



CMJ collection

The Canadian Forces Northern Area (CFNA) area of responsibility.

“GREAT GAME IN A COLD CLIMATE”: CANADA’S ARCTIC SOVEREIGNTY IN QUESTION

by Lieutenant-Commander Guy Killaby

Introduction and Background

During the summer of 2005, Canadians were again witnesses to a vivid – if periodic – demonstration of their government’s commitment to Arctic sovereignty. In July, a diplomatic row was sparked by two helicopter visits by the Canadian Forces to Hans Island. Hans Island is a dollop of stone slightly larger than a square kilometre that sits astride the median between Greenland and Ellesmere Island in the Nares Strait, and *Exercise Frozen Beaver* was in apparent response to the commencement of annual Danish naval visits in 2002. Besides delivering a plaque and replacing a Danish flag with a Canadian flag, the participating Rangers and aircrew constructed an Inuit stone marker known as an *inukshuk*.

During the second visit, the Minister of National Defence, the Honourable Bill Graham, accompanied the military, and he subsequently characterized his visit as simply part of his tour of Canadian installations located in the Far North. The Danish government, on the other hand, claimed Hans Island as their own, and, shortly thereafter,

delivered a note of protest to the Canadian ambassador in Copenhagen. However, by mid-August, the threat of the matter escalating to further mutual naval inspections had subsided, and the two governments renewed their commitment to further negotiations over title to Hans Island.

On their face, the negotiations are concerned with the narrow question of national title over Hans Island and the 1000 metres of water that surrounds it. The issue of ownership of Hans Island – inconsequential on its own – had been left unresolved by the 1973 agreement between Canada and Denmark, delimiting the continental shelf boundary between the Canadian eastern Arctic islands and Greenland.¹ However, with the passage of 30 years, the tectonic changes

Lieutenant-Commander Guy Killaby is a Regular Force legal officer with the Office of the Judge Advocate General.

The views expressed by the author in this article are personal, and do not necessarily reflect the views of the Government of Canada, the Canadian Forces or the Office of the Judge Advocate General.

in the economic and strategic climates have now invested the simple question of ownership of little Hans Island with grander symbolic and legal stature.

The Danes hold the responsibility for the defence of Greenland and its Exclusive Economic Zone (EEZ), and stand to gain from the exploitation of Greenland's natural resources. While there is interest in the mining of gold, diamonds and water from icebergs, it is the oil and gas reserves on Greenland's continental shelf that Denmark regards as its greatest prize.² The Geological Survey of Denmark and Greenland (GEUS), financed by the Danish Ministry of the Environment, has extensively studied the 1000-mile undersea mountain range, the Lomonosov Ridge, with the presumed intent of proving that it is a geological extension of the Greenland land mass. As noted in the *New York Times*, the Danes believe that evidence of such a link may support a claim of theirs under the *United Nations Convention on the Law of the Sea* (UNCLOS) for a vast area of the Far North, including the North Pole.³



It is argued that the law of the sea not only provides guidance to delimiting maritime boundaries, but it has a significant influence upon naval operations. Just as Articles 2(4) and 51 of the *Charter of the United Nations* have served to limit the use of force, UNCLOS contains many examples of provisions – such as those dealing with international straits, archipelagic sea lanes and transit passage – that will also serve to restrict the conduct of naval operations. For the navies of coastal states such as Canada, experience has proven that the influence of these legal restrictions can be felt far away from their own shores.

The influence of the law upon future Canadian naval operations in the Arctic will continue to be heavy. The Canadian title over the Arctic Archipelago has long relied upon the demonstration of Canadian *historic rights*. The evidence of these *historic rights* has served to support Canada's Arctic claims founded, in turn, by the sector theory, historic waters, and, most recently, straight baselines pursuant to the UNCLOS. For example, in relation to ownership of Hans Island, the Canadian claim is based upon its "undisputed use" by Canada in the past, and that Hans Island was intended to be included with the entire Arctic Archipelago that Britain handed over to Canada in 1867.⁴

While Canadians may be historically familiar with our national quarrelling with the United States over title to northern territory and waters, far greater challenges to Arctic sovereignty may eclipse the narrow disagreements

we share with the Americans, at the Dixon Entrance on the Pacific Coast, and the delimitation of the continental shelf in the Beaufort Sea. The Far North – including the portion that Canada has traditionally viewed as its own – is quickly becoming the scene of intense global interest that may not allow us to continue the indulgence of bickering with our neighbours. In the past, Canada's traditional Arctic competitors for territory – Russia, Denmark, Norway and the United States – have never allowed disputes to grow beyond intramural dimensions. However, two recent developments are prompting Canada to confront new competitors from beyond the Arctic "house-league." The first of these developments was the coming into force of the UNCLOS in 1994, and the second is the burgeoning need for energy resources by distant and surging economic and military powers.

