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CLARIFYING THE LIABILITY RISK OF SHIPPING IN THE CANADIAN ARCTIC
BY:
TIMOTHY E. STEIGELMAN

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ABSTRACT

In the coming years the Arctic Ocean will become navigable for significant periods of time. Now is the time to consider the legal regime that will govern the arctic region, and the recent Polar Code is a major international step in that direction. Among the areas that need further attention before the Arctic becomes a major commercial highway is shipping liability. In particular, Canadian law may hold cargo owners liable for ship owners' mistakes, errors, and omissions leading to oil spills in the Canadian Arctic. This peculiar cargo owner liability may be an uninsurable risk, and is therefore potentially destabilizing to firms that may not even appreciate their risk. Rather than getting rid of this protection entirely, however, this article proposes a solution to bring this facet of Canadian law into harmony with the Polar Code, preserving the additional protection afforded by cargo owner liability, while tempering it with principles from the Polar Code itself.

KEY TERMS

Admiralty Law; Comparative and Foreign Law; Conflict of Laws; Disaster Law; Energy and Utilities Law; Environmental Law; Insurance Law; International Law; Law of the Sea; Legislation; Oil, Gas, and Mineral Law; Torts; Transnational Law; Transportation Law; Water Law.

Arctic shipping is bound to increase in the coming years. The retreat of Arctic sea ice is in full swing. Multi-year sea ice is melting and giving way to smaller, thinner seasonal sea ice, which in relatively short order will make the region more passable to vessel traffic.¹ These new routes are a potential economic boon for both producer and consumer states, and will allow shipping lines to ply their trade on shorter polar routes, in waters that even now are impassable, or at least impracticable most of the time.

When Arctic shipping becomes practical and even commonplace, there will be a corresponding increased risk of environmental disaster in the Arctic. To be sure, risk is inherent in any seagoing venture. Since time immemorial, the “perils of the sea” have been understood as a daunting, if necessary, risk of putting to sea. The “perils of the sea” may variously relate to both the risks a ship and its cargo encounter on a voyage,² as well as the dangers to which seamen are regularly exposed.³ Regrettably, those perils come to fruition from time to time, and on occasion the perils erupt into full-fledged disasters. Some of the most notable and notorious seaborne disasters of recent years involved oil spills, such as the *Exxon Valdez* in Alaska, the tanker *Erika* that recently sank off the coast of Brittany, or the Deepwater Horizon disaster in the Gulf of Mexico.⁴ Those oil spills were each an environmental disaster in their own right, and each shows that extracting and moving hydrocarbons by sea, as with any human endeavor, is prone to error. When the perils of the sea and the harsh environment of the Arctic are layered over human frailty, it is an unfortunate foregone conclusion that, sooner or later, there is almost sure to be a marine disaster of some kind in Arctic waters.

Before that first major disaster happens, it is a worthwhile exercise to determine the rules that will control when disaster strikes.⁵ What follows is an exploration of the liability regime in Arctic waters, particularly in the Canadian Arctic. The discussion begins with a hypothetical disaster in the Arctic to frame the problem. The state of the law is reviewed under longstanding international conventions and Canadian law, as well as the applicability of the recently adopted Polar Code.⁶ This comparison will give rise to a recommendation to reconcile Canadian law with the Polar Code, in hopes of creating a more predictable liability regime for Arctic shipping.

I. HYPOTHETICAL

In the near future, Arctic sea ice has declined and thinned to such an extent that regular Arctic passage is a financially viable alternative to shipping through the Panama Canal. One of the

¹ U.S. GOVERNMENT, NATIONAL STRATEGY FOR THE ARCTIC REGION 5 (May 2013).

² See *Lanasa Fruit S.S. & Importing Co. v. Universal Ins. Co.*, 302 U.S. 556 (1938).

³ See *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995).

⁴ Cataloging these and many similar disasters would sadly take volumes and is beyond the scope of this piece.

