CMLA: The Latest in Maritime Law

Eric Machum, CMLA National Vice President



Eric Machum is a partner at Metcalf & Company, Barristers & Solicitors.

His practice focuses on marine, transportation, insurance, and associated litigation (coverage and subrogation) and corporate-commercial law.

Before joining Metcalf & Company in 2005, Eric worked as a cadet for Atlantic Towing Limited and spent four years at Clyde & Co. in Caracas, with additional experience in London.

He holds an LLM in Marine Law and a JD from Dalhousie University Law School, teaches Maritime Law part-time at Dalhousie's Schulich School of Law. He has delivered maritime law training in Latin America. Eric is a published author of numerous maritime law articles.

Industry Recognition

- *Named 2023 "Lawyer of the Year" in the Transportation sector by Best Lawyers.*
- *"Global Leader" and "National Leader" in Transport Law by Who's Who Legal, ranked in Chambers and Partners*
- *"Most Frequently Recommended Lawyer for Halifax" by Lexpert.*
- *CCH Canadian Limited award for highest mark in Legal Research and Writing.*

Professional Activities & Affiliations:

- *Honorary Consul for Finland from December 2016 to present.*
- *Canadian Maritime Law Association (CMLA): National Vice-President.*
- *Canadian Transportation Lawyers Association (CTLA): Past Director.*
- *Canadian Board of Marine Underwriters (CBMU): Member of the Loss Prevention Committee.*
- *Eastern Admiralty Law Association (EALA): Vice-Chair.*
- *Mission to Seafarers Halifax: Member of the Board of Directors.*
- *Dalhousie University School of Law, professor of "Maritime Law and Practice" for 2022-2023 year.*

Eric is a certified scuba diving instructor.

39th Annual Meeting with Transport Canada

1. Coasting Trade Act need for review
   - Unmanned Aquatic Vehicles. Since not all are designed for, or used in, "navigation" they may not be captured by the CTA and we should try to capture those to promote investment in Canadian marine industry.
   - Is section 3(2)(c.1) (the “Seismic Exemption”) still appropriate?

2. Registry of Ships: Issues registering ships in the name of a Joint Venture LP, adding additional recipients to Registry notices?

3. Regulation of Fixed-Floating Objects: What is the status and what is new since 2024? Also, is TC looking at MORUs (Marine Offshore Renewable Units)?

4. Status of Proposed Marine Emergency Services Regulations.

5. Review / Update of Carriage of Goods and s. 46 of the Marine Liability Act

6. Shipping Conferences Exemption Act Review

7. Vessel Recycling

CMLA Committee Highlights

Carriage of Goods Committee

- Hazardous and Noxious Substances Convention – 2027
- Draft Convention on Negotiable Cargo
- Bills of Lading

Arctic Issues Committee

- Bill C-5 – Port of Churchill

New Technologies Committee Report

- Saildrone Surveyor – Uncrewed Vessel
- Ammonia-powered vessels

Fisheries Committee

- R v. Steer 2025 BCSC 1443
- R v. Nichols 2025 BCSC 1704

Legislative and Regulatory Committee

- Canada Shipping Act, 2001 - Interim Orders

CMLA Annual Meeting 2025 Highlights

June 13, 2025

Limitation of Liability for Small Craft – a Comparative Approach and Update	Kim Stoll and Raymond Waid
Canadian Maritime Law Case Review	Marc Isaacs
Case Law Update - US Law	John Sullivan
The Ethical Treatment of Seafarers in 2025	Judith Altree
Transport Canada Update	Francois Marier
Bridging the Digital Divide: The Legal Imperative for Subsea Cable Infrastructure in Canada’s North	Seamus Ryder
Submarine Cables - Everything You Need to Know: International Context	Ian Breneman
Salvage & Recovery Avoiding Constructive Total Loss	Michael Delaney
International Maritime Cases of Significance	George Douvelos
CMI Recent Developments in International Working Groups and Standing Committees 2025	John O'Connor

