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A B O R I G I N A L R I G H T S A N D

T H E S O V E R E I G N T Y O F

C O U N T R I E S

(including a case study of
the Canadian Arctic)

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Canada

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PART I - INTRODUCTION

The overwhelming majority of countries in the world have uncertain boundaries.

The majority of countries claim sovereignty to areas which are subject to challenge by other countries. Even among close allies, such as Canada and the United States, there are disagreements over issues such as maritime boundaries.

To increase the credibility of their sovereignty claims, countries have often argued that their citizens used the territory in question. Sometimes the citizens referred to were an "aboriginal" people such as the peoples represented at this conference.

That could often create an awkward situation: on one hand, the country's diplomats may have been arguing that the aboriginal people WERE PART AND PARCEL of that country's boundary claims at the same time as the government's lawyers argued that these people were NOT really part of the country's legal system.

This paper will discuss the relationship between a country's sovereignty and the position of its aboriginal peoples. The word "sovereignty" is used here in the context of COUNTRIES, not of peoples. It will be argued that in many cases, a country's claim to sovereignty over a given area will be strengthened or weakened depending upon its approach to aboriginal rights. The example of Canadian arctic waterways will be used as a case study.

PART II - GENERAL OBSERVATION ON LAWS AND PEOPLES

A. LEGAL ORIGINS

Innumerable texts attempt to define the "origins of law". From a purely practical standpoint, one can argue that a legal system originates when certain CUSTOMS ARE ROUTINELY ENFORCEABLE by the community, or by institutions established by the community for that purpose.(1)

In continental Europe, the situation was (until the nineteenth century) comparable, despite the efforts of universities to standardize law along the Raman model. Indeed, before Napoleon French law was divided into systems which were even named "COUTUMES" (customs) - The Quebec Civil Code of 1866 was, first and foremost, a codification of one such system called the COUTUME DE PARIS, i.e. the "Custom of Paris".

Whose customs are enforceable? It is not true that the customs of the predominant ethnic group were necessarily the only customs which were enforced by a legal system; in fact, the history of European legal systems (which are the basis of laws in most of the world's countries) indicates that these systems often went out of their way to accommodate the customs of non-dominant groups.(2)

1. Sir William Blackstone described custom in these terms; 'Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind.... This it is that gives it its weight and authority: and of this nature are the maxims and customs which compose the common law, or LEX NON SCRIPTA (unwritten law), of this kingdom. "BLACKSTONE'S COMMENTARIES, Sweet and Maxell, 1929 p.67. Jessel M.R. described custom as "local common law... Local common law is the law of the country (i.e. particular place) as it existed before the time of legal memory," HAMMERTON v. HONEY, 24 W.R. 603. In the United States there is also

judicial recognition of "usage acquiring force of law": see CORPUS JURIS SECUNDUM, Vol. 10A p.536ff.

2. As early as 1066, William the Conqueror enacted that traditional Anglo-Saxon law would continue to apply except where specifically superseded. To this very day, non-conforming legal systems continue to be applicable in various parts of the U.K., such as the Isle of Man or the Channel Islands.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

In continental Europe (until the nineteenth century), the situation was not appreciably different, e.g. as witnesses by the different "coutumes" across France.

How could one determine whether a people's customs were enforceable or not by the country's legal system? Domination was not the criterion, Instead, it is arguable that the deciding factor was whether a people was considered part of the mainstream of the country. If a people was considered an integral part of the country's population, then its customs usually became enforceable (in some way or another) under the country's legal system. If that people were utterly peripheral to the mainstream, then its customs were usually disregarded by the prevailing legal system. This would explain historically, for example, why a country like the U.K. tolerated radically different customary rules in the County of Kent(3), but not in Wales(4): the former was perceived as part of the historical mainstream, whereas the latter (acquired by conquest) was not,

3. Kent was not ethnically identical to the other areas of England: its origins were not Anglo-Saxon, but Jute. The most important legal rule of all in earlier times, i.e, the inheritance of land, operated differently in Kent: instead of land being inherited by the eldest son, it was inherited by children equally. Elsewhere in England, a custom called "burgage" existed in various communities: land was inherited by the youngest son.

4. The case of Wales was specifically dealt with by statute during the reign of Edward I.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

During the centuries of colonial expansion, various European courts had to deal again with the question of whose customs they would respect and whose customs they would ignore. This caused much misery to the judicial mind.(5) After some 170 years of uncertainty, the Common Law finally developed a theory which drew distinctions depending on whether the colony had been acquired by "conquest" or "settlement": that criterion determined whose customs would be enforceable.

That legal approach worked efficiently when a case was clear, e.g. when Britain defeated the French at Quebec, or where Englishmen settled uninhabited territories. However, that approach caused great difficulty when an area was appropriated neither by clear.cut conquest nor by

settlement, but rather by gradual encroachment.

As a result, legal writers and courts have had to resort to an assortment of legal fictions and esoteric theories to explain how a given territory falls into one category or the other. It has been argued that these various stratagems usually lead to the same conclusion; courts eventually wind up treating agrarian societies as part of the mainstream, and give effect to their laws and customs; judges have had much greater difficulty in taking hunting societies seriously, and hence have not treated the latter's rules as part of the enforceable mainstream.(6)

5. A thorough analysis of the Common Law cases is found in Geoffrey S. Lester's INUIT TERRITORIAL RIGHTS IN THE N.W.T. Doctoral thesis in four volumes, York University, 1981.

6. This argument is presented forcefully by Lester in "Primitivism versus Civilization, OUR FOOTPRINTS ARE EVERYWHERE. Labrador Inuit Association, Nain, 1977. P.351 et seq.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

What has this meant for "aboriginal rights"? Aboriginal rights, are, after all, the rights inherited under an aboriginal legal system, Where the aboriginal population was perceived as part of a country's mainstream (because it was numerous, well organised, an ally in warfare or for other reasons), there was less judicial reluctance to recognize the aboriginal legal system and the rights flowing from it.(7) Where the population was perceived as peripheral (e.g. where Canada considered its "two founding nations"to be English and French), the prospects for judicial recognition of aboriginal rights were much less promising.

The conclusion is therefore as follows. If one wants to know whether a country treats a people as part of the mainstream or part of the periphery of national life, the most obvious indicator is the legal treatment of aboriginal rights. If the rights inherited under an aboriginal legal system (particularly land rights) are respected in a country's laws and in its courts, then that is a good indication that the aboriginal group is perceived as an integral part of the country and national life. If those aboriginal rights are not recognized, then that suggests that the aboriginal group is not considered (by that country) as a true component of the national homeland and the country's historical development.

