

# *Fordham Environmental Law Review*

---

*Volume 20, Number 3*

2017

*Article 4*

---

## Dire Straits: the Necessity for Canadian Sovereignty in the Arctic Waterways

Kimberly C. Gordy\*

\*University of Houston Law Center

Copyright ©2017 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/elr>

# DIRE STRAITS: THE NECESSITY FOR CANADIAN SOVEREIGNTY IN THE ARCTIC WATERWAYS

*Kimberly C. Gordy\**

## I. INTRODUCTION

Experts predict that a desperate global desire for the Arctic's natural resources will be the catalyst for the next cold war unless the question of sovereignty in the Northwest Passage and surrounding Arctic waterways is finally settled.<sup>1</sup> The shield of Arctic ice that once protected the "planet's most fragile and pristine ecosystem" is melting at an alarming rate, leaving Canada's Northern Region increasingly vulnerable to international exploitation and environmental devastation.<sup>2</sup> Unless Arctic access is carefully regulated, foreign-owned vessels, including oil tankers, cruise ships,

---

\* Editor in Chief, Board 33, *Houston Journal of International Law*; J.D. University of Houston Law Center, expected 2010; B.S. Texas A&M University, 2007. The Author would like to thank both Dr. David VanderZwaag, the Canada Research Chair in Ocean Law & Governance at the Dalhousie University Marine and Environmental Law Institute, and Dr. Rob Huebert, Professor and Associate Director of the Centre for Military & Strategic Studies at the University of Calgary, for their generous help while writing this Article. The Author is also grateful to Maryse Durette and Eric Collard of Transport Canada for their invaluable information on Canada's Arctic Waters Pollution Prevention Act. Finally, to Professors Jim Hawkins and Geraldine Moohr at the University of Houston Law Center, thank you for your guidance, your patience, and your never-wavering support.

1. Tim Reid, *Arctic Military Bases Signal New Cold War*, LONDON TIMES, Aug. 11, 2007, available at [http://www.timesonline.co.uk/tol/news/world/us\\_and\\_americas/article2238243.ece](http://www.timesonline.co.uk/tol/news/world/us_and_americas/article2238243.ece). For the purposes of this Article, the terms Arctic, North, and Arctic Archipelago connote the islands, waters, and ice of the archipelago which forms the northernmost extremity of North America.

2. Marsha Walton, *Countries in Tug-of-War over Arctic Resources*, CNN.COM, Jan. 2, 2009, <http://www.cnn.com/2009/TECH/science/01/02/arctic.rights.dispute/index.html?iref=newssearch>.

and submarines, will have largely unrestricted passage through Canada's Northern Region; this without accountability for any damage done during passage.<sup>3</sup>

Facing what experts agree is the "most important territorial dispute of this century," the welfare of Canada's Northern Region is dependent upon the quality of protection afforded its adjoining Arctic waters.<sup>4</sup> Scholars continue to suggest an international Arctic management system to quiet, rather than solve this problem; however, this solution leaves Canada's Arctic citizens and Arctic ecosystem without a voice and without a defense.<sup>5</sup> Instead, this Note contends that a feasible Arctic solution must promote socio-economic stability for Arctic residents while also preserving the indigenous culture and integrity of the Arctic ecosystem. As recently as March of 2009, the former executive director of the United Nations' Environment Program stated that Canada has over a dozen unique advantages, which other nations lack, for protecting and studying the Arctic.<sup>6</sup> The purpose of this Note is to embrace those advantages, thereby proving that the well-being of both Northern Canadians and the Arctic ecosystem hinges on Canadian Arctic sovereignty. This Note focuses on Canada's recent reassertion of Arctic sovereignty, its effectiveness in international law, and why Canadian sovereignty is the only equitable solution for the modern Arctic.

The Arctic includes the land, sea, and ice north of the 65th parallel.<sup>7</sup> Although each Arctic nation can claim some Arctic

---

3. See Ken Crist, Program Associate, Woodrow Wilson International Center for Scholars, Canada and the Arctic: Issues of Northern Sovereignty (Dec. 11, 2007), [http://www.wilsoncenter.org/index.cfm?topic\\_id=1420&fuseaction=topics.event\\_summary&event\\_id=278388](http://www.wilsoncenter.org/index.cfm?topic_id=1420&fuseaction=topics.event_summary&event_id=278388) (featuring panelists Rob Huebert, Associate Director, Centre for Military and Strategic Studies, University of Calgary and Michael Byers, Academic Director, Liu Institute for Global Issues, University of British Columbia).

4. Walton, *supra* note 2.

5. BATTLE FOR THE ARCTIC (CBC Documentaries 2009).

6. Margaret Munro, *Panel Urges Canada to Pump Up Arctic Research*, CANWEST NEWS SERVICE, Mar. 5, 2009, [www.ipycanada.ca/c/document\\_library/get\\_file?folderId=6&name=DLFE-267.pdf](http://www.ipycanada.ca/c/document_library/get_file?folderId=6&name=DLFE-267.pdf) (including Canada's knowledgeable indigenous populations and Canada's proximity to the crisis).

7. Keith F. Miller, *The Implications of UNCLOS for Canada's Regulatory Jurisdiction in the Offshore: The 200 Mile Limit and the Continental Shelf*, 30

coastline, and the geographic Arctic is currently considered an international region, this advocates for Canadian sovereignty over the waters of the Canadian Arctic Archipelago. The Canadian Arctic Archipelago is the world's largest high-arctic land area.<sup>8</sup> Canada's Arctic islands form the largest island group in the world, covering 1.3 million kilometers.<sup>9</sup> The islands are separated by straits, or narrow channels, and this series of connected straits forms the Northwest Passage, the accessible shipping route through the Arctic waterways.<sup>10</sup> The Northwest Passage is one of three distinct geographic areas at the center of the sovereignty dispute.<sup>11</sup> This Note will also discuss Canadian sovereignty in the Northwest Passage, as this dispute will ultimately have an impact upon any nation wishing to ship, research, or obtain resources within this area.<sup>12</sup>

---

DALHOUSIE L.J. 341, 342 (2007); Mike Perry, *Rights of Passage: Canadian Sovereignty and International Law in the Arctic*, 74 U. DET. MERCY L. REV. 657, 657 n.2 (1997). The Arctic Basin includes the Arctic Ocean and the circumpolar seas: the Barents, Kara, Siberian, and Chukchi Seas. Miller, *supra*. The Arctic littoral comprises northern Alaska and Canada, the complete northern shores of the former Soviet Union and associated islands, and the approach, consisting of the Bering Strait, the Greenland Norwegian Seas, and Iceland. *Id.*

8. Suzanne Lalonde, *Increased Traffic Through Canadian Arctic Waters: Canada's State of Readiness*, 38 REVUE JURIDIQUE THEMIS [R.J.T.] 49, 53 n.1 (2004) (Can.) (excluding Greenland, which is almost entirely ice covered and is considered a geographic extension of the archipelago); Miller, *supra* note 7, at 342 (distinguishing between an international region, an area beyond a nation's territorial sea, and a nation's sovereignty in internal waters)'.

9. Lalonde, *supra* note 8, at 53 n.1.

10. *Id.* The Parry Channel runs from Lancaster Sound to the M'Clure Strait and is large enough to qualify as a sea were it located somewhere other than the Arctic. Oliver Burkeman, *A Very Cold War Indeed*, GUARDIAN, Apr. 5, 2008, at 16, available

[at http://www.guardian.co.uk/environment/2008/apr/05/poles.endangeredhabitats](http://www.guardian.co.uk/environment/2008/apr/05/poles.endangeredhabitats). This particular channel is an important route through the Northwest Passage. *Id.* See also Christopher Mark Macneill, *Gaining Command and Control of the Northwest Passage: Strait Talk on Sovereignty*, 34 TRANSP. L.J. 355, 365 (2007) (noting that the Northwest Passage is critical to Arctic trade development).

11. Keith Lewis, Deputy Dir., Oceans and Env't Law Div., Dep't of Foreign Affairs & Int'l Trade, Address at the Inuvik Petroleum Show: Arctic Sovereignty: Myths & Reality (June 11, 2008) (PowerPoint presentation available at <http://www.inuvik.ca/events/pdf/KeithLewis.pdf>).

12. *Id.* (noting that the dispute is over the legal status of these waters and not over ownership); see Macneill, *supra* note 10, at 365 n.59 (noting importance of the Northwest Passage in Arctic trade development).

Canada's strongest argument for sovereignty is its drawing of straight baselines, which enclose the waters of the Arctic Archipelago as internal waters.<sup>13</sup> This Note first argues the validity of its straight baselines, and its use as a legitimate claim to Arctic sovereignty. Second, this Note recommends that Canada reinforce its claim by arguing sovereignty under Historic Consolidation of Title. This doctrine serves as a subsidiary basis in order to consolidate the title resulting from Canada's use of the straight baseline system.<sup>14</sup> This Note offers a modern and timely interpretation of sovereignty under Historic Consolidation of Title. The analysis presents the legal merits of Canada's claim under this doctrine and demonstrates Canada's ability to exercise effective control over the Arctic. The term control is redefined under this doctrine to encompass a nation's ability to enforce its environmental and cultural preservation policies.

Despite grumblings from the international community, environmental and cultural responsibility is now indivisible from a nation's right to Arctic sovereignty.<sup>15</sup> This Note advocates the established policy that the nation with the greatest risk of irrevocable damage is the most effective at preventing harm.<sup>16</sup> Because welfare of both northern Canadians and the Arctic ecosystem is best promoted through Canadian management, Canadian sovereignty is the only equitable solution for the modern Arctic.<sup>17</sup>

---

13. *Canada: Statement Concerning Arctic Sovereignty, Statement by the Secretary of State for External Affairs Joe Clark, in the House of Commons Sept. 10, 1985*, 24 I.L.M. 1723, 1724 (declaring that the Arctic Islands and the Northwest Passage were under Canadian jurisdiction and formalizing the Territorial Sea Graphical Co-ordinates and baselines).

14. DONAT PHARAND, *CANADA'S ARCTIC WATERS IN INTERNATIONAL LAW* 145-46 (1988).

15. James Raffan, *Policing the Passage*, *GLOBE & MAIL*, Sept. 1, 2008, at A10; Walton, *supra* note 2.

16. CHARLOTTE BREIDE & PHILLIP SAUNDERS, *LEGAL CHALLENGES FOR THE CONSERVATION AND MANAGEMENT OF THE HIGH SEAS AND AREAS OF NATIONAL JURISDICTION* 82 ('2005).

17. Chuck Strahl, Minister of Indian Affairs and Northern Development, *Arctic Plan is in Place, Says Strahl*, *NATIONAL POST*, Dec. 20, 2008, at A21.

## II. THE VALUE OF SOVEREIGNTY TO CANADIANS

A State's sovereignty is often tantamount to a nation's political and economic independence.<sup>18</sup> A coastal state has full sovereignty over both its internal waters and its territorial sea, however, exclusive autonomy occurs only within the internal waterways.<sup>19</sup> The independence of internal waters entitles a coastal state, like Canada, to fully protect its environment and national security.<sup>20</sup> A coastal state may refuse passage to a foreign flagged vessel, especially if the vessel is considered a "risky ship."<sup>21</sup> A risky ship is, for example, a vessel that threatens a coastal state's security or one that carries radioactive wastes or other dangerous substances.<sup>22</sup> A ship not of the proper Polar Class, and therefore unable to safely navigate the Arctic environment, is also considered a risky ship.<sup>23</sup> Equally important to the ability to prohibit a ship's passage is a sovereign nation's right to impose stringent environmental standards on those ships to which passage is granted.<sup>24</sup> To ensure compliance, a coastal state can exercise maximum jurisdiction over those ships entering its internal waters.<sup>25</sup>

Beyond a State's internal waters the United Nations Convention on the Law of the Sea (UNCLOS) authorizes a coastal state to designate a limit of twelve nautical miles as its territorial sea.<sup>26</sup> Under Article

---

18. Donald McRae, *Arctic Sovereignty? What Is at Stake?*, 64 BEHIND HEADLINES' 1, 2 (2007).

19. See DAVID L. VANDERZWAAG ET AL., MARINE & ENVTL L. INST., DALHOUSIE UNIVERSITY, IN GOVERNANCE OF ARCTIC MARINE SHIPPING 4-5 (2008) (including a discussion of sovereignty over internal waters and the coastal state's sovereignty over the territorial sea).

20. See *id.* at 5 (describing a coastal state's entitlement to exercise a far reaching power over its internal waters). A coastal state has the customary duty to offer refuge to a ship in distress. *Id.*

21. *Id.* at 4-5

22. *Id.* at 5.

23. See *id.* (including substandard ships as a "risky ship"); see also *id.* at 17-18 (explaining that Polar Class requirements established by the International Maritime Organization Arctic Guidelines and the Unified Guidelines set the minimum ship standards). These guidelines include operation safety and pollution reduction requirements. *Id.*

24. See *id.* at 5 (including a "zero discharge" limit on ship-source pollutants).

25. *Id.* at 4-5.

26. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

3, the territorial sea is measured from a coastal state's baselines.<sup>27</sup> Unlike in internal waterways, Article 19 curbs a coastal state's jurisdiction over foreign-flagged vessels.<sup>28</sup> A coastal state must allow innocent passage of a foreign ship and can only enforce domestic laws in relation to navigation, marine preservation and pollution prevention.<sup>29</sup> The degree of environmental protection allowed within the territorial sea remains a point of contention between coastal states and flag states, and for that reason, the goal of the coastal state is to maximize the area considered sovereign internal waters.<sup>30</sup>

To many Canadians, however, Arctic sovereignty represents more than maritime control. It is synonymous with the preservation of Canada's national heritage in the north and the acknowledgment of the ownership rights of Canada's indigenous people.<sup>31</sup> To others, arctic sovereignty also means finally protecting from other nations what is considered rightfully Canadian.<sup>32</sup> Arctic sovereignty would ensure that Canada, the nation best able to protect the Arctic, is at the helm of any new development.<sup>33</sup> "Protecting national sovereignty, the integrity of our borders, is the first and foremost responsibility of a national government," stated Canada's Prime Minister, Steven Harper.<sup>34</sup>

---

27. *Id.* art. 3.

