

**CANADA-U.S. RELATIONS IN THE ARCTIC:
A NEIGHBOURLY PROPOSAL**



Canadian Defence
& Foreign Affairs
Institute

www.cdfai.org

Canada-U.S. Relations in the Arctic: A Neighbourly Proposal

By

Brian Flemming, CM, QC, DCL

Fellow of the Canadian Defence & Foreign Affairs Institute

and

Honorary Fellow, Marine and Environmental Law Program
Dalhousie Law School

December, 2008

Prepared for the Canadian Defence & Foreign Affairs Institute
1600, 530 – 8th Avenue SW, Calgary, AB T2P 3S8

www.cdfai.org

© Canadian Defence & Foreign Affairs Institute

Other Publications Written For Or Assisted By:

The Canadian Defence & Foreign Affairs Institute

President Al Gore and the 2003 Iraq War: A Counterfactual Critique of Conventional “Wisdom”

Frank Harvey
November, 2008

Canada and the United States: What Does it Mean to be Good Neighbours?

David Haglund
October, 2008

Redeployment as a Rite of Passage

Anne Irwin
April, 2008

The 2007 Ross Ellis Memorial Lectures in Military and Strategic Studies: Is there a Grand Strategy in Canadian Foreign Policy?

David Pratt
March, 2008

Military Transformation: Key Aspects and Canadian Approaches

Elinor Sloan
December, 2007

CFIS: A Foreign Intelligence Service for Canada

Barry Cooper
November, 2007

Canada as the “Emerging Energy Superpower”: Testing the Case

Annette Hester
October, 2007

A Threatened Future: Canada’s Future Strategic Environment and its Security Implications

J.L. Granatstein, Gordon S. Smith, and Denis Stairs
September, 2007

Report on Canada, National Security and Outer Space

James Fergusson and Stephen James
June, 2007

The Information Gap: Why the Canadian Public Doesn’t Know More About its Military

Sharon Hobson
June, 2007

Conflict in Lebanon: On the Perpetual Threshold

Tami Amanda Jacoby
April, 2007

Canada in Afghanistan: Is it Working?

Gordon Smith
March, 2007

Effective Aid and Beyond: How Canada Can Help Poor Countries

Danielle Goldfarb
December, 2006

The Homeland Security Dilemma: The Imaginations of Failure and the Escalating Costs of Perfecting Security

Frank Harvey
June, 2006

An Opaque Window: An Overview of Some Commitments Made by the Government of Canada Regarding the Department of National Defence and the Canadian Forces; 1 January 2000 – 31 December 2004

David J. Bercuson, Aaron P. Plamondon, and Ray Szeto
May, 2006

The Strategic Capability Investment Plan: Origins, Evolution and Future Prospects

Elinor Sloan
March, 2006

Confusing the Innocent with Numbers and Categories: The International Policy Statement and the Concentration of Development Assistance

Denis Stairs
December, 2005

In the Canadian Interest? Assessing Canada's International Policy Statement

David J. Bercuson, Derek Burney, James Fergusson, Michel Fortmann/Frédéric Mérand, J.L. Granatstein, George Haynal, Sharon Hobson, Rob Huebert, Eric Lerhe, George Macdonald, Reid Morden, Kim Richard Nossal, Jean-Sébastien Rioux, Gordon Smith, and Denis Stairs
October, 2005

The Special Commission on the Restructuring of the Reserves, 1995: Ten Years Later

J.L. Granatstein and LGen (ret'd) Charles Belzile
September, 2005

Effective Defence Policy for Responding to Failed And Failing States

David Carment
June, 2005

Two Solitudes: Quebecers' Attitudes Regarding Canadian Security and Defence Policy

Jean-Sébastien Rioux
February, 2005

In The National Interest: Canadian Foreign Policy in an Insecure World

David J. Bercuson, Denis Stairs, Mark Entwistle, J.L. Granatstein, Kim Richard Nossal, and Gordon S. Smith
October, 2003

Conference Publication: Canadian Defence and the Canada-US Strategic Partnership

September, 2002

To Secure A Nation: The Case for a New Defence White Paper

David J. Bercuson, Jim Fergusson, Frank Harvey, and Rob Huebert
November, 2001

Publications are available at www.cdfai.org or call Katharine McAuley at (403) 231-7624

EXECUTIVE SUMMARY

Canada and the United States have been at legal loggerheads for years over the status of the North West Passage through the Arctic Ocean. Now that the Passage has been open for the past two summers, and with more and more unregulated transits going through the Passage, this paper argues it is time for these North American neighbours to set aside their formal legal claims and return to a time when bilateral agreements of cooperation were more common between them. The election of new governments in Ottawa and Washington will open the door to new cooperative initiatives such as creation of a treaty-based North West Passage Authority that will allow Canada and the U.S. to manage the Passage – jointly as they do the Great Lakes and the St. Lawrence Seaway. The paper reviews in detail how such a negotiation might proceed if it is to be successful.