⁵ There are many other Arctic shipping issues that remain unresolved at this writing: delimitation, search and rescue, environmental response, navigational aids, and marine insurance, to name just a few. Those issues are beyond the scope of this work that narrowly focuses on liability regimes.

⁶ *International Code for Ships Operating in Polar Waters (“Polar Code”)*, INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/en/MediaCentre/HotTopics/polar/Documents/POLAR%20CODE%20TEXT%20AS%20ADOPTED.pdf> (last visited July 21, 2016).

first vessels to regularly ply the polar route is the *M/V Hesperus II*, a post-Panamax container ship running from China to Portland, Maine. The goods landed in Portland are trans-shipped via rail or truck to their destinations further within the United States.⁷

On a certain Arctic voyage, several dozen of the hundreds of containers carried onboard *Hesperus II* are packed full of motor oil. The oil is shipped by PetroCorp Inc., an oil manufacturer headquartered in the United States with its major production activities in China. PetroCorp ships its motor oil in fifty-five gallon drums for industrial use, and in quarts for the consumer market. The rest of the containers onboard *Hesperus II* contain the full range of finished goods that might be expected to be sent to the North American market to include clothing and linens, electronics, and foodstuffs.

The *Hesperus II* is delayed from an on-time departure from China, and by the time it leaves is nearly a week behind schedule. Because of unseasonably late storms in the northern Pacific, *Hesperus II* is re-routed and delayed on its approach to the Bering Strait. As the *Hesperus II* passes into Alaskan waters, the shipping line receives a warning that unseasonably early winter weather, significant snowfall, and early freezing are expected off of Baffin Island in northern Canada, toward the eastern end of the Northwest Passage. While there is no confirmed threat to shipping, there is no indication of just how icy the Northwest Passage has become, so extreme caution is urged for ships planning that voyage. Because *Hesperus II* recently received its certification as a Category C polar vessel,⁸ the shipping line is unconcerned about a little ice building up—after all, polar ice has mostly melted, freeze-overs are rare, and the *Hesperus II* is a certified polar ship.

The shipowner's confidence is sadly misplaced. While approaching the western end of Baffin Island at night, *Hesperus II* encounters a sheet of sea ice nearly a foot thick. The crew has no warning of the ice, only sees it minutes before collision, and even then has no way to determine the thickness of the ice; evasive maneuvers are far too little too late. This ice sheet is a combination of an old ice inclusion meeting up with newer, first-year ice, knit together by an unseasonably early freeze. The ship's crew only hears a lurching thud as the ice penetrates the ship's hull, and the *Hesperus II* begins taking on water. The vessel begins to go down by the bow, listing to starboard. Flooding continues, and the ship takes on even more water. Portions of

⁷ Casting Portland, Maine, as a cargo port in the near future is based on recent developments, and may very well come to pass. See, e.g., Penelope Overton, *Port of Portland Approved for Federal Grant That Will Double Freight Capacity*, PORTLAND PRESS HERALD (Jul. 6, 2016), <http://www.pressherald.com/2016/07/06/port-of-portland-approved-for-7-million-grant/>; *Portland, Maine Will Replace Norfolk, Virginia As A Port of Call*, EIMSKIP (Nov. 2, 2013), <http://eimskip.is/news/Portland,-Maine-will-replace-Norfolk,-Virginia-as-a-port-of-call.html>; Tom Bell, *Eimskip Moves to Bring More Cargo Ships to Portland*, PORTLAND PRESS HERALD (Jan. 29, 2015), <http://www.pressherald.com/2015/01/29/eimskip-moves-to-bring-%E2%80%A8more-vessels-to-portland/>; Lori Valigra, *After Dropping Anchor in Portland, Iceland's Eimskip Looks to Hunker Down*, MAINEBIZ (Apr. 7, 2014), http://www.mainebiz.biz/article/20140407/CURRENT_EDITION/304039994/after-dropping-anchor-in-portland-iceland-s-eimskip-looks-to-hunker-down-expand; Tom Bell, *Eimskip's Global Managers Meeting in Portland*, PORTLAND PRESS HERALD (Oct. 14, 2014), <http://www.pressherald.com/2014/10/14/eimskip-managers-meeting-in-portland/>.