28. *Id.* art. 19.

29. *Id.* Non-innocent passage includes willful pollution, unauthorized research, and military activities. *Id.* A coastal state is prohibited from imposing additional construction or crewing requirements. *Id.* art. 21.

30. See VANDERZWAAG ET AL., *supra* note 19, at 6 (explaining the ongoing tension between coastal states wishing to maximize marine environmental protection and flag states wanting to maximize freedom of navigation); see also McRae, *supra* note 18 (highlighting the importance of internal waters).

31. McRae, *supra* note 18, at 1. Mary May Simon, President, Inuit Tapiriit Kanatami, Lecture at the University of Waterloo: Inuit and the Canadian Arctic: Sovereignty Begins at Home (Mar. 3, 2009) (noting the political, social, and economic place the Inuit hold in Canada's Arctic).

32. See McRae, *supra* note 18, at 1.

33. See J. Sheppard, *Robert Huebert on Canada and Arctic Sovereignty*, GLOBEANDMAIL.COM, Mar. 31, 2009, <http://www.theglobeandmail.com/news/opinions/article704436.ece> (regarding comments by expert Rob Huebert that Canada must prove they are the nation that will most effectively protect the waterways).

34. Reid, *supra* note 1.

### III. THE IMPORTANCE OF CANADIAN SOVEREIGNTY IN A CHANGING ARCTIC

Climate change, coupled with the global drive for natural resources, calls for a reevaluation of the traditional methods for determining sovereignty.<sup>35</sup> It is no longer appropriate to award sovereignty to the nation with the most impressive military fortress around its border.<sup>36</sup> Nor is it reasonable to chance the welfare of Canada's northern region to the ruse that is the regulation and protection afforded under international law.<sup>37</sup> Although Canada has always maintained that the Arctic waterways are internal waters, other Arctic nations repeatedly undermined Canadian sovereignty because Canada had not yet established a legitimate claim at international law.<sup>38</sup> That was then. The Canada of today has taken steps to ensure that its argument is as solid as ice.<sup>39</sup> For Canadians, the stakes have never been higher.<sup>40</sup>

This past fall, Canada unsheathed its sword and demanded that the international community recognize its Arctic sovereignty.<sup>41</sup> In August of 2008, Prime Minister Steven Harper announced the new Canadian Arctic agenda, which incorporates two new policy

---

35. See Perry, *supra* note 7, at 667 (explaining that the principles of equity impose a new way to evaluate sovereignty).

36. P. Whitney Lackenbauer, Arctic Front, Arctic Homeland: Re-Evaluating Canada's Past Record and Future Prospects in the Circumpolar North 4-5 (July 2008) (Canadian International Council, Preliminary Paper).

37. Robyn Frost, *Underwater Cultural Heritage Protection*, 23 AUSTL. Y.B. INT'L L. 25, 36-37 (2004) (comparing the environmentally beneficial Canadian Arctic Waters Pollution Prevention Act with the "ineffective current state of international law" and any claimed international basis for such regulations).

38. CBC News, *Inuit Leader Demands Input on Arctic Sovereignty*, CBC.CA, Aug. 22, 2007, <http://www.cbc.ca/canada/north/story/2007/08/22/north-arctic.html>. Canada, along with Denmark, Norway (via Greenland), Russia, Sweden, Iceland, Finland, and the United States (via Alaska) are considered the "Arctic nations" because they surround the North Pole. Walton, *supra* note 2. The North Pole is delineated by the Arctic Circle.

39. Raffan, *supra* note 15.

40. See Crist, *supra* note 3 (explaining potential environmental harm and the threat to Canada's residents).

41. CBC News, *Harper Talks Tough on Arctic Enforcement*, CBC, <http://www.cbc.ca/canada/north/story/2008/08/27/north-ships.html> (Aug. 27, 2008) [hereinafter *Enforcement*].



initiatives to facilitate Canadian control over the region.<sup>42</sup> First, Prime Minister Harper announced a new provision mandating that all ships entering the Northwest Passage register with the Canadian Coastguard.<sup>43</sup> Second, the Prime Minister, with the support of Transport Canada, introduced a new bill that extends the protection of the Arctic Waters Pollution Prevention Act (AWPPA) by one hundred nautical miles.<sup>44</sup> As the historical world leader in environmentalism, Canada is the only nation prepared to protect those living in its Northern Region from exploitation and environmental devastation.<sup>45</sup>

*A. International Interference Will Harm Canada's Northern Region*

Historically, for an area so little visited and so distant, Canada's Northern Region, the Northwest Passage in particular, has long played an integral role in the imagination of the Western world.<sup>46</sup> The famed Northwest Passage is bordered by three Canadian territories: Nunavut, Yukon, and Northwest Territories (NWT).<sup>47</sup> Russia, Denmark, and the United States claim limited coastline along the Northwest Passage, however, the majority of coastline belongs to Canada.<sup>48</sup> The Bering Strait is the only entrance from the west, connecting the northern Pacific Ocean to the Canadian Arctic

---

42. *Id.*

43. *Id.*

44. The Arctic Waters Pollution Prevention Act, 2003 S.C., ch. A-12 (Can.); Raffan, *supra* note 15; Transport Canada, About Transport Canada, <http://www.tc.gc.ca/aboutus/menu.htm> (last visited Mar. 6, 2009). Transport Canada is responsible for the waterways inside and surrounding Canada. *Id.*

45. BATTLE FOR THE ARCTIC, *supra* note 5.

46. Frommer's, *Introduction to Yukon, the Northwest Territories, and Nunavut*, N.Y. TIMES, [http://travel.nytimes.com/frommers/travel/guides/north-america/canada/yukon-the-northwest-territories-and-nunavut/frn\\_yukon-the-\\_3048010001.html?scp=1&sq=Introduction%20to%20Yukon,%20the%20Northwest%20Territories,%20and%20Nunavut&st=tcse](http://travel.nytimes.com/frommers/travel/guides/north-america/canada/yukon-the-northwest-territories-and-nunavut/frn_yukon-the-_3048010001.html?scp=1&sq=Introduction%20to%20Yukon,%20the%20Northwest%20Territories,%20and%20Nunavut&st=tcse) (last visited Jan. 9, 2010) (featuring Frommer's travel information regarding touring the Northwest Passage as part of the *New York Times*' online travel guide, "the Northwest Passage ha[s] conjured up powerful images of rugged determination in an untamed and harsh wilderness").

47. *Id.*

48. Stephanie Holmes, Comment, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, 9 CHI. J. INT'L L. 323, 326 (2008).

Archipelago.<sup>49</sup> Nunavut is on the Passage's eastern border, sharing shores with the Davis Strait and Baffin Bay.<sup>50</sup> The waters of the Canadian Arctic archipelago encompass the five recognized routes through the Northwest Passage.<sup>51</sup> However, only two of the five routes are fully accessible at this time and either would take two weeks to travel.<sup>52</sup>

As a result of global warming, 2007 marked the first year that a portion of the Northwest Passage was free of ice.<sup>53</sup> This dramatic reduction in sea ice will increase both shipping accessibility and the opportunity for energy exploration.<sup>54</sup> Arctic scholars warn that a rise in shipping activity within Northwest Passage places Canadians living in Nunavut, NWT, and Yukon at risk.<sup>55</sup> Furthermore, any foreign claim to the potential oil and mineral reserves will likely have

---

49. M.P.M. REDDY, *DESCRIPTIVE PHYSICAL OCEANOGRAPHY* 14 (2001).

50. *Id.* at 14 (noting Baffin Bay connects the Central Arctic Region and the Canadian Arctic Archipelago through a series of shallow channels); NASA, Visible Earth: Davis Strait, [http://visibleearth.nasa.gov/view\\_rec.php?id=3792](http://visibleearth.nasa.gov/view_rec.php?id=3792) (last visited Nov. 23, 2009) (explaining that the Davis Strait is located between Midwestern Greenland and Baffin Island).

51. Donald R. Rothwell, *The Canadian-U.S. Northwest Passage Dispute: A Reassessment*, 26 *CORNELL INT'L L.J.* 331, 352 (1993).

Route I runs east to west runs through Davis Strait into Baffin Bay and then west into Lancaster Sound, Barrow Strait, Viscount Melville Sound, Prince of Wales Strait and then Amundsen Gulf Route III follows the Parry Channel, but turns south through Peel Sound, Franklin Strait, Larsen Sound, Victoria Strait, Queen Maud Gulf, Dease Strait, Coronation Gulf, Dolphin and Union Strait, and into the Amundsen Gulf, where it exits through the Barrow Strait. Route IV is slightly different than Route III, in that ships pass to the east of Somerset Island through Prince Regent Inlet to the Bellot Strait. Route V approaches from the east via Somerset Island through Hudson Strait, Foxe Basin, Fury and Hecla Strait, and then through the Gulf of Boothia to Bellot Strait, where it ultimately connects with Route III.

*Id.* (noting that only Routes I and II are the accessible routes).

52. See CBC News, *The Arctic Grail*, CBC.CA, Aug. 8, 2006, <http://www.cbc.ca/news/background/northwest-passage/>.

53. Raffan, *supra* note 15.

54. *Id.*; MATTHEW CARNAGHAN & ALLISON GOODY, *LIBRARY OF PARLIAMENT, CANADIAN ARCTIC SOVEREIGNTY* 1 (2006). The Institute for the North and the International Arctic Science Committee estimated that the Canadian Arctic will experience entire summer seasons of ice-free conditions as early as 2050. *Id.*

55. *Id.*

a disastrous effect upon those living in the Canadian Arctic.<sup>56</sup> Leading Arctic expert, Dr. Rob Huebert, Associate Director for the Centre for Military and Strategic Studies at the University of Calgary, anticipates that:

As the [Northwest] [P]assage becomes ice-free, . . . Canada's northern sea routes will become increasingly vulnerable to drug trafficking, as well as ships carrying illegal immigrants, terrorists, or weapons of mass destruction. If Canada's sovereignty over the Northwest Passage were recognized internationally, the Canadian government would have the ability to carry out maritime interdictions that would not be possible if the strait were considered international waters.<sup>57</sup>

Huebert also suggests that economic development and climate change pose enormous threats to the "extraordinarily fragile" Arctic marine ecosystem.<sup>58</sup> Experts caution that the Northwest Passage could become a viable route to transport oil and gas, which vastly increases the risk of a major oil spill in Canada's Arctic region.<sup>59</sup> This type of incident would be "catastrophic," not only for the Arctic ecosystem, but also for Canada's Inuit population, as the Arctic is an integral part of their culture.<sup>60</sup> Noting the direct environmental and social impact such interference will have on Canada's vital state interests, it is proper for Canada to take responsibility for Arctic environmental protection and receipt of the potential energy resources found therein.<sup>61</sup>

### *B. The International Community's Disregard for Canadian Sovereignty*

The recent Canadian declaration of sovereignty has created a conflictual relationship between the Arctic nations because these

---

56. Crist, *supra* note 3; Perry, *supra* note 7, at 657-58.

57. Crist, *supra* note 3.

58. *Id.*

59. *Id.*

60. *Id.*

61. ARCTIC CLIMATE IMPACT ASSESSMENT (Carolyn Symon et al. eds., 2005) [hereinafter ACIA].

nations previously saw the Canadian Arctic agenda as heuristic at best.<sup>62</sup> The international community adhered to an outdated belief that Canada was not a “global player” or world power.<sup>63</sup> Whether a world power or not, each Arctic nation has taken some legitimate steps in an attempt to secure Arctic rights, although most acts have been ineffectual grand gestures.<sup>64</sup> However, after the U.S. Geological Survey estimated that 90 billion barrels of oil, 44 billion barrels of natural gas liquids, and 1,670 trillion cubic feet of natural gas are hidden below the world’s smallest ocean, both the United States and Russia have dialed up their efforts.<sup>65</sup> Arctic experts agree that “whenever you mix undetermined boundaries, the potential of very rich resources, and insert major powers such as Russia and the United States, [nations will play] hardball; as a result, “[i]t could get a lot more rough in the North.”<sup>66</sup>

The United States, more subtle than Russia, is arguing both geography and policy, and conducting extensive scientific research in order to secure a claim to the natural resources.<sup>67</sup> The United States continues to insist that the Northwest Passage is an international strait, as defined under the United Nations Convention on the Law of

---

62. Lalonde, *supra* note 8, at 53. In decades past, Canada’s assertion and enforcement of Arctic sovereignty was considered somewhat lackadaisical. *Id.*

63. *Id.*

64. Burkeman, *supra* note 10, at 16. Canada and Denmark have maintained dispute over Hans Island, located in a resource-rich channel between Greenland and Canada’s far north-east. *Id.* When the Danish government learned that the Canadian government was researching on that island, the Danish government minister planted a flag attached to a bottle of Danish Cognac. *Id.* Years later, Canadian soldiers answered by leaving a bottle of Canadian rye whiskey. *Id.*

65. KENNETH J. BIRD, ET AL., U.S. DEP’T OF THE INTERIOR, CIRCUM-ARCTIC RESOURCE APPRAISAL: ESTIMATES OF UNDISCOVERED OIL AND GAS NORTH OF THE ARCTIC CIRCLE (Peter H. Stauffer ed., 2008). The Arctic Ocean spans only 14 kilometers. Holmes, *supra* note 48, at’ 325-26.

