

# Canada-U.S. Treaties: RADARSAT and Military Exports

From the start, RADARSAT was a Canada-U.S. government project. Terms of the RADARSAT treaty, proposed by the U.S. on November 12, 1991, and accepted that day by Canada's Ambassador to the U.S., Derek Burney, are spelled out in a Memorandum of Understanding (MOU) dated February 27, 1991.

The RADARSAT deal made no mention of any military applications but left the door wide open for such uses: "Use of SAR [Synthetic Aperture

partment [of National Defence] and the Canadian Forces."<sup>6</sup>)

JAG's 1999-2000 "Performance Report," lists six "areas of ongoing involvement in international legal fora." One of these six "areas" is listed as:

"Advice and counsel concerning Ballistic Missile Defence, drafting a Canada/U.S. agreement concerning RADARSAT-2 involving negotiations with OGDs [Other Government Departments]...and the U.S."<sup>7</sup>

(The OGDs involved included Foreign Affairs and International Trade, Justice, the Canadian Space Agency and the Canadian Security Intelligence Service.)

## Military Production

June 16, 2000, was a busy day for Canada-U.S. military relations. Not only was NORAD's treaty renewed,<sup>8</sup> Axworthy and Albright signed treaties on RADARSAT-2 and military production.

In 1999, the U.S. State Department, saying Canada was too lax in its control of military exports, punished Canadian military exporters by amending its International Traffic in Arms Regulations (ITAR). For decades, this U.S. law gave Canada's arms industries preferential treatment over all other foreign companies, treating them as part of the U.S. military industrial base. However, on April 12, 1999, the State Department "removed many of the preferential elements in the Canadian Exemptions contained in ITAR.... The amendments...[imposed] licensing requirements on a broad range of goods and technology that had been...licence-free. In addition, the U.S.... ruled that Canadians with dual citizenship could no longer take advantage of the...Exemptions. These [changes]...adversely affected access to U.S. goods and technology, thereby affecting the competitiveness of Canada's defence, aerospace and satellite sectors."<sup>9</sup>

The government's partners in many Canadian military/space export firms were hurt by these U.S. sanctions. Bilateral negotiations led to a tentative deal on October 8, 1999, that tried to

"maintain a strong, integrated North American defence industrial base."<sup>10</sup>

The Canadian government did its best to regain preferential treatment for its friends in the war industry. Simultaneous treaty negotiations on U.S. military access to RADARSAT-2 data, may have provided a handy bargaining chip to get concessions in the deal for Canada's military producers.

Canada's new law "to Amend the Defence Production Act," began working its way through the Senate on June 14, 2000<sup>11</sup> (just two days before the three military treaties were signed). When it came into effect on April 30, 2001, this new law created a

"new category of strategic goods [on]...the list of products requiring prior government approval to export. The new category...includes satellite systems, payloads for spacecraft, ground control stations [and] radiation-hardened microelectronic[s] [useful for space-based systems]."<sup>12</sup>

## C-25: The RADARSAT Bill

Canada's Bill C-25, the RADARSAT Bill or "Remote Sensing Space Systems Act," passed into law on November 25, 2005.<sup>13</sup> It brings Canadian legislation in line with the U.S. "Commercial Remote Sensing Policy" which arose from their "National Space Policy Review." That process began when Pres. George W. Bush issued National Security Presidential Directive 15, on June 28, 2002.<sup>14</sup>

The primary goal of the U.S. policy was to:

"Rely to the maximum practical extent on U.S. commercial remote sensing space capabilities for filling imagery and geospatial needs for military, intelligence, foreign policy, homeland security and civil users."<sup>15</sup>

A media release from ORBIMAGE, the U.S. company still controls RADARSAT-1 sales to the U.S. government, exuberantly announced that: "ORBIMAGE executives and investors reacted very positively after the White House released its new policy on Commercial Remote Sensing."<sup>16</sup>

The reasons for this "very positive" reaction were obvious; the increased use of commercial satellites by U.S. military and intelligence agencies,