⁸ Polar certification and its meaning under the recently adopted Polar Code is discussed *infra*, Part III.

the engine room are flooding. The highest of the stacked containers begin to teeter and fall over the side, their connections compromised by the collision, unstable at the precarious angle held over the water.

Some of the PetroCorp containers fall over the side and sink immediately, while others go down with the *Hesperus II*. One or two PetroCorp containers are sheared apart during the sinking, caught between the deck edge and the ice. Several fifty-five gallon drums of PetroCorp oil are ripped open on top of the ice and pour into the polar sea, mixing with the diesel fuel, lubrication oil, and other chemicals that floated out of the engineering spaces of the *Hesperus II*. More oil is released from the sinking wreck, as containers are smashed and implode deep underwater. Oil and other floating cargo are released hundreds of feet below the surface and float back up; some oil and other debris is trapped under the ice, while other pockets of oil and debris, spread by underwater currents, surface in open water several miles from the wreck site.

Miraculously, the whole crew escapes and is mercifully rescued after a quick, efficient search conducted by a well-trained Canadian Coast Guard. As the clean-up effort begins, the owner of the *Hesperus II* begins its discussions with the authorities, insurers, and others to determine its liability for this first major environmental disaster in polar shipping. Unsurprisingly, the shipowner (“Owner”) is first on the chopping block. However, the Owner and its insurer are surprised, even a little relieved, to discover that PetroCorp may be obligated to pay for some of the losses caused by this environmental disaster.

What follows is a discussion assessing the state of the law, which will shed light on how a cargo owner like PetroCorp may be partially liable for this shipping disaster.

II. STATE OF THE LAW

Who is liable for the clean-up of the wreck of the *Hesperus II*? Under the current state of the law, not only are vessel owners or operators liable, but, perhaps surprisingly, a cargo owner may also share in the liability for the arctic disaster described in the hypothetical above. This discussion reviews the current state of the law, starting with the key international conventions that apply, and then discusses applicable Canadian law, with a focus on the shared liability for cargo owners. A discussion of the recently adopted Polar Code follows, to see how the changing regime in the arctic may affect shipping standards and liability in the future.

A. *International Conventions*

There is a patchwork of different treaties and conventions that apply to arctic shipping. The *Comite Maritime International* (“CMI”) issued a report early in 2016 that compiled the definitive list of the patchwork of conventions that apply to arctic shipping.⁹ Rather than recreate the CMI’s very good distillation, the discussion below will focus on three of the more generally applicable conventions that apply to oil spills in the arctic: the UN Convention on the Law of the

⁹ Lars Rosenberg Overby, *Report on the Legal Framework for Civil Liability for Vessel Source Oil Spills in Polar Regions*, COMITE MARITIME INTERNATIONAL, 4-15, (Feb. 2, 2016), <http://static1.squarespace.com/static/566212aae4b0d8f0948180ce/t/57225c26b09f95444b47db38/1461869828808/REPORT+ON+THE+LEGAL+FRAMEWORK+FOR+CIVIL+LIABILITY+FOR+VESSEL+SOURCE+OIL+SPILLS+IN+POLAR+REGIONS.pdf> (hereinafter the Overby CMI Report).

Sea (“UNCLOS”), the Civil Liability Convention (“CLC”), and the Fund Convention. While this is an admittedly limited review of the entire legal landscape, these three conventions will provide necessary context for a later discussion of domestic Canadian law.

