

Canada's Sovereignty in Changing Arctic Waters

MARK E. GAILLARD, LL.B, LL.M

*Oceans, Environmental and Economic Law Division, Legal Affairs Bureau,
Department of Foreign Affairs and International Trade*

Sovereignty and the Arctic

The definition of the word "sovereignty" is simple: it is the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation. Combine that word with the word "Arctic" and you provoke in Canadians strong feelings of both pride and fear. Pride that such a remote, beautiful and unique region of the planet is part of Canada, contributing so much to our sense of place and national identity. Fear that others covet it and its riches, or, even worse, refuse to respect the fact that the Arctic is integral to our nationality. Fear also that its legendary isolation has been breached, and that the poisons and troubles of the southern world intrude there, causing malevolent change. And fear that we are powerless to stop this, or those who wish to plunder it or change it for the worse.

Is the Arctic changing? There is concern that climate change is contributing to a warming of the Arctic. And certainly there is renewed interest in developing the untapped energy resources of the Arctic littoral of North America. It is this interest that is yet again stimulating the perennial debate about Canadian sovereignty in the Arctic. For example, a December 7, 2000 newspaper article quotes a Canadian military report that the "vast mineral, marine and freshwater resources located in the Canadian Arctic virtually ensure the existence of future challenges to Canadian claims to sovereignty over the Arctic waters and archipelago."

The aim of this paper is to explore these challenges to Canadian "claims" of sovereignty over the lands and waters of the Arctic Archipelago.

Land and Law

First of all, Canada has no "claims" of sovereignty over the Arctic Archipelago. Canadian sovereignty is an accepted fact. There is no dispute about the ownership of the lands and islands of the Canadian Arctic Archipelago. So let there be no mistake: they belong to Canada.

Without delving too deeply into the legal history, the salient points are as follows: the legal title to the Arctic Islands, belonging to Great Britain, was formally transferred to Canada by means of an Imperial Order-in-Council in 1880. In 1895, by its own order-in-council, Canada explicitly established the boundaries of its northern possessions, which included all islands up to latitude 83 1/4° North, i.e. the northern-most point of Ellesmere Island. This order-in-council enclosed all the islands southward from that latitude as part of Canada.

Between the two World Wars, it is true that there were nebulous claims from other countries as to the legitimacy of Canadian sovereignty in the High Arctic. About 1920 the Danes started to view Ellesmere Island as *terra nullius*, a no man's land, and Greenland hunters began killing muskoxen on the island. Ottawa responded to the Danes immediately in typical Canadian fashion, by forming a committee! The Technical Advisory Board, made up of senior civil servants, was established to study the sovereignty issue. The committee concluded that greater governmental presence in the High Arctic was needed to fend off any competing claims. Starting in 1922, the Canadian government began sending annual expeditions to the area, mostly by members of the Royal Canadian Mounted Police. Another order-in-council was adopted in 1926, this one creating the Arctic Islands Preserve and which made the Arctic region a hunting preserve for the exclusive use of its aboriginal inhabitants. At the same time, the annual American expeditions to the High Arctic Islands of the mid-1920s complied with the 1925 amendment to the Northwest Territories Act that obliged foreign explorers to obtain a Canadian permit before conducting research in that area.

But Mounties and government licenses were not the only means by which Canada took control over its Arctic. The Department of International Affairs and International Trade was also deeply involved. Reading the history of the Department of External Affairs, one learns that important diplomatic steps were taken to affirm Canadian sovereignty over the Sverdrup Islands, which were "discovered," named and apparently claimed by the Norwegian explorer, Otto Sverdrup, in the 1880s. In a 1928 diplomatic note, Norway notified Canada that it intended to affirm its rights in international law over these islands. Old Otto Sverdrup however, wrote a letter to say that he would relinquish Norway's claim for a fee. Through the good offices of the Canadian Pacific Railroad agent in Oslo, there being no Canadian Embassy, a deal was worked out. Ottawa would pay an *ex gratia* payment of \$67,000 to Mr. Sverdrup in return for the formal affirmation that Norway would recognise Canada's sovereignty over the Sverdrup Islands. The *quid pro quo* for Norway was Ottawa's assurance that, should the Arctic Islands Preserve order-in-council ever be lifted, Canada would treat applications by Norwegian citizens to operate in the region in a "most friendly manner." On this basis the deal

was closed in 1930. Unfortunately for Mr. Sverdrup however, he died two weeks later.