It is the combined influence of these two factors that has prompted commentators to conclude that the Arctic is about to become the scene of jockeying among world powers for influence and access. An energy analyst, Christopher Weafer, has asserted in the *New York Times* that this increased Arctic activity has become "the Great Game in a cold climate."⁵ Whether one deems the invocation of Kiplingesque language to be fitting, there does appear to be ample evidence that Canada will be facing new challenges to her historic Arctic claims. Further, Canada's new competitors will be driven by strategic needs and supported by an international legal regime that may not provide unqualified support to Canadian claims of Arctic sovereignty.

Legal Status of the North American Arctic

One of the most elusive concepts to grasp in any discussion about the Far North is its remote, hostile and vast nature. While there is some dispute about the finer details, it has been generally accepted that the portion of the World Ocean lying within the Arctic Circle (66° 33' 40") is considered to make up the Arctic Ocean.⁶ It includes the Norwegian, Barents, Beaufort, Chukchi, East Siberian, Laptev, Greenland and Kara Seas, Baffin Bay and the waters of the Canadian Arctic Archipelago. This constitutes approximately 14 million square kilometres, of which approximately 5.2 million square kilometres are covered by ice in the summer, and 11.7 million square kilometres are so covered in the winter. The average thickness of the pack ice – ice that has not melted for at least two years and is not attached to – land – varies from three to 3.5 metres. The continental shelf around the Arctic Ocean basin occupies

"On their face, the negotiations are concerned with the narrow question of national title over Hans Island and the 1000 metres of water surrounding it."

slightly more than half of the ocean area, and this proportion is significantly greater than below any other ocean on the globe.

The Arctic Archipelago is the group of islands situated over an area of 1.3 million square kilometres, and it constitutes the largest grouping of islands in the world. The three largest islands in the archipelago are Baffin, Victoria and Ellesmere Islands. Many of the smaller islands – and the surrounding continental shelf – are made up of sedimentary rocks that contain vast deposits of oil and gas.⁷

It has been estimated that the Arctic region holds between 100 and 200 billion barrels of recoverable oil, and approximately 2000 trillion cubic feet of natural gas.⁸ Of that total, it is further estimated that approximately 50 billion barrels of that oil may be found in the North American Arctic. The estimates of commercially recoverable oil and gas in the Beaufort Sea range from 4 billion to 12 billion barrels of oil and between 13 trillion and 63 trillion cubic feet of gas,⁹ and the petroleum reserves in the Mackenzie Delta and beneath the Beaufort Sea amount to over 10 percent of Canada's total.¹⁰

The difficulty of finding the Arctic oil and gas, and then transporting it to market, poses an expensive, but not technologically insurmountable challenge. While the Mukluk site remains, to this day, the most expensive dry hole in history, the exploitation of Arctic oil and gas is becoming more attractive to investors.

Another reason for this increased recent interest in Arctic drilling is the growing consensus among scientists that climate change is causing ice cover in the Arctic to melt at a rate greater than previously envisaged. While in the 1990s, it had been accepted generally that the ice was losing approximately 3 percent of its volume per decade, recent studies have suggested that the rate of melt is occurring at the greater rate of 10 percent of volume per decade.¹¹ Although there is dispute about the relationship between the rate of ice-melt and any increase of freedom of navigation in Arctic waters,¹² there is firm evidence of an increased commercial interest for operating in Arctic waters. For example, companies have been able to use the longer ice-free seasons in recent years to increase the usage of the port of Churchill, Manitoba, on Hudson Bay.

The actual exercise of sovereignty over the portions of the Arctic that Canada has claimed has posed problems for successive Canadian

governments. The appeal of the Arctic has always been rooted in Canada's national mythology, rather than in any compelling substantive interests that might have prompted a long-term strategy or a significant investment. In the place of action – or even a workable plan – Canadians had largely chosen to admire the Arctic from afar – either in literature or in film. As noted by Canadian legal scholar Douglas M. Johnston, "... the remoteness and vastness of these territories have passed down a legacy of political, legal, and military unease."¹³ Part of this uneasiness can be traced to the history of Canada's unrequited claims of Arctic sovereignty.

