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Right of (Northwest) Passage: Toward a Responsible Canadian Arctic Sovereignty

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Abstract

Canada has long claimed the Northwest Passage as its "internal waters," while the United States and other countries argue it is an "international strait." The latter "free sea" position originates in Hugo Grotius, often styled the "father of international law." However, Grotius later qualifies his own position by granting to coastal states the right to regulate maritime traffic. Grotius's works also inspire the English School of International Relations: an "international society" approach that Canada has historically followed in its overall foreign policy. Hence, a twenty-first-century Grotian vision might suggest a compromise amenable to Canada: Canada would grant passage to conforming American vessels, thus facilitating international trade, but Canada would also gain powers of effective jurisdiction, allowing it to secure and conserve the fragile environment. Canada might thus re-envision sovereignty not as a zero-sum contest for status symbols but as the exercise of functional jurisdiction for the common good of international society.

Résumé

Le Canada revendique depuis longtemps le passage du Nord-Ouest comme faisant partie de ses « eaux intérieures », tandis que les États-Unis et d'autres pays soutiennent qu'il s'agit d'un « détroit international ». Cette dernière position de "mer libre" trouve son origine dans Hugo Grotius, souvent surnommé le "père du droit international". Cependant, Grotius précise plus tard sa propre position en accordant aux États côtiers le droit de réglementer le trafic maritime. Les travaux de Grotius inspirent également l'English School of International Relations : une approche de « société internationale » que le Canada a historiquement suivie dans sa politique étrangère globale. Par conséquent, une vision grotienne au XXIe siècle pourrait suggérer un compromis viable : le Canada accorderait le passage à des navires américains conformes facilitant ainsi le commerce international, mais il obtiendrait également des pouvoirs de compétence efficaces, ce qui lui permettrait de protéger et de conserver cet environnement fragile. Le Canada pourrait donc ré-envisager la souveraineté non pas comme un jeu à somme nulle pour les symboles de statut, mais comme l'exercice d'une juridiction fonctionnelle pour le bien commun de la société internationale.

Keywords: Northwest Passage; arctic sovereignty; Grotius; English School; Law of the Sea; Canadian foreign policy; United States

In fall 2017, the Chinese icebreaker *Snow Dragon* successfully transited Canada's fabled Northwest Passage, accomplishing what the ill-fated (and recently discovered) HMS *Terror* could not. In doing so, the *Snow Dragon* joined a record 31 other vessels in transiting the Northwest Passage in 2017—a figure nearly double that of any previous single year. But the *Snow Dragon* was also the most portentous of such vessels to take advantage of increasing polar ice–free periods. Its transit further substantiated China's declared intent to transport cargo through the Northwest Passage, a route that offers a shorter, deeper, less congested and potentially more economical path to major Western markets (Byers and Lalonde, 2009: 1141–46). The vessel's transit also sought to strengthen China's aim to influence Arctic governance, despite the fact that China has no territory inside or even near the Arctic Circle (Fisher, 2017: 2–3). While China requested Canada's permission for this voyage, it refused—as has the United States and others—to openly acknowledge Canada's sovereignty over the Northwest Passage. Indeed, a newly assertive China has flouted the law of the United Nations Convention on the Law of the Sea (UNCLOS) by occupying the South China Sea and has publicly castigated the UNCLOS tribunal's ruling against it (Calvert, 2018: 146, 160; China, 2016; Phillips, 2016). This adds weight and urgency to the concern that the advent of commercial shipping could doom Canada's claim to sovereignty over the Northwest Passage (Byers, 2006: 6–7; Byers and Baker, 2013: 128–31; Elliot-Meisel, 2015: 201–3; Grant, 2010: 451–52; Huebert, 2009: 1–2, 7–9; Nolin, 2017: 341–42, 349–51; Pharand, 2007: 48–49, 58–59).[1]

Canada has long claimed that the several (indeed seven) routes from the Beaufort Sea (in the west) through Davis or Hudson Strait (in the east) are its "internal waters" and, as such, subject to absolute Canadian sovereignty (Headland, 2018: 1–2). Canada is thus entitled to regulate foreign ships, impose fines or fees for their passage and even proactively prevent them from entering. It may do so for reasons ranging from finance to environment to security, evaluated through Canada's unilateral judgment. By contrast, other countries—most consistently the United States—maintain that the Northwest Passage is an "international strait," open to unlimited and unconstrained passage for vessels of all nations. This permits Canada only very weak powers of international environmental regulation, leaving little effective enforcement capability over the Northwest Passage (Byers and Baker, 2013: 164). This latter position, which advocates the absolute freedom of the sea, is said to be grounded in the work of seventeenth-century European polymath Hugo Grotius, often considered the father of modern international law. So influential is Grotius that his arguments still shape our current discourse. The battle leading up to UNCLOS in 1982 was effectively a re-enactment of his battle with the Portuguese: one contemporary account observed that "the classic debate between Grotius and Selden has been re-opened" (McConachie and Reid, 1977: 160; see also Logue, 1982; Rossi, 2017: 67–79).

Yet while Canada's opponents claim a position with a four-century-old pedigree, they do so without recognizing the nuance in the position. Grotius developed his "free sea" position at the ripe old age of 21 and later qualified it in important ways, as he developed a more consistent and overarching philosophy of international relations. Hence, a better understanding of Grotius's mature logic might demonstrate to Canada's opponents that the foundations of absolute maritime

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freedom are not so firm as they think, which, in turn, might help to turn the "free sea" argument back on them and win concessions for Canada.