1. United Nations Convention on the Law of the Sea

UNCLOS is the foundational treaty for international maritime law. The treaty sets up different zones of ocean, measured seaward from the “baseline,” which is a coastal state’s coastline at low water.¹⁰ From the baseline to twelve nautical miles (“NM”) are the coastal state’s territorial seas.¹¹ Beyond twelve NM are the high seas, which are open to travel by all vessels.¹² From the baseline out to 200 NM (or the end of the continental shelf) is a coastal state’s exclusive economic zone (“EEZ”), where high seas freedoms are limited by the coastal state’s right to regulate the extraction of natural resources, whether biological or mineral.¹³ Outside any EEZ state’s EEZ are the high seas, colloquially known as “international waters,” which are largely ungoverned space.

While defining these different zones, and states’ and vessels’ respective obligations in those zones, UNCLOS does not actually delimit any particular maritime boundaries. Instead, neighboring coastal states have been left to themselves to resolve their disputes through bilateral treaty,¹⁴ binding arbitration,¹⁵ international litigation,¹⁶ or otherwise. In one recent example, the Permanent Court of Arbitration issued a decision that almost completely vindicated the Philippines’ position regarding Chinese claims to much of the South China Sea.¹⁷ That particular arbitration was commenced by the Philippines’ invoking UNCLOS Article VII over the objections, and non-participation, of China. It remains to be seen what real world consequences, if any, will follow from the arbitration panel’s decision.¹⁸

Returning to the arctic region, many competing nations lining the Arctic Ocean have claimed arctic waters to be within their respective EEZ. Russia made a splash by planting a flag

¹⁰ United Nations Convention on the Law of the Seas art. 5, Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261 (1982).

¹¹ *Id.* at art. 2-4.

¹² *Id.* at art. 86-90.

¹³ *Id.* at art. 55-58.

¹⁴ *See, e.g.*, Howard Amos, *Arctic Treaty With Norway Opens Fields*, THE MOSCOW TIMES (July 6, 2011, 8:00 PM) <https://themoscowtimes.com/articles/arctic-treaty-with-norway-opens-fields-8114>.