7. That was, for example, the case of various, African peoples; see AMODU TIJANI v. SECRETARY, SOUTHERN NIGERIA (1921) 2 A.C. 399, and particularly RE SOUTHERN RHODESIA (1919) A.C. 211.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

B - EFFECT ON BOUNDARY CLAIMS

As mentioned earlier, the vast majority of the world's countries have claims on each other's lands or waters, or which are otherwise under challenge.

There are various ways in which those claims can be consolidated. One is military appropriation, sometimes called conquest. Recent examples, dealing with appropriations of both lands(8) and waterways(9), have been noticeably unsuccessful, and risk creating problems in the international community.(10) Indeed, even conquests of centuries past continue to be challenged today; and any country whose claim to sovereignty is based upon military occupation - even dating back a century or more - can find itself challenged by competing claims.(11)

The most reliable method for a country to maintain its claim to sovereignty in an area is for that area to be historically occupied by a people which is considered part of the national mainstream. Such areas are usually perceived as integral components of a country's "homeland." The same principle has been extended to waters: international law has recognized that a country can have "historic title" to an area beyond its normal territorial waters if the area has been traditionally the object of "effective occupation" by the citizens of that country.(12)

8. As in the Argentine in the Falkland Islands

9. As in the Iraqi action for the Shatt al-Arab waterway bordering on Iran.

10. The Charter of the United Nations distinctly condemns this method.

11. This is the case, for example, of South American countries which never accepted the outcome of the Guerra del Pacifico and the Guerra del Confederacion Peru-Boliviana of 1879.

12. This principle has been recognized at least since the beginning of the century: see e.g. HALL'S INTERNATIONAL LAW, 8th ed. p.193.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

It is therefore apparent that it is in a country's interest, when asserting sovereignty in an area, to produce evidence that the area is occupied by people who are an integral part of the national mainstream. It is these people who, so to speak, carry the nationality of the country to the area and who "bind" it to the "homeland".

C - RELATIONSHIP BETWEEN ABORIGINAL RIGHTS AND A COUNTRY'S SOVEREIGNTY.

Many countries attempt to play both sides of the fence: they argue that their aboriginal peoples are not part of the national mainstream for domestic legal purposes (and hence aboriginal rights under their customary law are unenforceable), but that these same peoples are part of the national mainstream for international legal purposes (and hence can be used as evidence of the country's historical occupation of an area).

That game has its limits. It will probably work within the domestic courts of a country, because these courts are usually unauthorized to challenge the boundary claims of their own country, whether the latter are logical or not.(13) However, there is no reason why courts of other countries, or indeed the international community generally, should take a similar position.

In order to develop a fully credible position, a country must make a choice. It must decide whether to portray its aboriginal peoples as being integral parts of the national mainstream, or portray them as being peripheral to the life of the homeland. If it portrays them as part of the mainstream, it may be sacrificing some of its position in domestic litigation (over aboriginal rights) in return for a stronger case (for sovereignty) in the international community.

13. This is based upon the so-called "Act of State" doctrine, which forbids most courts from reviewing the legality of unilateral national moves which have international consequences (e.g. wars, occupations, assertions of sovereignty etc.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

This exercise is usually in the national self-interest. Although the acknowledgement of aboriginal rights occasionally means that a country must make commitments to its aboriginal peoples, these benefits accrue to citizens of the country and may even be a component of its prosperity. This is immeasurably less costly than a challenge to the country's sovereignty can be, in which case it is foreigners who have everything to gain and nothing to lose.

Not all countries, however, see matters in this light. There are some countries whose governments are so accustomed to thinking of aboriginal peoples as peripheral that it never even occurs to them that aboriginal peoples are citizens whose well-being can be consistent with the national interest. These countries would tacitly prefer to take their chances with the international community rather than making any admissions concerning the status of their own aboriginal citizens.(14) That attitude is potentially hazardous for the country involved.

14. Overtones of that position are sometimes seen in Canadian documents. A case in point was the Governor General's proclamation commemorating the 100th anniversary of Canadian sovereignty in the Arctic Archipelago. The document re-asserted Canadian claims to waterways, claims which are the subject of some international controversy. The preamble recited the grounds for Canadian claims, including (in one draft version) the fact that Canadian Inuit had "used and occupied these lands and waters since time immemorial. However, the draft was intercepted and amended, to state only that Inuit "frequented" the area. The change not only made the Arctic sound like a pub, but was also inconsistent with the terminology of international law. It presumably reflected a greater fear, among some officials, of admitting the presence of Canadian Inuit than of undercutting the very

basis of Canadian claims to sovereignty.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

PART III - SUMMARY OF BASIC PRINCIPLES

A country treats an aboriginal people as part of its historical and current mainstream, or else it treats the people as part of the periphery.

If that people is treated as part of the mainstream, then the areas occupied by that people are part of the historical "homeland" of the country. The customary laws of that people also have a place in the legal system of the country; accordingly, the rights under that customary law are enforceable in the country's courts, as being part of the historical mainstream of the country's juridical evolution.

If that people is treated as part of the periphery, then its customary laws will probably not be enforceable, nor will any rights under those customary laws. By the same token, the areas occupied by this people cannot be considered part of the historical homeland of the country. Instead, those areas will be perceived as having been conquered or appropriated by legal fiction, neither of which are necessarily binding upon the international community. As a result, the country will not be in as strong a position to maintain its sovereignty claims if those claims are challenged,

PART IV - CASE STUDY: CANADIAN ARCTIC WATERS

A. GENERAL

This discussion will not concentrate on "moral" or "political" rights, but rather those which could be enforced in a Canadian Court of law.(15)

The legal rights of Inuit of offshore areas stem from two main bodies of law:

1. Government enactments; and
2. Jurisprudence on aboriginal rights.

15. This case study was presented at McGill University at the Sikumiut Workshop (April, 1982) held by the Centre for Northern Studies. The"proceedings of that conference are scheduled for publication in 1982.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

B. GOVERNMENT ENACTMENTS: THE ARCTIC ISLANDS GAME PRESERVE

In the early part of the Century, Canada enacted sweeping provisions which were designed not only to serve Inuit interests, but also Canadian sovereignty and the interests of conservation.

The degree to which Inuit interests were intertwined with the sovereignty issue is seen in the chronology of events leading to these provisions.

As late as 1918, there was no statute, regulation or Order in Council which clearly defined Canada's boundaries in the Arctic.(16) Unofficially, the Sector Theory, (which advocates Canadian sovereignty right up to the Pole) had been advanced in the Senate(17) and in the Arctic itself (18) a decade earlier; and by the 1920's, it was being advanced officially by Ministers of the Crown.(19)

16. E.G, see Order in Council P.C. No. 655 (March 16, 1918), which defines the District of Franklin simply as "that portion of the Northwest Territories not included in the provisional Districts of Mackenzie and Keewatin."