66. Steven Chase, *Russia Won’t Bully Canada in Arctic, Cannon Vows*, GLOBE & MAIL, Mar. 28, 2009, at A4.

67. Interview with Mike Cordray, Optical Imaging and Spectroscopy Lab, Rice University Dep’t of Bioengineering, in Houston, Tex. (Sept. 19, 2008) (explaining that the amount of funding a country pours into Arctic research has been suggested to imply a claim in the Arctic’s resources); MEAD TREADWELL, UNITED STATES ARCTIC RESEARCH COMMISSION (White House Council on Environmental Quality and Interagency Office of the President, 2009) (summarizing current research initiatives, including those funded by the National Science Foundation).

the Sea (UNCLOS).<sup>68</sup> Although UNCLOS provides the basic framework for the United States' argument, the United States refuses to ratify the Convention.<sup>69</sup>

The legal definition of an international strait consists of both a geographical component and a functional component.<sup>70</sup> In order to satisfy the geographical component, the body of water must adjoin two high seas.<sup>71</sup> Because of the simplicity of this requirement, this component is rarely the source of a dispute.<sup>72</sup>

In order to meet the functional component, the strait must satisfy two elements. First, it must be "used for international navigation."<sup>73</sup> The textual interpretation of this requirement does not include those bodies of water that are only *potentially* useful for navigation, like a frozen waterway.<sup>74</sup> Second, if the strait is used for navigation, a strait is considered to have met the functional component only when there have been a sufficient number of transits to qualify it as a "useful route for international maritime traffic."<sup>75</sup>

However, it is not appropriate to evaluate the total number of transits without considering whether those transits were authorized.<sup>76</sup> If repetitive unauthorized vessels are considered to be "sufficient use," there would be an increasing claim and perception that the passage is an international strait, thereby jeopardizing a State's legal claim of sovereignty.<sup>77</sup> It is inequitable for nations to have the ability to thwart Canadian sovereignty by incessant unauthorized transit of the passage.

---

68. CBC News, *Inuit Leader Demands Input on Arctic Sovereignty*, CBC.CA, Aug. 22, 2007, <http://www.cbc.ca/canada/north/story/2007/08/22/north-arctic.html>.

69. UNCLOS, *supra* note 26. See Matthew Padilla, Comment, *The Great Thaw: National Security at the Top of a Melting World*, 8 SUSTAINABLE DEV. L. & POL'Y 52 (2008); see also Raffan, *supra* note 15, at 1-2.

70. CARNAGHAN & GOODY, *supra* note 54, at 4-5.

71. *Id.*

72. *Id.*; McRae, *supra* note 18, at 3 (providing the Malacca Strait, which joins the Indian Ocean with the South China Sea, as an example of a body of water which satisfies the geographic component).

73. McRae, *supra* note 18, at 3.

74. CARNAGHAN & GOODY, *supra* note 54, at 4 ("[A]n international strait must also satisfy in the criterion of being a useful (not just potentially useful) route for navigation . . .").

75. *Id.* (quoting PHARAND, *supra* note 14, at 221-25).

76. *Id.*

77. *Id.*

The climate crisis intensifies the dispute over the status of the Northwest Passage. The first ever commercial passage took place as recently as November of 2008 by a Canadian company for the sole purpose of delivering supplies to the communities in western Nunavut.<sup>78</sup> While this passage was domestic in nature, there is a strong potential for international commercial shipping.<sup>79</sup>

The increased transit posits both environmental and national security concerns for Canada. Should foreign nations treat the Northwest Passage as an international strait, rather than as an internal waterway, Canada's right to regulate shipping is circumscribed.<sup>80</sup> The coastal state cannot prevent or impede transit in anyway, something that it could do in the case of waters that are internal.<sup>81</sup> This right of transit extends such passage to submerged submarines as well, creating a considerable national security concern.<sup>82</sup>

A coastal state also has curtailed authority to regulate the transit passage itself. "In respect [to] the prevention, reduction and control of pollution, the coastal state can give effect only to 'international standards' regarding the discharge of oil or other noxious substances."<sup>83</sup> The reference to "international standards" is to standards set by the agreement of states, often in treaties sponsored by the International Maritime Organization.<sup>84</sup>

At present, there is no indication that the United States will concede that the Northwest Passage is a Canadian internal waterway, although that is the most reasonable and equitable argument. Shortly before leaving office, former President George W. Bush implied that, in the interest of the potential fossil fuel wealth, the United States will continue to consider the Northwest Passage an international strait.<sup>85</sup> In his response, Prime Minister Stephen Harper maintained

---

78. CBC News, *1st Commercial Ship Sails Through Northwest Passage*, CBC.CA, Nov. 28, 2008, <http://www.cbc.ca/canada/north/story/2008/11/28/nwest-vessel.html>.

79. *Id.*

80. McRae, *supra* note 18, at 2-3.

81. *Id.* at 2.

82. *Id.* at 3.

83. *Id.* at 2-3.

84. *Id.*

85. CBC News, *supra* note 38 (referring to the statement of a White House official that declared, "[W]hile the meeting left Bush with a better understanding of Canadian concerns, Harper's remarks did not change the traditional U.S. view: that

the Canadian position, declaring that the Northwest Passage constitutes internal waterways of Canada.<sup>86</sup> He stated, “[w]e have some disagreements with the United States over the extent of our sovereignty over Arctic waters. I’ve been very clear with President Bush. This government will assert its sovereignty over all of its land and sea territories.”<sup>87</sup>

Likewise, Canada is rebuking Russia’s belligerent attempts to undermine Canadian sovereignty.<sup>88</sup> Russia’s aggressive posturing demonstrates its disregard for Canadian security and environmental interests.<sup>89</sup> In a 2007 highly controversial show of bravado, Russia sent a mini-submarine to plant a flag in the seabed near the North Pole, symbolizing Russia’s intentions for Arctic sovereignty.<sup>90</sup> The Canadian Foreign Minister responded to this action by stating, “This isn’t the 15th Century . . . You can’t go around the world and just plant flags and say, ‘We’re claiming this territory.’”<sup>91</sup> Legal scholar, Eric Posner, made the following remarks about the validity of Russia’s claim:

I take [the Russian flag-planting] as a signal that they’re going to claim this regardless of what the UN commission is going to say sometime in the future . . . Usually, they

---

Canada owns the Arctic islands, but not the vast and potentially resource-rich waters that surround them.”). This position was reemphasized by U.S. State Department official Robert Fisk who stated, “[The U.S.] continue[s] to believe that the Northwest Passage is an international waterway.” *Id.* At the 2007 Montbello Summit, then U.S. President George W. Bush stated, “Yes, we will manage the differences. Because there are differences on the Northwest Passage. We believe it is an international passageway.” Lewis, *supra* note 11 at 12.

86. *Id.*

87. Jeff Davis, Canadian Response to New U.S. Arctic Policy Muted, EMBASSY MAG., Jan. 21, 2009, <http://www.portalfornorthamerica.org/pnacigi-news/2009/01/canadian-response-new-us-arctic-policy-muted> (quoting comments made by Prime Minister Stephen Harper during an interview with a Calgary radio station on January 13, 2009).

88. Chase, *supra* note 66.

89. BBC News, *Russians to Dive Below North Pole*, NEWS.BBC.CO.UK, July 24, 2007, <http://news.bbc.co.uk/1/hi/world/europe/6914178.stm>. “The Arctic is ours and we should demonstrate our presence[.]” *Id.* (quoting Russian legislator Artur Chilingarov).

90. *Id.*

91. Reid, *supra* note 1.

make a legalistic argument, which may be implausible, but they make it anyway-and go ahead and do what they want to do.<sup>92</sup>

Professor Posner's prediction proved true on February 18, 2009 when Russia sent two bombers over the Canadian arctic.<sup>93</sup> Canadian forces turned them away from Yukon about two hundred kilometers from Canadian airspace.<sup>94</sup> Dangerous news from Moscow came again on March 27, 2009 when the Russian Presidential Security Counsel revealed its intention to secure the Arctic as Russia's primary natural resources supply.<sup>95</sup> Russia also announced its plan to establish a special Arctic military force to ensure a Russian military presence.<sup>96</sup> Canadian Foreign Affairs Minister Lawrence Cannon resolutely stated, "Let's be perfectly clear here; Canada will not be bullied."<sup>97</sup> Because an international sovereignty decision is outcome determinative for the security of Canadians, asserting Canadian sovereignty is "uppermost for [the Canadian government]" and Canada "will not be swayed from this [position]."<sup>98</sup> Canadian Defense Minister Peter MacKay announced that the government's response includes options to improve surveillance and response capabilities, increase patrol ships, and an expansion of its armed reserves, the Canadian Rangers.<sup>99</sup>

---

92. Burkeman, *supra* note 10, at 16.

93. CBC News, *Canada Won't be 'Bullied' over Arctic, Cannon Tells Russians*, CBC.CA, Mar. 27, 2009, <http://www.cbc.ca/canada/north/story/2009/03/27/arctic-canon.html>.

94. *Id.*

95. Chase, *supra* note 66; BBC News, *Russia Outlines Arctic Force Plan*, NEWS.BBC.CO.UK, Mar. 27, 2009, <http://news.bbc.co.uk/2/hi/europe/7967973.stm>.

96. Chase, *supra* note 66; BBC News, *supra* note 95.

97. Chase, *supra* note 66.

98. *Id.*; Press Release, Office of the Prime Minister, *Prime Minister Harper Delivers on Commitment to the "New North"* (Mar. 10, 2008), available at <http://www.pm.gc.ca/eng/media.asp?id=2015> (stating that Canadians have the greatest stake in the consequences of a changing Arctic) [hereinafter *New North*].

99. Chase, *supra* note 66; CBC News, *supra* note 93.



#### IV. THE CHALLENGE OF PROMOTING SOCIO-ECONOMIC GROWTH WHILE PRESERVING CANADA'S NORTHERN CULTURE

The Arctic is changing, and changing in ways that we do not fully understand. As Canadians, we need to ensure that we attempt to understand these changes and respond in a manner that allows Canadian interests and values to be protected and promoted. Of critical importance is the need to ensure that the interests of Northern Canadians be at the front of such a policy.<sup>100</sup>

Life in Nunavut, NWT, and Yukon requires a balance between vulnerability and resiliency, and the above comments by Arctic expert Dr. Rob Huebert exemplify those challenges.<sup>101</sup> Prime Minister Harper recently noted that the “people of the Arctic are as much a part of Canada’s identity as the red maple leaf,” and therefore, Canada is prepared to protect the interests of those living in its largest region.<sup>102</sup>

The territory of Nunavut, Canada’s newest and largest territory, is roughly the size of Western Europe.<sup>103</sup> While the capital, Iqaluit, is primarily non-Inuit, eighty-four percent of Nunavut’s residents are Inuit.<sup>104</sup> NWT is home to approximately 40,000 Canadians, with half the population being indigenous.<sup>105</sup> The people who belong to the recognized indigenous populations are members of First Nations, Inuit, and Métis.<sup>106</sup> NWT has eleven official languages, nine of which are indigenous.<sup>107</sup>

---

100. Sheppard, *supra* note 33.

101. ACIA, *supra* note 61, at 4; Sheppard, *supra* note 33.

102. *New North*, *supra* note 98.

103. Nunavut Act, 1993 S.C., ch. 28, s. 3 (Can.). The Northwest Passage lines Nunavut, which stretches from the North Pole to Ontario’s James Bay. *Id.*

104. Government of Nunavut, <http://www.gov.nu.ca/english/> (last visited Nov. 13, 2008) [hereinafter Nunavut].

105. Government of the Northwest Territories, <http://www.gov.nt.ca/> (last visited Oct. 20, 2009).

106. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, ch. 11.

107. Official Languages Act, R.S.N.W.T. 1988, ch. O-1, amended by S.N.W.T. 2003, ch. 23 (Can.).

Yukon, the third Arctic territory, is situated between Alaska, NWT, and British Columbia.<sup>108</sup> Yukon has 430 kilometers of shoreline along the Beaufort Sea, where it meets the Northwest Passage.<sup>109</sup> The indigenous community, First Nations, has an independent government recognized under the Canadian Constitution.<sup>110</sup>

### A. *The Revitalized Voice of the Indigenous People*

Arctic policy has become increasingly important to the citizens of Canada. Steven Harper's 2008 re-election to Prime Minister was based, in part, on his Arctic agenda to achieve sovereignty.<sup>111</sup> The Canadian government continues to focus increased energy and resources on the Arctic territories of Nunavut, NWT, and Yukon.<sup>112</sup>

The 1999 confederation of Nunavut is perhaps the most important step Canada has taken towards Arctic sovereignty.<sup>113</sup> The creation of Nunavut redressed the federal government's past treatment of the Inuit and provided Nunavut's Inuit an opportunity to partake in Canadian legislation.<sup>114</sup> Nunavut is now the only self-governing state

108. YUKON AT A GLANCE 3 (2008) available at [http://www.gov.yk.ca/pdf/yukon\\_at\\_a\\_glance\\_web2.pdf](http://www.gov.yk.ca/pdf/yukon_at_a_glance_web2.pdf).

109. *Id.* at 5; CORDILLERA REGION OF CANADA 2-4 (2004).

110. YUKON AT A GLANCE, *supra* note 108.

111. Keith Richburg, *Canada's Harper Returned to Power as Prime Minister*, WASH. POST, Oct. 15, 2008, at A16. Harper is a member of the Conservative Party of Canada. *Id.*

112. See CBC News, *supra* note 41 (during Prime Minister Harper's tour of the Arctic territories he explained the government's goals for the region); see also CBC News, *Harper Promises to Cut Red Tape in the North*, CBC.CA, Sept. 20, 2008, <http://www.cbc.ca/news/canadavotes/story/2008/09/20/harper-iquait.html> (discussing plans to invest in Canada's Arctic).

113. See Perry, *supra* note 7, at 675 (discussing the upcoming importance of Nunavut); see also CBC News, *supra* note 112 (discussing the value of Canada's Arctic).

