INTERNATIONAL LAW

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As international law has become so complex and many-sided, it cannot be expected that this annual survey be both comprehensive in scope and thorough in its treatment of particular topics. Since this is a "survey of Canadian law," it is proposed to confine the scope of inquiry to Canadian legislation and decisions of Canadian judicial and administrative tribunals. International treaties and adjudications which are readily accessible in various international law journals are not intended to be covered in this survey.

I. SOVEREIGN IMMUNITY

Two important sovereign immunity cases were decided by the Appellate Court in Quebec recently. In each case, the court unequivocally reaffirmed the Quebec Superior Court's decisions adopting the "restrictive doctrine" of sovereign immunity.

Venne v. *Congo* [1] was an appeal from an interlocutory judgment of the Quebec Superior Court, District of Montreal, which dismissed a declinatory exception by the defendant, the government of the Democratic Republic of Congo, invoking sovereign immunity. The action was taken by an architect, claiming fees for professional services rendered in preparing plans for the Congo pavilion at "Expo '67." The Quebec Court of Queen's Bench, Appellate Side, dismissed the appeal by a unanimous decision.

The court acknowledged that the Supreme Court of Canada has not accepted the doctrine of restrictive sovereign immunity. [2] However, it took note of the indications given by the Supreme Court in the earlier case of *Flota Maritima Browning de Cuba S.A. v. "Canadian Conqueror"*, that Canada might no longer consider the doctrine of sovereign immunity to be absolute. [3]

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[1] [1969] Que. B.R. 818, 5 D.L.R.3d 128 (1968).

[2] In Dessaulles v. Poland, [1944] Sup. Ct. 275, 4 D.L.R. 1, the appellant claimed payment for professional services and disbursements, including a demand for an accounting of the various business transactions which had taken place during the time the appellant acted as legal adviser to the Polish Consulate and represented the various nationals of Poland who had been referred to him. The Supreme Court of Canada applied the doctrine of absolute sovereign immunity and stated: "There is no doubt that a sovereign State cannot be sued before foreign courts. This principle is based on the independence and dignity of States, and international courtesy has always respected it. The jurisprudence has also adopted it as being the domestic law of all civilized countries."—translation. *Id.* at 277 4 D.L.R. at 7.

[3] [1962] Sup. Ct. 598, 34 D.L.R.2d 628. The case arose out of a suit against seven ships for breach of a lease-purchase agreement. The Cuban government made

After an extensive survey of the pronouncements of leading writers and judges in various countries, the court concluded that the evolution of Canadian jurisprudence and the jurisprudence of other countries, with the possible exception of the United Kingdom [4] and Soviet bloc countries, justified the court in repudiating the theory of absolute sovereign immunity as "outdated and inapplicable to today's conditions." The court's rationale was that the theory of absolute sovereign immunity might have been workable in the past when government acts were more limited in scope. It similarly might have been an apt theory when sovereigns were in many cases personal despots. In a present day context, Mr. Justice Owen said:

> However, today, instead of starting from the principle that every sovereign State enjoys jurisdictional immunity unless the other party can demonstrate some established exception to this rule, I believe we should reverse this process. Sovereign immunity is a derogation from the general rule of jurisdiction. Any attorney seeking immunity from jurisdiction on behalf of a sovereign State should be called upon to show, to the Court's satisfaction, that there is some valid basis for granting such immunity. Mere proof that the party seeking immunity is a sovereign State or any agency thereof and the invocation of the doctrine of absolute sovereign immunity is no longer sufficient. [5]

Having adopted the restrictive theory of sovereign immunity, the court found that counsel for the appellant, the Democratic Republic of the Congo, had not shown that there was a valid basis for sovereign immunity in an action claiming fees for professional services. What is required to demonstrate a "valid basis for sovereign immunity?" The court gave no specific criteria. Mr. Justice Brossard said: "[I]t is subject in each case to the circumstances,

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an appearance under protest to assert sovereign immunity on the ground that the ships were owned by and in the possession of the government of Cuba. The Supreme Court of Canada was of the opinion that, although at the time of arrest they were being equipped as trading or passenger ships, since there was no evidence that they were so used, they were regarded as "public ships of a sovereign state" and thus immune from the jurisdiction of the Canadian courts.

The court did not express any opinion as to whether the concept of sovereign immunity should equally apply to property purely used for private commercial purposes. In the judgment, however, Mr. Justice Ritchie, with three other justices concurring, stated: "[I] do not find it necessary in the present case to adopt that part of Lord Atkin's judgment in The Cristina, *supra*, in which he expressed the opinion that property of a foreign sovereign state 'only used for commercial purposes' is immune from seizure under the process of our courts, and I would dispose of this appeal entirely on the basis that the defendant ships are to be treated as . . . 'the property of a foreign state devoted to public use in the traditional sense,' . . . ." *Id.* at 608, 34 D.L.R.2d at 638. The language used by Mr. Justice Ritchie was interpreted as a strong indication of the court's intention to adopt the restrictive theory when private commercial transactions are involved. See the notes in J. CASTEL, INTERNATIONAL LAW at 686-87 (1965).

