

## **THE NORTHWEST PASSAGE SHIPPING CHANNEL: SOVEREIGNTY FIRST AND FOREMOST AND SOVEREIGNTY TO THE SIDE**

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The Northwest Passage (the Passage) is a series of seven channels<sup>1</sup> that link the Atlantic and Pacific oceans. The Passage could represent a seven thousand kilometre (7,000 km) shorter route between Europe and Asia from the current route through the Panama Canal. The difficulty is that the Northwest Passage is frozen and impassable for surface vessels for the majority of the year. Even in the summer months the Passage is only open for a few weeks to ice-strengthened vessels, whose captain and crew must have nerves of steel.<sup>2</sup>

However, scientific evidence stemming from global warming is suggesting the possibility that the Passage will be ice-free for many more weeks and possibly months during the year thus leading many to envisage a new, international, commercial shipping channel. With this possibility comes a number of issues not the least of which for Canada are environmental concerns. In addition, security, protection of resources and shipping are all issues that stem from an ice-free (or freer) Passage.

Above and beyond these practical issues is the very emotional and complicated tie Canadians have with their Arctic and the Northwest Passage. Long the subject of sagas and epic journeys, The Passage is part of the Canadian identity. An ice-free Passage could threaten Canada's control of it due to increased claims that the Passage represents an international strait. Such claims, many fear, would force Canada to

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<sup>1</sup> Only five are considered potentially navigable for large supertankers, however.

<sup>2</sup> This paper will look strictly at issues associated with above-water shipping due to space constraints.

necessarily lose its sovereignty over the Passage as well as a piece of its collective identity.

The recent *Speech from the Throne*<sup>3</sup> calls for the “first-ever comprehensive Northern Strategy” that would, among other things, tackle this issue of the Passage once and for all. The question, therefore, is what should Canada do if the Passage becomes ice-free given the practical concerns regarding commercial shipping and the deeply-held Canadian conviction that the “true North [remain] strong and free”? To date, there have been many suggestions that fall into one of two conceptual frameworks. However, neither framework solves both the practical issues as well as the more emotive sovereignty issue: the best advice from both must be considered.

The first conceptual framework I have entitled *Sovereignty First and Foremost*. It assumes that Canada’s sovereignty is tied directly to the ice. Franklyn Griffiths, professor of political science, University of Toronto and holder of the *George Ignatieff Chair of Peace and Conflict Studies*, refers to this as the “sovereignty-on-thinning-ice” theory. Any solutions or suggestions regarding the Passage, according to this theory, must have as its end objective the solidification of Canada’s sovereignty claim to the area.

The second school of thought, which I call the *Sovereignty to the Side*, holds the sovereignty issue constant, as it were, in order to concentrate on the more practical issues associated with an ice-free Passage such as protecting the environment, ensuring the security of Canada and the North American continent, protecting and researching resources and facilitating navigation and shipping. This school of thought

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<sup>3</sup> *Speech from the Throne* delivered by her Excellency, the Governor General, to open the first session of the thirty-eighth Parliament of Canada, October 5, 2004.

believes sovereignty is important. However, rather than being tangled in a legal imbroglio, proponents of this school prefer to “put sovereignty to the side” while they tackle other, related issues.

Which school of thought Canada chooses in its new Northern strategy will not only affect Canadians but also its biggest trading partner, the US, the six other circumpolar nations, commercial shipping companies, non-governmental organizations and the like.

There are no illusions this issue will be solved quickly. It is hoped, however, that the government’s Northern Strategy will not be “alarmist” in tone or action. As this paper outlines, agreeing to disagree on legal principle should not and does not impede or impinge on Canada’s ability to solve the ongoing, practical issues associated with the Passage. Canada’s sovereignty is not in danger of floating away so long as the best advice of both schools are applied. But first, before we discuss the two frameworks, we must understand the complexities of the legal status of the Passage if only to highlight that a strictly legal solution is highly unlikely.

### ***The Legal Status of the Northwest Passage***

Both the US and Canada have strong legal arguments that are supported by cases from the International Court of Justice (ICJ). All evidence suggests that a strictly legal solution to the Passage is unlikely hence the importance of the two conceptual frameworks as potential solutions to the legal stalemate.

The current legal conundrum posed by the Passage is that while Canada maintains it falls within “historic internal waters”, which gives Canada the exclusive right

to decide which ships may and may not enter the Passage, the US maintains the Passage is an international strait and therefore free access must be automatically and necessarily granted to all vessels entering the Passage. It is universally recognized that the Arctic waters are “Canadian”; the issue is the degree of “legal” control Canada may exercise. Freidrich Kratochwil, Paul Rohrlich and Harpreet Mahajan, eminent legal experts, have concluded what we have: that continued reliance on strictly legal arguments is likely to be fruitless with regards to the Passage as argue. Parties that largely agree on the facts and context of the problem but “disagree as to the reasoning proper to resolve it” are arguing over principles<sup>4</sup>. In the case of Canada, it is the principle of historic internal waters and the US’s non-recognition of Canada’s claim; in the case of the US it is the principle of transit access through international straits and the rejection of any suspension of navigational rights. Thus a strictly legal approach to the Passage “problem” means that an impasse is inevitable.

### ***Sovereignty First and Foremost***

Protectionist sentiments apply to both Canada and the US when it comes to the Passage but for Canada, “the concern for Arctic sovereignty is deep-seated [and] symbolic...”<sup>5</sup> Any suggestions or actions that endanger the government’s exclusive authority over the disputed territory sparks an emotional and defensive response.<sup>6</sup> As

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<sup>4</sup> Kratochwil, Freidrich, Paul Rohrlich and Harpreet Mahajan, *Peace and Disputed Sovereignty: Reflections on Conflict Over Territory*, (Boston: University Press of America, 1985): 79-83.

