

# The Northwest Passage Shipping Channel: Is Canada's Sovereignty Really Floating Away?

**Andrea Charron**  
War Studies Programme  
Royal Military College of Canada

Andrea Charron, a native of Waterloo, is beginning her first year in the War Studies doctorate programme at the Royal Military College of Canada. With a BScH from Queen's University, MPA from Dalhousie University and an MA in International Relations from Webster in Leiden, The Netherlands, Andrea has an eclectic academic background. As a participant of the Canadian Federal Government's Management Trainee Programme, Andrea has worked for the both the customs and revenue departments of the now split Canada Revenue Agency and Canada Border Service Agency. She has also worked for the Privy Council Office in the Security and Intelligence Secretariat as a policy advisor. Andrea's areas of interest include international organizations and international law, especially humanitarian law.

## Abstract:

In the 1940's, Canada's attention was brusquely turned to the Arctic Archipelago. The nuclear age focused attention on the Arctic: 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 to guard against a common nuclear threat, while maximizing Canada's security, also maximized Canada's potential loss of sovereignty<sup>1</sup>. Today, Canada's claim to the Arctic is still not recognized by the United States. But now, because of lucrative commercial interests, Canada will fixate on the protection of its northern border once more. The need to settle Canada's sovereignty claim has become more pressing since the findings of a group of international scientists studying the effects of global warming were released. Reported in *The Economist*, results from the *Canadian Arctic Shelf Exchange Study* (CASES) suggest that the Northwest Passage – a sea passage along the northern coast of Alaska through the Canadian Arctic joining the Atlantic and Pacific – could soon be a busy shipping channel. Impassable most of the year, global warming could make the Passage ice-free allowing ships to travel from Europe to Asia. Further, this new route could be nearly 7,000 kilometres shorter than the route through the Panama Canal<sup>2</sup>. The majority of research sounds the alarm for quick and determined action by the Canadian government as a result of this new finding. But, this paper suggests the alarm need not be sounded yet and that a hurried approach may be the real threat to Canada's sovereignty. Measured and considered action in conjunction with other states (including the US) and commercial shipping companies will prove the wiser course of action.

<sup>1</sup> Grant, Shelagh, D., *Sovereignty or Security: Government Policy in the Canadian North, 1936- 1950.*, Vancouver: University of British Columbia Press, 1988., p. xvi.

<sup>2</sup> See "Breaking the Ice", *The Economist*, August 19, 2004.

## The Northwest Passage Shipping Channel: Is Canada's Sovereignty Really Floating Away?

The Northwest Passage, considered to be within Canada's historic, internal waters, is a series of seven channels<sup>1</sup> that link the Atlantic and Pacific oceans. The Passage has always been considered potentially lucrative and commercially promising because it represents a 7000km shorter route for vessels transporting cargo between Europe and Asia and could represent a new source of undiscovered natural resources. 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. There are concerns regarding the operating pollution of supertankers and commercial vessels not to mention the cargo that could be lost or spilled thus damaging a very sensitive and valuable ecosystem. In addition, ice-breaking, navigational support, development, protection and extraction of raw materials and resources, security screening, monitoring and enforcement of national and international laws are issues that come with 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. The Passage has long been the subject of sagas and epic journeys and is part of the Canadian identity. An ice-free passage could threaten Canada's sovereign control of the Passage as there are pressures to designate the Passage an international strait. Many believe that if the Passage becomes an international commercial thoroughfare, Canada must necessarily lose its sovereignty over the Passage as well as a piece of its collective identity. This summarizes the ongoing legal debate between Canada and the United States (US).

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 first conceptual framework, entitled *Sovereignty First and Foremost*, assumes that Canada's sovereignty is tied directly to the ice. Franklyn Griffiths refers to this as the "sovereignty-on-thinning-ice" theory. Therefore, any solutions or suggestions regarding the Passage must have as its end objective the solidification of Canada's sovereignty claim to the area.

The second framework 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, facilitating navigation, ice-

breaking services, harvesting and protecting raw materials and resources and monitoring and enforcing national and international laws. This school of thought does believe 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. The *Speech from the Throne* seems to suggest that both schools of thought can be combined in order to protect Canada’s sovereignty and tackle the practical issues of sovereignty. This paper will explore those frameworks to determine whether or not it is possible to achieve a comprehensive and all-inclusive strategy – one that allows for international commercial shipping in a Canadian-owned Passage. But first, we must understand the complexities of the legal status of the Passage if only to highlight that a strictly legal solution to the Northwest Passage is highly unlikely.

There are no illusions that the Passage conundrum will be solved anytime soon. It is hoped 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. The only issue that does necessitate a legal decision is the ownership and extraction of resources. Canada’s sovereignty and security is not in danger of floating away so long as the best advice of both schools are applied.

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

A brief, historic record of Canada’s sovereignty claim to the Northwest Passage is necessary to understand the complexity of the arguments. Both the US and Canada have strong legal arguments both of which 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.

A very short explanation of 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 United States (US) maintains the Passage is an international strait and therefore free access must be automatically and necessarily granted to all vessels entering the Passage. To be stringent in analysis, one must look at both sides of the legal argument and therefore, we shall explore the American case first.

The question Canadians must ask is: are there any legal precedents that could lend support to the US case that the Passage be designated an international strait? The answer is yes if two conditions are met. The first is geographical and the second is usage.

