Rights of Passage: It’s Time the U.S. Recognizes Canada’s Arctic Claim

by Robert Hage
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George Bernard Shaw once said the Irish will do anything for their country but live in it. While Canadians seem to have a passion for the Arctic, few will visit it, let alone live there. Nevertheless, the Arctic, particularly the Northwest Passage, has long held a place in the country’s collective imagination.

Indeed, over the past decades Canada’s Arctic has been a place where popular opinion has taken the lead urging various Canadian governments, sometimes reluctantly, to take a stand against the United States. In 1970, a long-time Canadian diplomat said a piece of Canadian legislation “led to what may be one of the most acerbic exchanges in the history of diplomatic communications between Canada and the United States”.

This was Canada’s 1970 extension of maritime jurisdiction through the *Arctic Waters Pollution Prevention Act (AWPPA)*.

While Canada and the United States have been duelling over the status of the waters of the Northwest Passage ever since, new challenges have emerged which both nations have to consider. Before last June’s NATO summit, a CBC analysis warned, “Russian advances in the Arctic are leaving NATO behind”, and that “the Russian bear has pursued a steady march forward much closer to Canada in the Arctic.”

China poses another challenge as it looks to exploit the Passage as a shortcut from the Pacific to the Atlantic. When Beijing published its 356-page *Arctic Navigation Guide*, Northwest Passage, in July 2016, it declined to state its position on Canada’s claim that the Passage constitutes its internal waters. *Time* Magazine entitled its article “China Could Be Preparing to Challenge Canada’s Sovereignty over the Northwest Passage”.

Surprisingly, the United States’ position opens the door not just to challenges to Canada’s security but to North America’s. The dispute between Canada and the United States was triggered by the discovery of oil in Alaska in the 1960s and Humble Oil’s decision to determine whether oil could be transported through the Northwest Passage to East Coast refineries. The tanker *Manhattan* made the transit in 1969, although not without the aid of a Canadian Coast Guard icebreaker aptly named Sir John A. Macdonald. Neither the company nor the U.S. government requested Canadian permission to do so. This was then, and is now, the key legal question: does Canada have the right to determine access to the Northwest Passage?

While former prime minister Lester B. Pearson had told the House in 1963 that Canada was prepared to use straight baselines in the Arctic to define its sovereignty claim, the government decided on another approach to respond to the public outcry from the *Manhattan*’s passage. It opted for something dubbed “functionalism”; the notion that Canada’s offshore authority be limited to what was functionally necessary to achieve a particular goal. This is in contrast to

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3 McDorman, 68.
4 Lester Pearson, Prime Minister, House of Commons Debates, June 4, 1963, 621.
5 McDorman, 75.
exercising Canadian sovereignty over Arctic waters, although the minister of External Affairs in endorsing functionalism in the House made clear Canada was not abandoning its sovereignty claims.⁶

The AWPPA created a 100 nautical-mile pollution prevention zone, the world’s first, allowing Canada to impose strict safety and environmental requirements on all shipping. This was the first time a country outside Latin America claimed jurisdiction to an area beyond the territorial sea. The Americans did not like any of it.

Canada, with the world’s longest coastline and one of its largest continental shelves, played a leading role in the Third United Nations Conference on the Law of the Sea which opened in 1972. It fulfilled one of its objectives by obtaining Article 234, the so-called Arctic exception, which recognized the rights of coastal states to adopt and enforce pollution prevention measures in “ice-covered” areas out to 200 miles. Both the United States and the former USSR supported it.

During the conference, cabinet decided that, once the conference concluded, Canada would remove any doubt about the historic status of the Northwest Passage by drawing straight baselines around the Arctic archipelago. When the convention was signed in 1982, government officials began drafting a memorandum to cabinet that would make that happen.

The memorandum made its way through the bureaucratic process involving a number of departments and arrived on the desk of then-External Affairs minister Mark MacGuigan for signature. Then, two messages arrived. The first was from Canada’s ambassador for the law of the sea, Alan Beesley, in Geneva, who knew of the decision to proceed to cabinet but was now having second thoughts. He argued that drawing baselines was no longer necessary because the “functional approach” had worked and Article 234 was in place to protect Canadian interests. Explicit recognition of Canadian sovereignty was no longer required. The second message was from then ambassador Allan Gottlieb in Washington who strenuously opposed the proposal, maintaining it would damage relations with the United States. The minister did not sign the memorandum.

