THE CANADIAN MARITIME LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DE DROIT MARITIME
www.cmla.org

John G. O'Connor, President
Langlois Kronström Desjardins LLP
2820 Laurier Boulevard, Suite 1300
Quebec, QC G1V 0C1
Tel: 418-650-7002 Fax: 418-650-7075
E-mail: john.oconnor@lkd.ca

Robert C. Wilkins, Secretary-Treasurer
Borden Ladner Gervais LLP
1000 de la Gauchetière Street West, Suite 900
Montreal, QC H3B 5H4
Tel: 514-954-3184 Fax: 514 954-1905
E-mail: rwilkins@blg.com

Quebec City, January 22, 2015

Honourable David L. Emerson, P.C.
Chair
CANADA TRANSPORTATION ACT REVIEW
SECRETARIAT
350 Albert Street, Suite 330
OTTAWA, ON
K1A 0N5

Re: Canadian Maritime Law Association Submissions to Canada Transportation Act Review

---

Dear Sir:

The Canadian Maritime Law Association wishes to take this opportunity to make submissions to the Canada Transportation Act Review to address its mandate whether adjustments to the current transportation legislative and policy framework are required to support Canada's international competitiveness, trade interests, and economic growth and prosperity.

During the last decades, the CMLA has made various submissions to the Minister of Transport and ministers of other departments responsible for transportation related legislation on law reform proposals to address developing commercial and technological practices and legal inconsistencies and anomalies which impede maritime commerce. While much has been accomplished through the enactment of a restructured *Canada Shipping Act, 2001* and the *Marine Liability Act* and its successive amendments, there are still aspects of maritime and transportation law reform which need to be addressed. We submit the following adjustments to the

current legislative and policy framework are required to support Canada's international competitiveness, trade interests, and economic growth and prosperity.

- Carriage of Goods, including intermodal carriage, international water carriage and domestic water carriage.
- Arctic Marine Transportation.
- Application of Sale of Goods Law to Offshore Transactions and Maritime Property.
- Fair Treatment of Seafarers.
- Facilitating Financing of Marine Property and Transportation Assets.
- Modernizing Obsolete Common Law Rules.

The CMLA, established in 1951 and continued as a federal not-for-profit corporation, aims to represent all Canadian commercial marine interests for the uniform development of Canadian and international maritime laws affecting marine transportation and related aspects. As well as almost 300 individual members based throughout Canada, including lawyers and marine industry executives, the CMLA has 13 constituent member businesses and trade associations representing diverse participants in Canadian marine and related service industries. While the CMLA consults constituent members in developing policy recommendations, constituent members are free to make their own policy recommendations to government.

Summary

The existing transport legal liability regimes for each individual transportation mode are lagging behind business needs and expectations for seamless intermodal movements. Because some transportation operations fall within provincial jurisdiction, Canada needs to work toward a uniform and harmonized liability regime for intermodal transport applying federally and provincially.

Canada has tried to keep its international water transportation regime in step with that of its major seaborne trading partners. With five types of legal systems which may apply to international waterborne transit, it is bad for business to only wait and hope for international consensus. Canadian industries and exporters are increasingly disadvantaged by a backlog of unaddressed uncertainties in application of existing law to evolving marine transportation business practices. Canada should act now to update its international water transportation law to reflect incremental reforms by major trading partners and Canadian commercial needs.

The Northwest Passage is now actively being used for international cargo transit and an international Polar Code will likely come into effect in 2017. Canada needs to make sure its Arctic shipping regulatory regime is consistent with increasing use and international requirements.

Coastal and EEZ resources such as fish and petroleum being traded from offshore locations internationally but there are gaps as to what law applies. Canada should act to properly apply sale of goods laws to offshore transactions and marine property.

Canada has enacted legislation imposing major criminal penalties and duties of civil compensation on ships officers for marine pollution incidents over which they may have no control. These laws take away legal defenses. This deters anyone from wanting to be a ship's officer. These laws are inconsistent with Canada's international treaty obligations for channeling responsibility for pollution damage and may contravene the Charter of Rights. They should be repealed or amended. Canada does follow international standards for seafarer documents and should take the final step to ratify International Labor Organization treaty 185 to confirm seafarers are treated fairly.

Canada's federal law has gaps and gives little guidance for secured financing of ships and other marine assets. Legal uncertainty discourages access to investment. Canada needs to clarify eligibility for ship ownership, priority of registered ship mortgages and give the same procedural legal guidance for financing of marine property as is currently found in the provinces' PPSA laws.

Canada inherited shipping mercantile law from England in 1931 but has not kept up with provincial commercial law reform. Canada needs to update obsolete parts of the federal common law of shipping to be consistent with the commercial law of the provinces applying to land-based business.

Carriage of Goods

A. Intermodal Carriage

Issues

Commerce has moved to a "mode blind" logistics model. Deregulation has driven the load brokerage business. There are increasing anomalies between the existing modal related transportation liability regimes and actual commercial practices because the existing transport legal liability regimes for each individual mode are lagging behind business needs and expectations.

Although the Federal Court takes jurisdiction over through bills of lading with a water carriage component, over international carriage by air and over surface carriage liabilities arising from federal statutes such as the *Railway Act* and *Canada Transportation Act*, there are jurisdictional gaps in the law applicable to the logistics chain such as land pre carriage and on carriage not covered by a through bill of lading or inland storage in transit[1].