[4] In refusing to follow the British jurisprudence of absolute sovereign immunity, Mr. Justice Brossard, reinterated an interesting statement made by the respondent's counsel: "In matters of international law, and in 1968, there is no reason why our Courts, when called upon to examine the international jurisprudence, should lean towards England rather than towards the United States, nor towards France or any other nation." [1969] 5 D.L.R.3d 128, at 146 (Que. 1968).

[5] *Id.* at 138.

to 'reason and good sense', to the reciprocal acquiescence of the States whose sovereignty is in question, to the matter in dispute in which the rule is being invoked, to the purely private or commercial nature of the matter (*jure gestionis*), and to the direct relationship which may exist between the matter in dispute and the exercise by the sovereign State of its *jus imperii*, as the case may be." [6]

Similarly, *Penthouse Studio Inc. v. Venezuela* [7] was an appeal from a judgment of the Quebec Superior Court dismissing a defence of sovereign immunity in a contract for the supply of goods by the respondent to the appellant's pavilion at "Expo '67." Also by a unanimous judgment, the Quebec Court of Appeal had little difficulty in affirming the lower court's decision.

Mr. Chief Justice Tremblay's decision, based on *Venne* v. *Congo*, rejected the doctrine of absolute immunity and upheld the doctrine of relative immunity. He saw no reason to grant sovereign immunity to the appellant, the Government of Venezuela, in a case where a commercial company was suing for the enforcement of a commercial contract. But the judgments of Mr. Justice Hyde and Mr. Justice Montgomery were based on a different proposition. While accepting the restrictive theory of sovereign immunity in principle, they thought Venezuela was acting in at least a *quasi*-diplomatic activity in its participation in "Expo '67." Therefore, they did not rely on the theory *per se* but instead, considered that by entering into the contract with the respondent, the Government of Venezuela had implicitly waived its right of immunity. Their reasoning was that, here, unlike the *Congo* case, the court was dealing with a revendication action. Since a revendication action is given by Quebec law to a person to recover possession of his own property, it would be unreasonable to require that person to follow that property into another jurisdiction and would make the recourse practically illusory. If Venezuela was not prepared to accept Canadian jurisdiction, it should not have agreed to give the respondent the right to revendication. [8]

II. Political Asylum

It is an accepted rule of international law that, once in the country, an alien who becomes subject to deportation may seek relief if he can prove that he will be in danger of political persecution in the state to which he is to be deported. [9] Thus section 15(1)(*b*)(*i*) of the 1967 Immigration Appeal Board Act provides:

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[6] *Id.* at 146-47.

[7] 8 D.L.R.3d 686, (Que. 1969).

[8] By art. 7 of the contract, Venezuela agreed: "Title to, property in and ownership of the equipment, materials and film sold herein shall remain in Penthouse at the risk of Venezuela until all amounts due hereunder are paid in cash." *See id.* at 687.

[9] The Universal Declaration of Human Rights, art. 14, G. A. Res. 217, U.N. Doc. A/810, at 71 (1948). *See also* M. Garcia-Mora, International Law and Asylum as a Human Right (1956).

> [I]n the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made. [10]

For the alien subject to deportation, a successful application under this section provides an extension of political asylum, albeit at the discretion of the Immigration Appeal Board. [11] Three recent cases decided by the Immigration Appeal Board have shed some light on the scope of political asylum recognized by Canada.

In *Petersen v. Minister of Manpower & Immigration*, [12] the appellant was a South African journalist. In South Africa, he was known as "coloured," his mother being white and his father a Negro. He entered Canada as a non-immigrant in 1967. During his sojourn in Canada, his application for permanent residence in Canada was rejected for failure to obtain fifty units of assessment in accordance with Schedule A of the Immigration Regulations, Part I. [13] Therefore, an order for his deportation was made by the Immigration Officer.

During the appeal proceedings before the board, the appellant sought relief under section 15(1)(*b*)(*i*). The argument was that what the appellant had said in Canada about apartheid had all been reported in the press in Capetown and that there was a very good chance that the appellant might be imprisoned when he got to South Africa.

During the inquiry, one South African-born witness testified that there was evidence that when people had done the sort of thing that the appellant had done, that is, been abroad and criticized the regime, they were immediately subjected to various kinds of pressure when they went back. He referred to a well-known case where a South African who spoke in Toronto against the South African regime had had his passport confiscated upon his return. He also made reference to the provisions of the one hundred and eighty-day detention clause found in the General Law Amendment Act of 1965 which provides for detention for one hundred and eighty days, merely

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[10] Can. Stat. 1966-67 c. 90. Canada has not signed or ratified any international convention establishing a right of asylum. Canada's position concerning asylum is based on general principles of international law which recognize that the right of asylum may be exercised under very exceptional circumstances. See the statement of Mr. Courtney Kingstone for the Under-Secretary of State for External Affairs in 1961, in J. CASTEL, INTERNATIONAL LAW 541 (1965).

[11] The discretionary power of the board is limited to the degree of relief to be granted to the person concerned, namely, to quash, stay, etc. the order of deportation. If proof is made for one or both of the conditions very specifically set out in section 15(1)(*b*)(*i*) and there is no ground to reject such proof, the board *must* grant relief under the section. *See* Agouros v. Min. M. & I. (Imm. App. Bd. Feb. 13, 1970 not yet reported).