114. See VALERIE ALIA, NAMES AND NUNAVUT: CULTURE AND IDENTITY IN THE INUIT HOMELAND 63-64 (2006) (noting that the creation of Nunavut, part of the restitution process, brings the Inuit more "dignity and control over their resources and their lives"). Occupation is a factor in sovereignty determination, and experts agree that the High Arctic Relocation was a strategic geopolitical move. Canadian Arctic Resources Committee, *Policy Issues*, 19 NORTHERN PERSPECTIVES (1991), available at <http://www.carc.org/pubs/v19no4/2.htm> (citing DANIEL SOBERMAN, CANADIAN HUMAN RIGHTS COMM'N, INUIT RELOCATION '(1992)); ROYAL COMMISSION ON ABORIGINAL PEOPLES, THE HIGH ARCTIC RELOCATION: A REPORT ON THE 1953-55 RELOCATION (1994). As part of the restitution process, Canadian

to be established for the benefit of indigenous people in the entire world.<sup>115</sup> With the creation of Nunavut, the Inuit received important political recognition and autonomy which has solidified a Canadian government presence in the Arctic.<sup>116</sup>

Leona Aglukkaq, a strong supporter of Harper, is the first Inuit Cabinet Minister.<sup>117</sup> She is currently serving simultaneously as Nunavut's Member of Parliament and as Canada's Minister for Health.<sup>118</sup> She offers a personal voice for the Canadian Inuit.<sup>119</sup> Her first language was Inuktitut, and she remains close to the Inuit culture, despite now working in Ottawa.<sup>120</sup> The president of the Inuit land-claims organization, Nunavut Tunngavik Inc., noted the benefit of having a Cabinet Minister who speaks the Inuit language and the assurance it gives the Inuit people that the Canadian government is concerned for their welfare.<sup>121</sup> Already, Aglukkaq is boosting federal funding for Arctic health initiatives.<sup>122</sup>

NWT is also an important part of Canada's assertion of sovereignty.<sup>123</sup> In August of 2008, Prime Minister Harper held a

---

school systems include the High Arctic Relocation in their curriculum. See NUNAVUT DEPT. OF EDU., HIGH ARCTIC RELOCATION MODULE (2002) (incorporating Zebedee Nungak, *Exiles in the High Arctic*, ARCTIC CIRCLE, Sept.-Oct. 1990, at 36, into the tenth grade curriculum). The Confederation of Nunavut legitimizes the claim of a Canadian presence in the Arctic. Perry, *supra* note 7, at 675.

115. MELANIE MCGRATH, *THE LONG EXILE: A TALE OF INUIT BETRAYAL AND SURVIVAL IN THE HIGH ARCTIC* 262 (2007).

116. ELSPETH YOUNG, *THIRD WORLD IN THE FIRST, DEVELOPMENT OF INDIGENOUS PEOPLES, 1475-80* (1995).

117. Leona Aglukkaq, <http://www.leonaaglukkaq.ca/EN/423/4933> (last visited Nov. 9, 2008) [hereinafter Aglukkaq].

118. *Id.*

119. Jane Taber, *Rookie Health Minister Fulfils Her Dream—and Then Some*, GLOBEANDMAIL.COM, Oct. 30, 2008, <http://www.theglobeandmail.com/news/politics/article719752.ece>.

120. *Id.*

121. *Id.*

122. CBC News, *Northern Development Agency to Get \$10M Budget: Aglukkaq*, CBC.CA, Jan. 23, 2009, <http://www.cbc.ca/canada/north/story/2009/01/23/north-dev.html>.

123. Town of Inuvik, <http://www.inuvik.ca/index.html> (last visited Nov. 9, 2008).

sovereignty-oriented press conference in NWT.<sup>124</sup> The city of Inuvik was chosen for the conference because it is strategically located on the northwest entrance into North America, as well as the western entrance to the Northwest Passage.<sup>125</sup> Inuvik is a Forward Operating Location for Canada's Air Force, the essential supply base for the western portion of the North Warning System, and, undoubtedly, a window into the critical Arctic ecosystem.<sup>126</sup>

*B. Safe, Smart, & Sustainable: the Canadian Approach to Arctic Development*

The Canadian government is "committed to helping the [Arctic] region and its residents realize their true potential."<sup>127</sup> The Canadian government has been providing Nunavut with much needed funding to ensure it has the modern infrastructure needed to maximize success.<sup>128</sup> In 2006, Infrastructure Canada invested over \$10 million to modernize Nunavut's airport and to provide broadband access throughout the territory.<sup>129</sup> This investment increases Canada's ability to communicate and secure its most remote areas.<sup>130</sup> Nunavut also depends on tourism.<sup>131</sup> As evidenced by Nunavut's national tourism slogan, "Untamed, Unspoiled, Undiscovered," the future growth of Nunavut is truly dependent on the protection of its natural resources and its indigenous culture.<sup>132</sup>

The creation of new jobs for NWT residents is a challenge currently facing its economy. However, a Canadian-managed oil and

124. CBC News, *Harper Lands in Inuvik for Northern Tour*, CBC.CA, Aug. 27, 2008, <http://www.cbc.ca/canada/north/story/2008/08/27/north-harper.html>.

125. *Id.*

126. Town of Inuvik, *supra* note 123.

127. *New North*, *supra* note 98.

128. Press Release, Infrastructure Canada, *Canada's New Government Makes Nunavut Airport Runways Safer With \$1.2 Million Investment* (Dec. 1, 2006), available at <http://www.infcc.gc.ca/media/news-nouvelles/ptf-ftc/2006/20061201iqaluit-eng.html>.

129. *Id.*

130. See *Traveling in Nunavut, Nunavut Parks*, <http://www.nunavutparks.ca/english/visitor-information/traveling-in-nunavut.html> (last visited Feb. 09, 2010) (noting that air travel is the primary way to reach Nunavut, as very few roads are available to reach its communities).

131. Nunavut, <http://www.nunavuttourism.com/> (last visited Jan. 8, 2010).

132. See *id.* (expressing the attraction of Nunavut's culture and ecosystem).

gas industry will create new jobs for people living in NWT.<sup>133</sup> Canada is evaluating the possibility of a Canadian-owned and operated gas pipeline in the Mackenzie Delta, with the expectation that seventy-two percent of the Operations jobs created will go to indigenous people and current NWT residents.<sup>134</sup> Because it is unrealistic to expect no oil and gas development in the Arctic, it is important to remember that a Canadian managed gas pipeline is clearly better than a foreign run project for two reasons. Industry experts agree that a domestic oil or gas pipeline poses less environmental risk than transoceanic shipping.<sup>135</sup> If the project was, for instance, Russian-operated, international shipping would be required to transport the oil.<sup>136</sup> The world's most damaging oil spills, in frequency and severity, have been associated with such shipping.<sup>137</sup>

The Yukon Environmental and Socio-economic Assessment Board (YESAB), established under the Yukon Environmental and Socio-economic Assessment Act, is another example of Canada's commitment to responsible Arctic development.<sup>138</sup> YESAB oversees Yukon's development programs, including The First Nations Forestry Program.<sup>139</sup> The Forestry Program promotes sustainable

---

133. Government of the Northwest Territories, Industry, Tourism, and Investment, <http://www.itl.gov.nt.ca/MediaRoom/DYK.shtml#mog> (last visited Feb. 09, 2010).

134. 2 JOINT REVIEW PANEL FOR THE MACKENZIE GAS PROJECT, FOUNDATION FOR A SUSTAINABLE NORTHERN FUTURE 463 (2009), available at [http://www.ngps.nt.ca/PDFs/JRP\\_report\\_vol\\_II.pdf](http://www.ngps.nt.ca/PDFs/JRP_report_vol_II.pdf). The project is anticipated to generate up to sixteen percent of direct employment during the Construction phase, creating an annual average of 5,707 direct jobs, of which twenty percent would go to NWT residents. *Id.*

135. Telephone Interview with C. A. Gordy, Manager (Retired), Health, Environment and Safety Compliance, Chevron Corporation (Mar. 16, 2009).

136. *Id.*

137. *Id.*

138. See YUKON TOURISM AND CULTURE, YUKON WILDERNESS TOURISM BEST MANAGEMENT PRACTICES FOR HERITAGE RESOURCES 4 (2009), available at [http://www.tc.gov.yk.ca/pdf/Wilderness\\_Tourism\\_BMP\\_for\\_Heritage\\_Resources.pdf](http://www.tc.gov.yk.ca/pdf/Wilderness_Tourism_BMP_for_Heritage_Resources.pdf) (YESAA oversees tourism programs to prevent damage to heritage resources).

139. An Act to Establish a Process for Assessing the Environmental and Socio-Economic Effects of Certain Activities in Yukon, 2003 S.C., ch.7. (Can.); First Nations Forestry Program, <http://fnfp.cyfn.ca/> (last visited Mar. 15, 2009).

development and creates jobs within the First Nations communities.<sup>140</sup>

## V. CANADA'S REASSERTION OF ARCTIC SOVEREIGNTY

In August of 2008, Prime Minister Harper stated, "We will be sending a clear message to the world that our environmental standards and sovereignty are not up for debate—if you are in Canada's Arctic you will be playing by Canada's rules."<sup>141</sup> Stephan Harper's plan is clear.<sup>142</sup> At a strategically located press conference in Tuktoyaktuk, NWT, the western gate to the Northwest Passage, he announced Canada's two elements of his sovereignty plan: (1) increased Coastguard control, and (2) increased protection under the AWPPA.<sup>143</sup>

### A. *The Canadian Coastguard's Increased Enforcement Capability*

The first element of Canada's sovereignty platform, which will come into force in 2010, imputes new power and responsibility upon the Canadian Coastguard.<sup>144</sup> Currently, all Ships of Particular Interest must register 96 hours in advance.<sup>145</sup> A ship is identified as a Ship of Particular Interest if it is deemed substandard after reviewing past incidents, reports, and a third party assessment of ship quality.<sup>146</sup> Under the upcoming modification to the Canada Shipping Act 2001, all large ships entering the Northwest Passage will be required to register with NORDREG, the marine operating system for the

140. *Id.*

141. Vesna Jaksic, *Canada Extends Jurisdiction over Arctic Waters*, NAT'L L.J., Aug. 29, 2008, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202424125182&slreturn=1&bxlogin=1>.

142. *Id.*

143. *Id.*

144. See Office of the Prime Minister, *Prime Minister Harper Announces Measures to Stengthen Canada's Arctic Sovereignty and Protection of the Northern Environment*, Aug. 27, 2008, <http://www.pm.gc.ca/eng/media.asp?id=2259> (last visited Feb. 9, 2010).

145. Transport Canada, *Tanker Ship Safety in Canada Regulations and Programs—May 2006*, Oct. 22, 2007, <http://www.tc.gc.ca/mediaroom/backgrounders/b03-m002.htm>.

146. *Id.*

Canadian Coast Guard.<sup>147</sup> No longer voluntary, ship registration before, during, and after passage will be required.<sup>148</sup>

*B. An Act to Amend the Arctic Waters Pollution  
Prevention Act*

Amplified protective legislation is the second element of the Arctic platform.<sup>149</sup> Canada is now prepared to establish a bulwark to safeguard the Northwest Passage and the people of the northern region.<sup>150</sup> The Canadian Parliament is currently reviewing a bill to strengthen AWPPA.<sup>151</sup> If passed, Bill C-3 will double the reach of the AWPPA protection by establishing a two hundred nautical mile pollution prevention zone in the Arctic waters.<sup>152</sup>

The necessity for increased regulation became clear after the *Manhattan*, an American-owned icebreaker, crossed the Northwest Passage without Canadian permission.<sup>153</sup> In response, the AWPPA was passed in 1970, predating UNCLOS by a decade.<sup>154</sup> AWPPA's one hundred mile pollution prevention zone is within Canada's exclusive economic zone (EEZ), as set forth by UNCLOS.<sup>155</sup> Defined under UNCLOS, the EEZ extends out two hundred miles from the bases from which the breadth of the territorial sea is measured.<sup>156</sup> Within this zone, all international transit is permissible, including submerged submarines, and a vessel is not required to show its flag.<sup>157</sup> Canada may not regulate a foreign nation's placement of

---

147. See Canadian Coast Guard, [www.ccg-gcc.gc.ca/](http://www.ccg-gcc.gc.ca/) (last visited Oct. 19, 2008) (explaining that The NORDREG system keeps track of all traffic north of 60°, as well as within Ungava Bay and the southern part of Hudson Bay).

148. *Id.*

149. Office of the Prime Minister, <http://pm.gc.ca/eng/default.asp> (last visited Oct. 19, 2008).

150. *Enforcement*, *supra* note 41.

151. The Arctic Waters Pollution Prevention Act, 2003 S.C., ch. A-12 § 9 (Can.).

152. An Act to Amend Arctic Waters Pollution Prevention Act, 2009, Bill C-3, 40<sup>th</sup> Parl. (Can.).

153. DONALD ROTHWELL & CHRISTOPHER JOYNER, PROTECTING THE POLAR MARINE ENVIRONMENT: LAW AND POLICY FOR POLLUTION PREVENTION 150-51 (Davor Vidas ed., 2000). The voyage's only purpose was to demonstrate American transit capabilities. *Id.*

154. *Id.*

155. *Id.*

156. UNCLOS, *supra* note 26, art. 57.

157. *Id.*

pipelines and cables within its own EEZ.<sup>158</sup> Under UNCLOS, Canada cannot suspend passage and may only adopt ship-source pollution laws if such laws are within international standards and are applied equally to both domestic and foreign-flagged vessels.<sup>159</sup> Canada also may only undertake physical inspection of a foreign ship, versus detention, where a violation has resulted in a substantial discharge causing or threatening significant pollution of its marine environment.<sup>160</sup> Despite the fragile Arctic ecosystem, UNCLOS Article 234 prohibits only those actions causing *irreversible* damage to the ice-covered areas.<sup>161</sup> Finally, if a foreign state seriously harms Canada's EEZ, UNCLOS offers only nominal remedies.<sup>162</sup>

AWPPA, therefore, is preferable to UNCLOS because it ensures that marine polluters are prosecuted under Canadian law.<sup>163</sup> AWPPA's pollution prevention zone prohibits all deposits of waste by any person or ship.<sup>164</sup> Unlike UNCLOS, AWPPA has a comprehensive definition of Arctic pollution.<sup>165</sup> The Act defines "waste" as:

- (a) Any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water to an extent that is detrimental to their use by man or by any animal, fish or plant that is useful to man . . . .
- (b) Any water that contains a substance in such a quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state

158. OCEANS: THE SOURCE OF LIFE, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: 20TH ANNIVERSARY BROCHURE (2002), available at <http://secint50.un.org/issues/docs/documents/losenbrch.html>.

