Devon and the Parry Islands): In 1819 and 1852-53, British explorers visited these islands and took formal possession.

Group IV (Ellesmere, Axel Heiberg and Ringnes Islands): British explorers took possession of Ellesmere at various points in the north and south island during the 19th Century. In 1882, United States explorers took possession of Grinnell Land in central Ellesmere. In 1899-1901, Norwegian explorers discovered and took possession of western Ellesmere, Axel Heiberg, Cornwallis, Findlay, King Christian, Devon, Ellef Ringnes and Amund Ringnes. These claims were abandoned in 1930 when Canada agreed to pay the costs of the Norwegian expedition.

Speaking of discoveries in Groups I – IV, the King Report<sup>347</sup> concludes: “...the vast preponderance of discovery is British. Next comes the United States, but their explorations...undertaken chiefly in the search for Sir John Franklin, may be said to merely follow in the steps of previous British explorers... . The object of their voyages (in Group IV) was rather the discovery of the North Pole than geographical exploration, which was only an incident... . Most of the British discoveries were made by commissioned officers. Most of the foreign discoveries were not”. This was of course written before several important U.S. explorations on Ellesmere.

The King Report also gives the results of a study of the national assignment of the Arctic islands on 157 old maps (99 British, 40 American, 10 French, 8 German). This study evidently referred to maps produced before the Norwegian discoveries of 1899-1901. The study showed that the known islands of the Archipelago were assigned to Great Britain on an overwhelming majority of the maps, with only

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<sup>347</sup> In 1905, W.F. King, Chief Astronomer of Canada, prepared a confidential “Report Upon the Title of Canada to the Islands North of the Mainland of Canada” for the Department of the Interior. So far as is known, this report has never been made public although it has been available to scholars and this officer was permitted to examine it.

Ellesmere left somewhat in question. Southern Ellesmere was marked as British on 115 maps, as belonging to other countries on 17. Northern Ellesmere was assigned to Britain on 75 maps, to other countries on 22.

### Transfer of British Claims to Canada

“Rupert’s Land” and “Northern Territory” were united to Canada by an Imperial Order in Council of June 23, 1870, but a precise description of these areas was given. Rupert’s Land was the name of the area granted to the Hudson Bay Company in 1670, and though never exactly bounded, was considered to include all the country draining in Hudson Bay plus most of Baffinland and the smaller islands of the Hudson Straits. The Northwestern Territory was understood to include all land west of Canada and Rupert’s Land (i.e. British Columbia, parts of Alberta and Saskatchewan, Yukon and the District of Mackenzie). Canada was uncertain as to whether this Order in Council granted her all the territory on the east to the Arctic Ocean, and whether it included the Arctic Islands. Because of this unclarity, Canada asked Great Britain to remove doubts on the northern boundaries, and recommended that the areas transferred be delineated exactly. In particular Canada wanted Britain to add claims to “such portion of the North West coast of Greenland as may belong to Great Britain by right of discovery or otherwise”. There followed Imperial Order in Council of July 31, 1880 which transferred to Canada “all British territories and possessions in North America, not already included in the Dominion of Canada, and all islands adjacent to such territories or possessions” (excluding Newfoundland). Since this still failed to give an exact definition of the territories, it did not meet Canada’s desires. It seemed evident that Britain did this deliberately to avoid controversy over its own claims and to let ownership be settled otherwise.

A Canadian Order in Council of October 2, 1895 seems to have been the first step taken by Canada to indicate acceptance of the transfer of claims of 1880. This Order set up provisional districts in the new areas, but was defectively worded and was replaced by an Order-in-Council of December 18, 1897 which placed in Franklin District all the islands more than 20 miles from the coast in the area bounded by 141° West and the channel west of Greenland, and on the north by the parallel of 83 1/4°. This order constituted Canada’s notification to other countries that she claimed all the Arctic Islands north to 83 1/4° (northern tip of Ellesmere).

### Canadian Occupation

The King Report of 1905 ended with the warning that Canada’s title to some of the Arctic Islands was “imperfect” (no doubt he had in mind the Norwegian claims in the northwestern corner of the Archipelago and the U.S. claims in central Ellesmere) and with the recommendation that Canada “exercise jurisdiction where any settlements exist”.

