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MARITIME LAW REFORM
Discussion Paper

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Introduction

Under the Constitution of Canada, Parliament has the exclusive authority to make laws in relation to navigation and shipping. The provincial legislatures have the exclusive legislative authority to make laws in relation to property and civil rights. It is worth keeping this division of legislative powers in mind. Much of maritime law deals with rights and obligations in relation to maritime property. Claims arising out of such rights and obligations would nevertheless be governed by Canadian maritime law.

Current Canadian maritime law has both statutory and non-statutory components. The statutory component of maritime law is reflected in statutes such as the *Canada Shipping Act* (CSA) and the *Marine Liability Act.* The non-statutory component is composed of specialized principles of maritime practice developed over centuries and adopted and applied by judges of the English Court of Admiralty. These principles were incorporated into Canadian law by the *1934 Admiralty Act* and have been, and continue to be, modified and expanded in Canadian jurisprudence.

This paper deals primarily with policy proposals that would require changes in statutory maritime law. It covers a wide range of subjects that can be grouped into three categories as described below:

Part One – Marine Liability

Part One is divided into two chapters. **Chapter One** deals primarily with the question of ratification of various international marine liability conventions or protocols. It provides background information on each instrument, an analysis of policy issues arising from possible ratification, and policy recommendations proposing a way forward. Information on current Canadian legislation in each area is also provided.

The instruments, listed below, pertain to improvements to the international marine liability regime and, if ratified by Canada, would be implemented in the *Marine Liability Act*.

1. *International Convention on the Limitation of Liability for Maritime Claims (1976), as amended by its 1996 Protocol*[1]
2. *Supplementary Fund Protocol of 2003 to the International Oil Pollution Compensation Fund (1992)*
3. *International Convention on Civil Liability for Bunker Oil Pollution Damage (2001)*
4. *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (1996).*

Chapter Two deals with possible changes to the *Marine Liability Act* with regard to the implementation of a compulsory insurance and revised liability regime for the carriage of passengers in Canada.

[1] The provisions of this convention have been implemented in the *Marine Liability Act* in 2001, thus no new legislation would be needed if it is decided to ratify the convention at this time.

Part Two – Miscellaneous Amendments of Canadian Maritime Law

This part provides a detailed explanation and possible resolutions for certain issues and problems that have been raised by stakeholders.

The issues for consideration under this part are:

- general limitation periods for maritime claims and section 39 of the *Federal Courts Act*;
- amendments to various common law rules that may affect maritime property;
- creation of a maritime lien for Canadian suppliers providing goods and services to ships; and,
- aligning the English and French texts in subsection 43(8) of the *Federal Courts Act* on the subject of sistership arrest.

Part Three – 'Housekeeping' Amendments

This part deals with 'housekeeping amendments'. The first is to move the existing provisions on salvage, based on the *International Convention on Salvage*, from the CSA to the *Marine Liability Act;* and the second is to change the title of the *Marine Liability Act*, perhaps to be called the *Marine Liability and Property Act* to reflect the introduction of new legislation on maritime property proposed in
Part Two.

PART ONE - MARINE LIABILITY

Chapter One

The 1976 International Convention on the Limitation of Liability for Maritime Claims (LLMC), as amended by its 1996 Protocol

Introduction

The *1976 International Convention on the Limitation of Liability for Maritime Claims (LLMC), as amended by its 1996 Protocol,* establishes a set of international rules that govern limitation of liability as applied to maritime claims. Historically, a limitation of liability was accorded to shipowners as an incentive to invest their money in maritime ventures without the risk of losing all their assets if their ship caused loss or damage. The shipowners continue to enjoy this protection on the grounds that they have no direct control over
day-to-day operations and management of their ships while they are at sea.

Thus, the limitation of liability remains an important economic instrument to encourage ship ownership and shipping services to carry both passengers and cargo, domestically and internationally, particularly among major maritime nations such as Canada. Such limitations are reflected in the laws of almost all maritime nations in one form or another.

Overview of LLMC 1976 and its 1996 Protocol

The LLMC, adopted by the International Maritime Organization (IMO) in 1976, came into force internationally in December 1986. The Convention was later amended by the 1996 Protocol, which came into force in May 2004.[2] While Canada has implemented the provisions of these two instruments in the *Marine Liability Act*, no decision has been made yet on their ratification by Canada.

Broadly speaking, the LLMC and its Protocol set out rules governing the limitation of liability for all maritime claims and the conditions under which this limitation can be "broken". Under the Convention, limits of liability can be broken in the event that the person seeking to break limitation proves that the loss was caused intentionally or recklessly on the part of the party entitled to limit liability. The Convention and Protocol also include formulas for calculating the limits of liability and a tacit amendment procedure for the IMO to amend these limits over time to reflect the rate of inflation.

The following table contains the key provisions of the LLMC Convention and its Protocol, as implemented in the *Marine Liability Act.* For a more detailed analysis, readers may wish to

[2] The 1976 LLMC is in force in over 40 countries. The 1996 Protocol is now in force in the following countries: Australia, Denmark, Finland, Germany, Norway, Russian Federation, Sierra Leone, Tonga, United Kingdom.

consult an earlier discussion paper entirely devoted to this subject and published by Transport Canada in 1993.[3]

Table 1 – Key Provisions

Parties that may limit their liability	Shipowners, charterers, ship managers and operators; and their insurers and salvors rendering salvage services
Scope of application	Any seagoing vessel, except air cushion vehicles or floating platforms used for exploration of natural resources.
Claims covered	Any claim for damage to property or personal injury or loss of life, except claims for oil pollution damage covered by other international conventions (see Part 6 of the *Marine Liability Act*) and claims for nuclear damage or by "servants" of the shipowner
Reservations	A state party may exclude the application of LLMC to "wreck removal claims" and to claims covered by the *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention)*
Limits of Liability	
a) vessels up to 300 grt[4]	- Personal injury/loss of life (non-passenger claims) - $1 million - Property damage - $500,000 - Passenger claims o vessels carrying up to 12 passengers - $4 million o vessels carrying more than 12 passengers - $350,000 x number of passengers the vessel is authorized to carry
b) vessels 300-2000 grt	- Personal injury/loss of life (non-passenger claims) 2 million SDR or $4 million[5] - Property damage 1 million SDR or $2 million
c) vessels over 2000 grt	add to the above amounts: - Personal injury/loss of life: o for each tonne from 2001 to 30,000 tonnes, 800 SDR or $1,600; o for each tonne from 30,001 to 70,000 tonnes, 600 SDR or $1,200; o for each tonne in excess of 70,000 tonnes, 400 SDR or $800 - Property damage o for each tonne from 2001 to 30,000 tonnes, 400 SDR or $800; o for each tonne from 30,001 to 70,000 tonnes, 300 SDR or $600; o for each tonne in excess of 70,000 tonnes, 200 SDR or $400

Canadian Context and Legislation

[3] Document TP 11577

[4] grt refers to gross registered tonnage of a vessel.

[5] SDR - Standard Drawing Rights, are a unit of account derived from a basket of currencies by the International Monetary Fund (IMF). 1 SDR equals approximately 2 Canadian dollars. Current conversion rates can be found at www.imf.org.

As indicated above, Canada implemented the provisions of the 1976 LLMC and its 1996 Protocol in Part 3 of the *Marine Liability Act* (previously, this regime was located in the CSA*)*. Thus, the only issue for consideration and decision at this time is whether Canada should ratify the LLMC Convention and its Protocol and whether it should make any of the reservations allowed under the Convention, either at the time of ratification, or at a later date.

Policy Options

Option 1 - Do not ratify the Convention or Protocol

Under this option, Canada would not ratify the LLMC or its Protocol but would continue to maintain the provisions of this regime in the *Marine Liability Act*. This option would not pose any change to our current law and both shipowners and claimants would remain in the same position as they are today. However, Canada would stand outside an international regime that is often referred to in other international liability conventions and, in the absence of any treaty relationship with other countries, foreign courts would not necessarily be bound to apply the LLMC when dealing with limitation actions involving Canadian shipowners or claimants.

Option 2

a) Ratify the Convention and Protocol

There are no expected downsides to this option. As stated previously, the provisions of these instruments are already part of our national law and ratification would come at no additional cost. Moreover, by becoming a party to the Convention, Canada would contribute to uniformity of international law, which would enable Canadian shipowners and claimants to rely on this Convention when dealing with limitation actions in other state parties and to benefit from up-to-date limits of liability kept current by the *tacit amendment* procedure.

b) Decide whether to make a reservation for wreck removal claims and claims covered under the HNS Convention at the time of ratification or sometime thereafter

The LLMC provides that states may, at the time of signature, ratification, acceptance, approval or accession or at any time thereafter, reserve the right to exclude specifically wreck removal claims and claims within the meaning of *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996*, from the application of the Convention's limits.

With regards to wreck removal claims, the limits provided under the LLMC seem to be sufficient at the present time. Also, there is currently consideration being given in the IMO to a new Wreck Removal Convention (WRC). Thus, it might be more prudent not to make a reservation at this time and continue applying the LLMC to wreck removal claims until the IMO completes its work on the new WRC. Canada will then be in a better position to determine whether or not to adopt the new Convention and whether or not to proceed to make a reservation for wreck removal claims under the LLMC.

The 1996 HNS Convention, was developed by the IMO in response to a need to provide separate limits of liability and compensation for HNS claims, irrespective of other claims that may arise from the same incident and that are subject to the LLMC limits. The regime serves to protect the interests of claimants involved in HNS incidents so that their rights to compensation are not adversely affected by other claims competing for the limitation amounts available under the LLMC. A reservation under LLMC for HNS claims would therefore allow interested states to achieve this objective.

Policy Recommendation

In view of these factors, it is recommended that:

- **The 1976 LLMC Convention and its 1996 Protocol be ratified by Canada.**

- **A reservation under the LLMC for HNS claims can be made if it is decided that Canada will ratify the HNS Convention.**

- **A reservation under the LLMC for wreck removal claims not be made at this time and that this issue be reviewed at a future date when the new Wreck Removal Convention is completed and ready for consideration of possible ratification by Canada.**

The Supplementary Fund Protocol of 2003 to the 1992 International Oil Pollution Compensation Fund

Introduction

The 1992 Civil Liability Convention (CLC) and 1992 International Oil Pollution Compensation Fund (IOPC Fund) provide the international liability and compensation regime for pollution damage resulting from spills of persistent oil[6] from tankers, whether carried on board as cargo or in bunkers. Under the CLC regime the owners of a tanker are liable to pay compensation up to a certain limit for oil pollution damage following an escape of persistent oil from their ship. If that amount does not cover all the admissible claims, further compensation is available from the IOPC Fund if the damage occurs in a contracting state. The IOPC Fund is financed by levies paid by entities that receive certain types of oil in the ports of a contracting state.

The sinking of the tanker '*Erika*' off the coast of France in December 1999 resulted in total claims well above the maximum compensation amount of $270 million available under the 1992 CLC/IOPC Fund regime. This incident prompted calls for review of the regime and, as a result, the limits of liability under the 1992 CLC/IOPC Fund were increased to approximately $405 million, effective November 2003, pursuant to the *tacit amendment* procedure included in these Conventions.

Overview of The Supplementary Fund Protocol of 2003

Despite the increase in compensation limits in November 2003, the general view of contracting states to these Conventions was that in order for the international compensation scheme to maintain effective coverage, maximum compensation levels should be further increased to ensure full compensation to all victims, even in the most serious oil spill incident. As the recent sinking of the *Prestige* off of the coasts of Spain and France demonstrated, the revised limits adopted in November 2003 were not sufficient to deal with that incident.

Fuelled by the reality that current coverage is still viewed as inadequate in the case of a major spill, a solution was put forward to develop a 3rd tier of compensation in the form of a Protocol to the 1992 Fund. This Protocol, adopted at a diplomatic conference held in May 2003 at the IMO, established a Supplementary Fund to the 1992 IOPC Fund Convention, which increased the level of compensation for oil pollution damage from $405 million to about $1.5 billion (750 million SDR)[7]. The Protocol of 2003 put the international regime on par with the United States' Oil Pollution Act of 1990.

The Supplementary Fund is voluntary, however a state cannot join it without first being a member of the 1992 CLC and Fund Conventions. It logically follows that a state that is a member of the 1992 CLC/ IOPC Fund, but not a member of the Supplementary Fund, would not

[6] "Persistent oil" as presented in this paper is a commonly used term for "contributing oil" defined as either crude oil or fuel oil, in Article 1(3) of the 1992 IOPC Fund Convention.

[7] Currently 1 SDR equals approximately 2 Canadian dollars.

be entitled to any additional compensation benefits above and beyond the $405 million per incident currently available under the 1992 regime.

The key provisions of the Supplementary Fund are as follows:

Supplementary compensation

Broadly speaking, the Supplementary Fund will be available to pay compensation for oil pollution damage where the claims exceed the limit of the 1992 IOPC Fund. As mentioned above, the total compensation available under the Supplementary Fund will be about $1.5 billion per incident, inclusive of the $405 million available under the 1992 CLC and IOPC Fund. In order for a claimant to receive compensation from the Supplementary Fund, the claim must already be admissible and recognized under the rules of the 1992 IOPC Fund.