<sup>5</sup> Young, Oran R., “Arctic Shipping: An American Perspective”, *Politics of the Northwest Passage*, Franklyn Griffiths (ed) (Kingston: McGill-Queen’s University Press, 1987): 119.

<sup>6</sup> Research by Elizabeth B. Elliot-Meisel, Shelagh Grant and John Honderich support this emotional tie to the claim of sovereignty. See Elliot-Meisel, Elizabeth, B., *Arctic Diplomacy: Canada and the United States in the Northwest Passage*, (New York: Peter Lang Publishing, 1998), Grant, Shelagh, D., *Sovereignty or Security: Government Policy in the Canadian North, 1936- 1950*, (Vancouver: University of British Columbia Press, 1988) and Honderich, John, *Arctic Imperative: Is Canada Losing the North?* (Toronto: University of Toronto Press, 1987).

stated by the Rt. Hon. Joe Clark in his statement on sovereignty to the House of Commons, September 10, 1985:

The Arctic is not only a part of Canada, it is part of Canadian greatness. The policy of the Canadian government is to preserve the Canadian greatness undiminished. Canada's sovereignty in the Arctic is indivisible. It embraces land, sea and ice. It extends without interruption to the seaward-facing coasts of the Arctic islands. These islands are joined, and not divided, by the waters between them. They are bridged for most of the year by ice. From time immemorial Canada's Inuit people have used and occupied the ice as they have used and occupied the land. The policy of the Government is to maintain the natural unity of the Canadian Arctic archipelago and to preserve Canada's sovereignty over land, sea and ice undiminished and undivided.<sup>7</sup>

The difficulty for Canada is that many, including the US government, believe insufficient resources and personnel have been dedicated to the Arctic to demonstrate a significant presence thereby weakening Canada's sovereignty claim.<sup>8</sup> Weak resources translate into a weak claim. Therefore, Canada's insistence that it have absolute and complete control of the Passage symbolically serves to rattle the cage of a (very large, powerful and anti-obstructionist) US beast.<sup>9</sup> But this does not mean Canada and the US cannot "cooperate" when faced with a common threat.

In the 1940's, Canada's attention was brusquely turned to the Arctic archipelago because of the Cold War; Canada's undefended north and its proximity to the Soviet Union meant that the Canadian government had to abandon its laissez-faire attitude of the 1930's and pursue a policy of active monitoring and intervention.

Lacking the finances and manpower, Canada had little choice but to turn to the United States for military presence and weapons. These "collaborative" defence efforts

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<sup>7</sup> *Statement on Sovereignty*, September 10, 1995 as reprinted in *Politics of the Northwest Passage*, Franklyn Griffiths (ed), (Kingston: McGill-Queen's University Press, 1987): 269-273.

<sup>8</sup> Young, "Arctic Shipping...": 119.

<sup>9</sup> This is in reference to Prime Minister's Pierre Trudeau's comments that the US could be likened to a white elephant beast - Canadians may try to ignore its presence but would eventually feel its every move and its every grunt.

to guard against a common nuclear threat, while maximizing Canada's security, also maximized Canada's potential loss of sovereignty. This fact has not been forgotten.<sup>10</sup>

As a result, events such as the Cold War or the voyage of US vessels such as the *Manhattan* though the Passage serve as triggers. Between events, however, Canada adopts a laissez-faire attitude in the hopes that by not addressing the issue, the status quo can remain (i.e. both sides agree to disagree) and Canada's claim to the Passage remains unchallenged.<sup>11</sup> It is no wonder therefore, that Canada's attitude toward the Northwest Passage has been characterized as schizophrenic<sup>12</sup> thus frustrating the US government all the more. The result is a great potential to over-react and impose all-or-nothing "solutions". This rashness translates into what Franklyn Griffiths refers to as the "alarmist" position or the "*Sovereignty First and Foremost*" school as I have named it.

The difficulty one has outlining the *Sovereignty First and Foremost* framework is that, while very vocal and urgent in their pleas, the associated policies are rather elusive. Continued insistence that Canada's right to the Passage has already been established based on the ICJ *Fisheries Case* is not sufficient. The Fisheries case may have confirmed the method of measurement to determine a state's internal water/territorial water boundaries, however, a question remains as to whether or not Canada's method of measurement via straight baselines<sup>13</sup> "will automatically terminate

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<sup>10</sup> Grant, Shelagh, D., *Sovereignty or Security: Government Policy in the Canadian North, 1936- 1950*, (Vancouver: University of British Columbia Press, 1988): xvi.

<sup>11</sup> Elliot-Meisel, Elizabeth, B., *Arctic Diplomacy: Canada and the United States in the Northwest Passage*, (New York: Peter Lang Publishing, 1998): 121. John Honderich echoes this in his book *Arctic Imperative*. See page 5.

<sup>12</sup> Grant, *Sovereignty.....*: xvi.

<sup>13</sup> Rather than following the outline of a country's land mass, as was the more traditional method, the straight baseline method allows a country with offshore islands and/or very jagged coastlines to calculate its territorial seas from straight lines drawn from a point on the coast to the islands or from island to island. One then connects the dots literally and the water behind the lines is designated internal water while waters away from the line and toward open waters are considered territorial seas. Hence the

the right of passage for foreign ships.”<sup>14</sup> While the government of Canada believes to be fully within its right to pass laws to interdict traffic at its discretion, Bing Bing Jia, eminent professor of international law, argues that a strait may retain its international character in spite of having become part of the internal waters by operation of the rules of straight baselines.<sup>15</sup> Once again, one is faced with a legal impasse.