RÉSUMÉ

Le Canada et les États-Unis sont depuis des années à couteaux tirés concernant le statut juridique du passage du Nord-Ouest par l'océan Arctique. Maintenant que le passage a été ouvert pendant les deux derniers été, et avec de plus en plus de transits non réglementés qui se font à travers le passage, cet article fait valoir qu'il est temps que ces voisins nord-américains mettent de côté leurs réclamations juridiques formelles et retournent à une époque où les ententes de coopération bilatérales étaient plus coutumières entre eux. L'élection de nouveaux gouvernements à Ottawa et à Washington ouvrira la porte à de nouvelles initiatives de coopération, comme la création d'une Autorité du passage du Nord-Ouest fondée sur un traité, qui permettra au Canada et aux États-Unis de gérer le passage conjointement, comme ils le font pour les Grands Lacs et la Voie maritime du Saint-Laurent. L'article examine en détail comment une telle négociation pourrait procéder pour réussir.

“Ah, for just one time I would take the Northwest Passage, To find the hand of Franklin reaching for the Beaufort Sea. Tracing one warm line through a land so wild and savage, And make a northwest passage to the sea.”

The late Nova Scotia folksinger, Stan Rogers, wrote those haunting words in 1981 in his song, *Northwest Passage*. If Rogers, who died in a 1983 Air Canada plane crash in Cincinnati,¹ were with us today, he would be astonished that the fabled Passage, that took the lives and treasure of Franklin and many other brave explorers, had been open for the past two summers. Indeed, for the first time in history, a ring of navigable waters has opened all around the fringes of the warming Arctic Ocean so that the North West Passage over North America and the North East Passage over Russia have opened simultaneously.²

Whether one's environmental belief system maintains that the disappearance of the ice sheet of the Arctic Ocean is a normal cyclical occurrence in our planet's extraordinarily complex weather patterns, or is due to the sun's influence, or whether one believes the warming in the Arctic is being caused by human-generated carbon that inexorably leads to “climate change” or “global warming”, or both, the stark fact is that Arctic ice is disappearing at a rate far faster than even the most pessimistic observers predicted. The resulting summertime openings of the North West Passage in 2007 and 2008 have suddenly transformed the Arctic Ocean into a political, military and diplomatic football for Canada and all the other “Arctic powers.” Stories and opinions about the Arctic, once rare, are becoming increasingly common in the media. Cruise ships and smaller private vessels are beginning to transit the Passage. Advertisements for tourist “expeditions” through the Passage are routinely being carried in Canadian newspapers.

In mid-October, 2008, the third annual “Arctic Report Card” was released by 46 scientists from 10 countries. This annual statement examines a variety of conditions occurring in the Arctic which, the group says, is the region in the world that “has long been expected to be among the first areas to show the impacts from global warming.”³ One of the report card's authors, Dr. James Overland, said:

Changes in the Arctic show a domino effect from multiple causes more clearly than in other regions. It's a sensitive system and often reflects changes in relatively fast and dramatic ways.⁴

Dr. Overland admitted there were discernable cycles of warming and cooling in the Arctic in recent years and that the world was currently in the midst of a cooler cycle in some areas of the Arctic; however he said that cycle would inevitably end soon and revert to a warming trend. The reality, then, is that the Arctic Ocean is melting quickly, with the area covered by ice shrinking by more than 1.5 million square kilometres in recent years, thereby reducing the Arctic icecap to half the size it was in the mid-20th century.

Prime Minister Stephen Harper's focus on Canada's “sovereignty” in the Arctic during his first term in office has put this country's northern claims squarely on the policy table. But, simultaneously, this prime ministerial focus has also had the effect of revealing how poorly prepared Canada was, and is, to protect or project that sovereignty. Canada is not alone. As

¹ On a flight from Dallas to Toronto, via Cincinnati, within hours of the Air Canada DC-9 crash that took Rogers' life, the author saw the smouldering hulk of the plane in which he died, still on the runway.