Contributions

Contributions to the Supplementary Fund will be made by any person in a contracting state that, within a calendar year, has received oil in total quantities exceeding 150,000 tonnes. This refers to "contributing oil" received in ports or terminal installations in the contracting state, regardless if such port or installation is the final destination of the contributing oil. In addition to the contributions levied for payment of compensation to claimants, the Supplementary Fund will also levy nominal contributions for the general administration of the Fund.

Information on contributing oil

When a state is preparing to ratify the Supplementary Fund it will have to communicate to the Fund the name and address of any person that would be liable to contribute to the Fund. Like the 1992 Fund, this information, and data on the relevant quantities of contributing oil received by any such person in the contracting state during the preceding calendar year, will have to be provided by the state to the Fund on an annual basis.

Entry into force

The Supplementary Fund has entered into force internationally on 3 March 2005. At that time, eight states with a combined total of over 450 million tonnes of contributing oil in a calendar year had ratified the Protocol.[8] For individual states joining after 3 March 2005, the Protocol will enter into force three months after the state has ratified the Protocol. However, as mentioned above, the new Protocol can be ratified only by those states that have already ratified the 1992 Fund Convention.

[8] The following states have ratified the Protocol: Denmark, Finland, France, Germany, Ireland, Japan, Norway and Spain.

Canadian Context and Legislation

Canada has long coastlines and although the number of incidents involving the carriage of oil by sea has been minimal in recent years, the high amount of tanker traffic ensures that the risk of a large oil spill, no matter what precautions are taken, is very real. Canada is an oil-trading nation as exemplified in our import traffic. From 1997 through 2001, Canada averaged 1,140 oil tanker calls to Canadian ports. In 2001 alone, Canada received approximately 60 million tonnes of oil carried by tankers, placing it 9th in terms of oil received on the list of countries that are members of the 1992 Fund.

In Canada the current system of compensation for pollution by oil tankers, as shown in Table 2 below, operates under a 3-tier system established in Part 6 of the *Marine Liability Act*. As mentioned earlier, under the 1992 Conventions the maximum limit of the IOPC Fund is $405 million per incident. In addition, the Ship-source Oil Pollution Fund (SOPF) provides up to $140 million per incident for oil spills by any vessel operating in Canadian waters, including tankers, thus bringing the total amount of compensation available for victims of persistent oil spills in Canada to about $545 million per incident.

Table 2 - Tiered Coverage for Oil Spills in Canadian Waters

Tier	Coverage
Tier I	Establishes, through the 1992 Civil Liability Convention, a strict liability regime for the shipowner for damage caused by persistent oil, subject to specific limits based on the tonnage of the ship. The maximum compensation available is $180 million or 90 million SDRs for the largest ship.
Tier II	The International Oil Pollution Compensation Fund has a maximum limit of $405 million or 203 million SDRs, inclusive of any amount payable by the shipowner under Tier I.
Tier III	Canada's SOPF, which has an additional $140 million available for claims that occur in Canada and that exceed Tier I/II compensation. The SOPF also pays Canada's contribution to the IOPC Fund.

Policy Options

Option 1 - Do not ratify the Protocol of 2003

Under this option, the current situation in Canada in the event of an oil spill from a tanker would remain the same with up to $545 million available for compensation of pollution damage per incident. By not joining the Supplementary Fund, the financial exposure to Canadian victims of oil pollution, in the event of a major spill, could be overwhelming. If an event such as the *Prestige* occurred in Canadian waters, it is quite feasible that after receiving compensation from the 1992 CLC and IOPC Fund and the SOPF, Canada would still fall about $1 billion short of the amount of money needed for compensation and clean-up costs. The Supplementary Fund would provide sufficient cover for such a catastrophic loss.

Option 2 - Ratify the Protocol of 2003

Marine oil spills are directly related to frequency of ship arrivals, departures, transits, and to the tonnage of cargo handled. Weather and hydrographical features are also important determinants of the risk of an incident, with human and mechanical factors playing by far the largest role in oil spills (28% and 40% respectively)[9]. These factors have the greatest effect where ship movements and oil tonnage are the highest. The fact that Canada has had so few spills up until now is a testament to its thorough safety and Port State Control program. However, no matter how effective a Port State Control program a country has, it cannot completely eliminate the risk of an oil spill off its coast due to factors listed above.

The clear advantage of ratification of the Supplementary Fund Protocol is the reduction of the risk of financial exposure in the case of a major spill of persistent oil caused by an oil tanker in Canada. An incident such as the *Prestige* disaster serves as a benchmark for estimating costs that would occur if a similar incident took place in Canadian waters. The *Prestige* incident, based on available estimates, will have resulted in clean up and compensation costs of approximately $1.7 billion. Another incident that highlights potential costs caused by oil pollution is the *Exxon Valdez* spill off the coast of Alaska in 1989. The clean-up and compensation costs that have resulted from the spill have exceeded $2.5 billion.[10]

A spill of this magnitude in Canada would certainly reach the maximum liability per incident of the SOPF ($143 million) and would use up approximately 40% of the SOPF's reserve (currently $330 million). This could possibly lead to the resumption of levies on major oil receivers pursuant to section 93 of the *Marine Liability Act*. The collection of this levy was halted in 1976 and since then the SOPF's reserve has grown through accrued interest. If it were to be collected today, the levy would be 43¢ per tonne of oil.

Over the 15 years of Canada's membership in the IOPC Fund, our average contribution has been about 5¢ per tonne of oil. With the increases in limits that took effect in November 2003, Canada should now expect to pay somewhere between 5-10 ¢ per tonne of oil. In the case of an incident covered by the Supplementary Fund and reaching the maximum amount available, $1.5 billion, with payments typically spread over several years, the annual contribution could increase from 10¢ to 28¢. While the "international" levy would be unavoidably higher, it is still considerably lower and more cost-effective than the "domestic" levy of 43¢ that would likely be resumed if such an incident occurred in Canada today, without the benefit of the Supplementary Fund.

Both the 1992 Fund and the Supplementary Fund would continue to be administered internationally by the IOPC Fund Secretariat. From the Canadian perspective, the SOPF would continue to provide compensation for any claims exceeding the Supplementary Fund and would continue to pay Canada's contributions to the IOPC Fund.

[9] Environmental Emergencies Program, Environment Canada Summary of Spills in Canada 1984-1995, November 1998.

[10] Figures taken from the Exxon Valdez Oil Spill Trustee Council website.

Policy Recommendation

In view of these factors, it is recommended that:

- **Part 6 of the *Marine Liability Act* be amended to implement the provisions of the Supplementary Fund Protocol of 2003;**

- **Canada ratify the Protocol to reduce the risks of a large financial exposure associated with major oil spills and higher clean-up costs.**

International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 **(Bunker Convention)**

Introduction

The *International Convention On Civil Liability For Bunker Oil Pollution Damage, 2001* (Bunker Convention) governs the liability of shipowners for bunker oil spills from non-tankers. The need for an international convention to address this problem has long been established and consideration has been given to it in the IMO on various occasions.

During discussions in IMO leading to the 1992 Convention on Civil Liability for Oil Pollution Damage (1992 CLC) and the 1992 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, (1992 IOPC Fund), it was decided to extend these conventions to cover bunkers on tankers, whether laden or not, but bunkers on non-tankers were not included in the regime.

The need for a liability regime to deal with pollution damage from bunker oil spills continued to become more apparent. As reported by the United Kingdom P&I Club[11], global accident figures in the 1990's showed that half of pollution damage claims involved vessels that were not carrying oil as cargo. Moreover, many countries were in agreement that an international convention should include provisions on compulsory insurance to ensure that the shipowner has the necessary coverage in the event of a bunker spill. Consequently, in 1996, a draft bunker convention was introduced in the work of the IMO's Legal Committee to address the gap in the international pollution and liability regime regarding bunker spills from non-tankers.

In March 2001, the final text of the Bunker Convention was adopted by the IMO. Canada signed the Convention, subject to ratification, on September 27, 2002.[12] It should be noted that signature of this Convention is non-binding but implies that a country intends to give favourable consideration to the Convention's ratification.

Overview of the Bunker Convention

The Convention provides a framework for the liability of shipowners for bunker oil spills from non-tankers and it includes the following key provisions.

Ship and Bunker Oil Definition and Applicability to Ships

The Convention applies to any seagoing vessel and seaborne craft of any type. However, the Convention is only applicable if the vessel is carrying "bunker oil", defined as "any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion

[11] This Club, like others in the International Group of P&I Clubs, is a protection and indemnity association of shipowners or operators, offering mutual insurance, generally for third party liability risks and the defence of claims.

[12] Other countries that have signed, also subject to ratification, include: Australia, Brazil, Denmark, Finland, Germany, Italy, Norway, Sweden and the United Kingdom.

of the ship, and any residues of such oil", used in operating the ship. The Convention does not apply to warships or government ships being operated in non-commercial service, unless decided otherwise by a state party. Government ships used for commercial service are, however, included in the Convention.

Pollution Damage

The Convention applies to pollution incidents caused by bunkers from non-tankers. It specifically does not apply to oil pollution incidents as defined in the 1996 CLC.

Geographic Scope of Application

The Convention applies to pollution damage caused in the territory and territorial sea of a state party, or in the exclusive economic zone of a state party.

Liability of Shipowner

The shipowner, defined as "the owner, including registered owner, bareboat charterer, manager and operator of the ship", is strictly liable for pollution damage unless the damage was caused by the act or omission of a third party, the negligence or wrongful act of any authority responsible for maintaining aids to navigation, or it resulted from an act of war. Where more than one of the five parties above are liable under the Convention, each person shall be held jointly and severally liable.

Limits of Liability

Bunker pollution claims are subject to existing laws on the limitation of liability for maritime claims, up to the amounts specified in the LLMC and as amended by the 1996 Protocol. The limits of this Convention are implemented in Part 3 of the *Marine Liability Act*.

Thus, for ships up to 2,000 grt,[13] their maximum liability is 2 million SDR ($4 million) for loss of life or personal injury and 1 million SDR ($2 million) for other claims.[14] The limit of liability increases by 400 SDR ($800) per grt for loss of life or personal injury, and 200 SDR ($400) per grt for other claims. This sliding scale applies to vessels up to 70,000 grt.

Compulsory Insurance

The registered owner of a vessel of 1000 grt or greater must have insurance or other financial security equal to the limit of liability as set out above. Insurance is required to ensure that the owner has the means to pay for the damage caused by an incident. The ship must carry a certificate attesting to the quality of the insurance or financial security. The state party has the responsibility to issue this certificate or it can authorize another organization to issue it on its behalf.

[13] grt refers to gross registered tonnage of a vessel.
[14] Currently 1 SDR equals approximately 2 Canadian dollars.

Time Limits

Under this Convention, an action must be brought within three years from the date when the damage occurred. However, under no circumstances shall an action be brought more than six years from the date of the incident.

Entry into Force

The Convention will enter into force one year after ratification by at least 18 states. In addition, five of the 18 states must have a total registered ships' tonnage of at least one million gross tonnes.

Canadian Context and Legislation

The potential damage to shorelines and the marine environment from oil spills has been clearly demonstrated by several incidents. Pollution damage from a spill of bunker oil presents a potentially greater threat than crude oil and other petroleum products because of its persistent physical properties. The majority of all ship-source oil spills in Canadian waters are attributed to bunkers and more than half of the costs incurred for environmental response operations involving ships bunkers are not recovered.

As noted earlier in this paper, Part 6 of the *Marine Liability Act* deals with the liability of shipowners for pollution damage. Specifically, it provides a comprehensive legal framework for liability and compensation for pollution damage caused by oil tankers that is based on two international conventions - the 1992 CLC/ IOPC Fund. In the *Marine Liability Act* these tankers are referred to as "convention ships".

However, Part 6 also applies to pollution damage caused by "non-convention ships" such as bulk carriers, containerships, general cargo and other vessels, which may carry thousands of tonnes of bunkers. Part 6 includes a provision on liability for these ships for actual or anticipated **pollution damage** caused by their cargo or bunkers in Canadian waters and in the exclusive economic zone of Canada. Thus, our current legislation already contains most of the elements embodied in the Bunkers Convention, but it does not provide for compulsory insurance to cover pollution liability caused by bunkers. As mentioned earlier, it has proved to be difficult to recover pollution damages and associated costs from these "non-convention ships". In some cases, the shipowner did not have adequate insurance or other resources to pay for the damage or the owner was located in a country where it was extremely difficult to collect damages.

Policy Options

Option 1 - Do not ratify the Bunker Convention

Under this option, Canada would not ratify the Bunkers Convention and would continue to rely on its current legislation that covers bunker spills but without the benefit of compulsory insurance and direct action against insurers.

Option 2 - Ratify the Bunker Convention

It is widely accepted that international conventions have been, and continue to be, very successful as a means of harmonizing international maritime law and thus avoiding a patchwork quilt of national legislation. The Bunkers Convention contributes to that goal by providing a degree of certainty for shipowners about their potential exposure to liability, and for claimants about their rights to compensation for loss or damage caused by bunker spills. Coupled with compulsory insurance and direct action against the insurer, the Bunkers Convention presents an improvement over our current legislation in this field. By ratifying this Convention, Canadian interests will be better protected in terms of our ability to recover damages resulting from pollution by bunker spills caused by non-tankers.