Lloyd Axworthy and Madeleine Albright

Radar] data for internal governmental use...is the choice and privilege of the Parties [Canada and U.S.]."<sup>22</sup>

Their intent to privatise data sales made military access a simple business deal:

"An international company...will be given the exclusive right to distribute SAR data to all Third Parties. [It] will be composed of Canadian and U.S. private sector entities."<sup>23</sup>

On June 16, 2000, then-Foreign Affairs Minister Lloyd Axworthy and the-U.S. Secretary of State Madeleine Albright, signed a treaty on RADARSAT-2. Canada's "defence" minister, Art Eggleton, said it was "another significant achievement in addressing our mutual security needs."<sup>24</sup> A Canada-U.S. statement said the treaty would foster "private uses of commercial remote sensing satellite systems, while protecting common national security and foreign policy interests."<sup>25</sup>

## JAG and "Missile Defense"

A document from the Office of Canada's Judge Advocate General (JAG) seems to link this RADARSAT treaty with "missile defense." (The JAG is the "legal advisor to the Governor General, the [Defence] Minister, the De-

means more RADARSAT contracts for ORBIMAGE. Also, the company's top executives, freshly drawn from long U.S. military careers, happily support the interests of U.S. warfighting institutions.

## References

1. Exchange of Notes between... Canada and the... USA constituting an Agreement for Cooperation in the Radarsat Programme (with MOU), Nov. 12, 1991. [www.lexum.umontreal.ca/ca\\_us/en/cts.1991.50.en.html](http://www.lexum.umontreal.ca/ca_us/en/cts.1991.50.en.html)
2. Exchange of Notes..., op. cit. (MOU 11.1)
3. Exchange of Notes..., op. cit. (MOU 12.5)
4. DFAIT media release, "Canada and U.S. Sign Agreement Concerning Operation of Commercial Remote Sensing Satellite Systems," June 16, 2000. [w01.international.gc.ca/MinPub/Publication.asp?publication\\_id=377855](http://w01.international.gc.ca/MinPub/Publication.asp?publication_id=377855)
5. Canada/U.S. Joint Statement, Commercial Remote Sensing Satellite Systems [w01.international.gc.ca/MinPub/Publication.asp?publication\\_id=377855](http://w01.international.gc.ca/MinPub/Publication.asp?publication_id=377855)
6. JAG Role and Responsibilities [www.forces.gc.ca/jag/office/roles\\_and\\_responsibilities/default\\_e.asp](http://www.forces.gc.ca/jag/office/roles_and_responsibilities/default_e.asp)
7. Office of the Judge Advocate General. Report, April 1, 1999 to March 31, 2000. [www.forces.gc.ca/jag/office/publications/performance\\_reports/PerformanceReport2000\\_e.pdf](http://www.forces.gc.ca/jag/office/publications/performance_reports/PerformanceReport2000_e.pdf)
8. DFAIT media release, "Canada & U.S. to Extend Defence Agreement," June 16, 2000. [w01.international.gc.ca/minpub/Publication.asp?publication\\_id=377856](http://w01.international.gc.ca/minpub/Publication.asp?publication_id=377856)
9. DFAIT media release, "Agreement with U.S. on Defence Trade Controls and New Legislative Framework," June 16, 2000. [w01.international.gc.ca/MinPub/Publication.asp?publication\\_id=377858](http://w01.international.gc.ca/MinPub/Publication.asp?publication_id=377858)
10. Ibid.
11. Legislative History of Bill S-25 [www.parl.gc.ca/common/bills\\_ls.asp?Parl=36&Ses=2&ls=s25](http://www.parl.gc.ca/common/bills_ls.asp?Parl=36&Ses=2&ls=s25)
12. Ken Epps, "U.S. imposes improvements to Canadian export controls," *Ploughshares Monitor*, Spring 2002 [www.ploughshares.ca/libraries/monitor/monm02h.html](http://www.ploughshares.ca/libraries/monitor/monm02h.html)
13. Legislative History of Bill C-25 [www.parl.gc.ca/common/Bills\\_ls.asp?Parl=38&Ses=1&ls=C25](http://www.parl.gc.ca/common/Bills_ls.asp?Parl=38&Ses=1&ls=C25)
14. National Security Pres. Directives. [www.fas.org/irp/offdocs/nspd](http://www.fas.org/irp/offdocs/nspd)
15. Fact Sheet, U.S. Commercial Remote Sensing Policy, April 25, 2003. [www.fas.org/irp/offdocs/nspd/remsens.html](http://www.fas.org/irp/offdocs/nspd/remsens.html)
16. ORBIMAGE media release, "New White House Policy on Commercial Remote Sensing Positive News for ORBIMAGE," May 14, 2003. [www.orbimage.com/news/releases/05-14-03.html](http://www.orbimage.com/news/releases/05-14-03.html)

