grant of probate on behalf of the sole executrix who resided in the State of California, Wootton, J. held that a foreign executor is entitled to a grant of probate, reserving to the Court a discretion to demand assurances from the executor that creditors not be overlooked. He states at page 697 "There is a considerable difference between the right to the grant of probate and the conditions upon which a grant may be made".

It would seem that this was essentially the position of Alberta law prior to the *Re Adler* decision.[14] In fact the possibility of a grant to a foreign executor and the safeguards to be applied by the Court in such a situation are dealt with by Rule 876 of The Alberta Rules of Court which states:

> Each person to whom a grant of administration is made and every *foreign executor* shall give a bond with at least two sureties in double the value of the property. (own italics).

With respect, the decision in *Re Adler Estate*[15] appears to be wrong. This question should, therefore, be clarified, and since Alberta now has a Surrogate Courts Act,[16] proper provisions for a foreign executor should be made.

The Province of Ontario's Surrogate Courts Act[17] provides:

> Letters Probate shall not be granted to a person resident in Ontario or elsewhere in the British Dominion, unless such person shall have given the like security, as is required from an administrator in case of intestacy, unless in the opinion of the Judges, such security should, under special circumstances, be dispensed with or reduced in amount.[18]

It seems manifestly unjust and unreasonable that a testator's personal choice of an executor should be refused merely because that person resides in the U.S.A.

—J. C. GORMAN, Q.C.*
—G. C. STEWART**

14 *Supra*, n. 1.
15 *Id.*
16 S.A. 1967, c. 79; see also the Administration of Estates Act, S.A. 1969, c. 2.
17 R.S.O. 1960, c. 388, s. 24.
18 See Macdonell and Sheard, *Probate Practice* (1953) at 106.

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INTERNATIONAL LAW—ARCTIC SOVEREIGNTY—NORTHWEST TERRITORIES ACT, R.S.C., 1906, c.62—*R.* v. *TOOTALIK.*

The recent trans-Arctic voyage of the United States supertanker SS Manhattan and the oil discoveries in the Canadian Arctic have again brought to fore the long controversial question of Canada's sovereignty over the waters of the Arctic archipelago.[1] In a recent decision in *Regina* v. *Tootalik*,[2] Mr. Justice W. C. Morrow of the Territories Court of the Northwest Territories, declared in effect that Canada's sovereignty extends north to the Pole.

1 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 Acrtic Regions*, (1963) 9 McGill L.J. 200; G. W. Smith, "Sovereignty in the North: the Canadian Aspect of an International Problem," in *The Arctric Frontier*, 194 (R. St. J. Macdonald ed. 1966); Pharand, "Innocent Passage in the Arctic," 6 *Can. Y.B. Int'l L.* 3 (1968); and Pharand, (1969) 19 U.T.L.J. 201.
2 (1970) 71 W.W.R. 435. (Case decided November 17, 1969.)

The case involved the conviction of a Spence Bay Eskimo hunter named Tootalik of violating the Territories' game conservation ordinance[3] 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 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,[4] 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. St. Laurent, in a speech in the House of Commons in 1953, urged that "We must leave no doubt about our active occupation and exercise our sovereignty in these lands right up to the pole."[5] Pearson, in 1946 while Canadian Ambassador to the United States, wrote: [6]

> A large part of the world's total Arctic area is Canadian. One should know exactly what this part comprises. It includes not only Canada's northern mainland, but the islands and the frozen sea north of the mainland between the meridians of its east and west boundaries extended to the [North] Pole.

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.[7] For at least 40 years, he observed, Canada's R.C.M.P. have 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 is it true with the 14 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 sitting on the sea ice off Tuktoyaktuk. Again in early 1956 the late 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 60 miles northeast of Perry River in 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 went on to establish his authority over the case by referring

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3 Game Ordinance, O.N.W.T. 1960 (2nd), c. 2, as amended 1961.