Between 1903 and 1910, the Government of Canada sent five expeditions to the territories received from Great Britain in 1880, giving them instructions to maintain

peace and order and to establish police posts, customs offices, and post officers at strategic points where required. The first of these expeditions took place in 1903-04 and included a detachment of Northwest Mounted Police. The police were ordered to “impress upon the captains of whaling and trading vessels, and the natives, the fact that after reasonable notice and warning the laws will be enforced as in other parts of Canada”. Landings were made at Cape Sabine (Melville Island) and Cape Herschell (Ellesmere Island). The second expedition in 1904-05 established Mounted Police stations in Hudson Bay. In 1906, an expedition took formal possession of Cornwallis, Griffith, Bathurst, Byam Martin, Melville, Prince Patrick and the Parry Islands. The 1908-09 expedition covered a similar area plus Bands and Victoria Islands. The 1910 expedition touched at North Devon and other islands in the Queen Elizabeth group along Melville Sound.

At the instruction of the Canadian Government, the expedition of 1909 enforced the issuance of fishing and whaling licenses in the Archipelago. When a question of Greenland Eskimos hunting on Ellesmere came up in 1920, Denmark told Canada that it regarded Ellesmere as “no man’s land”. Thereafter Canada renewed its efforts to establish sovereignty on the island to forestall a Danish claim. In 1922, the first of annual expeditions to the Arctic Islands sailed up to the southern tip of Ellesmere. Royal Canadian Mounted Police posts were established at Craig Harbour (southern Ellesmere) and Pond Inlet (Baffin Island). The 1923 expedition included a magistrate and complete court to conduct the trial at Pond Inlet of an Eskimo charged with murdering a white trader. In addition to resupplying the two stations, a third station was established at Pangnirtung (Baffin). In 1924, another post was established at Dundas Harbour (Devon). No new posts were set up in 1925, but in 1926, Bache Peninsula (Ellesmere) was established and in 1927, Lake Harbor (Baffin) as established.

Beginning in 1923, these posts were used as bases for various surveys and investigations, mostly on Baffin Island. In 1927, an RCMP inspector made a patrol from Bache westward to Axel Heiberg, Sverdrup, King Christian, Cornwall and Graham Islands. In 1929 an RCMP team traveled from Dundas Harbour west to Winter Harbour on Melville, then northerly to Hecla and Griper Bay, then northeasterly to Bache. These islands were visited: Devon, Cornwallis, Bathurst, Melville, Lougheed, Edmund Walker, King Christian, Ellef Ringnes, Cornwall, Axel Heiberg and Ellesmere.

The patrols of 1927 and 1929 seem to be significant and the first efforts by Canada to “maintain order” in the most remote parts of the northwestern islands of the Archipelago, where Canadian sovereignty was least clearly established.

Today there are a considerable number of settlements in the southern half of the Arctic Archipelago, most of them on Baffin Island. In the northern half, or Queen Elizabeth Islands, there are only the five weather stations and posts at Craig Harbour and Dundas Harbour. While the Eskimo population of the southern half, particularly on Baffin, is fairly numerous (2800 in 1951), the only Eskimos in the Queen

Elizabeths are some 100 settled there in 1953 by the Government. There are practically no permanent white residents in the Arctic Archipelago except for missionaries. The total white population in 1951 was under 150.

The Eskimos have from the first been regarded as Canadian citizens through birth in Canada. If this area were divided into electoral districts, which it is not because the population is too small, the Eskimos would be allowed to vote. The Eskimos carry identity discs issued by the Government; their vital statistics are recorded by the RCMP. Family allowances (monthly payments based on the number and ages of children) are paid to the Eskimos in kind. They are also entitled to Canadian old age security and old age assistance payment and allowances for blind persons, all paid in kind.

The Mounted Police undertake collection of taxes and game license fees, act as postmasters at certain settlements, and RCMP commissioned officers act as justices of the peace.

The commanding officers of the joint weather stations, always Canadians, function as customs officers and immigration officers, except at Resolute where the RCMP exercise these duties.

The Royal Canadian Air Force carries on a number of activities in the Archipelago, including aerial surveys and ice reconnaissance. Under the International Civil Aviation Organization, Canada is responsible for providing aid to aircraft in distress, and these searches are carried out by the RCAF in the Archipelago. The RCAF plays an important part in supplying the joint weather stations; the RCAF and the Royal Canadian Navy now supply all the stations except Alert. In 1954, preliminary charting of the straits of the Arctic seas was begun by the new RCN patrol vessel, the HMCS LABRADOR. The announced purpose of the charting is to prepare for navigation in the area in connection with defense establishments and, eventually, to exploit possible mineral wealth. It is felt that if the Arctic continues to warm up, heavy shipping for increasing periods will be feasible.