[1] *Matsuura Machinery Corp. v. Hapag Lloyd AG* (1997), 211 N.R. 156 (Fed. C.A.) (truck delivery from United

While the provinces have jurisdiction to regulate business under Section 92(10) (a) of the *Constitution Act, 1867*, the federal government has jurisdiction to regulate transportation undertakings if such jurisdiction is an integral part of its primary competence over some single federal subject, such as navigation and shipping (for example, shipping lines and functionally related businesses such as stevedoring) and the grant of jurisdiction to the federal government over "Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or "extending beyond the Limits of the Province."[2] To the foregoing, court decisions have added as part of federal jurisdiction aeronautics and aviation, which also forms part of the multi-modal transportation and logistics industry[3]. For example, the balancing of logistics along the axes of speed, price and reliability has led to arrangements such as forwarders shipping cargo by ocean from the Far East to western Canada and then consolidating shipments for onward air transport to specific destinations, with shipments all covered by NVOCC bills of lading.

Courts have ruled that the logistics services agency agreements which load brokers and freight forwarders enter into with their customers are governed by provincial law even though the intermediaries' contracts with interprovincial land, air and marine carriers to actually move the goods are governed by federal law[4]. Contracts for logistics services, suspended in the uneasy interface between principal and agent, do not always give legally predictable results[5]. In this mode blind age the liability regime applicable to intermodal carriage should not depend upon the geographic accident whether a leg of the carriage crosses or does not cross a provincial boundary.

As a result of the Supreme Court *Re Securities Act* reference[6] the only comprehensive solution may be co-operative enactment by the Government of Canada and the provinces of uniform legislation governing liabilities and responsibilities for intermodal carriage. Comprehensive solutions might involve either a cooperative enactment by the Government of Canada and the provinces of uniform legislation governing liabilities and responsibilities for intermodal carriage and terminal and warehousing operations or species of further delegated legislation to provincial authorities to achieve the same objects[7]. An example of the latter is the *Motor Vehicle*

States to Ontario), *Sio Export Trading Co. v. The "Dart Europe"*, [1984] 1 F.C. 25 (truck delivery from ship at Montréal to Dorval within a province).

2 *Total Oilfield Rentals Limited Partnership v. Canada (Attorney General)*, 2014 ABCA 250 (CanLII).

3 *Prudential Assurance Co. v. Canada*, [1993] 2 F.C. 293.

4 *Consolidated Fastfrate v. Western Canada Council of Teamsters*, [2009] 3 SCR 407.

5 Compare *Intermunicipal Realty Corp. v. Gore Mutual Insurance Co. et al.*, [1978] 2 F.C. 691 and *Alcan Primary Metal v. Groupe Maritime Verreault Inc.*, 2011 FCA 319 (CanLII).

6 *Reference re Securities Act*, [2011] 3 SCR 837.

7 Intergovernmental delegation of administrative authority has been recognized since *A. G. Nova Scotia v. A.G. Canada*, [1951] S.C.R. 31.

Transport Act Conditions of Carriage Regulations[8], applying truck transport waybill terms set under provincial law to interprovincial cargo movements.

Recommendations

1.1 To the extent federal jurisdiction permits, a consolidated intermodal carriage liability regime applicable to all transport modes should be enacted by Parliament

1.2 As some logistics operators are not interprovincial undertakings, enactment of co-operative federal and provincial harmonized intermodal liability regimes will be necessary to ensure a uniform logistics liability regime across Canada

B. International Water Carriage

Issues

Presently, there are five major types of legal regimes potentially applicable to carrier and shipper responsibility for international cargo carriage by water[9].

- The 1968 *Hague-Visby Rules*[10], last amended in 1979, which have the force of law in Canada and 51 other countries
- The 1924 *Hague Rules* (precursor to the Hague-Visby Rules), still applicable in 58 countries, including the United States
- The 1979 *Hamburg Rules*, in force or applicable in 29 countries
- The 2008 *Rotterdam Rules*[11], not yet in force and not signed by Canada
- National laws of countries which do not follow the above international treaties

Canadian policy has been to choose a water carriage of goods liability regime consistent with that of its major seaborne trading partners, to avoid disadvantaging exporters and to encourage carriers to service Canadian ports.

The Rotterdam Rules is a United Nations initiative to comprehensively update the international carriage of goods regime and extend its application from only the ocean going leg to international water transport with a land leg. So far, the Rotterdam Rules have been adopted only by Congo, Spain and Togo. The United States signed the Rotterdam Rules but has not ratified the Convention. Major trading partners of Canada, such as the United Kingdom and China, have not committed to adoption of

---

8 SOR/2005-404.

9 See http://www.mcgill.ca/maritimelaw/glossaries/package-kilo.

10 *Marine Liability Act*, S.C. 2001 c. 6 Sched. 3.

11 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, http://www.uncitral.org/pdf/english/workinggroups/wg_3/CTCRotterdamRulesE.pdf

the Rotterdam Rules. Some commentators predict that many nations will ratify the Rotterdam Rules only once the United States has done so, for otherwise that Convention will suffer the same fate as the Hamburg Rules which is in force but applies only to a limited number of states.

