

**NAVIGATING CHOPPY WATERS: THE DISPUTED LEGAL STATUS
OF THE NORTHWEST PASSAGE**

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INTRODUCTION

Sherrill E. Grace, author of *Canada and the Idea of North* and professor emerita at the University of British Columbia (UBC), once said, “the Canadian North is as enduring a myth of cultural and national significance as the American West is to the United States.”¹ From the unsolved mystery surrounding Sir John Franklin’s ill-fated expedition to the iconic landscape paintings of Lawren S. Harris, the notion of northernness has captured the Canadian imagination, moulded the national consciousness, and roused passionate debate over the perceived American willingness to encroach on Canada’s Arctic sovereignty. Indeed, since the dark days of World War II, territorial sensitivities about the frozen reaches above the 60th parallel have prompted the federal government to take a stand against Canada’s powerful southern neighbour. Nowhere has this desire of control been more acute than with the fabled Northwest Passage (NWP), the strategic ice-bound strait meandering through the sparsely populated Arctic Archipelago. Any suggestion that the waterway might be anything but Canadian—“[w]e own it lock, stock and icebergs,”² as Prime Minister Brian Mulroney liked to put it—is challenging something essential to national pride.

While the cause célèbre of the NWP’s legal status has ebbed and flowed in the deep-rooted bilateral relations, the respective positions of Canada and the United States regarding the sea road’s navigational rights have rarely wavered. As far as Ottawa is concerned, there is no controversy over the matter, namely the extent of its authority to regulate the use of the NWP. The web of several (indeed seven) possible routes are part of Canada’s internal waters by virtue

¹ Gavin Wilson, “An Enduring Myth,” *The University of British Columbia*, April 17, 1997, <https://archive.news.ubc.ca/ubcreports/1997/97apr17/97apr17pro.html>.

² Adam Lajeunesse, *Lock, Stock, and Icebergs: A History of Canada’s Arctic Maritime Sovereignty* (Vancouver: UBC Press, 2016), 276.

of historic title and, as such, subject to the full force of Canadian domestic law, which includes the power to govern access by foreign ships passing through. Consequently, Canada asserts absolute jurisdiction over all vessels within the waterway.³ To underscore this non-negotiable point, the House of Commons passed a bill in 2009 to officially rename the once-impassable sea corridor as the *Canadian Northwest Passage*.⁴

The United States, by contrast, has never accepted Canada's historical claim. Instead, the Americans have long held the view that the NWP, connecting two expanses of high seas (the Atlantic and Arctic oceans), is an international strait sanctioning the right of uninterrupted transit passage for ships of all nations. As a result, foreign-flagged vessels, both civilian and military, are not required to request permission to utilize the seaway and Canadian laws, shipping regulations, and pollution-prevention measures cannot limit or restrict navigation. The U.S. government is concerned that recognizing Canada's position could set an unwanted legal precedent elsewhere in the world, potentially enclosing maritime choke points that underpin America's strategic mobility and projection of naval power.⁵ The longstanding freedom-of-the-seas doctrine, a stance unaltered under President Donald J. Trump's zero-sum worldview, implies that the "final, authoritative decision-making power" over the NWP does not rest in the hands of the Canadian government.⁶

As the ice retreats and new commercially viable shipping lanes open across the circumpolar North, forceful rhetoric from the Trump administration has brought the long-

³ Jeremy Seth Geddert, "Right of (Northwest) Passage: Toward a Responsible Canadian Arctic Sovereignty," *Canadian Journal of Political Science* 52, no. 3 (2019): 596.

⁴ Danita Catherine Burke, *International Disputes and Cultural Ideas in the Canadian Arctic: Arctic Sovereignty in the National Consciousness* (New York: Palgrave Macmillan, 2017), 181.

⁵ Michael Byers, *International Law and the Arctic* (Cambridge, England: Cambridge University Press, 2013), 141.

⁶ Robert Huebert, "Canadian Arctic Sovereignty and Security in a Transforming Circumpolar World," in *Canada and the Changing Arctic: Sovereignty, Security, and Stewardship*, eds. Franklyn Griffiths, Robert Huebert, and P. Whitney Lackenbauer (Waterloo, Ontario: Wilfrid Laurier University Press, 2011), 21.

dormant disagreement about the nature of the NWP back to the fore. In 2019, U.S. Secretary of State Mike Pompeo raised eyebrows when he stated in a high-profile foreign-policy speech that “Arctic sea lanes could [become] the twenty-first-century Suez and Panama Canals,” and rejected Canada’s territorial claims to the NWP as “illegitimate.”⁷ In an age of winner-take-all American diplomacy, Canada may soon face a renewed challenge to its Arctic sovereignty.⁸

This paper begins by exploring the historical drivers, intertwining Canada’s claim to sovereignty with the United States’ rigid adherence to continental security, behind the volatile NWP dispute. It then explains the sea of outrage left by the 1969 experimental voyage of the American oil tanker *Manhattan* and the 1985 transit by the U.S. icebreaker *Polar Sea* before touching upon the subsequent stroke of diplomatic genius that allowed Ottawa and Washington to comfortably agree to disagree on the wrangle from that point on. With the tried-and-tested arrangement at risk of being overtly challenged by “Mr. Trump’s pathological need to win,”⁹ the paper concludes by putting forth a legally prudent and politically wise solution—the nuts-and-bolts retooling of the six-decade-old North American defence pact—to better secure Arctic waters and resolve the lingering imbroglio.

