Report of the Canadian Maritime Law Association
To the Members of
The Canadian Board of Marine Underwriters
May 24, 2018
By David G. Colford, Immediate Past-President

The Canadian Board of Marine Underwriters Association was one of the founding associations of The Canadian Maritime Law Association in 1951, some 67 years ago, and, on behalf of the CMLA. I have the honor and privilege to congratulate you on your 101st anniversary.

Our president, Marc Isaacs is stuck in a trial and he has asked me to convey his apologies for being unable to be here and to give the CMLA's annual report on legal developments that are relevant to the marine insurance industry.

First off, I can report to you of one "non-development" in marine insurance is that we in our association have noticed a total lack of interest in the reform efforts in marine insurance law in the United Kingdom, that is, there are no discussions, surveys, opinion soliciting about whether Canada should follow the lead of the United Kingdom. This must be because the traditions and practices here in Canada do not need reform.

I wish to report that there has been no progress in the ratification efforts of the Rotterdam Rules, mainly due to a lack of interest in the United States. The importance of ratification by the United States is that many African countries have declared that they will ratify on the US has ratified and the Convention will gain momenturm to coming into force. Since the Canadian government has declared that they will considering ratifying once the intentions of their major trading partners becomes clear, our Association has encouraged the government, in the meantime, to consider incremental reform of our carriage of goods by water, namely, by making the Hague-Visby Rules compulsorily applicable for both export and import cargoes and also expressly stipulate that these Rules apply to sea waybills which are in common use now.

Also, I will say nothing about the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS) because our previous speaker (Francois Marier from Transport Canada) owns the bragging rights about that subject!

That is not to say that the courts haven't been busy and Marc Isaacs asked me to inform you that the Ontario Court of Appeal upheld a decision in CNA's favour in the Broadgrain where an insured had tried to claim compensation under the policy even though it was paid for the goods covered, but on the ground that its purchaser in China, rather than filing a claim, simply deducted amounts it claimed it was owed from a damaged shipment from amounts due on shipments that followed. In other words, the shipper under a CIF sale who is paid under that sale cannot claim under the policy for amounts that are deducted from posterior sales.

The Supreme Court in the UK issued an important decision for all of commercial law, last week in Rock Advertizing v MWB Business Exchange 2018 UKSC24 holding that "No Oral Modification" clauses in contracts, including marine insurance contracts, are fully legal and effective, and are only subject to doctrines of estoppel developed by the common law (they do make the comment that "other legal systems" use concepts of good faith and abuse of rights). Such clauses usually read:

> "The contract sets out all of the terms as agreed between the parties. No other representations or terms shall apply or form part of this contract. All variations to this contract must be agreed, set out in writing and signed on behalf of both parties before they take effect."

Aside from the HNS convention, there is a piece of legislation making its way through the Houses of Parliament, being Bill-64 whose purpose is to implement the Nairobi International Convention on Removal of Wrecks, 2007 and to address the general problems arising from dilapidated and abandoned vessels. The Convention makes the ship owner strictly liable for the costs of locating, marking and removal of wrecks caused by a maritime incident and for which there is no limit of liability for wreck removal.

The legislation will require owners of vessels over 300 metric tons and unregistered vessels to maintain wreck removal insurance or some other financial security. It will prohibit owners of any vessel to simply abandon that vessel except in limited circumstances, for example, abandoning a sinking ship to preserve life. It will prohibit what it refers to as a dilapidated vessel to remain in the same place for more than 60 days.

Efforts are underway to develop a system through the ship registers and licensing registries to maintain an up to date list of current owners, not just shell company owners, but actual individuals who will be held responsible for a vessel they have a relation with in the event that the vessel has outlived its use and value.

There will be a array of administrative actions and penalties that the government departments can use and authorizations to take action to remedy the failure of any defaulting owner, including the removal and disposal of the vessel – so we won't hear the Coast Guard responding "since the vessel is not a navigational hazard nor causing a pollution, it is no business of ours that its tanks are full of contaminants and the owner is nowhere to be seen."

Since the legislation is part of the government's Oceans Protection Plan, there is talk of constituting a fund and raising monies through various levies, whether through licensing fees and the like, to provide the necessary funding in the event that the owner is in default and no insurance is available to address the removal and disposal of an abandoned vessel. What will be done about all the old abandoned vessels that already litter our shore lines has not been addressed.