[12] 1 Imm. App. Cas. 21 (1969).

[13] P.C. 1962-86, *as amended*, P.C. 1967-1616.

on the word of the Minister of Justice. A second South African-born witness followed this testimony by reading a prepared statement: "Under existing South African laws there is no doubt . . . that Petersen's appearance at this inquiry constitutes in the eyes of the South African government an act of nothing less than treason. For a non-white South African to plead for permission to remain in Canada and not be deported on humanitarian grounds simply compounds this treason." [14]

Having heard the evidence, the board reached the conclusion that reasonable grounds existed for believing that Petersen would be punished for activities of a political character if execution of the deportation order was carried out. Accordingly, the board directed that the deportation order be stayed and Petersen be permitted to remain in Canada pending a review.

A number of Vietnamese students have also sought to take advantage of the new Immigration Appeal Act. In *Luong Chan Phuoc v. Minister of Manpower & Immigration*, [15] the appellant contended that he would be punished by the South Vietnamese government for his anti-Saigon activities in Canada if the deportation order was executed. The petition for political asylum was granted and the deportation order suspended.

In this case the appellant came to Canada with a student visa under the Colombo Plan in 1964. After earning a B.Sc. degree in biochemistry from Laval University in 1968, he made an application for permanent residence. His application was rejected by the Immigration Officer and an order of deportation was made against him.

The evidence disclosed in the inquiry showed that the appellant was a political activist who had taken an open position against the war in Vietnam, particularly against American participation in the conflict. [16] It was also found that the appellant had been the editor-in-chief and was still an editor of a magazine which freely discussed the situation in Vietnam. Among the numerous witnesses called was Professor Robert Garry, an expert on Vietnamese questions, who testified that: "In all sincerity, to send back this young man, and perhaps others in his situation, to Vietnam would be to deprive him of his liberty, if not his life." Relying on these findings, the board had no difficulty in reaching the conclusion that there were reasonable grounds to believe that if the execution of the deportation order was carried out, the appellant would be punished for activities of a political nature. Therefore, the execution of the deportation order was suspended without prejudice to the appellant's contractual obligations under the Colombo plan. The rationale of the board was:

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[14] 1 Imm. App. Cas. at 31 (1969).

[15] Imm. App. Bd., May 8, 1970 (not yet reported).

[16] According to the Gateway, (the University of Alberta Students' Union newspaper) Feb. 19, 1970, at 8, col. 4, there were approximately two hundred Vietnamese students in Montreal who were opposed to the war in Vietnam, and the appellant was one of the forty Vietnamese students who were members of the Association of Vietnamese Patriots, a group dedicated to peace, independence and neutral government in South Vietnam.

> Toute guerre est une horreur en soi et elle est plus horrible encore lorsque les ennemis qui s'affrontent sont des frères de sang; tout citoyen qui veut alors s'interposer ou qui tout simplement préconise la paix devient également suspect aux factions rivales qui n'auront de cesse—il n'est pas irraisonnable de le présumer—qu'elles ne l'aient neutralisé ou qu'elles ne s'en soient débarrassées. . . . Si la preuve révélait que l'appelant par des gestes, des déclarations, des écrits s'est dressé comme un contestataire des actions du gouvenement dont il est ressortissant, il faudrait conclure que sa contestation, dans les circonstances particulières au conflit vietnamien, revêt nettement le caractère d'activité politique et il serait raisonnable de croire que pour cette activité l'appelant serait puni ou soumis à de graves tribulations si l'on procédait à l'exécution de l'ordonnance d'expulsion.

While overt opposition to the government of the state of destination, as demonstrated by joining the editorial board of a protest magazine in Canada, or making public statements here against such government, is thought to justify relief, prospect of prosecution on charges of military desertion is not considered the result of political activities nor is it construed as being "unusual hardship." Therefore, in *Caudill v. Minister of Manpower & Immigration*, [17] the board declined to exercise its discretion under section 15 and directed that the deportation order be executed where the appellant was an American Marine Corps deserter whose application for permanent residence in Canada was rejected for failure to obtain necessary units of assessment in accordance with the Immigration Regulations, Part I. [18]

The fact that the appellant was opposed to his government's involvement in the war in Vietnam did not in the opinion of the board constitute the existence of such compassionate or humanitarian grounds as to warrant the granting of special relief.[19]

The three cases surveyed seem to suggest that the board has adopted a liberal approach to the application of section 15 in granting territorial asylum to political refugees. [20] This is entirely consistent with the broadly humanitarian policies of Canada designed to alleviate the condition of politically oppressed persons.

III. Air Law—Carriage of Goods

In *United International Stables Ltd. v. Pacific Western Airlines Ltd.*,[21] the plaintiff brought an action against the Pacific Western Airlines (PWA) for damages resulting from the loss of one of seven stallions on a charter transportation from New Zealand to Canada. The British Columbia Supreme Court awarded the plaintiff 35,000 dollars which was the specially declared

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[17] 1 Imm. App. Cas. 108 (1969).

[18] *Supra* note 13, § 34.

[19] 1 Imm. App. Cas. at 109, 115 (1969).