17. See speech of Senator Pascal Poirier of Feb. 20, 1907.

18. Captain Joseph Bernier's expedition made this claim on a memorial at Melville Island, July 1, 1909. For further commentary, see Canada's Arctic Archipelago" by Gordon Smith, NORTH NORD, Summer 1980, pp. 18-20.

19. Eg. the Minister of the Interiors speech to the House of Commons, 1925 HANSARD p. 4093. A detailed description of the events leading up to this is found, among other places, in NATIVE RIGHTS IN CANADA, CUMMING AND MICKENBURG, eds. 2nd ed., General Publishing, Toronto 1972. pp. 150-4.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

The Arctic Islands Game Preserve (AIGP) was intended to serve both the cause of sovereignty and the cause of protecting Inuit game(20); and that dual purpose was clearly perceived by both Ministers(21) and other public officials(22)

The Preserve, as established in 1926,(23) imposed the status of native "game preserve" on most of the area north of Hudson Bay and Hudson Strait. In 1926, the Preserve included only "lands". However, the boundaries to "lands" was deleted.(24) Thereafter (after some adjustments) the definition of the preserve's boundaries coincided approximately with the Sector Theory, and hence encompassed land and sea. It eventually covered almost all northern waters (except most of Hudson Bay, Hudson Strait, and the southern Beaufort).

20. This is documented by Constance Hunt in "The Development and Decline of Northern Conservation Reserves", CONTACT: ARCTIC LAND USE ISSUES, Nov. 1976 See also "Inuit Hunting Rights in the NWT," by Cumming and Aalto, (1974) Sask. L.R. 251 at pp. 277-280.

21. Per Minister of the Interior Stewart: "We are quietly and unassumingly trying to maintain our right in the territory... We must protect the native population." HANSARD 1925 p.4093.

22. Commissioner of the N.W.T. and the Yukon O.S. Finnie:

> "The creation of this 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 an area between the 60th and 141st meridians of longitude, right up to the Pole, is owned and occupied by Canada."

Under-Secretary of State for External Affairs O.D, Skelton:

> "Aside from its immediate purpose, this Preserve should prove of distinct value as an assertion of our sovereignty in the North, and it is all the more valuable because apparently arising as a normal active police administration."
>
> Quoted by Constance Hunt, OP. CIT.

23. P.C. 1146, July 19, 1926; Canada Gazette July 31, 1926. The authority for game preserves was found in the Northwest Game Act, R.S.C, 1906c. 151, as amended 7-8 Geo. 5, c.36.

24. P.C. 807 May 15; see Canada Gazette Vol. 62 p.4021

25. An account is in Hunt, OP. CIT. By 1945, the following description was found in the CANADA GAZETTE (p. 4345):

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

Certain activities were prohibited in the AIGP, notably:

- Non-native hunting, trapping, trading or trafficking(26)

- Entry by any "corporations or newcomers"(27)

These activities could, however, take place upon authorization of the Commissioner of the NWT. However, such authorization would issue only so long as it has a "purpose not incompatible with the interests of natives in such preserve."(28)

These stringent measures served their desired purpose in 1930, when the AIGP was successfully invoked to counter Norwegian Claims(29) for special rights in the Sverdrup Islands and Basin which would have compromised Canadian sovereignty.(30) Norway dropped its claims on learning that:

26. An exception was made for prospectors, who could hunt for food. A later exception was also made to protect rights of non-native trappers already living in the area: see P.C. 6115, Sept. 20, 1945, s 49 A.

27. S 6 (B).

28. S 6 (B). As mentioned by Hunt, no guidelines on this subject interpreted this requirement. In 1929, the Minister took over (from the commissioner) the task of issuing authorizations to anyone"to enter any native preserve." Again,there was a condition that the entry be fora "purpose not opposed to the interests of the natives." P.C. 807 May 15, S. 41.

29. Otto Sverdrup had claimed some 100,000 square miles of the central High Arctic for the Kingdom of Norway in 1900 and 1902. The Norwegian Government remained ambivalent toward sovereignty claims, but insisted on the right to carry on various activities (see Smith, OP. CIT: pp.14-15), By Canadian sovereignty, as seen in his speech to the House of Commons of March 31, 1930, HANSARD (1930) p. 1092.

30. Norway insisted that Canada impose no "obstacles to Norwegian fishing, hunting or industrial and trading activities." Diplomatic Note of Aug, 8, 1930. See DOMINION OF CANADA TREATY SERIES, 1930, No. 17

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

> "it is the established policy of the Government of Canada, as set forth in an Order in Council of July 19, 1926, and subsequent Orders, to protect the Arctic areas as hunting and trapping preserves for the sole use of the aboriginal population of the Northwest Territories."(31)

In reaching final agreement, Canada and Norway provided:

> That should these regulations be altered in the future, the Canadian Government will treat in the most friendly manner any application from Norwegians for facilities to carry on fishing, hunting, industrial or trading activities in the areas which the Norwegian Government's recognition comprises.(32)

31. Diplomatic Note of Nov. 5, 1930. See Treaty Series above. The note went on to explain that this was "in order to avert the danger of want and starvation through the exploitation of the wild life by white hunters and traders. Except with the per. mission of the commissioner of the Northwest Territories, no person other than native Indians or Eskimos is allowed to hunt, trap, trade or traffic for any purpose whatsoever in a large area of the mainland and in the whole Arctic island area, with the exception of the southern

portion of Baffin Island. It is further provided that no person may hunt or kill or traffic in the skins of the musk-ox, buffalo, wapiti, or elk. These prohibitions apply to all persons, including Canadian nationals. Should, however, the regulations be altered at any time in the future, His Majesty's Government in Canada would treat with the most friendly consideration any application by Norwegians to share in any fishing, hunting, industrial, or trading activities in the areas which the recognition comprises."

