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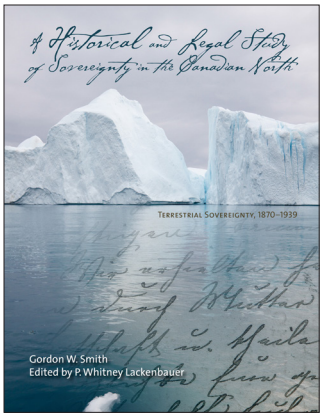

A HISTORICAL AND LEGAL STUDY OF SOVEREIGNTY IN THE CANADIAN NORTH: TERRESTRIAL SOVEREIGNTY, 1870–1939

By Gordon W. Smith, Edited by P. Whitney Lackenbauer

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The Eastern Greenland Case and Its Implications for the Canadian North

The dispute over Eastern Greenland between Denmark and Norway, which was decided by the Permanent Court of International Justice on 5 April 1933,[1] was not directly connected with the Canadian Arctic, but it nevertheless had important implications for Canada's claims to sovereignty over the entire archipelago north of the Canadian mainland. The case was one of the most involved of all those settled by the court, and even though the territories in dispute were not considered to be of great value, it was evident that by analogy the judgment might have far-reaching consequences in other parts of the world. The roots of the dispute lay in the remote past, and to find its real origins, it is necessary to go back to the very beginning of European experience in the western hemisphere. As the case developed, it came to involve practically the entire history of Norwegian and Danish activity in Greenland and also many aspects of their relations with each other.[2]

During the nineteenth and early twentieth centuries, Denmark gradually extended her activity and control in Greenland.[3] In 1894, the first Danish settlement on the east coast was made at Angmagssalik at latitude 65° 36' N, and a Danish station was established in Scoresby Sound, at about 70° 30' N, in 1925.[4] Norwegians also undertook a good deal of important exploratory and scientific work in and near Greenland, with their interests gradually focusing upon Eastern Greenland, much of which was unoccupied and, from Norway's point of view, open to exploitation. Norwegians began the hunting of fur-bearing animals in Eastern Greenland, and they wintered there for the first time in 1893–94, at Kulusuk at approximately 65° 30' N latitude. In or about 1910, the practice of wintering on the scene was temporarily abandoned, but it was resumed in the early 1920s and was accompanied by increasing activity in fishing, whaling, and even the building of permanent posts and meteorological and wireless stations. This activity, and the implications that went with it, brought the disagreement with Denmark over Eastern Greenland to crisis.[5]

In the meantime, Denmark's effort to bring all Greenland under her sovereignty continued, and gradually took on a more comprehensive and official aspect than that indicated by explorers' claims and the establishment of mostly private settlements. While attempting to consolidate her sovereignty over Greenland, Denmark also undertook to obtain recognition of this sovereignty from other states which might be interested.[6] When Denmark endeavoured to obtain this by approaching the delegates who were meeting at the Paris peace conference,[7] the delegates – preoccupied with problems arising directly out of the war – were not favourable.[8] The Danish government therefore