SHARED CONTINENTAL DEFENCE AND ARCTIC SECURITY

Before World War II, Canada did not need to safeguard its northern frontier. The unforgiving environmental conditions of the frigid no man’s land provided “a vast and

⁷ Levon Sevunts, “More assertive U.S. Arctic policy puts Ottawa and Washington on collision course,” *Radio Canada International*, May 6, 2019, <https://www.rcinet.ca/eye-on-the-arctic/2019/05/06/u-s-navy-arctic-northwest-passage>.

⁸ Robert Huebert, *Protecting Canadian Arctic Sovereignty from Donald Trump* (Calgary: Canadian Global Affairs Institute, 2018), 1.

⁹ Robert Huebert, “Winning at all costs: the bizarre position of the Trump administration on the Northwest Passage,” *The Globe and Mail*, May 20, 2019, <https://www.theglobeandmail.com/opinion/article-winning-at-all-costs-the-bizarre-position-of-the-trump-administration>.

impenetrable strategic barrier.”¹⁰ However, as the rise of militant dictators in the heart of Europe set the stage for an imminent conflagration, North American statesmen recognized the need to deepen cooperation in continental defence, particularly in the Arctic, in the event of hostilities.

Thus, in 1938, at Queen’s University in Kingston, Ontario, U.S. President Franklin D. Roosevelt delivered a historic speech that ushered in a new era of Canadian-American collaboration. In velvet words, he made a pledge to Canadians that remains in place to this day: “I give you assurance that the people of the United States will not stand idly by if domination of Canadian soil is threatened by any other Empire.”¹¹ Within days, Prime Minister William Lyon Mackenzie King made it clear that Canada intended to do its part: “We, too, have our obligations as a good friendly neighbour, and one of these is to see that, at our own instance, our country is made as immune from attack or possible invasion as we can reasonably be expected to make it, and that, should the occasion ever arise, enemy forces should not be able to pursue their way, either by land, sea or air to the United States, across Canadian territory.”¹² Both speeches, institutionalized in the Permanent Joint Board on Defence (PJBD) in 1940, laid the groundwork for a myriad of postwar bilateral northern projects—weather stations, over-the-horizon radar systems and, eventually, the North American Air (later Aerospace) Defence Command (NORAD)—and hold the key to the present impasse.¹³

U.S. MILITARY PRESENCE AND CANADIAN SOVEREIGNTY

¹⁰ R. J. Sutherland, “The Strategic Significance of the Canadian Arctic,” in *The Arctic Frontier*, ed. Ronald St. John Macdonald (Toronto: University of Toronto Press, 1966), 256.

¹¹ Kim Richard Nossal, Stéphane Roussel, and Stéphane Paquin, *The Politics of Canadian Foreign Policy*, 4th ed. (Montréal and Kingston: McGill-Queen’s University Press, 2015), 27.

¹² Nossal, Roussel, and Paquin, *The Politics of Canadian Foreign Policy*, 27–28.

¹³ Elizabeth B. Elliot-Meisel, “Politics, Pride, and Precedent: The United States and Canada in the Northwest Passage,” *Ocean Development & International Law* 40, no. 2 (2009): 205–207.

The smouldering sovereignty issue of the Arctic waters in general, and of the NWP in particular, gained new strategic importance during the post-World War II years. With the disintegration of the uncomfortable wartime partnership and the ideological polarization of world affairs between the communist East and the democratic, capitalist West, the defence of the Arctic became inescapably linked to continental security and the Far North became a bulwark against potential Soviet aggression. In the late 1940s, scarce funds and lack of suitable vessels meant that the Royal Canadian Navy (RCN) could no longer afford both an Arctic presence and fulfill its North Atlantic Treaty Organization (NATO) collective defence responsibilities.¹⁴ Around the same time, the United States Navy (USN) became increasingly interested in nuclear-powered submarine operations and under-ice navigation exercises within hitherto inaccessible portions of the Arctic Basin. In 1958, the USS *Nautilus* completed the first successful transpolar crossing, and a year later the USS *Skate* punched through several feet of ice to surface at the North Pole, demonstrating the almost inevitability of regular naval deployments in the strategically significant region. Ever since, American submarines have plied Canada's Arctic waters on secret missions, including the NWP.¹⁵

Compared to the traditional route between Asia and Europe via the Panama Canal in Central America, the NWP appeals to military and commercial interests because it represents a 7,000-kilometre shortcut without Panamax restrictions.¹⁶ Hence, Ottawa's deep-seated territorial anxieties increased during the 1960s as it became obvious that "Canada was no more than an observer in the area of the world it claimed with romantic, emotional, and mythical

¹⁴ Elizabeth B. Elliot-Meisel, "Still Unresolved after Fifty Years: The Northwest Passage in Canadian-American Relations, 1946–1998," *The American Review of Canadian Studies* 29, no. 3 (Autumn 1999): 411–412.

¹⁵ Adam Lajeunesse, "A very practical requirement: under-ice operations in the Canadian Arctic, 1960–1986," *Cold War History* 13, no. 4 (2013): 507–513.

¹⁶ Michael Byers, *Who Owns the Arctic? Understanding Sovereignty Disputes in the North* (Vancouver: Douglas & McIntyre, 2009), 40.

attachment.”¹⁷ In 1968, the discovery of enormous petroleum reserves at Prudhoe Bay on Alaska’s North Slope would merge the spectre of an oil spill with the sovereignty issue in Canada’s pristine northern environment,¹⁸ creating a paradigm shift in the NWP conundrum.