### Sector Theory

It is not clear just how Canadian adherence to the sector theory arose; in fact, it is still not clear that Canada fully supports the sector theory. Speaking to an officer of the Embassy in 1954, Gordon Robertson, Deputy Minister for Northern Affairs and National Resources and Commissioner of the Northwest Territories, said the original sector claim was made by a cartographer in 1903, who “evened things off” by extending the 60°-141° parallels of longitude up to the North Pole in delineating the Canadian area. Cartographers have since followed this principle. In 1951 a new map of Canada was issued which included the North Pole and the Canadian Sector of 60°-141°. However, at a meeting of the Arctic Circle club in Ottawa on February 2, 1955, Northern Affairs Minister Lesage would not commit himself on the sector principle, observing that the official maps were produced by another department than his.

No mention is made of the sector theory in the aforementioned King Report. The earliest reference to it that has been found is 1907 when a resolution was moved in the Canadian Senate 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”.

The Government spokesman opposed this motion on the grounds that it might not be of any practical advantage to assert jurisdiction quite that far north “...while negotiations are going on a while the Governments are asserting themselves, it may not be the part of policy to formally proclaim any special limitation...”.

In the expedition of 1909, Captain Bernier, acting as official agent of the Government, took possession of the Arctic Archipelago on behalf of Canada, erecting a cairn at Winter Harbor (Melville) that claimed the “whole Arctic Archipelago lying to the north of America from longitude 60° W to 141° W up to latitude 90°”, i.e., to the North Pole.”

In the Canada Year Book (an official publication) up to and including 1924, the following statement was part of the description of the Canadian boundary: “...Northern boundaries have yet to be fixed by further exploration, but Cape Columbia in north latitude 83°5’ is the most northerly known point of land in the dominion...”.

On June 1, 1925, the Minister of the Interior introduced a bill requiring licenses for scientists and explorers in the Northwest Territories. He said this would “assert our ownership over the whole northern archipelago...possibly there may arise a question as to the sovereignty over some land they may discover in the northern portion of Canada, and we claim all that portion... right up to the North Pole”. This appears to have been the first official statement acknowledging Bernier’s claim of 1909.

Then, in Canada Year Book 1925, the following statement appeared:

“...As regards the far north, Canada includes all the lands in the area bounded on the east by a line passing midway between Greenland and Baffin, Devon and Ellesmere islands to the 60th meridian of longitude, following this longitude to the pole, and on the west by the 141st meridian of longitude, following this longitude to the pole...”.

On numerous occasions since 1925, the Government has at least by implication accepted the sector theory. Recent editions of the Canada Year Book, for example, say:

“...Northward Canada extends to the North Pole and includes the Arctic Archipelago between Davis Strait, Baffin Bay and the connecting waters northward to and along the 60th meridian on the east and the 141st meridian on the west.”. (Canada Year Book 1954.)

And on December 8, 1953 in introducing a bill to rename the Department of Resources and Development by calling it the Department of Northern Affairs and National Resources, the Prime Minister said “We must leave no doubt about our active occupation and exercise of our sovereignty in these northern lands right up to the Pole”.

However Mr. Lesage’s remarks of February 2, 1955 stated Canada’s claims in a more modest way. He said that Canada does not by statute adhere to the sector theory, nor for that matter, to the theory of occupation. But “we might adopt both theories because we would be safe on both”. He then said Canada claimed sovereignty to three-mile territorial waters beyond Ellesmere Island, about 500 miles from the North Pole.

### Jurisdiction Over Polar Ice

The first reference that can be found to a possible claim by Canada to jurisdiction over permanent polar ice beyond the three-mile limit is found in the King Report. King says:

“The case of the northern straits is different. They are not used for purposes of navigation merely. Although some of them, like Lancaster Sound and Barrow Strait may be said in a certain sense to lead though to the open sea beyond, yet they are blocked by ice during a great part of the year. A navigator, therefore, using them, if such could be the case, with the intention of passing though from sea to sea, must be presumed to have at least a half-formed intention, or expectation, of wintering there. A ship frozen in the ice is as effectually attached to the land as if she were in a harbor.