I will use Franklyn Griffiths’ critique of the “alarmist” view to piece together the *Sovereignty First and Foremost school*. His article entitled “The Shipping News, Canada’s Arctic Sovereignty Not on Thinning Ice”<sup>16</sup> is largely a rebuttal to his “former self” (and fellow colleague)<sup>17</sup> in which Griffiths admittedly provided the trumpet from which to sound the alarm. As Griffiths has declared himself to have been alarmist, his critique is very instructive.

According to Griffiths the alarmists, are the “southern Canadians”<sup>18</sup> who insist on exaggerating the threat the lack of legal clarity vis-à-vis the Passage and the effects of global warming pose to Canada’s sovereignty.

The alarmists are accused by Griffiths of perpetuating a faulty, “sovereignty-on-thinning –ice thesis” via three fallacies: rapidly decreasing ice conditions, a new and large commercial shipping interest and the worsening of Canada-US relations.<sup>19</sup> With

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term “straight baseline”. The “old” method of measurement (which is still used and favoured by the US) simply calculated the territorial seas from a baseline not exceeding twelve nautical miles from shore (at the low-water line) that traced the outline of the coast. Therefore the baseline would exactly match the seacoast but, twelve miles out toward sea.

<sup>14</sup> Grant, *Sovereignty.....*: 7.

<sup>15</sup> Ibid: 6-9.

<sup>16</sup> Griffiths, Franklyn, “The Shipping News: Canada’s Arctic Sovereignty Not on Thinning Ice”, *International Journal*, (Spring 2003), :257-282.

<sup>17</sup> The colleague is Dr. Rob Huebert, associate Director of the Centre for Military and Strategic Studies, University of Calgary. To be fair, I am not convinced Dr. Huebert is as alarmist as Franklyn Griffiths has suggested in his article, “The Shipping News...”.

<sup>18</sup> Griffiths, “The Shipping News....”: 257. Griffiths seems to intimate that the large majority of alarmists are employed by the Privy Council Office. This is my conclusion.

<sup>19</sup> Ibid: 259-260.

the recent research from the *Canadian Arctic Shelf Exchange Study (CASES)*<sup>20</sup> and the recent *Arctic Climate Impact Assessment (ACIA)* study<sup>21</sup> in hand seemingly confirming some of the alarmist's predictions, the bureaucrats, in Griffiths' opinion, are rushing to put together an ill-conceived plan to save Canada's sovereignty once and for all. Griffiths contends that the alarmists have made the ultimate slippery slope argument equating thinning ice to loss of sovereignty. In other words, Canada is peering over a dangerous precipice so better to act hurriedly than not to act at all. Their position, according to Griffiths is as follows.

Due to global warming, the Northwest Passage will be open to commercial shipping (and most specifically American commercial shipping) in very little time on a year-round basis. Furthermore, the "thinning ice" of the Passage will bring the issue of Canada's sovereignty acutely to focus. Canada will then be forced to cede sovereign territory because of an inability to defend it due to lack of resources, international pressure and the general call for the Passage to be considered and used as an international strait. In a sense, Canada's sovereignty would float away with the pack ice.

For Griffiths, the bureaucrats are making a "motivated error;"<sup>22</sup> they continually exaggerate evidence and leap to absolutist conclusions concerning the true physical state of the Passage and Canada's jurisdictional claims. First, the bureaucrats consistently over-estimate the effect of global warming to the Passage. While no one is

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<sup>20</sup> *The Economist* reported that the international CASES study had released statistics that suggested the Passage could become ice-free in the future. "Breaking the Ice", *Economist*, August 19, 2004.

<sup>21</sup> This four-year study by 250 scientists from eight circumpolar countries headed by Dr. Rob Corell (US) and commissioned by the Arctic Council was released November 8, 2004. It confirms that global temperatures are rising at a rate unprecedented in the experience of modern human society....which are being experienced particularly intensely in the Arctic". See <http://www.amap.no/acia/index.html>, November 9, 2004.

<sup>22</sup> Griffiths, "Shipping News....": 257.



suggesting the Passage will be ice-free tomorrow, Griffiths is quite convinced that the policy analysts and “experts” are hanging their collective opinions on facts that are not only questionable but also spurious. Through his own research, Griffith’s has calculated that given the average thickness of the ice and even assuming the fastest rate of melting, the likelihood of the Passage becoming ice-free, especially ice-free all year round is remote. A conference in which the possibility of part of the Passage becoming navigable in decades to come for a few more weeks is suddenly translated into language that would suggest the Passage is ready for year-round trips of the Love Boat.<sup>23</sup> (Or more accurately the ice-strengthened *Marine Discovery* – a Canadian cruise ship.) However, amongst Griffiths’ criticisms are some truths that could aid Canada in its choice of an effective Northern Strategy.