² Throughout this paper, the phrase “North West Passage” will be used in preference to “Northwest Passage.”

³ Associated Press story by Randolph E. Schmid, carried in *The Globe and Mail*, October 18, 2008, p. A11.

⁴ *Ibid.*, Quote from Dr. James Overland of the Pacific Marine Environmental Laboratory, Seattle.

one American expert testified on April 8, 2008, to the Canadian Senate Standing Committee on Fisheries and Oceans:

[America has] allowed our icebreaker fleet to atrophy into effectively one light ship and [we] have no plans as of yet to build new ones...We have virtually no Alaskan north shore presence...and significantly we have no equivalent of [Canada's] Arctic Waters Pollution Prevention Regulations.⁵

Most importantly, Canada's closest neighbour and ally, the United States of America, not only challenges Canada's claim that the North West Passage runs mostly through Canadian "internal waters," but also worries – behind the scenes in a post-9/11 world – about the security holes a warming Arctic may punch in the perimeter protecting North America from violent extremists, illegal immigrants or drug lords.⁶ The swearing in of a new American administration in 2009 under president-elect Barack Obama will give Canada an unparalleled opportunity to cooperate more closely with America in scientific studies in the Arctic and perhaps allow the two countries to negotiate a new legal regime for the North West Passage, a regime that will accommodate key foreign policy goals in both Ottawa and Washington. Indeed, in the summer of 2008, the following statement by Obama was posted on the Internet:

The oceans are a global resource and a global responsibility for which the U.S. can and should take a more active role. I will work actively to ensure that the U.S. ratifies the Law of the Sea Convention – an agreement supported by more than 150 countries that will protect our economic and security interests while providing an important international collaboration to protect the oceans and its resources.⁷

Once back in his Senate seat, former Republican presidential candidate, John McCain, might revert to his historic position of support for ratification of the multilateral treaty that emerged from the Third United Nations Conference on the Law of the Sea ("UNCLOSIII"). McCain flip-flopped to a negative position during the recent election campaign to appease the conservative base of his party.

The creation by bilateral treaty of a new international institution – the North West Passage Authority (NWPAA) – would require Canada to set aside, but not give up legally, its claim that most of the Passage lies within Canada's internal waters. On the American side, there would have to be a suspension, but not a legal surrender, of the U.S. claim that the Passage is an "international strait" under international law. The setting aside of these current claims could herald a renewed, 21st century period of cooperation between Canada and the United States. Diplomatic success in negotiating such an agreement could pave the way for successful negotiations on other issues that have been "on ice" between Canada and the U.S. during the presidency of George W. Bush. The importance of reviving the old, historic relationship between Canada and the United States was urged by Professor Robert A. Pastor this summer when he outlined his idea for a new "North American Community" that would "lay the foundation for a new North America."⁸ Success in negotiating a new Arctic arrangement will start Canada and the U.S. down the trail towards this goal and will perhaps

⁵ Testimony of Dr. Scott G. Borgerson, International Affairs Fellow, Council of Foreign Relations, New York, to the Canadian Standing Committee on Fisheries and Oceans, Ottawa, April 8, 2008, p. 3.

⁶ *New York Times*, October, 2008, *passim*. The EU and China also challenge Canada's claim to the North West Passage.

⁷ See <http://sharp.sefora.org>.

⁸ Robert A. Pastor, "The Future of North America: Replacing a Bad Neighbour Policy," *Foreign Affairs*, July/August, 2008, pp. 84-98.

put paid to dark suggestions such as the one made by a former U.S. Coast Guard Lieutenant Commander, Scott G. Borgerson, when he said:

Without U.S. leadership to help develop diplomatic solutions to competing [Arctic] claims and potential conflicts, the [Arctic] region could erupt in an armed mad dash for its resources.⁹