All nations maintain the right to prevent vessels from landing except at specified ports. This right in the present case cannot be effectually exercised unless by prohibiting vessels altogether, without special permission, from frequenting these straits, that is, by considering the waters territorial.

Therefore Canada may reasonably claim that the maintenance of her national rights, as such rights are universally understood, demands that their northern waters be considered territorial.”

After World War II, statements by two Canadian officials gave the plain impression that Canada would adopt the extreme position that the polar sea, not only within straits, but within the entire Canadian sector, was Canadian territory. In an article for Foreign Affairs of July 1946, Lester Pearson, then Canadian Ambassador to the United States, wrote:

“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.”

In a speech on May 14, 1949, H.L. Keenleyside, Deputy Minister of Mines and Resources, said:

“The Arctic and sub-Arctic regions of this country can be defined roughly as consisting of the Yukon Territory, the Northwest Territories including the Arctic Islands and their waters, the northern half of Quebec and Labrador, and that segment of the ice-capped polar sea that is caught within the Canadian sector.”

(Lecture Entitled “Recent Developments in the Canadian North” given by H.L. Keenleyside, Deputy Minister of Mines and Resources, at McMaster University, May 14, 1949)

In a conversation with an Embassy officer in 1954, Northwest Territories Commissioner Gordon Robertson said that this point had never been clearly settled by the Government. He felt that various statements, particularly that by the Prime Minister on December 9, 1953 (see above) claimed sovereignty only in all lands contained in the Canadian sector. The polar ice question had been discussed in Cabinet, but no decision had been reached. A minority felt that Canada should claim polar ice while a majority including the Prime Minister felt that Canada should not attempt to do so. The Prime Minister was said to feel such a claim might lead to unnecessary quarrels, e.g., if a Russian-occupied ice island floated into the Canadian sector.

Talking to this officer in January 1955, Minister Lesage said flatly that Canada made no claim to polar ice within its sector. In his statement of February 2, 1955 quoted above, Mr. Lesage similarly indicated that Canada made no claim to the polar ice.

As has now been made public, a Soviet-occupied ice island did, in fact, float into the Canadian sector at one time. It is thought likely that this may be responsible for the apparent change in attitude on the polar ice question since 1949, and it may have been in Mr. Lesage’s mind when he carefully limited Canada’s jurisdiction to the territorial waters above Ellesmere in his recent remarks.

When newspapermen questioned officials of Northern Affairs about the Russian-occupied ice islands, they were told that Canada had no right to claim frozen seas. It was pointed out to them that Canada had never taken action in the form of notes to foreign powers to claim a Canadian sector.

### U.S. Recognition of Canadian Claims

Canadian officials are extremely sensitive of the fact that the United States has never explicitly recognized Canada’s claims to the Arctic islands, and that it does not accept the sector principle. However, they have frequently stated that by obtaining consent of the Canadian Government before sending official parties into the islands, the United States tacitly recognizes Canadian sovereignty. Similarly, the fact that private American citizens have purchased hunting and fishing permits as early as 1909 and have secured Scientists and Explorers Permits since these were required in 1925

strengthens the view that the United States had implicitly recognized Canadian claims.

In his article in *Foreign Affairs* for July 1946, Mr. Pearson pointed out that the 1944 Arctic Manual of the United States War Department described the Canadian Arctic as including all the islands to the north of the mainland of Canada.

The Arctic Weather Stations were established in 1947-48 in the Queen Elizabeth Islands as a joint US-Canadian project with Canadian commanders at each station. No formal agreement exists for this project; a draft exchange of notes specified that these stations were in the "Canadian Arctic," however the exchange was never made effective. The formal basis for the weather station project seems to lie in the minutes of the meetings held each year by representatives of the various Canadian departments, and representatives of the U.S. services in the Weather Bureau. It has always been the understanding at these meetings that the stations were on Canadian territory. For example, in the meeting of March 11, 1948, a Canadian delegate said, without contradiction from the U.S. side, that "The selection of sites, for the Prince Patrick and Isachsen stations, would be made jointly by the U.S. and Canadian representatives, but the final decision rested of course with the Canadian officials since the programme was taking place in Canadian territory."