So by 1930, the vague claims of three states, Denmark, the United States and Norway, were neutralised. As historian Morris Zaslow put it, "although Canada had maintained persistent, patient, low-key diplomatic offensives against three essentially uninterested foreign powers, it had really achieved its goal [of asserted sovereignty] by establishing unquestionable practical control over the region that wiped out the potential claims of other nations based on earlier discoveries of their nationals." Prime Minister Trudeau advised Parliament in May 1969 that Canada's sovereignty over the Arctic "is well established and that there is no dispute concerning this matter. No country has asserted a competing claim, no country now challenges Canada's sovereignty on any other basis; and many countries have indicated in many ways the recognition of Canada's sovereignty over these areas." In 1971 the then-Director-General of the Legal Bureau of the Department of External Affairs (the bureau in which I serve), emphasised that "Canada is aware of no challenge to its sovereignty over the mainland and islands of the Canadian Arctic." This remains true today, thirty years later. Only tiny Hans Island, a speck of land in Kennedy Channel exactly half-way between Ellesmere Island and Greenland, remains in dispute.

All this means that the land areas of Canada's Arctic Archipelago are undisputed parts of Canada. This is true whether the islands are inhabited or not. Should persons travel to the islands and, without Canada's lawful permission, take from them any wildlife, or minerals, or fresh water, or archaeological relics or if they leave their wastes and garbage, then they are breaching the laws of Canada and they can be prosecuted. It is a matter for law enforcement. Canada's legal sovereignty does not somehow evaporate simply because there are no Canadians on the island in question.

Sea, Ice and Law

There is also the question of sovereignty over the waters of the Canadian Arctic. Historically, this has not been a problem because the International Law of the Sea largely deals with ships and shipping. Until recently, commercial shipping in the Arctic was not feasible, so no-one was interested in contesting Canada's sovereignty. But now the Arctic's non-renewable resources have entered the picture. Beginning with the discovery of oil at Prudhoe Bay on the Beaufort Sea shore of Alaska in 1967, the potential for oil and gas in the Arctic has generated a renewed interest in the Arctic offshore. At the same time, this re-opened the jurisdictional question.

The International Law of the Sea is crystal clear on one point: that the "territorial sea" of a coastal state, where the state has sovereignty, extends only a short distance (three nautical miles, later extended to 12 nautical miles)

from “straight baselines” that approximate the low water mark but enclose the mouths of bays, inlets, rivers and “internal waters.” Internal waters are any waters on the landward side of the straight baselines. Beyond the limit of the territorial sea are the “high seas” which are international waters. The law of the sea also incorporates something called an “international strait” in which rights of transit passage apply for state surface vessels, together with the right of innocent passage for commercial vessels. It is the United States view that the Northwest Passage constitutes such an international strait.

I do not digress when I pause to point out that the Arctic waters of Canada are unique in one obvious respect: they are not “waters” like other ocean areas. They are mostly ice-covered. The existence of permanent ice raises the question whether for legal reasons the “waters” of the Arctic Archipelago should be treated as “water,” or whether the correct analogy is with land. Regardless, the Canadian government has never relied on the “ice as land” concept to support a claim at law of sovereignty. There are two different kinds of ice encountered in the Arctic, pack ice and shelf ice. The pack ice, unlike land, is dynamic and ever-changing, and is thus unsuited for legal analysis as being like dry land, which tends to stay put. That leaves shelf ice which many authors have pointed out is indistinguishable from the ice covering terra firma and therefore should be treated as land. In legal terms, however, this does not help Canada as the four ice shelves that exist in the Canadian Arctic are along the northern coastline of Ellesmere Island, well away from the areas of concern in the Northwest Passage. As an interesting aside, however, when Canada drew the straight baselines around the whole Arctic in 1986, the baselines on northern Ellesmere Island were located on the outer edge of the ice shelves. Should these ice shelves begin to expand, will the baselines be pushed seaward as well, thereby expanding outward Canada’s territorial sea?