[20] Compare the restrictive approach adopted by the American administrative and judicial decisions analyzed in Evans, *Political Refugees and the United States Immigration Laws*, 62 Am. J. Int'l L. 921, at 924-26 (1968); and *The Political Refugee in United States Immigration Law and Practice*, 3 Int'l L. 204, at 225-53 (1969).

[21] 5 D.L.R.3d 67 (B.C. Sup. Ct. 1969).

value of the horse under the terms of article 22(2) of the Warsaw Convention. [22]

Under article 22(2) of the Warsaw Convention, the liability of the carrier of cargo in international carriage by air is limited to a sum of two hundred and fifty francs per kilogram, unless the consignor has made, at the same time when the package is handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case, the carrier is liable to pay a sum not exceeding the declared sum unless he proves that the sum is greater than the actual value to the consignor at delivery. According to article 9, in order to invoke article 22(2), the carrier has to show that he has "made out" an air waybill containing all the obligatory particulars when he accepts the cargo; otherwise he would be responsible as an insurer. [23]

The plaintiff contended that in this case there was no air waybill. He maintained that to be "made out" the document should have been signed and delivered. Consequently, the carrier could not invoke the provisions of article 22(2) here. Relying on article 6 of the Convention [24] which implicitly indicates that the making out of the waybill is quite a different step from the signing of it, the court was able to reject the plaintiff's contention. The court stated:

> The first paragraph of art. 6 provides that it shall be made out and handed over. Signatures are dealt with in subsequent paragraphs. To say that it was not made out until it had been signed as required in paras. (2), (3) and (4) would be to say that it was not made out until the cargo had been delivered. The article distinguishes making out from signing because the first paragraph does not read intelligently if "made out" means signed. Clearly the article requires that it be "made out" before it is signed. [25]

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[22] Sched. 1 to the Carriage by Air Act, CAN. REV. STAT. c. 45 (1952), *as amended* Can. Stat. 1963 c. 33 is a translation of the Warsaw Convention. For an excellent analysis of the limit of carrier's liability in respect of goods, see 1 C. SHAWCROSS & K. BEAUMONT, AIR LAW 452-64 (3d ed. P. Keenan 1966).

[23] Art. 9 of the Warsaw Convention provides: "If the carrier accepts cargo *without an air waybill having been made out*, or if the air waybill does not contain all the particulars set out in Art. 8(a) to (i) inclusive and (q), the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability." (Italics added). Sched. 1 to the Carriage by Air Act, CAN. REV. STAT. c. 45 (1952), *as amended*, Can. Stat. 1963 c. 33, § 3(d).

[24] Art. 6 reads (*as amended, id.*):

> (1) The air waybill shall be made out by the consignor in three original parts and be handed over with the cargo.
> (2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the cargo. The third part shall be signed by the carrier and handed by him to the consignor after the cargo has been accepted.
> (3) The carrier shall sign on acceptance of the cargo.
> (4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.
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> . . . .

[25] 5 D.L.R.3d at 73.

It concluded that it was not necessary that the documents be properly signed and delivered before an air waybill may be said to be "made out" within the meaning of article 9 of the Warsaw Convention. Accordingly, PWA, which accepted the horse for carriage on an air waybill, even though the air waybill was defectively executed, was not an insurer of the horse under the terms of the Warsaw Convention and might exonerate itself upon showing that "all [reasonably] necessary measures" were taken to avoid the damage.[26]

The court further found that during the flight, the horses were, although accompanied by the plaintiff's handlers, "in charge of the carrier" within the meaning of article 18(2) of the Convention.[27] The insufficient care of PWA's maintenance crews in designing and building the stalls for transportation of the horses rendered the carrier liable in damages to the plaintiff when one of the horses escaped during the flight and, upon becoming unmanageable, was destroyed by order of the captain.

IV. Arctic Sovereignty

The recent trans-Arctic voyage of the United States supertanker SS. Manhattan and the oil discoveries in the Canadian Arctic have again brought to the fore the long controversial question of Canada's sovereignty over the waters of the Arctic archipelago.[28] In a recent decision, *Regina* v. *Tootalik*,[29] Mr. Justice Morrow of the Territories Court of the Northwest Territories declared that Canada's sovereignty covered "all that part of Canada north of the Sixtieth Parallel of North Latitude," including the sea-ice extending off from the land.[30]

The case involved the conviction of a Spence Bay Eskimo hunter named Tootalik who violated the Territories' game conservation ordinance[31] when, with three other Eskimos, he killed a female polar bear and two cubs last April on the sea-ice offshore from Pasley Bay on the west side of Boothia Peninsula. At trial in Yellowknife, it was never established precisely where

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[26] Art. 20, para. 1 of the Warsaw Convention provides as follows: "(1) The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

[27] According to art. 18, the carrier is liable under the Warsaw Convention only during the period in which the cargo is "in charge of the carrier." (*as amended, supra* note 23).