THE MANHATTAN AFFAIR

The mid-summer trial voyage of the ice-strengthened American supertanker SS *Manhattan* through the NWP in 1969 embodied the emotion-charged sovereignty problem; it also ignited the Canadian-American quarrel over the waterway’s status and transit rights. The gigantic Prudhoe Bay strike triggered such a shale-drilling frenzy that Humble Oil, a subsidiary of Standard Oil (now Exxon), wanted to test the logistical and economic feasibility of carrying hydrocarbons by ship—as an alternative to pipelines—to refineries on the Atlantic seaboard.¹⁹ The United States Coast Guard (USCG) icebreaker *Northwind* was dispatched to accompany the merchant vessel, but the U.S. government made a point of not seeking permission from Canada to sail the sea route.²⁰ Ottawa nevertheless granted its unsolicited approval and volunteered the services of one of its own icebreakers, the *John A. Macdonald*. As part of its support, the federal government also appointed an experienced navy officer as its official representative aboard the behemoth tanker to prevent any undermining of Canada’s claim.²¹ “[T]he legal status of the

¹⁷ Elizabeth B. Elliot-Meisel, “Canada, the United States and the Northwest Passage,” in *The Oceans in the Nuclear Age: Legacies and Risks*, eds. David D. Caron and Harry N. Scheiber (Leiden, Netherlands: Brill, 2014), 378.

¹⁸ John Kirton and Don Munton, “The Manhattan Voyages and Their Aftermath,” in *Politics of the Northwest Passage*, ed. Franklyn Griffiths (Montréal and Kingston: McGill-Queen’s University Press, 1987), 70–71.

¹⁹ Bern Keating, *The Northwest Passage: From the Mathew to the Manhattan, 1497 to 1969* (Chicago: Rand McNally & Company, 1970), 140.

²⁰ Christopher Kirkey, “The Arctic Waters Pollution Prevention Initiatives: Canada’s Response To An American Challenge,” *International Journal of Canadian Studies* 13 (Spring 1996): 42.

²¹ Donald R. Rothwell, “The Canadian-U.S. Northwest Passage Dispute: A Reassessment,” *Cornell International Law Journal* 26, no. 2 (Spring 1993): 337.

waters of Canada's Arctic Archipelago is not at issue in the proposed transit of the [NWP] by the ships involved in the *Manhattan* project," Prime Minister Pierre Elliott Trudeau explained to Parliament in May 1969. "The Canadian government has welcomed the *Manhattan* exercise, has concurred in it and will participate in it."²² In the end, the icebreaker-escorted convoy proved that using the treacherous NWP was possible for oil-laden tankers, but not as a commercially viable route given the considerable risk of collisions stemming from unpredictable ice conditions.²³

The U.S. refusal to seek prior authorization set off ripples of complaints about threats to Canadian sovereignty, as Ottawa had yet to officially claim the NWP as internal waters. The test voyage also highlighted the risk of accidental oil spills in the fragile Arctic marine ecosystem and the necessity for guaranteeing adequate control over such shipping.²⁴ In response to an aroused public opinion, the Canadian government enacted the landmark *Arctic Waters Pollution Prevention Act* (AWPPA) in 1970, which established a 100-nautical-mile pollution-prevention zone in the ice-infested waters within which Canada would control navigation and, if necessary, prohibit passage.²⁵ The other key initiatives were to extend Canada's territorial seas from three to twelve nautical miles and to enclose exclusive Canadian fishing zones off its coastlines; the multi-faceted stratagem created "territorial water gates" at both entrances of the NWP. Moreover, several television appearances supplemented the practical pieces of legislation. On March 9th, for instance, Mr. Trudeau, live via satellite from an undisclosed Arctic location, told

²² Kirkey, "The Arctic Waters Pollution Prevention Initiatives," 43.

²³ Elliot-Meisel, "Canada, the United States and the Northwest Passage," 379.

²⁴ Rothwell, "The Canadian-U.S. Northwest Passage Dispute," 337.

²⁵ Lajeunesse, *Lock, Stock, and Icebergs*, 167.

viewers of NBC's *Today Show* that Canada extended its maritime boundaries based upon the sector principle and continental shelf.²⁶

When Ottawa revealed the AWPPA, it emphasized that the statute did not constitute a declaration of sovereignty but a “constructive and functional approach whereby Canada will exercise only the jurisdiction required to achieve the specific and vital purpose of environmental preservation.”²⁷ Although large swathes of the American public applauded Canada's clever initiative, with one Alaskan senator even praising the bill and hailing its “intelligent innovation,”²⁸ the unilateral assertion of pollution-control jurisdiction was protested by the United States, who feared it might generate “a hodgepodge of new and stringent regulations around the world.”²⁹ While the *Manhattan* affair represented a success for Canada because it did not force the federal government to assert a direct claim to the Arctic waters, the country would be forced to revisit the politically charged issue sixteen years later.

THE POLAR SEA CRISIS

In August 1985, history repeated itself when the heavy icebreaker USCG *Polar Sea* steamed through the NWP from the U.S. air base at Thule, Greenland, to its home port of Seattle. American diplomats insisted that the *démarche* was not meant to stir up controversy, merely that using the Arctic thoroughfare instead of the Panama Canal would save time, fuel, and transit fees. According to Donald Grabenstetter of the State Department's Canada desk: “The transit is not motivated by any desire to challenge Canadian claims. It is just cheaper to send this ship that

²⁶ Kirton and Munton, “The Manhattan Voyages and Their Aftermath,” 91–92.