I. Canada and the Arctic

Despite having long coastlines fronting on three oceans, Canada has rarely conceived itself to be a “maritime power.” More than half of Canada’s current population lives in the “Kingdom of the St. Lawrence and the Great Lakes.” Indeed, most Canadians live in a “Chile turned sideways” that lies within a few hundred kilometres of the American-Canadian border. The approximately 40 per cent of Canada’s land mass that lies north of 60 degrees of latitude is home to only 100,000 people. The “North” has not often entered the collective consciousness of Canadians who live “in the south” throughout history. Prime Minister John Diefenbaker excited Canadians in election campaigns with his “vision” for the North but, once in office, he did not follow up with specific northern legislation. Other PMs – notably Pierre Trudeau and Brian Mulroney – also made desultory policy pronouncements on northern issues.”¹⁰

When Harper outlined his own vision for the North, he crudely suggested that Canada should “use it or lose it” in the Arctic, meaning Canada should assert its sovereignty there in some meaningful way, or risk being shunted to one side by other countries possessing greater scientific knowledge of the North or having the technology to move around the North with or without our permission (or even our knowledge in the case of submersibles). At one point, Harper said: “Sovereignty over one’s territory is not a theoretical concept. It is earned and retained by being present, by having planes in the air, ships in the sea and, most importantly, boots on the ground.” What Harper should have pointed out when he took his important initiative was that the Inuit, who make up the majority of Arctic Canadians, are really a “maritime people” who, for millennia, have lived on the frozen sea ice of the North. Harper should have, more poetically, said “mukluks on the ice,” rather than the overly militaristic “boots on the ground.” The Inuit, who are all Canadian citizens, have long given credibility, not to speak of legal support, to Canada’s claim over the hitherto frozen sea of the North West Passage. The Inuit have indeed been “using” the frozen Arctic Ocean for millennia and are the ones with the most to lose when it disappears.¹¹ It is important to remember that the islands – i.e. the land masses – in the archipelagos that make up the geographic context for the North West Passage are clearly Canadian territory. Great Britain ceded the ownership of these islands to Canada in 1880 and no country – except for Denmark with regard to Hans Island – has ever disputed Canada’s claim over them.

II. The UNCLOSIII Legal Regime

During the late 1970s and early 1980s, when the UNCLOSIII treaty was being negotiated and signed, creating an international legal regime for the Arctic Ocean was far from the minds of most countries participating in that negotiation.¹² No one ever dreamed the North West and North East Passages would be open in the early 21st century. Only because a

⁹ Scott Borgerson, “Arctic Meltdown: The Economic and Security Implications of Global Warming,” *Foreign Affairs*, March/April, 2008, p. 64.

¹⁰ Prime Minister Harper’s decision to name Canada new super-icebreaker, the CCGS “John G. Diefenbaker” was inspired.

¹¹ See Michael Byers, “Intent for a Nation,” Douglas & McIntyre, Vancouver, 2007, ch. 7.

¹² The author was, for a number of years in the 1960s and 1970s, a member of the Federal Government’s Advisory Committee on Marine and Environmental Conferences, a group of international lawyers that was chaired by Prof. Maxwell Cohen. Other members included: Prof. Douglas Johnston and Prof. Donat Pharand.

Canadian, Ambassador Alan Beesley, was chairman of the UNCLOSIII drafting committee was one article about the north even included in the treaty. It was Article 234 on ice-covered waters, the so-called “Canadian exception.” It reads as follows:

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

Beasley, one of Canada’s most accomplished diplomats ever, was one of Pierre Trudeau’s advisors when, following the transit of the American ship M/V “Manhattan” through the North West Passage in 1969, Parliament adopted the *Arctic Waters Pollution Prevention Act*. This legislation established a 100-mile-wide pollution protection zone at either end of the Passage. This zone prefigured the establishment of the 200-mile-wide exclusive economic zone around all the world’s land masses that is contained in the UNCLOSIII treaty. After lying dormant for nearly 40 years, Harper finally proposed the update of that statute by extending Canada’s Arctic pollution protection limit to 200 miles. Only in recent years, as more attention began to be paid to the Arctic Ocean, has Article 234, and other articles, in the UNCLOSIII treaty begun to assume “an Arctic applicability.” The problem now is that many of these articles fall short of giving countries a clear chart for making valid, defensible international claims. But they do provide a solid legal base for any bilateral arrangements on maritime issues between Canada and the U.S.