If it can be demonstrated that the Passage represents a waterway, then the geographical condition is said to have been met. A waterway “must join one area of high seas to another”.<sup>4</sup> Since all seven channels of the passage link Davis Strait (a high sea) to the Beaufort Strait (a high sea), the

first condition is met even if two of the channels are considered too shallow for commercial cargo vessels.<sup>5</sup> Furthermore, the US has consistently defended the right of innocent passage through international waters. Some examples include the US refusal to accept Libya's claim that the Gulf of Sidra is internal waters and, in 1986, sending the cruiser *Yorkton* and destroyer *Caron* deep into the Black Sea "on a route that deliberately passed through the Soviet Union's internationally accepted twelve-mile-territorial waters" in order to prove their point that states cannot limit the access of vessels to an international strait.<sup>6</sup> Even during the Cold War at a time when brinkmanship courted nuclear disaster, the US insistence on establishing the right of innocent passage was paramount.

For the second condition, legal scholars turn to the ICJ *Corfu Channel Case (United Kingdom v Albania)*<sup>7</sup> in which a relatively small amount of international maritime traffic constituted sufficient usage to be designated a strait. While there has been relatively little traffic through the Passage due to the ice condition, unregulated foreign submarine could be considered amongst the numbers.<sup>8</sup> While Donat Pharand, Canada's legal expert on the law of the sea, does not believe this condition has been met to date<sup>9</sup>, should the Passage become ice-free, it is quite possible the "use" condition will be met. Therefore, having already met the waterway condition and with the strong likelihood of meeting the usage criteria in the future, the US is quite confident the Passage will be designated a strait with time. The likelihood of the US backing down in the face of contrary Canadian objections is, therefore, unlikely. The Central Intelligence Agency's *Factbook* lists Canada's passage as an ongoing international dispute stated thusly:

"[Canada continues to have a] managed maritime boundary disputes with the US at Dixon Entrance, Beaufort Sea, Strait of Juan de Fuca, and around the disputed Machias Seal Island and North Rock; uncontested dispute with Denmark over Hans Island sovereignty in the Kennedy Channel between Ellesmere Island and Greenland"<sup>10</sup>

The "managed" reference should be read as "agree to disagree" but in no way should Canadians mean it to imply that the US is prepared to compromise its principles at this time. The only reason the US continues to agree to disagree is because the ice has not melted sufficiently to make it a top priority.

Canada's claim to the Passage, on the other hand, rests on historic rights and on internationally accepted methods of measuring baselines. The Passage is a difficult piece of territory to categorize because it is neither just land nor just water and the legal jurisprudence for waters, let alone, remote, ice-infested, arctic waters, is not clear.<sup>11</sup> The US does not dispute Canada's sovereignty over the islands located in the Canadian sector of the Arctic<sup>12</sup> but insists the laws governing international waters do not align with Canada's position.

It was not until 1951 and the International Court of Justice's (ICJ) ruling on the *Fisheries Case (United Kingdom v. Norway)*<sup>13</sup>, that there was some "direction regarding jurisdiction of states over waters adjacent to their coasts".<sup>14</sup> This ruling was particularly important for Canada because: 1) it recognized the concept of historic title to coastal waters and 2) it accepted a new method of measurement of territorial seas that Canada preferred. This new method of calculation introduced the concept of "straight baselines". 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.<sup>15</sup> One then connects the dots literally and the water behind the lines is designated internal waters while waters away from the line and toward open waters are considered territorial seas. Hence the 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 that traced the outline of the coast. Therefore the baseline would exactly match the seacoast (but twelve miles out toward sea). The area encompassing a country’s internal waters can be greatly increased by adopting the new method<sup>16</sup> of calculation thus increasing the amount of water deemed internal and under the full authority and sovereignty of the coastal state. The coastal state may pass laws it deems fit to control traffic and more importantly, no foreign ship may claim automatic right of passage.<sup>17</sup> This method of calculation was reinforced seven years later at the first United Nations (UN) Conference on the Law of the Sea.<sup>18</sup>

Canada, however, had still not adopted any national legislation to formally claim a historic right to the Passage because, according to McCrae, the new jurisprudence was considered quite radical and, at the time, Canada was more preoccupied with protecting Canada’s fishing industry.<sup>19</sup> As well, McCrae feels that “the anticipated reaction from the US to any formalizing of a Canadian position that the waters of the Arctic Archipelago were internal waters of Canada discouraged precipitate action”.<sup>20</sup> This would change quickly in 1969<sup>21</sup> when the American supertanker, the *Manhattan*, traversed a portion of the Northwest Passage twice as part of a feasibility study of delivery routes for oil to the US.<sup>22</sup> The *Manhattan* was owned and operated by Humble Oil, a private US firm that was part of the multinational giant, EXXON.

There are differing accounts as to the amount of cooperation that existed between the *Manhattan*’s captain, and the US and Canadian governments. According to John Kirton and Don Munton, the first voyage by the ice reinforced *Manhattan* in 1969 was aided and supported by both the Canadian and US governments as part of feasibility study.<sup>23</sup> Humble Oil contacted Canadian authorities to inform them of the planned expedition and requested information on ice conditions. While careful not to admit de facto support for Canada’s jurisdictional claims, the US Coast Guard informed its Canadian counterparts of its plan to escort the *Manhattan* for the journey by the *Northwind*. Canada volunteered the services of the icebreaker *John A. Macdonald* and suggested that the icebreakers of both countries escort the *Manhattan* through US and Canadian waters.<sup>24</sup> The voyage was difficult and the navigation proved even more challenging.<sup>25</sup> The *Manhattan* was damaged during the voyage which may have planted the seed for Canada’s future pollution legislation to be discussed later. Most importantly, however, the success of the voyage brought the issue of sovereignty into stark focus.