Some Recent Court Decisions

Elite Insurance Co. (Aviva) v. Borgatti Estate, [2025] F.C.J. No. 1474, September 8, 2025

- **Issue:** Coverage denial in a fatal boating incident.
- **Decision:** Insurer was estopped from denying coverage to the Estate after it took steps that prejudiced the Estate's access to evidence, including disposing of the boat before advising the Estate the boat's lights could be the basis for denying coverage (breach of warranty).
- Disposal of the vessel deprived Estate access to physical evidence that may have assisted in responding to the denial of coverage.
- Note: Insurer also paid physical damage and accidental benefit claims under the Policy, and appointed counsel under a Reservation of Rights to defend Estate in tort litigation.

Some Recent Court Decisions

Furtado v. Lloyd's Underwriters, 2024 ONCA 579, leave to appeal dismissed March 27, 2025

- **Issue:** Relief from forfeiture in the case of late reporting of a claim.
- **Decision:** No relief from forfeiture (imperfect compliance) when no coverage to forfeit.
- The policy was a "claims-made and reported" D&O policy requiring claims (or circumstances likely to give rise to claims) to be reported to the insurer during the policy period. A "Suspension Clause" allowed delay in reporting if disclosure was legally prohibited.
- The insured's company was investigated by the OSC and later commenced proceedings. The *Securities Act* initially prohibited notice to third parties, including insurers. The Act was later amended to permit notice to the insurer.
- The obligation to report resumed once disclosure was permitted under the revised *Act*. The insured failed to report the investigation for nearly a year after receiving multiple summonses from the OSC drawing his attention to his ability to disclose the investigation to the insurer.

Some Recent Court Decisions

Opsis Airport Services v. Quebec (Attorney General), 2025 SCC 17, May 30, 2025

- **Issue:** Whether provincial security licensing laws apply to port security operations.
- **Decision:** Supreme Court held that marine port security is part of the federal “core” of navigation and shipping. Provincial law was constitutionally inapplicable due to interjurisdictional immunity.

Catherwood Towing Ltd. v. Lehigh Hanson Materials Limited, 2024 BCCA 348, October 15, 2024

- **Issue:** Effect of covenants to insure in towage agreements versus negligence indemnity clauses.
- **Decision:** Covenant to insure supersedes indemnity clauses, providing tort immunity even for negligence unless contract language clearly states otherwise.

Some Recent Court Decisions

ETG Commodities Inc. v. Hapag-Lloyd (Canada) Inc., 2025 FC 474, March 14, 2025

- **Issue:** Cargo loss, geographic deviation, and limitation period under Hague-Visby Rules.
- **Decision:** Geographic deviation does not defeat the one-year time bar for claims in the HVR. Forbearance of suit clause also barred action against the carrier's agent.

Crosby Molasses Company v. Scot Stuttgart (Ship) 2024 FC 1358, September 3, 2024

- **Issue:** Arbitration clauses in bills of lading and forum non conveniens.
- **Decision:** *Marine Liability Act* nullifies foreign arbitration clauses in bills of lading. Proceedings in Canada were allowed to continue. Court also refused to fix clerical errors in one of the Bills of Lading resulting in a misdirected reference to another charterparty.

Section 46 MLA: Jurisdiction Overboard

Limits and potential scope for expansion



Marine Liability Act: Section 46

Part V of Marine Liability Act (“MLA”)



- The Hague-Visby Rules have force of law in Canada. The Hague-Visby Rules define the carrier’s and shipper’s duties, while also setting a limit on the carrier's liability for loss or damage to cargo.

- The Hague-Visby Rules do not provide mandatory jurisdiction provisions, leaving parties to negotiate an applicable jurisdiction or rely on national law where contracts are silent.