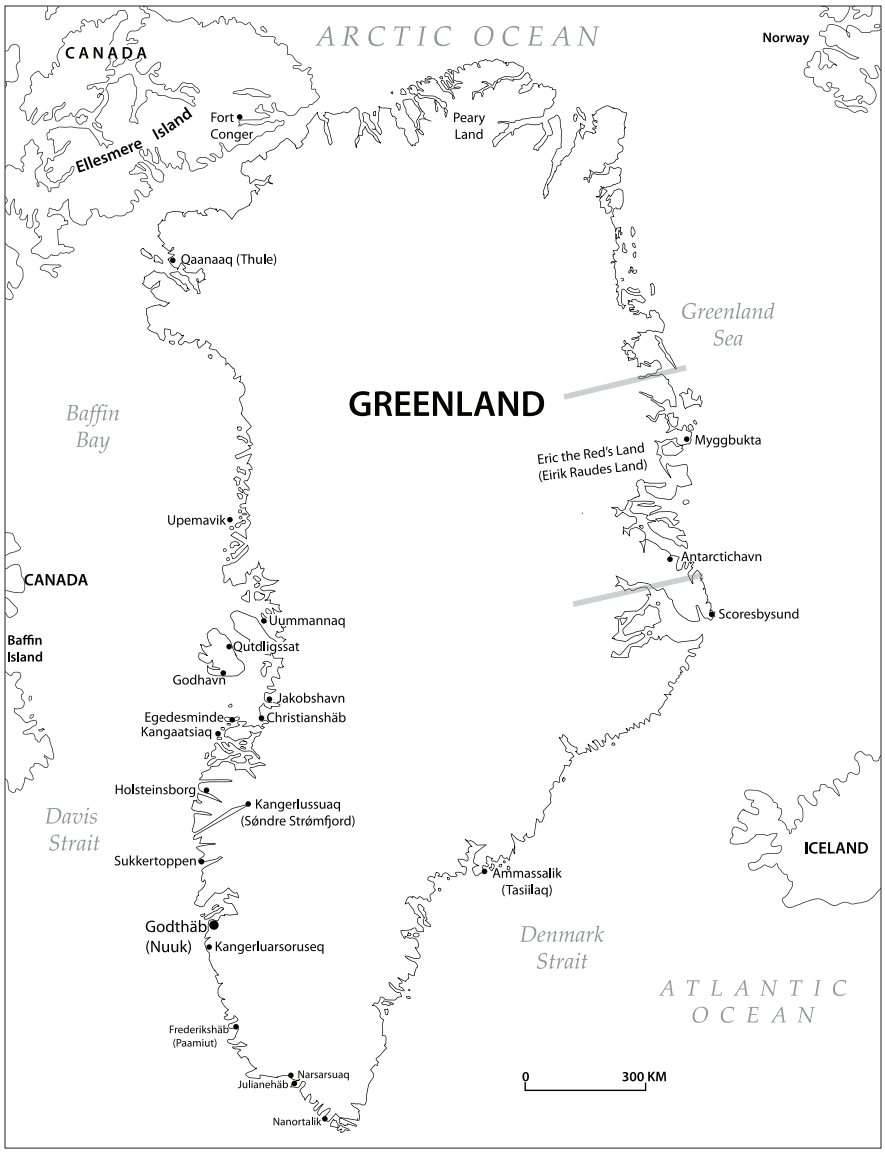

Figure 13-1: Norway's claim to Eastern Greenland. *Jennifer Arthur-Lackenbauer.*

decided to submit the matter to each of the principal Allied powers separately,[9] whose replies, taken collectively, did little to remove the ambiguity.[10] For its part, Britain's definitive response was delayed because its government believed that Britain's recognition should be qualified by a right of pre-emption granted by the Danish government in case Denmark should ever decide to dispose of Greenland (see chapter 10). As discussed, on 6 September 1920, after consultations with Canada, the Foreign Office sent a note to the Danish government, recognizing Danish sovereignty over Greenland but stating that Britain reserved her right to be consulted if Denmark should ever consider the "alienation" of the territory.

Having thus obtained recognition of a sort from the five principal Allied powers, Denmark

undertook to obtain recognition from Sweden and Norway. The Swedish response was prompt and favourable. The response from the Norwegian government turned out to be an entirely different matter. When the Danish Minister of the Interior issued a proclamation on 10 May 1921, announcing that henceforth all Greenland was to be under Danish sovereignty,[11] the new Norwegian Foreign Minister stated that his government could not accept an extension of Danish sovereignty over Greenland that would entail a corresponding extension of the monopoly to the detriment of Norwegian interests.[12] Denmark insisted that it would not accept the Norwegian concept that hunting and fishing by Norwegian subjects close to Greenland should be related to the question of Danish sovereignty over the island.[13]

This exchange of notes established the basic position of the two states in the matter and brought the dispute into the open. The passage of time failed to provide a settlement, and the differences of view became sharper in the years ahead. Denmark contended that in spite of the wording of some of her own documents and those of other states, she actually had full sovereignty over all Greenland for some time, and she had only asked Norway for written acknowledgment of an existing fact. Norway contended that Denmark had sovereignty over only those parts of Greenland which she genuinely occupied and administered, that this was all Norway had acknowledged, and that an extension of this occupation and administration was necessary before Denmark's full sovereignty over all Greenland could be recognized.[14] Although a convention agreed to in 1924 brought a *modus vivendi*, and open controversy over Eastern Greenland remained at a lower ebb for about half a dozen years, neither side forgot the dispute and both endeavoured to improve their positions. The Danish government, determined not to yield in its contention that it had sovereignty over Eastern Greenland, enacted laws to regulate hunting and fishing in Greenland waters, set up new administrative arrangements, and reserved all commercial activity to the Danish state.[15] The Norwegian government registered formal protests against laws that it believed applied "to regions where the sovereignty of Denmark has not yet been demonstrated"[16] and did its best to counter Danish moves and advance its own interests.