32. Diplomatic Note of Nov. 5, 1930. Norway stated:

> The Norwegian Government has noted that it is a leading principle in the policy of the Canadian Government to preserve the Arctic regions as hunting and trapping preserves for the sole use of the aboriginal population of the Northwest Territories, in order to prevent their being in want as a consequence of the exploitation of the wild life by white hunters and trappers and that they have drawn up more definite regulations to this end by means of several Orders in Council.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

In fact, a private challenge to the agreement (which is a treaty)(33) took place shortly after World War II, to little avail;(34) but interest has continued. (35)

In 1948, the federal government transferred(36) power over the "preservation of game" to the Northwest Territories Territorial Council.(37) The Council abolished almost all preserves; the AIGP was abolished in 1966, over the objections of the Canadian Wildlife Service. There was no mention of sovereignty, nor any indication that the Councilors had addressed their minds to that issue.(39)

Did that vote indeed have the effect of abolishing the game preserve?(40) It has been argued that although the GNWT was empowered to legislate for "preservation of game", the abolition of the Preserve did the reverse and was beyond the powers of the territorial Council.(41) That argument is

33. The argument that the Canada-Norway agreement, (which appears in the Dominion of Canada Treaty Series) is indeed a treaty is outlined by P. Cumming and K, Aalto in "Inuit Hunting Rights in the Northwest territories," (1974) 38 Sask.L.Rev. 252 at 286.

34. It is referred to in Smith, OP. CIT. p. 15

35. See, for example, an article exploring possible subsisting Norwegian claims by G. Henriksen, "Norske Rettigheter 1 Det Danadiske Arktis?" ONSDOG AFTEN MENPOFLEN, Sept. 16, 1970.

36. 11 and 12 Geo. 6 c., 20's. 1

37. The Federal NORTHWEST GAME ACT was repealed as part of the transfer 11-12 Geo. 6 c. 20's. 3(1). It was replaced a few months later by a Territorial GAME ORDINANCE: NWT Ordinances 1949c.12. This Ordinance reenacted the Game Preserves.

38. (Missing note in original text) The Council was mostly non-elected and overwhelmingly non-active.

39. A chronological account of the abolition, including the views of government spokesmen, is found in Hunt OP. CIT. pp. 52-56.

40. In order to be effective, the abolition must have been within the jurisdiction of the Council as defined in the Northwest Territories Act. In the case at hand, that jurisdiction could stem from either the Council's power

    (i) to enact provisions of a merely local or private nature (s. 13x)
    (ii) to enact provisions for the preservation of game. (s. 13q)

41. Hunt advances this argument, OP. CIT. pp. 66-68.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

debatable;(42) but on the other hand, the abolition clearly nullified the exclusivity of native hunting rights, and to that extent, it may conceivably be challenged as to its confiscatory results.(43) In short, the status of the abolition remains open to doubt.

C. THE ARCTIC WATERS POLLUTION PREVENTION ACT

Since 1966, most statutes have omitted mention of Inuit rights offshore except(44) the ARCTIC WATERS POLLUTION PREVENTION ACT,(45) which states;

> "Parliament at the same time recognizes and is determined to fulfill its obligation to see that the natural resources of the Canadian arctic are developed and exploited and the arctic waters adjacent to the mainland and islands of the Canadian arctic are navigated only in a manner that takes cognizance of Canada's responsibility for the welfare of the Eskimo and other inhabitants of the Canadian arctic and the preservation of the peculiar ecological balance that now exists in the water, ice and land areas of the Canadian arctic."

42. In the view of this writer it is unlikely that the courts would interfere with provisions (which were passed bona fides under a given head of power)? simply on the ground that the provisions were inept or even retrogressive in achieving their stated purpose. It would be necessary to demonstrate that the provisions were either intended to

achieve purposes outside that head of power, had consequences which did so, or constituted a wholescale abdication of responsibility.

43. The question of "confiscation" is explored and advanced from a number of standpoints by Cumming and Aalto, OP. CIT. at p. 312 et seq.

44. For example, the James Bay Agreement omitted the offshore. The offshore around northern Quebec is technically within the Northwest Territories, and has not been the object of any aboriginal rights settlement.

45. R.S.C. 1970, 1st Supplement c. 2

46. See the preamble to the Act.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

D. JURISPRUDENCE AND OFFSHORE RIGHTS: GENERAL

"Aboriginal rights" are a recognized category of rights in Canadian jurisprudence,(47) and (to the extent which they are existing) are entrenched in the new constitution(48). In order for aboriginal rights to exist in Inuit occupied areas, the following conditions must be met:

a) The Inuit must have possessed "an organized society",
b) The Inuit must have occupied the area;
c) The occupation must have been "to the exclusion of other organized societies; and
d) The occupation must predate assertions of British sovereignty.(49)

It was held that Inuit met those conditions.(50)

47. For a full analysis of this topic, see Geoffrey S. Lester's INUIT TERRITORIAL RIGHTS IN THE NWT. Doctoral thesis in four volumes, York University, 1981.

48. Constitution Act 1981, s. 35 (1)

49. These conditions are summarized by Mahoney J. in HAMLET OF BAKEN LAKE et. al v. MINISTER OF INDIAN AFFAIRS et al (1980) 1 F.C. 518,

50. The case dealt with Inuit in the Keewatin; but aside from the issue of Indian incursions (which were apparently non-existent in the Arctic Archipelago) the other conditions would be identical throughout most Inuit-occupied areas. Mahoney J. ruled that:

a) "Aboriginal Inuit had an organized society;"
b) "To the extent the barrens lent themselves to human occupation, the Inuit occupied them."

c) Most of the area had been to the exclusion of Indians;
d) The occupation predated British sovereignty.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

As a result, "an aboriginal title to that territory, carrying with it the right freely to move about and hunt and fish over,(51) was vested at common law in the Inuit."(52)

However, when applying this reasoning to the offshore, the following question arises: Is it possible for the sea-ice to be the object of an aboriginal title?

In order to determine whether a claim of aboriginal title can be made to the seas and sea-ice, it is necessary to probe deeper into the nature and legal origins of aboriginal title.

E. APPROACHES TO ABORIGINAL TITLE

The law pertaining to aboriginal title has been approached from different perspectives by different authors and judges. In one view, this part of the law stems from sixteenth century legal and judicial doctrines which originated in Spain and which gradually gained acceptance in the United States and Canada.(53) A second source of Native Rights is a Canadian constitutional document, namely The Royal Proclamation of 1763.(54) The Proclamation, whose application to the High Arctic is arguable,(55)

51. It is important to note that in the Baken Lake case, lawyers for the Inuit scrupulously avoided the question of PROPRIETARY interests and confined their assertions to hunting and trapping rights. "The aboriginal title asserted here encompasses only the rights to hunt and fish as their ancestors did." Per Mahoney J.

52. Per Mahoney J.

53. A similar thrust is to be found in the Memorandum of Law presented by the lawyers for the Inuit in the Baken Lake Case. For a presentation of this viewpoint, see Cumming & Mickenburg, OP. CIT.

54. R.S.C. 1970, Appendix p. 123. This is not an "Aboriginal Title" in the strict sense, since its basis is in a government EDICT.