John Honderich’s account of the first voyage is very different. He maintains that the *Manhattan* was dispatched without the Canadian government’s permission but “by a sweet twist of fate”, became stuck in the pack ice and was rescued by the *Sir John A. Macdonald*.<sup>26</sup> Honderich is a proponent of the *Sovereignty First and Foremost* school whereas Kirton and Munton are supporters of the second, *Sovereignty to the Side* school thus highlighting the pitfalls of bias. Regardless of the accounts, the fact is the *Manhattan* did make a voyage through a part of the Passage. The US did not ask the Canadian government for formal permission nor did the Canadian government actively or publicly denounce and/or prevent the voyage.<sup>27</sup>

The Canadian government realized and feared that the *Manhattan* might represent future commercial voyages that could seriously undermine Canada's unannounced claim to sovereignty. Should other US or international vessels transverse the passage, "a practice [of using the Canadian archipelago] for navigation may [be said to have] evolved among states".<sup>28</sup> McCrae states that international law would likely, therefore, have designated the Passage an international strait.<sup>29</sup> The designation of strait requires all vessels to be granted "innocent passage" meaning that so long as the ship was abiding by international laws (ie. its mission was peaceful, it was not collecting information or prejudicing the defence or security of the coastal state etc.) the vessel must be allowed to pass unimpeded. Therefore, rather than being viewed as an opportunity for continued bilateral cooperation and exploration of the Passage, the first voyage of the *Manhattan* became a watershed for the formal declaration of Canada's right of ownership of the Passage.

The second *Manhattan* voyage in 1970 did not proceed "under the same spirit of cooperation" as the first depending, of course, on whose account you prefer. Humble Oil had to agree to a number of anti-pollution rules; Canada's Department of Transportation inspected the hull of the vessel. Furthermore, the captain of the Canadian icebreaker accompanied the *Manhattan* (now mandatory) and had ultimate responsibility and authority to end the voyage if necessary. A Canadian authority was also on-board the *Manhattan*.<sup>30</sup> Humble Oil agreed to the conditions, posted a bond and gave Canada ultimate control of the voyage.<sup>31</sup> As a result of the Canadian demands on Humble oil, however, the US government affirmed their belief that the Passage was an international strait, oil imports from Canada were reduced by twenty percent and most damaging, on the day *Manhattan* began its second voyage (April 1, 1970), the US Congress approved construction of the *Polar Sea* – the most powerful non-nuclear icebreaker in the world.<sup>32</sup> The US, presumably, was preparing to ram its point home.

Canada and the US were at an impasse and despite future national anti-pollution legislation enacted by Canada (which will be discussed in the section entitled "*Putting Sovereignty to One Side*"), the two countries fundamentally disagree on principles of international law that have yet to be solved hence the caution at the beginning of this section lest one search for a strictly legal solution. The position of the Canadian Government is unwavering – the Passage is within internal waters. If the Canadian government is to create an effective Northern strategy that includes the Passage, it will use, as its starting point, this belief. However, given the fundamental disagreement between the two countries, a look beyond the law is necessary. Therefore, we shall begin our investigation with the first framework.

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

Sometimes it takes an American to tell Canadians how they really feel. 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>33</sup> According to many experts on the subject including Robert Huebert, Shelagh Grant, Elizabeth Elliot-Meisel and John Honderich, the claim of sovereignty over the arctic archipelago is uniquely tied to the country's sense of national pride and identity and therefore, any suggestions or actions that endanger the government's exclusive

authority over the disputed territory sparks an emotional and defensive response.<sup>34</sup> As 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>35</sup>

The difficulty for Canada is that many, including the Americans believe insufficient resources and personnel have been dedicated to the Arctic to demonstrate a significant presence thereby weakening its sovereignty claim.<sup>36</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>37</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. The nuclear age focused attention on the Arctic: 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 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>38</sup>

As a result, events such as the Cold War, or the voyage of the *Manhattan* 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 (ie. both sides agree to disagree) and Canada’s claim to the Passage remains unchallenged.<sup>39</sup> It is no wonder, therefore that Canada’s attitude toward the Northwest Passage has been characterized as schizophrenic<sup>40</sup> thus confusing and infuriating the Americans 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.

The difficulty one has outlining the *Sovereignty First and Foremost* framework or school is that, while very vocal and urgent in their pleas, their policies are rather elusive. Continued insistence that Canada’s right to the Passage has already been established based on the ICJ *Fisheries Case* and international acceptance of straight baselines, as we have explored, is not sufficient. Therefore, I will use Franklyn Griffiths’s 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” is largely a rebuttal to Rob Huebert and his “former self” in which he 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>41</sup> who insist on exaggerating the threat the lack of legal clarity with regard to the Northwest Passage and the effects of global warming poses 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>42</sup> With the recent research from the Canadian Arctic Shelf Exchange Study (CASES)<sup>43</sup> in hand seemingly reconfirming some of the alarmist’s predictions, the bureaucrats are rushing to put together an ill-conceived plan to save Canada’s sovereignty and only its sovereignty once and for all. Griffith’s 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 Griffith’s 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 succeed sovereign territory to the American’s because of its inability to defend against the will of the US due to a lack of resources, international pressure and the general call for the Passage to be designated an international strait. In a sense, Canada’s sovereignty would float away with the ice pack.