Article 76 permits signatory states to claim continental shelves beyond their 200-nautical mile exclusive economic zones (“EEZs”). But, in order to do this legally, a state not only has to ratify the convention (as Canada did in 2003), but also has to draw territorial sea baselines (as Canada has done) and conduct serious scientific studies of subjects such as the morphology of the shelf, the thickness of sediments on the shelf and bathymetry of the shelf (as Canada is now doing). Each signatory state, once it ratified the UNCLOSIII treaty, has ten years from ratification to make a scientifically-sound claim to the shelf and to submit this claim to the experts who make up the United Nations’ “Commission on Limits of the Continental Shelf.” Canada therefore has until 2013. The Commission must then review the submissions and make recommendations concerning them. The Commission is also empowered to provide scientific and technical advice to states that request it (although no state has yet asked for this help). Like many legal texts that are written by large committees, Article 76 appears clear on its face but, upon closer examination, bears little relationship to the real world: its terminology is ambiguous and overly simple. Plus the process that is followed inside the Commission has, up to now, been shrouded in secrecy.

Articles 122 and 123 – respectively on defining enclosed or semi-enclosed seas and cooperating in dealing with these kinds of seas – are also possibly in play in the Arctic. It is not clear from the UNCLOSIII treaty whether the Arctic is an enclosed or semi-enclosed sea. Finally, there are those UNCLOSIII treaty articles that define freedom of passage – or “innocent passage” – through international straits. Article 17 encodes the long-established customary international law on the right of innocent passage. The Article is quite simple and states, “Subject to this Convention, ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.” Subsequent Articles require such passage to be “continuous and expeditious.”¹³ The passage must not be “prejudicial to the

¹³ Article 18(2).

peace, good order or security of the coastal state”¹⁴ and prejudices may include “any act of wilful and serious pollution.”¹⁵ Finally, Article 21 on the “Laws and regulations of the coastal state relating to innocent passage” give countries like Canada the right to regulate “the safety of navigation and the regulation of marine traffic,”¹⁶ “the protection of navigational aids and facilities...”¹⁷ and “the preservation of the environment of the coastal State and the prevention, reduction and control of pollution.”¹⁸ The latter anti-pollution provisions, taken together with Article 234, establish an important legal foundation for Canada and the U.S. if they decide to act either together or separately in the North.

When these articles are interpreted together, they certainly offer a starting point for solving some of the international legal problems of the North, but not necessarily the final solutions to those problems. What is clear to this writer is that the existence of the UNCLOSIII treaty does not preclude Canada and the United States from agreeing to a new treaty that regulates the respective countries’ relationship in the Arctic. This opinion is at odds with the Manichean view of Prof. Suzanne Lalonde of *le faculte de droit, Université de Montréal*, who recently wrote:

...barring the adoption of a specified multilateral Arctic treaty, international law provides a choice between only two possible navigational regimes for the Northwest Passage and these two regimes are poles apart. The Passage is either subject to the Canadian legal regime or it is governed by the international legal system.¹⁹

If a new bilateral treaty covered not only cooperation in scientific studies, including hydrography, along the track of the North West Passage, but the creation of strict and enforceable rules for transiting the Passage, that initiative would probably be welcomed by most responsible states with an interest in using the Passage. Oddly enough, such a bilateral treaty might even be welcomed by Russia that believes its North East Passage is more likely to become an international shipping route than the North West Passage. Strict regulation of shipping transiting the North West Passage would certainly be welcomed by the private international shipping community and its nervous insurers. When concluded, the Canada-U.S. treaty could be framed in such a way as to allow other “Arctic Powers,” especially Russia, to adhere to it in some way, either as a full Party or as a Party with less than Contracting Party status. The negotiation of this new treaty would be partly based also, not just on the UNCLOSIII treaty provisions, but on the spirit of later agreements such as the 1988 *Arctic Cooperation Agreement* between Canada and the U.S.

III. Learning from the Past

The Great Lakes, scene of battles between warships in both the American Revolution and the War of 1812, were demilitarized in 1817 by an American-British treaty. The Lakes have remained under that legally demilitarized regime until today; however, it took until 1909 for Canada and the United States to negotiate and sign the *Boundary Waters Treaty* to guarantee that any navigable waters in the Great Lakes would be “free and open” to both signatories. Another stated purpose of the treaty was, and is, to prevent and resolve disputes about the use, diversion or quality of “boundary waters.” Those “boundary waters” today include other rivers and lakes well beyond the Great Lakes and the St. Lawrence

¹⁴ Article 19(1).