Policy Recommendation

In view of these factors, it is proposed that

- **Current legislation in Part 6 of the *Marine Liability Act* be amended to implement the provisions of the Bunker Convention**

- **The Bunker Convention apply to all ships, whether seagoing or not, operating in Canadian waters, including inland waters.**

- **Canada ratify the Bunker Convention.**

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 **(HNS Convention)**

Introduction

In the 1990's, several incidents involving water-borne spills of hazardous and noxious substances (HNS) highlighted a gap in the marine liability system and prompted the international community to take action. Through the IMO, a liability regime was devised to compensate claimants adequately in the event of spills involving chemicals and other hazardous substances. This effort culminated in the HNS Convention, which was adopted under the auspices of the IMO in 1996.

The Convention essentially sets out a shared liability regime to compensate claimants for damages arising from the international or domestic carriage of HNS by seagoing vessels. Under the regime, liability is shared by the shipowner (tier 1) and the receiver or importer of the HNS cargo (tier 2).

Canada signed the Convention in 1997 following widespread consultations with industry stakeholders. This sent a signal to the international community that Canada intends to give favourable consideration to the Convention's ratification and to the legislation required to implement the regime in national law.

As it currently stands, the Convention has been signed, subject to ratification, by several other states[15] but has not yet come into force internationally as the entry into force provisions have not been met. However, several developments on the international scene have contributed to raise the momentum for the Convention's ratification. The 1999 oil spill from the ship *Erika* off the coast of France, and the 2002 *Prestige* oil incident in Spain have increased the profile of environmental damage and highlighted the urgency of having a regime of liability for chemical spills. In Canada, over the last four years (2001-2004) there have been at least 60 chemical spills from vessels in Canadian waters.[16] Although most of these were small spills, the high volume of HNS carried by sea-going vessels, particularly in our international trade, highlights the potential for a major chemical spill occurring in Canadian waters.

This section sets out an overview of the instrument's main provisions, Canadian legislation in this regard, the policy questions to be addressed if Canada were to ratify the Convention, and a recommended way forward.

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[15] As of December 1, 2004, seven countries have ratified the Convention: Russia, Angola, Tonga, Slovenia, Samoa, St. Kitts and Nevis, and Morocco. Furthermore, Japan, Netherlands, Denmark, New Zealand, Ireland, Italy, Singapore, Germany, Sweden, Finland, Norway, Greece, Latvia, Spain and UK have indicated their intentions to consider ratification. In addition, EU member states are expected to ratify the HNS Convention before June 30, 2006 if possible.

[16] Canadian Coast Guard Marine Pollution Incident Reporting System (CCG MPIRS).

Overview of the HNS Convention

The HNS Convention follows the two-tier model of compensation of the international oil pollution liability and compensation regime (CLC/IOPC Fund), which Canada adopted in 1989. That is, the shipowner assumes liability in the first place, which is supplemented beyond a certain level by a fund made up of contributions collected from receivers of HNS cargoes. The regime provides up to 250 million SDR[17], or approximately $500 million per incident in total compensation to claimants. Loss of life and personal injury are also included under the Convention and prioritized for payment of compensation before the satisfaction of other types of claims. Fire and explosion damage caused by an HNS substance (including oil), is also covered under the Convention.

The Convention differs from the oil pollution regime mainly in that it covers many more substances and combines the shipowner liability regime and the HNS Fund into one instrument. The key provisions of the Convention are outlined below.

HNS substances

Estimates indicate there are approximately 6,500 substances covered under the definition of HNS. The definition of HNS substances and the relevant Codes can be found in Article 1(5) of the HNS Convention (see Annex 1). Table 3 provides an overview of the substances covered under the Convention.

Table 3 – HNS Substances

Substances covered	**Conventions Codes**	**Reference (www.imo.org/)**
Bulk		
Oils	MARPOL 73/78	Annex I, Appendix I
Noxious Liquids	MARPOL 73/78	Annex II, Appendix II
Dangerous liquids Liquids with a flashpoint not exceeding 60C	IBC Code[18]	Chapter 17
Gases	IGC Code[19]	Chapter 19
Solids	BC Code[20]	Appendix B (if also covered by the IMDG Code in packaged form)
Packaged	IMDG Code	

An electronic system, known as the HNS Convention Cargo Contributor Calculator (HNS CCCC), has been developed to assist states and potential contributors in identifying and

[17] Currently 1 SDR equals approximately 2 Canadian dollars.
[18] International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, 1983, as amended.
[19] International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, 1983, as amended.
[20] Code of Safe Practices for Solid Bulk Cargoes (BC Code).

reporting contributing cargoes covered by the HNS Convention. The name or UN number of the substance can be used to find out whether or not a chemical falls within the definition of HNS. The use of the HNS CCCC is discussed in greater details below.

HNS damage covered by the Convention

The Convention covers the following damage resulting from the carriage of HNS by sea:

- **loss of life or personal injury** on board or outside the ship carrying HNS
- **loss of, or damage to, property outside the ship**
- **loss or damage caused by contamination of the environment**
- and the **costs of preventive measures** taken by any person after an incident has occurred to prevent or mitigate damage.

All or some damages are covered depending on where they occur geographically. Specifically, the Convention covers any damage caused during the international or domestic carriage of HNS by any seagoing vessels in the territory or territorial sea of a state party to the Convention. It also covers pollution damage in the exclusive economic zone, or equivalent area, of a state party. In addition, the Convention covers damage (other than pollution damage) caused by HNS carried on board seagoing vessels of member states when they are outside the territory or territorial sea of any state. This information is summarized in Table 4 below.

Table 4 - Scope of Application and Coverage

Scope of Application	**Damages Covered**
Territorial sea (0-12 nautical miles) of a state party	Any damage (loss of life, injury, pollution, property, preventative measures)
Exclusive Economic Zone (EEZ) (12 - 200 nautical miles) of a state party	Pollution damage
On board a seagoing vessel of a state party beyond the territorial sea	Any damage excluding pollution

The Convention does not cover

- damage caused during the transport of HNS on land before or after carriage by sea.[21]
- pollution damage caused by persistent oil, since such damage is already covered under the existing international regime established by the 1992 CLC and Fund Conventions. However, it covers non-pollution damage caused by persistent oil, i.e., damage caused by fire or explosion.

[21] Article 1(9) of the HNS Convention defines *"carriage by sea"* as "*the period of time from when the hazardous and noxious substances enter any part of the ship's equipment, on loading, to the time they cease to be present in any part of the ship's equipment, on discharge. If no ship's equipment is used, the period begins and ends respectively when the hazardous and noxious substances cross the ship's rail."*

Claimants

Any victim of damage in Canada will be entitled to make a claim. Claimants can be any individual or partnership or any public or private body including a state or any other level of government within that state.

Tier 1 – The Shipowner's liability

Under the Convention's two-tiered system, claimants first seek compensation from the shipowner (tier 1), who is held strictly liable for any damage caused, subject to certain defences (e.g. an act of war, negligence of governmental authority to maintain navigational aids, act or omission of a third party). The shipowner's liability is based on the tonnage of the ship, as depicted in Table 5, up to the maximum limit of 100 million SDR ($200 million).

Table 5 – Ship Size and Limits of Liability

Ship Size	Limits of liability
Ships ≤ 2,000 grt[22]	10 million SDR
Ships between 2,001 and 50,000 grt	1,500 SDR per gross ton = a maximum of 82 million SDR at 50,000 grt
Ships between 50,001 grt and 100,000 grt	360 SDR per gross ton = a maximum of 100 million SDR at 100,000 grt
For ships ≥ 100,000 grt	100 million SDR

The Convention requires all shipowners transporting HNS to have onboard the vessel a certificate of insurance issued by a state party indicating they have coverage for their liability under the Convention.[23] The shipowner's insurance must provide for direct action so that claimants can pursue their claims for compensation directly with the shipowner's insurer rather than having to seek compensation from the shipowner. State parties must ensure that any ships carrying HNS entering or leaving a port in its territory, irrespective of where that vessel is registered, have the required insurance certificate.

Tier 2 – The Fund

When damage costs exceed the shipowner's limit of liability under tier 1, additional compensation will then be paid under tier 2 - the HNS Fund - up to a maximum of 250 million SDR ($500 million) per incident, including the shipowner's portion. If the total amount of admissible claims does not exceed the maximum amount available for compensation, then all claims will be paid in full. Otherwise, the payments will be prorated, i.e. all claimants will receive an equal proportion of their admissible claims.

[22] grt refers to gross registered tonnage of a vessel.
[23] Compulsory insurance applies to seagoing ships registered in a state party and carrying HNS (with the exception of warships and other ships owned or operated by a state party and used only for the provision of government non-commercial services).

Claims for loss of life and personal injury have priority over other claims. Up to two thirds of the available compensation amount is reserved for such claims.

To claim against the HNS Fund, the claimants have to prove there is a reasonable probability that the damage resulted from an incident involving one or more seagoing ships. The HNS Fund may be liable to pay compensation "from the first dollar up" if the particular ship causing the damage cannot be identified. In the event that the shipowner is exonerated from liability, or if the shipowner is financially incapable of meeting his obligations, the Fund is also liable. However, as is the case of the shipowner, the HNS Fund can also apply certain defences that exempt it from paying compensation e.g. if the damage was caused by an act of war, or by HNS discharged from a warship.

HNS Fund Accounts

The HNS Fund will consist of four separate accounts:

- Oil *(Oil Account)*
- Liquefied natural gas (*LNG Account)*
- Liquefied petroleum gas *(LPG Account)*
- All Other HNS *(General Account)*

The principal reason for the separate accounts is to ensure that each account pays its own claims, thus avoiding cross-subsidization of claims among major HNS groups and the industries involved. However, during the early existence of the HNS Fund, it is possible that there may not be sufficient HNS received in member states to set up all four separate accounts. If this were to be the case, the separate accounts may be postponed and the HNS Fund may for a period of time be comprised of only two accounts:

1. Oil Account
2. General Account including three sectors: LNG, LPG and all other HNS

Contributions to the Fund and the concept of "receiver"

The HNS Fund and its account will be financed by annual contributions from those persons located in a state party who in the preceding calendar year:

- received over 150,000 tonnes of persistent oil;
- received over 20,000 tonnes of LPG;
- held title to any LNG cargo immediately prior to its discharge in a port or terminal of a state party; or
- were the receivers of any other HNS cargo, including oils other than persistent oil, in quantities exceeding 20,000 tonnes.

While the Convention covers damages caused by HNS carried in whatever quantity, the duty to pay levies will rest only with those persons who exceed the above thresholds of HNS received in a given year.

The contributions to the HNS Fund will be made in respect of HNS carried by seagoing vessels and received in Canadian ports. The contributions will be made post-event, i.e. they will only be due after an incident occurs and will be levied only in respect of the account(s) involved in that incident (i.e. Oil/LNG/LPG/all other HNS). The levies applying to individual receivers will be calculated according to the quantities of contributing cargo received in the year preceding the year of the incident. Levies may be spread over several years depending on the progress of payment of claims resulting from the incident.

State parties can choose either of these two definitions of "receiver" in Article 1.4:

> 1.4 (a) ***the person who physically receives contributing cargo*** *discharged in the ports and terminals of a State Party; provided that if at the time of receipt the person who physically receives the cargo acts as an agent for another who is subject to the jurisdiction of any State Party, then the principal shall be deemed to be the receiver, if the agent discloses the principal to the HNS Fund;*

or

> 1.4 (b) ***the person in the State Party who in accordance with the national law of that State Party is deemed to be the receiver*** *of contributing cargo discharged in the ports and terminals of a State Party, provided that the total contributing cargo received according to such national law is substantially the same as that which would have been received under (a)."*

Article 1.4(a) allows the physical receivers of cargo, such as storage companies, to pass on the obligation to pay a levy, to principal receivers or the owners of the cargo, by identifying the final receivers. Both the person who physically receives the contributing cargo in a port or terminal, and the designated third party must be subject to the jurisdiction of a state party to enable the physical receiver to pass on the levy. In such a case, the final receiver or owner of the cargo will include it in their annual report if the total amount they received in the year exceeds the applicable thresholds of "contributing cargo". The agent or storage company would in this case not have any obligation to pay levies in respect of the HNS cargo they handle on behalf of their principal.

If the agents or storage company cannot disclose who their principal is, or if the principal is located in a non-contracting state, the agent or storage company will include such cargo in their annual report. In this situation, the agent or storage company would be considered to be the "receiver" of the HNS and would be responsible for payment of any levies in respect of the contributing cargo.

Article 1.4 (b) allows a state to establish its own definition of "receiver" under national law. Such a definition must result in the total quantity of contributing cargo received in the state in question being the same as if the definition in 1.4 (a) had been applied.

Treatment of cargo in transit

While the HNS Convention covers any damage arising from HNS in transit, such "cargo in transit" is not a contributing cargo, as provided in Article 1(10):

> *Cargo in transit which is transferred directly, or through a port or terminal, from one ship to another, either wholly or in part, in the course of carriage from the port or terminal of original loading to the port or terminal of final destination shall be considered as a contributing cargo only in respect of receipt at the final destination*.

This means that where the HNS is stored at an intermediary stage, in between carriage by sea, with the transhipment being direct (ship-to-ship) or through a port or a terminal, the receipt of such an HNS cargo at an intermediary stage does not constitute a "contributing cargo" since this is a transhipment in the "course of carriage by sea". The purpose of this provision is to avoid the situation where two separate levies from two separate contributors, first at the port of transhipment and then again at the port of final destination, would be paid on the same HNS cargo. However, HNS cargo received in a port for transhipment by truck or rail to its final destination will be subject to a levy at that port.