“The Americans,” Sir Winston Churchill once said, “always do the right thing in the end, after exhausting every other alternative.” MacGuigan’s decision might have remained had the United States not sent the U.S. Coast Guard icebreaker, the Polar Sea, through the Passage in 1985. The U.S. advised Canada that it was sending the vessel “as an exercise in navigational rights and freedoms not requiring prior notification.”⁷

Canadian public reaction to the sailing was so intense that the new Mulroney government finally acted to draw straight baselines around the archipelago. In announcing the government’s decision, then-External Affairs minister Joe Clark said, “these baselines define the outer limit of

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⁶ Mitchell Sharp, Minister of External Affairs, House of Commons Debates, April 17, 1970, 6014-15
Canada’s historical internal waters.” There is no better exponent of that claim than the Inuit who have used these waters since time immemorial and treated the ice and the land as one.

With the rising Russian military threat in the Arctic, melting Arctic ice and the possibilities of Chinese and other cargo ships using the Passage to shorten the route between Asia and Europe – along with cruise ships bringing tourists on Arctic adventures – the waters’ status continues to be a question. In April 2015 the Globe and Mail published an article entitled “Canadians’ Support for Northwest Passage Claim Collapsing, Survey Shows.” It cited an Ekos Research survey which indicated that only 45 per cent of Canadians still believe the Northwest Passage is within Canadian waters, a dramatic drop from 74 per cent five years previously. The journalist attributed this to the “dawning realization that no other country, and in particular the United States, which regards the Northwest Passage as an international strait no different from the Strait of Hormuz in the Persian Gulf, accepts Canada’s claim.”

That is simply incorrect. The Northwest Passage is entirely different from the Strait of Hormuz, which has always been used for international navigation. Under international law one of the indices of the validity of a state’s historic maritime claims is acceptance by other states.

When Canada drew the baselines, it received only two indications of non-acceptance. The United States dealt with the subject in a letter of Feb. 26, 1986 from the assistant secretary of state to Maryland Senator Charles Mathias and the other was a note from the U.K. purportedly acting on behalf of the European Community. A reference to both can be found in a 1992 State Department document. The British note was dated July 1986, almost a year after baselines were proclaimed and before the European Community had established its common foreign and defence policy permitting joint action on political and defence questions. The rest of the world has not objected.

In 1988, then-prime minister Brian Mulroney and then-president Ronald Reagan agreed on an Arctic co-operation agreement in which the U.S. would seek Canada’s consent before its icebreakers navigated in waters Canada claimed as internal. Canada undertook to facilitate their passage.

In 2004, following the 9/11 attacks, then-U.S. ambassador Paul Cellucci said “we are looking at everything through the terrorism prism ... So perhaps when this (the Northwest Passage) is subsequently brought to the table again, we may have to take another look.” He later said he had asked the State Department to re-examine its position that the Passage is an international strait “in light of the terrorist threat”. After he left Ottawa, Cellucci told the Toronto Star in 2007 that it was in the United States’ security interests “that the Northwest Passage be considered part of Canada.”

Ships aren’t the only concern. Under the U.S. position, aircraft, including military aircraft, could exercise their legal rights to overfly international straits. The United States should ask

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8 Joe Clark, Minister of Foreign Affairs, House of Commons Debates, Sept. 10, 1985, 6463.
9 Byers, 138 n47.
10 Byers, 140, 141 n60.
itself whether it wants an unregulated international strait across the top of North America or one controlled by a friend and ally. This is particularly important at a time when Vladimir Putin’s Russia is taking more aggressive steps in the Arctic and autocratic China, with its agenda for world leadership, is eyeing an important Arctic role.

Cellucci got it right in maintaining that having the Northwest Passage under Canadian control would allow the Canadian military to intervene if necessary to counter any security threats. Canada has a solid historic claim to these waters now enclosed by straight baselines. In many ways, they are there because the Canadian people, especially the Inuit, have led and governments have followed. In this way, Canada can safeguard its fragile Arctic environment, take measures against security and terrorist threats, overuse and smuggling, establish ports and search and rescue facilities, and work with the Inuit to ensure their rights over the land and sea are respected. No other nation can do so.
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