Britain first came to hold legitimate title over the North American Arctic region in 1763 through the terms of the *Treaty of Paris*, when France ceded to Great Britain all her possessions in North America, with the exceptions of the small islands of St-Pierre and Miquelon off the Atlantic coast. Later, the new Dominion of Canada developed its claim to the Arctic territories and waters as a result of two transfers of title from the British government. The uncertainty created by the two British *Orders in Council* transferring the Arctic lands to Canada, first, in 1870, and, later, in 1880, prompted the Canadian Government to proclaim, in 1897, the boundaries of its northernmost district:

"The District of Franklin (situated inside the grey border on the map herewith) comprising Melville and Boothia Peninsulas, Baffin, North Devon, Ellesmere, Grant, North Somerset, Prince of Wales, Victoria, Wollaston, Prince Albert and Banks Lands, and Parry Islands and all of 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."¹⁴



On 13 July 2005, Corporal Manasie Kaunak (left), Sergeant Jeffery Qaunaq (center) and Ranger Jimmy Nungqaq (right), all of 1 Canadian Ranger Patrol Group, Grise Fiord, walk behind an *inukshuk* they built on Hans island. In the background is the Danish flagpole and the Canadian flag.

DND photo 2005-0114-42a by Corporal David McCord, Canadian Forces Joint Imagery Centre



Over the next century, Canada would found its claim of sovereignty over the Arctic territory, continental shelf, and associated waters on three different legal bases: the sector theory, historic waters, and, finally, straight baselines in accordance with the UNCLOS. While the legal principles supporting each of these approaches were distinct, they have shared the common need to demonstrate Canada's "historic rights" to the Archipelago and the surrounding waters. The difficulty in having those rights universally accepted has proven troublesome for those advocating Canada's legal brief for almost one hundred years.

The Sector, Historic Waters, and Straight Baseline Theories of Arctic Delimitation

In 1907, Pascal Poirier proposed a resolution before the Canadian Senate making a formal declaration of possession of the lands and islands to the North Pole. There is a consensus among historians that this speech constitutes the first mention by a Canadian public official that Canada would claim a sector of the Arctic. Poirier declared that Canada could now claim possession:

"...[of] all lands that are to be found in the waters between a line extending from the eastern extremity north, and another line extending from the western extremity north."¹⁵

Canada's claim would be based upon the sector theory – to a greater or lesser degree – until the 1980s. The strongest authority called upon in support of the sector theory has been *customary international law*. As expressed in Article 38(1)(b) of the *Statute of the International Court of Justice*, international custom serves "as evidence of a general practice accepted as law." As held by the *International Court of Justice* (ICJ) in the *North Sea Continental Shelf Cases*, two elements are required to be established for proof of the existence of international custom: first, that it is a practice followed by the generality of states; and second, that it was followed as a result of the belief that it was legally bound to do so.

The strength of both of these elements remained doubtful in relation to the Canadian sector claim, despite efforts over the years by the Canadian government to buttress its case. After a brief and damaging claim for Wrangel Island north of Russia in 1926, the Government of Canada established the Arctic Islands Preserve, and described its northern portion using sector theory terminology. Besides granting an American request to establish a weather station in the Canadian Arctic at the close of the Second World War, Lester B. Pearson, the Canadian Ambassador to Washington at the time, proclaimed, in an article published in 1946 by *Foreign Affairs*:

"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, extending to the North Pole."¹⁶

Despite the Government of Canada's reliance upon the sector theory for its Arctic claims as late as the 1980s, support for the theory among other Arctic nations was virtually non-existent. While the 1959 *Antarctic Treaty* was based upon the sector theory, the governments of the Soviet Union, Denmark, Norway and the United States were consistently opposed to the application of the sector theory to matters of Arctic delimitation.

In the absence of a conclusive argument, based upon customary international law, Canada has also sought to rely upon the provisions found in the original boundary treaties, which had partitioned the northern frontiers. The search for firm authority within these historical agreements has also proven to be elusive. The 1867 *Boundary Treaty* between Russia and the United States,¹⁷ which ceded Alaskan title to the Americans, adopted the legal description found in the earlier

1825 *Boundary Treaty* between Russia and Britain.¹⁸ In particular, the line of demarcation between Russian and British possessions in the northwest was:

“... [to] ascend to the North along the Channel called Portland Channel, as far as the point of the Continent where it strikes the 56th degree of North latitude; from this last-mentioned Point, the line of demarcation shall follow the summit of the mountains situated parallel to the Coast, as far as the point of intersection of the 141st degree of West longitude (of the same Meridian); and, finally, from the said point of intersection, the said Meridian Line of the 141st degree, in the prolongation as far as the Frozen Ocean, shall form the limit between Russian and British Possessions on the Continent of America to the North-West.”¹⁹

The infamous Alaskan Boundary Tribunal Award of 1903 demonstrated the hazard of applying a legal description drafted before the land was properly explored, where the respective American and Canadian claims turned upon the meaning attributed to a boundary that was to “follow the summit of the mountains.” The American interpretation – adopted for the majority by the British Commissioner, Lord Alverstone – effectively cut off much of British Columbia from the sea.