A major policy choice is whether the Government of Canada should await developments whether the Rotterdam Rules will be adopted by Canada's major trading partners before deciding to continue with the Hague Visby rules, adopt the Rotterdam Rules or develop a made in Canada option. Recently in its Report to Parliament [12]Transport Canada has recommended that "no action should be taken under section 44 of the MLA to implement the Hamburg Rules over the review period ending January 1, 2020. What was significant in Transport Canada's considerations is that 50% of Canada's international seaborne trade is with nations which have enacted the Hague or Hague Visby Rules while only 4% of Canada's trade is with nations parties to the Hamburg Rules. 46% of Canada's trade is with nations not party to any international regime.

Awaiting international developments indefinitely before deciding to reform Canada's international water carriage of goods regime in our view is bad for Canadian commerce. As early coming into force of the Rotterdam Rules becomes increasingly unlikely, Canadian industries and exporters are increasingly disadvantaged by a backlog of unaddressed uncertainties in application of existing law to evolving marine transportation business practices and Canadian judicial decisions diverging from decisions of other major trading nations' courts interpreting the same international conventions, such as the Canadian Federal Court's refusal to apply the Hague Visby rules to waybills[13] and continuing Federal Court enforcement of bill of lading identity of carrier clauses.[14]

In 1991 Australia significantly amended its earlier legislation adopting the Hague Rules to clarify and modernize aspects relating to standing to sue, sea carriage documents, the range of carriers responsible, the period for which carriers must accept responsibility, carrier responsibility for delay and the right of cargo interests to sue in

---

[12] To reflect the perceived balance at the time of enactment of domestic commercial interests between shippers and carriers, the *Marine Liability Act* continued the Hague Visby Rules and also enacted the Hamburg Rules with provision under section 44 that Transport Canada report to Parliament every five years whether Canada should proclaim the Hamburg Rules in force.

[13] *Cami Automotive Inc. v. Westwood Shipping Lines Inc.*, 2009 FC 664, affirmed 2012 FCA 16. Canadian courts' refusal to regard the Hague Visby rules as compulsorily applicable to cargo carried under waybills has considerable commercial impact because general and containerized cargoes are increasingly and commonly being carried under waybills rather than bills of lading.

[14] Unlike the Canadian decision in *Jian Sheng Co. v. Great Tempo S.A.*, [1998] 3 F.C. 418 (FCA), upholding identity of carrier clauses, England's House of Lords commented: " ... I have great difficulty in accepting that a shipper or transferee of a bill of lading would expect to have to resort to the detailed conditions on the reverse of the bill (and to persevere in trying to read the conditions until reaching conditions 33 and 35) in order to discover who he was contracting with. And I have even greater difficulty in accepting that he would expect to do so when the bill of lading contains, on its face, an apparently clear and unambiguous statement of who the carrier is. " *Owners of Cargo Lately Laden on Board the "Starsin" and Others*, [2003] UKHL 12.

Australia.[15] Other major trading partners, such as United Kingdom[16] and Germany[17], have recently incrementally amended their ocean carriage law on a subject by subject basis.

Marine Liability Act s. 46 permitting cargo claims to be litigated here, has not benefitted Canadian exporters as intended to permit claims for cargo loss or damage to be brought in Canada, because of the Federal Court's very restrictive interpretations of that section resulting in cargo interests being bound by contractual clauses to pursue cargo claims elsewhere[18]. *Marine Liability Act* s. 46 is a precedent for the incremental approach as it already has enacted parts of the Hamburg Rules dealing with the places where carriers and may be sued for loss or damage to cargo. Many of the recommended areas for reform are incremental to the present Hague Visby Rules regime.

Canada's *Bills of Lading* Act, which governs transport documents, was first enacted in 1871 and replicated a British 1855 statute. The Canadian statute has not been updated, notwithstanding reforms in the United States[19], the United Kingdom[20] and the various provinces[21]. The federal *Bills of Lading Act* does not provide for electronic bills of lading and waybills which are becoming increasingly commonplace in international transportation.

Recommendations

2. Canada should now amend its international carriage of goods by water regime taking into account recent maritime law reform by our major seaborne trading partners.

These amendments should:

2.1 clarify the extent to which contracting parties may derogate from the carriage of goods regime

---

[15] Australian *Carriage of Goods by Sea Act, 1991.* http://www5.austlii.edu.au/au/legis/cth/consol_act/cogbsa1991196/sch1a.html

[16] The *Carriage of Goods by Sea Act, 1992* (c. 50) (UK) supplements the Hague -Visby Rules by clarifying the range of cargo interests who have standing to sue for cargo damage.

[17] 2013 amendments to the German Commercial Code modify the Hague-Visby Rules by making the actual carrier responsible along with the contractual carrier, removing the carrier fire and error of navigation defences, and extending carrier responsibility for goods as long as they are under the carrier's control.

[18] *Mazda Canada Inc. v. Cougar Ace (The)*, [2009] 2 FCR 382.

[19] 49 U.S. Code Chapter 801 - BILLS OF LADING http://www.law.cornell.edu/uscode/text/49/subtitle-X/chapter-801

[20] *Carriage of Goods by Sea Act, 1992* (c. 50) (UK).