What is more, Grotius's overarching framework has given rise to a major twentieth-century school of thought in International Relations (IR), the English School, which provides a "middle way" between a realism that suggests absolute sovereignty of the Northwest Passage and a liberal internationalism that connotes international governance. Indeed, as Tom Keating has shown, this approach actually well characterizes Canada's overall foreign policy, when viewed historically (Keating, 2014), suggesting that recourse to Grotius's position on maritime sovereignty might be unexpectedly consistent with Canadian self-understanding and interests—and even its recent Arctic policy declarations. As the Trudeau government embarks upon consultations for a new Arctic Policy Framework (Canada, 2017), it might find that making some Grotian concessions actually fits the spirit of Canada's interests and vision for the Arctic.

Hence, a Grotian position might move both Canada and its opponents to a reasonable compromise—and one that addresses the inconsistencies of both the "international strait" and the "internal waters" regimes in the Arctic. It might persuade other countries to acknowledge a limited Canadian sovereignty over the Northwest Passage, but only because that sovereignty enables Canada to take up responsibilities toward international society. Far from being inimical to Canada, a Grotian approach to the Northwest Passage might offer some surprising possibilities, including protecting Canada's legitimate interests, recapturing its traditional middle power commitment to multilateralism and enhancing its international stature.

This article first outlines the two competing maritime regimes and critically examines their applicability to the Northwest Passage. In the second and third sections, it presents and contextualizes Grotius's 1604 defence of the free sea and then explains both how and why he qualifies this position in his later and more comprehensive works. Section four shows how this mature Grotian IR philosophy grounds the contemporary English School approach to IR, while section five identifies an English School undercurrent in Canada's traditional foreign policy and Arctic strategy. The final section suggests a contemporary English School policy approach to Canada's looming challenges in the Northwest Passage.

The Limits of International Law

Virtually every land region of the earth's territory is governed by one framework: that of the sovereign nation-state. In contrast, most regions of the earth's waters are apportioned into one of two opposed frameworks standardized by international law: "internal waters" or "high seas" (the latter of which are also known as "international waters," or, in the case of narrow corridors like the Northwest Passage, "international straits"). Much like landed territory, waters designated "internal" permit a nation full sovereignty and control. For instance, the Nelson River is unavailable to Chinese ships to transit, unless Canada should grant an exception. By contrast, waters designated as an "international strait" are effectively portions of the high seas over which no adjacent nation has the authority to prevent passage of foreign vessels (United Nations, 1982: Part II, Sec. 3, Art. 19). For example, the

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Strait of Tiran is bordered by Egypt and Saudi Arabia, and Egypt's 1967 decision to close it off helped to precipitate a war that led to its reopening.[2]

Naturally, states whose landed territory abuts sea lanes covet the ability to restrict those ships, much as they might control vehicle or air traffic entering their land borders. Thus, they prefer an expansive definition of "internal waters." In contrast, states with the capacity to travel by sea prefer that their ships face as few restrictions as possible and thus prefer a wide application of the "international strait" regime. These two categories form the legal contours of the battle over the Northwest Passage. However, the Passage—for independent reasons—does not easily fit into either category. We begin with the Canadian claim of internal waters.

The category of internal waters includes all waters within a state's landed territory. When a state's coastline is rough and uneven and the boundaries jagged, international law permits the state to delineate a smoother and more easily mappable boundary by drawing straight baselines between two points, often the furthest edges of the coastlines or outlying islands. The state thus encloses a small portion of the sea within its boundaries. A Canadian example is the enclosure of the jagged fjords on the west side of Vancouver Island.

In 1985, Canada responded to an American provocation by drawing straight baselines around its Arctic archipelago. Its goal was to buttress its claim to the Northwest Passage as "internal waters." Many experts believe that this geographical claim is sound (Coates et al., 2008: 135; Nolin, 2017: 345–48; Pharand, 2007: 36–37, 44). However, one cannot help but note that the baseline at the west end of the Northwest Passage is over 100 miles long, belying the presumed aim of baselines to connect a succession of closely linked peninsulas or islands. What is more, straight baselines typically close off an area of sea that hugs the coast, thus allowing ships to continue their journey rerouted only slightly further from—but still parallel to—the coast. By contrast, Canada's straight baselines internalize a channel that runs perpendicular to the coastline, thus rerouting ships to an entirely different region of the globe.

Beyond geography, another important requirement of internal waters is that of historical usage. Here Canada's claim is more tenuous, as no states have de jure recognized the area as internal waters. Canada might respond by pointing to its de facto exclusive historical control over the Northwest Passage (Zou, 2005: 76). Yet this claim also began to weaken in the 1960s due to the increasing difficulty of excluding occasional American icebreakers, which fortunately still courteously requested Canadian permission. Canada's claim could be more seriously undermined with the thawing of the Northwest Passage, as frequent and varied foreign vessels might transit without requesting permission.