55. The criterion has been whether the lands were "TERRA INCOGNITA" (in 1973) or not: see Cumming & Mickenburg, OP. CIT. p. 30. The Royal Proclamation was expected to apply elsewhere than TERRA INCOGNITA. In the case of the eastern Arctic, it is fairly obvious that the area was not terra incognita in 1763 due to the extensive efforts at locating the Northwest Passage. The Status of more westerly areas is open to doubt. The most recent jurisprudence, which departs

significantly from earlier cases, in THE QUEEN v. SEC. STATE. FOR FOREIGN AND COMMONWEALTH AFFAIR exparte INDIAN ASSOC. OF ALBERTA et al (Jan. 28, 1982); Lord Denning's judgement held (on a point that was not discussed by other judges) that the Royal Proclamation applies to all of Canada - even the areas which were TERRA INCOGNITA in 1763. The judgement of Hall J. in SIGEAREAK EL-53 N. The Queen (1966) S.C.R. 645 excluding Hudson Bay from the area covered by the proclamation. Elsewhere note that Sisions J. ruled that the Royal Proclamation is applicable to Inuit in R.V. Kogogolak (1959) 28 W.W.R. 376.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

"reserves for the use of the (said natives)(56), all the Lands and Territories not included within (Quebec and Florida), or within the Limits of the Territory granted to the Hudson's Company...". Do those "Lands and Territories"include the offshore? That point is arguable.(57) It is perhaps more reliable, in discussing aboriginal claims in this area, to refer back to basic principles of Common Law.(58)

56. The actual expression is "said Indians." This does not exclude Inuit; see Brian Slatten's LAND RIGHTS OF INDIGENOUS CANADIAN PEOPLES, University of Saskatchewan 1979, pp. 210-212, 233-238, 244ff.

57. Application of the Proclamation to the offshore should depend on whether the expression "Territories" (used in the Proclamation) includes the seas and sea-ice. That precise question was, in another context, answered in the affirmative in one court case: R.V. TOOTALIK E4-321, 71 W.W.R. 435, overturned on other grounds 74 W.W.R. 740. The question was whether the same word "Territories", in the Northwest Territories Act, included seas and sea-ice. Per Morrow J.:

"When (the Northwest Territories Act) defines 'Territories' to include 'all that part of Canada north of the sixtieth Parallel of North Latitude' does it purport to include the waters and, where appropriate the sea-ice in between the islands or the continent of the islands or does it only embrace the land area itself?... I conclude therefore that the definition in no wise restricts 'Territories' to land only as distinct from 'and' in the larger sense." See also B.P. EXPLORATIONS CO. v. HUNT (1980) 23 Alberta Reports 271. Furthermore, the proclamation refers to both "lands and Territories." The above interpretation follows the basic rule of statutory interpretation that different words in an enactment have different meaning. If "Territories" meant "lands" then reference to both in the Proclamation would be "suplusage" (i.e. redundant). "Territories" therefore must arguably apply to something distinct from "lands --- in which case it would be plausible to apply the Proclamation offshore.

58. A wide-ranging description of these rules is found in Brian Slattery's Land Rights of Indigenous Canadian Peoples, University of Saskatchewan, 1979. An even more meticulously documented description is found in Lester, OP. CIT.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

Before the European arrival, the aboriginal populations (including the Inuit) possessed systems of customary law. Those systems defined obligations and rights, including the private rights which various collectivities had in the areas in question.(59) When the Crown asserted sovereignty over these areas, did it necessarily abolish these systems and (by the same token) any rights which those systems recognized pertaining to lands and waterways?

The Anglo-Canadian legal system distinguishes between sovereignty and title.(60) The two concepts are distinct; so when the Crown asserted sovereignty, it does not necessarily follow that the Crown was abolishing all other rights (property, hunting etc.) and expropriating the area as its private domain.(61)

59. The fact that Inuit possessed such a system has been outlined in various works including INUIT LAND USE & OCCUPANCY PROJECT, Milton Freeman, ed, Dept. of Supply & Services, 1976; and Nobert Rouldand's LES MODES JURIDIQUE DE SOLUTION DES CONFLITS CHEZ LES INUIT, Etudes Inuit, Universite Laval, 1979. The existence of the system was recognized by Mahoney J. in the Baker Lake Case, mentioned earlier.

60. The legal expressions are, respectively, "Imperium and "Dominium."

61. Otherwise, as Lester points out, all the inhabitants of an area passing to the Crown would have become trespassers - a result which is obviously absurd and which has been recognized as such in jurisprudence.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

Rights under the pre-existing legal system could have become unenforceable in several ways. For example, if the Crown had acquired the area by conquest, (e.g. New France) the pre-existing rights would have been unenforceable unless the Crown re-introduced (or "recognized") them.(62) None of those conditions existed in Northern Canada.(63)

On the contrary, the assertion of sovereignty rendered the Inuit British Subjects; and the Crown was bound by law not to take or grant rights to a subject except with a written record. No written record appropriates (to the Crown) Inuit rights in the North.(64)

In the absence of any edict or doctrine to abolish the Inuit customary law, that customary law (and rights flowing under it) continues in the ordinary way until changed by statute.(65)

What is that customary law? It is not necessary that it be already spelled out: in order to be enforceable,(66) it is sufficient that the customary rules should be "discoverable to (lawyers) by evidence."(67)

62. This is the thinking which underlies American jurisprudence in the thirteen colonies and which, as Lester points out, has been mistakenly applied in some cases where no conquest took place.

63. Lester produces four volumes of evidence and judicial pronouncements to substantiate this point.

64. The Hudson Bay Company Charter, for example, does not do so; see Lester Chapters XX, XXI.

65. The population can, however, agree to alienate its lands and rights to the Crown, as long as it is done by written record. Other means of change are improper: for example, the Crown cannot acquire areas by "conquest" after sovereignty has already been asserted, since the Crown cannot legally "conquer" people who have already become technical British subjects.

66. Enforceability is demonstrated by Lester pp. 150-155,

67. Lester, OP. CIT. 1428. Authorities for this proposition are cited pp. 822-831, 884-896.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

Nor is it necessary for the subsisting system of customary law to conform to British Common Law categorizations.(68)

The expression "aboriginal rights" therefore refers, very simply, to that body of rights which were vested in peoples (prior to the European arrival) under their own legal systems, which were not interrupted by any statute subsequent to the European arrival, and hence which continue to be enforceable under the recognized principles of continuity of law.

Are such rights recognizable offshore? That question can be answered by reference to both principle and legal authorities.