The rejection of the “ice as land” concept means that, even if the ice were to melt, Canada’s legal sovereignty would be unaffected. This is because Canada has consistently considered its waters in the Arctic legally as being the same as open water elsewhere. The waters of the North are coloured blue on the maps and, in terms of our sovereignty over them, they are in law “blue water.”

Ice-breaking Ships

Where there is ice, there are now ice-breaking ships. In 1969, the ice-breaking oil tanker *Manhattan* cruised through the Northwest Passage, picked up a single symbolic barrel of oil from Prudhoe Bay, and returned to the United States. This voyage illustrated the American view that we are familiar with: first, that much of the Northwest Passage is beyond Canada’s territorial sea and thus beyond Canada’s direct jurisdiction (at that time only 3 nautical

miles); and second, that even where parts of the Northwest Passage are clearly within Canada's territorial sea, the nature of the Northwest Passage is that of an "international strait" where the principle of freedom of navigation reigns.

Canada's view, then and now, is that since the 1880 deed transfer, the waters of the Arctic Archipelago have been Canada's internal waters by virtue of historic title. These waters have been used by Inuit, now of Canada, since time immemorial. Canada has exercised unqualified and uninterrupted sovereignty over the waters.

Canadian sovereignty over its internal waters would be tested once again in 1985, when the United States Coast Guard ice-breaker *Polar Sea* made her traverse of the Northwest Passage. I was personally involved with this incident, as I was the RCMP constable in Resolute Bay at the time. My mission then was to be the front-line of Canada's sovereignty. On one occasion, I was flown over the ship in a Canadian Armed Forces patrol plane, while the vessel was actually plowing through the ice in Viscount Melville Sound. (That same summer I also enforced Canadian customs and immigration laws by clearing the passengers and crew of the *M. V. Lindblad Explorer*, the first cruise ship to make a complete transit of the Northwest Passage.)

Meanwhile, back in Ottawa, the External Affairs Minister, Joe Clark, reminded the House of Commons in September 1985 that the policy of the government was to "exercise full sovereignty in and on the waters of the Arctic archipelago and this applies to the airspace above as well." The Minister noted that policy was founded on the fact that the waters in question had always been "historical internal waters." Although Canada's legal position was fully protected during the *Polar Sea's* voyage, he declared that further steps would be taken to reinforce Canada's sovereignty. Among other things, a new order-in-council was adopted drawing straight baselines around the perimeter of the archipelago, thus removing any doubt about these waters being internal waters by virtue of historic title. And new domestic legislation in the form of the Canadian Laws Offshore Application Act was passed to underline that Canadian jurisdiction prevailed over the entirety of the internal waters of Canada.

Legal Bureau discussions with the United States were re-opened, and led to the conclusion of the 1988 Agreement on Arctic Cooperation. The main purpose of the agreement is to regulate ice-breaker navigation in the Canadian Arctic. It ensured that "all navigation by U.S. icebreakers in waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada." Article 4 sets out that nothing in the agreement, "nor any practice developed thereunder," would effect the respective legal positions of the two parties, Canada and the U.S. Instead, it is a practical means to ensure that U.S. icebreakers seek Canada's consent and meet all require-

ments of Canadian law while in the waters of the Canadian Arctic Archipelago. Recently, under the terms of the 1988 Agreement, the U.S. Coast Guard ice-breaker *Healy* traversed the Passage during the summer of 2000 without incident after meeting all appropriate Canadian legal requirements. This voyage proved that Arctic navigation can take place without threatening Canadian sovereignty.

Conclusion

In sum, where does this discussion leave us with respect to our sovereignty over changing Arctic waters? Is our sovereignty in peril because the permanent ice cover is receding? Is it in danger due to the likelihood of increased commercial shipping in and through the Arctic waters?

Speaking from the legal perspective, the answer to both is no. Canada's sovereignty over the lands and waters of the Arctic stands on a secure foundation of law. Any foreigners who travel there are visiting Canada, and must obey Canada's laws.

Sovereignty over the marine areas is based on law, not on the fact that the waters in question frequently are covered by ice. The waters between the lands and islands are the internal waters of Canada by virtue of historic title.