On the other hand, the American claim that the Northwest Passage is an "international strait" also features several incongruities. Geographically, this strait would be significantly longer than any other international strait (the most famous ones being Gibraltar, Malacca, and Bosporus), and even longer than many major rivers, which clearly qualify as internal waters. The historical grounds are similarly inconclusive. They arise largely from the precedential 1949 *Corfu Channel* case, in which Albania protested British naval transit near its shoreline. There, the International Court of Justice held that the channel's prior 2,400 transits by several major powers rendered it international in character, but the granting of standing to the plaintiff

presumably indicates an ambiguity about whether even this high number would suffice to internationalize the passage (International Court of Justice, 1949). In contrast, the Northwest Passage has been transited barely a hundred times in recorded history, and those transits were often by small private vessels (Macfarlane, 2012: 1). Moreover, Canada's 1970 assertion of sovereignty went entirely unchallenged for 15 years (McKinnon, 1987: 800). It is far from clear that an international tribunal would (at this time) deem the Northwest Passage an "international strait." Hence, the situation seems to call for a third option. And partisans of the "international strait" position may be surprised to learn that the man who first conceived their own position actually offers one.

The Young Grotius and the Free Sea

The implicit frameworks that ground the current legal debate were forged as the Westphalian system of sovereign modern nation states was beginning to take shape. At the turn of the seventeenth century, Portugal and Spain were the world's two undisputed naval powers. Unsurprisingly, both advocated private ownership of the sea, and the only dispute—settled by the Vatican—concerned the demarcation of this maritime duopoly. However, in 1603, a Portuguese merchant ship was attacked and subdued in the Strait of Singapore by a challenger to the concept of Portuguese Pacific ownership: the Dutch East India Company (Vereenigde Oost-Indische Compagnie, or VOC). The VOC defended its action by turning to one of its directors' sons: the twenty-year-old Hugo Grotius, a young prodigy already known across Europe. The VOC sought a brief pamphlet cataloguing Portuguese iniquity and justifying the punitive Dutch response; the precocious Grotius would instead produce the synthetic treatise *De Jure Praedae (DJP)*, or *The Law of Prize and Booty*, grounding the Dutch action in a theory of global seafaring.

The VOC would publish only the twelfth chapter of *DJP*, titled *Mare Liberum (ML)*, or *The Free Sea*; the rest remained hidden until 1864. Yet this short selection builds on the foundations that Grotius lays out in *DJP*: that "self-interest is the first principle of … nature" and that individual "expediency"—in the imperative of protecting person and property—is "the mother of justice" (Grotius, [1603] 2006: 21–22, 27–28). The enlightened protection of our natural self-interest will produce two conclusions about maritime travel: that naval transit passage cannot be denied to any nation and that the sea cannot be owned.

Grotius bases his first conclusion—the imperative of transit passage—on a theory of trade. Just as Aristotle had pointed out that individuals are not economically self-sufficient and therefore must come together to specialize and trade in the polis, Grotius argues that the same is true at the national level. Because some nations are not naturally self-sufficient in their endowment of resources, they must rely on specialization and trade with other nations for a complete material existence. Hence, a nation's freedom to trade with a variety of counterparts is essential to its very existence. Thus, when the Portuguese close off the Pacific to foreign transit passage, they threaten the very principles of sovereign nationhood, including—indirectly—their own (Grotius, [1603] 2006: 302–4).

Grotius bases his second conclusion—that the sea cannot be owned—on a theory of property. This conclusion anticipates a twenty-first-century understanding of

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public goods, as well as John Locke's more famous iteration. Private property is legitimate when a good is rivalrous, and it is possible when a good is excludable (Grotius, [1603] 2006: 320–21, 337–38). A good is rivalrous when its first user either consumes it or causes wear and tear on it. When goods are common, first users cannot be prevented from using up goods and leaving less for others, resulting in the tragedy of the commons. In order to better preserve such a good, users must be made to pay to take it from the commons. For Grotius, one may "pay" by expending one's labour to occupy it. In doing so, one metaphorically fences off this rival good, making it excludable. Grotius here cites Seneca's classic example of open theatre seating for a free event. Such seats operate on the principle of "first come, first served," and the "industrious" first arrival lays a claim to a particular seat through the duration of the show. Hence, there is a natural exclusion—a right of property—that arises from one's labour (Grotius, [1603] 2006: 314–19).

According to Grotius, the sea cannot be owned because it is neither rival nor excludable. It is nonrival because it is "capable of serving the convenience of a given person without detriment to the interests of any other person"—a perpetual wellspring seemingly incapable of depreciation. It is nonexcludable because, like the air, one cannot occupy it as one occupies an unused theatre seat (Grotius, [1603] 2006: 320–22). What is more, if it cannot be legitimately owned, then it cannot be subject to the sovereignty of a ruler. Hence, any claim to sovereignty over the sea is not a natural labour-claim to property, but an artificial speculator-claim to a monopoly. It turns a nonrival, nonexcluded public good into a nonrival but (illegitimately) excluded club good.

The Mature Grotius and the Conditionally Free Sea

When Grotius defended the VOC action by developing a doctrine of the free sea, he showed signs of the integrative ability that would later blossom into a vast oeuvre; one contemporary would even describe Grotius as "the greatest universal scholar since Aristotle" (quoted in Trevor-Roper, 1992: 79). While Grotius uncharacteristically held off on publishing his early *DJP* (save for the one chapter), he and his heirs would publish the 1625 *De Jure Belli ac Pacis (DJB)*, or *The Law of War and Peace*, a hundred times in a dozen languages. The University of Heidelberg would install Samuel von Pufendorf in its newly established chair in the law of nature and nations—a subject that Grotius's *DJB* was thought to have originated.