In principle, if Inuit customary law recognized collective Inuit rights in the offshore, that fact should be sufficient to vest an aboriginal title in the offshore area. The pre-existing rules of customary Inuit law in offshore areas have not been abolished by any statute since the advent of Anglo-Canadian Sovereignty. Contrary to popular belief, the Common Law itself has recognized rights of ownership in offshore areas.(69) However, even if the Common Law had not traditionally foreseen such rights, it would nevertheless be bound to

recognize them because the Common Law recognizes the enforceability of aboriginal customary law even when the latter does not coincide with the traditional Common Law.(70)

The second point is that for legal purposes, there is already precedent for the proposition that the legal system on land can be extended to sea-ice.

68. "Cramping the aboriginal LEX LOCI ("law of the place") into a specific set of common law rights and relationships has been proscribed by principle and authority." Lester, p. 1428.

69. The presumption that the seabed belongs to the Crown is rebuttable by evidence: JARDINE v. SIMON, (1876) Tru. 1. Under certain conditions, the seabed can be granted and owned in fee simple: CAPITAL CITY CANNING v. ANGLO-BRITISH COLUMBIA PACKING (1905) 2 W.L.R. 59. GAGE v. BATES (1858) 7 U.C.C.P. 116, BROWN v. REED (1874) 15 N.B.R. 206.

70. See footnote 68
That argument is being used by Alaskan Inuit in their claim to Alaskan offshore. See Plaintiff's Memorandum in INUPIAT COMMUNITY OF THE ARCTIC SLOPE EL AL. v. U.S.A. EL AL., U.S. District Ct, Alaska No. A81-019., pp.24 et seq. The Alaskans cite legal opinions from U.S. Attorneys General, e.g.:

> "thus unless the rights which natives enjoyed from time immemorial in waters and submerged lands of Alaska have been modified under Russian or American sovereignty, there must be held that the aboriginal rights of the Indians continue in effect" (1821); and
>
> "In the first place, it must be recognized that the mere fact that common law does not recognize several rights of fishery and ocean waters or rights in land below the high water mark does not mean that such rights were abolished by the extension of American sovereignty over the waters in question. It is well settled that Indians legal relations, established by tribal laws or customs antedating American sovereignty are unaffected by the common law" (1821).

And per Homes J. in CARTER v. HAWAII, 200 U.S. 255 (1906)

> The right claimed is a right within certain metes and bounds to set apart one species of fish to the owner's sole use. A right of this sort is somewhat different from those familiar to the common law but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or profit a prendre as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit.

And per the Dept. of the Interior:

> A careful study of the cases and statutes confirms... that submerged lands in Alaska are susceptible to such claims of aboriginal possession as were recognized by the act of May 17, 1884, and by subsequent legislation of the same tenor; that such rights, whatever they may be, have not been destroyed by the course of congressional legislation since 1884; whether such rights have been abandoned and or otherwise extinguished or whether they still exist as valid rights today is entirely a question of fact to be decided on the available evidence in each particular case. It is the duty of this Department to respect existing rights in disposing of the Federal public domain. This is true whether the public domain is land or water or a mixture of both, and whether the existing rights were established under Spanish, Mexican, Hawaiian, Danish, Choctaw or Tlingit law. It makes no difference whether the evidence of such rights is found in papers sealed and notarized or in custom and the fact of possession, which is older than seals and notaries.
>
> >>>>>>>>>>>>END NOTES<<<<<<<<<<<<

Those precedents are in three areas:

a) In international law, it has been held on at least one occasion that iced-over areas are "integrated" to the land.(71)

b) For the purposes of territorial legislation, it has been held that sea-ice is an "attribute of land."(72)

c) It is recognized law in Canada that solid ice can be owned and dealt with in a manner similar to the land beneath it.(73)

There is therefore no overwhelming legal impediment of Inuit rights in sea-ice, which would be analogous to Inuit rights on land. Such an impediment would have occurred, of course, if the Crown had appropriated the offshore for itself.

However, the assertion of sovereignty does not necessarily vest ownership of areas in the Crown; and the same principle applies to the offshore.(74)

71. That is the reason, for example, that the White Sea, in the northern U.S.S.R., is generally regarded as internal waters of the U.S.S.R.: see, e.g., Johnston "Canada's Title to, Hudson Bay and Hudson Strait", 1934 BRITISH YEARBOOK OF INTERNATIONAL LAW p. 4.

The rationale includes the fact that it is iced over for most of year: "C'est une mer, mais si particuliere que, durant les trois quarts de l'annee, elle s'agrege territoire de la Russie, perdant ainsi son aspect international." Revue generale de droit international public (1911) p. 98. ("It is a sea, but so unusual that during three quarters of the year, it is integrated to Russian territory, thereby losing its international character)".

72. R. v. TOOTALIK E4-321 (1969) 71 W.W.R. 435 at 439, reversed on other grounds 74 W.W.R. 740.

73. This is derived from the system of "water lots", which were well known throughout Canada in the days of ice-cutting for refrigeration. For authority see LAKE SIMCOE ICE AND COLD STORAGE CO. v. MCDONALD (1901) S.C.R. 130, at p. 133.

74. RE OFFSHORE MINERAL RIGHTS OF BRITISH COLUMBIA (1967) S.C.R. 792.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

No statute has vested the arctic seas in the Crown either, as far as property rights are concerned.(75) Since customary Inuit occupancy of the off-shore has been approximately the same as Inuit occupancy of land, it follows that Inuit aboriginal rights continue over the offshore and are analogous to those on land.(76)

F. LEGAL DILEMMAS AND SOLUTIONS

In view of the existence of aboriginal rights in the offshore, the following questions arise. First, what are the implications of those rights? Second, how should the Canadian government and public formulate future policy in light of that reality?

In answer to the first question, the foregoing analysis suggests that "aboriginal rights" in the offshore are composed of the Inuit customary rules of conduct, insofar as the latter have not been distinctly superseded by statute. The Canadian courts would be empowered to apply those rules, to the extent that the rules could be demonstrated by evidence.(77)

75. Although the Hudson Bay Charter purported to convey the offshore in Hudson Bay and Hudson Strait to the Hudson Bay Company, it did not have the effect of transferring property rights; see Lester OP. CIT. Chapters XX and XXI.

76. "The Inuit's possessory title (to the offshore) will prevail against the claim of the Crown or its grantee, and the Crown can only rebut the Inuit's claim to title by producing a documentary or statutory title in its own hands." Geoffrey Lester, evidence to the National Energy Board on the Arctic Pilot Project, March 1982.

77. e.g. The expert testimony of Inuit elders, anthropologists etc.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

Since these rules have seldom been outlined in literature (and never in Canadian courts), it is obvious that there are problems in making forecasts on how Inuit aboriginal rights would affect questions such as the legality of mega projects, etc. In order to find a solution to this problem (and to avoid laborious litigation in the process), the federal government undertook (in 1973) to "settle" aboriginal rights.