²⁷ Lajeunesse, *Lock, Stock, and Icebergs*, 170.

²⁸ Ivan Head and Pierre Elliott Trudeau, *The Canadian Way: Shaping Canada's Foreign Policy, 1968–1984* (Toronto: McClelland & Stewart, 1995), 55–58.

²⁹ Lajeunesse, *Lock, Stock, and Icebergs*, 170–171.

way.”³⁰ Having received formal notification from the United States about the incoming expedition, Canada informed its neighbour that the itinerary traversed its historic internal waters and that a request for permission would be required to navigate the NWP. The U.S. government refused to do so, arguing that the waterway was an international strait. As a result, both nations agreed that the *Polar Sea*’s crossing would occur without prejudice to their differing legal positions.³¹

As Ottawa’s stonewalling on the proposed *Manhattan*-style transit quickly elicited public uproar from the Canadian side of the 49th parallel, Secretary of State for External Affairs Joe Clark was questioned in the House of Commons as to what he would do to ensure “that no icebreaker, even from one of the countries friendliest to Canada, will come into our territory to try to take our sovereignty away from us.” He replied that the question was “deliberately anti-American” and declared that the *Polar Sea*’s route “does not compromise in any way the sovereignty of Canada over our northern waters.”³² Opposition parties swiftly lambasted the government’s handling of the perceived crisis; in a fiery declaration, a New Democratic Party member of Parliament went as far as likening the journey to “psychological rape.”³³ Be that as it may, the United States firmly rejected the Canadian claim of the Arctic waters as historic internal waters. As a case in point, a U.S. State Department letter mentioned: “The United States position is that there is no basis in international law to support the Canadian claim. The United States cannot accept the Canadian claim because to do so would constitute acceptance of full Canadian

³⁰ Robert Gordon, “No escort for Polar Sea,” *The Chronicle Herald (Halifax)*, July 20, 1985, 5.

³¹ Donat Pharand, “Canada’s Sovereignty Over the Northwest Passage,” *Michigan Journal of International Law* 10, no. 2 (1989): 653.

³² Charles Campbell, “U.S. ship’s itinerary irks Canadians,” *The Philadelphia Inquirer*, August 1, 1985, E1.

³³ Lajeunesse, *Lock, Stock, and Icebergs*, 257.

control of the [NWP] and would terminate U.S. navigation rights through the Passage under international law.”³⁴

The unwarranted American incursion into Canadian waters touched off a jingoistic furor in Canada. A nationalist group proclaimed its intention to install Canadian flags along the U.S. icebreaker’s route to complain about the “meek and ineffectual” protection of the nation’s sovereign Arctic waters by the federal government.³⁵ For its part, the *Globe and Mail* printed a scathing editorial on the *Polar Sea* voyage. Titled “All in the family,” the newspaper article argued that the United States’ insistence upon free transit could lead to unfettered navigation in the Arctic for Soviet submarines thought to already prowl beneath the ice cap. In unequivocal terms, it asserted that this was “a predatory policy, one based on respect for a rival superpower and contempt for a feckless friend.”³⁶ This viewpoint was supported by the late Donat Pharand, a prominent legal authority on Canada’s Arctic waters and specialist on the NWP, who was quoted in the *Montreal Gazette* as saying that “Canada should take the bull by the horns, draw the lines on the map and say to the world that those waters are internal waters of Canada.”³⁷

Canadian citizens also penned several editorial letters castigating the government’s laissez-faire attitude concerning the *Polar Sea* expedition. One published in the *Globe and Mail* declared that “Canadian sovereignty has been challenged, a precedent has been successfully established and Canada’s claim to the northern sea as its territorial waters has been undermined, if not irrevocably forfeited.”³⁸ Another letter, this time printed in the *Toronto Star*, noted the following: “By allowing the *Polar Sea* to trespass in our Arctic region, Brian Mulroney and Joe

³⁴ J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims*, 3rd ed. (Leiden, Netherlands: Martinus Nijhoff Publishers, 2012), 112.

³⁵ “Group plans confrontation with U.S. ship on Arctic ice,” *Toronto Star*, August 6, 1985, A1–A5.

³⁶ “All in the family,” *The Globe and Mail*, August 8, 1985, 6.

³⁷ Margaret Munro, “U.S. Arctic voyage stirs debate; Canadian sovereignty undermined, critics say,” *Montreal Gazette*, July 17, 1985, A8.

³⁸ “Letters to the Editor,” *The Globe and Mail*, August 7, 1985, 7.

Clark have opened up a Pandora's box regarding territorial rights of our nation's surrounding waterways. Every country in the world may now feel free to walk all over us because of our mindless, incompetent, self-serving leaders."³⁹

In September 1985, stung by domestic criticism, Mr. Mulroney's cabinet answered its detractors by introducing a series of legal and military measures designed to shore up Canada's claim to sovereignty over the northern waters. In a stirring speech to the House of Commons, Mr. Clark stated that Ottawa was enclosing the Canadian archipelago within formal boundaries around its outer perimeter. He said: "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. Those islands are joined, and not divided by the waters between them."⁴⁰ Crucially, Mr. Clark was at pains to stress that the straight baselines "define the outer limit of Canada's historic internal waters,"⁴¹ thus conferring upon the adjacent coastal state total administrative, civil, and criminal jurisdiction over the NWP.