The magisterial *DJB* introduces a concept of nature that diverges from the earlier *DJP*. Notably, where *DJP* employed a self-interested "first nature" (Grotius, [1625] 2005: 82–86), *DJB* adds what we might call a "second nature" that posits additional, more directly other-oriented norms (Grotius [1625] 2005: 87–89; Geddert, 2016: 76–81). Where one's first nature self-interestedly seeks to protect one's physical flourishing, one's second nature seeks to actualize the essence of one's best self. In *DJB*, Grotius now describes the latter, not the former, as the "mother of justice." Societies can attain the aims of second nature only by pursuing the wider flowering of nature in both its human (that is, sociable) and physical (that is, environmental) dimensions (Grotius, [1625] 2005: 87–89, 93, 142–50, 1159–62; Geddert, 2017: 53–56, 154–59).

When Grotius augments his concept of nature in *DJB*, he is also forced to revisit his earlier understanding of politics in three important ways. First, *DJB* now asserts

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that people would enter political society even in the absence of material scarcity, simply to see their naturally social and political character flourish (Grotius, [1625] 2005: 80–81, 87–89, 241; Tuck, 1993: 197–98; Brett, 2002: 40–41; Geddert, 2017: 77–82; see also Grotius, [1614] 2001: 208–11, 222–25). Second, *DJB* argues that justice may call for active sacrifices on behalf of the common good (Grotius, [1625] 2005: 118–23). Third, *DJB* now sees justice as a political community's responsibility to foster overall human flourishing (Grotius, [1625] 2005: 87–89). To sum up in reverse, nations now have more than the negative responsibility of *DJP* to not threaten other countries' sovereignty; they have 1) positive responsibilities, 2) ones that may indeed call for sacrifice, 3) to an international society that exists by reference to a human good that transcends the basic survival of its individual member states. These changed theoretical foundations provide a context when we come to Grotius's surprising admission in *DJB*: that under certain conditions, the sea may be closed off, regulated and taxed.

In *DJB,* Grotius treats the sea by reference to his earlier "public goods" framework, but he reconsiders both the nonexcludable and nonrival character of the sea. He begins with excludability. From his industrious Dutch vantage point, Grotius now accounts for the fact that shallow and marshy sea territory may be used for agriculture or aquaculture. When one labours to install a permanent apparatus in the sea, such as dikes or fish-holding instruments, one occupies the sea as one occupies a theatre seat (Grotius, [1625] 2005: 463–70). Thus, the sea might now be legitimately excludable by the nature of labour, not illegitimately excludable by Portuguese artifice. He then treats rivalrousness. This industrious transformation that makes the sea economically productive redounds to the benefit of all. However, it requires expensive up-front capital investment by the operator and laborious upkeep to prevent depreciation. No single actor will take on this expense and risk if free riders can appropriate the product. One must thus fence off this rival good through labour, but one still depends on state enforcement of that boundary. Hence, unlike naturally provided nonrival goods, which ought not to be excluded by state artifice, the creation of such rival goods in fact calls for excludability by state enforcement; common pool goods ought to become private goods. In Grotius's words, if coastally adjacent areas of the sea can be both improved and "compelled from the land," then they can (and should) come under the sovereignty of a nation (Grotius, [1625] 2005: 444–47, 463–70).

Yet while Grotius has altered his second premise of *DJP* to allow for ownership and thus sovereignty over the sea, he has not altered his first premise that demands the right of nonmilitary passage for all states. After all, the productive use of the sea need not prevent its use for maritime transport. What is more, if this ownership (and consequent sovereignty) legitimately arises from the public benefit of the increased bounty that it bestows on the earth, then that same public benefit requires a wide exchange market on which that bounty can be made available. The wide availability of goods requires maritime passage by vessels of other nations (Grotius, [1625] 2005: 466–69). But if Grotius's prescription for this right of passage remains the same as in *DJP*, the framework has been substantially altered. In *DJP*, one must merely refrain from harming the existence of another state and thus not close off what belongs to all. Now Grotius points out that one must actively help others by sacrificially granting them right to use what legitimately belongs to oneself.

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Nonetheless, if this possibility of sovereignty requires granting the right of passage, it does not require granting free passage. Much as economic installations in the sea require upkeep, Grotius now points out that safe sea lanes require public goods such as lighthouses that cost money. These allow ships from all countries to avoid wreck, but the coastal country that constructs such a pure public good incurs costs disproportional to the meagre fractional benefit it reaps from the installation. Accordingly, Grotius now says that it is licit to impose "a reasonable tax" upon those who pass through one's maritime territory. But one may not gain a profit from these fees; one may only recoup the costs associated with facilitating transportation for the benefit of every nation (Grotius, [1625] 2005: 444–47, 470–74). Coastal nations and seafaring countries are responsible to co-operate for the common good.

In sum, Grotius's mature concept of sovereignty is not the *DJP* vision, which merely demands the noninjury of others' sovereignty, a restraint that ultimately improves the protection of one's own sovereignty. Rather, Grotius's sovereignty is now a nonabsolute concept that implies responsibilities. In other words, Grotius envisions a maritime regime in which maximum use, co-operation, trade and economic growth are balanced against the imperative of conservation and the greater investment of the sovereign littoral state toward that end.