¹⁵ Article 19(2)(h).

¹⁶ Article 21(1)(a).

¹⁷ Article 21(1)(h).

¹⁸ Article 21(1)(f).

¹⁹ Lalonde, *Arctic Waters: Cooperation or Conflict*, *Behind the Headlines*, Vol. 1, No. 4, p. 8. This issue of *Behind the Headlines* contains excellent brief articles on the Arctic by such distinguished Canadian Arctic experts as Prof. Rob Huebert, Prof. Franklyn Griffiths, Hon. Paul Okalik and Prof. P. Whitney Lackenbauer.

Seaway system. In 1959 the St. Lawrence Seaway, another joint treaty-based initiative between Canada and the U.S., was completed and opened by President Dwight D. Eisenhower and Queen Elizabeth II.

Since World War Two, Canada and the U.S. have entered into other significant international bilateral arrangements that have shown how important each country is to the other. Among the most important of these initiatives have been NORAD and NAFTA. So well-integrated was the NORAD military arrangement that, on the morning of September 11, 2001, when staggeringly serious decisions had to be made about how to respond to the attacks on New York and Washington, it was a Canadian officer who was in charge of NORAD that day. And it was therefore a Canadian officer who ordered that North American airspace be cleared immediately. Airplanes all over North America complied with this order.

NAFTA, despite its dispute-settlement flaws, has served Canada and the United States well since it was negotiated and signed. During the primaries of the Democratic Party in America in 2008, many Canadians were distressed to hear both major candidates for the Democratic nomination for the presidency promise to completely reopen the NAFTA treaty or to seek major, likely anti-Mexican, and possibly anti-Canadian, changes to NAFTA. Informed observers of the NAFTA pact have long wished that it could be updated and “tweaked” to make it work better. The time for that “tweaking” may have arrived.

Most Canadians appear to believe the Obama administration that will be inaugurated in January, 2009, will shift gears and return to a stance that will allow the conclusion of new treaties between the United States and other countries, including bilaterally with Canada or multilaterally with Canada and others. An early approach by Prime Minister Harper to President Obama in 2009 on the creation of a North West Passage Authority between Canada and the United States might not only mark a return to a time when there was closer international cooperation between these North American neighbours, but it might signal to the world that a new day had dawned in America’s future international relations with the world.

IV. The Negotiation

The election in Canada in October, 2008, of a renewed and strengthened minority Conservative government under Prime Minister Harper and the concurrent election in November, 2008, of a new Democratic Party-controlled Congress and of President-elect Obama, gives both countries an opportunity to cooperate in new and creative ways. Because it will take until the Spring of 2009 for the Obama administration to find its feet, and for a first meeting to take place between Harper and Obama, the Canadian government has time to prepare carefully and systematically for this Arctic initiative. But work on this initiative must start immediately.

Because of the centrality of the Prime Minister’s Office in policy-making in Harper’s Ottawa,²⁰ this project will only succeed if the PM himself takes charge of this issue by becoming, if necessary, the chair of a committee of insiders and outsiders that will be given the urgent task of hammering out Canada’s negotiating position on the creation of the North West Passage Authority. Insiders on the committee should include the “usual suspects,” such as officials from Foreign Affairs, National Defence, Indian Affairs and Northern Development, Environment, Transport, Finance and International Trade. Harper should also name outsiders to the committee, the obvious choices being academic experts on the North, shipping company or insurance executives and, most importantly, Inuit leaders.

²⁰ See the author’s review article of Prof. Donald Savoie’s book, *Court Government and the Collapse of Accountability in Canada and the United Kingdom*, in *The Literary Review of Canada*, Vol. 16, No. 8, October, 2008, p. 6.

The *imprimatur* of the PM will ensure the committee does its work quickly and thoroughly. Having a committee structured this way will be novel in Canada but, given the current pre-eminence of the PMO in Harper's Ottawa, and looking at how similar initiatives have been successful in other parliamentary democracies like Japan, this kind of policy-making structure will be a demonstration project on how this, and other important issues, might be handled in the Ottawa of the late "noughties" – the decade between 2000 and 2009. Harper should be reminded by his officials that many "pro-Canadian initiatives" that have in the past succeeded diplomatically with the Americans originated in Canada, e.g. FTA, the auto pact and the post-9/11 smart border agreement. Canada's must therefore, and once again, seize the initiative.