In his statement, Mr. Clark also pledged several new policy initiatives to assert Canada's presence in the Arctic. The program included the construction of a powerful icebreaker capable of operating year-round in the NWP, an increase in military surveillance overflights and naval exercises in the Arctic, and the withdrawal of Canada's reservation to having the International Court of Justice (ICJ) adjudicate a boundary dispute regarding the enactment of the AWPPA. Concerning the nation's neighbour to the south, Mr. Clark called for immediate "talks with the

³⁹ "Letters to the Editor," *Toronto Star*, August 9, 1985, A20.

⁴⁰ Rothwell, "The Canadian-U.S. Northwest Passage Dispute," 344.

⁴¹ Byers, *Who Owns the Arctic*, 52.

United States on co-operation in Arctic waters on the basis of full respect for Canadian sovereignty.”⁴²

ESTABLISHING AN AGREE-TO-DISAGREE MODUS VIVENDI

For the United States, the political context of the NWP jurisdictional status was about preserving its historic freedom-of-the-seas policy, “perhaps [its] oldest customary international law doctrine,”⁴³ that is of paramount importance to American national interests. In a private letter to Mr. Mulroney, President Ronald Reagan made this point abundantly clear when he wrote: “I have to say in all candor that we cannot agree to an arrangement that obliges us to seek permission for our vessels to navigate through the [NWP]. To do so would adversely affect our legitimate rights to freely transit other important areas globally.”⁴⁴ George Boutin, the State Department officer running the Canadian desk, echoed the president’s position heading into the discussions: “[The United States] is interested in reaching agreement on that area without addressing the question of sovereignty.”⁴⁵ The context of both comments was the Canada-U.S. negotiation of the 1988 Arctic Cooperation Agreement.

Two developments during spring 1987 helped bring the two parties closer. First, both Messrs. Mulroney and Reagan, in the midst of hammering out a pioneering free trade agreement, desired to “inject new impetus” into the bilateral talks to find a satisfactory compromise.⁴⁶ Around the same time, the Canadian government released its big-spending *Challenge and*

⁴² Rothwell, “The Canadian-U.S. Northwest Passage Dispute,” 344.

⁴³ John D. Negroponte, “Who Will Protect Freedom of the Seas?” *Department of State Bulletin* 86, no. 2115 (October 1986): 41.

⁴⁴ Brian Mulroney, *Memoirs: 1939–1993* (Toronto: McClelland & Stewart, 2007), 495.

⁴⁵ Philip J. Briggs, “The Polar Sea Voyage and the Northwest Passage Dispute,” *Armed Forces & Society* 16, no. 3 (Spring 1990): 446.

⁴⁶ John F. Burns, “Canada’s Battle for the Arctic Straits,” *The New York Times*, April 12, 1987, <https://www.nytimes.com/1987/04/12/weekinreview/canada-s-battle-for-the-arctic-straits.html>.

Commitment defence white paper, reasserting Canada's NATO obligations by commissioning ten to twelve nuclear-powered attack submarines—a contentious economic and diplomatic issue from the day it was announced—to police Canadian sovereignty in the Arctic. Canada's defence minister made a case for the procurement proposal by arguing that “[s]omebody’s navy will be in our North, whether it’s Soviet, American or Canadian.” He continued: “I want to make sure it’s Canadian.”⁴⁷ However, Pentagon bureaucrats were not keen on the project, instead preferring that Canada spend its money on reinforcing its diminishing forces in Europe, a contributory role recognized within the Western alliance more “for [its] political symbolism than for [its] manpower or weapons.”⁴⁸ U.S. defence planners expressed reservations about Ottawa’s plan and resisted transferring the required American nuclear-propulsion technology to construct Canadian submarines. The officials were “said to be reluctant to help Canada build vessels that would be used to guard against unauthorized intrusions into Canada’s Arctic waters by United States nuclear submarines.”⁴⁹

In the early days of 1988, Messrs. Mulroney and Reagan, to the satisfaction of both parties, “salved an old diplomatic wound” and signed a brief agreement to cooperate on trans-Arctic voyages through the NWP.⁵⁰ The problem-solving initiative, alleviating Canadian sovereignty concerns without prejudicing American legal and strategic interests, is notable for both what it included and what it omitted. Under the settlement, the United States pledged “that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of Canada.” The treaty only concerned USCG icebreakers because

⁴⁷ Hilary MacKenzie and Marc Clark, “A defence plan for Canada,” *Maclean’s*, June 15, 1987, <https://archive.macleans.ca/article/1987/6/15/a-defence-plan-for-canada>.

⁴⁸ Burns, “Canada’s Battle for the Arctic Straits.”

⁴⁹ John F. Burns, “Canada May Drop Nuclear Sub Plan,” *The New York Times*, November 27, 1987, <https://www.nytimes.com/1987/11/27/world/canada-may-drop-nuclear-sub-plan.html>.

