

**RESPONSE OF THE CANADIAN MARITIME LAW ASSOCIATION TO THE QUESTIONNAIRE OF THE
CMI INTERNATIONAL WORKING GROUP ON THE FAIR TREATMENT OF SEAFARERS**

PART I

Question 1:

Who has responsibility for administering and enforcing maritime safety and marine pollution prevention and control in the waters under the jurisdiction of your State?

The Canadian Department of Transport has principal responsibility for administering and enforcing maritime safety in Canada. With respect to marine pollution prevention and control in Canadian waters, responsibility is held principally by the Canadian Department of Transport, the Canadian Department of Fisheries and Oceans and the Canadian Department of the Environment. The principal statutes governing the role of federal regulators in maritime safety and pollution prevention and control are the *Canada Shipping Act* (which will be replaced by the *Canada Shipping Act 2001*, not yet in force), the *Fisheries Act*, the *Canadian Environmental Protection Act*, 1999, and the *Migratory Birds Convention Act*. The latter two statutes may shortly be amended by a bill currently before Parliament (Bill C-15), which would expand the jurisdiction and powers of the Canadian Department of the Environment.

Question 2:

When maritime accidents and/or marine pollution incidents occur within the waters under the jurisdiction of your State, what process of accident investigation is legally required?

Maritime accidents, including those resulting in pollution incidents, are investigated by the Transportation Safety Board of Canada (“TSB”) pursuant to the *Canadian Transportation Accident Investigation and Safety Board Act*, which implements Canada’s obligations to investigate marine casualties under the United Nations Convention on the Law of the Sea. The particular investigation process is determined by the investigators conducting the investigation and typically depends upon the seriousness of the incident. TSB has the power to conduct a public inquiry if considered appropriate, and TSB’s investigators have the power, on reasonable grounds, to enter premises (including a ship), search and seize evidence and interview witnesses. TSB’s mandate is to determine causes and contributing factors, but not to assign fault, and the ability of other regulatory authorities to investigate is limited while TSB’s investigation is ongoing.

The Canadian Department of Transport is also likely to be involved in investigation of marine accidents. That Department, as well as the Canadian Department of Fisheries and Oceans and the Canadian Department of the Environment, all have jurisdiction to investigate a marine pollution incident, pursuant to the statutes described under question 1 above.

To a lesser degree, provincial regulatory authorities may seek involvement in the investigation of a marine pollution incident where provincial territorial interests are affected.

Question 3:

Do your State’s maritime accident and/or marine pollution investigative processes

contemplate criminal charges against any ships' personnel involved and, if so, what action may be involved?

Investigations of maritime accidents and marine pollution incidents may result in charges being laid against a ship's personnel. While these charges are not under the Canadian *Criminal Code*, they do contemplate fines or imprisonment and could therefore be considered criminal or penal. These offences are predominantly strict liability offences, with a due diligence defence available.

For example, in the case of a maritime accident, failure on the part of a master to render assistance after a collision may result in a fine on summary conviction or imprisonment under the *Canada Shipping Act*. Similarly, this Act makes it an offence for any person or ship to discharge a pollutant. While the typical Canadian practice is that it is the ship that is charged for such an incident, the jurisdiction to charge individual seafarers committing the discharge does exist.

The potential for prosecution of seafarers will increase if Bill C-15, amending the *Migratory Bird Convention Act* and *Canadian Environmental Protection Act, 1999*, becomes law, as the amendments expressly contemplate prosecution of a master or chief engineer for failing to take reasonable steps to prevent pollution incidents.

Question 4:

If there is no criminal process, what other investigative process is utilized?

While the investigative processes would be those identified under question 2 above, the prosecution for offences as described under question 3 above would be conducted through the Canadian court system in the same manner as a more conventional criminal prosecution.

Question 5

Does your State's investigative process permit detention of seafarers and, if so, under what circumstances and with what safeguards?