As preparatory work is being done in Ottawa, Canada's embassy in Washington should be alerted to what is being planned so that initial contacts can be coordinated, not only with the Obama transition team but with congressional leaders' offices and the Pentagon to scope out the pitfalls that might await the unwary when Canada takes the initiative on the Arctic. It will be especially important to learn what appetite there is in the new Congress, particularly in the Senate, for ratification of the UNCLOSIII treaty. If there is still stubborn resistance, particularly from conservative Republican senators and the Pentagon, to ratifying the UNCLOSIII treaty, the Canadian case for the North West Passage Authority might both encourage the holdouts to reconsider or, at worst, cause them to agree to support the initiative as a way station to eventual ratification of the UNCLOSIII treaty.

Canada would certainly have to prove to these members of Congress that approving the NWPA treaty would be in the best interests of the United States, not only for navigational purposes in the North but for eventual exploitation of the vast mineral and petroleum wealth of the Arctic. Canada will have to draft a solid legal opinion on the legitimacy of drafting and signing a NWPA treaty to counter legal arguments such as the one from Prof. Lalonde, quoted earlier in the paper. Canada would also have to convince all parties in Washington that such a treaty would in no way interfere with innocent passage through all other international straits around the world. Such an initiative could also be "sold" in Congress as a way to allow Canada and the United States to begin to catch up to the Russians who clearly believe the Arctic is more "theirs" than "ours." Playing the security "card" of the "Arctic perimeter" by reminding Americans how easily in future, in the absence of a new and tighter legal regime, this perimeter could be breached by extremists, by illegal immigrants or by drug lords, will be a key element of Canada's initiative when dealing with Congress.

The negotiation of the NWPA treaty should also include a negotiation of the disputed dividing line between Canadian and American territory in the Beaufort Sea, an irritant that could simultaneously be put to an end. In addition, the involvement of the territorial governments of Nunavut, the North West Territories and the Yukon – plus the state government of Alaska – will be fundamental to finding a way to agree on this issue. Giving the Inuit people, who live in all these jurisdictions, a major role in helping shape the final form of this new international institution will be fundamental to making the initiative work on both sides of the table. One of the flaws to date in Harper's welcome emphasis on Canada reasserting its sovereignty over the North has been the absence of strong Inuit involvement, or explaining how the initiative would impact on Inuit culture and economics. It will be essential for Inuit leaders to have a senior presence at the negotiating table for the NWPA. A logical candidate to participate in, if not lead, the process would be the Hon. Leona Aglukkag, the newly-elected Conservative MP for Nunavut. One advantage of having this Inuit participation will be to remind American negotiators (and Canada's) that the melting ice sheet over the North West Passage is gradually taking away the historic home of the Inuit. What is happening is more than a geological or climatic phenomenon: it represents nothing less than the disappearance of the Inuit "homeland." It is not just ice that is melting, but the Inuit home itself.

The completion of preparatory work in Canada and Washington for the negotiation should be defined by strict timetables. Most of the serious policy and legal preparation, plus agreeing on which parts of the proposed NWP treaty are negotiable and which are non-negotiable, should be completed before the first meeting between Prime Minister Harper and President Obama. There will be other, perhaps more important, trans-national issues on the table when these parties meet, but Harper should emphasize to Obama that agreeing on a NWP would have the advantage of publicly marking a new and historic opening between Canada and America. It would demonstrate to both countries, and to the world, that a new era of engagement with friends and allies had begun in Washington. Indeed, if the initiative were to succeed, it might be far easier for Obama and Harper to begin to talk informally about how NAFTA might be tweaked to better serve the current needs of both countries. It would also be advantageous if an Arctic treaty could be deemed in Washington to be an “executive agreement” that was able to be signed and deemed ratified by the President. If not, the treaty must be fast-tracked for legislative approval through Congress and Parliament. Canada’s spade work behind the scenes in Congress will have been important to the success of this process.

Focusing first on the NWP project would also allow both leaders to move seamlessly to the areas of policy and government initiatives that are likely to be the “new, new things” for the next few years, starting with the attempted harmonization between the Canadian and American positions on how to handle the climate change file. While a Stéphane Dion-like green shift is now out of the question as a possible policy for Harper, the march in both Canada and the U.S. towards some kind of cap-and-trade system of reducing greenhouse gases will have resonance in an Obama White House, in Congress and in Harper’s Ottawa. The appointment of a trusted Harper lieutenant, the Hon. Jim Prentice, as Harper’s new environmental minister shows that Harper may be ready to change course on environmental policy, at home and abroad. Once again, Canada must get out front in this issue, or risk being overwhelmed by the Americans.