New scientific evidence would suggest that Griffiths should re-check his calculations. The ACIA study, headed by an American scientist, Dr. Robert Corell, would suggest that the ice is melting more quickly than any one previously believed. And yet, Griffiths’ caution not to equate thinning ice to a loss of sovereignty is still valid. Rob Huebert, professor of international relations and strategic studies at the University of Calgary, suggests that because an American headed the study and because the US has most to gain from an ice-free Passage, these results should be considered with some scepticism.<sup>24</sup> This sounds rather conspiratorial. Dr. Corell is a respected scientist who headed a multinational team and who himself is suggesting that the latest

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<sup>23</sup> See Griffith’s discussion concerning the Canadian Arctic Resources Committee, January 2002 as cited in his article “The Shipping News”: 258. He “credits” Mel Hurtig for promoting much of these “misconclusions” in Hurting’s book *The Vanishing Country: Is It Too Late to save Canada?* (Toronto: McClelland & Stewart, 2002). In it, Hurting stated that “the Northwest Passage... in a few years will be navigable for commercial or military vessels for most or all of the year”. As cited in *The Shipping News*,: 258.

<sup>24</sup> CBC Radio interview “The Current” with Dr. Rob Huebert, November 8, 2004.

information be examined in a measured and considered fashion. The ACIA was not specifically studying the Passage. In fact, and as is cautioned in the ACIA, no one really knows for sure what will be the real effect of global warming on the Passage specifically. The points the scientists stress are that global warming is a result of “man-made” activities, is very damaging to the environment, but, is largely preventable.

Griffiths’ more convincing challenge to the alarmists is their assumption that commercial interests will race to use the Northwest Passage despite the fact that: 1) vessels will still need to be ice-strengthened; 2) the shipping season will be a matter of a few weeks and likely never the same few weeks because of wind and weather variables; and 3) because navigation is likely to be hazardous always – the Passage being likened to an ice-infested labyrinth especially for four months of the year when it is plunged into complete darkness twenty-four hours a day. Without mentioning issues of search and rescue and the environment, common sense would suggest that unless millions of dollars can be saved by using the Passage, there are too many unpredictable variables to entice shipping companies to change from their more predictable routes.

Griffiths wonders why, then, the Canadian government insists on promoting the thinning ice thesis thereby drawing attention to a possible ice-free Passage and inviting a direct challenge to Canada’s sovereignty. For Griffiths, the alarmists are their own worst enemies.

The final fallacy Griffiths tackles is the assumption by alarmists that Canada/US relations are bound to deteriorate further in the future should the Passage become ice-free. The alarmists have good reason to suspect that the US will continue to press its

case with more “deliberate affronts to Canadian sovereignty”<sup>25</sup> such as the twelve-day crossing of the US icebreaker the *Polar Sea* through the Passage in 1986.<sup>26</sup> The alarmist cannot envisage a scenario that includes compromise. Ergo, Canada must have total control.

From Griffiths’ critique, the *Sovereignty First and Foremost* framework is as follows: supporters (especially the “southern Canadians”) are convinced the Passage will be ice-free, therefore, commercial shipping will begin *en masse* and, given the American clout, (in terms of military, trade and legal might), Canada’s claim to the Passage will necessarily be lost. On the other hand, if sovereignty is secured, all other issues (environmental, security concerns etc.) will be resolved because of the complete authority the sovereignty claim confers on the Canadian government. But, most importantly, full and recognized sovereignty will continue to ensure Canada’s identity is preserved.

This absolutist reasoning sounds extreme and suspect but is a reflection of past and present Canadian governments and, most importantly, many Canadians. In a cross-country tour in 1986, the chair of the tour, MP Tom Hockin, was overwhelmed by the Canadian concern and preoccupation with Canada’s loss of sovereignty.<sup>27</sup> One may assume this is a vestige of Cold War politics but the sentiment is equally strong today. A “true North strong and free” does mean something to Canadians. However, for it to remain “strong and free” given the absolutist language of the *Sovereignty First and Foremost* school, there are only three possibilities to secure the Passage in my opinion:

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<sup>25</sup> Honderich, John, *Arctic Imperative: Is Canada Losing the North?* (Toronto: Toronto University Press, 1987): 40.

<sup>26</sup> Ibid: 39-40. Interestingly, however, in Canada’s Sovereignty Statement of 1985, Joe Clark insisted that the Polar voyage had not compromised Canada’s sovereignty position in any way. See Griffiths, “Shipping News...”: 270.

<sup>27</sup> Honderich, *Arctic Imperative*...: 219.

- 1) Canada's identity and well-being as a country must not rest solely with ownership of the Passage. Canada must disconnect the emotional attachment to Canada's North from the legal definition of sovereignty philosophically. One may find the attachment to the Passage can still have meaning without absolute, legal control. Only then can Canada have discussion with the US in language it will understand and appreciate; and/or
- 2) Spend the necessary resources to put in place a significant presence in the north to bolster Canada's legal position which may counter or even serve as an "antidote" to international strait arguments; and/or
- 3) Campaign vigorously for the support of other trading nations and then spend the necessary resources to make the Canadian-run Passage so user-friendly and so well managed that the other nations abandon the need to call the Passage an international strait.

Clearly, the Canadian government would find my first point politically unacceptable; the Passage and surrounding territory is Canada's not only in the legal sense but in the emotional as well. Therefore, the remaining two options are possibilities for the *Sovereignty First and Foremost* school to secure the Passage. However, given Canada's record of resource allocation to the North in the past, significant changes in government policy would be required. Absolute sovereignty is expensive emotionally and financially it would seem. Therefore, let us turn to the second school of thought.

### ***Putting Sovereignty to the Side***

This conceptual framework also begins with the assumption that the Passage will become more and more ice-free. However, rather than entangling one's self in a debate about sovereignty with all its emotion and diplomatic wrangling, this school suggests holding constant the sovereignty issue while the more practical issues of: 1) the environment, 2) security; 3) the protection and research of resources; and 4) shipping issues (including navigation, bathymetry, ice-breaking, monitoring etc.) are tackled. For *Sovereignty to the Side* proponents, focusing on Canada's sovereignty

claim only obfuscates the clarity of one's thinking at the expense of these other, important and more immediately pressing requirements.