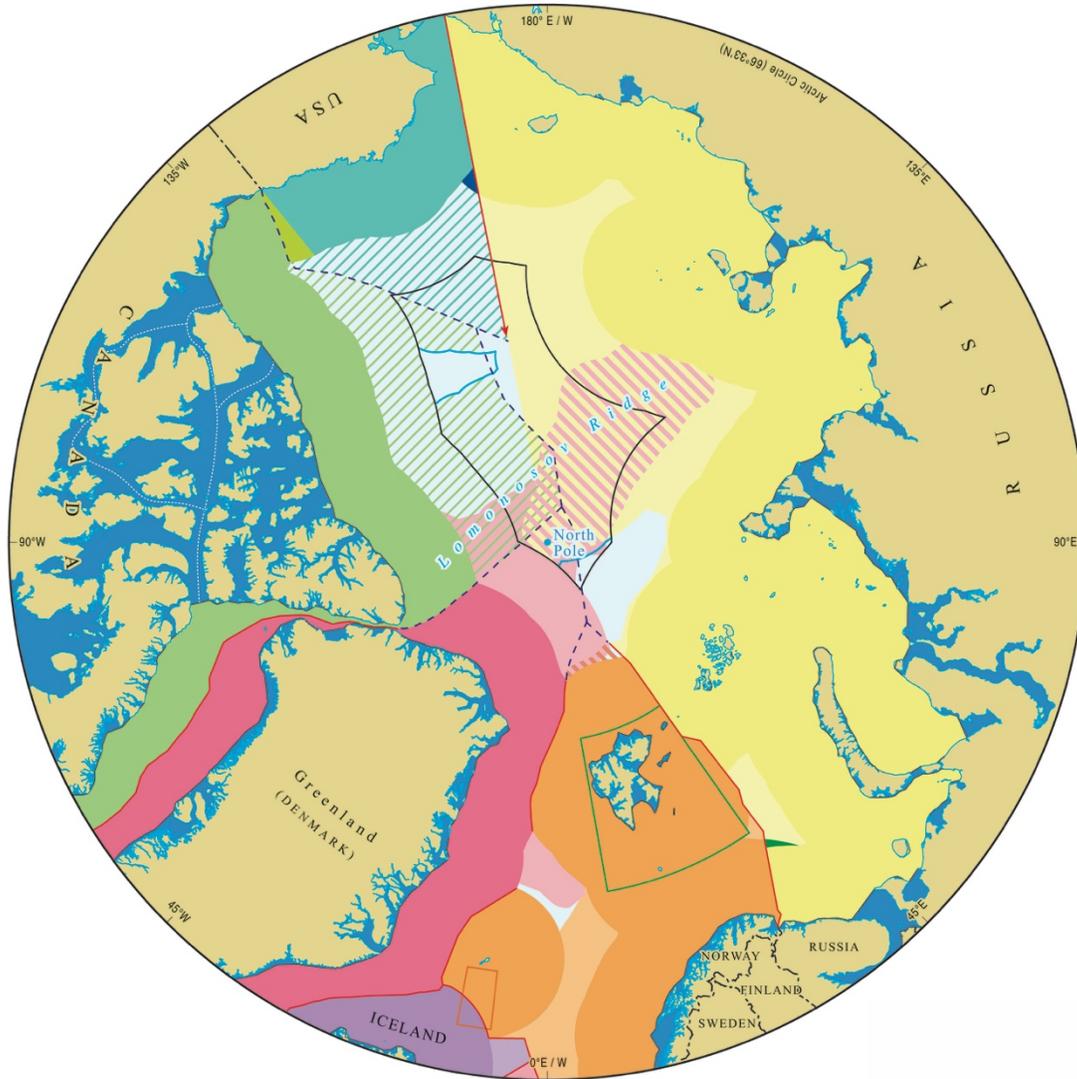
¹⁵ *See, e.g.*, South China Sea Arbitration (Phil. v. China), PCA Case no. 2013-19 (Perm. Ct. Arb. 2016).

¹⁶ *See, e.g.*, Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), 1982 I.C.J. 246 (Oct. 12).

¹⁷ South China Sea Arbitration, *supra* note 15.

¹⁸ Because of the disparity in economic and military power between China and the Philippines, political and military concerns are likely to continue to impact the actual utilization of the South China Sea. A future discrepancy between the arbitration decision and its implementation may simply shows the limits of international litigation and arbitration in delimiting maritime boundaries with uncooperative counterparties.

on the floor of the Arctic,¹⁹ and more prosaically filed a claim for control over much of the arctic seabed.²⁰ At the time of this writing, there remain overlapping maritime claims in the arctic between Russia, Denmark, Canada, and the U.S. Below is a good graphical representation of the competing claims in the Arctic.



Source: IBRU, Durham University²¹

¹⁹ *Russia plants flag under N Pole*, BBC NEWS (Aug. 2, 2007, 5:22 PM), <http://news.bbc.co.uk/2/hi/europe/6927395.stm>.

²⁰ Andrew E. Kramer, *Russia Stakes New Claim to Expanse in the Arctic* (Aug. 4, 2015), http://www.nytimes.com/2015/08/05/world/europe/kremlin-stakes-claim-to-arctic-expanse-and-its-resources.html?_r=0. See also *Maritime jurisdiction and boundaries in the Arctic region: Russian Claims*, IBRU, DURHAM UNIVERSITY, https://www.dur.ac.uk/resources/ibru/resources/ArcticmapRussianonlyclaims05_08_15.pdf (last visited July 26, 2016).

²¹ Reprinted with the generous permission of the IBRU at Durham University, <http://www.durham.ac.uk/ibru/resources/arctic> (last visited July 26, 2016).