Like Denmark, Norway also tried to increase its own activity in Eastern Greenland. The Foldvik Expedition was sent to this region in 1926, the Hird Expedition in 1927, the Norwegian East Greenland Expedition in 1928, an expedition of the company Arktisk Naeringsdrift A/S in 1929, and a Norwegian scientific expedition that same year. Most of these expeditions erected houses and other establishments, some of them scientific. By 1930, it was apparent that Norway had done much more to actually occupy the central part of Eastern Greenland than Denmark had.[17]

The dispute was brought into the open again in the summer of 1930. The Norwegian government conferred police powers upon some Norwegian subjects to enable them to inspect Norwegian hunting stations in Eastern Greenland, and Denmark refused to accept the granting of such authority to Norwegians in territories under Danish sovereignty.[18] When the Norwegian Foreign Office replied that it considered its action justified because Eastern Greenland was, in its view, *terrra nullius*,[19] the Danish government instructed its embassy in Oslo to inform the Norwegian government that police authority over all persons in Eastern Greenland was being conferred upon a large Danish expedition which was being sent out.[20] Both parties later indicated their willingness to withdraw or abstain from such measures.[21]

When the Norwegian government proposed on 30 June 1931, however, that during the life of the 1924 convention neither side should establish any police authority in Eastern Greenland or carry out any acts of sovereignty there,[22] the Danish government refused to agree because this would have exceeded the limits in the 1924 convention and would recognize the Norwegian point of view.[23] In the meantime, Denmark inaugurated a comprehensive three-year plan for scientific research in the central part of Eastern Greenland. The Norwegian government objected to this plan because its focus was precisely where Norway had concentrated her own enterprise and contemplated establishing a colony.[24]

The Norwegian government took decisive action. On 28 June 1931, some Norwegian nationals raised the flag of their country in Mackenzie Bay in Eastern Greenland and proclaimed occupation of the surrounding area.[25] On 10 July, Norway issued a royal proclamation confirming this occupation and proclaiming Norwegian sovereignty over the territory from 71° 30' N to 75° 40' N.[26] On the following day, Denmark submitted the dispute to the Permanent Court of International Justice,[27] in accordance with the previous agreement between the two and also in conformity with the "optional clause" of article 36 of the court's statute, which both had accepted.[28] The oral arguments began on 21 November 1932 and ended on 7 February 1933.[29]

In the arguments, both written and oral, both sides held firmly to the basic positions which had already been established. These were well stated in a brief summary by the court in its judgment:

> The Danish submission in the written pleading, that the Norwegian occupation of July 10th, 1931, is invalid, is founded upon the contention that the area occupied was at the time of the occupation subject to Danish sovereignty; that the area is part of Greenland, and at the time of the occupation Danish sovereignty existed over all Greenland; consequently it could not be occupied by another Power.
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> In support of this contention, the Danish Government advances two propositions. The first is that the sovereignty which Denmark now enjoys over Greenland had existed for a long time, had been continuously and peacefully exercised and, until the present dispute, has not been contested by any Power. This proposition Denmark sets out to establish as a fact. The second proposition is that Norway has by treaty or otherwise herself recognized Danish sovereignty over Greenland as a whole and therefore cannot now dispute it.
>
> The Norwegian submissions are that Denmark possesses no sovereignty over the area which Norway occupied on July 10, 1931, and that at the time of the occupation the area was *terra nullius*. Her contention is that the area lay outside the limits of the Danish colonies in Greenland and that Danish sovereignty extended no further than the limits of these colonies.
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> Other contentions were also developed in the course of the proceedings.
>
> On the Danish side it was maintained that the promise which in 1919 the Norwegian Minister for

Foreign Affairs, speaking on behalf of his Government, gave to the diplomatic representative of the Danish Government at Christiania debarred Norway from proceeding to any occupation of territory in Greenland, even if she had not by other acts recognized an existing Danish sovereignty there.

In this connection Denmark has adduced certain other undertakings by Norway, e.g. the international undertakings entered into by that country for the pacific settlement of her disputes with other countries in general, and with Denmark in particular.

On the Norwegian side it was maintained that the attitude which Denmark adopted between 1915 and 1921, when she addressed herself to various Powers in order to obtain a recognition of her position in Greenland, was inconsistent with a claim to be already in possession of the sovereignty over all Greenland, and that in the circumstances she is now estopped from alleging a long established sovereignty over the whole country.[30]

The award of the court, generally favourable to Denmark, was given on 5 April 1933. The lengthy written judgment, besides summarizing the main arguments in the form quoted above, set forth the historical background of the case in detail and then proceeded to comment upon the principal propositions which had been advanced.