159. UNCLOS, *supra* note 26, arts. 42, 45.

160. *Id.* art. 220(5).

161. *Id.* art. 234.

162. VANDERZWAAG ET AL., *supra* note 19, at 6.

163. See ROTHWELL & JOYNER, *supra* note 153, at 340 (citing the Canadian Minister for External Affairs' comment that Canada was "not prepared to litigate with other states on vital issues concerning [law that] is either inadequate, non-existent or irrelevant to the kind of situation Canada faces, as in the case of the Arctic." HOUSE OF COMMONS DEBATES (Hansard), vol. 6, (Apr. 16, 1970) at 5952 (Can.)).

164. The Arctic Waters Pollution Prevention Act, 2003 S.C., ch. A-12 § 9 (Can.).

165. *See id.*



that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water to the extent described in paragraph (a)<sup>166</sup>

This is a much more effective definition of pollution than a general statement against nebulous “irreversible damage.”<sup>167</sup> AWPPA specifically prohibits the dumping of solid or liquid waste into Canada’s Arctic waters<sup>168</sup> and requires an offender to notify Canada immediately in the event of a spill.<sup>169</sup> Discharge is only permitted if it is permitted by other regulations for environmental purposes.<sup>170</sup>

Under AWPPA, the federal cabinet sub-divides Arctic waters into shipping safety control zones and can pass regulations for vessel construction, equipment, and navigation.<sup>171</sup> Pollution Prevention Officers are given broad powers to board and inspect any ship within a shipping safety control zone, to direct ships to remain outside a zone, or to anchor in a place selected by the officer in case of safety concerns.<sup>172</sup>

The newly proposed amendment to AWPPA, Government Bill C-3, received Royal Assent on June 11, 2009.<sup>173</sup> Although, Canada’s other marine safety laws apply to the outer limits of the EEZ, this amendment expands the application of AWPPA to govern waters two hundred miles from its low water mark, making its protection extend throughout the entire EEZ.<sup>174</sup> Although Second, C-3 will replace AWPPA’s definition of “Arctic Waters” with the following:

“Arctic waters” means the internal waters of Canada and the waters of the territorial sea of Canada and the exclusive

---

166. *Id.* § 2(a).

167. UNCLOS, *supra* note 26, art. 234.

168. The Arctic Waters Pollution Prevention Act, 2003 S.C., ch. A-12 § 9 (Can.).

169. Andrew Mayeda, *Canada to Extend Arctic’s Water-Pollution Prevention Zone*, GAZETTE (Montreal), Aug. 28, 2008, at A15.

170. *Id.*

171. The Arctic Waters Pollution Prevention Act, 2003 S.C., ch. A-12 arts. 11, 12 (Can.).

172. *Id.* art. 14(4).

173. Bill C-3 [Act to Amend Arctic Waters Pollution Prevention Act], 40th Parl. (2009).

174. *Id.*; Mayeda, *supra* note 169.

economic zone of Canada, within the area enclosed by the 60th parallel of north latitude, the 141st meridian of west longitude and the outer limit of the exclusive economic zone; however, where the international boundary between Canada and Greenland is less than 200 nautical miles from the baselines of the territorial sea of Canada, the international boundary shall be substituted for that outer limit. . . .<sup>175</sup>

The Canadian government has effectively announced that Canada will be treating the Northwest Passage as an internal waterway and not as an international strait.<sup>176</sup> The increased authority of the Canadian Coastguard and the extension of AWPPA place Canada in a propitious position to obtain Arctic sovereignty.<sup>177</sup>

#### VI. BREAKING LEGAL ICE: CANADA'S CLAIM TO ARCTIC SOVEREIGNTY IS NOW LEGITIMATE

Now is the time for Canada to assert its Arctic sovereignty.<sup>178</sup> There are two arguments for sovereignty that will break the legal ice preventing Canada from taking full responsibility for the waterway's

---

175. Bill C-3 [Act to Amend Arctic Waters Pollution Prevention Act], 40th Parl. (2009). The previous definition is below:

Arctic waters means the waters adjacent to the mainland and islands of the Canadian arctic within the area enclosed by the sixtieth parallel of north latitude, the one hundred and forty-first meridian of west longitude and a line measured seaward from the nearest Canadian land a distance of one hundred nautical miles, except that in the area between the islands of the Canadian arctic and Greenland, where the line of equidistance between the islands of the Canadian arctic and Greenland is less than one hundred nautical miles from the nearest Canadian land, that line shall be substituted for the line measured seaward one hundred nautical miles from the nearest Canadian land.

The Arctic Waters Pollution Prevention Act, 2003 S.C., ch. A-12 (Can.). The word "internal" is not used. *Id.*

176. McRae, *supra* note 18.

177. Steven Chase & Campbell Clark, *Summer Melt Buoys PM's Bid to Champion Arctic Sovereignty; Temporarily Navigable Northwest Passage Reinforces Point of Harper Trip*, GLOBEANDMAIL, Aug. 27, 2008, at A4.

178. CARNAGHAN & GOODY, *supra* note 54, at 6; Crist, *supra* note 3.

protection.<sup>179</sup> First, Canada can successfully assert sovereignty through the validity of its straight baselines.<sup>180</sup> Second, modern Canada can reinforce its claim by arguing sovereignty through the doctrine of Historic Consolidation of Title.<sup>181</sup>

### A. Successful Application of the Straight Baselines System

Canada's most effective argument for sovereignty over the Arctic Archipelago is the validity of its straight baselines, which were drawn in 1986 to enclose the Northwest Passage.<sup>182</sup> Baselines mark the end of a State's internal waters and the beginning of its maritime extension and territorial sea.<sup>183</sup> Waters on the landward side of the baseline are internal waters of the coastal state.<sup>184</sup> The standard method for delimiting the territorial sea is set forth in UNCLOS Article 5, stating, "[T]he normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast . . . ."<sup>185</sup>

However, in the case of a coastal archipelago, like the Canadian Arctic Archipelago, a coastal state is permitted under UNCLOS Article 7 to delimit its territorial sea by drawing straight baselines from headland to headland.<sup>186</sup> The Convention further provides for the drawing of straight baselines where the coastline is deeply indented or if there is a fringe of islands along the coast.<sup>187</sup> Likewise, the waters landward of the straight baselines become internal waters, and the coastal state enjoys the right to enforce its civil and criminal laws

---

179. FRANÇOIS CÔTÉ & ROBERT DUFRESNE, *THE ARCTIC: CANADA'S LEGAL CLAIMS* 3 (Parliamentary Info. and Res. Serv. Pub., PRB 08-05E, 2008); Perry, *supra* note 7, at 667-83.

180. *See Canada: Statement Concerning Arctic Sovereignty, Statement by the Secretary of State for External Affairs Joe Clark, in the House of Commons Sept. 10, 1985*, 24 I.L.M. 1723 (declaring that the Arctic Islands and the Northwest Passage were under Canadian jurisdiction and formalizing the Territorial Sea Graphical Co-ordinates and baselines).

181. *See The Grisbadarna Case (Nor. v. Swed.)*, Hague Ct. Rep. (Scott) 121, 130 (1916) (dictating the criteria to evaluate a nation's contention of title via historic consolidation). Perry, *supra* note 7, at 666.

182. ROTHWELL & JOYNER, *supra* note 153, at 153.

183. *See CÔTÉ & DUFRESNE, supra* note 179, at 2.

184. UNCLOS, *supra* note 26, art. 8(1).

185. *Id.*, art. 5.

186. *Id.*, art. 7; David VanderZwaag & Donat Pharand, *Inuit and the Ice: Implications for Canadian Waters*, 21 CAN. Y.B. INT'L L. 53, 59 (1983).

187. UNCLOS, *supra* note 26, art. 7.

therein.<sup>188</sup> The Canadian Arctic Archipelago is directly implicated by Article 7.<sup>189</sup>

Canada's decision to draw of straight baselines is an accepted practice at international law,<sup>190</sup> and has been so since the 1951 *Norwegian Fisheries Case*.<sup>191</sup> The great majority of coastal states have chosen to enclose their respective internal waters through straight baselines, and Canada's use of the technique should be accredited the same respect.<sup>192</sup> In the *Fisheries Case*, the International Court of Justice (ICJ) established two compulsory requirements to delimit the legal baselines around coastal regions: (1) baselines must not depart to any appreciable extent from the general direction of the coastline; and (2) the waters lying within the baselines must be closely linked to the coastal State's domain as to be considered internal waters; and a third non-compulsory factor, (3) the waters represent economic interests which are particular to the region and which have an importance evidenced by a long history of use.<sup>193</sup> The Canadian baselines satisfy each factor.<sup>194</sup>

---

188. See CÔTÉ & DUFRESNE, *supra* note 179, at 2 (citing T. L. McDorman, *In the Wake of the Polar Sea: Canadian Jurisdiction in the Northwest Passage*, 10 MARINE POL'Y 243, 243-57 (1986)).

189. See VanderZwaag & Pharand, *supra* note 186, at 62 (defining Canada's Arctic islands as a coastal archipelago). Canada's Arctic Archipelago qualifies because it forms a visual unity with the rest of Canada and numerous islands link the northern and southern sections of the Archipelago. *Id.*

190. See PHARAND, *supra* note 14, at 155 (noting that by 1985, sixty States had used the straight baseline system and twelve more had adopted enabling legislation).

191. See *Fisheries Case (U. K. v. Nor.)*, 1951 I.C.J. 115 (Dec. 19); see also Mark Jarashow, Michael B. Runnels, & Tait Svenson, Note, *UNCLOS and the Arctic: The Path of Least Resistance*, 30 FORDHAM INT'L L.J. 1587, 1597 (2007); Lalonde, *supra* note 8, at 69-70 (discussing the International Court of Justice's case-specific reasoning for upholding Norway's delimitation system).

192. See PHARAND, *supra* note 14 at 155.

193. See *Fisheries Case*, 1951 I.C.J. at 133; see also Jarashow et al., *supra* note 191, at 1598-99 (noting that the three factors were applied to baselines enclosing inlets, fjords, bays, and the Norwegian *skaergaard*—the mass of islands and rocks that border most of the Norwegian coastline). This geography is equally complicated with the Canadian Arctic Archipelago. *Id.*

194. McRae, *supra* note 18, at 5.

The first factor requires that baselines conform to the general direction of the coastline.<sup>195</sup> However, the ICJ emphasized that baselines should follow the coastline to the extent that is geographically possible, and must be reviewed reasonably.<sup>196</sup> Canada's enclosure of its entire Arctic Archipelago is consistent with the ICJ's conclusion in the *Fisheries Case*.<sup>197</sup> The ICJ held that the outline of the skjaergaard, or Norwegian Archipelago,<sup>198</sup> determined the actual Norwegian coastline.<sup>199</sup> Under this standard, the Canadian Arctic coastline extends to the outer perimeter its coastal islands.<sup>200</sup> For this reason, Canada's baselines meet the ICJ's first constraint.<sup>201</sup>

Canada's satisfies the second requirement of a close land to sea link.<sup>202</sup> The presence of pack ice over its enclosed waters "bolsters the physical unity between the Canadian land and the sea."<sup>203</sup> Despite the current climate change, Canada's argument remains valid because ice sheets still connect the arctic waters to the mainland for a portion of time each year.<sup>204</sup> Canada also meets the second factor under the ratio of sea to land test.<sup>205</sup> This test compares the ratio of the land present within an archipelago to the total land area in that same region.<sup>206</sup> The sea to land ratio in the Canadian Arctic

---

195. Jarashow et al., *supra* note 191, at 1600. The term "coast" is inherently ambiguous and is subject to interpretation. *Id.* at 1601 n.70; UNCLOS, *supra* note 26, art. 7(1).

196. See VanderZwaag & Pharand, *supra* note 186, at 63 (stressing that the criterion should be applied liberally because baselines might, within reasonable limits, depart from the physical coastline). This concept is "devoid of any mathematical precision." *Id.*

197. PHARAND, *supra* note 14, at 163.

198. *Id.* at 133 (defining the skjaergaard as the Norwegian archipelago comprised of 120,000 insular indentions and a series of fjords).

199. *Id.* at 163.

200. See VanderZwaag & Pharand, *supra* note 186, at 63.

201. Donat Pharand, *The Legal Regime of the Arctic: Some Outstanding Issues*, 39 INT'L J. 742, 780 (1984) (noting that there are eighteen coastal archipelagos where straight baselines have been accepted, despite indented coastline).

202. Jarashow et al., *supra* note 191, at 1602.

203. PHARAND, *supra* note 14 at 163.

204. Jarashow et al., *supra* note 191, at 1602.

205. Mark Killas, *The Legality of Canada's Claims to the Waters of Its Arctic Archipelago*, 19 OTTAWA L. REV. 95, 119 (1987) (recommending this test to interpret Article 7(3) of UNCLOS).