For Griffiths, the bureaucrats are making a “motivated error”<sup>44</sup>: that is they continually exaggerate evidence and leap to absolutist conclusions concerning the true state of the Northwest Passage and its jurisdictional claims to ensure, above all, Canada’s claim to sovereignty is preserved.

First, the bureaucrats, according to Griffiths, have consistently over-estimated the effect of global warming to the Passage. While no one is suggesting the Passage will be ice-free tomorrow, Griffiths is quite convinced that the policy analysts and “experts” are hanging their collective hopes 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 become 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>45</sup>. (Or more accurately the ice-strengthened *Marine Discovery* – a Canadian cruise ship.) This does little to inspire confidence in Canada’s bureaucracy or the experts that sit on these committees. However, amongst the vitriol is some truth that could aid Canada in its choice of an effective Northern Strategy.



Griffith's 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”<sup>46</sup> 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 because the Passage could 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” such as the twelve day crossing of the US icebreaker the *Polar Sea* through the Passage in 1986.<sup>47</sup> The alarmist cannot envisage a scenario that includes compromise. Ergo, Canada must have total control.

From Griffith's critique, the *Sovereignty First and Foremost* framework is as follows: they 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 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>48</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:

- 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 designate the Passage a strait.

Clearly, the Canadian government would find my first point unacceptable; the Northwest 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. The *Speech from the Throne* in February 2004 did promise a \$3.7 billion investment in Canada's North<sup>49</sup> which may well represent a nod to this change. Nevertheless, when broken down, much of the funds promised are backfilling a gap highlighted in the main estimates of the Indian and Northern Affairs departmental budget. Absolute sovereignty is expensive emotionally and financially it would seem.

### ***Putting Sovereignty to One 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, extraction and research of resources; and 4) shipping issues (including navigation, bathymetry, ice-breaking, monitoring etc.) are tackled. For *Sovereignty to One Side* proponents like Franklyn Griffiths, Oran Young and W. Harriet Critchley, 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.

After the first voyage of the *Manhattan* and the realization that it could be the start of an international navigation practice, Canada searched for ways to, above all, protect the delicate environment of the Passage. Because the *Manhattan* supertanker (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 Arctic Waters Pollution Prevention Act was a truly novel response to the potential crisis.<sup>50</sup> The Act 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>51</sup> In essence, the government had put sovereignty to the side to solve a more pressing, pedestrian issue.

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 (lending credence, perhaps, to the Honderich version of events).<sup>52</sup> Prime Minister Trudeau, however, resisted this pressure in favour of a Canadian liberal internationalist ideology.<sup>53</sup> The Act was seen as a vital tool to protect the distinctive way of life of Canada's northern communities.<sup>54</sup> Conceived by Jean Chrétien, the Act<sup>55</sup>, according to Kirton and Munton, 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>56</sup> The 100-mile limit was chosen as it was compatible with international legal standards applicable to oil pollution from tankers.<sup>57</sup> The thinking was: if states could defend themselves against armed attack, why not environmental attack? At a time when the world was only 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>58</sup>

Acknowledging the novelty of its legislation, Canada submitted a reservation to the ICJ to exempt this Act 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 has since been revoked as of September 1985). Canada, realized, however, that its Act 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>59</sup>, Canada secured enough international support especially amongst the circumpolar Scandinavian states of Sweden, Norway, Iceland and most importantly, the Soviet Union to rejected the US international regime for a Canadian regime focused on custodianship and exceptionalism.<sup>60</sup> Ultimately, Canada's reasoning behind its Arctic Waters Pollution Prevention Act 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>61</sup>

Canada had secured environmental protection for the Passage without having to raise the sovereignty issue. All of this being said, this legislation 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. However, while the pollution Act does refer to Canadian waters, the calculation of the 100-mile zone begins at Canadian land and there is no mention of Canada’s use of straight baselines. This is likely because the straight baseline method of calculation was relatively new when this legislation was conceived and inclusion of this, specifically, would have antagonized the US even further. As well, Canada was careful not to antagonize Denmark specifically allowing for alterations should the 100-mile zone encroach on Greenland’s waters.<sup>62</sup> The bulk of the literature suggests that the Arctic Waters Pollution Prevention Act 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

According to Joel Sokolsky, there are few issues that test Canada’s collective resolve more than sovereignty – he refers to sovereignty as Canada’s litmus test. In other words, Canada accepts cooperation with the US until they disregard Canada’s sovereignty and independence.<sup>63</sup> Canadians object to “fitting in” sovereignty within the wider context of American interests (strategic or political). Sokolsky reminds Canadians and Americans that sovereignty protection is not and should not be equated to neutralism.<sup>64</sup> That being said, Griffiths suggests that by appealing to the US’s sense of security to which Canada is intimately connected, the “litmus test” can be used to Canadian advantage and to the mutual satisfaction of both countries.

Because the Cold War is over, protection of the North is not as urgent as it once was simply because the proximity of Russia to the US and Canada no longer represents an immediate threat. However, Griffiths sees an opportunity for Canada as a result of the US focus on continental security because of the events of 9/11. This focus could represent a boon for Canada. Because of the US’s focus on security, they would be unwise to aggravate relations with Canada at a time when cooperation is needed. The US should, therefore, abandon its insistence the Passage be designated an international strait in favour of Canadian control through its Arctic Waters Pollution Prevention Act in order to complete a security perimeter around the North. Conveniently, if all vessels are subject to search for pollution control verification purposes, would-be terrorists, smugglers and criminals might consider an alternate route.<sup>65</sup> Currently,

vessels voluntarily declare their adherence to the conditions of the Act. However, with US assistance, the Act could finally be enacted as it was meant with mandatory searches of any vessel that voyages through the Passage. Considering there are at least ten different and viable entry points for large vessels, 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”.<sup>66</sup>

Defence and policing is currently provided by the following 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 Arctic Waters Pollution Prevention Act 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>67</sup>). Currently, by all estimations, Canada’s defence and security posture in the North is minimal.<sup>68</sup> And despite the fact that, “sovereignty talk lends itself to a rhetoric of alarm and exaggeration aiming to ‘energize’ others”<sup>69</sup>, whether Canada assumes an alarmist posture or a *Sovereignty on the Side* posture, 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.