Although the United States at first assumed most of the responsibility for supplying the stations, the Canadians have taken over as much as they could handle, so that now only Alert on northeastern Ellesmere is supplied by the United States. The Canadians have said in the past that they planned to man the stations with Canadian personnel exclusively as soon as they can find the meteorologists needed. In addition, two all-Canadian stations are expected to go into operation shortly.

The United States has not, so far as is known, acknowledged any possible Canadian claim to polar ice by obtaining clearance for vessels proceeding more than three miles from land areas in the Arctic Archipelago. In 1954, the Beaufort sea project, involving two United States Navy ice breakers, was given clearance by the Canadians, but merely to travel in Canadian territorial waters without specifying what these might be. The ice breakers did not enter within the three-mile zone and, indeed, landings were made in Melville Sound.

### 36. Jean R. Tartter, Third Secretary of Embassy to the Department of State, Canadian Territorial Claims in the Arctic, 3 May 1955

NARA, RG 59, CDF 1955-59, Box 2777, File 702.022, Oct. 1959, Antarctic

#### CANADIAN TERRITORIAL CLAIMS IN THE ARCTIC

In a committee hearing on the Department of Northern Affairs and National Resources on March 23, 1955, the following exchanges took place:

Mr. Thatcher (CCF member for Moose Jaw-Lake Centre, Saskatchewan): A short time ago a newspaper carried a story about six Soviet scientists who came down on an ice pack which was apparently in Canadian territory. Has the minister some comment to make on that? If we have no population up there, what are we going to do from a defence standpoint?

Hon. Mr. Lesage (Minister of Northern Affairs and National Resources): Those people were not dangerous when they came in on the ice pack. Mr. Robertson is an expert on territorial waters and he could perhaps tell you more about it.

Mr. Robertson (Deputy Minister): I assume Mr. Thatcher is referring to the indication that these Soviet scientists floated into what is sometimes called the Canadian sector in the north. Canada has never formally asserted a claim to the northern sector as such. Sector lines have been drawn on the map since about 1903 at which time there was no complete knowledge of the land that is in the far north and the indication was that Canada was, in effect claiming any land within this sector line, though there was no formal statement of claim.

Mr. Thatcher: Has our department made any survey of this island yet?

Mr. Robertson: It has, indeed. The sector lines were not drawn up however, to indicate any claim to water or ice, so when this ice island floated into that sector where it is all water, it entered an area to which there has never been a Canadian claim formally extended.

Mr. Thatcher: It would not be correct to say then that these Russians on this ice pack were ever in Canadian territory?

Mr. Robertson: Not in any Canadian territory to which there has been a formal claim.

Mr. Thatcher: The newspaper report was not correct then?

Mr. Robertson: The sector lines are there but those lines were put there only to indicate the areas within which the land was Canada. ...

Mr. Harkness (Conservative member for Calgary North): Have we asserted our sovereignty to all those northern islands?

Hon. Mr. Lesage: We have not only asserted it, but we have exercised it.

Mr. Harkness: To what extent have we exercised this sovereignty and just how can our claim particularly to the most northerly islands such as Ellesmere be exercised?

Hon. Mr. Lesage: Our claim to the northernmost islands has never been challenged. If you will look at the annual report of the department and the map which is attached to the back cover it shows the effective occupation of the northern islands. There is a weather station at Alert bay which is at the northern tip of the northernmost island; then you have a weather station at Eureka, at Isachsen and at Mould bay. At Resolute bay you have an R.C.M.P. post, a weather station and an air field. At Craig Harbour you have R.C.M.P., at Alexander Fiord you have an R.C.M.P. post. These are all in the Queen Elizabeth Islands which are the northernmost islands. Are you interested mostly in the most northern islands?

Mr. Harkness: As this matter was brought up in connection with these Russian scientists who drifted down on an iceflow it was a general question as to what means we had taken to establish our effective occupation of these most northern islands so there would be no question raised as to our sovereignty over those islands.

Hon. Mr. Lesage: We are occupying those islands effectively now. We have these weather stations where there are Canadians living all the year around.

Mr. Harkness: As far as international law is concerned there is no question about the actual occupation of these islands by Canada?

Hon. Mr. Lesage: That is right. ...

Mr. Harkness: There is one other question in regard to the establishment of sovereignty. Is there any definite demarkation between some of these northern islands and the frozen water?