⁵⁰ Howard Witt, “U.S., Canada sign Arctic accord,” *Chicago Tribune*, January 12, 1988, <https://www.chicagotribune.com/news/ct-xpm-1988-01-12-8803210656-story.html>.

they were the only vessels capable of traversing the harsh 1,000 nautical miles of the ice-clogged seaway.⁵¹

However, the constructive, yet neutral, accord failed to settle the competing jurisdictional claims of both countries regarding the legal status of the NWP—the Reagan administration worried about setting a precedent that could be cited in other international disputes. The American president made it clear to his constituents that the mutually accommodative outcome was “a pragmatic solution” to the ownership dispute “without prejudice to [both nations’] respective legal positions.” He added that “it sets no precedents for other areas.”⁵² Political scientist Christopher Kirkey highlighted the crux of the matter: “The agreement provides that future United States icebreaker passages will no longer be potentially embarrassing or threatening to the political health of the ruling party in Ottawa.”⁵³ Therefore, the transit-per-consent arrangement, not applicable to USN ships or submarines, represented a pause rather than an end to the long-running stalemate.

A RENEWED CHALLENGE

While the 1988 treaty has limited the potential for conflict over the last three decades, the status of the NWP has remained an intractable problem. In January 2009, during the final days of the George W. Bush administration, the president issued a national security directive establishing a new policy toward the Arctic—the first such memorandum in the U.S. since 1994. In the ten-page paper, the White House reiterated the traditional American position that “[t]he NWP is a

⁵¹ Byers, *Who Owns the Arctic*, 56–7.

⁵² Herbert H. Denton, “U.S. to consult Canada on use of Northwest Passage,” *The Washington Post*, January 12, 1988, <https://www.washingtonpost.com/archive/politics/1988/01/12/us-to-consult-canada-on-use-of-northwest-passage/7755dd6a-65d0-44b1-8b54-0b49a5b7af99>.

⁵³ Christopher Kirkey, “Smoothing troubled waters: the 1988 Canada-United States Arctic co-operation agreement,” *International Journal (Toronto)* 50, no. 2 (1995): 421.

strait used for international navigation.”⁵⁴ His successor, Barack Obama, released his own 2013 *National Strategy for the Arctic Region*, a document that, predictably enough, restated Mr. Bush’s interest in preserving the United States’ freedom of action in the frigid waters.⁵⁵

Yet, as in decades past, other prominent figures have made attempts to remove the old thorn in the side of the bilateral relationship and bridge the two positions. In 2004, in light of the September 11 attacks and the ongoing war on terror, Paul Cellucci, the U.S. ambassador to Canada, stated publicly that American national security might be enhanced if Washington were to accept the sovereignty claim of its northern neighbour. “We are looking at everything through the terrorism prism. [...] So perhaps when [the NWP] is brought to the table again, we may have to take another look,”⁵⁶ he said. In 2007, after he left Ottawa, Mr. Cellucci told the *Toronto Star* that “in the age of terrorism, it’s in [U.S.] security interests that the [NWP] be considered part of Canada.”⁵⁷ Indeed, if the NWP were an international strait, there would be very few restrictions on foreign navigation: warships would have virtually the same right of transit passage as they have on the high seas, submerged submarines would not be required to surface and alert Canada to their presence, and long-range bombers would have a right of overflight in the air column above the NWP, unless they linger or show hostile intent.⁵⁸

A decade later, Mr. Trump’s upset-the-applecart approach to foreign policy resurrected many of the old fears and challenges surrounding Canadian Arctic sovereignty, conceivably

⁵⁴ Mike Blanchfield and Randy Boswell, “Bush takes final swing at Arctic sovereignty,” *National Post*, January 11, 2009, <https://nationalpost.com/news/bush-takes-final-swing-at-arctic-sovereignty>.

⁵⁵ Lajeunesse, *Lock, Stock, and Icebergs*, 291.

⁵⁶ Byers, *Who Owns the Arctic*, 80.

⁵⁷ Jim Brown, “Ex-U.S. envoy backs Canada’s Arctic claim,” *Toronto Star*, August 20, 2007, https://www.thestar.com/news/canada/2007/08/20/exus_envoy_backs_canadas_arctic_claim.html.

⁵⁸ Suzanne Lalonde, “The Right of Overflight above International Straits,” *Canadian Yearbook of International Law* 52 (2014): 39–43.

putting Ottawa and Washington on a “collision course.”⁵⁹ In 2019, the American secretary of the Navy, Richard V. Spencer, announced plans for the U.S. fleet to conduct a so-called freedom-of-navigation operation, or FONOP, through the NWP as the ice recedes and promises to open new possibilities for shipping across the circumpolar North,⁶⁰ “an extraordinary comment with potentially serious ramifications for Canada.”⁶¹ FONOPs have grabbed the headlines in recent years as the USN has sailed warships near disputed islands in the South China Sea to challenge Beijing’s creeping expansionism over those international waters. The highly publicized patrols “are aggressive and extremely visible political statements, normally reserved for the highest priority maritime disputes.”⁶² A voyage through the NWP, the likes of which would have seemed impossible only a few years ago, would be an unprecedented break from the nuanced diplomacy that has long maintained a mutually beneficial status quo in the Arctic and risk turning the well-managed irritant into a renewed political crisis.

If the USN indeed carries out a FONOP in the NWP, the Canadian government will need to come up with a cunning solution given its little room to manoeuvre. On the one hand, Canada’s operational capabilities, with no year-round patrol capacity for its Arctic waters, are too weak to prevent the passage of an American warship. On the other hand, referring the question of its historical claim to the ICJ is too risky a gamble since, in the words of Mr. Clark, “[y]ou lose and that’s it.”⁶³ The combination of unsavoury military and legal costs means that

⁵⁹ Sevunts, “More assertive U.S. Arctic policy puts Ottawa and Washington on collision course.”

⁶⁰ Huebert, “Winning at all costs.”