It would seem, therefore, that the *Sovereignty to One Side* is not prepared for increased traffic in the Passage any more so than the alarmists: regardless of the legal status of the Passage, Canada will require help to secure ice-free channels. For better or worse, the US will continue to be a major contributor to Canada’s (and North America’s) arctic security.

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

Both Canada and the US have found and are in the process of extracting hydrocarbons from the North. By some estimates, “up to fifty percent (50%) of the earth’s remaining undiscovered reserves of hydrocarbons are located north of 60°N latitude”.<sup>70</sup> Besides pipelines, the Passage could represent an expedient way to transport large amounts from the west to the east coast of Canada and the US. The now defunct Arctic Pilot Project (APP)<sup>71</sup>, however, is a reminder that ventures in the North especially megaprojects, must be researched and financed properly – it is not a corollary that the North automatically equals money.

Furthermore, many from both conceptual frameworks (including Honderich and Huebert on the *Sovereignty First and Foremost* group and Griffiths and Burnet on the *Sovereignty to the Side* group) chide the Canadian Government for exploiting the Inuit to further their sovereignty agenda while ignoring their suggestions and demands. The importance of an equal partnership between the federal government and the Inuit regarding a future Northern Strategy 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>72</sup> The principle and aim behind Canada’s Arctic Waters Pollution Prevention Act are excellent starts, but without the ability to enforce this Act at present, the likelihood of protecting Northern resources is equally unlikely.

However, with the creation of Nunavut comes new hope that perhaps the Canadian government has turned the page with respect to its relationship with the Inuit. There are 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>73</sup> and Indian and Northern Affairs' *Sustainable Development Strategy 2004-2006* are hopes for continued cooperation with Canada's indigenous' communities is increasing. Arctic tourism, for example is fast becoming a new source of revenue and business for the Inuit that the government of Canada has encouraged from a distance.

While it may sound trite, managing Northern resources and wildlife is challenging and whether one has absolute control of the Passage or not, the difficulties posed by remoteness and climate are not sensitive to this fact. For example, if zebra mussels, hydrilla, New Zealand mud snails and milfoil are imported by foreign vessels to the Passage, their effects on the ecology of the Arctic do not respect boundaries and therefore, whether or not it is Canadian internal waters or an international strait does not change the fact that irreversible damage can be done. Regardless of sovereignty, protection of the environment is key and Canada's Arctic Waters Pollution Prevention Act does not cover these forms of "natural" pollution.

Therefore, any exploitation of resources via use of the Passage will not only impact Canada but also the other circumpolar states. Recognizing the limits of its pollution act, Canada has been a leader in establishing multilateral discussions amongst the various states to discuss common threats and concerns. In Finland in 1996, the eight circumpolar states established an Arctic Council - an intergovernmental forum in which issues and concerns related to the environment, sustainable development, as well as social and economic considerations are addressed. This council can only function by putting sovereignty to the side in order to tackle the wider and common concerns of Canada<sup>74</sup>, Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, the Russian Federation, Sweden and the United States.<sup>75</sup>

The Council has been successful in establishing a number of initiatives including the *Arctic Environmental Protection Strategy* (AEPS)<sup>76</sup> – a joint action plan to share scientific information to support the promotion of 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

Only through cooperation and by putting sovereignty to the side, have the circumpolar states been able to address common problems associated with protection and research. However, you will note a large gap exists regarding the extraction of resources. When it comes to the acquisition of potentially lucrative resources, cooperation is less forthright. Designating the Arctic a common heritage like the Antarctic and space so as to curtail economic exploitation seems not to have been considered which means the possibility for large hydrocarbon windfalls must be quite great; most certainly, states will declare their ownership of these valuable resources through sovereignty as a legal claim is still the best way to protect ownership of resources. Therefore, divorcing sovereignty from protection and research is a possibility but not, to date, from the ownership and extraction of resources.

#### 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. Young 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>77</sup>

Some of these issues have been anticipated in Canada's Arctic Waters Pollution Prevention Act 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>78</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.

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 designated a strait. The more ships using the Passage, the more resources 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.

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

***Finding Common Ground***

As luck would have it, legal authors have concluded what we have: that continued reliance on strictly legal argument is likely to be fruitless with regards to the Passage.

In Peace and Disputed Sovereignty: Reflections on Conflict Over Territory, the authors summarized a table comparing the principles and perceptions of parties to territorial disputes. While the authors had the Gulf of Maine dispute<sup>79</sup> in mind, they discussed the Canada/US Arctic conundrum and would still classify the problem thusly<sup>80</sup>:

		<i>Principles</i>	
		<i>Congruent</i>	<i>Incongruent</i>
<i>Perception</i>	<i>Congruent</i>	I Peaceful solution possible through legislation (eg. North Sea Continental Shelf FRG, NL and DM*)	<b>II Passive Dispute - Bilateral negotiations recommended (eg. Canada/US and the Arctic)</b>
	<i>Incongruent</i>	III Passive-Active Dispute - Situation demands arbitration (eg. Ecuador/Peru Beagle Channel)	IV Active and dangerous situation - Little third party action would be accepted. Most potential for serious conflict. (eg. Ethiopian-Somali dispute over Ogaden region of Ethiopia/ Falklands)

\* the disputes in the boxes are presented to provide readers with a basis for comparison. The disputes are categorized by the authors of Peace and Disputed Sovereignty.