There is no provision for the detention of seafarers as witnesses other than for purposes of participating in TSB interviews. Provision does exist for detention of seafarers who are charged with offences, although this process has been rarely used, as most pollution prosecutions have been of the vessel itself. The proposed amendments in Bill C-15 would expressly empower arrest of seafarers under the *Migratory Birds Convention Act* or the *Canadian Environmental Protection Act, 1999* where there is reasonable belief an offence has been committed.

With respect to safeguards, Canada has a Charter of Rights which includes due process rights that would apply to detention of a seafarer charged with an offence. On being arrested a seafarer has the right (a) to be informed promptly of the reasons for arrest (b) to retain counsel without delay and to be informed of that right and (c) to have the validity of the detention determined by way of *habeas corpus* and be released if the detention is not lawful.

In many of the provisions of the *Canada Shipping Act* involving interference with a foreign ship, particularly for instance involving violations of international conventions or an incident outside Canada's territorial sea, notification of the foreign flag state is contemplated. The proposed amendments to the *Canadian Environmental Protection Act, 1999* in Bill C-15 similarly provide for notice to a foreign state and require the consent of the Minister of the Environment.

Question 6

If Seafarers are required to be present for an investigation, trial or other hearing will they be permitted to leave your State until such investigation, trial or other hearing takes place?

There is no provision for a seafarer to be compelled to remain in Canada pending a hearing or trial if his or her role is solely as witness. However, if a seafarer is charged with contravention of Canadian law, then the Court will typically fix the terms of the individual's release pending trial, often involving the posting of bail, and it is doubtful the seafarer would be permitted to leave Canada unless the Court is satisfied the seafarer will return to Canada for the trial.

Question 7

Does your State require a financial surety to ensure that seafarers return for any subsequent hearing and, if so, how is the amount of such a surety determined and what form is required?

For a seafarer charged with an offence, the availability and amount of bail to be posted to obtain a seafarer's release and compel his or her return for trial would be determined by the Court.

Question 8

Is your State's maritime administration or other authority given legal responsibility for the protection, rights and welfare of all seafarers and, if so, how is this responsibility administered?

The Canadian Department of Transport has some measure of legal responsibility with respect to seafarers under the *Canada Shipping Act*. This Department also has responsibility for port state control inspection pursuant to the Paris and Tokyo Memoranda of Understanding, which powers are in part exercised to protect the safety of seafarers. Human Resources Canada also deals with aspects of seafarer rights and protection through its jurisdiction over labour matters, although this is principally handled through the Department of Transport under a Memorandum of Understanding between the Departments.

Question 9

If a maritime accident resulting in serious pollution occurs in waters under the jurisdiction of your State that involves a foreign-flag vessel with a crew of different nationalities, what is the expected role of vessel crew members held responsible in the subsequent investigative process?

The TSB would typically interview the crew members with a view to reaching conclusions as to causes and contributing factors. The crew members are obliged to participate in such interviews. Other regulatory authorities, such as the Department of Transport, Department of Fisheries and Oceans and Department of the Environment, may also expect to interview crew members either as witnesses or accuseds. There have been disagreements, between regulatory authorities and their counsel on the one hand and the defence bar on the other hand, concerning the extent of crew members' obligations to participate in interviews in the context of such investigations.

Question 10

If the accident, as outlined in Question 9, is due to negligence but not wilful misconduct by responsible crew members, will your State proceed only with pollution damage claims under the accepted international civil liability and compensation system?

The fact that a pollution incident is attributable to negligence rather than wilful misconduct does not necessarily mean that the incident will be treated strictly as a civil matter without penal prosecution. For the most part, the offences to which a vessel and its crew are potentially subject are strict liability offences. While a defence of due diligence is available, such defence may not be applicable if negligence is involved.

The responsible regulatory authority, guided by the Canadian Department of Justice, would assess each incident on a case by case basis in deciding whether to lay charges.

Question 11

If the answer to Question 10 is “No”, what other processes or procedures will be undertaken by your State?