Marine Liability Act: Section 46
“Sue You Where I Want To / Can’t Sue Me There”

- Section 46 MLA allows claimants to bring proceedings in Canada for “contracts for the carriage of goods by water” if:

    (a) Port of loading/discharge is in Canada

    (b) Defendant is domiciled in Canada

    (c) Contract was made in Canada

- The Federal Courts have “contracts for the carriage of goods by water” only refers to such contracts as defined in the Hague-Visby Rules, ie. covered by a bill of lading. Section 46 does **not** cover seaway bills or charter parties.
- British Courts have concluded s. 46 MLA is permissive only, if carrier under a contract evidenced by a seaway bill insists on litigation in the UK, it can get an anti-suit injunction quickly.
- Charter parties and similar private agreements are excluded, as they are used by parties with equal bargaining power.

Marine Liability Act: Section 46
Bills of Lading vs Seaway Bill

	Bill of Lading	Seaway Bill
Contract Rights	Evidence of contract between carrier and shipper; transfers rights to consignee or endorsee by law.	Evidence of contract only between named shipper and carrier; consignee has no rights; bailment terms bind consignee.
Evidence of Cargo Condition	Proof cargo received in good order and condition; conclusive for consignees/endorsees.	Only basic evidence of receipt; does not confirm cargo's condition or benefit the consignee.
Document of Title	Transferable and negotiable; consignee/endorsee can demand delivery by surrendering the document.	Not a document of title; only shipper holds rights; consignee cannot demand delivery.
Regulatory Regime	Subject to international rules (Hague-Visby, Hague, Hamburg Rules).	Governed by freedom of contract; not regulated by international regimes. Typically, Hague Rules with lower limits than Hague-Visby Rules.

Marine Liability Act: Section 46
Impact on consignees and their insurers

Narrow scope means that for shipments other than under bills of lading:

(a) Jurisdiction is subject to contract terms (typically UK), limiting choice and cargo interests' access to justice, and likely increasing litigation costs (GBP lawyers and arbitrators vs CAD lawyers and arbitrators).

(b) Limits of liability are likely lower Hague Rules limits vs Hague-Visby Rules limits.



Marine Liability Act: Section 46
CBMU Member Survey Results

Support for Expanding s. 46 MLA
Respondents support amending Section 46 to broaden contracts for carriage of goods by water to include Seaway Bills, DFRs, and multimodal contracts.

Financial Impact of Current Limitations of s. 46 MLA
Most respondents said they had no hard data on whether subrogation claims were abandoned because of foreign jurisdiction clauses. Some responses did note however:

(a) Cost/benefit analysis includes time and cost of service of documents under the Hague Convention, and asset search in foreign jurisdiction, which may make smaller claims (under e.g. $50,000) less viable to pursue outside Canada.

(b) There would not be negotiated rates or agreements (with lawyers) for claims outside Canada, thus recovery costs would in all likelihood be higher abroad.

(c) One responded pointed our Canadian litigation is sometimes slower than abroad.

Marine Liability Act: Section 46
Comparative Jurisdictions: Australia & Nordic Countries

Australia (*Carriage of Goods by Sea Act 1991)*

- Applies ‘amended Hague Rules’ to a broad range of contracts, including non-negotiable documents (ie seaway bills, DFRs, etc.).
- Jurisdiction clauses limiting Australian courts are invalid (inbound and outbound).
- Arbitration clauses are valid only if arbitration is held in Australia.

Nordic Maritime Code (Denmark, Finland, Norway, Sweden)

- Applies to any cargo claims under Part 13 of the Code (bills of lading, seaway bills, COAs, etc.)
- Claims may be brought in:
  - (a) Defendant’s principal place of business or residence.
  - (b) Place where contract was made (if defendant has a business/agent there).
  - (c) Place of loading or discharge.
- Good-faith holders of bills of lading are not bound by charter party jurisdiction clauses unless explicitly stated.

CMLA Conference 2025

75th Anniversary

Ottawa, Ontario
June 16th – 18th
Save the Date