[28] Canada's claims to territorial sovereignty over the Arctic islands have never been questioned by another state. However, regarding the position of Canadian sovereignty over the Arctic waters, the abundance of opinions expressed by politicians and publicists, both Canadian and foreign, are embarrassingly contradictory. See Head, *Canadian Claims to Territorial Sovereignty in the Arctic Regions*, 9 McGill L.J. 200 (1963); G. W. Smith, *Sovereignty in the North: the Canadian Aspect of an International Problem, in* The Arctic Frontier 194 (R. Macdonald ed. 1966); Pharand, *Innocent Passage in the Arctic*, 6 Can. Y.B. Int'l L. 3 (1968); and Pharand, *Freedom of the Seas in the Arctic Ocean*, 19 U. Toronto L.J. 210 (1969).

[29] 71 W.W.R. (n.s.) 435 (1969).

[30] *Id.* at 442-43.

[31] Game Ordinance, N.W.T. Ord. 1960 c. 2, *as amended* 1961.

the offence took place. Yet there was little question that the shooting occurred well beyond the traditional three-mile territorial limit. Taking note of the present federal government's disinclination to assert unilaterally Canada's sovereignty beyond the internationally recognized limit, [32] defence counsel contended that the N.W.T. government had no authority over the Arctic waters beyond a three-mile limit, and thus the Territories' game laws were inapplicable and the court did not have jurisdiction to hear the case. This argument was not accepted by the court.

The gist of the problem facing the court was the perplexing question regarding the legal status of the Arctic waters in international law. For the record, Mr. Justice Morrow cited both Prime Ministers Louis St. Laurent and Lester Pearson. Mr. St. Laurent, in a speech in the House of Commons in 1953, urged that, "[w]e must leave no doubt about our active occupation and exercise our sovereignty in these lands right up to the pole." [33] In 1946, Mr. Pearson (then Canadian Ambassador to the United States) wrote: "A large part of the world's total Arctic area is Canadian. One should know exactly what this part comprises. It included not only Canada's northern mainland, but the islands and the frozen sea north of the mainland between the meridians of its east and west boundaries extended to the [North] Pole." [34]

Realizing that "[i]t is not declarations of sovereignty that count so much," Mr. Justice Morrow relied mainly on the principle of active occupation—the actual day-by-day display of sovereign rights—as the basis of Canada's claims.[35] For at least forty years, he observed, Canada's R.C.M.P. had provided just such a display on their patrols over the sea-ice, "attending to law and order and to the welfare of the inhabitants." So was it true with the fourteen-year-old Territories Court. The judge pointed out that his predecessor, Mr. Justice John Howard Sissons, on at least one occasion held court in a ski-equipped Otter aircraft sitting on the sea-ice off Tuktoyaktuk. Again in early 1956, the late Mr. Justice Sissons did not hesitate to assume jurisdiction over a case involving an Eskimo named Allan Kootok who was accused of murdering his father while on a seal-hunting trip sixty miles northeast of Perry River in the Queen Maud Gulf.

Having found Canada's sovereignty over the Arctic waters on the basis of Canada's effective occupation over the area, Mr. Justice Morrow then

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[32] Despite heavy pressure from the opposition parties and the general public, the Trudeau government is opposed to an outright declaration of Canadian sovereignty over the waters of the Canadian Arctic. See 114 H.C. DEB. No. 50, at 2681-2727 (1970). *See also* M. Sharp, *A Ship and Sovereignty in the North*, The Globe and Mail (Toronto), Sept. 18, 1969, at 7, col. 1.

[33] 1 H.C. DEB. 700 (1953-54).

[34] Pearson, *Canada Looks Down North*, 24 FOREIGN AFFAIRS 638 (1945-46). Mr. Pearson later served as Secretary of State for External Affairs in the St. Laurent government. For contradictory views taken by other Canadian government officials, see *supra* note 28.

[35] Perhaps owing to the lack of reference materials at Yellowknife, the judge did not mention the famous cases of *Isle of Palmas*, the *Clipperton Island* and the *Legal Status of Eastern Greenland* to substantiate his reasoning.

went on to establish his authority over the case by referring to section 10 of the Territorial Sea and Fishing Games Act, [36] wherein section 420 of the Criminal Code was amended to give the court jurisdiction to try offences committed on the "territorial sea." The inference seems to be clear that the Justice was satisfied to regard the Arctic waters as the traditional "territorial waters" of Canada, rather than "internal waters," [37] and was prepared to recognize the "rights of innocent passage" for foreign ships.

The final question the court had to deal with was whether or not the Game Ordinance [38] was also intended to apply to sea-ice off from the land rather than to the land only. The judge answered the question in the affirmative. Mr. Justice Morrow then postponed sentencing the accused, who faced a maximum penalty of 1,000 dollars fine and a one year imprisonment, until he had heard the cases of two of the other three hunters involved.

V. The Arctic Environment

National concern about Canada's Arctic sovereignty is in fact precipitated mainly by the growing threat of marine pollution in the Arctic waters. There is increased recognition of the particular risks involved in navigating these waters and of the potential scope and nature of the damage which could be inflicted upon the uniquely vulnerable Arctic environment. After unsuccessful attempts to bring about international agreement on effective pollution prevention measures, [39] Canada has resorted to unilateral action by

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[36] Can. Stat. 1964-65 c. 22.