That commitment presumably extended, at first, to lands only. However, in 1980 the federal government specifically undertook to deal with claims in the offshore. That commitment was stated to the House of Commons by the then Parliamentary Secretary to the Minister of DIAND:

> The Minister of Indian and Northern Affairs and his officials are now negotiating a variety of claims made by groups which represent the native people of Canada. Several of these claims concern the control of the territories now governed and regulated under the Arctic Waters Pollution Prevention Act. For instance, the Inuit have always based the whole of their society and economy on the harvesting of wildlife resources which depend directly and indirectly on the Arctic waters, and any regulation concerning these resources must therefore be considered relevant to the final legal settlement of the claims presented by the Inuit to the government.(78)

The Inuit and the government are currently involved in negotiations. In order to discuss the evolution of Inuit rights in the offshore, it is important to look at that negotiating process.

78. M. Bernard Loiselle, HANSARD July 11, 1980.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

D. "LAND CLAIMS" AND THE OFFSHORE

From the federal standpoint, the negotiating process was originally intended to "extinguish" aboriginal title in return for cash and/or other, specified rights.(79) The term "extinguishment" has, however, been used much less frequently in recent discussions.

From the Inuit standpoint, "extinguishment" is not what is taking place. Instead, the Inuit leadership viewed the exercise as a means to translate pre-existing but unspecified legal rights into a more modern context.(80)

In essence, "the real objective of these discussions must be to provide a solid and acceptable blueprint for the future of the

North."(81)

Seen in that context, the negotiations provide an extremely important opportunity to overcome some of the legal and administrative fictions and anachronisms, and to replace them with a more workable and scientific approach based upon the realities of the North. The offshore is a notable example.

79. For a brief chronology, see Graham & McAllister, THE INUIT LAND CLAIM CONSTITUTIONAL DEVELOPMENT, AND LOCAL GOVERNMENT REFORM IN THE NWT Queen's University Institute of Local Government, 1981.

80. "The nature of this exercise is for the various parties to agree on a definition of their respective rights in certain key areas. Neither side is abolishing its rights; it is clarifying them, in an area which currently suffers from a lack of clarity." PARNAGUJUK, Inuit Tapirisat of Canada, 1980. p.9.

81. PARNAGUJUK, p. 2.
See also "Big Step by Inuit on Land Claims", Globe & Mail, Feb. 5, 1981, p. 7.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

It is also clear that a cooperative system of planning and administration for the arctic offshore would be consistent with the national policy of providing a just settlement of aboriginal claims.

In particular, it would provide a mechanism for the orderly settlement of disputes and the development of consensus positions on an area which the Inuit consider absolutely vital. That, in turn, should minimize the prospect of laborious lawsuits over the assertion of aboriginal title in these offshore areas. That result can only be beneficial for national policy.

It is a basic necessity, according to ITC, that local expertise be used in every phase of the planning process. This is a necessity not only because local Inuit are most intimately familiar with the areas in question (and hence have a most important contribution to make), but also because they are most directly affected by policy decisions. Both the credibility and the fairness of that process depend on Inuit participation. The Land Claims proposals will recommend an orderly and efficient way for that participation to take place, and this can only be beneficial for the process itself.

G. IMPACT OF SOVEREIGNTY

The impact of Inuit rights on Canada's assertions of sovereignty in arctic waters is likely to be highly significant. Until now, those assertions have run into a certain amount of opposition, notably from the United States, If Inuit rights contribute to overcoming that opposition, it is arguable that this benefit alone should be sufficient to prompt strong federal support for an expeditious resolution of Inuit claims.

No SINGLE argument or fact is likely to be DECISIVE in resolving the controversy over arctic waterways in favour of Canadian sovereignty. However, the foregoing information gives rise to a NUMBER of arguments which can be added to Canada's position; collectively, they may go a long way to substantiating Canadian sovereignty.

Those points can be summarized as follows:

First, one must consider what the foregoing information does to a Canadian claim to "historical title".(82)

It is clear that Canadian residents (i.e. the Canadian Inuit) have been treating the offshore as part of their hunting area since time immemorial is equally clear that if the Canadian government recognizes this occupancy (and translates the aboriginal rights flowing from this occupancy into a settlement with Inuit), Canada will be officially asserting that its nationals have been conducting an "effective occupation" of these areas. In international law, it has long been recognized that such occupation can be a basis for a country's claim to sovereignty.(83)

The strength of that argument is increased when one considers the fact that aboriginal occupancy gives rise to rights which are enforceable in the courts. If this occupancy were treated (for legal purposes) as being so superficial and flimsy that it gave rise to no legal rights, then it would be easier for other countries to attempt to discount its impact on international law; but that occupancy becomes somewhat more difficult to discount when one recognizes that it vests legal rights enforceable in a court of Common Law (for which countries such as the U.S.A. share a certain respect).

82. Canada is already expected to have an "historical" title to Hudson Bay and Hudson Strait. This title stems largely from the assertion that these bodies of water were given to the Hudson Bay Company in 1670, which thereafter transferred them to Canada in 1870. This transfer was followed by various administrative acts whereby Canada assumed sovereignty; a decisive feature was also the acquiescence of other countries. See "Canada's Title to Hudson Bay and Hudson Strait", by V.K. Johnston, BRITISH YEARBOOK OF INTERNATIONAL LAW XV (1934) pp. 1-20. However, the current most pressing concern is in the Northwest Passage, which was outside that area.

83. See footnote 12

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

A further (if relatively peripheral) feature of the "historical" argument is that the foregoing information indicates a much longer period of functional jurisdiction than is usually assumed. Canada's day-to-day administration of waters in the Arctic Archipelago did not begin with the enactment of the ARCTIC WATERS POLLUTION PREVENTION ACT in 1970; it dates

at least as far back as the expansion of the Arctic Islands Game Preserve(84) in 1929.(85) The AIGP further appears to have obtained (with the exception of certain Norwegian comments) the acquiescence of the international community.(86)

Above and beyond those features, there are other ways in which Inuit rights can benefit Canada's position on sovereignty - particularly pursuant to a comprehensive settlement as in now being negotiated.

Part of the way in which countries can assert sovereignty is by exercising "functional jurisdiction" over an area in the manner of "business-as-usual": if more and more administrative measures are applied over time, it becomes increasingly awkward for other countries to challenge that jurisdiction. Furthermore, if this "incremental approach" is applied over several decades, it can contribute to a claim to "historical title". It is clear that a comprehensive settlement with the Inuit, binding on the offshore, would be a significant addition to these "LAYERS" of administration, and hence would contribute to Canada's "functional jurisdiction". That addition would be particularly significant if, as Inuit have proposed, it includes the setting up of a comprehensive and co-operative PLANNING PROCESS for the offshore and costal zones.