On the eastern frontier of Alaska, however, the language supporting the sector theory could be found in the formulation of the boundary along the 141st meridian, “in its prolongation as far as the Frozen Ocean.” The Government of Canada sought a generous interpretation of this phrase extending the frontier along the 141st meridian beyond the land, and into the Beaufort Sea to the North Pole. While there may have been skepticism in this reading, for the first half of the 20th century, there was little reason to challenge the Canadian sector claims in the Arctic.

After the Second World War, a Canadian presence in Arctic waters continued to be only occasional and nominal. In 1948, the Canadian aircraft carrier *Magnificent* and her escorts became the first warships to enter Hudson Bay.²⁰ The Royal Canadian Navy had commissioned the HMCS *Labrador* – a 6700-ton icebreaker – in 1954, but transferred the vessel to the Canadian Coast Guard in 1957. Despite the under-ice transit of the USS *Nautilus* in 1957, the Canadian Navy would not return to Arctic waters until 1970, then in a temporary response to an American challenge to Canadian Arctic sovereignty claims.

During the summers of 1969, 1970 and 1985, elements of the Canadian populace may have appeared to outside observers to become unhinged over American threats to Arctic sovereignty. The transits of the USS *Manhattan* and

“One of the most elusive concepts to grasp in any discussion about the Far North is its remote, hostile and vast nature.”

the USCG *Polar Sea* through the Northwest Passage provoked public cries for prompt government action. While the first voyage of the *Manhattan* in 1969 generated only parliamentary statements, the second voyage the following year resulted in legislative action. The *Arctic Waters Pollution Prevention Act*²¹ was brought into force, extending Canadian jurisdiction to enforce pollution standards 100 nautical miles from the low-water mark of Arctic waters, bounded by the Arctic islands to the east and the 141st meridian to the west. In addition, Parliament passed an amendment to the *Territorial Sea and Fishing Zones Act*,²² which extended Canada’s claim to a territorial sea from three to 12 nautical miles. Of course, this extension resulted in more of the Northwest Passage becoming enclosed within Canadian territorial seas and therefore subject to Canadian jurisdiction.

However, Canada’s concurrent withdrawal from the compulsory jurisdiction of the ICJ, with respect to Canada’s Arctic jurisdiction, betrayed a lack of confidence in the possible judicial result to any legal challenge,²³ and undercut the full impact of Parliament’s actions. In addition, government policy had moved from a strict sector theory claim. While not making any public declarations of the change, within the Canadian Government there were discussions that accepted the premise that Arctic waters were to be considered “internal waters” on a historical basis.²⁴

It is important to recognize the nuanced differences between assertions of historic title over Arctic lands and islands from the title upon the surrounding waters. It is settled international law that national claims of sovereignty over remote islands are held to a standard of control less onerous than over territory or waters. The *Island of Palmas (Or Miangas) Arbitral Award* rendered by the Permanent Court of Justice in 1928 found that, in relation to claims for an uninhabited, small and remote island, the necessary standard to establish title was to demonstrate “continuous and peaceful display of state authority” that was open and public.²⁵ In the case of the Arctic Archipelago, the voyages of Canadian explorers A.P. Low and J.E. Bernier prior to the Great War, and the later Eastern Arctic Patrols by the Canadian Coast Guard and the RCMP, helped to establish firm Canadian claims to the islands of the Arctic Archipelago. However, the claim over the surrounding waters – and the continental shelf below – remained an ongoing concern. Despite this concern, however, the Canadian naval and air presence in the Arctic had diminished. By the early 1980s, the summer support ship voyages and the maritime patrol aircraft flights ordered in response to the *Manhattan* had ended entirely.²⁶

The 1985 transit of the USCG *Polar Sea* prompted another round of editorializing in Canada, and, again, the Canadian Government invoked historic title as the basis for its claims. The Government expressed its intention to exercise full sovereignty in and on the waters of the Arctic Archipelago by establishing straight baselines around the

Canadian Arctic Archipelago. The straight baselines were proclaimed,²⁷ as well as the intention to enforce the *Arctic Waters Pollution Prevention Act* within the new boundaries. However, the intention to exercise jurisdiction is simply not the same as *actually* exercising jurisdiction. Again, the new capabilities announced in 1985, including the increase of aircraft surveillance and naval activity, and the construction of a Polar Class 8 icebreaker for the Coast Guard, were allowed to disappear quietly over time.