Each of Grotius's three emphases in *DJB*—excludability, promotion of trade and taxability—is, in fact, quite prescient. First, while land reclamation was in its infancy in Grotius's day, offshore oil platforms today make productive even portions of the sea not immediately adjacent to land. Second, international commerce is also far greater today than in Grotius's day, and sea transits—including those through areas of oil exploration—have mushroomed. Third, modern technology has multiplied the possibilities—and thus the expenses—of safe passage; the efforts involved in constructing and staffing a Coast Guard, icebreaker or search-and-rescue operation dwarf those of a lighthouse. Such costs are even higher in the Arctic, where native species are uniquely vulnerable and logistical challenges are magnified. The Northwest Passage is less a perpetual wellspring, which ought to be a public good rather than a club good, and more a free public swimming pool with no governing authority—a common-pool good that would be better kept as a private facility with modest fees. If Grotius recognized limits to free passage in 1625, he would even more surely recognize limits today. But before we explore the immediate implications for Northwest Passage transit, we turn to examine how Grotius's new presuppositions in *DJB* ground a wider and more comprehensive foreign policy framework, one that might guide Canada in the Arctic.

The Grotian Legacy and the English School of International Relations

If Grotius were merely the originator of a (qualified) defence of the free sea, this would be reason enough to explore his relevance for Arctic policy. After all, Grotius leaves Canada's opponents in an awkward position: how can they maintain a hard line when even he does not? But Grotius is worth studying further, because the overall vision that grounds his maritime policy is surprisingly amenable to Canada's historical foreign policy approach and international identity. When we explore Grotius's contemporary manifestation, we might find that a Grotian compromise also suits Canada.

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Grotius's international vision was given its contemporary manifestation in the 1960s with the rise of the English School of IR. This school of thought arose informally around Martin Wight, who self-consciously placed himself within the Grotian legacy (Wight, 1992: 268). Wight and his interdisciplinary circle sought an alternative approach to the ascendant American positivist schools of neorealism and neoliberalism. This group instead drew from—and mediated between—the classic normative and historical traditions of Machiavellian realism and Kantian idealism. In doing so, they captured the spirit of Grotius, who sought peace as a diplomat during the Thirty Years' War and who drew on custom and history—both contemporary and ancient—as he developed the concept of international law.

The English School continues to advance today through a variety of methodological commitments—perhaps a sign of its success (Little, 2000: 396–99). Nonetheless, its inspiration remains Grotian, and its agenda is still deeply influenced by Wight and his better-known collaborator Hedley Bull (Buzan, 2014: 5). In *The Anarchical Society*, Bull portrays international relations not as total anarchy (as in Machiavellian realism) or as an embryonic world society (as in Kantian idealism) but rather—reflecting Grotius's presuppositions in *DJB*—as a "society of states," or "international society." States (and their leaders) are the basic unit of international relations, but they ought to (and ordinarily do) constrain their actions by a common set of practices and institutions that are mediated through moral-political discourse (Bull, 1995: 13, 46).

One particular kind of state is especially well suited to promote and strengthen international society: the middle power. Middle powers are large and powerful enough to credibly take a measure of international responsibility. For this reason, they can be balanced in their criticisms of the great powers that carry even greater burdens of responsibility. However, middle powers are also small enough that they cannot act with impunity. Thus, they seek to check those larger states that can act with relative impunity and to remind them of Lord Acton's famous dictum about the corrupting influence of absolute power(s) (Wight, 1979: 63–66; Keating, 2014: 171–75).

Wight further expands this concept of responsibility when he depicts leaders of states as trustees, responsible for the legitimate interests of the people they govern. They are not obliged to act with familial charity toward other nations any more than the executor of a will can distribute the money to his or her favourite charity. Nonetheless, as they must pursue their own interests, they must yet uphold the international society in which they participate, which requires them also to consider the legitimate interests of the other member states (Wight, 1992: 241–42). Hence, these national leaders must seek a harmony of interests. Wight's use of the term "harmony" is fitting, as musical harmony features individually distinct pitches in dynamic relationship with other pitches, together moving back and forth between tension and (always imperfect) resolution (Wight, 1992: 120–27). Hence, the English School places a premium neither on the international lawyer nor the warrior-statesperson, who respectively seek permanent solutions through law or conquest, but on the Grotian diplomat, who seeks to prudently manage these tensions.

How should the diplomat do so? First, by recognizing that not all elements of negotiation are essentials, and by making concessions on nonessentials. Leaders should avoid the strategy of "divide and conquer," which not only undermines

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societal harmony but also functions less effectively than the "unite and influence" approach. This is because their nation's power depends not only on the ability to project diplomatic and military pressure but also on the ability to reduce its number of enemies. Second, the diplomat should seek agreements rather than triumphs. As Wight puts it, "the art of diplomacy is to conceal the victory … 'to resist a score.' Leave your antagonist a line of retreat but studiedly ignore whether he is taking it" (Wight, 1992: 121, 153–54, 187). The diplomat best attracts allies and influences non-allies by using honey rather than vinegar.

The diplomat might foster this harmony by looking first to long-established partners. Much like individuals look first for co-operation among friends with a common background, diplomats work most effectively with other countries that share a history, culture and practices. This helps them to fulfil the obligations that have arisen toward these historical allies, while also looking ahead to a stronger friendship (Grotius, [1625] 2005: 833–35, 1151–58).