Parties that largely agree on the facts and context of the problem but “disagree as to the reasoning proper to resolve it” characterize “Box II” disputes.<sup>81</sup> Therefore, at issue are principles. In the case of Canada, it is the principle of sovereignty and the US’s disregard for Canada’s claim; in the case of the US it is the principle of access to international straits and the rejection of any national claim of jurisdiction. Thus the macro-level approach by both parties toward the Northwest Passage means that an impasse is inevitable based on legal principles and Sokolsky’s litmus test. One could argue that there are also differing issues of perception but, by and large, Canada and the US agree on the geography, history and factual basis for the positions – factors the authors believe constitute “perception”.<sup>82</sup> The US has always been very clear that



their position is unfettered access to the Passage both as a shipping channel and for the access to resources as prescribed by international law. Canada, although at times with less confidence and conviction, maintains that the Passage belongs to it and that only Canada has the authority to decide what vessels may have access and what resources may be extracted. The perceptions, of course, are largely tied to the principles of law on which they stand.

In the main, however, the important point to note is that, according to Kratochwil, Rohrlich and Mahajan, there is the possibility of a workable agreement if not an outright solution. They caution that “[pressing] for coordination of principles is a difficult strategy; principles are difficult to compromise because of the social mores that engender them, the honor tied to upholding them, and the publicity with which they are held”.<sup>83</sup> This aptly summarizes the pitfall of problem solving with regard to the Northwest Passage in the past.

Given Sokolsky’s warning and the Box II characterization of the Passage, it would seem that the dispute is not putative as suggested by Griffith’s. However, that doesn’t mean that his warning to alarmists to prevent “motivated error” from clouding their judgment is not valid – Griffith’s is right to criticize the ‘thinning-ice’ theory. While global warming cannot be ignored, the likelihood of the Passage become ice-free in the future is tenable and making policy decisions on such uncertainty is alarmist. This is not to say that Canada cannot prepare for an ice-free Passage, as in fact has been done via legislation and cooperation with the international community.

As stated by Oran Yong contrary to the Rt. Hon. Joe Clark, “[bundles] of jurisdictional claims are [divisible]” In other words, there is nothing preventing states from exercising authority over certain, particular activities. Eg. the US could be charged with the responsibility for marine transport while Canada could be charged with environmental protection. Young suggests this is already the case with fishery zones. However, as has been argued, there are certain factors such as security but most definitely ownership and extraction of resources that are not indivisible from jurisdiction. This is perhaps why “settlement” of the Passage is so difficult because one ends up in a circular argument; on the one hand, sovereignty is not needed to discuss some issues, on the other hand, sovereignty is needed to discuss others. Added to the endless cycling of arguments is the fact that, unlike the issue-oriented and pragmatic view of the US focused on continued continental security<sup>84</sup>, access to resources (especially non-renewable resources), and the abolishment of any legislation that impedes its ability to conduct its affairs freely, Canada’s position is tied to ideas about the identity and greatness of Canada thus complicating an already laborious issue. The US is not insensitive to our attachment to the North but it might help if Canada could adopt a more pragmatic discourse in discussions like it does with trade issues: it is language that tends to produce more results.

## ***Conclusion***

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

1) There is no guarantee that the Passage will become a commercial shipping route unless the ice melts sufficiently to entice international, commercial shipping. The more ice there is, the more protection the Canadian legal argument has against challenges.

2) 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).

3) 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.

4) 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. This is not unique to Canada, however. As well, it must be acknowledged that Canada is improving its consultative record.

5) Ownership and extraction of resources is the sole issue that does, for now, necessitate a legal solution. It should not, however, detract from or obfuscate the other issues.

It shall be interesting to see what the *Comprehensive Northern Strategy* details for the Passage. Likely, 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>85</sup> Likely, as with most policy conundrums, a new Department will be created to concentrate on Northern issues. With all of these constraints, the Martin government is likely to maintain the status quo leaving Canada and the US to agree to disagree on legal principles. As well, Canada will be left hoping that when the Arctic Council meets in Iceland in November 2004 to discuss the latest climate conditions in the Arctic, the facts and rhetoric suggest a slower rate of melting in the Passage.<sup>86</sup>

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.

---

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

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

<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.

<sup>4</sup> Honderich, John, Arctic Imperative: Is Canada Losing the North? Toronto: Toronto University Press, 1987, p. 47.

<sup>5</sup> *Ibid.* p. 47.

<sup>6</sup> *Ibid.* p.40.

<sup>7</sup> ICJ *Corfu Channel Case*, April 9, 1949.

<sup>8</sup> Honderich, p. 47-48.

<sup>9</sup> Pharand, Donat, *The Northwest Passage Arctic Straits: Volume VII*, Dordrecht: Martinus Nijhoff Publishers, 1984. pp. 120-121. Since 1902, there have been only 99 above-ground sorties – many of them smaller vessels. Interview on CBC-1 Radio, "The Current", interview with Rob Huebert – University of Calgary, November 8, 2004.

<sup>10</sup> CIA Factbook, Canada, <http://www.cia.gov/cia/publications/factbook/geos/ca.html>, October 7, 2004.