However, the international legal regime governing the world's oceans underwent a significant change with the coming into force of the 1982 *Third United Nations Convention on the Law of the Sea* (UNCLOS), in 1994. While the Canadian government finally ratified the treaty on 7 November 2003, its letter of ratification stated that it did not accept the compulsory dispute resolution procedures where the disputes involve sea boundary delimitations or those involving historic bays or titles, military activities, law enforcement activities in regard to the exercise of sovereign rights or justification of the Seabed Disputes Chamber, and, finally, disputes involving the Security Council.²⁸ If one accepts the proposition that international law is an extension of politics by other means, one might also draw the conclusion that Canada intends to continue to keep its 'hand close to the vest' with respect to maritime claims and enforcement activities.

This caution reflects Canadian concern with a number of the provisions in the UNCLOS that may affect the Canadian claims upon the waters surrounding its Arctic Archipelago. For example, Article 7 prescribes the circumstances where straight baselines would be appropriate, "where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity." That the straight baselines claimed by Canada enclose an archipelagic extension, arguably depart, to an appreciable extent, from the coastline, and have been the subject of protests by both the United States and the European Community, have contributed to the concern about the authority for this fundamental element of Canada's claim.²⁹

Further, the portions of the Convention relating to "international straits" and "archipelagic waters" also create unease. The designation of the Northwest Passage as an "international strait" pursuant to Article 37, or the waters surrounding the islands of the world's largest archipelago as "archipelagic waters" in accordance with Article 47, would afford maritime states navigation rights that would directly conflict with the Canadian claim that the baselines enclose Canada's "internal waters." While the Northwest Passage obviously connects one part of the high seas or EEZ with another – a basic element of the designation as an "international strait" – evidence of its use for international navigation, remains spotty, since the first transit that could be fairly described as "commercial" did not occur until 1976. Again, however, the important evidence of Canadian

"Canada's claim would be based upon the sector theory – to a greater or lesser degree – until the 1980s."

governmental effort to regulate transits is ambiguous, as the enforcement of the *Arctic Waters Pollution Prevention Act* remains on a voluntary basis, and Canada continues to possess only a nominal capability to enforce the regulations.

Finally, Canada had worked very hard during the negotiations of the Convention to have the language of Article 234 included in the final text, allowing coastal states to adopt and enforce "non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone..." While Article 234 successfully distinguishes "ice-covered areas" from other less environmentally-sensitive areas of the world's oceans, it does not provide comfort to Canadian claims, as the provision is considered merely "functional" – that is, it allows all Coastal States to adopt and enforce non-discriminatory pollution regulations.

In the end, Canada's claim to the waters within the straight baselines may rest – as uneasily as it did with the earlier sector and "historic waters" theories – upon the thin dossier of historic evidence of Canadian "exclusive control" of the Arctic waters. It is in this light that one must consider the two outstanding maritime boundary disputes with the United States, and the judicial result of a third. The difficulty posed by these disputes at the Dixon Entrance on the Pacific Coast, and at the Alaska/Yukon boundary in the Beaufort Sea, is that their continued pursuit binds Canada to legal arguments that may conflict with its greater strategic interests.

The Canada-US Boundary Disputes

In 1977, both the US and Canada extended their jurisdiction to enforce domestic fishing regulations to 200 nautical miles. The two states were asserting overlapping claims: in the Gulf of Maine; in the Strait of Juan de Fuca and the Dixon Entrance on the Pacific coast; and in the Beaufort Sea on the Arctic coast. While the enforcement of the fishing regulations in the Strait of Juan de Fuca was successfully resolved by negotiation, the other three remain contested.

As noted above, the frontier dividing the Alaskan panhandle from British Columbia was the subject of the 1903 Alaska Boundary Tribunal. The Tribunal had established a line of demarcation connecting Cape Muzon on Dell Island in Alaska and the entrance to the Portland Channel – known as the "A-B" Line – to separate the land territory. Subsequent to the Tribunal's unpopular decision, the Canadian government asserted its jurisdiction over both the Hecate Strait and the waters of Dixon Entrance south of the line, established by the Alaska Boundary Award of 1903.

The British were skeptical of the legitimacy of Canada's claim, and they deferred resolution to a later time, in order to preserve their warming relations with the Americans. While the issue was periodically raised, and proposals were

exchanged over the years, formal resolution between the two states was not seen as a priority, since the Canadian authorities rarely enforced the Canadian fishing regulations over American boats. However, the arrival of Russian and Japanese vessels in the mid-1960s in the area compelled the Canadian government to warn off all foreign fishing fleets from the disputed waters. Perhaps most persuasively, Canada had begun selling oil and gas exploration leases throughout the area. In June 1973, the American government proposed submitting the dispute to the ICJ, and the Canadian government duly rejected the proposal. The resulting discussions continue to the present day.