4 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* (1970) 114 H.C. Deb. No. 50, at 2681-2727, also Mitchell Sharp, A Ship and Sovereignty in the North, in The Globe and Mail, Sept. 18, 1969, at 7, col. 1.

5 (1953-54) 1 H.C. Deb. No. 700.

6 Pearson, *Canada Looks Down North*, (1945-46) 24 Foreign Affairs, 638. 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*, n. 1.

7 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.

to section 10 of the Territorial Sea and Fishing Games Act,[8] 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 is satisfied to regard the Arctic waters as the traditional "territorial waters" of Canada, rather than "internal waters"[9] and is prepared to recognize the "rights of innocent passage" to foreign ships.

The final question the court had to deal with was whether or not the Game Ordinance[10] was also intended to apply to sea ice off from the land rather than the land only. The judge answered the question in the affirmative. Justice Morrow then postponed sentencing the accused, who faces a maximum penalty of $1,000.00 fine and an one year imprisonment, until he has heard the cases of two of the other three hunters involved.

The legal status of the Arctic waters seems to depend primarily on two factors: (1) whether the Arctic waters could be assimilated to land masses and therefore are susceptible to effective occupation, and (2) whether the practices of states, particularly those of the major Powers and the Arctic states, have accepted the principle that territorial acquisition is possible over Arctic waters.

Mr. Justice Morrow's bold assertion of Canada's sovereignty over "not only Canada's northern mainland, but the islands and the frozen sea north of the mainland" is well received by the Canadian public.[11] Given the fact that the "frozen sea" is not merely a form of water but is an eminently solid substance and is possessing certain characteristics of land in that it is solid and capable of supporting settlement and erection of permanent structures, it is also possessing the fluid precarious character of the sea. The surface of the Arctic Ocean is ever-changing, and never stable. The perplexing problem is where to draw the lines between the ice which can support a national territorial claim and which would otherwise be open sea? The court certainly could not offer a satisfactory answer.

The major stumbling block, however, to Canada's claims over Arctic waters is the lack of general acceptance by the Arctic states. Except Russia and, probably, Canada herself,[12] the Arctic states generally, in particular the United States, regard the Arctic waters as being "open to all nations", and "no state may validly purport to subject any part of them to its sovereignty".[13] The Federal Government's cautious attitude towards the Arctic claims is not without justification. A blunt declaration of sovereignty by Canada before the legal claims are conclusive would only invite open challenge from other states, particularly the United States in view of its major strategic and economic interest involved in the area.

The *Tootalik* case noted above and the Arctic pollution control bill

8 S.C. 1964-65, c. 22.
9 The judge could have applied a second theory by invoking the *Anglo-Norweigian 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*, n. 2 at 218-20. If this theory were followed, Canada could seek complete control of the waters surrounding the Arctic archipelago and rightfully deny the rights of innocent passage to foreign ships.
10 *Supra*, n. 3.
11 Time, November 28, 1969, at 13, col. 3.
12 *Supra*, n. 2.
13 The 1958 Convention on the High Seas, Geneva, S.Z. April 28, 1958, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82. Not yet ratified by Canada.

the Federal Government is planning to introduce[14] are not of themselves sufficient to establish Canada's sovereignty in the Arctic. But what is clear is that, as External Affairs Minister Mitchell Sharp wrote recently,[15]

> . . . Canada's sovereignty over the Arctic waters is being steadily strengthened by developing concepts of international law and by our own activities.

It was a "historical consolidation"[16] upon which Norway relied to gain title in the *Fisheries* case, and it is upon a similar consolidation that Canada will have to rely to assert her territorial claims in the Arctic.

—TUNG-PI CHEN*

14 The Toronto Globe and Mail, Jan. 23, 1970, at 27, col. 2.
15 Sharp, *supra*, n. 5 at col. 4.
16 For the theory of "historical consolidation" of title, see 1 Schwarzenberger *International Law*, 292 (3rd ed., 1957).

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