As these and other current and former maritime boundary disputes show, UNCLOS does not create boundaries, but merely sets the terms for discussing maritime boundaries.

Much like how UNCLOS defines but does not delimit maritime boundaries, it similarly defines pollution without creating a robust enforcement regime. Under UNCLOS, “pollution of the marine environment” is defined broadly enough to include any substances “likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities including fishing, and other legitimate uses of the sea.”²² Suspected pollution may be investigated by a vessel’s flag state,²³ a state where a vessel makes a port call,²⁴ or a nearby coastal state.²⁵ The substantive law to be applied in each case is left up to the individual state, which may enforce “its laws and regulations adopted in accordance with [UNCLOS] or applicable international rules.”²⁶ One example of a coastal state’s enforcement regime will be discussed in the discussion of Canadian law, *infra*. The bigger point regarding UNCLOS, however, is that it is the foundational convention that sets the terms for discussing international maritime law, leaving substantive particulars and enforcement to individual states and to states acting together in multi-party conventions.

2. Civil Liability Convention

One such convention governing international pollution prevention and clean-up costs is the Civil Liability Convention (“CLC”).²⁷ This convention originally went into effect in 1969, and was the first effort by the international community to provide a comprehensive liability regime while also providing funds to respond to oil spill disasters. Soon after the initial CLC came into effect, the 1971 Fund Convention was implemented, in order to fund oil cleanups discussed and defined in the CLC.²⁸ The 1971 Fund Convention governed a concomitant fund, which was a pool of money set aside in advance to pay for oil spill cleanups.²⁹ This regime was updated in 1992 with a then-new liability convention, fund convention, and clean-up fund.³⁰

²² United Nations Convention of the Law of the Sea, *supra* note 10, at art. 1(4).

²³ *Id.* at art. 217.

²⁴ *Id.* at art. 218.

²⁵ *Id.* at art. 220.

²⁶ *Id.* at art. 220(1).

²⁷ International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3.

²⁸ International Maritime Organization, International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), Dec. 18, 1971, 1110 U.N.T.S. 57.

²⁹ International Oil Pollution Compensation Funds, *Liability and Compensation for Oil Pollution Damage*, IOPCFUNDS.ORG (2011), http://www.iopcfunds.org/uploads/tx_iopcpublications/Text_of_Conventions_e.pdf.

³⁰ *See* International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage, Nov. 27, 1992, 1953 U.N.T.S. 373; International Convention on Civil Liability for Oil Pollution Damage, Nov. 27, 1992, 1956 U.N.T.S. 285. For a good overview of the history of the conventions and funds, *see* International Oil Pollution Compensation Funds, The International Regime for Compensation for Oil Pollution Damage: Explanatory note,

Generally speaking, the 1969 CLC and its 1992 progeny set up a liability regime that imposes strict liability on shipowners whose oil tankers cause oil pollution. In exchange, the regime limits the shipowners' liability for their pollution. The convention is limited in scope only to oil carried in bulk by oil tankers.³¹ Geographically, the convention only applies to pollution damage to a member state's territory, territorial sea, and EEZ.³²

The 1992 CLC places strict liability for oil pollution on registered owners (with very limited exceptions),³³ while protecting owners' agents (to include vessel charterers) from pollution claims.³⁴ In exchange for their strict liability, owners enjoy caps on the amount of liability depending on the vessels' gross tonnage.³⁵ In addition, insurance is compulsory under the CLC,³⁶ and claims may be brought directly against the insurance carrier for covered pollution damages.³⁷

The CLC channels liability to the vessel's registered owner, so a charterer or other operator is uncovered by the CLC.³⁸ The 1992 CLC explicitly allows claims against third parties, meaning entities not covered by the CLC.³⁹ As previously mentioned, however, vessel charters are exempt from pollution claims under the CLC.⁴⁰