[21] Part 2 of *The Personal Information Protection and Electronic Documents Act*, S.C. 2000, c 5 does not apply to bills of lading: by contrast, the Uniform Law Conference of Canada model law applying also to transportation documents is reflected in several provinces' legislation - see *Electronic Transactions Act,* SA 2001, c E-5.5, *Electronic Transactions Act*, SBC 2001, c 10 , s. 23 *Electronic Commerce Act, 2000*, SO 2000, c 17, *The Electronic Information and Documents Act, 2000,* SS 2000, c E-7.22 .

2.2 make the compulsorily applicable carriage of goods regime explicitly applicable to goods carried under waybills

2.3 make the compulsorily applicable regime applicable to inbound as well as outbound cargoes[22]

2.4 make the performing carrier jointly and severally liable with contracting carrier

2.5 clarify standing of cargo interests to sue

2.6 clarify who in the logistics chain can benefit from carrier defenses and limitations[23]

2.7 amend *Marine Liability Act* s. 46 to exclude court discretion to enforce choice of foreign forum clauses in marine bills of lading and waybills, so Canadian cargo interests can pursue cargo claims here

2.8 abrogate the error in navigation and management of the ship defences

2.9 increase the time bar for claims to two years[24]

2.10 increase weight and per package limitation of liability to reflect inflation since 1979 and provide an indexing formula

2.11 update federal transport documents legislation including the *Bills of Lading Act*

C. Domestic Water Carriage

Issues

What liability regime should cover domestic water carriage? Presently, under the *Marine Liability Act*, carrier and cargo interests are free to contract for allocation of responsibilities in water carriage from point to point in Canada as long as no bill of lading is issued and the contract stipulates that the Hague Visby rules do not apply. Canadian carriers have pressed for continued freedom of contract for domestic carriage where no bill of lading or waybill is issued. If Canada makes a policy decision to implement the Rotterdam Rules, because these rules stand to apply to

---

[22] This would avoid inconsistencies in application of foreign countries' choice of jurisdiction rules - see *Ontario Bus Industries Inc. v. "Federal Calumet" (The)* (1991), 1991 CarswellNat 150 (Fed. T.D.); affirmed (1992), 1992 CarswellNat 1048 (Fed. C.A.).

[23] For example the Hague Visby Rules extend the protection of water carriers' liability defenses to employees and agents but not to subcontractors.

[24] Presently only one year under the Hague Visby Rules, but two years under the Hamburg Rules and the Rotterdam Rules.

international water carriage with a land-based leg, a review of the interface between the Rotterdam Rules and the domestic water carriage regime is necessary.

Recommendation

3.1 Any changes to the Canadian law on international water carriage of goods should be reviewed for consistency and compatibility with the domestic water carriage of goods regime.

Arctic Marine Transportation

Issues

2013 saw the first commercial cargo through transit of the Northwest Passage not stopping to take on or discharge cargo and not associated with Canadian arctic resupply[25]. The Tanker Safety Expert Panel is working to release its study of the pollution and HNS substances preparedness and response north of 60°. Voyaging in the Arctic by passenger and recreational vessels is increasing. Transit by a conventional cruise ship (as distinct from smaller expedition type passenger vessels) has been announced for 2016[26]. The International Maritime Organization has given approval to the operating safety aspects of a Polar Code for commercial vessels. If the environmental protection aspects of the Polar Code are approved this year will come into force in 2017 under the tacit acceptance procedure of the SOLAS Convention.

As a general rule, international regulatory instruments such as the Polar Code apply only to larger ships operating internationally. The tonnage cut off for application of international standards varies between international conventions. In some cases Canada has extended the application of international standards to smaller vessels or those using its internal waters and in other cases Canada has developed a made in Canada domestic regulatory regime for smaller commercial vessels[27].

At present, regulation of Arctic marine transportation subject to the usual operational regulatory regime of the *Canada Shipping Act, 2001* and additional specialized requirements under the *Arctic Waters Pollution Prevention Act.* Canada through the Nordreg reporting system[28] requires that ships of whatever flag registry which use Canada's arctic waters comply with Canadian standards.

In Canada, the legislative authority for the implementation of the SOLAS Convention and its amendments is found in the *Canada Shipping Act, 2001.* There are

---

[25] See for a dramatic example, http://www.fednav.com/en/voyage-nunavik; Lackanbauer, W. and Lajeunesse, A. "More ships in the Northwest Passage will boost our Arctic Claim", *Globe and Mail*, January 5, 2015 http://globeandmail.com (accessed January6, 2015).

[26] http://www.maritime-executive.com/article/Experts-Voice-Concerns-Over-New-Arctic-Cruise-2014-07-26 (accessed December 31, 2014).

[27] e.g. *Small Vessel Regulations*, SOR/2010-91.

[28] http://www.tc.gc.ca/eng/marinesafety/tp-tp12819-menu-2890.htm

inconsistencies between present operational regulatory requirements for Arctic shipping in the regulations under the *Arctic Waters Pollution Prevention Act* and the Polar Code. Canada was able to negotiate a clause in the safety portion of the Polar Code which preserves the right of parties to take additional regulatory actions consistent with international law including the UN Law of the Sea Convention article 234[29]. Transport Canada is reviewing the *Arctic Waters Pollution Prevention Act*[30]. Unless there is an overriding and demonstrable policy rationale that international operational regulatory regimes are inadequate to meet the Canadian public interest, it is inefficient for marine commerce to have a domestic regulatory regime inconsistent with Canada's international obligations.