Hon. Mr. Lesage: North of Ellesmere island which is the most northern island there are places where some ice stays all the year around but at other places it breaks in July and August.

Mr. Harkness: There is a fair amount of this area where the ice stays and it is difficult to tell where the land ends and the ice begins, is it not?

Hon. Mr. Lesage: Yes, in some cases that is true.

Mr. Harkness: Is there a plan on foot to determine where the line of demarkation is? In other words what area we have and what area we have not sovereignty over?

Hon. Mr. Lesage: The whole question is under very serious study by an inter-departmental committee, the whole question of territorial waters.

Mr. Harkness: I think this is a very important question at the present time in view of the fact that the Americans are establishing certain weather stations and military installations in the north.

Hon. Mr. Lesage: What has that to do with it?

Mr. Harkness: I think it brings up the whole question as to what area there we have sovereignty over and what area we do not have sovereignty over.

Hon. Mr. Lesage: The Americans are not establishing weather stations in the north. The weather stations we have in the north are operated and manned by Canadians. There are some stations where there are some Americans up to about half strength, but the commanding officer at each station is a Canadian. ...

Mr. Thatcher: Americans are spending far more on radar lines than Canada is spending?

Hon. Mr. Lesage: Yes.

Mr. Thatcher: Where they establish these stations will not that mean that there will be kind of a little community spring up and also mean that American personnel will do a good deal to open up that territory?

Hon. Mr. Lesage: There will be American personnel but, according to the agreement with the United States, the stations can be taken over by us at our option at any time and our criterion is manpower.

Mr. Thatcher: These various stations should mean a great deal to the development of the north.

Hon. Mr. Lesage: I do not believe so.

Mr. Thatcher: Why do you say that?

Hon. Mr. Lesage: Because they will be defence establishments, and they will be isolated. It might mean some increase for the transportation companies that we have. Certainly the building period will mean some increase in the business for our maritime and air transport organizations.

#### EMBASSY COMMENTS:

The statement by Mr. Robertson that Canada had never formally claimed a northern sector seems to be a continuation of the recent policy of Canadian officials, that of seeking to avoid expansive claims like the one put forth by the Prime Minister in December 1953 when he spoke of exercising occupation and sovereignty "in these northern lands right up to the Pole". This change has been especially noticeable since it was made public that a Soviet-occupied ice island had floated into the Canadian sector. (See Embassy Despatch 631, March 10, 1955).

From other statements made by government officials in the committee hearings of the Department of Northern Affairs, it was evident that, notwithstanding the desire of the government to make some dramatic gesture to show its earnestness in expanding Canada's northern frontiers, the problems still bulk formidable and a large-scale program of northern development is far in the future. Mr. Lesage spoke most enthusiastically of the government's plans, but as one member of the opposition was quick to notice, these plans were still in terms of "studies", "examinations", "surveys", and "investigations by inter-departmental committees". One important project which will be undertaken by the Geological Survey Branch of the Department of Mines and Technical Surveys this summer is an air, ground, and airborne magnetometer survey of the Queen Elizabeth Islands. The purpose will be to measure the volume of oil, coal and other mineral deposits and also to learn how far out the continental shelf extends into the Arctic Sea and to check the Soviet report that an undersea mountain range extends across the Arctic basin. Not only will this be the first proper study of the remote Queen Elizabeth group, but it will help to establish Canadian claims in the area which have heretofore been weak because the islands are

almost unoccupied and other countries might have claims on the basis of earlier exploration.

The exchange in the committee hearings on American personnel in the Arctic illustrates the concern which is felt about the presence of United States stations in isolated areas where Canadian jurisdiction and occupation are only formal. While the Government is most sensitive to criticism of this sort, it emanates mostly from the parliamentary opposition, from certain daily journals and columnists, from a few individuals whose interests lie in the Arctic, and most loudly from the insignificant Communist press. Until now there has been little noticeable public awareness of this rather abstruse problem, but, as the Government knows, it could easily become an issue should any unfortunate incident come to light in which the United States could be pictured as heedless of Canadian sovereignty in the far north.

For the Ambassador:

Jean R. Tartter  
Third Secretary of Embassy

## 37. Canadian Sovereignty in the Arctic, 15 August 1956

NARA, RG 59, entry 5298, lot 69D302, box 1

### CANADIAN SOVEREIGNTY IN THE ARCTIC

This subject arises from time to time in connection with joint defense operations undertaken by both countries in the far northern reaches. The issue is no longer a pressing political problem, but certain legal considerations are still extant and require accommodation or, at very least, some cognizance in arrangements made from time to time with the Canadian Government.