When an oil spill occurs that is subject to the CLC, the Fund should be available to pay for clean-up according to the Fund Convention.⁴¹ The 1992 Fund is funded by mandatory contributions from individuals, companies, and even governments.⁴² The contribution amounts are set by the Fund's governing body, and based on the amount of oil received by a given entity after shipment by sea.⁴³ Contributions are mandatory for any recipient of seaborne oil in any member state.⁴⁴

IOPCFUNDS.ORG (Oct. 2015),

http://www.iopcfunds.org/fileadmin/IOPC_Upload/Downloads/English/OCT15E.pdf (hereinafter Explanatory Note). For more details about the different conventions and funds, see generally the IOPC Funds website (www.iopcfunds.org), which includes helpful explanations and diagrams, as well as the full text of the several conventions. For a detailed review of the 1992 conventions, see the Overby CMI Report, *supra* note 9.

³¹ International Convention on Civil Liability for Oil Pollution Damage, *supra* note 31, at art. I, § I.

³² *Id.* at art. II.

³³ *Id.* at art. III, §§ 1-2.

³⁴ *Id.* at art. III, § 4.

³⁵ *Id.* at art. V, § 1.

³⁶ *Id.* at art. VII, § 1.

³⁷ *Id.* at art. VII, § 8.

³⁸ *Id.* at art. III, §§ 1-3 (referring only to the "owner"); *see also id.* at art. I, § 3 ("owner" limited to registered owner).

³⁹ *Id.* at art. III, § 5.

⁴⁰ *Id.* at art. III, § 4(c).

⁴¹ International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage, *supra* note 31, at art. II-IV.

⁴² *Id.* at art. X.

⁴³ *Id.* at art. X, XII, and XIII.

⁴⁴ *Id.* at art X.

The Fund is available to pay cleanup costs that are not covered by the responsible shipowner and its insurer.⁴⁵ Reasons for an owner or insurer to be unable to meet the cleanup costs may include insolvency, exemption under the CLC, or severe damages in excess of the maximum damages recoverable under the CLC. In those instances, member states who are party to the CLC and Fund regime would be able to access the Fund to pay for the excess cleanup costs.⁴⁶ There is also a Supplementary Fund Protocol providing significantly increased coverage for large incidents of pollution.⁴⁷

Inclusion in the CLC regime is widespread but not universal. Like any other convention, states must opt-in to become members, which membership is inconsistent between the CLC, the 1992 Fund, and the Fund Convention. There are 114 member states that are part of both the 1992 CLC and the 1992 Fund Convention.⁴⁸ An additional 21 states are party to the 1992 CLC, but are not part of the 1992 Fund or Fund Convention, and are therefore ineligible for the coverage the Fund provides in the event of oil spills.⁴⁹

The CLC and Fund regime provide no particular guidance about polar shipping. Many polar nations are full members of the regime, including Canada, Iceland, Norway, and Russia. The United States, however, is conspicuously absent from the list. The CLC therefore provides at best a partial liability regime for polar shipping that may or may not apply to a polar pollution incident depending on where it occurs, or what precisely is spilled or by what type of vessel.

By comparison, UNCLOS at least discusses the peculiar hazards of icy waters, but refers back to states' municipal law to address it more fully. UNCLOS recognizes that "ice-covered areas" are particularly hazardous to shipping and fragile to pollutants. For "ice-covered areas" within a nation's EEZ, UNCLOS specifically empowers coastal states to adopt laws and regulations to control shipping and prevent pollution.⁵⁰ It is unclear, however, if this specific exhortation to coastal states (such as arctic nations) will continue to be relevant if the north pole ceases to be covered with ice for "most of the year" as described in UNCLOS.⁵¹ If climate change progresses to a point where the Arctic Ocean no longer presents the "exceptional hazards to navigation" discussed under UNCLOS Article 234, special protections may no longer be required under international or domestic law.