[37] The judge could have applied a second theory by invoking the *Anglo-Norwegian Fisheries* case, drawn baselines surrounding the entire Canadian Arctic archipelago and declared that the waters inside the baselines are Canada's internal waters. See Head, *supra* note 28, at 218-20.

[38] Game Ordinance, N.W.T. Ord. 1960 c. 2, *as amended* 1961.

[39] Canada has attempted the multilateral approach to the pollution prevention problem most recently at the International Legal Conference on Marine Pollution Damage convened in November 1969 by the Intergovernmental Maritime Consultative Organization at Brussels. On that ocassion, however, Canada was unsuccessful in its attempts to persuade the major shipping and cargo owning states to provide adequate recognition and protection for the rights and interests of coastal states which are the innocent victims of pollution incidents of the seas.

Nevertheless, the conference adopted two conventions relating to oil spills occasioned by maritime casualties. The public law convention (the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties) gives coastal states the right to take preventive action against vessels on the high seas in the face of imminent danger of oil pollution. The private law convention (the International Convention on Civil Liability for Oil Pollution Damage), imposes strict liability, up to a specified limit, upon the owner of a vessel involved in a pollution incident for compensation to injured coastal victims. Unsatisfied with the results of the conventions, Canada abstained on the first and voted against the second convention. For the texts of the two conventions and other documents of the Brussels conference, see 9 Int'l Legal Materials 25-67 (1970), and 64 Am. J. Int'l. L. 396-400 (1970). For comments on the results of the Brussels conference and the Canadian position at the conference, see The Freedom of the Seas: A License to Pollute? (An unpublished paper prepared by the Legal Division of the External Affairs Dept., Ottawa, 1970). *See also* Healy, *The CMI and IMCO Draft Conventions on Civil Liability for Oil*

legislating the Arctic Waters Pollution Prevention Act.[40] Introduced into Parliament in April 1970, it received royal assent in June 1970. The overwhelming support for this act among Canadians was reflected in the vote of unanimous approval for its second reading in the Commons.

The act prohibits the deposit of waste of any kind in Arctic waters under Canadian jurisdiction and authorizes the Governor-in-Council to make appropriate regulations which would apply to all regardless of nationality.[41] It prescribes very strict criminal liabilities.[42] The civil liabilities imposed upon the violators are absolute and do not depend upon proof of fault or negligence.[43] The Governor-in-Council is authorized to impose "shipping safety control zones" from which vessels will be banned unless they comply with regulations governing oil, fuel tank construction, pilotage and ice-breaker services.[44] The owners of shipping and cargoes would be required to provide proof of financial responsibility.[45] Canadian pollution prevention officers are empowered to seize a ship and its cargo if there are reasonable grounds to suspect that the act has been violated.[46]

Most significant of all, however, is the provision that Canadian jurisdiction for the purposes of the act extends to " 'Arctic waters' [frozen or liquid] adjacent to the mainland and islands of Canadan Arctic within the area enclosed by the sixtieth parallel of north latitude, the one hundred and forty-first meridian of longitude and a line measured seaward from the nearest Canadian land and a distance of 100 nautical miles. . . ."[47] The act thus seeks to establish Canadian environmental authority, though not necessarily sovereignty,[48] in the Arctic waters up to one hundred miles from every

Pollution, 1 J. MARITIME L. & COMM. 93 (1969); *The International Convention on Civil Liability for Oil Pollution Damage, id.* at 317; Shutler, *Pollution of the Sea by Oil*, 7 HOUSTON L. REV. 415 (1970).

[40] Can. Stat. 1969-70 c. 47.

[41] *Id.* § 4.

[42] *Id.* §§ 18, 19, 20.

[43] *Id.* §§ 6, 7, 9.

[44] *Id.* §§ 11, 12.

[45] *Id.* § 8.

[46] *Id.* § 15.

[47] *Id.* § 3(1).

[48] According to the Canadian government, the action is not a claim to sovereignty, but a "lawful extension of a limited form of jurisdiction to meet particular dangers." (See *Summary of Canadian Note Handed to the United States Government on April 16, 1970, in* 6 H.C. DEB., app. 6027 (1970)). The External Affairs Minister Mitchell Sharp said in the House of Commons: "We have refused to be stampeded by clamour from any quarter, and we have rejected simplistic solutions which could create more problems than they might resolve. Instead, we have evolved, after very wide ranging deliberations, a constructive and functional approach that distinguishes between jurisdiction and sovereignty and between essential national objectives and chauvinism, which reconciles national interest and international responsibility, and which will prevent pollution without discouraging development." H.C. DEB., 5948 (1970). However, the *Tootalik* case noted above and the Arctic Waters Pollution Prevention Act will certainly affect the consolidation of Canada's territorial claims in the Arctic, as Mr. Sharp wrote on an earlier occasion: "Canada's sovereignty over the Arctic waters is being steadily strengthened by developing concepts of international law and by our own activities." See Sharp, *A Ship and Sovereignty in the North*, The Globe and Mail (Toronto), Sept. 18, 1969, at 7, col. 4.

point of Canadian coastal territory above the sixtieth parallel latitude. The effect of this new legislation is to make clear that the Northwest Passage is opened for the passage of shipping of all nations subject to necessary conditions required to protect the delicate ecological balance of the Canadian Arctic.