Recommendations

4.1 The existing *Arctic Waters Pollution Prevention Act* review should include whether the *Canada Shipping Act, 2001* or the *Arctic Waters Pollution Prevention Act* is the appropriate primary matrix for regulation of Arctic shipping operations

4.2 The *Arctic Waters Pollution Prevention Act* and its regulations should be reviewed for consistency with the Polar Code.

4.3 The existing AWPPA policy review should include what is the appropriate regulatory regime for smaller commercial vessels operating in Arctic areas.

Application of Sale of Goods Law to Offshore Transactions and Maritime Property

Issues

Petroleum cargoes are frequently traded at and after the point of loading from offshore oil platforms within Canadian territorial waters seaward of the provinces or Canada's exclusive economic zone and therefore outside provincial geographical jurisdiction[31]. Commodities generally can, and are being traded during the course of marine transport. Rapid agreement to sale contracts by commodity traders without negotiation of terms by reference is commercially essential. Application of the existing non-statutory contract "closest connection" choice of law rule[32] in situations where the operational connecting factors to a contract are geographically diverse is

---

29 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. ...

30 https://www.tc.gc.ca/eng/marinesafety/debs-arctic-debate-direction-1228.htm

31 *Reference Re: Offshore Mineral Rights*, [1967] SCR 792.

32 *Imperial Life Assurance Co. of Canada v. Segundo Casteleiro y Colmenares*, [1967] S.C.R. 443.

unpredictable. This has been identified as a specific commercial uncertainty for the petroleum industry.

Similar legal uncertainties could arise regarding the supply of any goods seaward of provincial boundaries in the offshore sector or other offshore transactions outside the territory of Canada or a province such as ship to ship transfer at sea of fish to wholesale purchaser vessels[33].

There is already provision in the *Oceans Act* [34] to extend the application of provincial laws to activities carried on outside provincial territory in Canada's territorial waters or its exclusive economic zone.

Canada and its provinces have enacted legislation implementing the Vienna Convention on International Sale of Goods. This treaty is applicable to international sales between businesses located in contracting states unless it is specifically contractually excluded. The federal statute applies the Convention only to contracts entered into by Her Majesty in right of Canada or on behalf of Her Majesty in right of Canada by any departmental corporation or agent corporation[35]. This leaves a gap in implementation which is inconsistent with Canada's international obligations especially in the context of the United States also being a party to the Vienna Sales Convention.

Recommendations

5.1 Regulations should be made under the *Oceans Act* to permit provincial sale of goods legislation to apply to transactions where risk or title passes at offshore structures or anywhere within Canada's territorial waters seaward of the provinces or within Canada's EEZ.

5.2 The existing federal *International Sale of Goods Contracts Convention Act* should be amended to make it applicable to international sale contracts not governed by provincial law.

Fair Treatment of Seafarers

Issues

The CMLA is a national member association of the Comite Maritime International, an international nongovernmental organization which since 1897 has urged the development and greater uniformity of international maritime law. The CMI has begun an initiative with the IMO and other nongovernmental organizations to encourage the implementation or wider adoption of various international maritime

[33] *Shogun Seafoods (1985) Ltd. v. "Simon Fraser No. 1"(The)* (1990), 36 F.T.R. 289 (T.D.).
[34] S.C. 1996, c. 31, s. 21.
[35] S.C. 1991, c 13, s. 5.

conventions. The Conventions subject of this initiative include the International Labour Convention 185 on Seafarer Identity Documents, which entered into force in 2005. Seventy-nine countries are now parties. Canada is a state party to the predecessor Convention 108 on Seafarer Identity Documents, but not to Convention 185.

The Seafarers Identity Documents Convention is intended to facilitate entry of seafarers into a country for the purpose of shore leave, transit, transfer or repatriation. Convention 185 is intended to update standards for seafarers identity documents to reflect the more robust general maritime security regimes introduced after 9/11 by providing for coded biometric identity information and audited security standards for governmental organizations issuing seafarer identity documents. For the marine workplace to be a sufficiently attractive employment choice seafarers should be entitled to travel and shore leave without unnecessary hindrance. Canada has implemented voluntarily issuance of seafarer identity documents which are technically compatible with requirements of Convention 185, but has not yet ratified Convention 185[36].

The international liability and compensation regimes for marine oil pollution, to which Canada is a party were intended to channel responsibility for compensation only to registered shipowners and supplementary compensation funds with monetary contributions from cargo interests. Employees of the carrying vessel such as ships officers and crew were intended not to be exposed to legal liability[37]. This general policy has been significantly eroded by various countries' domestic legislation imposing compensatory and criminal liability upon ships officers and crew even where the results of the accident investigations show significant causes of many marine pollution incidents were not related to crew operational decisions during the voyage but to factors outside crews' control such as inadequate ship design, inadequate maintenance budgets and the refusal of coastal state authorities to permit damaged ships to enter a port of refuge.