206. Jarashow et al., *supra* note 191, at 1602.

Archipelago is .822 to 1.<sup>207</sup> This test weighs heavily in Canada's favor because the land to sea ratio in Canada's archipelago is actually higher than that in the Norwegian skjaergaard.<sup>208</sup>

Finally, Canada is in the unique position to invoke the third, non-compulsory ICJ factor, because it can prove the longstanding economic interest of the Inuit in Canada's Arctic waters.<sup>209</sup> When setting forth the third requirement, the ICJ considered the fact that the Norwegian fishermen lived for centuries off of the fish they caught in the Norwegian coastal waterways.<sup>210</sup> Similarly, the Canadian indigenous populations have survived for centuries by harvesting the Arctic's living resources.<sup>211</sup> This contribution is comparable to the economic contribution of the Norwegian fishermen.<sup>212</sup> Experts agree that the lifestyle of the 20,000 Canadian Inuit presently living in the Arctic is economically significant to the nation of Canada.<sup>213</sup> Furthermore, the confederation of Nunavut allows Canada to legitimately claim a sufficient economic interest in the northern region because Canadian law is the governing law.<sup>214</sup>

The legality of Canada's straight baselines has been endorsed by many of the leading arctic experts as legally sound.<sup>215</sup> However, Article 8 of UNCLOS gives standing to the pre-existing navigation regimes in place prior to the baseline proclamation.<sup>216</sup> In other

---

207. PHARAND, *supra* note 14 at 163.

208. *See id.* (reporting the Norwegian ratio as 3.5 to 1); *see also* Jarashow et al., *supra* note 191, at 1602.

209. PHARAND, *supra* note 14 at 163.

210. *Id.*; *see also* Fisheries Case (U. K. v. Nor.), 1951 I.C.J. 115, 127-28 (Dec. 19) (discussing the history of the Norwegian fishermen).

211. *See* ACIA, *supra* note 61, at 91-92 (noting that the indigenous populations have long relied on the harvest of arctic wildlife, including seals, walruses, polar bears, whales, salmon and ptarmigan for survival).

212. Perry, *supra* note 7, at 675-76; Fisheries Case (U. K. v. Nor.), 1951 I.C.J. at 127-28.

213. Jarashow et al., *supra* note 191, at 1602.

214. *See* YOUNG, *supra* note 116, at 1475-80 (describing the autonomy Nunavut has given to the Inuit people); *see also* Perry, *supra* note 7, at 675-76 (discussing the expected economic benefits the establishment of Nunavut will bring to both the Inuit and to Canada).

215. *See* CÔTÉ & DUFRESNE, *supra* note 179, at 3 (citing Donat Pharand, *The Arctic Waters and the Northwest Passage: A Final Revisit*, 38 OCEAN DEV. & INT'L L. 3, 7 (2007) (providing a comprehensive discussion on the legal attributes of the baseline theory)).

216. ROTHWELL & JOYNER, *supra* note 153, at 359.

words, when newly proclaimed baselines enclose as internal waters areas which had not previously been considered as such, a right of innocent passage exists in those waters.<sup>217</sup> This is an inequitable argument against Canada's sovereignty claim, because Canada has long asserted that those waters are in fact, internal waters.<sup>218</sup> As illustrated in the following section, Canada may rely on Historic Consolidation of Title to Lancaster Sound and Barrow Strait in the east and Amundsen Gulf in the west for additional evidence of its sovereignty.<sup>219</sup>

*B. Historic Consolidation of Title: From Grisbadarna to the Canadian Arctic*<sup>220</sup>

The effect of the Historic Consolidation of Title is to confirm, or consolidate, "the title to those waters resulting from their enclosure by straight baselines."<sup>221</sup> This doctrine is the most effective argument for Canada because it is based on the law of equity.<sup>222</sup> Traditionally, title based on "historical consolidation" encompasses sovereignty, recognition, consent, good faith, self-defense, international responsibility, and freedom of the seas. Title to a region is achieved by the "gradual solidification process" built on these historical piers.<sup>223</sup> Under a modern interpretation of Historic Consolidation of Title, the nation most capable of protecting a region's vital interests and its indigenous peoples is the sovereign nation.<sup>224</sup>

---

217. *Id.*

218. *Id.*; PHARAND, *supra* note 14, at 178.

219. PHARAND, *supra* note 14, at 178.

220. Historic Consolidation of Title should not be confused with the Doctrine of Historic Title. *United States v. Alaska*, 422 U.S. 184 (1975); Perry, *supra* note 7, at 665-66.

221. *Id.*

222. Macneill, *supra* note 10, at 355.

223. VanderZwaag & Pharand, *supra* note 186, at 74 n.92.

224. Perry, *supra* note 7, at 667; see Nunavut Land Claims Agreement Act, 1993 S.C., Art 15.1.1(c) (Can.) (demonstrating Canada's relationship with the Inuit living in Nunavut); PHARAND, *supra* note 14, at 143 (focusing on the state's vital interests as a key component to the doctrine).

The *Grisbadarna Case* is the foundation for the theory of Historic Consolidation of Title.<sup>225</sup> The *Grisbadarna Case* assigned the *Grisbadarna* banks to Sweden after analyzing both its use and the claims made by Norwegian and Swedish fishermen.<sup>226</sup> The court set a series of three requirements to determine ownership, and Canada is now able to meet the *Grisbadarna* factors: (1) discovery of land or receipt of title from the previous sovereign; (2) administrative control over the region; and (3) peaceful possession by the natural inhabitants.<sup>227</sup>

### 1. Receipt of Title to the Arctic

Canada satisfies the first factor by the receipt of title to the region from the Inuit.<sup>228</sup> The Inuit strongly believe that they are the owners of the Arctic land.<sup>229</sup> It is undisputed that the Inuit used the “ice

225. See *The Grisbadarna Case* (Nor. v. Swed.), Hague Ct. Rep. (Scott) 121, 130 (1916) (dictating the criteria to evaluate a nation’s contention of title via historic consolidation); See also Perry, *supra* note 7, at 667; Jarashow et al., *supra* note 191, at 1620-21 (discussing the Permanent Court of Arbitration’s promulgation of the historic consolidation of title doctrine); Michael Byers, *The Need to Defend Our New Northwest Passage*, THEYEE.CA, Jan. 30, 2006, <http://theyee.ca/Views/2006/01/30/DefendNorthwestPassage/> (“The historic consolidation is also supported by [additional] judgments of international courts. In 1975, in a dispute between Spain and Morocco over the Western Sahara, the International Court of Justice held that the historic presence of nomadic peoples can help to establish sovereignty.”). Michael Byers holds the Canada Research Chair in Global Politics and International Law at the University of British Columbia. See Crist, *supra* note 3 (featuring other material by Byers).

226. See *The Grisbadarna Case*, Hague Ct. Rep. (Scott) at 130-32 (holding that the demarcation of the maritime boundary was supported by the fact that Swedish nationals had a long history of lobster fishing in shoals of *Grisbadarna*, exercised dominion over the region, and maintained light-boats, whereas Norwegian fisherman had fished for a shorter period of time).

227. *Id.*; Jarashow et al., *supra* note 191, at 1621.

228. See *The Grisbadarna Case*, Hague Ct. Rep. (Scott) at 130-32 (holding that cession from previous sovereigns is one definitive criteria to determine sovereignty); see also Roy A. Perrin III, Comment, *Crashing Through the Ice: Legal Control of the Northwest Passage or Who Shall Be ‘Emperor of the North’*, 13 TUL. MAR. L.J. 139, 151-53 (1988) (suggesting that Canada’s Inuit population is comparable to that of the Swedish Nationals in *The Grisbadarna Case* and satisfies the first requirement set out in the decision).

229. INUIT CIRCUMPOLAR COUNCIL (CANADA), ANNUAL REPORT 2006-2007 (2008). The annual publication of the Inuit Circumpolar Council (Canada) refers to



cover of the Northwest Passage as part of their livelihood throughout their habitation,” and, therefore, bestowed sovereignty on themselves, and in turn, on Canada.<sup>230</sup> Canada’s argument for receipt of title is bolstered further by the Inuit negotiations with the Canadian government during the establishment of Nunavut.<sup>231</sup>

## 2. Today’s Canada is Upholding Administrative Control

The Canada of today is successfully asserting administrative control of the Arctic by safeguarding the ecosystem and people of the Arctic.<sup>232</sup> In line with the equitable principles of the doctrine, Canada should argue the modern principal that the nation closest to the environmental crisis will exercise the most effective control, as it has the greatest stake in the negative consequences.<sup>233</sup>

### *a. A Modernized Definition of the Term “Control”*

In the *Grisbadarna Case*, assertive control was tantamount to actual force.<sup>234</sup> It is unreasonable for any nation to assume that today’s definition of the word control is the same as that intended in

---

the Arctic as the Inuit original homeland and instructs the Canadian government and international community to continue working with the Inuit as an equal partner having a prior claim to the Arctic. *Id.*

230. Jarashow et al., *supra* note 191, at 1621.

231. MCGRATH, *supra* note 115, at 262. Canada should also assert that the discoveries made by the English and French explorers should satisfy the first element. See ROTHWELL & JOYNER, *supra* note 153, at 334 (detailing the discoveries of English and French explorers of the Northern Arctic territories). Jarashow et al., *supra* note 191, at 1622.

232. MCGRATH, *supra* note 115, at 262-63; Byers, *supra* note 225. The International Court of Justice holds that the number of occupants necessary to establish title over territory is lower in inhospitable regions than in more temperate climates, and that number is based upon what is appropriate for that region. Perry, *supra* note 7, at 673-74.

233. BREIDE & SAUNDERS, *supra* note 16, at 82 (“The activities and areas concerned should, so far as possible, engage the particular interest of a State or States likely to take a pro-conservation stance with respect to conserving biodiversity in the area. Other areas distant from coastal states should not be forgotten, but given that actual regulatory action requires the participation of states, progress is more likely to be achieved where some states see their interests as affected.”).

234. The *Grisbadarna Case* (Nor. v. Swed.), Hague Ct. Rep. (Scott) 121, 130-32 (1916).

the 1909 *Grisbadarna Case*.<sup>235</sup> Restricting Canada's argument for control to its military capabilities is both inequitable and archaic. Modern methods, including legislation, necessary military enforcement, and community action, will protect the Arctic waterways from environmental devastation and terrorism, and therefore, must comprise the new definition of control.<sup>236</sup> Canada is currently employing the above methods to defend its Arctic sovereignty.

*b. Canada's Unrivaled Environmental Control*

Canada's resources are controlled and safeguarded by comprehensive environmental protection legislation.<sup>237</sup> Most obvious is the AWPPA, which will be broadened, should Bill C-3 pass.<sup>238</sup> From a protected area perspective, several federal statutes defend Canada's Arctic waters and EEZ.<sup>239</sup> These include the Oceans Act (marine protected areas), the Canada Wildlife Act (marine wildlife areas), the Canada National Marine Conservation Areas Act (marine conservation areas), and the Migratory Birds Convention Act, 1994, which prevents vessels from depositing substances harmful to migratory birds.<sup>240</sup> The Department of Fisheries and Oceans, together with other federal departments, enacted the Federal Marine Protected Areas Strategy and The Fisheries Act to prevent overfishing and to protect breeding sites in Canada's territorial sea and internal Arctic waters.<sup>241</sup> The Canada Shipping Act of 2001 is

---

235. NATALIE MYCHAJLYSZYN, *THE ARCTIC: CANADIAN SECURITY AND DEFENSE 1* (Parliamentary Info. and Res. Serv. Pub., PRB 08-13E, 2008) (noting that the effects of climate change and technology have added another dimension to Arctic security and defense strategy).

236. See Sheppard, *supra* note 33 (quoting expert Robert Huebert's explanation of breadth of threats facing the changing Arctic).

237. CÔTÉ & DUFRESNE, *supra* note 179, at 3.

238. An Act to Amend Arctic Waters Pollution Prevention Act, 2009, Bill C-3, 40<sup>th</sup> Parl. (Can.).

239. See VANDERZWAAG ET AL., *supra* note 19, at 51-52.

240. *Id.*; see Canada National Marine Conservation Areas Act, 2002 S.C., ch. 18 (Can.); Oceans Act, 1996 S.C., ch. 31 (Can.); Migratory Birds Conventions Act, 1994 S.C., ch. 22. (Can.); Canada Wildlife Act, R.S.C. ch. W-9 (1985) (Can.).

241. CÔTÉ & DUFRESNE, *supra* note 179, at 3; VANDERZWAAG ET AL., *supra* note 19, at 51.

especially relevant to pollution control in the Arctic.<sup>242</sup> The Act regulates the management of ballast water for all vessels, including foreign ships in Canadian waters and in the EEZ, and covers pollution discharges outside of the one hundred nautical mile pollution prevention zone in Arctic waters.<sup>243</sup>

The Species at Risk Act in Canada provides a comprehensive protection plan for species that are listed as endangered or threatened, and a prevention program for species determined as vulnerable.<sup>244</sup> Environment Canada and the Canadian Wildlife Service (CWS) receive support and authority from Canada's environmental legislation.<sup>245</sup> CWS manages sixteen Migratory Bird Sanctuaries and two National Wildlife Areas in NWT and Nunavut.<sup>246</sup> Their responsibilities not only include conservation actions but also the exercise of control over the protection efforts in coastal areas.<sup>247</sup> Primary management activities include the development of management plans, the review of permit applications, and the production of public information.<sup>248</sup> The Nunavut Land Claim Agreement (NLCA) requires management plans for all CWS protected areas in the Nunavut Settlement Area, and the negotiation of Inuit Impact and Benefit Agreements for many of them.<sup>249</sup> This active involvement recognizes the importance of those indigenous peoples who have long relied on Arctic resources.<sup>250</sup> CWS does not exert a traditional military control; rather, they partner with the organizations that create energy policy and thereby, exert effective

---

242. VANDERZWAAG ET AL., *supra* note 19, at 54; Canada Shipping Act, 2001 S.C., ch. 26. (Can.).

243. *Id.*

244. Species at Risk Act, 2003 S.C., ch. 29 (Can.).

245. *See generally* Environment Canada, Legislation and Agreements, <http://www.pnr-rpn.ec.gc.ca/pollution/e00s09.en.html> (last visited Jan. 19, 2009) (providing an explanation of the programs and legislation sponsored by Environment Canada).