Negotiating the actual structure of the NWP will be important to its success. The model of the International Joint Commission, which has six members, three from Canada and three from the United States, is a good one except that the IJC is a “deliberative” body, not an “executive” international institution with the power to make and enforce the kind of strict regime that a NWP must have to be effective. However, much could be made, from a public relations point of view, on having Canada and the U.S. mark the 100th anniversary of conclusion of IJC agreement by signing a 21st century clone of the IJC (the year 2009 is also the 50th anniversary of the opening of the St. Lawrence Seaway). Appointment of the former American ambassador to Canada, Republican Paul Cellucci, who supports Canada’s position on the Passage, to be the first chairman of the NWP would be a brilliant move, and might even find favour with a Democratic White House and Congress in Washington.

One expert recently suggested the institutional arrangements found in the Montreux treaty on passage through the Dardanelles might provide a good model for the international lawyers who are assigned the task of preparing a draft convention for the NWP.²¹ Other possible models include creation of a “public-private Arctic seaway management corporation” with a mandate to provide for the safe and secure transit of vessels in North American Arctic waters while protecting the area’s sensitive environment.²² A less powerful “joint US-Canada Arctic Navigation Commission” might be all that is possible. Creating a corporate model while Canada and the U.S. are attempting simultaneously to negotiate a multilateral treaty among all the Arctic powers for settling the many claims and possible disputes that might arise in the Arctic may be a “bridge too far”.

²¹ Borgerson, *op. cit.*, Fn. 5, p.4.

²² *Ibid.*, *op. cit.*, Fn. 9, p. 76.

It may be better to get the simpler, easier Canada-U.S. NWPA treaty done and then allow other interested states, most importantly Russia, either to accede to the NWPA treaty, or to negotiate parallel bilateral treaties that, together, would add up to a consistent and legally viable regime. Negotiation of a series of bilateral treaties, rather than negotiating multilateral treaties, has a long history of success in the United States. Even many on the Democratic Party side of the aisle might find bilateral treaties to have more appeal than the recent U.N. call for new multilateral treaty regime in the Arctic would have. Lurking in the background in this negotiation will be the perilous state of public finances in the world in general, and in Canada and the U.S. in particular. Accordingly, the NWPA will probably have to charge Panama Canal or Suez Canal-level fees for passage if it is to succeed over time.

In the end though, it is impossible for a paper like this to predict or to shape the final outcome of this negotiation, or even the final negotiating position of Canada, as it enters this new international "ground." Suffice to say the author believes the creation of a NWPA is an idea whose time has come and offers a rare diplomatic opening between neighbours who have had a long history of solving bilateral problems through international institutions, a history that has been in suspended animation for eight years and looks ready to reawaken in 2009.

Canadian Defence & Foreign Affairs Institute

CDFAI is the only think tank focused on Canada's international engagement in all its forms: diplomacy, the military, aid and trade security. Established in 2001, CDFAI's vision is for Canada to have a respected, influential voice in the international arena based on a comprehensive foreign policy, which expresses our national interests, political and social values, military capabilities, economic strength and willingness to be engaged with action that is timely and credible.

CDFAI was created to address the ongoing discrepancy between what Canadians need to know about Canadian international activities and what they do know. Historically, Canadians tend to think of foreign policy – if they think of it at all – as a matter of trade and markets. They are unaware of the importance of Canada engaging diplomatically, militarily, and with international aid in the ongoing struggle to maintain a world that is friendly to the free flow of goods, services, people and ideas across borders and the spread of human rights. They are largely unaware of the connection between a prosperous and free Canada and a world of globalization and liberal internationalism.

In all its activities CDFAI is a charitable, nonpartisan organization, supported financially by the contributions of foundations, corporations and individuals. Conclusions or opinions expressed in CDFAI publications and programs are those of the authors and speakers and do not necessarily reflect the views of the Institute staff, fellows, directors, advisors, or any individuals or organizations that provide financial support to CDFAI.



Canadian Defence
& Foreign Affairs
Institute