The obvious question which arises is whether the Arctic Waters Pollution Prevention Act violates the freedom of the high seas, in view of the uncertainty underlying Canada's sovereignty over the Arctic waters? The Canadian government's justification is based on "the fundamental principle of self-defence" of coastal states to protect themselves against any ecological disaster. [49]

The Americans have been most vociferous in voicing objections to the Canadian move. Understandably, the United States is concerned that the action might well set a precedent for other nations to unilaterally infringe upon freedom of the high seas. Accordingly, it challenged Canada to test the validity of the act in the International Court of Justice. [50] Unsure of its legal position, the Canadian government asserted that the matter was wholly within its essential domestic jurisdiction, and thus submitted a new reservation to its acceptance of the compulsory jurisdiction of the International Court in excluding disputes related to the control of marine pollution and the conservation of living resources of the sea. [51]

VI. Territorial Sea and Fishing Zones

A second enactment relevant to the law of the sea, adopted by Parliament recently, is the Act to amend the Territorial Sea and Fishing Zones Act. [52] The amendments contain two major provisions: the first establishes the territorial sea of Canada at twelve miles in substitution for the earlier limit of three miles and as a result eliminates the former nine-mile fishing zone

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[49] See Prime Minister Pierre Trudeau's statement in the House of Commons on April 8, 1970 in 6 H.C. Deb. 5623, 5624 (1970). Perhaps Canada can also rely on the concept of the doctrine of constructive presence in international law whereby a state may exercise its jurisdiction on the high seas as it is "reasonable and necessary" to prevent the violation of its laws. For the doctrine, see Church v. Hubbard, 2 Cranch 187, 2 L. Ed. 249 (U.S. Sup. Ct. 1804) and 2 D. O'Connell, International Law 726-27 (1965).

[50] *U.S. Press Release on Canada's Claim to Jurisdiction over Arctic Pollution and Territorial Sea Limits*, in 6 H.C. Deb., app. "A," 5923, 5924 (1970).

[51] The text of the new reservation excludes from the jurisdiction of the court "disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada." From the text of the letter to Secretary-General U Thant by Yvon Beaulne, Canadian Ambassador to the United Nations tabled by the Prime Minister in the House of Commons, on April 8, 1970, 6 H.C. Deb. 5623 (1970).

[52] Can. Stat. 1969-70 c. 68.

which has become incorporated within the twelve-mile territorial sea;[53] the second authorizes the government, by Order-in-Council, to create exclusive Canadian fishing zones comprising areas of the sea adjacent to the coasts of Canada.[54] The main reason underlying Canada's extension of its territorial sovereignty from three to twelve miles is that the limited fisheries jurisdiction which Canada formerly exercised over the outer nine-mile zone is no longer sufficient to protect the full range of Canada's vital coastal interests.[55]

The extension of Canada's territorial sea to twelve miles seems to be consistent with the overwhelming state practice today which is an illustration of the application of international law. In 1958, at the time of the first Geneva Conference on the Law of the Sea, some fourteen states claimed a twelve-mile territorial sea, whereas by 1970 some forty-five states had established a twelve-mile territorial sea and fifty-seven states had established a teritorial sea of twelve miles or more. In fact, the three-mile territorial sea is now claimed by only twenty-four countries.[56]

An important effect of the twelve-mile territorial sea is that it will protect the status of the Northwest Passage as a part of Canadian waters, as well as the Canadian position that the Passage is not an international strait under customary or conventional international law.[57]

With respect to the reason behind the legislative provisions permitting the establishment of exclusive fishing zones, it is the view of the Canadian government that the existing international law is inadequate to prevent the continuing and increasingly rapid depletion of the living resources of the sea. Therefore, Canada has no alternative but to take unilateral action for the protection and conservation of the living resources of the sea adjacent to Canada.[58]

However sweeping the language of the fisheries provisions may be, according to the Minister of External Affairs, Canada intends to draw the so-called "fisheries closing lines" across the entrances to only those bodies of

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[53] Can. Stat. 1969-70 c. 68, § 1.

[54] *Id.* § 2.

[55] According to the External Affairs Minister, Mitchell Sharp, the twelve-mile territorial sea would have a number of advantages: (a) it would provide the comprehensive jurisdictional basis which Canada requires to enforce anti-pollution controls outside Arctic waters off Canada's east and west coasts up to twelve miles from the baselines of Canada's territorial sea, rather than merely three miles as at present; (b) it will permit Canada to expedite the conclusion of negotiations with the European countries which have been permitted to continue their fishing activities in Canada's nine-mile fishing zone; (c) it will further protect Canada's security interests by permitting Canada to exercise greater control over the movement of foreign ships; and (d) since the inner limit of the continental shelf is measured from the outer limit of the territorial sea, the twelve-mile territorial sea will have the effect of pushing the inner limit of Canada's continental shelf seawards a distance of nine miles. 6 H.C. DEB. 6012 (1970).

[56] See *Summary of Canadian Note Handed to the United States Government on April 16 1970*, 6 H.C. DEB., app. 6027 (1970).

[57] *Id.* at 6028.