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* *See also* Nunavut Land Claims Agreement Act, 1993 S.C., ch. 29 (Can.).

250. *See* YOUNG, *supra* note 116, at 1475-80 (noting the importance of the Inuit's policy influence in Nunavut).

influence and control over energy resource management.<sup>251</sup> Their partners include the Renewable Resource Board, the Renewable Resource Council, wildlife co-management boards, local Hunters and Trappers Organizations, and Nunavut Tunngavik Incorporated.<sup>252</sup>

### i. The Problem of Pollution

The effectiveness of Canada's legislation is critical to Canada's exertion of environmental control. In such an exceptional ecosystem, "the emphasis [must] be on the prevention of pollution, instead of remedial measures."<sup>253</sup> As previously mentioned, the Arctic pollution problem is a focus of Canada's environmental protection legislation and a serious concern for the Canadian community. The two types of Arctic pollution, extra-regional pollution and intra-regional pollution, are almost impossible to remove.<sup>254</sup> The Arctic is especially susceptible to extra-regional sources of pollution.<sup>255</sup> The source of this type of pollution is often remote from the polar areas themselves.<sup>256</sup> Extra-regional pollution is difficult to control because the damage has generally occurred by the time the pollutant is discovered.<sup>257</sup> The persistent organic pollutants of extra-regional origin are dangerous to the indigenous population for whom the local food sources remain important dietary and cultural resources.<sup>258</sup> This type of pollution is almost impossible to remove prior to harm

---

251. See Canadian Wildlife Service, Management of Protected Areas, <http://www.mb.ec.gc.ca/nature/ecb/da02s09.en.html> (last visited Feb. 19, 2009) (explaining the goals and partners of CWS).

252. *Id.*

253. INTRODUCTION TO PROTECTING THE POLAR MARINE ENVIRONMENT: LAW AND POLICY FOR POLLUTION PREVENTION 11 (Davor Vidas ed., 2000) [hereinafter MARINE ENVIRONMENT].

254. See *id.* at 9. The term *intra-regional* pollution has been introduced in this Article to summarize the type of pollution generated within the same region it affects.

255. *Id.*

256. See *id.* (citing W. C. Camplin & M. D. Hill, *Sea Dumping of Solid Radioactive Waste: A New Assessment*, 7 RADIOACTIVE WASTE MGMT. AND THE NUCLEAR FUEL CYCLE 242 (1986) (discussing the environmental impact of the dumping of radioactive waste in the Arctic and Antarctic waters).

257. See MARINE ENVIRONMENT, *supra* note 253, at 9.

258. *Id.*

because it is consumed unknowingly by those who depend upon the Arctic ecosystem for survival.<sup>259</sup>

Intra-regional pollution is derived from activity within the Arctic itself.<sup>260</sup> Even a marginal increase in Arctic shipping or development will create intra-regional pollution within this particularly fragile ecosystem. Because the continued reduction of ice will lengthen the navigation season and increase marine access to the Arctic, Canadian regulation is necessary to guarantee an immediate response in the event of a shipping accident.<sup>261</sup>

Experts predict that the Northwest Passage will be especially vulnerable to intra-regional pollution.<sup>262</sup> The anticipated increase in industrial activities, exploration, and ship traffic will generate a disproportionate burden of pollutants entering the Passage.<sup>263</sup> The synergistic effects of the new development may result in “an increased incidence of epizootics among the marine species residing in the Northwest Passage.”<sup>264</sup> Marine mammals, “as long-lived apex consumers with high lipid content, have a [greater] potential for long-term accumulation of contaminants.”<sup>265</sup>

The impact of ship-source pollution is exacerbated in semi-enclosed seas like the Arctic Ocean.<sup>266</sup> Geography imposes hydrological limitations, which trap non-biodegradable waste in the region’s marine environment for decades.<sup>267</sup> It is, therefore, imperative that emphasis be placed on the prevention ship-source pollution.<sup>268</sup>

---

259. See ACIA, *supra* note 61, at 11 (explaining that many Indigenous peoples depend on hunting polar bear, walrus, seals, caribou, and fishing, not only for food and economic support, but for the foundation of cultural and social identity).

260. *Id.*

261. See *id.* at 82; see also Mayeda, *supra* note 169 (noting that AWPPA mandates immediate notification in the event of an accident).

262. See Cynthia T. Tynan & Douglas P. DeMaster, *Observations and Predictions of Arctic Climate Change: Potential Effects on Marine Mammals*, 50 ARCTIC 308, 317 (1997) (highlighting the Northwest Passage as a region of particular concern to environmental researchers).

263. *Id.*

264. *Id.*

265. *Id.* at 318.

266. VANDERZWAAG ET AL., *supra* note 19, at 24.

267. *Id.*

268. *Id.*

An oil spill in an ice-covered area is also exceptionally dangerous.<sup>269</sup> Thick-billed Murres, for example, suffer substantial mortality due to Arctic transport of oil.<sup>270</sup> At this time, there are no effective methods to remove hydrocarbon pollutants from ice-infested waters.<sup>271</sup> Oil spilled on or under ice cannot be cleaned by the same technologies used in warmer waters.<sup>272</sup>

## ii. The Arctic Ecosystem

When left undisturbed, the polar marine ecosystems are “among the most productive ecosystems in the world.”<sup>273</sup> Given the harsh Arctic climate, this fact may seem counterintuitive; however, polar waters are particularly conducive to marine life.<sup>274</sup> When compared to warmer waterways, Arctic temperatures better support the necessary nutrient growth.<sup>275</sup> In addition, the subtle temperature fluctuations direct the seasonal bloom of ice algae, thus balancing the migration and breeding patterns at every level of the food web.<sup>276</sup> However, the equilibrium of the Arctic ecosystem is uniquely vulnerable to both climate change and human interference.<sup>277</sup>

The direct effect of climate change and Arctic development is the loss of ice-associated habitats.<sup>278</sup> This change most affects Arctic pinnipeds, as they depend on ice-pack for pupping, foraging, and resting.<sup>279</sup> Polar bears, which prey on pinnipeds, are also suffering

269. See MARINE ENVIRONMENT, *supra* note 253, at 11.

270. Canadian Wildlife Service, Population Dynamics of Thick-Billed Murres, <http://www.mb.ec.gc.ca/nature/ecb/da02s18.en.html> (last visited Jan. 19, 2009).

271. VanderZwaag, *supra* note 253, at 27.

272. *Id.*

273. MARINE ENVIRONMENT, *supra* note 253, at 10-11.

274. See *id.* (noting that colder waters are especially rich in the nutrients essential to marine life).

275. *Id.*

276. See Tynan & DeMaster, *supra* note 262, at 914 (explaining that ice algal cells initiate a seasonal bloom of phytoplankton, which sustains the secondary production required to support High Arctic marine mammals).

277. See *id.* at 11.

278. See *id.* at 312.

279. *Id.* The primary Arctic pinnipeds are the ringed seal, bearded seal, and the Walrus. *Id.* The Ringed Seal requires snow cover and fast ice in order construct a pupping lair. *Id.* In contrast, both the bearded seal and the walrus require ice thick enough to hold their weight, yet thin enough to puncture, creating a breathing hole. *Id.* at 313.

from a diminished habitat.<sup>280</sup> They are the only marine mammal habitually occupying landfast coastal sea ice.<sup>281</sup>

An altered habitat subsequently causes indirect effects, felt at every level of the food web.<sup>282</sup> Sympagic communities are especially vulnerable to these effects, which include shifts in prey availability, reproductive cycles, and migration patterns.<sup>283</sup> The availability of prey in the sympagic community fluctuates with the slightest environmental change.<sup>284</sup> Because the Arctic has a relatively low number of species, and each species maintains a large population, the food chains of Arctic marine species are characteristically short.<sup>285</sup> The following, an example of the food web operating in the Baffin Bay, illustrates the interdependence of each Arctic species.<sup>286</sup> Beginning at the secondary production level, ice algae mats prompt the bloom of phytoplankton, which becomes the principal food of the arctic cod.<sup>287</sup> The arctic cod is the pivotal species in the food web because it supports the belugas, narwhals, harp seals, ringed seals, bearded seals, and hooded seals.<sup>288</sup> The polar bear is then at the highest trophic level, preying on other marine mammals.<sup>289</sup>

Arctic conditions require that each species has a short, site-specific breeding season.<sup>290</sup> Degradation of the Arctic environment will result in irreparable damage, because these species cannot easily “relocate” to another area.<sup>291</sup> For example, the Nirjutiqavvik National Wildlife Area is essential because it protects the primary nesting site of Northern Fulmars, Black-legged Kittiwakes, and

---

280. John M. Broder & Andrew C. Revkin, *Warming May Wipe Out Most Polar Bears*, *Study Says*, N.Y. TIMES, Sept. 8, 2007, at A11, (melting ice is causing irreparable harm to the polar bear habitat, access to food, and breeding sites).

281. *Id.*; Tynan & DeMaster, *supra* note 262, at 312.

282. Tynan & DeMaster, *supra* note 262, at 312.

283. *Id.* at 312-14 (defining a “sympagic” environment as where water exists mostly as solid ice).

284. *Id.*; MARINE ENVIRONMENT, *supra* note 253, at 11.

285. MARINE ENVIRONMENT, *supra* note 253, at 11.

286. Tynan & DeMaster, *supra* note 262, at 314.

287. *Id.*

288. *Id.*

289. *Id.* at 312.

290. MARINE ENVIRONMENT, *supra* note 253, at 11.

291. *Id.*

Thick-billed Murres.<sup>292</sup> Like other Arctic animals, aspects of Thick-billed Murre breeding biology, including diet, timing of laying, adult mass, and chick growth are dependent upon environmental stability.<sup>293</sup> Furthermore, researchers predict that the opening of the Canadian Arctic may alter the gene flow within marine species, thereby reducing the genetic diversity.<sup>294</sup> A particular concern is for the beluga whale.<sup>295</sup> Scientists speculate that “a lengthening in the open-water season in the Canadian Arctic Archipelago might alter the timing and geographical patterns of seasonal migrations as well as the time spent in select summering or wintering grounds.”<sup>296</sup> “Sufficient changes in beluga behavior may promote genetic exchange between stocks,” yielding uncertain consequences.<sup>297</sup>

Scientists agree that on-site, risk-adverse management strategies must be implemented within the Canadian Arctic.<sup>298</sup> Special protection and research must be afforded to “indicator species,” such as the beluga whale and the polar bear, because the condition of an indicator species reflects the condition of the Arctic at large.<sup>299</sup> The Canadian government is demonstrating its vested interest in Arctic preservation by providing the recommended on-site monitoring of its indicator species. The beluga, recently named a Species of Special Concern, is now being closely monitored, and is under consideration for addition to its Species at Risk Act.<sup>300</sup> The 2008 assessment by the

---

292. Canadian Wildlife Service, Field Projects: Key Habitat Sites, <http://www.pnr-rpn.ec.gc.ca/nature/ecb/da02s09.en.html> (last visited Jan. 19, 2009).

293. *Id.*

294. Tynan & DeMaster, *supra* note 262, at 317.

295. *Id.* Populations of belugas in the Mackenzie Delta (Beaufort Sea) and Arviat (West Hudson Bay) regions have been genetically separate for 3900 years. *Id.*

296. *Id.* (“At present, the eastern Canadian stock of belugas arrives in the High Arctic in late June and early July and migrates westward through Lancaster Sound to summering areas in the Canadian Arctic Archipelago. From the opposite direction, in the southern Beaufort Sea, male belugas have been tracked as far northward and eastward as Viscount Melville Sound in the summer returning to the Bering Sea during the winter.” (citation omitted)).

297. *Id.*

298. *Id.* at 318.

299. *See generally* Tynan & DeMaster, *supra* note 262 (providing a comprehensive discussion of marine mammals as indicator species).

300. *See* Fisheries and Oceans Canada, The Beluga Whale (Eastern High Arctic-Baffin Bay), <http://www.dfo-mpo.gc.ca/species-especies/species-especies/beluga-east-beluga-est-eng.htm> (last visited Jan. 9, 2010).



Committee on the Status of Endangered Wildlife in Canada (COSEWIC) classified the polar bears' status as "special concern."<sup>301</sup> During Bill C-3's Second Reading in the House of Commons, Member of Parliament Don Davis made the following remark about the broader implications of the polar bear crisis and its importance as an indicator species, "What is most alarming about the threats to this species is that it exists at the highest level of the food chain. If we have problems at that level of higher order mammals, that is a harbinger of deep problems environmentally in the north."<sup>302</sup>

This depth of understanding is the reason Canadians are more likely to take a step towards protection and control than their American neighbors.<sup>303</sup> The management of polar bears in Canada is the responsibility of the specific provincial and territorial governments in which they live.<sup>304</sup> However, two national committees, comprised of technical experts and senior wildlife managers, are meeting to review research results and to consider the addition of the polar bear as a "species at risk."<sup>305</sup> This is a sharp contrast to the American agenda.<sup>306</sup> The state of Alaska, in a decision announced by Governor Sarah Palin, is currently suing the United States Secretary of the Interior in an attempt to remove polar bears from the Threatened Species list under the US Endangered

---

301. Committee on the Status of Endangered Wildlife in Canada, Bear, Polar, [http://www.cosewic.gc.ca/eng/sct1/searchdetail\\_e.cfm?id=167&StartRow=1&boxStatus=All&boxTaxonomic=All&location=All&change=All&board=All&commonName=polar%20bear&scienceName=&returnFlag=0&Page=1](http://www.cosewic.gc.ca/eng/sct1/searchdetail_e.cfm?id=167&StartRow=1&boxStatus=All&boxTaxonomic=All&location=All&change=All&board=All&commonName=polar%20bear&scienceName=&returnFlag=0&Page=1) (last visited Jan. 9, 2010). As a result of Arctic development and climate change, scientists predict that two-thirds of the world's polar bear population will disappear by 2050. Justin Olsson, Comment, *The Future of the Polar Bear Rests on Thin Ice: Listing Under the ESA and Its Impacts*, 8 SUSTAINABLE DEV. L. & POL'Y 46, 46 (2007).