“However, the intention to exercise jurisdiction is simply not the same as actually exercising jurisdiction.”

The continental shelf delimitation dispute in the Beaufort Sea also had its origins in the differing interpretations of the *1825 Boundary Treaty*. As noted earlier, Canada contends that this implies that the maritime boundary extending 200 nautical miles into the Beaufort Sea should be an extension of the land boundary, and should continue along the 141st meridian. This argument is said to be supported by two principles: first, the “historic claim” based upon the treaties themselves; and second, the sector theory of Arctic delimitation.

The American government, on the other hand, maintains that the *1825 Boundary Treaty* was only intended to govern the land boundary, and it cannot be interpreted to extend past the water’s edge. The Americans rely upon the equidistance

principle to establish the legitimate maritime and continental shelf delimitation in the absence of special circumstances in the area, and when equidistance results in a boundary that accords with equitable principles. The disputed area – 65 square kilometres, or four delineated blocks – lies between the two boundary lines claimed by the United States and Canada respectively, and both governments have expressed determination, in recent years, to exploit the area’s oil and gas resources. Most recently, in 2003, the United States Department of the Interior announced its intention to sell exploration lease rights for 1800 blocks of seabed beneath the Beaufort Sea, totalling 36,900 square kilometres. However, the four blocks on the contested seabed did not receive bids from wary investors, and, as with the Dixon Entrance, the negotiations to resolve the dispute are continuing.³⁰

The only maritime delimitation dispute between the two adjacent states to be recently adjudicated was the *Gulf of Maine Case* – a dispute involving maritime and seabed delimitation – brought before the ICJ³¹ in 1984, and the ruling itself has helped to contribute to the impasse preventing the resolution of the other two disputes. The Canadian government had argued on behalf of the equidistance principle, while the Americans argued for the application of a more complex delimitation – a line perpendicular to the general direction of the coast, but “adjusted to take account of the relevant circumstances of the area, i.e., to avoid the splitting



The new challenges. Route taken by the USCGC *Healy* through the Canadian Arctic, summer 2005.

NASA Map from earthobservatory.nasa.gov



The USCGC Healy in open water. Based out of Seattle, it is the longest and heaviest cutter ever designed and built for the United States Coast Guard.

of fishing banks.”³² When the decision was rendered, the Court professed that it was not adopting either the American or the Canadian positions. However, its application of the principle, “equidistance – special circumstances,” also served as a rejection of the American “historic rights” argument.

This result has encouraged neither the US nor Canada to submit its outstanding disputes to further judicial resolution. More to the point for Canada, there is unease with the Court’s rough treatment of the “historic rights” argument that is the basis for so much of Canada’s case for Arctic sovereignty.

Even with Canada’s endorsement of the UNCLOS, the relevant provisions – Articles 74 (Delimitation of the exclusive economic zone between States with opposite or adjacent coasts), and Article 83 (Delimitation of the continental shelf between States with opposite or adjacent coasts) – arguably do not provide any further legal guidance beyond that found in the *Gulf of Maine Case*.

While the United States has not ratified the Convention, and, as previously noted, Canada does not consider itself bound to submit to some of the Part XV arbitration procedures, some other members of the world community have come to regard the Convention as an important element of their foreign and defence policies.

Future Challenges to Canadian Arctic Sovereignty

The United States and Canada, as contiguous Arctic states whose economies share an insatiable taste for petroleum products, will be urged by

policy-inertia of the United States Navy *Freedom of Navigation Program* (FON). Instituted by the Carter Administration in 1979 to take advantage of the navigation provisions of the Law of the Sea Convention being negotiated at the time, it has continued to be a fundamental precept of American foreign policy.³⁴ As restated by President Ronald Reagan in 1983:

“It has been the United States policy to exercise and assert its navigation and over flight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the 1982 Law of the Sea Convention. The United States will not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and over flight and other related high seas uses.”³⁵

The complicating factor for Canada is that neither her claims for Arctic sovereignty nor the American FON Program can be regarded as simply bilateral annoyances. The internationalization of the Law of the Sea, and of the exploitation of Arctic energy have created a significant legal and policy conundrum for Canada. Government policy will have to adjust to meet direct challenges from countries other than just the United States and Denmark.

An example of this type of challenge – and the possible new tensions visited upon the Canadian Arctic-claims – may be embodied in the recent emergence of China as a major consumer and importer of oil.

“The continental shelf delimitation dispute in the Beaufort Sea also had its origins in the differing interpretations of the 1825 Boundary Treaty.”

While there is some dispute about the future of global oil prices, there is no question that the Chinese economy will be forced to compete to find new sources of oil and gas. This issue will only grow in importance. Of the world's total consumption of 84 million barrels per day (MMBD),

“China is currently embroiled in a maritime delimitation dispute with South Korea and Japan over gas-rich areas in the South China Sea.”