In 2005, Canada joined this trend by amending the *Migratory Birds Convention Act* 1994. Bill C-15 imposes strict penal liability on among others, the master and chief engineer of a ship for all pollution and imposes a reverse onus to prove that they took "all reasonable care" to ensure that the ship and its crew did not pollute[38]. In 2009, Bill C-16 greatly increased the fines for pollution offenses under the *Migratory Birds Convention Act 1994* in respect of individuals to a minimum $5000 or maximum of

---

[36] http://www.tc.gc.ca/eng/marinesafety/mpsp-training-examination-certification-central-registry-537.htm (accessed December 31, 2014).

[37] For background to development of the Canadian and international marine pollution liability and compensation regimes, see http://www.cmla.org/papers/ErosionCLC-Popp.pdf

[38] This act gives effect to a 1916 treaty for the protection of migratory birds. Because of the extensive geographic scope of bird migration between United States and Canada, a marine pollution incident on practically any of Canada's navigable waters could be a prohibited deposit of oil on waters frequented by migratory birds. *Migratory Birds Protection Act, 1994* s. 5.4.

$300,000 or six months imprisonment or both for summary conviction proceedings and a minimum of $15,000 or maximum of $1 million or three years imprisonment or both for an indictable offense. That amending legislation provides that a court may only impose a fine less than the minimum if it provides reasons why the court considers a minimum fine would cause undue financial hardship.

The 2009 amendment also empowers the sentencing court to direct convicted offenders to compensate any person for the cost of any remedial or preventive action as a result of the act which constituted the offense unless the victim is entitled to make a claim for such expense under the *Marine Liability Act* or the *Arctic Waters Pollution Prevention Act*[39]. If the cost of remediation exceeds the monetary limits of civil compensation liability under *Marine Liability Act* (which may be the case for smaller vessels), it is possible that the right to civil compensation under the *Migratory Birds Convention Act 1994* could be interpreted as a right to claim top up of compensation available from the other statutory civil compensation regimes.

Under general principles of insurance law, it is unlikely any coverage could be purchased for civil compensation ordered as part of sentencing for a criminal offense. Some insurers will offer directors and officers errors and omissions coverage for the expense of defending criminal proceedings, but only on restrictive conditions that the result of the proceedings is an acquittal.

The CMLA has gone on record with the Government of Canada that the amendments enacted by Bill C-15 are inconsistent with Canada's international obligations under the MARPOL and Fund Conventions and that the present reverse onus defence is inconsistent with the Canadian Charter of Rights and Freedoms. The dread of possible uninsurable exposure to significant criminal and civil compensation liabilities upon ships officers is a significant deterrent to the recruitment and retention of ships' crew.

Recommendations

6.1 Canada should take necessary implementing measures to declare ILO Convention 185 applicable for Canada.

6.2 The *Migratory Birds Convention Act, 1994* should be amended to repeal criminal and civil compensatory liability of ships' officers for pollution damage otherwise compensable under the Marpol and Fund Conventions including any civil liability exposure in excess of the monetary limitations under such Conventions, or, at a minimum, to provide for the standard prosecution onus of proof appropriate to serious criminal offenses.

[39] Migratory Birds Protection Act, 1994 ss. 16(1)(d) and 17.1(3).

Facilitating Financing of Marine Property and Transportation Assets

Issues

The *Canada Shipping Act, 2001* permits any Canadian individual or corporation to own a Canadian flag vessel, but extends ownership rights only to foreign corporations[40]. It also restricts ownership by holders of financing leases only if they gain ownership. This prevents commercial flexibility in ship ownership by entities such as tax advantaged limited partnerships and impedes ship financing, because financial institution lessors may be legally precluded from operating ships [41] or may not wish to risk manage direct regulatory responsibilities of a registered shipowner. Present ownership restrictions are unnecessary to assure regulatory compliance, because all commercial shipowners must appoint an authorized representative with a presence in Canada. Such authorized representatives have statutory responsibilities for complying with regulatory requirements[42].

While the *Canada Shipping Act, 2001* and the *Bank Act* clearly set out priority rules for multiple mortgages registered against Canadian registered and recorded vessels and fishing vessels under each of these statutes[43], the statutes are silent on the priority between ship mortgages registered under federal law and security interests attaching to ships which are permitted under the personal property security legislation of some provinces. There are conflicting cases whether a ship mortgage registered under federal law has priority over a security interest registered under provincial law[44]. The same potential for legal uncertainty and conflict has been noted in the context of secured financing of railway rolling stock[45]. Canada and its provinces have addressed what otherwise would be potential for conflicting priorities affecting security interests in aircraft and their equipment by each enacting coordinate legislation implementing the Cape Town Convention[46].

Although provincial law generally covers sales and financing transactions involving personal property, Canadian maritime law has been applied to various types of tangible and intangible personal property including ships, equipment and appurtenances associated with ships including bunker fuel, marine salvage, monetary compensation for the use of ships[47], marine insurance premiums and proceeds of

---

40 *Canada Shipping Act,* 2001, S.C. 2001 c. 26 s. 47.

41 *Bank Act*, S.C. 1991 c. 46, s. 410(2).