The court pointed out that although Denmark's case was based essentially upon the claim that it had exercised sovereignty over Greenland as a whole for many years, the validation of its case did not require that this sovereignty should have existed throughout the entire period. On the other hand, it was necessary that it should have existed at the time when the Norwegian occupation took place (10 July 1931), which thus became the critical date. Since Denmark's claim to sovereignty was founded basically upon historical rights, however, it was also necessary to consider both the existence and the extent of these rights.[31]

The court went on to observe that a claim to sovereignty "based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements, each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority."[32] Another important matter was that of competing claims, which, although present in most such cases, were absent in the case at hand until 1931. In fact, "up till 1921, no Power disputed the Danish claim to sovereignty." The court then made what was undoubtedly one of the key observations in the entire judgment:

> It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.[33]

On the question of historical rights, the court held that insofar as it was possible to apply modern terminology to the rights and pretensions

of the kings of Norway in Greenland during the time of the ancient Norse settlements, these rights amounted to sovereignty and were not limited to the two settlements. Although Norway had argued that Norwegian sovereignty was lost in Greenland because of *terra nullius* when these settlements disappeared, and put forward conquest and voluntary abandonment as the reason thereof, the court maintained that "conquest" was not an appropriate expression to describe the massacre of the inhabitants by the Aboriginal population, even if this could be established as fact, and there was no evidence of voluntary abandonment. On the contrary, the tradition of the king's rights lived on.[34]

Considering the early period of resettlement, from the founding of Hans Egede's colonies in 1721 to the Treaty of Kiel in 1814, the court found that both elements necessary to establish sovereignty – intention and exercise – were present, but the question arose as to how far these elements operated. Norway had maintained that the word "Greenland" as used in contemporary legislative and administrative acts had meant only the colonized area on the west coast, but the court rejected this argument, holding that the ordinary geographical connotation of "Greenland" as designating the entire island must be accepted in the absence of proof to the contrary. In the words of the judgment:

> The conclusion to which the Court is led is that, bearing in mind the absence of any claim to sovereignty by another Power, and the Arctic and inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway displayed during the period from the founding of the colonies by Hans Egede in 1721 up to 1814 his authority to an extent sufficient to give his country a valid claim to sovereignty, and that his rights over Greenland were not limited to the colonized area.[35]

The court underlined that where prior to 1814 the rights possessed by the king of Denmark-Norway over Greenland were enjoyed by him as king of Norway, the effect of the Treaty of Kiel was that what had been a Norwegian possession was left with the king of Denmark and became a Danish possession. Thus Denmark became full inheritor of Norway's rights in and over Greenland.[36] Looking at the period of one hundred years following, and considering all the evidence, the court took the view that "Denmark must be regarded as having displayed during this period of 1814 to 1915 her authority over the uncolonized part of the country to a degree sufficient to confer a valid title to the sovereignty."[37]

The judgment went into considerable detail discussing Danish applications to other governments between 1915 and 1921 which sought recognition of Denmark's position in Greenland. Noting that the dispute was between Denmark's contention that it was seeking recognition of an existing sovereignty extending over all Greenland, and Norway's that it was trying to get the powers to accept an extension of its sovereignty over territory which did not as yet belong to it, the court observed that the correspondence did not make the matter entirely clear.

Nevertheless, and in spite of the fact that certain expressions in the documents such as "extension of sovereignty" obviously did not support the Danish argument, "the conclusion which the Court had reached is that the view upheld by the Danish government in the present case is right."[38] In coming to this

verdict, the court relied heavily upon various official Danish statements claiming that full sovereignty already existed over all Greenland, even though Danish administration had not yet been extended over all of it. The court judged that during the previous decade Denmark had met the two necessary elements (intention and exercise) to establish a valid title to sovereignty, and even if this period were completely isolated from all the preceding ones and taken by itself, this would still be true. Accordingly, the court was satisfied "that Denmark has succeeded in establishing her contention that at the critical date, namely, 10 July 1931, she possessed a valid title to the sovereignty over all Greenland" and that the Norwegian government's steps to occupy it "were illegal and invalid."[39] Norway accepted the majority award of the court without quibbling. On 7 April 1933, only two days after the judgment was given, the Norwegian government revoked the declaration of sovereignty over Eastern Greenland it had made on 10 July 1931.[40]

The greatest significance of the *Eastern Greenland Case* lies in the definition it helped to give to the requirements for sovereignty over thinly settled or uninhabited lands, and particularly those in the polar regions. This was, in fact, the first occasion when an international tribunal was called upon to adjudicate a dispute about sovereignty over polar territories, and it was one of the few instances of serious disagreement regarding the ownership of such lands. Thus, the case had implications of an importance out of proportion to the value of the territories involved, which, at least in the context of the time, was rather small.