America consumes the most at 21 MMBD, and China is now second at 6.4 MMBD. It is anticipated that the Chinese demand could double by 2020.³⁶ Further, it is believed that over the next 25 years, China's dependency upon imported oil will double to 80 percent of its total consumption.³⁷

While Canada may boast of friendly economic relations with the emerging economies, the Chinese – who have also ratified the Law of the Sea Convention – consider the provisions of the UNCLOS protecting navigation rights to be a pillar of their foreign policy. Given its growing dependence upon foreign oil transported by sea, China has elevated the need to protect its commercial sea-lanes through the Strait of Malacca and the Taiwan Strait to the forefront. This is also reflected in the assertiveness with which its navy protects its national interests in other maritime disputes with otherwise economically friendly countries. China is currently embroiled in a maritime delimitation dispute with South Korea and Japan over gas-rich areas in the South China Sea. As reported by the *New York Times*, the dispute centres upon different legal interpretations of the limits of each nation's exclusive economic zone (EEZ), claimed pursuant to the UNCLOS. The distance between Okinawa and China is approximately 400 nautical miles, and while Japan has proposed a median line delimiting the two EEZs, China has advocated the proposition that the limit of its EEZ is influenced by the eastern extension of its continental shelf. This moves the limit of the Chinese EEZ claim to only 50 miles west of the Okinawan Archipelago.³⁸

Importantly, the Chinese and Japanese have not chosen to limit themselves to mere diplomatic exchanges:

“Chinese coast guard ships treat the surveyors as spies, radioing warnings to leave and shadowing the ship for days on end. On one occasion, the Chinese ships nearly collided with the vessel. Japan's trade minister, flying in a Japan coast guard plane, conducted an ostentatious survey, circling over the bright yellow gas production platform that China is building a mile west of waters claimed by Japan.”³⁹

It is not “great power” competition between China and the United States that poses the greatest threat to Canadian Arctic sovereignty claims, but, rather, their shared commitment to the maintenance of maritime freedom of navigation. As reported in a recent article in *Foreign Affairs*:

“...Washington and Beijing share a common interest in securing open sea-lanes to ensure the unhindered passage of cargo ships. That both governments want stability in the Malacca and Taiwan straits does not pit them against each other – just the opposite.”⁴⁰

The near-term challenge for Canada will be to assess the legal status of its Arctic sovereignty claims, and either address the shortcomings or re-evaluate the true worth of maintaining the Northern mythology. Canada will need to demonstrate more than a willingness to submit to the beguiling beauty of its vast Arctic land and waters. It could be argued that Canada has long been able to maintain its legal position at the pleasure – or sufferance – of our Arctic neighbours. It remains to be determined whether Canada's new foreign policy will also support the practical initiatives necessary to withstand the global forces seeking to turn Canada's Arctic into the arena of the next “Great Game.”



NOTES

1. *Limits of the Seas No. 72, Continental Shelf Boundary: Canada-Greenland*, U.S. Department of State, Bureau of Intelligence and Research, Issued by the *Geographer*, 4 August 1976.
2. Dianne DeMille, “Denmark ‘Goes Viking’ In Canada's Arctic Islands – Strategic Resources of the High Arctic Entice The Danes,” March 2005, *Canadian American Strategic Review*, In Detail, [http://www.sfu.ca/casr/id-arcticviking1.htm]
3. Clifford Krauss, Steven Lee Myers, Andrew C. Revkin and Simon Romero, “As Polar Ice Turns To Water,” *The New York Times*, Monday, 10 October 2005.
4. Tim Naumetz, “Canada Builds Hans Island Case,” *National Post*, Saturday, 6 August 2005 .
5. Clifford Krauss, Steven Lee Myers, Andrew C. Revkin, “As Polar Ice Turns To Water”, *The New York Times*, Monday, 10 October 2005.
6. David Larson, *Security Issues and the Law of the Sea*, (University Press of America, 1994), p. 169.
7. Robert M. Bone, *The Geography of the Canadian North: Issues and Challenges* (2nd Edition), (Oxford University Press, 2003), p. 26.
8. Oran R. Young, “The Age of the Arctic,” *Foreign Policy*, No. 61, Winter 1985-86, p. 169.
9. Todd Wilkinson, Alaskan Oil Battle May Shift Offshore: Environmentalists Warn of Oil Exploration in Beaufort Sea, *The Christian Science Monitor*, 6 May 2003.
10. Bone, *The Geography of Canada's North*, p. 33.
11. Ron Huebert, “The Shipping News, Part II”, *International Journal*, Summer 2003, pp. 295, 298. Professor Huebert cited Richard A. Kerr, “A Warming Arctic Means Change for All,” *Science* 297 (30 August 2002, pp. 1490-2.
12. Franklyn Griffiths, “The Shipping News: Canada's Arctic Sovereignty Not on Thinning Ice,” *International Journal* (Spring 2003), pp. 257, 258, at p. 258.
13. DM Johnston, “The Northwest Passage Revisited,” *Ocean Development & International Law*, Vol. 33, pp. 145-164, at p. 146.
14. *Order in Council*, 18 December 1897, *Canada Gazette*, 14 May 1898, p. 2613.