⁶¹ Adam Lajeunesse, “Is the next big fight over the Northwest Passage coming?” *Policy Options*, February 14, 2019, <https://policyoptions.irpp.org/fr/magazines/february-2019/is-the-next-big-fight-over-the-northwest-passage-coming>.

⁶² Adam Lajeunesse and Robert Huebert, “Preparing for the next Arctic sovereignty crisis: The Northwest Passage in the age of Donald Trump,” *International Journal (Toronto)* 74, no. 2 (2019): 226.

⁶³ Lajeunesse, *Lock, Stock, and Icebergs*, 262.

Canadian leaders must give up any thought of a confrontational approach. As Canada cannot coerce the United States to respect its position, cooperation becomes the only viable alternative.

To do so, Canada should point to the benefits of smooth continental defence collaboration as a reason for the U.S. to abandon its objections over Canadian sovereignty. As traffic through the NWP increases, America's outdated position opens the seasonally ice-free Arctic to catastrophic risks that, presumably, will provide an alternative route for illicit weapon-of-mass-destruction shipments and facilitate the entry of would-be terrorists via the continent's longest, largely unguarded coast. Although the prospect of terrorists infiltrating from the Far North may sound far-fetched, an aircraft allegedly purchased by al-Qaeda operatives made a stopover in Iqaluit en route to the Middle East in 1993.⁶⁴ Indeed, foreign extremists could surely take advantage of "spotty surveillance" and "lax security measures" in the increasingly accessible territory.⁶⁵ Add to that the fact that Russia is amassing unrivalled military might in the Arctic, notably reinforcing what is already the world's largest icebreaker fleet (numbering some forty conventional- and nuclear-powered ships spread across the Arctic Ocean),⁶⁶ and the seriousness of China's ambitions to become a "polar great power," an articulation of interest to acquire influence throughout a strategically valuable region ripe for inter-state rivalry and resource extraction,⁶⁷ and it becomes an immensely complicated security perimeter to manage.

To break the impasse, Ottawa and Washington, both *allies* in the quest for a practical and responsible navigational regime in the Arctic, need to hark back to the cooperative spirit of

⁶⁴ Nancy Teeple, "A Brief History of Intrusions into the Canadian Arctic," *Canadian Army Journal* 12, no. 3 (Winter 2010): 51.

⁶⁵ "Airport security in North a concern: expert," *CBC News*, November 19, 2010, <https://www.cbc.ca/news/canada/north/airport-security-in-north-a-concern-expert-1.868892>.

⁶⁶ Nurlan Aliyev, "Russia's Military Capabilities in the Arctic," *International Centre for Defence and Security*, June 25, 2019, <https://icds.ee/en/russias-military-capabilities-in-the-arctic>.

⁶⁷ Petra Dolata, *A Global Arctic? Chinese Aspirations in the North* (Calgary: Canadian Global Affairs Institute, 2018), 2.

consensus experienced by the PJBD during World War II and the Cold War, a forum through which the resolution of thorny problems has been expedited. To secure North America's "unlocked backdoor," a possible blueprint already exists. Historically, the two countries have fruitfully collaborated to navigate contentious transboundary water issues, namely the St. Lawrence Seaway, the Great Lakes, and the Strait of Juan de Fuca.⁶⁸ Therefore, expanding NORAD's current function—by which the two continental partners jointly monitor and respond to state-based and terrorist incursions into North American airspace—to fully include the maritime domain would satisfy Canada's across-the-North sovereignty concerns without hindering the movement of the USN or forcing America to surrender legal ground.⁶⁹ Furthermore, the Monroe Doctrine-like strategy, placing the existing naval actors in a subordinate role to a centralized, binational command assuming the *maritime control mission* for North America, is consistent with the 2006 NORAD amendment that enhanced military-to-military cooperation in the area of maritime warning, i.e., the sharing of information and intelligence related to the respective maritime areas, internal waterways, and ocean approaches to the U.S. and Canadian mainland.⁷⁰ In this scenario, the RCN and USN, on the strength of a strong tradition of interoperability, would amalgamate their command structures, headquarters, and operations when it comes to tightening up security and controlling marine traffic across the littoral waters surrounding North America. In other words, the USN would now be included in the policing of Canadian waters, in a fashion similar to American fighters routinely protecting the skies of both countries.

⁶⁸ Alastair Allan, "Canada needs to cut a deal with the U.S. to control the Northwest Passage," *National Post*, August 8, 2019, <https://nationalpost.com/opinion/canada-needs-to-cut-a-deal-with-the-u-s-to-control-the-northwest-passage>.

⁶⁹ Adam Lajeunesse, "The Northwest Passage in Canadian policy: An approach for the 21st century," *International Journal (Toronto)* 63, no. 4 (2008): 1047.

⁷⁰ Andrea Charron, "Canada, the Arctic, and NORAD: Status quo or new ball game?" *International Journal (Toronto)* 70, no. 2 (2015): 218.

The expansion of NORAD's mission suite beyond air-breathing threats that use the northern approaches as a throughway to attack Canada or the United States undoubtedly reawakens perennial fears of sovereignty degradation, which are always politically sensitive for Canadian governments.⁷¹ Indeed, given the disparity in military power between the two countries, the operational alliance has traditionally been headed by a four-star general and a three-maple-leaf deputy commander, reporting via a single chain of command to the secretary of defence in Washington and the chief of the defence staff in Ottawa. Nevertheless, adding maritime surveillance and enforcement capabilities to the enduring NORAD command-and-control structure represents an opportunity to make meaningful strides toward streamlining the continental security architecture and cross-border cooperation, the next logical step in binational defence at a time where intensified Cold War-type strategic challenges from near-peer competitors (read Russia and China) are emerging across the Arctic and the NWP. The revamped framework would also provide Canada with a means to have some control over its northern flank, neutralizing the menace that the United States unilaterally impose its own defence plans for the vital, if somewhat neglected, theatre of operation, at the expense of Canadian sovereignty.