In the case of persistent oil, the "receiver" under the HNS Convention will be the same as the party responsible for paying contributions under the IOPC Fund. This will mean that, for a levy in respect of persistent oil, the agent/principal relationship will not apply. As a result, the person who receives the oil cargo is liable and must pay contributions even if that person acts as an agent for the principal receiver.

Furthermore, reports of receipts of persistent oil would need to be submitted to both the HNS Fund and the IOPC Fund. However, considering that the thresholds for reporting receipts of persistent oil are the same under both Conventions (HNS and IOPC), the reporting obligation should not significantly increase the administrative burden on those receivers.

In the event of an incident involving persistent oil, the receivers may be required to pay levies to both the HNS Fund and the IOPC Fund, but only if and to the extent that damages arise under both Conventions. For example, should an oil tanker covered by both Conventions explode, levies could be due to the IOPC Fund to cover pollution damage resulting from the oil spilled,[24] as well as to the HNS Fund to cover damages other than pollution, e.g. personal injury caused by the explosion.

Reporting requirements

One of the key obligations state parties must fulfill under the HNS Convention is to report on HNS cargo received. More specifically, the state party must ensure that the name of any person liable to pay contributions appears on a list to be established by the Director of the HNS Fund. State parties are responsible for the levies lost as a result of the non-submission of reports by persons liable to pay them and therefore it is in the state's interest to ensure that accurate

[24] Currently, Canada's Ship-source Oil Pollution Fund pays all IOPC levies for Canadian contributors.

reporting takes place. To that end the Convention enables state parties to take appropriate measures under their national law, including the imposition of sanctions, with a view to achieving the effective implementation of any obligations for which the receivers of HNS are responsible.

Exclusion of seagoing vessels under 200 grt

Although the Convention applies to any seagoing vessel, including seagoing vessels navigating in domestic waters, state parties have the choice to exclude from the Convention, seagoing vessels under 200 grt engaged in domestic voyages and carrying packaged HNS only. If a state decides to exclude such vessels, no contributions will be due on any cargo carried by these vessels and they would not be subject to the compulsory insurance provisions. Likewise, the HNS Fund would not be liable for any compensation for pollution or other damage caused by such vessels. In these cases, national law would continue to apply to such incidents.

Entry into force provision

The Convention will enter into force eighteen months after ratification by at least twelve states that during the preceding calendar year, received a minimum of 40 million tonnes of HNS cargo. In addition, four of the twelve states must have a total registered ships' tonnage of at least two million gross tonnes.

Canadian Context and Legislation

Under current Canadian law, a shipowner's limits of liability for pollution damage is subject to the limitation of liability for maritime claims as set out in Part 3 of the *Marine Liability Act*. As an example, the maximum liability of a vessel of 20,000 gross registered tonnes would be about $16 million, compared to $74 million under tier 1 of the HNS Convention. Combined with tier 2, the maximum compensation under the HNS Convention would be $500 million.

An initial market analysis suggests that at the international level Canada is a much larger exporter of HNS substances than importer. At the national level the volume of HNS carried by ships within Canada is relatively low. This scenario suggests that the risk of incidents occurring is higher for goods moving on seagoing vessels in and out of Canada than through Canadian internal waters on domestic trade routes. Furthermore, the majority of HNS shipped domestically is oil and oil products, which are generally shipped on seagoing vessels coming from offshore oil platforms.

Although HNS imports are understood to be much lower than HNS exports, the number of importers in Canada that receive over 20,000 tonnes of HNS annually and would be potentially liable to pay contributions to the HNS Fund is unknown at this time, but has been estimated to be relatively few. It is expected that this consultative process will provide a sense of the number of contributors in Canada.

In terms of the potential costs of the Convention to Canadian receivers of HNS, this will depend on a number of variables. As with any liability regime that involves contributions to a common

fund to pay for claims made against it, the amount of any contribution from receivers in a given year will be determined by the size and frequency of HNS incidents and the cost of claims paid by the HNS Fund. In addition, contributions would likely be spread over several years, especially in the case of a major incident, and would likely be reduced by recoveries obtained by the HNS Fund under any recourse action taken against other parties. The only experience in this field that may provide some measure of potential obligations to pay contributions to the HNS Fund is the IOPC Fund. From that perspective, the contributions levied over the years by the IOPC Fund (on average about 5¢ per tonne of oil) seem to be reasonable.

Policy Options

There are two policy options for consideration in regard to this Convention. They are:

Option 1 – Do not ratify the Convention

Under this scenario, Canada would not ratify the HNS Convention and in the event of an HNS spill, Canada would continue to apply the existing regime relating to shipowner's liability in so far as any pollution damage is concerned. Thus, Part 6 of the *Marine Liability Act* would continue to govern the liability of the shipowner, subject to the limits of liability found in Part 3 of the Act. The shipowner's liability would remain lower than under the HNS Convention and would not be supported by compulsory insurance or an additional layer of compensation that is available from the HNS Fund. It follows that there would be no extra burden placed on Canadian receivers of HNS to pay any contributions to the HNS Fund and compensation for these claims exceeding the shipowner's limit of liability would not be available in Canada, as is the case at the present time.

Option 2 – Ratify the Convention

Ratifying the Convention would provide several advantages. It would provide a level of compensation for HNS incidents caused by seagoing vessels that is vastly superior to that currently available under the *Marine Liability Act*, and which more aptly addresses the higher level of risk posed by the larger volume of international movements of HNS. The strict liability of the shipowner for pollution and other damages including injury and death, the requirement to maintain insurance, the right of direct action against the insurer, and the HNS Fund, would ensure that claimants of damages arising from HNS incidents in Canadian waters would receive prompt and adequate compensation analogous to that provided by the IOPC Fund to oil pollution claimants.

However, the option to ratify requires consideration of several policy issues, including those that the Convention has left to the contracting states to decide. These are:

Meaning of "carriage by sea" and "domestic carriage of HNS"

As noted earlier, the Convention covers any damage caused during the international or domestic carriage of HNS by any seagoing vessel in the territory or territorial sea of the contracting state. While the Convention refers in various articles to "carriage by sea", consistent with its title, it

would be more prudent in the Canadian context to stipulate that the term "carriage by sea" should be read to mean "carriage by water". This will leave no doubt that **seagoing vessels** operating in our internal waters and carrying HNS cargo, be it international or domestic in origin, would be covered in the event of any incident. It follows that such cargo would also be considered "contributing cargo" for the purposes of the annual threshold under the various HNS accounts.

Notwithstanding the proposed provision on "carriage by water", the Convention will not apply to domestic carriage of HNS by **non-seagoing vessels**. Such vessels will continue to be covered under the existing regime in Part 6 of the *Marine Liability Act*. As indicated earlier, the existing regime covers only pollution damage, at a lower level of shipowner's liability than the HNS Convention. However, the principal commodity moved domestically by non-seagoing vessels are oil and other bulk products, in relatively small quantities when compared to the volume of HNS carried by seagoing vessels in Canada.

Given the relatively low risk presented by this type of domestic trade, the existing regime in Part 6 of the *Marine Liability Act* should be more than adequate to deal with any incident that may involve non-seagoing vessels engaged in domestic carriage of HNS. Moreover, for incidents involving oil pollution, the domestic Ship-source Oil Pollution Fund would continue to provide an additional level of compensation for any claims exceeding the shipowner's liability, up to about $145 million per incident.

It is proposed that the liability of non-seagoing vessels engaged in domestic carriage of HNS cargo continue to be governed by Part 6 of the *Marine Liability Act*; and, that such HNS cargo not be considered as "contributing cargo" for the purposes of the HNS Convention.

Exclusion of seagoing vessels under 200 grt

Although the Convention applies to any seagoing vessel, state parties have the choice to exclude from the Convention seagoing vessels under 200 grt engaged in domestic voyages and carrying packaged HNS only. This option has been introduced in the Convention on the grounds that this category of vessels poses a relatively low risk of damage, given the smaller volume of their cargo, especially when carried in packaged form. From a practical standpoint, excluding this category of vessels would reduce the administrative burden of obtaining and processing insurance certificates for small vessels that might be affected by the Convention.

Similarly, receivers of cargo carried by these vessels would not be required to report it to the HNS Fund. It follows that damage caused by such ships will not be governed by this Convention, but rather by national law. Thus, like in the preceding case involving non-seagoing vessels, the existing regime in Part 6 of the *Marine Liability Act* would also apply to seagoing vessels below 200 grt.

The adoption of the definition of "receiver":

As noted earlier, the Convention allows state parties to choose from two definitions of a receiver. Under Article 1.4 (a), the receiver is:

- the physical receiver of cargo in the port of discharge, including an agent or storage company that receives the cargo for carriage to a final destination in the state party; or
- the person who physically receives the HNS cargo. This could be the principal receiver or an agent of the principal receiver. The agent would not be required to report such cargo for the purposes of their own annual threshold, provided that the principal is located in the contracting state and the agent discloses the principal to the HNS Fund (or "designated authority").

Alternatively, under Article 1.4(b), the state party can formulate its own definition of receiver so long as contributions to the HNS Fund are the same as they would have been under Article 1.4(a).

Many states intending to ratify the Convention have indicated their preference for the definition in Article 1.4 (a) on the grounds that it contributes to certainty in the interpretation of who is considered a receiver. Moreover, this definition creates a certain level of stability for industry stakeholders in that no new state controlled mechanism would need to be created in order to satisfy the conditions of keeping track of contributing cargo and receivers within the state.

Special provision for LNG receivers

Pursuant to Article 19 of the HNS Convention, the "receiver" in the case of LNG is:

> "*any person who … immediately prior to its discharge, held title to an LNG cargo discharged in a port or terminal of a State Party".*

Considering that there is no threshold level for reporting receipts of LNG cargoes, a person who held title to the cargo immediately **prior** to its discharge ("owner of the cargo") will, regardless of the quantity, have to report the cargo to the designated authorities and pay levies, if and when required. It is believed that in the LNG trade, this will often be the person who holds title to the cargo immediately **following** its discharge. However, if this person is located in a non-contracting state, the duty to pay levy will rest with the receiver of the LNG in the contracting state.

Reporting mechanism

Reporting System

As noted earlier, the HNS Fund will be financed by contributions from receivers after an incident has taken place. Contributions or levies will be based on reports of HNS receipts exceeding certain thresholds in the year preceding an incident. In order to ensure that all persons who are obliged to contribute to the HNS Fund can be located and invoiced if necessary, the Convention requires all state parties to report to the Director of the HNS Fund, on an annual basis, details of all persons (i.e. contact details and quantities of contributing cargo) in a state who are liable to contribute to the Fund. Contracting states will therefore need to implement a reporting system in support of this obligation. Two main administrative options have been discussed internationally how this obligation could be discharged:

a) national reporting system administered and closely monitored by a national authority;
b) self-reporting system by industry with provisions for verification by a national authority.

Option (b) has been the preferred option of the majority of states and industry stakeholders. It consists of a system where receivers self-identify and report relevant information to a designated national authority on a yearly basis.[25] The national authority takes on the duty of spot verification (or audits) of reports and submission of information to the Director of the HNS Fund.

National law and regulations will have to provide appropriate measures for enforcement of the reporting requirements and for penalties when these are not met. There is a precedent in Canada to this approach. In order to discharge its responsibility as a member of the IOPC Fund, Canada adopted a set of regulations creating an effective mechanism for compliance with reporting requirements and for state verification of reporting responsibilities for receivers of oil. These regulations are found in Part 6 of the *Marine Liability Act*.

A decision to ratify the Convention comes with the obligation to implement the reporting system in advance of the entry into force of the Convention in that state. This obligation requires the state to provide data on the amount of HNS received in the twelve (12) months prior to the ratification of the Convention.

A lower threshold for reporting

Consideration will also be given in the regulations on reporting requirements to adopting a lower threshold for reporting HNS shipments than the one provided for in the HNS Convention. This would allow the designated authority to better monitor the HNS trade flows and those parties that are on the margins of the annual threshold and that could potentially be brought into the levy system in any given year. This might be a particularly important option for Canada, as the expected number of receivers has initially been estimated to be quite low with many smaller

[25] The "designated national authority" (DNA) will be determined at an appropriate time to ensure smooth operation of the Convention.

receivers under the annual 20,000 tonne threshold. It is important to note that the establishment of a lower national threshold is being considered only for the purpose of reporting annual HNS receipts to a designated national authority and not for the purpose of providing contributions to the HNS Fund. Information collected from those under the contribution threshold would not be shared with the HNS Fund in any way.

As mentioned earlier, in order to facilitate reporting requirements, receivers will be able to use the HNS CCCC, to identify and report HNS received to the designated national authority. The HNS CCCC will also allow a receiver to input the amount of HNS received in a Canadian port and to calculate whether the total HNS cargo received annually meets the thresholds in the Convention. Upon ratification of the Convention, the HNS Fund will invoice directly individual receivers for the amount of contributions payable to the Fund.

Although this system is currently available on CD ROM, it is expected that the HNS CCCC will be accessible through a website in 2005. Usernames and passwords will be issued allowing users to access appropriate parts of the system. A copy of the CD ROM can be obtained from Transport Canada and stakeholders are invited to familiarize themselves with the system pending the availability of the website.