15. Canadian Senate Debates, 20 February 1907, p. 271. Cited in Donat Pharand, *Canada's Arctic Waters in International Law* (Cambridge University Press, 1988).
16. Lester B. Pearson, "Canada Looks Down North", *Foreign Affairs*, Vol. 24, July 1946, pp. 638-647, at p. 639.
17. *1867 Boundary Treaty*, United States and Russia, Convention ceding Alaska between Russia and the United States, signed at Washington, 30 March 1867.
18. *1825 Boundary Treaty*, Great Britain and Russia, Convention between Great Britain and Russia concerning limits of their respective possessions on the north-west coast of America and the navigation of the Pacific Ocean, signed at St. Petersburg, 16 (28) February, 1825: 75 C.T.S. 96.
19. *Ibid.*
20. Nathaniel French Caldwell, *Arctic Leverage: Canadian Sovereignty and Security* (Praeger, 1990), p. 42.
21. *Arctic Waters Pollution Prevention Act*, c. 47, 1969-70 S.C. 653 (1970) (Can.)
22. *Act to Amend the Territorial Sea and Fishing Zones Act*, c. 68, 1969-70 S.C. 1243 (1970) (Can.)
23. *Canadian Declaration Concerning the Compulsory Jurisdiction of the International Court of Justice*, reprinted in 9 I.L.M. 598 (1970).
24. Letter of 17 December 1973 from the Department of External Affairs, Bureau of Legal Affairs, *Canadian Practice in International Law during 1973 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs*, 12 Canadian Yearbook of International Law, pp. 272, 279 (comp. Edward G. Lee, 1974).
25. *The Island of Palmas (Or Miangas)*, April 4, 1928, reprinted in 22 American Journal of International Law, pp. 867, 909 (1928).
26. Kenneth C. Eyre, "Forty Years of Military Activity in the Canadian North, 1947-87," *Arctic*, Vol. 40, No. 4 (December 1987), pp. 292-299, at p. 298.
27. S.O.R./77-173, *Canada Gazette* Part II, Vol. 111, No. 5, at p. 652 (9 March 1977).
28. *Canadian Statement filed at Ratification*, available at [http://www.un.org/depts/los/convention_agreements/convention_declarations.htm].
29. Ashley Roach and Robert W. Smith, *Limits of the Seas*, No. 36, 7th Rev., 23 (U.S. Dept. of State, 1995). The U.S. government protested Canada's straight baseline claims in 1985 and 1986.
30. Michael Byers, "We Can Settle This: Let's Trade Oil for Fish," *Globe and Mail*, Friday, 11 March 2005.
31. *Gulf of Maine Case* [1984] I.C.J. Rep., p. 246.
32. *Ibid.*, p. 287, para 77.
33. Robert Fife, "'NAFTA-plus' talks aim for security pact: Continental customs, energy, immigration policies on agenda of group co-chaired by Manley," *CanWest News Service*, 16 October 2004.
34. George Galdorisi, "The United States Freedom of Navigation Program: A Bridge for International Compliance with the 1982 United Nations Convention on the Law of the Sea?" *Ocean Development & International Law*, Vol. 27, pp. 399-408, at p. 401 (1996).
35. United States Oceans Policy, Statement by the President, March 10, 1983, Weekly Compilation of Presidential Documents, p. 19 (1983).
36. Robert Samuelson, "A New Era for Oil," *Washington Post*, Wednesday, 30 March 2005. This projection was based upon a study from the Center for Strategic and International Studies by Anthony Cordesman, *The Changing Balance of US and Global Dependence on Middle Eastern Energy Exports*, Revised 20 March 2005.
37. James Brooke, "Drawing the Line on Energy," *New York Times*, Tuesday, 29 March 2005, p. C1.
38. *Ibid.*, at p. C7.
39. *Ibid.*, at p. C1.
40. David Zweig and Bi Jianhai, "China's Global Hunt for Energy," *Foreign Affairs*, Vol. 84, No. 5, (September/October 2005), pp. 25-38, at p. 37.