In the 1920's we were officially reluctant to recognize explicitly Canadian claims to parts of the northern archipelago. In the days of the MacMillan Expedition, the Canadian Government reminded us that it would be glad to issue permits "for the purpose of exploring and flying over Baffin, Ellesmere, Axel Heiberg, and certain other islands within the northern territories of the Dominion." (British Embassy Note, June 19, 1925). Our response was equivocal and anything but positive, because we weren't quite sure what advantage might accrue to us as a result of the MacMillan Expedition. (There was some belief in those days that an Arctic continent might be discovered).

A great deal of the Canadian formality now apparent in matters concerning Canadian possessions in the North probably stems back to attitudes adopted by us in the 1920's. Now, of course, we obtain authorization for every move we make on known lands in the northern archipelago, and we have long since all but foresworn any rights that might have devolved to us by reason of the early explorations undertaken by Americans in that area.

Following are some points which might be borne in mind:

- 1) Sector Principle: Canada claims all lands, known and unknown
  - a) which lie north of the Canadian mainland up the Pole and
  - b) which are located west of longitude 60° (excluding Greenland and Davis Strait) and east of longitude 141°.

This is known as the sector principle. When first enunciated, the claim implicit in this principle included, apparently, all Arctic waters and ice between the two meridians. Recent interpretations by Canadian authorities indicate, however, that water and ice are no longer included. But all land, known as well as unknown, are regarded as Canadian under the sector principle.

- 2) Canadian right: The Canadian Federal Government seems to be perfectly within its rights in applying the sector principle. Miller says that "there is, of course, no doubt of the perfect jurisdiction of Canada over these lands under Canadian law. Statutes and Orders in Council include within the Dominion all of these territories;

the national act and the national assumption of jurisdiction are complete.” The question is how this assumption of jurisdiction is regarded by other countries, the United States in particular.

3) Making the claim effective: Inclusion in the sector principle of all unknown lands was reminiscent of the world’s arbitrary division in the 15<sup>th</sup> and 16<sup>th</sup> centuries by Spaniards and Portuguese under Papal sanction. At that time the theory of claim, in the absence of effective discovery and occupation, was strongly resisted in England. In our present era, however, Canada has developed a definite policy to occupy, or at least patrol, all important islands in the Arctic and would undoubtedly take more than token possession of any sizeable islands that might be discovered by Canadians in the sector. Implicit recognition by the United States of most known territories in the sector has been given on many occasions through official application by the United States for authorization to explore and carry out various projects at various points in the northern archipelago.

4) Points of disagreement: We do not agree with the Canadian sector principle in so far as it attempts to pre-empt undiscovered lands, water, or ice within the sector. This is a matter of principle with us, although we have never raised the subject formally with the Canadian Government. For the sake of preserving this principle, we must be particularly careful not to indicate by word or act a recognition of the Canadian Government’s alleged right to pre-empt undiscovered lands in any quarter of the so-called Canadian sector. This caveat should be observed tactfully, and the issue should be avoided whenever possible. Nevertheless, the United States viewpoint should not be overlooked at any time or for any reason.

References:

National Archives (Case Number 800.14, Arctic parts 1-16). This includes notes exchanged with British Government concerning the MacMillan Expedition; a study of territorial sovereignty in the Polar regions, and sundry bits of information concerning Arctic policy.

Ottawa Embassy Despatch No. 631 of March 10, 1955

Ottawa Embassy Despatch No. 785, May 3, 1955

Jurisdiction over Polar Areas – a pamphlet containing various articles, issued by the United States Naval War College, November 22, 1937. See particularly article called Political Rights in the Arctic, by David H. Miller.



## *About the Editors*

**PETER KIKKERT**, M.A., is currently finishing his Ph.D. in history at Western University. His research explores the evolution of sovereignty and the legal principles for the acquisition of territory in an international, bi-polar context. He co-edited *The Canadian Forces and Arctic Sovereignty: Debating Roles, Interests, and Requirements*, 1968-1974 with Whitney Lackenbauer, and his recent publications include articles on the sector principle, Canada's Arctic sovereignty strategy in the early Cold War, and the development of the Polar Code.



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