[58] *Id.* at 6029.

water where Canada's primary interests relate to fisheries and where Canada has historic claims. [59]

VII. Export Financing and Investment Guaranty

A federal act "to establish the Export Development Corporation (EDC) and to facilitate and develop export trade by the provision of insurance, guarantees, loans and other financial facilities" has recently been enacted. [60] Since its formation on October 1, 1969, EDC has succeeded the Export Credits Insurance Corporation (ECIC) [61] and administered new and expanded facilities for export credits, export credits insurance and guarantees. It has also been charged with the responsibility for the insurance of private Canadian investment in developing countries.

In the export credits insurance program, the exporter secures from EDC insurance against all or certain classes of risks covering either a single or all of his export transactions. Under the new act, eligibility for insurance coverage has been significantly extended. In particular, coverage of services and invisible exports, such as the leasing of goods for use abroad and the sale or licensing of patents, trade marks and copyrights are now eligible. [62] Export transactions involving barter are also now eligible. The insured need not be a person carrying on business and need not be the exporter so long as he is the one entitled to receive payment. [63]

In the export guarantee program, the exporter obtains his actual financing from a private financing institution, such as a bank, without recourse. EDC issues a guarantee to the financing institution, giving it protection against all or certain classes of risks incurred in extending the credit to the exporter. Under the Export Development Act, export guarantees are no longer restricted to transactions on medium-term credit and are available for institutions other than Canadian chartered banks. Guarantees are also issuable

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[59] According to the minister, those bodies of water include: the Gulf of St. Lawrence, Bay of Fundy, Dixon Entrance, Hecate Strait and Queen Charlotte Sound. See *supra* note 55, at 6015.

[60] Can. Stat. 1968-69 c. 39.

[61] Export Credits Insurance Corporation (ECIC) was formed by the Export Credits Insurance Act in August, 1944 (Can. Stat. 1944-45 c. 39, *as amended*) and commenced operations the following year. ECIC was empowered to provide credits insurance to exporters to protect them against a variety of risks, both commercial and non-commercial. It was authorized to issue an export guarantee to a chartered bank of a medium-term transaction covered by an insurance contract. ECIC was also able, with cabinet approval, to extend loans to or guarantee payment by foreign importers. Reacting to criticism of the limits on ECIC's insuring and lending activities imposed by the act, the lack of flexibility, and an attitude which was not sufficiently export-oriented, the government proposed the formation of EDC to succeed ECIC. As will be noted below, EDC has achieved more flexibility than ECIC through a broader range of functions, more substantial financial resources, and greater discretionary powers.

[62] Can. Stat. 1968-69 c. 39, §§ 24(1) and 23(*b*).

[63] *Id.* § 24(1)(*a*).

in connection with the financing of uninsured transactions provided such transactions are insurable. [64]

In the export credits (medium and long-term financing) program, EDC actually finances all or a portion of the exports by paying the exporter and taking over the securities which evidence the credit extended to the importer. [65] The purpose of the export credits program is to ensure that Canadian exporters of high priority capital goods and services are not inhibited from pursuing major sales opportunities abroad requiring long-term (or, in the exceptional case, medium-term) financing. Such lending had been carried out since 1961 under the Export Credits Insurance Act. But the new act has extended such powers, and EDC is also authorized to provide lines of credit to national development banks and similar financial institutions abroad to finance purchase of Canadian goods and services. [66]

Finally, an entirely new facility under the Export Development Act is the program to insure Canadian investors in developing countries against noncommercial risks: expropriation or confiscation, insurrection, revolution or war and inability to repatriate earnings or capital. [67] To be eligible for the investment guarantee program, an investment would have to be a new undertaking, including re-invested earnings, and would have to provide economic advantages to Canada or contribute to the economic development of the host country. [68] A further pre-condition to contracts of investment guarantee is the need for the host country concerned to enter into a bilateral agreement giving assurance satisfactory to Canada that in the event of payment of a claim by EDC, the investor's right can be subrogated to the corporation and that the corporation will receive treatment as favorable as that accorded any other person. [69]

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[64] *Id.* § 24(1)(*b*). *See also Export Development Bill Notes, in* 44 MINUTES OF PROCEEDING AND EVIDENCE OF THE H.C. STANDING COMMITTEE ON FINANCE, TRADE AND ECONOMIC AFFAIRS, Appendix pp. 2368. 2374-75.

[65] Can. Stat. 1968-69 c. 39, §§ 29, 31.

[66] *Id.* §§ 30, 32. *See also* statement by Hon. Otto E. Lang, M.P. and sponsor of the Export Development Bill (C-183) in the House of Commons, H.C. DEB. 7477 (1969).

[67] Can. Stat. 1968-69 c. 39, § 34(1).

[68] *Id.* § 34(2)(*a*), (*b*).

[69] *Id.* § 34(2)(*d*). EDC has encountered some difficulty in the signing of a bilateral agreement, and because such an agreement is a pre-condition to the writing of an investment guarantee, and no country has so far agreed to its terms, no foreign investment guarantee has been written as of the end of 1970. A government bill to amend the Export Development Act (C-164) has been proposed to the Parliament to dispense with the present legislative requirement for such bilateral agreement.