Moreover, the comprehensive perimeter-security arrangement is not only in line with the 2017 white paper on defence policy, *Strong, Secure, Engaged*, which states that Canada will fulfill its NORAD obligations “with new capacity in some areas” and “modernize NORAD to meet existing challenges and evolving threats to North America,”⁷² but also coherent with the “three functional principles” affirmed in Mr. Roosevelt's declaration and Mr. King's acknowledgement more than eight decades ago: joint defence of North America; the United

⁷¹ John Ivison, “NORAD could be expanded to land and sea,” *National Post*, February 11, 2011, <https://nationalpost.com/full-comment/john-ivison-norad-could-be-expanded-to-land-and-sea>.

⁷² Michael Dawson, “NORAD: Remaining Relevant,” *The School of Public Policy Publications* 12, no. 40 (November 2019): 9.

States will defend Canada if necessary; and Canada has its responsibility to contribute to continental defence.⁷³ Using the security argument could be a way for the two countries to prudently manage the legal disagreement and preserve their respective positions while further collaborating on the requirements to deter, detect, and (if necessary) defend Arctic waters from a variety of maritime threats emanating from outside and within the continent. As Michael Byers, a leading Arctic-affairs expert and Canada research chair in global politics and international law at UBC, once noted: “The obstacle to resolving the NWP dispute isn’t Canadian sovereignty. But sovereignty could be the solution, if combined with new and bold ideas.”⁷⁴ Thus, on balance, the integrative bargaining method, wrapped under the legal umbrella of the treaty-level defence agreement, which has demonstrated throughout its history an ability to incorporate increased scope and purpose, would not only shelve the win-lose situation permanently but strengthen continental security without compromising the territorial rights of either state.

CONCLUSION

In 1985, at the height of the Cold War, Oran R. Young, a renowned Arctic expert and a global governance scholar, proclaimed that “the world is entering the age of the Arctic, an era in which those concerned with international peace and security will urgently need to know much more about the region and in which policymakers in the Arctic rim states will become increasingly concerned with Arctic affairs.”⁷⁵ The prescient pronouncement was premature, but only by three decades. In recent years, the new understanding of the NWP’s strategic value,

⁷³ Dawson, “NORAD: Remaining Relevant,” 12.

⁷⁴ Michael Byers, “Sovereignty will solve the Northwest Passage dispute,” *The Globe and Mail*, August 11, 2007, <https://www.theglobeandmail.com/opinion/sovereignty-will-solve-the-northwest-passage-dispute/article724748>.

⁷⁵ Oran R. Young, “The Age of the Arctic,” *Foreign Policy* 61 (Winter 1985–1986): 160–161.

amidst the converging factors of anthropogenic global warming and a mercurial U.S. president, has brewed tensions in the Canadian-American partnership. As discussed earlier, the “old diplomatic safeguards” mitigated the reoccurring fears of a destabilizing rift.⁷⁶ However, the repercussions of Mr. Trump’s consolidation of U.S. foreign policy around great-power competition may spell doom for the longstanding agree-to-disagree modus vivendi nullifying the conflicting jurisdictional claims over the waters of the Arctic Archipelago, which are no longer viewed as protective moats to meet the geopolitical challenges posed by a revanchist Russia and a newly assertive China. Until a joint arrangement for surveillance and control is reached, such a predicament may give rise to an uninvited, and perhaps hostile, foreign presence in the increasingly navigable NWP that would pose a significant security threat to Canada and the United States. As the dust settles on the recent U.S. election, questions arise about prospective impacts and changes that the presidency of Joseph R. Biden Jr. will bring as America’s neglected Arctic backyard is once again an arena of strategic rivalry.

While both nations finessed their recurring dispute in 1988 with a political rather than a legal fix, Mr. Pompeo’s jaw-dropping remarks that the Canadian claim over the NWP is “illegitimate” hint that America is no longer content with the status quo.⁷⁷ The limits of business as usual in the Arctic, where both countries agreed to leave the issue dormant without prejudice to their respective positions, now appear to be cracking at the seams; as the shrinking ice cap opens up new shipping routes in the polar region, “the veneer of friendly differences” is concurrently melting away.⁷⁸ In the past century, only two vessels, the *Manhattan* and *Polar Sea*,

⁷⁶ Lajeunesse and Huebert, “Preparing for the next Arctic sovereignty crisis,” 239.

⁷⁷ Sevunts, “More assertive U.S. Arctic policy puts Ottawa and Washington on collision course.”

⁷⁸ Kieran Mulvaney, “The race to lay claim on the Bering Strait as Arctic ice retreats,” *The Guardian*, December 12, 2019, <https://www.theguardian.com/environment/2019/dec/12/bering-strait-northwest-passage-arctic-ice-melts>.

have openly passed through the NWP without asking Ottawa's permission. With a third one looming on the horizon, Canada's top brass needs to be proactive, not reactive, to avoid a future sovereignty crisis caused by an American ship travelling through the disputed waterway.

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