### **1) *The Environment***

One may leap to the conclusion that the Canadian government is only capable of applying the *Sovereignty First* framework to the Passage conundrum but this is not true. In fact, one of the cleverest examples of "putting sovereignty on the side" was the creation of Canada's Arctic Waters Pollution Prevention Act (AWPPA).

After the first voyage through the Passage in 1969 by the reinforced supertanker, the *Manhatta (US)*, Canadians feared this would be the start of an international navigation practice. The Canadian government searched for ways to, above all, protect the delicate environment of the Passage. Because the *Manhattan* (although empty of oil) had been damaged on its first voyage, and quite seriously, the Canadian government realized that, at a minimum, legislation had to be passed to protect the North from environmental damage.

The AWPPA was a truly novel response to the potential crisis.<sup>28</sup> The AWPPA enabled Canada to exercise jurisdiction over shipping in the Passage in order to protect the Arctic marine environment but it did not, in any way, change the position of Canada with respect to their claim of sovereignty over the Passage.<sup>29</sup> In essence, the government had put sovereignty to the side to solve a more pressing, pedestrian issue.

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<sup>28</sup> Nearly all of the literature credits Canada with being novel in its functional approach. See McCrae, D.M., "The Negotiation of Article 234", *Politics of the Northwest Passage*, Franklyn Griffiths (ed), (Kingston: McGill-Queen's University Press, 1987): 100.

<sup>29</sup> McCrae, "Negotiation...": 100-101.

At the time of the first *Manhattan* voyage, the Canadian public, the media and the opposition cried foul and demanded more concrete action by the government to protect its sovereignty.<sup>30</sup> Prime Minister Trudeau, however, resisted this pressure in favour of a Canadian liberal internationalist ideology.<sup>31</sup> The AWPPA was seen as a vital tool to protect the distinctive way of life of Canada's northern communities.<sup>32</sup> Conceived by Jean Chrétien, the AWPPA<sup>33</sup>, according to John Kirton and Don Munton, two Canadian professors of political science, was not a guise for national greed. Its sole purpose was to establish a one hundred-mile wide Arctic pollution control zone measured outward from the nearest Canadian land in which environmental controls to shipping practices and the protection of the marine environment were to be enforced by Canada. Canada argued that this legislation was necessary because of the danger posed by oil-laden tankers that could spill their contents thus permanently damaging the fragile Arctic environment. Such actions could not be considered "innocent".<sup>34</sup> The 100-mile limit was chosen as it was compatible with international legal standards applicable to oil pollution from tankers.<sup>35</sup> The thinking was: if states could defend themselves against armed attack, why not environmental attack? At a time when the world was only

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<sup>30</sup> Kirton John and Don Munton, "The *Manhattan* Voyages and Their Aftermath," *Politics of the Northwest Passage*, Franklyn Griffiths (ed), (Kingston: McGill-Queen's University Press, 1987): 74.

<sup>31</sup> Ibid: 96.

<sup>32</sup> Ibid: 96-97.

<sup>33</sup> The legislation was introduced to the House on April 8, 1970. The *Manhattan* began its second voyage on April 1, 1970.

<sup>34</sup> Passage is considered "innocent" so long as it is "not prejudicial to the peace, good order or security of the state". See Article 19, UN Convention on the Law of the Sea, 1982. Vessels are to be permitted innocent passage through territorial waters and international straits. The right of innocent passage does not apply to internal waters hence the Canadian insistence that the Northwest Passage is found within historic internal waters. Unfortunately, most references to the Passage are that they are "Canadian waters" which does not specify that the waters are internal and therefore, a right of innocent passage could still exist. See Pharand, Donat, "The Arctic Waters in Relations to Canada", *Canadian Perspectives on International Law and Organization*, R.St. J. MacDonald, Gerald L. Morris and Douglas M. Johnston (eds), (Toronto: University of Toronto Press, 1974): 434-441 especially 439..

<sup>35</sup> Kirton and Munton, "The *Manhattan*....": 91.

beginning to think about environmental protection issues, this legislation was particularly *avant-garde* in its custodianship concept. Kirton and Munton believe it was:

...legal enough to appeal the international community, large enough to satisfy the appetite of the Canadian public, and limited enough to sustain the distinction between full zonal sovereignty and purpose-specific jurisdiction – and hence to complicate the diplomatic response of the US government.<sup>36</sup>

Acknowledging the novelty of its legislation, Canada submitted a reservation to the ICJ to exempt the AWPPA from the compulsory jurisdiction of the Court - a move Canada's current Prime Minister, Paul Martin, opposed. While Canada has always supported international law as an ordering regime, in this case, national interests took precedent. Therefore the reservation to the court was necessary so as not to lose the "forest for the trees" so to speak. In other words, expecting US opposition, Canada did not want to lose its pollution protection for the sake of deference to the international court. (The reservation was withdrawn in September 1985). Canada, realized, however, that the AWPPA would have no legitimacy if not respected by the international community.

Through a number of multilateral conferences and meetings, Canada was able to promote its idea of custodianship to the world. While many states recognized the US's strong legal argument to designate the Passage as an international strait and "recognized the self-interest in Canada's measures,"<sup>37</sup> Canada secured enough international support especially amongst the circumpolar states of Sweden, Norway, Iceland and most importantly, the Soviet Union to reject the US international regime for

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<sup>36</sup> Ibid: 91.