See the answer to question 10.

Question 12

If the maritime accident outlined in Question 9 occurred outside your State’s Territorial Seas, although damage occurs in areas under your State’s jurisdiction, would the procedures involved be different?

Under the *Canada Shipping Act*, the jurisdiction to prosecute exists with respect to a pollution incident anywhere in Canada’s exclusive economic zone, not just its territorial sea. If Bill C-15 passes Parliament in its current form, the jurisdiction under the *Migratory Birds Convention Act* and the *Canadian Environmental Protection Act, 1999* will be similarly expanded.

Question 13

Regardless whether your State’s investigative process utilizes the criminal justice system or any other system, will the relevant vessel crew members be detained? If so:

a. What is the legal basis for such detention?

Other than the authority of the TSB to detain witnesses for interviews as part of their investigations and the possible jurisdiction of other authorities to act similarly, the legal reason for detention of a crew member would typically be arrest in contemplation of charges being laid against such crew member and the ultimate trial of such charges.

b. What rights will the accused/detained crew member have during the process, and do such rights differ from those available to citizens of your State?

An accused crew member would have the same rights afforded to any other accused, regardless of whether he or she is a Canadian citizen. See the rights described under question 5 above.

c. Will full reasons and/or charges be provided to those detained?

Yes.

d. What is the expected length of such detention?

This depends on the nature of the incident and the charge.

e. Where and how will the seafarers involved be detained?

Detention of an accused seafarer may be in a penal institution, unless the Court with the jurisdiction over the prosecution permits release on bail.

f. What access to legal advice and/or defence will such personnel have available to them?

They will be afforded the ability to retain counsel and will have the ability to access the legal aid system available in the province of arrest.

g. Will the vessel's representatives, agents, family members, labour organization representatives, or lawyers be given immediate and full access to those detained?

Limited and restricted access will be provided. See also the answer to f.

h. Will the relevant seafarers have the legal right not to answer questions that may be considered self-incriminating, if so advised?

Yes. Section 11 of the Canadian Charter of Rights provides that any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence. All questions must be answered in interviews by the TSB but information obtained in such an interview may not be used in criminal prosecution.

Question 14

Does your Association have any other comments, suggestions or recommendations on this subject?

The Canadian Maritime Law Association has previously expressed its position on this issue in the context of the CMI's work on the subject of International Places of Refuge. The Association's position is that seafarers should not face penal liability as a result of pollution incidents, as this may serve to divert attention from the principal objective of minimizing the possibility of a distressed vessel causing an environmental catastrophe, such as by discouraging a vessel's master from seeking refuge in a particular state because of personal criminal responsibility that could be faced there.

The Association wishes to repeat this position in the context of the CMI's work on Fair Treatment of Seafarers. In addition to the concerns that arise in the narrow context of places of refuge, the criminalization of seafarers is a serious disincentive to recruiting qualified personnel to this important profession. The draft resolution *Guidelines on the fair treatment of seafarers in the event of a maritime accident*, recently developed by the Joint IMO/ILO ad Hoc Expert Working Group on the Fair Treatment of Seafarers in the Event of a Maritime Accident, set out the appropriate principles and approach to the issue.

The Association has also expressed its opposition to the proposed adoption of Bill C-15, in the context of Parliament's consideration of that Bill. The amendments contemplated by Bill C-15 would only increase the exposure of seafarers to prosecution. Among the Association's concerns are compliance with Canada's international obligations, Canada having recently become a state party to the United Nations Convention on the Law of the Sea. This Convention provides that

monetary penalties only are to be applied in the event of a pollution incident outside the territorial sea, unless there is a wilful and **serious** act, and provides for prompt release and security, of which provisions the Association is concerned Canada may be in breach if it proceeds to adopt Bill C-15.

Respectfully submitted, this 2nd day of May 2005.

The Canadian Maritime Law Association

Per: (Sgd) Peter J. Cullen

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