Treatment of associated persons

Article 16(5) of the HNS Convention requires that quantities of HNS received in the same state by associated persons must be aggregated for the purpose of determining whether the threshold for payment of contributions has been reached. The objective of this provision is to maintain an equitable treatment of all receivers by ensuring that the duty to pay a levy cannot be avoided by spreading the receipts of HNS cargoes among several associated companies.

The Convention defines "associated person" as: *"any subsidiary or commonly controlled entity. The question of whether a person comes within this definition must be determined by the national law of the State concerned".* In the case of "associated persons", all entities receiving HNS within the group will have to submit the details of the HNS cargo even if they do not exceed the Convention thresholds since the assessment for the levy will be based on the aggregated HNS received within the group of "associated persons". The HNS CCCC will allow users to enter the details of associated persons so that the contributions can be aggregated.

Fines to be levied for not having an insurance certificate

As noted earlier, under tier 1 shipowners will be required to have a certificate of insurance or other financial security covering their liability under the regime. These certificates will be issued by a designated authority in the state party against evidence of insurance or other security provided by the shipowner. A valid certificate has to be carried on board the ship and be available for inspection along with other ship's documents.

This requirement raises the question of sanctions or fines for not having a valid insurance certificate. Using the example of current legislation for oil pollution in Part 6 of the *Marine Liability Act*, a shipowner that does not have a valid insurance certificate as prescribed in that Part, is subject to a fine up to $100,000. It would seem prudent to apply the same scheme of fines for not having an appropriate certificate of insurance in the case of the HNS Convention.

Policy Recommendation

In view of these considerations it is recommended that:

1. **Option 2, the ratification of the HNS Convention, be adopted along with proposed methods for proceeding with the implementation of the various aspects of the Convention in Canada;**

2. **The *Marine Liability Act* be amended to adopt new legislation in support of Option 2; and**

3. **Canada ratify the 1996 HNS Convention as soon thereafter as is practicable.**

PART ONE - MARINE LIABILITY

Chapter 2

Liability and Insurance for Carriage of Passengers by Water

Introduction

The *Marine Liability Act* established a new regime governing a vessel operator's liability for passenger claims. That regime is set out in Part 4 of the Act. During consultations held in 2002, stakeholders raised concerns about proposed regulations for compulsory insurance of passenger vessels operated for commercial or public purposes, to be adopted pursuant to section 39 of the Act. The objective of this chapter is to reflect on, and identify possible solutions to these concerns.

Canadian Context and Legislation

Prior to the enactment of the *Marine Liability Act*, the liability of vessel operators was governed by the CSA as part of a general limitation of liability of shipowners for all maritime claims. Under the CSA, all vessels under 300 grt[26] had a limit of liability of $1 million per incident, for personal injury or loss of life, covering both passenger and non-passenger claims. For vessels 300 grt or greater, the limit of liability increased incrementally with the vessel's size. However, with the exception of large ferry operators, the vast majority of small to mid-size operators of passenger vessels in Canada were subject to the limit of $1 million.

The passenger regime introduced in Part 4 of the Act is based on the 1974 Athens Convention and its 1990 Protocol, and includes a "per capita" limit of liability of about $350,000 per passenger.[27] Thus, the maximum liability of the operator of a tour boat for 10 passengers is $3.5 million (10 x $350,000), while a vessel carrying 20 passengers would have a limit of $7 million (20 x $350,000), and a vessel for 100 passengers would have a limit of $35 million, and so on.

Under this regime, the operator is presumed liable for loss of life or personal injury to a passenger due to shipwreck, collision, stranding, explosion, fire, or defect in the ship. In all other cases, the claimant must prove that the loss or injury was due to the fault or neglect of the operators. There are also provisions in Part 2 of the *Marine Liability Act* for the apportionment of liability according to the degree of fault or neglect by the passenger.

The *Marine Liability Act* invalidated waivers and any other contractual provisions that would relieve operators of their liability to passengers. As noted above, section 39 of the Act enables the introduction of regulations requiring operators of commercial or public purpose vessels to maintain insurance to cover liability to passengers.

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[26] grt refers to gross registered tonnage of a vessel.

[27] The Athens Convention stipulates that the limit of liability of 175,000 Special Drawing Rights (SDRs). The average value of 1 SDR equals approximately 2 Canadian dollars.

Compulsory Insurance Regulations

In 2002, Transport Canada engaged The Mariport Group to research and make recommendations on compulsory insurance for passenger vessels as a first step in developing regulations pursuant to section 39 of the Act. Transport Canada released the Mariport Report in January 2003 and asked for public feedback on its recommendations. Stakeholders in the adventure tourism industry (e.g. white water rafting, kayaking) expressed concerns about certain aspects of Part 4, which they felt would be detrimental to them, especially the invalidation of waivers and the proposed compulsory insurance. Adventure tourism stakeholders also had problems to obtain insurance in tight market conditions and felt that the invalidation of waivers of liability would make it even more difficult or impossible to secure affordable insurance. Many stakeholders recommended that "adventure tourism" be excluded from the *Marine Liability Act* on the grounds that this industry was not part of Canada's marine transportation sector and because of the prevailing insurance difficulties facing the industry.

In August 2003, the Minister of Transport announced Transport Canada's response to the Mariport Report and subsequent industry feedback. The department proposed a framework for regulations on compulsory insurance that would apply to:

- all commercial and public purpose **vessels over 15 grt** engaged in domestic carriage of passengers. These operators would be required to maintain insurance for their maximum liability under Part 4 of the *Marine Liability Act* (i.e. $350,000 multiplied by the number of passengers the vessel is certified to carry or the number of passengers carried on the ship if no certificate is required). In the case of fleet insurance, only the top vessel would be used to determine the required amount of insurance.

- all commercial and public purpose **vessels up to 15 grt** engaged in domestic carriage of passengers. These operators would be required to maintain liability insurance of $1 million for vessels carrying 12 passengers or less, and $2 million for vessels carrying above 12 passengers. These limits would apply to any operator of a single vessel or a fleet of vessels in this category.

- **The proposed regulations on compulsory insurance would not apply to all non-motorized and/or inflatable hull vessels and all vessels used solely in international carriage**.

The Minister's announcement also indicated that Transport Canada would review the *Marine Liability Act* and consider possible legislative changes with respect to vessels used in adventure tourism and with respect to compulsory insurance for the international carriage of passengers.

A policy proposal on the issue of adventure tourism is presented below. The issue of compulsory insurance for international carriage will be considered in the future, in conjunction with the consideration of the Athens Protocol 2002 and whether or not Canada should ratify it. An

important part of such consideration would be the level of international acceptance of the new Protocol, particularly by those countries that have operators involved in the carriage of passengers to or from Canada.

Policy Options

Option 1

a) Remove certain adventure tourism activities from Part 4 of the Marine Liability Act

As noted above, many stakeholders in the marine adventure tourism industry pointed out that passengers involved in white water rafting, kayaks and whale-watching zodiacs accept and expect a higher level of risk than passengers on ferries and other commercial vessels. Moreover, these activities offer direct participation of passengers in the operation of the raft or kayak thus assuming inherent risks that are involved in carrying out the activity.

The nature of these adventure tourism activities sets that industry apart from the vast majority of operators who provide either basic transportation service from point A to B or scenic and sightseeing transportation service. Their passengers are not involved in any way in the operation of the vessels and hence do not assume any risk inherent in that operation. This distinction between these two groups of passengers would seem to justify different consideration of the operator's liability to each group. That goal could be achieved by amending the scope of Part 4 of the *Marine Liability Act* to the effect that it would not apply to operators of "non-motorized and inflatable hull vessels". These types of vessels are mainly used in the adventure tourism industry, and for the purposes of a possible amendment of Part 4 of the *Marine Liability Act*, they could be defined as follows:

- non-motorized vessels: *any vessel, boat, or craft, of any length, propelled manually by oars or paddles*
- inflatable hull vessels: *inflatable vessels and rigid inflatable boats (RIBs)*

The amendment of Part 4 would have no impact on Part 3 of the *Marine Liability Act* and the global limitation of liability for maritime claims, which would continue to apply to all operators, including the operators of "non-motorized and inflatable hull vessels". Essentially, the adventure tourism industry would be placed in the same position where it was before *Marine Liability Act* was enacted in August 2001, when the operators were also able to use waivers of liability that has been the standard practice in this industry, especially in situations where the passengers participated in the operation of the vessel.

b) Enforcement and penalty provisions for compulsory insurance

Section 562 of the existing CSA would be used as the authority for the monitoring and enforcement of the regulations on compulsory insurance that are currently being developed under the *Marine Liability Act*. This authority is temporary, as section 562 will not be re-enacted under the CSA 2001 when that Act comes into force, expected in 2006. It is therefore necessary to amend the *Marine Liability Act* to include the following provisions for the enforcement of the regulations on compulsory insurance.

Detention of vessels

Under this provision, a designated officer would have the authority to detain operators who are non-compliant with the compulsory insurance regulations. This would be similar to the current regime in aviation where suspension of operations for lack of insurance is automatic. This proposal would also be consistent with section 222 of the CSA 2001 where a marine safety inspector has the authority to detain a vessel for specific reasons, including, carrying too many passengers, being unsafe or unfit to carry passengers or crewmembers, or having machinery or equipment that is defective such that it exposes persons on board to serious danger. The provisions on detention and any breach of a detention order under the *Marine Liability Act* would also be consistent with the current standards in aviation.

Delegation of authority

This provision is needed to delegate enforcement powers and administration under the *Marine Liability Act*. Similar to paragraph 10(1)(c) of the CSA 2001, the Minister should be provided authority to "enter into agreements or arrangements respecting the administration or enforcement of any provision of this Act or the regulations and authorize any person or organization with whom an agreement or arrangement is entered into to exercise the powers or perform the duties under this Act that are specified in the agreement or arrangement." Enforcement officers could include: Marine Safety technical inspectors, members of the Royal Canadian Mounted Police (RCMP), port authority officials, provincial and local police persons, persons designated as enforcement officers by either the Minister of Fisheries and Oceans or by Parks Canada.

c) Amendment of Section 39 of the Marine Liability Act to facilitate administration of compulsory insurance

To facilitate administration and enforcement of the compulsory passenger insurance regime, a new provision should be added pursuant to section 39 of the *Marine Liability Act* to require an insurer to notify the designated authority if a policy has been cancelled or altered.

d) Amendment of Section 37 of the Marine Liability Act to clarify the term "passenger".

In order to ensure clarity for both the Act and regulations governing compulsory insurance, it has been recommended that section 37 of the Act be amended to ensure that persons carried without a contract of carriage are considered passengers under Part 4 of the Act.

Policy Recommendations

It is therefore proposed that:

1. **The definition of "ship" in section 36 paragraph (1)(a) of the *Marine Liability Act* be amended to exclude "*any vessel, boat or craft, of any length, propelled manually by oars or paddles and inflatable hull vessels and rigid inflatable boats*" in recognition of the unique characteristics of these adventure tourism activities;**

2. **Section 39 be amended to require the insurer to provide notification when insurance policies are terminated or modified;**

3. **Provisions be added to the *Marine Liability Act* to enable the detention of vessels for non-compliance with the compulsory insurance regulations and to delegate enforcement powers and administration in a manner similar to paragraph 10(1)(c) of the CSA 2001.**

4. **Section 37 be amended to clarify that people carried without contracts of carriage are considered "passengers" under Part 4 of the *Marine Liability Act*.**

PART TWO - MISCELLANEOUS AMENDMENTS TO CANADIAN MARITIME LAW

In the light of recent decisions of the Federal Court and the Supreme Court of Canada, various interest groups have made representations to Transport Canada seeking the introduction of a series of amendments to Canadian maritime law. The proposed amendments, set out below, could address certain issues arising from these decisions.

General Limitation Period For Maritime Claims

Introduction

In most systems of law, including Canada's, a limitation period means the period of time during which a claimant can take a legal action before such action becomes time-barred. Limitation periods for maritime claims already exist in the *Marine Liability Act*[28], for example in respect of personal injury and death claims (2 years), passenger claims (2 years), damage to cargo (1 year), pollution damage (3 years or 6 years as applicable), and collision claims (2 years).

Most of these prescribed periods have a basis in international law but for a number of other claims there is currently no specific federal limitation period. The decision of the Supreme Court of Canada in *Ordon v. Grail* has put into question the possibility of applying provincial limitation statutes to fill this void [29]. Accordingly, it is thought that a judge using the test in *Ordon v. Grail* to determine the constitutional applicability of a provincial statute to a maritime claim, where none is provided by federal statute, might conclude that the application of provincial limitation statutes is an intrusion into the core of federal jurisdiction and as such, constitutionally impermissible.

There is also a concern that in the absence of federal legislation providing for specified limitation periods, the old, imprecise common law rule of "laches", i.e., failure to pursue one's claim within a "reasonable" time, might still apply.

Section 39 of the *Federal Courts Act* is not seen as a proper solution to this problem. This section provides for the application of provincial limitation periods in proceedings in the Federal Court in respect of any cause of action (including Canadian maritime claims) arising in that province in the absence of a federal statutory limitation period. If the cause of action does not arise within one single province, then section 39 provides for a 6-year limitation period. Dissatisfaction has been expressed with this provision, both as to the ambiguities that it raises, as well as to the lack of uniformity that results from its application. Because section 39 of the *Federal Courts Act* would not apply to proceedings in a court other than the Federal Court, an ambiguity would still be present in such cases.