<sup>37</sup> Ibid: 95.

a Canadian regime focused on custodianship and exceptionalism.<sup>38</sup> Ultimately, Canada's reasoning behind its AWPPA with its emphasis on the uniqueness of the Arctic translated into the "arctic exception" - Article 234 that was adopted by the final *UN Convention on the Law of the Sea*, December 10, 1982. Article 234 is reproduced below:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.<sup>39</sup>

Canada had secured environmental protection for the Passage without raising the sovereignty issue. All of this being said, the AWPPA could be discussed in the *Sovereignty First and Foremost* category for in today's terms, it is further evidence of Canada's assertion that the Passage is part of Canada's internal waters. Nevertheless, the bulk of the literature suggests that the AWPPA does belong to this second school of thought because it had, as its goal, the protection of the Arctic above and beyond any reference to internal waters (which is never mentioned in the Act). For now, we shall interpret it as evidence of creative thinking that should be encouraged for the future.

## **2) Security**

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<sup>38</sup> Ibid: 95.

<sup>39</sup> Article 234, "Ice Covered Areas", *UN Convention on the Law of the Sea*, December 10, 1982. Donat Pharand believes that this clause would still apply should the Passage become ice-free providing Canada with some (but not complete) protection against an international strait argument. See his discussion in *The Northwest Passage Arctic Straits: Volume VII*, (Boston: Martinus Nijhoff Publishers, 1984): 119-120.



Defence and policing of the Passage is currently provided by the following Canadian departments: the Department of National Defence through the Canadian Forces and the Arctic Rangers, the Royal Canadian Mounted Police (RCMP) and the Coast Guard (who are ultimately charged with enforcing Canada's AWPPA among other duties including ensuring safe and efficient maritime transportation, operation of navigation aids, marine search and rescue and annually restocking supplies to the communities and firms living and operating in the high Arctic).<sup>40</sup> Currently, by all estimations, Canada's defence and security posture in the North is minimal.<sup>41</sup> And despite the fact that, "sovereignty talk lends itself to a rhetoric of alarm and exaggeration aiming to 'energize' others,"<sup>42</sup> Canada has not made securing a presence in the Arctic a priority. This is because: 1) Canada has always known it can rely on the US to provide military might should it be required, and 2) establishing a significant presence in the North is extremely expensive. As a result, the US will continue to be a major contributor to Canada's (and North America's) Arctic security.

As Canadian diplomat John Holmes claimed, Canadian "soil is protected not by American generosity but by American self-interest, which is more dependable."<sup>43</sup> This is a fact that frustrates Canadians. Canadian sensitivity to perceived US threats to its sovereignty has been a long-standing problem in bilateral security relations. While during the Cold War Canadians generally accepted the need for bilateral defence

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<sup>40</sup> Honderich, *Arctic*....: 68-69.

<sup>41</sup> See W. Harriet Critchley's arguments in "Defence and Policing in Arctic Canada", *Politics of the Northwest Passage*, Franklyn Griffiths (ed), (Kingston: McGill-Queen's University Press, 1987): 200-215.

<sup>42</sup> Griffiths, Franklyn, "The Shipping News: Canada's Arctic Sovereignty Not on Thinning Ice", *International Journal*, (Spring 2003): 276.

<sup>43</sup> Holmes, John, "Is There a Future for Middlepowermanship?", J. King Gordon (ed), *Canada's Role as a Middle Power* (Canada: Canadian Institute of International Affairs, 1966): 23 as quoted in Elizabeth B. Elliot-Meisel, "Still Unresolved after Fifty Years: The Northwest Passage in Canadian-American Relations, 1946-1998", *American Review of Canadian Studies*, vol. 29, no. 3 (Fall, 1999): 407-430.

cooperation, even then, sovereignty concerns were a political problem for the government of Canada. Elizabeth Elliott-Meisel wisely counsels therefore, that,

[u]ltimately, both nations [must] assess at what point sovereignty is compromised in return for security, when diplomatic sensitivity must be subordinated to military necessity, and which operation and command arrangements facilitate cooperation even at the expense of control.<sup>44</sup>

And yet, while Canada has continued to claim “full sovereignty” over the Passage, the government has been reluctant to devote the necessary funds. For example, the proposals to purchase nuclear-powered submarines and a long-range Aurora aircraft failed to survive the Canadian government’s budget cuts of 1989 and Canada’s Polar-8 icebreaker was cancelled in 1990.<sup>45</sup> Therefore, the balance between sovereignty and security and between sensitivity and military necessity are skewed necessarily in favour of the US because the US is able to provide the necessary funds. Because of this financial fact and the US preoccupation with security, Franklyn Griffiths<sup>46</sup> sees an opportunity for Canada.

Griffiths sees a practical opportunity for Canada because of US focus on continental security as a result of 9/11. This focus could represent a boon for Canada if one is not averse to manipulating the insecurity of the US to the advantage of Canada. Because of the US focus on security, the US government is conscious that now may not be the time to aggravate relations with Canada when cooperation is needed. The US should, therefore, abandon its insistence that the Passage is an international strait in favour of Canadian control through its AWPPA in order to complete a security perimeter around North America. Conveniently, if all vessels are subject to search for pollution

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<sup>44</sup> Elliot-Meisel, “Still Unresolved...”: 410.

<sup>45</sup> McRae, Donald, M., “Arctic Sovereignty: Loss by Dereliction?” *Northern Perspectives* vol. 22, no.4. (Winter, 1994-1995): 8.