302. HOUSE OF COMMONS DEBATES (Hansard), 018 (Feb. 25, 2009) at 1550 (Mr. Don Davies) (Can.), available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=40&Ses=2&DocId=3694590&File=0>.

303. Martha Neil, *Alaska Sues Feds Over Polar Bear Listing as Threatened Species*, A.B.A. J., Aug. 5, 2008, [http://abajournal.com/news/alaska\\_sues\\_feds\\_over\\_polar\\_bear\\_listing\\_as\\_threatened\\_species/](http://abajournal.com/news/alaska_sues_feds_over_polar_bear_listing_as_threatened_species/).

304. Species at Risk Act Public Registry, Polar Bear, [http://www.sararegistry.gc.ca/species/speciesDetails\\_e.cfm?sid=167](http://www.sararegistry.gc.ca/species/speciesDetails_e.cfm?sid=167) (last visited Jan. 19, 2009).

305. *Id.*

306. See Neil, *supra* note 303.

Species Act because protection will interfere with oil and gas drilling.<sup>307</sup>

*c. Canada is Enforcing its Regulations*

It is, therefore, both reasonable and environmentally responsible for the Canadian government to insist upon the freedom to govern all shipping, harvesting of resources, and exploration within this region.<sup>308</sup> Canada's insistence is proving successful. Transport Canada, Fisheries and Oceans, the Canadian Coast Guard, Environment Canada, and the Department of National Defense and Justice Canada are working together to administer effective control over ship-source marine pollution in Canadian waters.<sup>309</sup> Recently, a fuel barge operated by the Northern Transportation Company Ltd. pled guilty to a charge under AWPPA for unlawfully depositing waste, oil or an oil mixture into Arctic Waters.<sup>310</sup> Following an investigation by Transport Canada, a court in Kugluktuk, Nunavut fined the company \$10,000 for spilling 1,000 liters of diesel fuel into the Coronation Gulf near Nunavut.<sup>311</sup> In February of 2009, the vessel BBC Nordland spilled 300 liters of oil and was ordered to pay a \$15,000 penalty for illegally discharging a pollutant in Canadian waters.<sup>312</sup> As explained above, the consequences of an oil spill can have a devastating environmental impact.<sup>313</sup> Canada's willingness to enforce their environmental regulations should certainly be considered "administering control" within Historic Consolidation of Title, and there can be no question that the added reporting provisions under NORDREG will enhance Canada's control over the Arctic waters.<sup>314</sup>

---

307. *Id.*

308. *See* Byers, *supra* note 225.

309. Press Release, Transport Canada, Marine Polluter Penalized \$15,000 for Oil Spill (Feb. 13, 2009), *available at* <http://www.tc.gc.ca/mediaroom/releases/atl/2009/09-a001e.htm>.

310. Press Release, Transport Canada, Arctic Marine Polluter Edgar Kotokak Fined \$10,000 (July 7, 2008), *available at* <http://www.tc.gc.ca/mediaroom/releases/pnr/2008/08-pn059e.htm>.

311. *Id.*

312. Press Release, *supra* note 309.

313. *Id.*; MARINE ENVIRONMENT, *supra* note 253, at 11.

314. Canadian American Strategic Review: Standing Senate Committee on Fisheries and Oceans Report on the Canadian Coast Guard, Icebreakers, and Arctic

Equally important to a strong Arctic voice in Parliament is the role of the Inuit in Canada's national security.<sup>315</sup> The Canadian Rangers, comprised almost solely of Inuit and First Nations members, are part-time reservists who provide a military presence in the Arctic region.<sup>316</sup> This unit was revitalized in 2006, and today there are nearly 5,000 Rangers across Canada.<sup>317</sup> In response to the March 2009 Russian aggression, the number of Canadian Rangers will be increased to "improve surveillance and response capabilities and expand overall presence in the North."<sup>318</sup> The Canadian Rangers strengthen Canada's strategic capabilities in the North because they operate in areas which cannot be conveniently or economically patrolled by other branches of the Canadian Forces.<sup>319</sup> The Rangers are responsible for protecting Canada's sovereignty by reporting unusual activities, collecting local data of significance for the Canadian Forces, leading Northern Warning System patrols, and conducting surveillance and sovereignty patrols.<sup>320</sup> The national security role of the Canadian Rangers is so critical that Yukon, in response to the current sovereignty crisis, is amending its Employment Standards Act to provide job protection for Rangers who take time from work for military service.<sup>321</sup>

---

Sovereignty, (June/Aug. 2008), <http://www.casr.ca/doc-dfo-senate-arctic-1.htm>, (last visited Jan. 19, 2009) [hereinafter Strategic Review].

315. See MYCHAJLYSZYN, *supra* note 235, at 4; see also Perry, *supra* note 7, at 672-73.

316. See Canadian Army, *Canadian Rangers*, <http://www.armee.forces.gc.ca/land-terre/cr-rc/index-eng.asp> (last visited Feb. 10, 2010) [hereinafter Canadian Rangers].

317. *Id.*; see MYCHAJLYSZYN, *supra* note 235, at 4.

318. *Russia Plans Arctic Military Force*, CANADIAN PRESS, Mar. 27, 2009 (quoting National Defence and Canadian Forces Communications director, Dan Dugas).

319. *Id.*; Canadian Rangers, *supra* note 316.

320. *Id.*

321. CBC News, *Rangers Get Job Protection as Sovereignty Issue Heats Up*, Mar. 27, 2009, CBC.CA, <http://www.cbc.ca/canada/north/story/2009/03/27/yukon-rangers.html> (noting that legislation makes it an both an offense to refuse to hire workers because of their Ranger service, and an offense to fire, demote, or discipline workers who take time off for Ranger service).

### 3. Peaceful Possession by the Inuit

The final factor to establish Canadian sovereignty is the *Grisbadarna Case* requirement demonstrating peaceful possession by the natural inhabitants.<sup>322</sup> Canada not only answers this requirement, it goes above and beyond. The natural inhabitants, or indigenous people, are the same individuals who both live peacefully in the Arctic and act as Canada's frontline for Arctic security and control.<sup>323</sup>

Members of First Nations, Métis, and Inuit are the natural inhabitants of Canada and have a longstanding dependence on Arctic resources.<sup>324</sup> Because "sovereignty is held important if it is sought to ensure the welfare of people who inhabit a region," the protection of the indigenous economy and overall vitality is essential to Canada's successful assertion of Arctic sovereignty.<sup>325</sup> In prior years, the Inuit Relocation, poor economic conditions in Arctic communities and lack of Parliamentary representation have all but negated Canadian claims under Consolidation of Historic Title.<sup>326</sup> However, the Inuit and the Canadian government have made great strides in repairing their relationship.<sup>327</sup> The Inuit are now actively involved in the governance, security, and welfare of not just the Arctic, but all of Canada.<sup>328</sup> The Confederation of Nunavut solidifies Canada's sovereignty claim because Canadian law is now applied throughout the territory.<sup>329</sup> As previously stated, a regional court in Nunavut successfully enforced the federal AWAPPA regulations against Arctic polluters, and this was made possible by cooperation between the residents of Nunavut, Transport Canada, and the Canadian Coast

---

322. The *Grisbadarna Case* (Nor. v. Swed.), Hague Ct. Rep. (Scott) 121, 130-32 (1916).

323. Perry *supra* note 7, at 672-73.

324. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, ch. 11.

325. Perry, *supra* note 7, at 675.

326. *Id.* at 674-76.

327. MCGRATH, *supra* note 115, at 262-63. See generally ROYAL COMMISSION ON ABORIGINAL PEOPLES, REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES, VOL. I: LOOKING FORWARD, LOOKING BACK (1996) (discussing Canada's past treatment of its indigenous population and its plans to rebuild a positive relationship).

328. MCGRATH, *supra* note 115 at 262-63.

329. Nunavut Act, 1993 ch. 28, s. 2; 1998, ch.15 (Can.).

Guard.<sup>330</sup> The application of Canadian law in Nunavut guarantees government funding, representation in Parliament, and most importantly, validates Canadian control in the Arctic region.<sup>331</sup>

The Canadian Government also advocates for Inuit culture and welfare on the international stage.<sup>332</sup> For generations, the Canadian Inuit have hunted seals and exported seal products, contributing approximately \$13 million to the Northern economy.<sup>333</sup> In 2009, the European Union introduced a ban on seal products.<sup>334</sup> Prior to this ban's enactment, the Canadian government introduced new seal hunting regulations.<sup>335</sup> The purpose was to simultaneously meet the EU's standard for a humane hunt and, at the same time, preserve the cultural traditions and source of funding for their Inuit citizens.<sup>336</sup> While not completely satisfactory to either group, the regulations worked to preserve peace between the Canadian government and the EU as well as between Canada's government and its citizens.<sup>337</sup> As a result of Canadian lobbying for the Inuit, the EU ban included an exception for seal products from the Canadian Inuit.<sup>338</sup> The Canadian Environment Minister has promised the Inuit continued negotiations with the EU to ensure that their sale of seal products remains profitable, while implementing the humane hunting standards expected by the global community.<sup>339</sup>

Finally, the Canadian Rangers play an important role in advancing public recognition of Canada's First Nations and Inuit groups.<sup>340</sup> They are widely known for their frequent selfless contributions to their communities,<sup>341</sup> including participation in The Junior Canadian

---

330. Press Release, *supra* note 310.

331. Perry, *supra* note 7, at 675-76.

332. CBC News, *Inuit Denounce Proposed EU Seal-Products Ban Despite Exemption*, CBC.CA, Mar. 5, 2009, <http://www.cbc.ca/canada/north/story/2009/03/05/seal-ban.html>; Jeff Davis, *New Seal Regs Aim to Stave off EU Ban*, EMBASSYMAG.CA, Jan. 14, 2009, <http://www.embassymag.ca/page/printpage/sealhunt-1-14-2009>.

333. *See* Davis, *supra* note 333.

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. Canadian Rangers, *supra* note 316.

341. *Id.*

Rangers program.<sup>342</sup> The Program is funded by the Department of National Defense and the Canadian Forces, Indian and Northern Affairs Canada and private corporations,<sup>343</sup> and provides a positive alternative to over 4,000 “at-risk” youth in remote and isolated communities.<sup>344</sup>

The traditional livelihood and culture of the Inuit is of vital interest to the coastal state of Canada, and the welfare of the Inuit community is inextricably linked to the health of the marine environment and Canadian national security.<sup>345</sup> Therefore, Canadian title to the Arctic Archipelago arises out of its administrative control over these waters and its longstanding commitment to protect its vital state interests.<sup>346</sup> For these reasons, Canada is in a position to rely on Historic Consolidation of Title as a subsidiary basis in order to consolidate the title resulting from Canada’s use of the straight baseline system.<sup>347</sup>

## VII. CONCLUSION

The melting Arctic waterways will soon provide unfettered access to natural resources, and this access will cause irreparable environmental harm unless carefully regulated. The Canada of today has demonstrated the desire and genuine ability to preserve the Arctic. This commitment is unlike anything the international community has seen from Canada previously. Canada is implementing policies and practices which not only prove that Canada is best suited to protect its Northern Region, but also that it can now assert a sovereignty claim sustainable at international law. Canada has long established the validity of its straight baselines, and the international community must recognize Canadian sovereignty over the Arctic Archipelago. However, Title by Historic

---

342. National Defence and the Canadian Forces, Junior Canadian Rangers: Overview, <http://www.rangers.dnd.ca/ove-ape/index-eng.asp> (last visited Mar. 6, 2009).

343. *Id.*

344. *Id.*

345. See PHARAND, *supra* note 14, at 176-77 (noting that the Inuit’s dependence on marine resources is an integral part of their culture and livelihood); see *id.* at 177 (discussing Canada’s vulnerability to submarines in the Northwest Passage should it not be considered sovereign waters).

346. *Id.* at 178.

347. *Id.* at 145-46.

Consolidation is now a crucial subsidiary argument for Canada. First, the longstanding occupation of the Arctic by indigenous persons and the negotiations with the Inuit during the confederation of Nunavut arguably provide for the passing of title from the Inuit to the State of Canada. Second, Canada can and *is currently* enforcing administrative control over the Arctic waterways. The definition of control must be modernized to include environmental and cultural preservation. The latest amendment to AWPPA is just one example of Canada's willingness to assert control within the international community. Canada's argument is more persuasive today than ever before because those assisting in administering control are also the natural inhabitants of the Arctic. The confederation of Nunavut ensures that Canadians living in the North have a political presence in Ottawa, an advocate on the international stage, and a unique role in sovereignty protection via the Canadian Rangers. Those nations who question Canada's commitment to enforcing sovereignty or want only to consume resources from a distance must submit to a new, equitable direction in sovereignty determination. Canada is the Arctic nation facing the greatest risk of harm from overexploitation and increased shipping. Canada, therefore, is in the best position to scrutinize the harvest of resources, protect the backyards of Arctic Canadians, and effectively voice concerns for today's Arctic.