[28] *Marine Liability Act,* S.C. 2001, c.6.
[29] *Ordon v. Grail* [1998] 3 S.C.R. 437.

Policy Recommendation

It is proposed to establish a general limitation period for all claims governed by Canadian maritime law for which there is not already a limitation period specified by federal statute. The implementation of a basic limitation period will ensure greater uniformity within Canadian maritime law.

It has been proposed that a six year time limit would conform with the period applicable in the past in the majority of the provinces as well as with the *de facto* limitation period contained in section 39 of the *Federal Courts Act*. However, in recent years, some provinces have moved towards a shorter basic limitation period. For example, actions for damage to property are now subject to a two-year limitation period in Ontario, Alberta, Newfoundland and Labrador and British Columbia while the same action is still subject to a six-year limitation period in Nova Scotia, New Brunswick, Manitoba, and Saskatchewan. The limitation period for such a claim in Quebec is three years.

In view of the above, it is proposed to adopt a two year general limitation period in recognition of the recent approach adopted by several provinces. This basic limitation period would apply to claims that are not already subject to a specific limitation period, such as actions against terminals/stevedores for post discharge damages to goods, actions involving marine insurance, actions for claims under a maritime lien.

Claims of Canadian Ship Suppliers for Unpaid Invoices

Current Status

Shipowners rely on the services of ship suppliers to provide them with goods and services while the ship is in port preparing for its next voyage. These services would include anything from drinking water, foods, spare parts, bunker oil etc. Due to the nature of international shipping, ship suppliers may agree to supply the goods and services to a vessel on credit with payment being due after the vessel sails. Occasionally, this business relationship breaks down and the ship supplier ends up with unpaid invoices.

The problem Canadian ship suppliers face is not unique to the Canadian situation. In spite of best intentions and good business decisions of the parties concerned, the problem of unpaid suppliers' accounts or, for that matter, unpaid port charges, exists in many other parts of the world. While there have been some attempts to rectify this problem through an international convention[30], the remedy available to claimants varies according to national law.

Under Canadian law, Canadian ship suppliers do not have a maritime lien over the vessel for unpaid invoices. A maritime lien is a secured claim against a ship in respect of services provided to the vessel or damage done by it. Such a lien survives changes in ownership. This means that the claimants (lien holders) can continue to pursue their claims even if the owners of the ship have changed. Maritime liens exist under Canadian law in respect of certain claims, among them unpaid master and crew wages, salvage claims, collision claims and port charges, but not in respect of ship suppliers. Thus, the right of a Canadian supplier for unpaid invoices is limited to a statutory right *in rem*[31], which is granted under subsection 43(3) of the *Federal Courts Act.* However, this right does not survive a change in ownership and thus any action commenced by ship suppliers in pursuit of their claims dies when the vessel is sold to a new owner. Furthermore, although the statutory right *in rem* allows ship suppliers to arrest the vessel for unpaid bills, it does not give them any privilege or lien or preference whatsoever, and therefore they remain in the same position as ordinary unsecured creditors and will rank after maritime liens and mortgages when there is a judicial sale of the vessel.

Contrary to the situation in Canada, U.S. law specifically grants an American ship supplier a maritime lien on a vessel for unpaid bills.[32] Under the U.S. priorities system, the maritime lien of an American ship supplier will rank ahead of some mortgages and, in all cases, ahead of foreign statutory rights *in rem* (e.g. ahead of claims from Canadian ship suppliers).[33]

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[30] The negotiations that led to the *1993 Maritime Liens and Mortgages Convention* addressed this issue only in part, relying on national laws to define the rights of ship suppliers. As a result of inconclusive industry-wide consultations, Canada did not ratify this convention. Moreover, it has not come into force internationally.

[31] An action *in rem* is one taken directly against the vessel; an action *in personam* is one take against the owner of the vessel.

[32] 46 U.S. Code Section 31342.

[33] An American maritime lien for ship supplies ranks ahead of a U.S. ship mortgage only when the lien arises prior to the recording of that mortgage. Conversely, such a lien ranks ahead of foreign ship mortgages (when such a mortgage is not guaranteed under Title XI of the *Merchant Marine Act, 1936*).

This difference between the American and the Canadian approach to maritime claims for unpaid ship supplies has led to inequitable situations when a vessel is arrested in Canada and limited funds must be distributed among the various creditors. Despite the fact that a maritime lien for Canadian ship suppliers does not exist under Canadian law, Canadian courts confer on American suppliers the benefits of a maritime lien if it is demonstrated that it is a maritime lien under U.S. law. Under the Canadian ranking system, a claim by an American ship supplier, being recognized as a maritime lien, will then rank ahead of any mortgages and ahead of similar claims by Canadian ship suppliers who, as noted earlier, are treated as unsecured creditors. As a result, American ship suppliers, including those operating in Canada, have in the past been able to recover their unpaid accounts while similar claims by Canadian suppliers against the same ship were frustrated as the funds available had been exhausted by higher priority claims.

Moreover, Canadian ship suppliers can also be at a disadvantage in American proceedings when the vessel is arrested in the United States. In this case, an American court will only grant to Canadian ship suppliers a statutory right *in rem,* applying Canadian law to define the nature of their rights, while the American suppliers will enjoy the benefits of a maritime lien as established by U.S. law, the latter being ranked ahead of the claims of Canadian ship suppliers.

Policy Options

It is proposed to amend the *Federal Courts Act* by introducing a new maritime lien for Canadian ship suppliers to address the above situation and ensure as far as possible that they receive the same treatment as American ship suppliers when pursuing a legal action against the vessel in Canada or the United States, for the recovery of unpaid invoices.

Transport Canada seeks stakeholder input on the following issues that would need to be addressed in the course of further consideration of this policy option:

1) What would be the scope of a maritime lien for ship suppliers?

Should it be limited to goods or materials supplied to the vessels or also include other services?

2) Who would have the authority to bind the vessel for ship supplies?

Under American law, the following persons are presumed to have the authority to procure supplies for a vessel:

> *Owner; master; a person entrusted with the management of the ship at the port of supply; an officer or an agent appointed by the owner, charterer, owner pro hac vice*[34]*, or an agreed buyer in the possession of the vessel.* [35]

No such presumption of authority currently exists under Canadian law. A ship is liable *in rem* only if the time and voyage charterers, masters, and ship's agents have been

[34] Under the American doctrine of ownership *"pro hac vice",* the bareboat charterer becomes subject to the duties and the responsibilities of the owner.

[35] 46 U.S.C. 31341 (a) and b).

authorized by the owner to contract on the owner's personal credit or on the credit of the ship (in the case of a third party in possession and control of a ship).

3) What would be the ranking of a new maritime lien for ship suppliers?

Currently in Canada, the ranking of maritime liens is based on common law, that is to say their ranking has evolved over the years through court judgments. As a result, recognized maritime liens, such as wages of masters and crew, salvage, damage (e.g. collisions) have a priority and rank ahead of mortgages. The ranking of a new maritime lien for ship suppliers would have to be assessed both in light of the current priority of other maritime liens and the particularities that exists in the ranking of a ship suppliers lien in the United States (considering the objective of parity in treatment between the claims of American and Canadian ship suppliers for unpaid invoices).[36]

[36]See above footnote 32 for further details on the ranking of maritime liens and mortgages in the United States.

Sistership Arrest and Amendment to the English Version of subsection 43(8) of the *Federal Courts Act*

Current Status

In maritime law, the concept of "sistership arrest" relates to a situation where a legal action is taken against any vessel in the fleet of vessels belonging to the same owner as the vessel that actually caused the loss or damage. That is, when the faulty vessel is out of reach of legal action, the aggrieved party may take an action against its "sistership" instead.

Ever since the sistership arrest provisions were introduced into the *Federal Courts Act* in 1990, there have been some doubts in the maritime law community concerning their scope. In 1997, the Federal Court in the *Ryan Leet* decision adopted a restrictive interpretation of the sistership arrest provisions[37]. Based on the English version of subsection 43(8) of the *Federal Courts Act*, the court limited the sistership arrest to vessels with identical registered owners. The effect of this ruling has been to exclude the right of arrest in cases where ships, although being in the same "beneficial ownership", are not owned by the same registered owner.

Currently the maritime law community is divided on the scope of any amendments that would modify Canada's approach to sistership arrest. However, there is agreement that a discrepancy exists between the English and the French versions of subsection 43(8) of the *Federal Courts Act*. The English version reads "beneficially owned by" while the French version reads "is owned by the beneficial owner". This reversal of the terms leads to differences in the scope of sistership arrest in Canada

43(8) The jurisdiction conferred on the Federal Court by section 22 may be exercised *in rem* against any ship that, at the time the action is brought, is beneficially owned by the person who is the owner of the ship that is the subject of the action.	43(8) La compétence de la Cour fédérale peut, aux termes de l'article 22, être exercée en matière réelle à l'égard de tout navire qui, au moment où l'action est intentée, appartient au véritable propriétaire du navire en cause dans l'action

In two recent decisions, the Federal Court has specifically addressed this discrepancy and moved away from the narrow interpretation adopted under the *Ryan Leet* case. In *Norcan Electrical Systems Inc. v. The FB XIX* and in *The Royal Bank of Scotland v. Golden Trinity (Ship)*[38], Prothonotary Hargrave concluded that the French version of subsection 43(8) is the only one that allows a plaintiff to invoke the concept of "sistership arrest" in a meaningful way, providing for an action *in rem* against a ship that "*at the time the action is brought, is owned by the beneficial owner [veritable propriétaire] of the ship that is the subject of action"*. This conclusion was

[37] *Hollandsche Aannaming Maatschappij v. The Ryan Leet* (1997), 135 F.T.R. 67.

[38] *Norcan Electrical Systems Inc. v. The FB XIX,* 2003 F.C.T. 702 *(hereafter FB XIX) and Royal Bank of Scotland. v. Golden Trinity (Ship),* 2004 FC 795 (hereafter *Golden Trinity).*

based in part on the purpose of sistership arrest legislation[39] and on the 1952 *International Convention Relating to the Arrest of Seagoing Ships* (although Canada has not ratified this convention).

In the *Golden Trinity* decision, Prothonotary Hargrave stated that "*the Ryan Leet is distinguishable for the English language version of section 43(8) in reality makes no sense, having suffered in the translation, with the French version providing relevant meaning to the section and reflecting the provisions contained in the 1952 Brussels Convention."* The court also rejected the claim that piercing of the corporate veil should take place only in the instance of a sham or a fraud.

The translation of the French version of subsection 43(8) adopted by the court in the *FB XIX* and in the *Golden Trinity* decisions reads as follows:

"The jurisdiction conferred on the Court by section 22 may be exercised in rem against any ship that, at the time the action is brought, is owned by the beneficial owner of the ship that is the subject of the action [Emphasis added.]"

Policy Recommendation

It is recommended that the English version of subsection 43(8) be amended in line with the French version as follows:

43(8)
The jurisdiction conferred on the Federal Court by section 22 may be exercised in rem against any ship that, at the time the action is brought, ~~is beneficially owned by the person who is the owner~~ is owned by the beneficial owner of the ship that is the subject of the action.

When considering the application of the proposed amendments to subsection 43(8), it must be noted that the Federal Court, in previous decisions, concluded that in Canada, the term "*beneficial owner*" does not include a "*demise charterer*"[40]. The Federal Court also held that factors such as common management"[41]; "management decisions as to the trading ventures of the ships", and "identical boards of single purpose companies" are NOT in themselves conclusive evidence of sistership relationship [42]. The burden of establishing the beneficial owner leading to a sistership relationship would require demonstrating that "*there is not merely a common beneficial owner, but that the beneficial owner or owners are the same throughout"*. [43]

[39] "Sistership arrest becomes fairly clear if one keeps in mind that its purpose was to prevent an owner from improperly insulating assets by putting each ship into a separate company in which the overall owner held all the shares" in the *FB XIX,* paragraph 13.
[40] *Mount Royal/Walsh Inc. v. Jensen Star (The),* [1990] 1 F.C.199, paragraphs 14 and 15.
[41] Common management can, "*in some instances, merely be the result of overlapping factional minority ownership",* the later (factional minority ownership) not giving rise to a sistership relationship. *Royal Bank of Scotland v. Golden Trinity (ship)* 2004 FC 795.
[42] *Royal Bank of Scotland v. Golden Trinity (ship)* 2004 FC 795.
[43] *Royal Bank of Scotland v. Golden Trinity (ship)* 2004 FC 795 based on Ssangyong Australia Pty Ltd. V. Looierstgracht *(The),* [1994] F.C.J. No 1553.

While the proposed amendment aims at reconciling the English and French version of the text, it is not intended to suggest a broadening of the scope of the term “beneficial owner” outside of the parameters described above.

Reform of Certain Outdated Common Law Rules on Maritime Property and Obligations

Introduction

The common law and statutes - sources of Canadian law

The laws of Canada (with the exception of the Civil Code of Quebec) originally derived from the English common law. The common law is often described as "judge made" law. Many of the principles that underlie modern common law are in fact quite ancient, their origins capable of being traced back to the Middle Ages. As a result, many of these principles reflect the social and political environments in which they were first created.