<sup>11</sup> McCrae, D.M. "The Negotiation of Article 234", Politics of the Northwest Passage, Franklyn Griffiths (ed), Kingston: McGill-Queen's University Press, 1987. p. 98.

<sup>12</sup> Young, Oran. R., "Arctic Shipping: An American Perspective". Politics of the Northwest Passage. Franklyn Griffiths ed. Kingston: McGill-Queen's University Press, 1987. p. 119. Much of the reason has to do with the fact that legal jurisprudence regarding sovereignty and jurisdiction of land is more developed and Canada is able to maintain a presence on the land through Rangers, Canada's Department of Defence as well as scientific and military outposts.

<sup>13</sup> 1951 ICJ rep 116.

<sup>14</sup> McCrae, p.99.

<sup>15</sup> *Ibid.* p.99.

<sup>16</sup> The possibility of calculation by straight baseline methods would also impact the calculation of internal waters on the east and west coast. Orders in Council did not settle these until 1967 and 1969 respectively. See McCrae, p.100.

<sup>17</sup> Honderich, John, Arctic Imperative: Is Canada Losing the North? Toronto: Toronto University Press, 1987. p.46.

<sup>18</sup> McCrae. p.99 Canada only ratified the UN Law of the Sea Convention on November 7, 2003 which provides some insight into the extent to which Canada wishes to be "constrained" or "protected" by multilateral agreements.

<sup>19</sup> *Ibid.* pp 99-100.

<sup>20</sup> *Ibid.* p 100.

<sup>21</sup> McCrae mentions in an endnote that USS *Nautilus* having traversed the passage under the polar ice-cap also prompted Canada to think about its jurisdiction in 1958. There is no doubt that during the Cold War, other vessels voyaged through the Passage under the ice but this paper is restricting its scope to above ice vessels. See McCrae, p. 285.

<sup>22</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. pp. 70-73.

<sup>23</sup> *Ibid.* pp. 70-71.

<sup>24</sup> *Ibid.* pp. 71-72.

<sup>25</sup> *Ibid.* p. 77.

---

<sup>26</sup> Honderich, p. 43.

<sup>27</sup> The Government of Canada's *Statement on Sovereignty*, September 10, 1985 adopted Honderich's assessment of the Manhattan voyage. Delivered by the Rt. Hon. Joe Clark to the House of Commons.

<sup>28</sup> McCrae, *Ibid.* p. 100.

<sup>29</sup> *Ibid.* p. 100.

<sup>30</sup> Kirton and Munton, p. 91.

<sup>31</sup> *Ibid.* p. 93.

<sup>32</sup> *Ibid.* p. 93.

<sup>33</sup> Young, p. 119.

<sup>34</sup> Research by Elizabeth B. Elliot-Meisel, Shelagh Grant and John Honderich support this emotional tie to the claim of sovereignty.

<sup>35</sup> *Statement on Sovereignty*, September 10, 1995 as reprinted in Frankly Griffiths, *Politics of the Northwest Passage*, pp.269-273.

<sup>36</sup> Young, p. 119.

<sup>37</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.

<sup>38</sup> Grant, Shelagh, D., *Sovereignty or Security: Government Policy in the Canadian North, 1936- 1950*, Vancouver: University of British Columbia Press, 1988, p. xvi.

<sup>39</sup> Elliot-Meisel, Elizabeth, B. *Arctic Diplomacy: Canada and the United States in the Northwest Passage*. New York: Peter Lang Publishing, 1998, p. 121. John Honderich echoes this in his book *Arctic Imperative*. See page 5.

<sup>40</sup> Grant.

<sup>41</sup> Griffiths, Franklyn, "The Shipping News: Canada's Arctic Sovereignty Not on Thinning Ice", *International Journal*, Spring 2003. p. 257. Griffiths seems to intimate that the large majority of alarmists are employed by the Privy Council Office. This is my conclusion.

<sup>42</sup> *Ibid.* pp. 259-260.

<sup>43</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>44</sup> Griffiths, "Shipping News", p. 257.

<sup>45</sup> See Griffith's discussion concerning the Canadian Arctic Resources Committee, January 2002 as cited in his article "The Shipping News". P. 258. He "credits" Mel Hurtig for promoting much of these "misconclusions" in his book *The Vanishing Country: Is It Too Late to save Canada?* Toronto: McClelland & Stewart 2002. In his book, 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*, p. 258.

<sup>46</sup> Griffiths may concede that unexpected climate changes could speed up the melting process, however, he reminds everyone that this change in ice depth will not "banish the polar night". Because the arctic is plunged in darkness for the winter months, this will always reduce the rate of melting and makes navigating particularly challenging. See Griffiths p. 262-263. Robert Huebert concedes that the Polar Ice Cap is likely to melt first which will contribute very large chunks of ice to lodge in the Northwest Passage further frustrating navigation. Even the Sovereignty First and Foremost school acknowledges that the scientific evidence to date is insufficient to make any definitive statements. See interview on CBC-1 Radio, "The Current", interview with Rob Huebert – University of Calgary, November 8, 2004.

<sup>47</sup> Honderich, John, *Arctic Imperative: Is Canada Losing the North?* Toronto: Toronto University Press, 1987. pp39-40. 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, p. 270.

<sup>48</sup> Honderich, p. 219.