By working with other nations to produce agreements, diplomats can gradually and organically develop international practices and institutions. Eventually, such customs may be fashioned into international law, which Wight describes as "the existing practices and treaties of states, constantly refined by references to certain fundamental standards and norms of which they are the imperfect expression" (Wight, 1992: 233–37). This slow and steady approach to legal codification helps to ensure that laws on the international books are not merely aspirational but are supported by the major constituencies who are invested in helping to enforce them.

The English School and the Northwest Passage

Why might this Grotian-inspired "English" approach suit Canadian foreign policy—and by extension, Canadian Arctic policy? Tom Keating and others argue that it has implicitly characterized elements of Canadian foreign policy for generations. As a post-war middle power, Canada employed its position to help build international society in several ways. For example, Canada brought together actors in the Commonwealth and La Francophonie, working together with natural allies of shared history and culture. Canada also helped to keep hostile states such as the Soviet Union at the table, displaying a "unite and influence" outlook to manage the tensions of Cold War dissonance (Keating, 2014: 171–75; Wolfraim, 2014: 72–73). Canadian diplomat-leader Lester Pearson also helped to develop the concept of peacekeeping, and for many years Canada participated heavily in such missions.

One might object that Canada's historical posture toward the Arctic belies this co-operative picture for at least two reasons. First, Canada's (in)famous 1904 "sector theory" claimed ownership to all seas between the 60th and 141st meridians up to the North Pole, a premise unsubstantiated in customary international law (Pharand, 1983: 324). Second, Canada's initial legal approach, the 1970 Arctic Waters Pollution Prevention Act (AWPPA), attempted to further stake Canada's claim to "internal waters" status in audacious fashion: it asserted control over waters within an expansive 100 miles of waters, far more than the 12 miles permitted in international law.

Yet such moves have demonstrated only a superficial or passing hostility to international society, and a deeper consonance with it. First, Canada never made

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the "sector theory" into official policy, and formally abandoned it in 2006 (Coates et al., 2008: 85). Second and more substantively, AWPPA based its ostensibly unilateralist claims not on the usual historical or geographical bases of Canada's sovereign right but instead on Canada's responsibility to protect the environment. In particular, AWPPA strikingly declined to assert the standard (and essential) sovereign provision of internal waters: the right to prevent innocent passage of foreign vessels. Rather, Canada claimed only the functional jurisdiction to delineate shipping lanes and to regulate and enforce standards for the construction, operation and navigation of foreign vessels that would traverse those lanes. Such powers were otherwise unavailable to Canada under the regime of "international strait" or even "territorial waters" (Byers, 2010: 15; Canada, 1970: Secs. 4–9, 12, 23–25; Coates et al., 2008: 97–99). Indeed, the nations that shaped UNCLOS specifically inserted Article 234, which effectively endorsed and incorporated AWPPA's approach to the Arctic (Young, 1987: 127–28). Canadian regulation of the Northwest Passage under AWPPA thus provided better stewardship and responsibility than does an international straits regime, to the benefit of all seafaring nations —and the planet itself.

Canada deepened this middle power "international society" approach in 1988, when it persuaded the US to make "the rarest of exceptions to its rigid navigational freedoms mantra" and to accept the Arctic Cooperation Agreement (ACA) (Gupta and Roy, 2014: 70–72). This mutual understanding committed the US to ask permission for government-sponsored icebreaker transits of the Northwest Passage, thus helping to preserve Canada's claim of sovereignty. Reciprocally, the agreement committed Canada to guarantee innocent passage for such American ships (Grant, 2010: 450). This approach built on the historical friendship between Canada and the US and on the personal friendship between Brian Mulroney and Ronald Reagan (Coates et al., 2008: 121–22). Here, Mulroney followed the "trusteeship" model of leadership, preserving Canada's interest in Arctic sovereignty but also recognizing the legitimate interest of the United States to access a maritime channel whose defence against the Soviet Union it had much helped to secure (Coates et al., 2008: 85).

In the twenty-first century, Canada's reputation as a middle power began to decline, as reduced Canadian military spending and political will led to a diminished role in international organizations (Paltiel, 2018: 351; Wolfraim, 2014: 73–75). Yet as Canada faced consequent calls to be more targeted with its reduced diplomatic clout (Welsh, 2004: 584–85; Cooper, 2015: 196–98), it nonetheless maintained the Arctic as one important arena in which to advance its national interest through transnational channels. For instance, Canada continued to drive forward the Arctic Council, whose American participation Canada had much helped to secure, thus building allies through shared Arctic interests. In 2010, it established a mandatory registration (NORDREG) for large ships in the Northwest Passage under its Article 234 powers, thus providing greater information to Canada while better enabling potential search-and-rescue efforts for these foreign vessels (Lajeunesse, 2017: 186, 293; Lasserre and Alexeeva, 2015: 182–83). Recently, Canada has also worked with the International Maritime Organization to develop a Polar Code (mandatory as of 2017) that grants Canada some powers not dependent on holding legal sovereignty (Kikkert, 2012: 326–32).