<sup>46</sup> Griffiths, Franklyn, “The Shipping News: Canada’s Arctic Sovereignty Not on Thinning Ice”, *International Journal*, (Spring 2003): 257-282. The title is derived from a conference held in Ottawa in 2002 entitled “Thinning Ice”.

control verification purposes, would-be terrorists, smugglers and criminals might consider an alternate route.<sup>47</sup> Currently, vessels voluntarily declare their adherence to the conditions of the AWPPA. However, with US assistance, the AWPPA could finally be enacted as it was meant with mandatory searches of any vessel that voyages through the Passage. Considering there are multiple, viable entry points to the Passage for large vessels and given Canada's limited resources and manpower, US help is a must. Therefore, Griffiths suggests the US would be better served in the long run by abandoning its international strait argument and courting Canada for preferential treatment. In political terms, this would be referred to as a "harmonization of policies".

### **3) Protection and Research of Resources**

While it may sound trite, protecting Northern resources and wildlife is challenging and not dependent on whether or not one has absolute control of the Passage.

The importance of an equal partnership between the federal government and the Inuit regarding the protection of the North cannot be underestimated. Not only do the Inuit have a very practical and immediate interest in the North, but their "interest is stewardship as opposed to remote control".<sup>48</sup> The principle behind Canada's AWPPA is an excellent start. There are also great hopes and expectations of initiatives such as the *Commercial Renewable Resource Development* policy, the *Aboriginal and Arctic Circumpolar Affairs* committee, *Nunavut Wildlife Service Conflict Control Policy*<sup>49</sup> and Indian and Northern Affairs' *Sustainable Development Strategy 2004-2006* that cooperation with Canada's indigenous' communities will continue and expand. Arctic

<sup>47</sup> Griffiths, "The Shipping News", p. 270.

<sup>48</sup> Griffiths, "The Shipping ...": 280.

<sup>49</sup> Government of Nunavut, <http://www.gov.nu.ca/Nunavut/policies/>, (October 5, 2004).

tourism, for example is fast becoming a new source of revenue and business for the Inuit that the government of Canada has encouraged.

Beyond Canada and its largest trading partner, other important stakeholders include the circumpolar states. Research and northern interests have served as a focus from which a spirit of cooperation has blossomed. Recognizing the limits of its AWPPA, Canada has been a leader in establishing multilateral discussions amongst the various states to discuss common threats and concerns. The *Arctic Council*, established in 1996, is an intergovernmental forum at which issues and concerns related to the environment, sustainable development, as well as social and economic considerations are discussed. This council can only function by putting sovereignty to one side in order to tackle the wider and common concerns of Canada<sup>50</sup>, Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, the Russian Federation, Sweden and the United States. This Council, however, is not a forum for tackling interstate, legal arguments – it has not the mandate or jurisdiction to do so.

The Council has been successful in establishing a number of initiatives including the *Arctic Environmental Protection Strategy (AEPS)*<sup>51</sup> – a joint action plan to share scientific information to support the promotion and protection of the environment and the indigenous way of life. In addition, an *Arctic Monitoring and Assessment Programme (AMAP)* has also been established to study anthropogenic pollutants. These research initiatives involving all of the circumpolar states are vital and must continue.

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<sup>50</sup> *The Northern Dimension of Canada's Foreign Policy*, Foreign Affairs Canada, [http://www.dfait-maeci.gc.ca/circumpolar/sec02\\_nfp-en.asp](http://www.dfait-maeci.gc.ca/circumpolar/sec02_nfp-en.asp), (February 10, 2005).

<sup>51</sup> AETPS as found on the Arctic Council website at [http://www.arctic-council.org/files/pdf/artic\\_environment.PDF](http://www.arctic-council.org/files/pdf/artic_environment.PDF), (October 7, 2004).

#### **4) Shipping Issues**

If the Passage is to become the hotbed of international shipping everyone expects, coordination between the littoral states of: the US, Canada, and Denmark/Greenland will be essential. Regardless of whether or not jurisdictional issues are sorted, pragmatic issues such as what country shall be responsible for providing what services needs to be resolved. Oran Young, professor and co-Director of the *Bren Program on Governance for Sustainable Development*, offers just a cursory list of those services that will need managing and funding including:

- Construction standards for tankers
- Rules for safe operations in Arctic waters
- Traffic control
- Aids to navigation (including icebreaking – by far the most important, ice-forecasting and rescue)
- User fees
- Environmental protection
- Socioeconomic integrity of nearby communities
- Liability for spills and other damages
- Clean-up procedures<sup>52</sup>

Some of these issues have been anticipated in Canada's AWPPA but Young urges for a regime approach rather than an institutional approach. The difference, he insists is that while equipment, personnel, and budgets lumber institutions, regimes focus on roles, rights and rules and are less encumbered.<sup>53</sup> Organizations, to be sure, may be needed, but rather than creating the institution first, as is often the case, the focus should be on the management of the Passage.

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<sup>52</sup> Young, "Arctic Shipping...":131-132.

<sup>53</sup> Ibid: 132.

It is highly likely that these services, like protection of the environment and resources can benefit from international cooperation especially if the issue of sovereignty is “set to the side”. Should a navigable passage materialize, especially under the command and guidance of Canada, it would increase trade possibilities for Canada, and the US and may convince the international community (including the US) to desist in their calls for the Passage to be called an international strait. The more ships use the Passage, the more resources will be required by, most notably, Canada. Should enough resources be invested by it, Canada may find it has increased its presence sufficiently to ward off legal attacks and make the Passage “usable” – in a sense accomplishing my suggestions for *Sovereignty First and Foremost’s* second and third solutions for a Canadian owned Passage. However, if Canada waits for other countries to provide the services, it could find itself fighting for attention and access to the Passage whether Canada’s or not. What this means for Canada is the expenditure of more resources.