<sup>49</sup> News Release from Indian and Northern Affairs Canada, "Budget Investments Seek to Realize Northern Potential", March 25, 2004. [http://www.ainc-inac.gc.ca/nr/prs/j-a2004/2-02481\\_e.html](http://www.ainc-inac.gc.ca/nr/prs/j-a2004/2-02481_e.html) (accessed October 3, 2004)

<sup>50</sup> Nearly all of the literature credits Canada with being novel in its functional approach. See McCrae p. 100.

<sup>51</sup> McCrae, pp. 100-101.

<sup>52</sup> Kirton et al., p.

<sup>53</sup> *Ibid.*, p. 96.

<sup>54</sup> *Ibid.* pp. 96-97.

---

<sup>55</sup> The legislation was introduced to the House on April 8, 1970. The *Manhattan* began its second voyage on April 1, 1970.

<sup>56</sup> Kirton et al., p. 92.

<sup>57</sup> Ibid. p.91.

<sup>58</sup> Ibid. p.91.

<sup>59</sup> Ibid. p.95.

<sup>60</sup> Ibid. p.95.

<sup>61</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, pp. 119-120.

<sup>62</sup> See Article 2 of the Arctic Waters Pollution Prevention Act definition of arctic waters.

<http://laws.justice.gc.ca/en/A-12/2134.html#rid-2141>, October 5, 2004.

<sup>63</sup> Sokolsky, Joel. J., Defending Canada: US-Canadian Defense Policies (New York: Priority Press Publications) 1989. p.20 credited to P.H. Chapin.

<sup>64</sup> Ibid. p. 24.

<sup>65</sup> Griffiths, "The Shipping News", p. 270.

<sup>66</sup> The question one must ask, however, is how likely is it that terrorists would use the Passage?

<sup>67</sup> Honderich, pp.68-69.

<sup>68</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, pp 200-215. The launching of RADARSAT II may help to provide better monitoring but in cannot address enforcement.

<sup>69</sup> Griffiths, "The Shipping News", p. 276.

<sup>70</sup> Young, p. 116.

<sup>71</sup> The APP was a Canadian private-public venture of the 1970's to create a gas pipeline from Drake Point to Melville Island where ice-strengthened supertankers would then transport the gas to eastern Canada all year round. For a summary of the failure of APP, see Jennifer Lewington's article "Lessons of the Arctic Pilot Project", Politics of the Northwest Passage, Franklyn Griffiths ed. Kingston: McGill-Queen's University Press, 1987, pp.163-180.

<sup>72</sup> Griffiths, "Shipping News", p. 280.

<sup>73</sup> Government of Nunavut, <http://www.gov.nu.ca/Nunavut/policies/>, October 5, 2004.

<sup>74</sup> Support for the Arctic Council is in line with Canada's Northern Dimension Foreign Policy that "sets out a vision for Canada in the circumpolar world, based on cooperation with Northerners and our circumpolar neighbours". Canada has committed \$2 million a year for the implementation of the NDFP that, realistically, is only able to cover travel expenses and the like in my opinion. [http://www.dfait-maeci.gc.ca/circumpolar/sec02\\_nfp-en.asp](http://www.dfait-maeci.gc.ca/circumpolar/sec02_nfp-en.asp) This is not to say, however, that other monies are not earmarked for the Passage but under other budgets including DND's, Foreign Affairs, the Coast Guard etc. Hopefully, the new Northern Strategy and (possibly) a new Northern department will consolidate these pots of money. I am not convinced, however, that a new department is necessarily a solution.

<sup>75</sup> The Arctic Council website, <http://www.arctic-council.org/about.html>, has more information.

<sup>76</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.

<sup>77</sup> Young, p. 131-132.

<sup>78</sup> Young. P. 132.

<sup>79</sup> In 1977 both Canada and the US claimed extension of their fishing zones to 200 miles in accordance with rule contained in the informal negotiating texts for the 1984 Law of the Sea Treaty. This created uneven access to fishing zones and a boundary delimitation problem. The tradition of claiming resources on the basis of territorial sovereign possession kept interfering with any agreement. Both parties took the issue to the *International Court of Justice*. The ICJ ruled that a median adjusted for coastal proportionality would be applied but also suggested that the parties conduct further bilateral discussions to manage fishing issues. On March 29, 1979 agreements were signed in Washington. Reciprocal access in perpetuity to all stock on both sides regardless of where the Gulf maritime boundary might be drawn in the future and a separate agreement on managing fish stocks was concluded See Freidrich Kratochwil, Paul Rohrlich and Harpreet Mahajan, Peace and Disputed Sovereignty: Reflections on Conflict Over Territory. Boston: University Press of America, 1985. pp. 79-83.

---

<sup>80</sup> Kratochwil, Friedrich, Raul Rohrllich and Harpreet Mahanjan, Peace and Disputed Sovereignty: Reflections on Conflict Over Territory. Boston: University Press of America, Inc., 1985 pp.118-119.

<sup>81</sup> Young. p.118.

<sup>82</sup> Kratochwil et al. pp.123-127.

<sup>83</sup> Ibid. p. 119.

<sup>84</sup> The threat to continental security is less urgent now that the Cold War is over and now that the US and Russia have a working, diplomatic relationship.

<sup>85</sup> Griffiths is most emphatic regarding this point. See “The Shipping News”. p.278.

<sup>86</sup> Dr. Robert W Curell (US) was the lead scientist on the report entitled *Arctic Climate Impact Assessment* commissioned by the Arctic Council released to the public November 9, 2004. It suggests that global warming could make the Passage ice-free sooner than later. However, Griffith’s warnings regarding motivated error are still valid – it is unlikely that the Passage will be an international shipping channel anytime soon.