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Canada's approach in each of these cases fits the aim of its 2009 Northern Strategy (Canada, 2009: 34): to "deepen cooperation" with its "exceptionally valuable [American] partner in the Arctic" on "common interests." In English School fashion, Canada has pushed far enough on these aforementioned issues to earn US protest but not backlash, thus managing the tensions within an overall general harmony (Grant, 2010: 452). Moreover, Canada's outcomes in these cases have given life to its 2010 "Statement on Canada's Arctic Foreign Policy" (Canada, 2010: 3–4, 16–18), which aims to institute an ecosystem-based management approach and to promote a rules-based international system. Canada has accomplished these outcomes by pushing not for the status of exclusionary sovereignty but instead for the exercise of functional jurisdiction that empowers it to protect the global environmental common good. This has vindicated Canada's assertion (Canada, 2010: 6) that it "exercises its sovereignty daily through good governance and responsible stewardship." Through these outcomes, Canada has effectively upheld (in Grotian fashion) not only the formal freedom of the seas but also the need to govern the exercise of that freedom.

A Grotian Foreign Policy?

What, then, might a Grotian policy of sovereignty as responsibility look like in a context where Canadian Arctic sovereignty is newly threatened by the advent of commercial shipping? In one possible option, Canada might pursue an agreement with the United States that extends the existing 1988 ACA to all vessels (including commercial and naval vessels). This option would commit Canada to significant investment in Arctic infrastructure; it would also commit the US to assist Canada in its Article 234 enforcement against third-party states; and it would avoid mention of the terms "internal waters" or "international strait" and thereby not set a precedent for other waters.

The first benefit of updating this agreement would be to improve Canada's functional jurisdiction by preventing noncompliant American commercial freighters from seeking to defy Canada's regulations. In English School fashion, this would protect essential Canadian provisions such as proactively regulating and enforcing Arctic shipping mandates, while conceding the nonessential "internal waters" right to arbitrarily stop American ships. Indeed, if Canada were able to exercise effective jurisdiction without actually holding the absolute power traditionally associated with sovereignty, it would function less as an owner than a trustee—the very image of the diplomat in the English School.

Second, such an agreement would recognize and formalize common interests. Several observers on both sides of the border have pointed out that the American insistence on "international strait" would confer a right of overflight on foreign nations—including Russia, which has reinstated Arctic patrols (Huebert, 2009: 27). For these reasons, US Ambassador Paul Cellucci recommended in 2005 that the US recognize the Northwest Passage as internal waters, and in 2010 Secretary of State Hillary Clinton stated that the US was beginning to discuss seriously the idea of such a recognition (Byers and Baker, 2013: 140; Lajeunesse, 2017: 291; O'Leary, 2014: 131–32). From the American perspective, such a bilateral agreement with a co-operative

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neighbour might also persuade the US Senate to accede to UNCLOS, a policy long desired by US presidents from both parties. Hence, in such an agreement both nations would consider the legitimate interests of the other, helping to promote the "harmony of interests" suggested by Wight. They would also bolster the existing Canada-US "special relationship" that has produced successful joint maritime ventures, such as the St. Lawrence Seaway (Huebert, 2009: 25–28; Macfarlane, 2014).

Third, placing the agreement within the framework of Article 234—and agreeing to avoid the language of sovereign status altogether—would provide both legal and diplomatic grounds to ensure that this policy would set no precedent for non-Arctic areas. Such a statement would help to preserve what America has consistently considered an essential interest: not setting a precedent for straits such as Hormuz or Malacca (Coates et al., 2008: 100; Huebert, 2009: 26; Lajeunesse, 2017: 291, 304). This would prevent an outcome in which one side has scores to settle or views the agreement as temporary (Wight, 1992: 187, 193–94, 198). Such an agreement (rather than a 'victory') would allow American diplomats to save face by returning home with tangible symbolic gains: Canadian assent to access for all American ships (Wight, 1992: 121).

The Canadian commitment to increase its enforcement capacities might bring a fourth (and related) benefit: helping to win over international society, at a time when none of its members have recognized Canada's claim. The proposed focus on functional jurisdiction would avoid the language of absolute sovereign status, in which the issue becomes one of zero-sum distributive bargaining. In such negotiations, one's prospective gain is another's loss, which invites the other to respond with a defensive show of strength. In contrast, by merely emphasizing existing Article 234 powers, Canada would emphasize a proactive commitment to the environment and would invite the world (beginning with the US) to help in this quest. This approach would refocus the issue toward mutually beneficial integrative bargaining (Young, 1987: 115, 124–25). Thus, rather than maximizing and galvanizing Canada's adversaries, it would recognize (in English School fashion) the importance of minimizing enemies.

Yet for all the focus on integrative bargaining, the diplomatic and military support of the world's superpower would also bring a fifth benefit: providing weight to Canada's ability to exercise its jurisdiction against potentially hostile third parties, such as Xi's China (Paltiel, 2018: 344, 357–61). Although China has pre-emptively inveighed against any bilateral Canada-US agreement, its recent denunciation of the Permanent Court of Arbitration currently places it in a weak position to accuse Canada of violating international law with such a deal (Nolin, 2017: 356; Lajeunesse, 2017: 294). American support would boost the credibility of Canada's international advocacy and strengthen Canadian environmental jurisdiction, thus—in English School fashion—uniting enforcement power with the moral ideals of international convention (Wight, 1992: 153–54).