While the common law is the root of much of the law of Canada, it has been modified by statutes of Parliament and legislatures. However, in the absence of explicit wording making a change in the law retroactive, these modifications are subject specific and not retroactive. In other words, a given piece of legislation modifies the common law rule to the precise extent indicated by its text, will only apply to subjects and courts within the jurisdiction of the legislative body enacting the law, and can only affect the interpretation and application of the law from the date of enactment onwards. In the absence of statutory intervention, common law principles persist in the form they possess as of the date of their most recent interpretation and application by the courts.

Canadian Maritime Law - the constitutional challenge presented by Ordon v. Grail

In its 1998 decision of *Ordon v. Grail*[44], the Supreme Court of Canada issued a very important ruling on the applicability of provincial statutes to, and therefore the future development of, Canadian maritime law. While not entirely excluding the potential applicability of provincial legislation to aspects of navigation and shipping, the court commented that the need for national uniformity in maritime law was paramount.

Courts can no longer apply provincial statutes of general application to matters of shipping and navigation. Instead, courts must look first to federal statutory sources of Canadian maritime law. Where no statutory rule exists, a trial court may apply common law. ***However, the common law to be applied is not the common law as updated by provincial legislation. It is the common law as it existed before statutory modification by the provinces.*** The Supreme Court of Canada ruled that trial courts may update common law principles applicable to Canadian maritime law incrementally to reflect modern-day social and economic expectations.

Why is there a need to reform Canadian maritime law?

For the reasons discussed above, it is arguable that much of Canadian maritime law as it applies to matters of maritime property and commerce, exists in an antiquated form, incorporating many common law principles that have remained largely unchanged since the 18th century. This state of affairs cannot be allowed to continue for the following reasons:

[44] [1988] 3 S.C.R. 437.

1. Litigants in maritime law cases may be exposed to the application of ancient common law rules, the operation of which may produce consequences that are out of step with present-day societal, commercial and legal expectations.

2. In some cases the uncertainty surrounding how ancient principles will be applied by present day courts may work to unduly complicate commercial arrangements and therefore discourage maritime commerce.

3. The existence of ancient common law principles in Canadian maritime law has the potential to significantly increase both the cost and complexity of pursuing claims before the courts.

While the common law rules extant in Canadian maritime law could be left to evolve on a case-by-case basis in accordance with regular judge made law, the pace of such evolution would be slow, because it would depend upon the inclination of private persons to take these legal issues to court. Some could well decide it would be less risky to order commercial arrangements in jurisdictions outside of Canada where the content of commercial law applicable to maritime transactions is clearer. Therefore, it is preferable to pursue an alternative approach of enacting federal legislation that would realize the twin goals of promoting uniformity in Canadian maritime law and eliminating much of the uncertainty that surrounds the potential impact of ancient common law rules upon modern maritime commerce.

The following sections include a short survey of some of the ancient common law principles, an example of their potential application to maritime obligations, including torts, contract and maritime property, and suggestions for remedial legislative intervention. By maritime property is meant types of property which are within the scope of Canadian maritime law, including ships, salvage, freight, deadfreight, charter hire, demurrage, despatch money, passage money, proceeds of marine insurance, marine mortgages, bail in actions *in rem* and proceeds of sale of maritime property.

(i) Survival of Actions

At common law, any right to sue died with the person. Estates of deceased persons had very limited rights to claim possession of the deceased's physical property for distribution to heirs, but generally the estate of a dead person could not be sued.

As is the case in land-based commerce, a considerable number of maritime small businesses are owned and operated by individual proprietors and partnerships. While land-based small enterprise is able to benefit from provincial legislation that specifically provides for the ability of an estate to sue and be sued upon commercial obligations, small maritime ventures, for jurisdictional reasons, are still subject to common law rules that restrict the ability of estates to claim commercial rights of a deceased and of creditors to sue the estates of deceased.

Example: Surviving Spouse of a Fisher

'A' is the spouse of a fisherman 'B' who is lost at sea. A is named as the executrix of B's estate, part of which includes all of the assets and liabilities of B's fishing operation. At the time of his death, B's fishing business has both accounts receivable and accounts payable. At common law A, as executrix, is unable to sue parties that owed money to B in connection with his business. Conversely, B's former creditors are unable to claim against his estate for debts owing in respect of his fishing business.

The *Marine Liability Act* now permits wrongful death actions by the dependents of deceased persons. But it does not extend to rights of estates of deceased persons to recover for tortious wrongs committed when they were alive, or to recover rights in contracts and property[45]. As both non-maritime and maritime business people now expect that commercial legal obligations will survive the death of an individual proprietor, it is desirable that both areas of commerce be subject to similar legal regimes.

It is proposed to introduce new provisions to achieve parity between the legal rights and responsibilities of land-based and maritime small enterprise similar to those found in provincial statutes providing for survival of rights to claim by and against estates of deceased persons[46].

(ii) Property Rights of Married Women

Traditionally, the common law restricted the rights of married women to own property and engage in business dealings. Although married women technically had the legal capacity to purchase goods, such contracts could be formally refused by their husbands. A married woman had no legal capacity to sell or transfer property while she was living.

Example: Family-Operated Harbour Taxi

'A' and 'B' are a married couple that own and operate a small harbour taxi operation. By their own arrangement, A, the female spouse, assumes responsibility for the purchasing of materials related to the day-to-day operation of the business. It is A's normal practice to contract for these goods and services in her own name. A dispute arises with a service provider to the business. The service provider brings a claim against A, in her own name, for payment. When the claim goes to court, B exercises right to dissent to a contractual arrangement made by his wife, and thereby avoids the contract.

It is proposed to introduce new provisions to preclude the application of this obsolete principle. These provisions would affirm the rights of women as persons with full legal capacity to sue (and be sued upon) obligations, and to own and transfer maritime property[47].

(iii) Rights of Assignees

The common law divided property rights between "things in possession" and "things in action".

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[45] The Supreme Court of Canada in *Ordon v. Grail* held that the common law part of Canadian maritime law ought to recognize the right of the estate of a deceased person to recover personal injury tort damages suffered by the deceased during his or her lifetime, but the issue whether estates could sue for a deceased person's losses generally, was not before the court.

[46] Ontario *Trustee Act* RSO 1990 c. T.23 s. 38, Ontario *Courts of Justice Act* RSO 1990 c. C.43, s. 122, Ontario *Mercantile Law Amendment Act* RSO 1990 c. M.10 s. 3.

[47] British Columbia *Law and Equity Act* RSBC 1996 c. 253, s. 60, Ontario *Family Law Act* RSO 1990 c. F-3 , s. 64.

Things in possession, such as cargo, may be transferred by means of a physical change of possession. A thing in action, such as a bill of lading or a marine insurance contract, is a right to an intangible thing. Although these kinds of property rights are commonly evidenced by paper, or electronic data, the rights themselves are not physical things, but rather intangible things giving rise to ambiguous rights to sue on obligations. However, if the party that had been assigned rights wished to enforce his or her rights they had to do so in the name of the person from whom the right to sue was originally obtained. This is a potentially serious impediment to commerce.

> **Example: Assignment of Freight**
> Company A is a shipping interest that needs to secure a line of credit to meet its operational expenses. Lending institution L is prepared to extend credit to A on the condition that it assign the benefit of one or more freight contracts that A has with Company C as security for the debt. Later, Company A experiences serious financial difficulties and L decides to call in its debt. Company A does not have liquid assets sufficient to cover the amount owing to L. At common law, L must sue Company C in the name of Company A. If Company A is dissolved before the suit is brought, L will be left without a way to enforce the contract; and its security is useless.

It is proposed to introduce new provisions, similar to those adopted by many provinces, to permit assignees, which have given notice of the assignment, to sue on assigned rights in their own names[48]. This would facilitate the flow of commerce in respect of land-based transactions as assignees would be assured that they will not be faced with procedural hurdles.

(iv) Rights of Assignment and Transfer of Property

Current Canadian maritime law does not provide the maritime commercial actor the same level of flexibility that has been extended to land-based commerce by provincial property legislation.

> **Example**
> A ship operator wishes to restructure its business to make it more attractive for investors. The ship operator proposes to transfer ownership of the fleet from a holding company to a partnership of companies in which the holding company would be only one of the partners. To do this the holding company would have to transfer the ownership of the vessels to itself and the other partners. The common law would not recognize an agreement to transfer property from oneself to oneself and other persons.

It is proposed to introduce new provisions, similar to those adopted in some provinces,[49] to enable maritime commercial sector to exercise all the same rights to assign and transfer personal property among joint owners, natural persons and corporations that are currently enjoyed by land-based ventures.

[48] BC *Law and Equity Act* s. 36, Ontario *Conveyancing and Law of Property Act* RSO 1990 c. C.34, s. 53.
[49] BC *Law and Equity Act,* s. 30, Ontario *Mercantile Law Amendment Act* RSO 1990 c. M.10 s. 6.

(v) Guarantors' Rights

Financial institutions and suppliers commonly require personal or affiliate company guarantees as a condition of extending credit to small businesses or new ventures. The guarantor acts effectively as an "insurer" of the debtor's ability to meet its obligations to the creditor. At common law, a guarantor could be ruled liable to pay or perform the whole obligation guaranteed even if other solvent guarantors existed or other debts could be recovered from a person not subject to the contract. The continued existence in Canadian maritime law of the common law restriction is a significant clog on commerce, and raises transaction costs associated with the financing of maritime ventures.

> **Example**
> A shipowner needs $1 million of additional operating capital. Bank B is willing to loan the money on the condition that it obtains a ship mortgage and personal guarantees for the full amount of the loan. Company A locates two Guarantors (G1 and G2) that are willing to provide security for $ 1 million each.
>
> The shipowner becomes insolvent. As the ship is no longer trading in Canadian waters and is not easily subject to arrest in the foreign coastal area where it is operating, and G2 has cash flow difficulties, Bank B calls on the guarantee provided by G1, as G1 has assets in Canada. G1 honours its obligation, and pays Bank B. G1 now tries to recover its loss. However, at common law, G1 has no direct right to claim upon the ship mortgage, or claim contribution from G2.

It is proposed to introduce provisions, similar to those adopted by provinces in respect of land-base commerce, to offset the potential impact of the unqualified application of these doctrines and to affirm the right of guarantors who pay to have transferred to them the right to claim upon other collateral and to claim contribution from co-guarantors[50].

(vi) Abolition of the Doctrine of Merger

Under the common law, if one party brought a lawsuit against a group of defendants that were liable under a joint obligation, and subsequently gave a release in settlement with, or obtained a judgment against one of them in respect of the obligation, the plaintiff's right to continue the suit against the remaining defendants was lost. In the eyes of the common law, the plaintiff's original right to sue the remaining defendants on the joint obligation had been "merged in" or "discharged by" the subsequent settlement or judgment. The operation of this particular common law rule can have a decidedly "chilling" effect on the willingness of plaintiffs to explore settlement possibilities with groups of co-defendants. The plaintiff is placed in a situation where if it wishes to resolve a claim before trial, it must be careful to choose a solvent person with whom to make a settlement. The plaintiff may also be placed in a situation where it is obliged to forego a reasonable settlement offer for partial recovery or risk losing its right to pursue the full extent of its claim against the remaining co-defendants. This common law rule is contrary to the modern policy of encouraging out of court settlements.

[50] BC *Law and Equity Act* s. 34, Ontario *Mercantile Law Amendment Act*, s. 2.

Example

A reduction gear fails on the propulsion system of a cargo vessel, putting it out of service. There are several defendants whose negligence contributed to the loss, including an engineering consultant, the shipbuilder, the equipment designers, the equipment manufacturers, and suppliers of forgings to the manufacturers. The shipowner sues all of these persons as defendants. The consultant decides not to contest the claim. The shipbuilder is prepared to pay part of the claim as settlement, but demands a full release. At common law, if the shipowner takes out judgement against the consultant only, or signs a release in favour of the shipbuilder, its right to claim against the other jointly liable defendants is lost.

It is proposed to introduce new provisions, similar to those adopted by the provinces, to abolish the doctrine of merger in respect of both dealings in maritime property as well as the making and settlement of maritime claims[51].

(vii) Performance of Contracts under Protest

At common law, if one contracting party agreed to perform in a way demanded by the other party, he or she was barred from later objecting that the demanded performance was unreasonable. While the courts may have initially adopted this rule in the interest of certainty, its operation can be unduly harsh and counterproductive for small businesses in commercial situations involving small margins and business decisions that must be made under severe time constraints.

Example

A cargo owner contracts for the carriage of goods under a voyage charterparty. The loading of the vessel is delayed and a dispute arises over calculation of laytime and demurrage. The shipowner claims a possessory lien on the cargo and demands an amount of demurrage that the cargo owner views as incorrectly calculated. At common law, if the cargo owner paid the amount of demurrage demanded, it could not later dispute the amount. If the cargo owner attempted to pay under reservation of rights, the shipowner could take the position that it was entitled to an unqualified payment of all the money demanded and refuse delivery. The dispute over the amount of demurrage owing could fester, and the cargo would be excluded from the stream of commerce.

It is proposed to introduce new provisions, similar to those adopted by the provinces in respect of land-based commerce that would allow for the performance of contractual obligations "under protest"[52]. This provision would stipulate that when one party to a contract performs part of its obligation "under protest" it is in effect signalling to the other party that it is reserving its right to contest to the validity of obligations imposed by the agreement at a later date.