As mentioned earlier, a sophisticated system for environmental planning (as urged by Inuit) would also add to the specificity of the ARCTIC WATERS POLLUTION PREVENTION ACT, and thus add credibility to that unilateral declaration.

84. The Arctic Islands Game Preserve, enacted in 1926 and expanded in 1929 and following years, purportedly applied to almost the entire Canadian arctic Sector. It also met the acquiescence of the international community, with the partial exception of Norway. Norway was prepared to recognize the Game Preserve, but stated explicitly that this recognition was not based upon the Sector Theory.

85. Indeed, legal purists might argue that once one acknowledges the existence of Inuit customary law and its application to arctic waterways (in the context of aboriginal rights), an embryonic form of "functional jurisdiction" has been exercised by the local population for centuries. It is unlikely, however, that this argument would have more than academic interest.

86. Acquiescence can play an important role in the issue of assertions of sovereignty.

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

Finally, the follow-up on Inuit rights (in a settlement) would reinstitute, to a partial extent, commitments which Canada had made to Inuit under the Arctic Islands Game Preserve, and which were the decisive factor in the Canada-Norway agreement of 1930.(87)

The primary mechanism currently under consideration by federal

officials to assert "functional jurisdiction" is the construction of an ice-breaking fleet, at a cost of unknown millions of dollars. The relative merit of that technique, in asserting Canadian sovereignty, is open to question. At present, the claim by shipping nations (notably the United States) that the Northwest Passage is an international strait is weakened by the fact that ice makes the Passage almost unnavigable. By turning the area into a navigable waterway, rather than an ice-bound extension of land, Canada would contribute to the argument of the shipping nations rather than undercutting it; in fact, Canada would be proving their point. From a sovereignty standpoint, such a move would need to be approached with extreme caution. It is clear that if Canada is committed to this course, it would be prudent to institute beforehand a series of measures affirming Canadian sovereignty (e.g. recognition of Inuit rights and a planning system) to compensate for any erosion of sovereignty which the opening of this waterway could cause.(88)

87. This is not to suggest that Norway could or would press claims in the Sverdrup Basin, now that the area is no longer "reserved" for native use as it was in 1930. However, Canada's "flip-flop" on the status of the area is not the most edifying example of Canadian adherence to what is written in its treaties.

88. This argument has been made by a variety of observers. For example, the following appears in the GLOBE & MAIL, May 27, 1981: "Canada could firmly establish sovereignty over the disputed Northwest Passage by recognizing the Inuit land claims in the Lancaster Sound region, a working group on the region's future was told yesterday. Donald Gamble, director of policy studies for the Canadian Arctic Resources Committee, said that if Canada settles the land claims on the basis of the Inuit use of permanent ice shelves in the area, 'it would, in effect, give Canada complete sovereignty and jurisdictional control of the Arctic Islands area'."

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

PART V. CONCLUSION

It is the stated objective of Inuit (through their national organization), to retain their identity, but also to seek "full participation in, and sense of belonging to Canadian society."(89)

Canada can potentially accommodate that objective. An indispensable element of that endeavour is the acknowledgement of aboriginal rights, and their translation into a modern system which provides for full local participation in the future of Inuit-occupied areas.

Canada has taken halting steps in that direction. It has declared a commitment to the settlement of "land" claims, and has extended that commitment to waters as well. Various cordial speeches have been made about the desirability of welcoming Inuit into the mainstream of Canadian life.

However, before a people can be considered a part of the

mainstream, it is essential that the population be considered by officials as "fellow citizens"(90) instead of adversaries.

89. Letters Patent of Inuit Tapirisat of Canada, objective (f).

90. See Vilhjarmur Stefansson's comments quoted in Margaret Fairley's SPIRIT OF CANADIAN DEMOCRACY: "We should not regard the Eskimos as foreigners but as friends. They are your fellow citizens. Their future is bound up in our future. If Canada is but a thin southern strip across which plies a shuttle railway we shall have no remarkable future."

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

Although it is arguable that the whole of Canada has been showing adversarial tendencies of late, this is a pattern which Inuit have consistently attempted to avoid.

The position of the Canadian government has not been quite as consistent, and sometimes creates doubts as to whether Inuit are considered part of the Canadian mosaic or not.(92)

In some areas, however, the mutuality of should be obvious to any rightminded observer. The issue of Canadian sovereignty in Arctic waterways is a case in point. If Canada is incapable of asserting functional jurisdiction over the waterways, then the shortfall in environmental planning and regulation could have disastrous consequences on a maritime-oriented population such as the Inuit. The Canadian national interest is also closely bound to this issue, since the waters in and around the Arctic Archipelago cover hundreds of thousands of square miles. The government has therefore been invited to acknowledge the Inuit presence (and consequent aboriginal rights) as a means of advancing its self-interest.(93)

91. The invitation to work on mutual concerns is stressed repeatedly in PARNAGUJUK, Inuit Tapirisat of Canada, 1980.

92. For example, in the 1978 Baker Lake case (footnote 49), the federal government at first denied the very existence of aboriginal rights (five years after it had promised to negotiate them), but at least acknowledged that Inuit lived in the central Keewatin. The government then amended its pleadings, and refused to admit that Inuit had lived there. In the respectful view of this writer, that move was absurd, and did not inspire confidence in the officials who authorized it.

93. See proceedings of the Sikumiut Workshop (footnote 15).

>>>>>>>>>>>>END NOTES<<<<<<<<<<<<

Canada is hardly the only country to find itself in such a situation. Indeed, a multiplicity of countries are having difficulties

sorting out boundaries (particularly at sea); and it is entirely conceivable that they may invoke aboriginal use (e.g. of a fishing area) as an argument to support claims to sovereignty.

Aboriginal peoples cannot, however, afford to be used merely as pawns in a worldwide jockeying for lands and seas. If an aboriginal presence is to be used as an argument in boundary claims, the country must equally be prepared to acknowledge that rights are attached to that presence. A country cannot legitimately play both sides of the fence.

There are signs that Canada will take a coherent position on this issue, that it will negotiate a system of Inuit participation in plans affecting the Arctic waters, and that it will invoke this Inuit role as proof that the Inuit presence (dating back to time immemorial) in these waters is an ongoing reality, That, in turn, will assist the credibility of the argument that these waters have been occupied by "Canadian nationals" since time immemorial, that this occupation is recognized as having legally binding effects, and that this area an integral historical part of Canada. If this approach is taken, it could prove a valuable precedent to aboriginal peoples in a number of other countries.

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