42 *Canada Shipping Act*, 2001, S.C. 2001, c. 26, ss. 14, 85, 92-94, 106.

43 *Canada Shipping Act, 2001*. S.C. 2001 c. 26 Part 2, *Bank Act*, S.C. 1991 c. 46 s. 428(5).

44 Compare Re Doucet (1983), 42 O.R. (2d) 638 with *Royal Bank of Canada v. 1132959 Ontario Ltd.*, [2008] O.J. No. 3142(QL) and *Innovation Credit Union v. Bank of Montreal*, 2009 SKCA 35.

45 Isaacs, M. D. and Cofman, Alan S. "Missing the Boat: The Limits of Provincial and Territorial Personal Property Security Regimes in the Face of Federally Registered Maritime Mortgages" http://isaacsco.ca/wp-content/uploads/2012/04/PPSA-Registration-and-Boat-Mortgages_Isaacs-and-Cofman.pdf (accessed January 8, 2015).

46 *International Interests in Mobile Equipment (Aircraft Equipment) Act*, S.C. 2005, c 3, and its provincial counterparts.

47 Including freight, hire, demurrage, deadfreight, despatch money and passage money.

marine insurance. All of these types of property and cash flows are commonly the subject of various commercial financing arrangements such as ship mortgages, assignments of freight and marine insurance and liens for freights and subfreights.

Other than the basic *Canada Shipping Act, 2001* provisions on ship mortgages and the minimal Part 13 *Bankruptcy and Insolvency Act* requirements for receiverships, there is little procedural guidance under federal statute for financing of marine assets and enforcement of security interests in maritime property. If the recent Ontario Commercial List decision in *Roynat Inc. v. Phoenix Sun Shipping*[48] is followed in other provinces, secured creditors wishing to enforce against marine assets will not be able to do so through provincial superior courts if another creditor has already arrested the vessel in the Federal Court. There is particular uncertainty where it is necessary to enforce claims against both marine and non-marine assets of the same company. Increased transaction costs and legal uncertainties increase the difficulty and expense of borrowing for business investment.

Recommendation 7.3 repeats an earlier CMLA recommendation to the Minister of Transport taken up in the Transport Canada 2005 discussion paper, but which has not progressed to legislative proposals.

Recommendations

7.1 To facilitate shipping investment and ship finance, the *Canada Shipping Act, 2001* should be amended to permit any form of business organization and to permit any form of financial lessee to be registered owners of Canadian recorded or registered vessels.

7.2 The *Canada Shipping Act, 2001* should be amended to provide that ship mortgages registered under that Act have priority over any security interests registered under the law of a province or territory attaching to a Canadian registered or recorded vessel.

7.3 To facilitate access by the Canadian marine industry to ship financing and ensure consistency and predictability in the enforcement of secured interests, federal insolvency legislation should be amended to provide a similar framework for enforcement of security interests in marine property that the provinces' personal property security legislation has already enacted for non-marine property.[49]

---

[48] http://www.grantthornton.ca/resources/creditor_updates/documents/Phoenix%20Sun%20Shipping%20Inc/Reasons%20of%20Brown%20J%20dated%20Nov-26-13.PDF accessed December 30, 2014.

[49] such as those set out in Part 5 of the *Personal Property Security Act* (Ontario). Maritime Law Reform Discussion Paper TP 14370E http://tc.gc.ca/media/documents/policy/tp14370e.pdf

Modernizing Obsolete Common Law Rules

Issue

The Supreme Court of Canada has extensively explained that Canadian maritime law includes English common law affecting navigation and shipping as received into federal jurisdiction in 1931 when Canada achieved its independence as a nation state[50]. This body of common law includes the mercantile law affecting shipping with its ancient and medieval origins from Mediterranean commerce and its associations with the civil law[51]. Although the Supreme Court in its 2013 *Marine Services International v. Ryan Estate* decision[52] clarified that the process for determining the scope of maritime law set out in the 1998 decision of *Ordon v. Grail*[53] must be interpreted in context of the aspect doctrine updated by the 2007 *Canadian Western Bank v. Alberta* decision[54], the Supreme Court still recognizes a distinct body of Canadian maritime law, including common law as it applies to maritime obligations.

While the provinces have modernized since even before Confederation their mercantile law, there is little Parliamentary mercantile law, even though the mercantile law of shipping is federal. The common law inherited from England has come with historical baggage. Some of this is very obsolete and does not meet modern social and commercial needs. Recent constitutional case law does not alter the need to update obsolete common law rules which still could potentially apply to many types of persons dealing in, and transactions involving marine property and contracts and produce unintended results if disputes arise [55]. Legal uncertainty and increased transaction costs for workarounds hinders commerce.

In contrast to other provinces which have passed beginning in the 19th century various multiple remedial statutes updating specific parts of mercantile law, the consolidation of updates for common law rules found in the British Columbia *Law and Equity Act*[56] is a useful template for federal legislation modernizing common law rules. We repeat an earlier CMLA recommendation to the Minister of Transport taken up in the Transport Canada 2005 discussion paper, but which has not progressed to legislative proposals. Legislative amendments could include federal enactment of the *Sale of Goods Act* as enacted by the provinces as it applies to maritime property such as ships.