(viii) Alternative Contract Remedies

Under the common law, there were a limited number of remedies available to those who wished to sue for breach of a contract. In most cases, the relief available to the successful party was limited to a right to obtain monetary damages or an order for the return of property.

Where parties contract for the sale of a unique object, and the transfer never occurs, monetary

[51] Ontario *Conveyancing and Law of Property Act*, s. 36.
[52] BC *Law and Equity Act* s. 62.

damages may be inadequate compensation. While the common law would not intervene to enforce such an agreement by compelling the seller to deliver the goods to the original purchaser, courts of equity could order "specific performance" of the original contract. In cases where a court of equity was precluded on the facts from awarding an order of specific performance to a deserving plaintiff, they could choose to award "equitable" damages instead.

> **Example "A"**
> A non-profit organization, after an extensive fundraising campaign, comes to an agreement to purchase a vessel of unique historic identity and return it to Canada. After a deposit is paid but prior to delivery, the existing owner is approached by another interested person who is willing to pay a higher price. The existing owner returns the deposit and states that the deal is off. Vessels of a similar size, performance and carrying capacity can be purchased in the market for lower price than the historic vessel.

At common law, the disappointed non-profit organization could recover only its deposit and nominal damages for breach of contract. A court of equity has the power to order that the existing owner perform the contract and deliver the historic vessel to the non-profit organization.

> **Example "B"**
> After the date originally scheduled for delivery but before the court can rule on the dispute, the historic vessel, while outside Canada, is sold to a third party purchaser for value without notice. As the original sale contract cannot be specifically performed, a court of equity can order equitable damages as a substitute for specific performance in a higher amount than the common law would give. Equitable damages in this case could be based on the cost of constructing a replica of the historic vessel using traditional materials and techniques.

The common law permitted contracts in which a failure to perform, however trivial, permitted the other party to keep the benefit of the contract or to require charges to be paid out of all proportion to the benefit or loss.

> **Example "C"**
> A mining company enters into a 10-year contract of affreightment with an ocean carrier. The contract of affreightment requires the carrier to make up to 25,000 tonnes of carrying capacity available each month for required loading, with tonnages to be notified between the 15th and 20th day of the previous month. The contract provides that the ocean carrier must keep 25,000 tonnes free cargo space reserved and cannot fix other top up cargoes for any nominated vessel until after the 20th day of each month. The contract provides that if the carrier fails to reserve 25,000 tonnes capacity until the 20th day of the month, the charterparty is at an end. For the first three years of the contract, the mining company never notifies more than 20,000 tons per month. During the fourth year, on a falling freight market, the carrier is approached on the 18th day of a month with an opportunity to carry a top up cargo at an attractive freight on the nominated ship that will leave free capacity of 24,000 tonnes. The carrier accepts the fixture. The mining company notifies 20,000 tonnes that month, but when it hears of the timing of the top up fixture, it seeks to cancel the contract of affreightment. At common law, the cancellation clause is enforceable and the carrier would forfeit six years of revenue. Equity would refuse to enforce the cancellation of the charterparty if the forfeiture was found unreasonable

The common law did not recognize any right of contracting parties to modify a contract without some additional value being given for the modification. This restricts the ability of parties to voluntarily agree to modification of contract performance. The common law statutes of the provinces confer a general power on courts to relieve against forfeitures[53] or to grant specific

[53] Ontario *Courts of Justice Act,* s. 98.

performance and equitable damages in land-based transactions.[54]

It is proposed to introduce new provisions, similar to those adopted by the provinces[55] affecting land-based obligations, to the effect that when there is a conflict in the performance of a contract, equitable rules are to prevail over the rules of the common law[56].

(ix) Mortgages and Security Interests in Maritime Property

At common law, a person could borrow money on the security of land by giving title to the land to a lender under an agreement that if the loan was fully paid, the lender, or mortgagee, would transfer the land back to the original owner, the mortgagor. By the eighteenth century, principles of land-based mortgages were being applied to mortgages of ships. The common law rules applying to mortgages were very harsh. Any delay in payment or non-payment could result in the complete forfeiture of the mortgaged property, even if the value of the property far exceeded the amount of outstanding debt.

The courts of equity intervened to modify these common law rules, to permit the mortgagor extensions of time to pay and to recover the property on repayment of the outstanding debt. Eventually the potential future rights of the mortgagor to the return of the property was viewed as a present right in itself, known as the equity of redemption. Equity permitted the mortgagor to deal in the equity of redemption and give second or subsequent mortgages, or to give mortgages as collateral with other security for financing purposes.

By the nineteenth century, these equitable rights were codified in many provinces' legislation. Other procedural protections and remedies are given in the provinces' personal property security legislation. While certain procedural rights are given to secured creditors and debtors under Part XI of the *Bankruptcy and Insolvency Act*, the application of that Part is limited to secured creditor's enforcement over all or substantially all of an insolvent person's property.

> **Example**
> A coastal sawmill owns several yard tugs, which are not registered under the *Canada Shipping Act* but only licensed as small commercial vessels. The sawmill gives a general security interest and a floating charge over present and after acquired mobile equipment to a bank. The mobile equipment's book value is about 30 percent of the sawmill's total assets. The financing agreement permits the sawmill to renew equipment without prior approval of the bank. The sawmill, which has cash flow difficulties, trades in its oldest yard tug as part payment for a new tug and makes a sale agreement with the builder which reserves title on the new tug to the builder until the entire purchase price is paid. The builder does not register the sale agreement as a purchase money security interest under the provincial Personal Property Security Act. After the new tug is delivered to the sawmill but before the new tug is fully paid for, the bank decides to enforce the floating charge and seizes and sells all of the mobile equipment, including the yard tugs.
>
> The common law would not recognize a floating charge and would not permit the sawmill to deal in previously mortgaged property. The common law would not grant the mortgagee the power to sell the

[54] Ontario *Courts of Justice Act,* s. 99.
[55] BC *Law and Equity Act* s. 43, Ontario *Mercantile Law Amendment Act* s. 16.
[56] BC *Law and Equity Act* ss, 4,5, 31, 44, Ontario *Mercantile Law Amendment Act* s. 15.

> property in the hands of the debtor but only to foreclose. As the yard tugs are not registered vessels, the parties cannot rely on the *Canada Shipping Act* relating to registration of ownership or to the power of sale under registered ship mortgages. The builder is surprised to hear the new tug has been sold to a purchaser from the bank and applies to the provincial superior court for a ruling. That court will have to wrestle with several issues, including whether the province's personal property security legislation applies to maritime property, whether the court can rely on equity to enforce a floating charge over maritime property or the equitable mortgage on the new tug and whether the equitable mortgage on the new tug has priority over the subsequently crystallized floating charge.

The absence of federal legislation applying to the mortgaging of all maritime property, regardless of its proportion to the debtor's other property or the debtor's financial status, contributes to uncertainty among those who deal in maritime property and could hinder access to financing for maritime ventures. The provincial legislation has evolved from regulation of discrete types of security over personal property, such as chattel mortgages or assignments of book debts, to the regulation of security interests generally[57].

It is proposed to introduce new provisions, subject to particular statutory rules such as those providing for mortgages of registered Canadian vessels, to the effect that the granting of security interests in maritime property generally is to be governed by the same principles, legal and equitable, as govern mortgages of other personal property.

This would include procedural and substantive rights generally enacted for security interests in land based personal property, including rights of debtors and others interested in mortgaged property to notice of enforcement, the right of secured creditors to sell the collateral, the right of the debtor giving the security interest to redeem and the right to apply to a court to control the sale process or for summary determination of parties' rights in secured maritime property[58].

(x) Vesting Orders

This issue deals with the legal basis of the authority of a court to order the transfer of ownership of maritime property from one person to another. One of the limitations of common law as a method of confirming ownership of disputed assets is that the court's decision bound only the parties to the lawsuit. Other persons who inherited or wished to buy such property took the risk that an original owner who is not a party to the court proceeding could later emerge and demonstrate better title. Currently, the most common process employed by the Federal Court to transfer maritime property is the *in rem* judicial sale. While judicial sale is an established process, which at its conclusion results in the granting of clear title in the previously arrested property, it is also procedurally complex and can be expensive.

There are types of cases where a full *in rem* sale is neither necessary nor desirable, but there is still a need to clear the ownership of property. Examples include disputes between intended buyers and sellers, administration of estates, and dealings in property whose ownership is uncertain. The *CSA* now confers limited powers on courts to make certain orders respecting registered vessels and on the Federal Court and the receiver of wreck to rule on disposition of

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[57] Quebec law now recognizes charges over moveable.

[58] Ontario *Personal Property Security Act* RSO 1990 c. P.10, Part V and s. 67.

salvage [59]. It would be desirable to enact a general power in courts to grant vesting orders in all types of maritime property, including non registered vessels, property under a lienholders' contractual power of sale and proceeds of insurance.

> **Example**
> A marine engine repairer, realising that it cannot rely on provincial legislative rights of sale for unpaid repair charges[60] and that maritime law gives only a possessory lien, decides to provide for a power of sale in its contract documentation. A potential purchaser from the repairer of a reconditioned engine is reluctant to make an offer out of concern the repairer cannot give good title against the engine's original owner. At common law, the engine's original owner had to be added as a party to legal proceedings in order for the sale to proceed without the risk of a future claim by the original owner.

It is proposed to introduce new provisions to give courts a general power to grant vesting orders for maritime property in any person, just as provincial legislation permit judicial vesting orders for other property[61].

(xi) Enforcement of Rights: Cross and Third Party-Claims

In many cases, a person defending a claim may seek contribution and indemnity from a liability insurer or from other persons believed to share responsibility for the claim. At common law, courts will enforce contract clauses requiring affected parties to delay any individual cross-, or third party-claim that they may have until a ruling has been made on the main action. Many insurers have included 'no action' clauses in contracts so that the insured is prevented from claiming indemnity until the insured's legal liability has been first decided. Parties to a main action can conceivably be put in the position of having to defend a claim without knowing whether the benefit of insurance or other rights of recourse will be available to them in the future.

> **Example**
> Company A is the owner operator of a tour boat business. Company A obtains liability insurance cover from an insurer that includes a "no action" clause into its insurance policy. During one of Company A's tours, the master is over-zealous in his manoeuvring and the ship is consequently capsized. A negligence suit is commenced by dependants of injured passengers. At the same time the insurer, acting on a tip that the master's certificate of competency has expired by the time of the accident, denies coverage and attempts to enforce the "no action" provision contained in the policy. As maritime claims are not subject to provincial legislation invalidating "no action" clauses, the court gives effect to the clause and the defendant Company A is precluded from immediately commencing a third-party claim against its insurer.
>
> At the trial of the underlying negligence action, defendant Company A is found liable. That company is now faced with the prospect of having to start a new lawsuit against its insurer claiming indemnity for amounts due to the plaintiffs.

This right to overlay contractual arrangements upon the resolution of underlying actions is recognized in the case of maritime tort actions by section 22 of the *Marine Liability Act*, S.C. 2001, c. S-6 which states:

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59 *Canada Shipping Act.* R.S.O. 1985 c. S.9 ss. 46, 47 and 453-465.
60 *FBDB v. Finning* (1989) 34 BCLR (2d) 235.
61 BC *Law and Equity Act*, s. 37, Ontario *Courts of Justice Act*, s. 100.

22. *The rights conferred by this Part on a person or ship that is found liable or that settles a claim are subject to any existing contract between that person or ship and a person from whom contribution and indemnity is claimed.*

It is proposed to introduce new provisions, similar to those adopted in some provinces, that would prohibit the formation of agreements to preclude the "claims over" before a main action is decided (footnote 61). This would be accomplished by an amendment of Section 22 of the Marine Liability Act which would render "no action" clauses inoperative but not affect other contractual rights.

PART THREE - HOUSEKEEPING AMENDMENTS

Salvage Provisions to be moved to the *Marine Liability Act*

The Canadian legislation on salvage is based on the *1989 International Convention on Salvage*. This Convention, which Canada ratified in 1994, provides a legal framework to ensure that salvage operations are undertaken in a professional manner and with due regard to environmental protection. The main provisions of the Convention deal with the duties of masters and shipowners to arrange for salvage and to cooperate with salvors; the criteria to be taken into consideration when fixing the salvage award; the possibility of special compensation in relation with efforts to prevent environmental damage; and, contribution to salvage awards by shipowners and cargo interests.

As noted earlier in this paper, one of the aims of the *Marine Liability Act* adopted in 2001 was to consolidate, in a single piece of legislation, all liability regimes and related subjects that were at the time located in several acts and regulations. Maritime salvage is one of those related subjects and therefore it is proposed to move existing provisions on salvage from the CSA to the *Marine Liability Act*.

Title of the *Marine Liability Act*

The proposals concerning the reform of outdated common law rules set out in Part Two above would, if adopted, require new legislation to implement. It has been suggested that this could be done by creating a new statute on "maritime property", or by incorporating the new legislation within the framework of the *Marine Liability Act*. The latter approach seems to be a more efficient and practical way of dealing with this new legislation but as it would extend the initial scope of the act beyond liability regimes and related subjects, **it is proposed to introduce the new legislation in a distinct chapter of the *Marine Liability Act*, perhaps to be called the *Marine Liability and Property Act*.**