## The RADARSAT Law's Secret Annex

**M**ichael Byers, Professor of Global Politics and International Law at UBC, testified to a Parliamentary committee regarding "The RADARSAT Bill" (C-25: "The Remote Sensing Space Systems Act"). It is tied to a Canada-U.S. treaty on the "Operation of Commercial Remote Sensing Satellite Systems," signed in 2000 by then-Foreign Affairs Minister Lloyd Axworthy and then-Secretary of State Madeleine Albright. Professor Byers testified that:

"The 2000 bilateral treaty with the U.S. contains the international obligations of greatest significance to Bill C-25.... The treaty concerns RADARSAT-2, as does this legislation. In terms of international obligations... this treaty is front and centre.... Article 3 [says]:

'Canada agrees to implement controls... set forth in Annex II hereto, which is protected as commercially confidential, with regard to the operator of RADARSAT-2.'

This is saying that Canada agrees, as part of its legal obligations under this treaty, to whatever is in Annex II. However, we don't know what is in Annex II.... All we know is that it concerns the operations of RADARSAT-2 .... Annex II...has not been published and is not available to this committee.

The unpublished character of Annex II contravenes the spirit and possibly the letter of international law.... The Vienna Convention on the Law of Treaties, which Canada ratified, states:

'Treaties shall, after their entry into force, be transmitted to the Secretariat of the UN for registration or filing and recording, as the case may be, and for publication.'

According to Professor Ian Brownlie's *...Principles of Public International Law*: 'This provision is intended to discourage secret diplomacy....'

As an international law professor, I am not prepared to conclude unequivocally that its unpublished character is in violation of international law, but I suspect it is....

Annex II....certainly relates to the U.S. and what powers, if any, [it]

has over operations of RADARSAT-2.

With this secret annex, the U.S. may...have secured the power...to conscript RADARSAT-2 in support of its intelligence and military operations.... This could cause some serious problems.... It could enable the U.S. to demand RADARSAT-2 be used to take images in preparation for a military intervention to which Canada was opposed.... [and] it could even be used to take images in preparation for a war that was illegal under international law....

**The secret annex: "could enable the U.S. to demand RADARSAT-2 be used to take images in preparation for a military intervention to which Canada was opposed.... [and] it could even be used to take images in preparation for a war that was illegal under international law."**

This would make Canada a party to that action. We would lose our neutral status by providing a satellite and imaging capability to support such an intervention. We would essentially become complicit in any violation of the UN Charter that occurred.

It's even possible that the U.S. has obtained a right of priority access to RADARSAT-2 that trumps that held by Canada.... There's no way that you, the members of this committee, could know that, because it's unpublished....

You are being asked to recommend the adoption of legislation that refers to international obligations that are secret... The government would probably object to any request that you be allowed to see the contents of Annex II, given security clearance issues that might arise.... I think that principles of democracy, transparency and good government require that you be allowed to see those contents.

**Source:** Evidence, Standing Cttee., Foreign Affairs & International Trade, Feb.22, 2005. [192.197.82.11/committee/CommitteePublication.aspx?SourceId=125796](http://192.197.82.11/committee/CommitteePublication.aspx?SourceId=125796)

**Update:** MPs on this Parliamentary committee were, eventually, briefed by a Foreign Affairs' bureaucrat on the contents of Annex II. However, they were not actually allowed to read it.