What the case really accomplished was to suggest, in fairly clear terms, that requirements for sovereignty over territory might be reduced if the circumstances of the situation warranted such reduction. Requirements for sovereignty have undergone a considerable evolution over the centuries, the main trend being a lessening emphasis upon certain things formerly considered important (such as papal grants, discovery, and symbolic acts of appropriation) in favour of genuine occupation. Contrary to what has sometimes been said on the subject, occupation has always been considered a matter of significance, but nonetheless it is also true that the stress upon occupation gradually increased as the age of discovery changed to and merged with the age of appropriation and exploitation (colonization). The Conference of Berlin on Africa in 1884–85 laid down effective occupation as a requirement for possession of any territories claimed by the participating powers in that continent,[41] and since then, effective occupation has been considered applicable as a general principle, although discovery has retained its traditional value in conferring an inchoate title. A counter-trend also set in, applicable to territories which were so inaccessible, intemperate, unproductive, or miniscule that they could not be occupied in a normal way, if at all, and yet could or should be identified as the property of particular states. This counter-trend is illustrated by the cases of *Bouvet Island* in 1928, *Palmas Island* in 1928, and *Clipperton Island* in 1931.[42]

The *Eastern Greenland Case* continued and enhanced the trend towards acceptance of a lesser degree of "effective occupation" in cases involving remote, insignificant, and largely unexploitable lands. Here, however, the territory involved was not a tiny island but an enormous land of almost continental size, about nine-tenths of which is permanently covered with ice and thus uninhabited and unexploitable. In accepting Denmark's rather shaky case for sovereignty over the entire island, in spite of this limited circumstance, the court placed its stamp of approval upon a minimum

requirement of effective occupation for acquisition of sovereignty over lands of a similar kind, and thus set a potent precedent which in all probability would be applied to polar territories generally.

This is a significant feature of the judgment. It shows not only how very small a part, if any, actual control or possession played in the creation of what was deemed to be an ancient and basic right of sovereignty but also how small an amount of control, measured geographically or otherwise, sufficed under the circumstances to yield a vast and unoccupied and unclaimed island to the modern inheritor and existing possessor of the right of sovereignty.[43]

The outcome of the *Eastern Greenland Case* was of vital importance to Canada. Like Denmark, Canada had fretted over the security of its Arctic territories for many years, although in Canada's case there had not been a challenge to its sovereignty as open, deliberate, and official as there was in the case of Denmark. The analogy between Danish and Canadian Arctic territories, although by no means exact, is close, the main difference being that Greenland is essentially one enormous island encompassed closely by many small islands, while the insular part of Canada's Arctic territories comprises a huge archipelago of many islands both large and small, no single one being dominant. If they were faced with challenges to their sovereignty, Denmark would likely assert the principle of continuity and Canada that of contiguity (for whatever benefit might be derived from these two inconclusive and much-debated doctrines). There is the further important difference that whereas most of Greenland is covered with a permanent ice cap, the Canadian archipelago is mostly free of such ice, with the exception of parts of Baffin and Ellesmere Islands. Otherwise, the Arctic lands of the two states have characteristics that are quite similar, both being very large, essentially Arctic in climate, difficult to access by surface transportation throughout much of their extent, very thinly inhabited with large areas not inhabited at all, and with few known resources that can be exploited on any considerable scale. Both Canada and Denmark would have great difficulty in demonstrating a satisfactory degree of effective occupation if the same standards were expected here as in more equable and populated parts of the world. For this reason, the decision in the *Eastern Greenland Case*, obviously gratifying to Denmark, could be greeted with almost equal satisfaction by Canada.[44] Canada's case for sovereignty over the archipelago has been in most respects similar and not inferior to Denmark's case for sovereignty over all Greenland. For this reason, if at any time after 1933 Canada's title had been formally challenged in law, the precedent then established would almost certainly have been sufficient to decide the case in her favour.