---

50 ITO-International Terminal Operators Ltd. v. Miida Electronics Inc. [1986] 1 S.C.R.752.

51 Q.N.S. Paper co. v. Chartwell Shipping Ltd., [1989] 2 SCR 683.

52 [2013] 3 S.C.R. 53.

53 [1998] 3 S.C.R. 437.

54 [2007] 2 SCR 3.

55 These include: survival of actions, property rights of married women, rights of assignment and transfer of property, guarantors' rights, performance of contracts under protest, vesting orders and alternative contract remedies - See scenario examples in Maritime Law Reform Discussion Paper TP 14370E http://www.tc.gc.ca/media/documents/policy/tp14370e.pdf

56 *Law and Equity Act*, RSBC 1996, c 253 http://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-253/latest/rsbc-1996-c-253.html

Recommendation

8. Canada should enact legislation, reflecting that of the common law provinces, updating mercantile law applicable to marine property and transactions, to make Canadian maritime law consistent with the commercial law of the common law provinces.

We thank the Review for the opportunity of making these submissions. We would be pleased to discuss aspects further with Mr. Emerson and his Advisors or the Secretariat.

All of which is respectfully submitted.

Yours truly,

John G. O'Connor
President
The Canadian Maritime Law Association

LIST OF RECOMMENDATIONS

Intermodal Carriage

1.1 To the extent federal jurisdiction permits, a consolidated intermodal carriage liability regime applicable to all transport modes should be enacted by Parliament

1.2 As some logistics operators are not interprovincial undertakings, enactment of co-operative federal and provincial harmonized intermodal liability regimes will be necessary to ensure a uniform logistics liability regime across Canada

International Water Carriage

2. Canada should now amend its international carriage of goods by water regime taking into account recent maritime law reform by our major seaborne trading partners.

These amendments should:

2.1 clarify the extent to which contracting parties may derogate from the carriage of goods regime

2.2 make the compulsorily applicable carriage of goods regime explicitly applicable to goods carried under waybills

2.3 make the compulsorily applicable regime applicable to inbound as well as outbound cargoes

2.4 make the performing carrier jointly and severally liable with contracting carrier

2.5 clarify standing of cargo interests to sue

2.6 clarify who in the logistics chain can benefit from carrier defenses and limitations

2.7 amend *Marine Liability Act* s. 46 to exclude court discretion to enforce choice of foreign forum clauses in marine bills of lading and waybills, so Canadian cargo interests can pursue cargo claims here

2.8 abrogate the error in navigation and management of the ship defences

2.9 increase the time bar for claims to two years

2.10 increase weight and per package limitation of liability to reflect inflation since 1979 and provide an indexing formula

2.11 update federal transport documents legislation including the *Bills of Lading Act*

Domestic Water Carriage

3.1 Any changes to the Canadian law on international water carriage of goods should be reviewed for consistency and compatibility with the domestic water carriage of goods regime.

Arctic Marine Transportation

4.1 The existing *Arctic Waters Pollution Prevention Act* review should include whether the *Canada Shipping Act, 2001* or the *Arctic Waters Pollution Prevention Act* is the appropriate primary matrix for regulation of Arctic shipping operations

4.2 The *Arctic Waters Pollution Prevention Act* and its regulations should be reviewed for consistency with the Polar Code.

4.3 The existing AWPPA policy review should include what is the appropriate regulatory regime for smaller commercial vessels operating in Arctic areas.

Application of Sale of Goods Law to Offshore Transactions and Maritime Property

5.1 Regulations should be made under the *Oceans Act* to permit provincial sale of goods legislation to apply to transactions where risk or title passes at offshore structures or anywhere within Canada's territorial waters seaward of the provinces or within Canada's EEZ.

5.2 The existing federal *International Sale of Goods Contracts Convention Act* should be amended to make it applicable to international sale contracts not governed by provincial law.

Fair Treatment of Seafarers

6.1 Canada should take necessary implementing measures to declare ILO Convention 185 applicable for Canada.

6.2 The *Migratory Birds Convention Act, 1994* should be amended to repeal criminal and civil compensatory liability of ships officers for pollution damage otherwise compensable under the Marpol and Fund Conventions including any civil liability exposure in excess of the monetary limitations

under such Conventions, or, at a minimum, to provide for the standard prosecution onus of proof appropriate to serious criminal offenses.

Facilitating Financing of Marine Property and Transportation Assets

7.1 To facilitate ship finance, the *Canada Shipping Act, 2001* should be amended to permit any form of business organization and to permit any form of financial lessee to be registered owners of Canadian recorded and registered vessels.

7.2 The *Canada Shipping Act, 2001* should be amended to provide that ship mortgages registered under that Act have priority over any security interests registered under the law of a province or territory attaching to a Canadian registered or recorded vessel.

7.3 To facilitate access by the Canadian marine industry to ship financing and ensure consistency and predictability in the enforcement of secured interests, federal insolvency legislation should be amended to provide a similar framework for enforcement of security interests in marine property that the provinces' personal property security legislation has already enacted for non-marine property.

Modernizing Obsolete Common Law Rules

8. Canada should enact legislation, reflecting that of the common law provinces, updating mercantile law applicable to marine property and transactions, to make Canadian maritime law consistent with the commercial law of the common law provinces.