The other significant legislation in the making is Bill 48, The Oil Tanker Moratorium Act, which is before the Standing Committee on Transport, Infrastructure and Communities – where I understand it is undergoing some heavy weather. The purpose of this bill is to restrict any movement of any oil tanker carrying more than 12, 500 metric tons in any waterway north of Port Hardy on the BC Coast. Now, 12,500 metric tons is a lot of oil, and smaller tankers with lower capacity will be able to continue to service the local communities needs – and continue to get into trouble as small tanker vessels are known to do (when was the last large oil tanker spill in Canada anyway?) The bill was a fulfillment of the promise made as part of the reconciliation efforts with First Nations – trouble is that some of the First

Nations think that the bill basically forecloses their own economic development and have challenged its validity before it even becomes law!

The Arctic Shipping Safety and Pollution Prevention Regulation came into force last December 19, 2017 bring into force in Canada the International Code for Ships Operating in Polar Waters (the “Polar Code”) with some “made in Canada” modifications (relating to garbage and sewage disposal).

Speaking of Arctic shipping matters, the Federal Court of Appeal rejected the appeal of the owners of the CLIPPER ADVENTURER who complained that the trial division’s concept of the government’s duty to warn mariners of obstacles in a timely manner by the publication of a Notice to Mariners rather than just circulating a notice to shippers somewhere on the internet, was too restrictive. That decision is now the subject of an application for leave to appeal to the Supreme Court.

Our Carriage of Goods Committee was asked to examine the recent adoption last summer of the Uncitral Model Law on Electronic Transferable Records which deals with the use of electronic transferable records equivalent to paper-based transferable documents. That subject immediately lead to a review of the some of the exciting projects being undertaken by Maersk and Zim Navigation on the use of “Blockchain” technology to develop a global trade digitization platform. I will cite from Dr.Rochester’s report which is easier than summarizing it:

> “While there are, certainly, carriage of goods applications for blockchain, notably smart contracts (bills of lading and charter parties) for tracking shipments and liaising with customs, there are other equally interesting developments. For marine insurance, EY (In association with Maersk, Microsoft, MS Amlin, Willis, XL Catlin and Accord), are building a blockchain platform to connect the stakeholders in the insurance value chain. In late 2017, they completed a 20-week blockchain proof of concept trial. The benefits expected when released generally include asset tracking, transparent distributed ledgers for reinsurance, smart contracts and automated payments. For navigation, the centuries old problem of a log book being lost or altered, can be resolved by sending encrypted log book entries to servers worldwide each verifiable by the captain’s digital signature. The log book thus becomes indestructible and non-

> modifiable by reason of the copies held in the blockchain by means of a distributed ledger. Also, in relation to charts that may not always be accurate or up to date, especially when hurricanes or other such events result in changes in an area or region. Certain ports have been making their own charts, and the International Hydrographic Organization has put a call out for crowd sourcing of bathymetric data. It is thought that distributed ledger technologies could change the way charts are compiled, indicating the originator of the survey data, the time stamp, the chart compiler, any amendments, whether it is hydrographic office data or private entity, etc.
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> The applications in the shipping industry for the authentication of a transaction or information in a decentralize manner cannot be underestimated. By way of example, using blockchain technology, Walmart was able to track the shipping history of 2 mangoes in 2 seconds…a task that using its standard methods took 6 days, 18 hours and 26 minutes."

However, beware, the aim of blockchain technology is to introduce efficiencies and reduce margins of error – generally caused by human intervention – its aim is also to reduce the reliance on human intermediairies such as agents, brokers, and, yes, lawyers.

Regulatory compliance is always of special interest to underwriters and some of our members reported about increased vigilance by the Canadian Coast Guard over speeding, particularly in restricted zones to protect the right whales.

We continue to foresee that technological developments in response to climate change, such as the mandatory requirement in 2020 that marine fuels not have more than 0.5% sulphur content, and demands made by increasing standards promulgated by the International Maritime Organization will present challenges with respect to compliance and enforcement. The future will continue to present uncertainty, which creates risk and therefore opportunities lie ahead for all of us.

Thank you.