Special bi-lateral agreements such as the Canada-US 1988 *Agreement on Arctic Cooperation* is an example of putting sovereignty to the side to facilitate the passage of US Coast Guard icebreakers through the Passage.<sup>54</sup> (It is also a reminder of the importance of a close relationship between the Canadian Prime Minister and the US President.) Ultimately, this agreement perpetuates the status quo but it has been instrumental in preventing further international squabbles. Both countries should now consider expanding this agreement to cover other surface ships.

A criticism of the *Sovereignty to the Side* school is that, eventually, “the big elephant in the room”, namely sovereignty, must be acknowledged and addressed.

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<sup>54</sup> *Agreement between the government of Canada and the government of the United States of America on Arctic Cooperation* (January 11, 1988). Signed by Joe Clark and George P. Schultz. The close relationship between Prime Minister Brian Mulroney and President Ronald Regan is offered as the reason for the establishment of this agreement.

This school however, has many suggestions for the protection of the environment and resources to the benefit of all states with due deference and use of international laws and regimes. One must ask therefore, if this is not another aspect of Canada's identity. Perhaps the emotional attachment to the "true North strong and free" as well as respect and promotion of international laws and cooperation are both a part of Canada's identity and greatness. In fact, this school may hold the key to my suggestion for the *Sovereignty First and Foremost's* school – untangle Canada's identity with the North from possession of the Passage in order to use language the US can understand and appreciate.

### **Conclusion**

Canada's legal position is sound today but as the ice melts, there is the genuine fear that its sovereignty will float away with the pack ice. This is not inevitable however. Canada is far from helpless – there are actions that can be taken and factors that could mitigate a legal challenge.

Firstly, there is no guarantee that the Passage will become a commercial shipping route. While it does represent a seven thousand kilometre shorter distance between Europe and Asia, it is still fraught with significant navigational hazards. Canada is best placed to assist foreign vessels avoid these hazards and guide them safely offering services for a fee. Protection of the environment and the Inuit is of paramount importance. Therefore, by aiding in the navigation of these vessels, Canada could minimize their impact on the north. Furthermore, if Canada were to adopt a "bond" program, similar to the one about to be applied to the Panama Canal whereby shipping companies buy financial bonds to help pay for environmental and social projects in the

area, such an initiative would be consistent with Canada's custodianship stance and would benefit the Inuit greatly.<sup>55</sup>

Secondly, Canada is wise to enact and support legislation as well as focus worldwide attention on the effects of global warming not only for the Passage but also for the world.

Thirdly, the US preoccupation with security, regardless of how much ice there is, could represent an opportunity for Canada to convince the US to adopt Canadian control of the Passage as a way of securing the North American perimeter. The challenge for Canadians is to sell this idea to the US in pragmatic language setting aside the discourse on Canadian identity and accepting the compromise that comes with relying on our neighbours for security as was done during the Cold War and many would argue, continues to be the case.

Fourthly, assuming the ice does melt significantly, the more adequately Canada provides funding for resources and for services (especially ice breaking), the less likely there will be calls to make the Passage an international strait especially if Canada extends preferred treatment to circumpolar states and trading partners.

Finally, apart from concerns about the Passage, Canada has to think seriously about what is the Canadian identity. Is it solely about the North or are there other aspects to Canada's greatness such as our respect for multilateral solutions and respect for international law? Many are right to chide Canada for "playing" the northern card and for making reference to our Inuit communities solely as an argument for control of the Passage without due deference to their views and contributions. Thankfully, Canada has and continues to improve its consultative record.

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<sup>55</sup> For more information on this bond program, see "Are You Being Served", *The Economist*, (April 23, 2005): 76-78.



It will be interesting to see what the *Comprehensive Northern Strategy* details for the Passage – only statements of intent have been released.<sup>56</sup> In the final document, I suspect it will profess an increased presence in the north (both military and civilian), continued support for the Arctic Council, increased funding to Indian and Northern Affairs and continued negotiations and cooperation with the US and the other circumpolar states. It is unlikely, however, that Prime Minister Martin will make any grand statements on sovereignty: while a minority government needs to ensure the continued support of Canadians, which this would accomplish, he cannot afford to isolate the US. Similarly, while Prime Minister Martin objected to the reservation to the ICJ for Canada's pollution Act, he is unlikely to suggest that the international courts decide Canada's fate (and his, for that matter). Mr. Martin will also have to tread lightly around any issues involving shipping lest he be accused of favoring his former company.<sup>57</sup> With all of these considerations and potential political land mines, the Martin government is likely to maintain the status quo leaving Canada and the US to agree to disagree on legal principles, which represents the simplest and most logical (yet perhaps unsatisfying) solution.

Canada's sovereignty is not floating away nor is it "ours to lose". It is waiting for Canada, like past explorers, to be creative and think beyond just the voyage to the possibility of an international, open, Canadian Passage – only one example of Canada's greatness.

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<sup>56</sup> See *The Northern Strategy* communication package including News Release, December 14, 2004. [www.northernstrategy.ca](http://www.northernstrategy.ca).

<sup>57</sup> Griffiths is most emphatic regarding this point. See "The Shipping News": 278.