Finally, such an agreement would commit Canada to take up a long-neglected role as active trustee (Griffiths, 1987: 81–83). As Donat Pharand has argued, "The United States will never agree to recognize our full control over those waters unless they know that we have the capability to exercise that control, which we do not have at the moment" (Byers, 2010: 62–70, 80). Indeed, at present, the US might even better

attain its own security by discreetly policing the Northwest Passage itself under an international straits regime than by granting Canada a robust authority that Canada cannot effectively exercise. A new agreement with the United States would provide a Canadian prime minister additional political capital by which to justify immediately increased spending on search-and-rescue capacity, oil spill prevention and polar mapping. Looking ahead, Canada might further consider speeding the construction of an icebreaker to replace the Plymouth Barracuda-vintage *Louis St. Laurent* and adding another heavy icebreaker to supplement its fleet of lighter Harry DeWolf–class vessels. These would help to facilitate Arctic shipping and international trade, as well as help to repair Canada's Arctic credibility. By committing to the expense of such resources, Canada would make Grotian sacrifices for the good of international society, thus in turn better vindicating its own claim.

Of course, some US presidents might be less amenable than others to such a proposed agreement; the Trump-Trudeau relationship is not the Reagan-Mulroney one. But while heads of government come and go, the issues remain. Future American administrations may seek to mend fences with traditional allies. Even at present, President Trump's insistence that US allies should increase their military spending might well dispose him to such an agreement. Indeed, the current American insistence on greater allied responsibility is only a louder variant of President Obama's earlier and more diplomatic calls for the same.

Sovereign Responsibility and International Society

In conclusion, a Grotian foreign policy offers surprising possibilities for Canada. The classic defender of the free seas is not so much a threat to Canada as an ally. Canada might better preserve its political capital not by resolutely opposing the legitimate interests of the seafaring states that constitute much of international society but by directing those states—particularly the US—to examine the foundations of their own supposedly Grotian position on the free seas. Much like a sea captain confident of navigating around a visible iceberg while neglecting its much greater hidden depths, those advocates of a simplistic "international strait" stance might find their own position beginning to take on water. Indeed, if Canada were to take up the mantle of the free-sea progenitor, and thus appeal to the basic premises of its opposition, it might be able to symbolically affirm the desirability of the open sea, while still achieving its substantive aims.

Canada might, of course, be wise to continue its appearance of opposition, as a necessary bargaining chip to trade for these concessions. Indeed, Wight argues that while diplomatic agreements should be made public, it is not necessary (or even wise) to conduct negotiations in public (1992: 199–202). However, behind closed doors, Canada might consider holding off on advancing status-based claims of sovereignty in order to gain better exercise of functional sovereignty (see Beesley, 1971: 7).

A recent standard-bearer in Arctic scholarship suggests that the centuries-old Western quest for the Northwest Passage will be unfinished until "either the

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international community can be brought to accept the Canadian position or Ottawa is forced to accept the existence of the right of transit passage through its waters" (Lajeunesse, 2017: 13). But perhaps a Grotian "middle way" might transcend this binary opposition, at least for now. Indeed, if sovereignty is about responsibility and the capacity to exercise it, then Canada needs acquiescence only to the acts it wishes to carry out. As Young points out, "many social institutions operate effectively in the absence of formalization" (1987: 130)—perhaps even the current Canadian Constitution.

Indeed, this distinction between the status and the exercise of sovereignty reflects an important and underexplored theme in Grotius's conception of rights (including the right of sovereignty): that of an embedded notion of responsibilities (Geddert, 2017: 1–3, 15–16, 142–62, 198–208). Rights are the political discourse of today, and Grotius is increasingly cited as the true pre-Hobbesian/Lockean progenitor of subjective natural rights. Likewise, Grotius is even more commonly cited as a progenitor of the modern nation-state system characterized by sovereignty. But when we examine the Grotian roots of rights, we might find a rights discourse less fixated on enlightened self-interest and more attentive to the enlargement of responsibility. Likewise, we might find a conception of sovereignty not simply defined by power but oriented toward the general good—a good not reducible to the sum total of national self-interests in maintaining the idea of sovereignty, but a good that transcends such interests by seeking to preserve nature in all its forms. Hence, rather than clinging to an absolute concept of Arctic sovereignty as a status symbol, Canada might advocate its own fitness to maintain such elements of leadership over the Northwest Passage as conduce to the benefit of all. This approach might allow Canada to recapture, in this specialized sphere, its historical attitude of multilateralism, to assume greater international responsibilities and to strengthen its voice in the society of states. As Canada grapples with the fading "middle power" self-understanding of its youth, it might find that agreeing to a right of (Northwest) passage in the Arctic heralds a coming stage of mature and invigorated international citizenship.

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NOTES

1 Some observers reject an impending threat to Canadian sovereignty; see, for example, both Griffiths and Lackenbauer (Griffiths et al., 2011: 2–9), Coates et al. (2008) and, most recently and comprehensively, Lajeunesse (2017: 294–301). The last argues that 1) destinational shipping will increase; 2) shipping transits will not materialize due to a) ice hazards and b) inadequate mapping; and 3) China will ask permission. One all-too-brief response is that 1) Arctic oil and gas exploration likely requires a major price increase; 2) climate change might a) quickly reduce ice hazards and b) shipping savings could quickly incentivize mapping efforts; and 3) China suddenly reversed its "hide and bide" policy in the South China Sea, and it could do the same in the Arctic.

2 Other sea regimes overlap noninternal waters, such as high seas, exclusive economic zones, territorial seas and archipelagic waters. The last, if extended in scope beyond "mid-oceanic waters," would offer Canada a limited measure of control. Canada, however, has sought the strongest possible powers over the waters of the Northwest Passage by claiming them as internal waters.

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