Until that very warm day comes, however, UNCLOS continues to extend to arctic states an invitation to enact strong pollution prevention laws, especially in icy climates. To that end, Canada has led the way in creating powerful, targeted anti-pollution laws that relate specifically to arctic waters.

B. Canadian Law

Canada's two statutory schemes that work together to prevent oil spills in the Arctic are the Arctic Waters Pollution Prevention Act (AWPP), and the Marine Liability Act (MLA). While these two statutes are not in complete accord, they are Canada's primary domestic laws that

⁴⁵ *Id.* at art. IV.

⁴⁶ *Id.*

⁴⁷ Explanatory Note, *supra* note 31, at 7.

⁴⁸ *Id.* at 1.

⁴⁹ *Id.* at Annex.

⁵⁰ United Nations Convention on the Law of the Sea, *supra* note 11, at art. 234.

⁵¹ *Id.*

address liability for arctic pollution, including situations like the one discussed above in the hypothetical.

1. Joint & Several Liability in the Arctic Waters Pollution Prevention Act

Passed in 1970, the AWPP provides extensive protections for the Canadian arctic. The AWPP is intended to protect arctic waters, ice, and landmass. This includes the natural environment and native peoples of the arctic zone.⁵² By its terms, the AWPP only applies to Canadian waters (territorial seas and EEZ) above the 60th parallel and east of 141 degrees of west longitude.⁵³ The act generally prohibits dumping or depositing materials of any kind, defined as “waste,” that might “degrade or alter or form part of a process of degradation or alteration of the quality of that water to an extent that is detrimental to their use by man or by any animal, fish or plant that is useful to man.”⁵⁴ Depositing or dumping waste into arctic waters is prohibited,⁵⁵ and all instances of waste or potential waste “by reason of any accident or other occurrence” must be reported to Canadian authorities.⁵⁶

The AWPP creates strict liability, and provides for recovery by the Canadian government and individual plaintiffs as well. Individuals are strictly liable under the AWPP, without regard to fault.⁵⁷ The government can recover costs of cleanup and mitigation.⁵⁸ Individual plaintiffs can recover for actual loss or damage.⁵⁹ In exchange for strict liability, the Canadian government is empowered to set a maximum liability limit for damages under the AWPP.⁶⁰

Together, these portions of the AWPP show that liability for depositing waste covers both intentional dumping as well as accidental discharges. The liability is absolute, and without fault: For vessels transiting arctic waters, any discharge of any kind will give rise to liability under the AWPP. Considering most vessels operating on the oceans discharge *something* overboard on a regular basis, such as sewage or food waste, the complete prohibition on discharge presents a moderate engineering challenge.⁶¹

The AWPP creates a remarkable, even unique, civil liability regime for violations of this anti-dumping prohibition. To begin with the less surprising, in instances where waste is

⁵² Arctic Waters Pollution Prevention Act, R.S.C., 1985, c. A-12 (Preamble).

⁵³ R.S.C., 1985, c. A-12, § 2 (definition of “arctic waters”).

⁵⁴ *Id.* (definition of “waste”).

⁵⁵ *Id.* at § 4.

⁵⁶ *Id.* at § 5(1)(b).

⁵⁷ *Id.* at § 7(1).

⁵⁸ *Id.* at § 6(3).

⁵⁹ *Id.* at § 6(4).

⁶⁰ *Id.* at §§ 6(4) & 9(1).

⁶¹ One major category of discharge from vessels is heat, in the form of heated water. Vessels often take in relatively cool seawater and discharge warmer water after it travels through the engineering plant, using the seawater itself as part of the engine’s cooling system. It is unclear whether warm water discharge, if free of any contaminants, would constitute “waste” under the AWPP section 2(a) definition. Similarly, after seawater has been desalinated onboard a vessel for use as drinking and cooking water, a concentrated salt brine by-product is often discharged back to the sea. It is unclear if this brine that initially came from the seawater itself would be “waste” under the AWPP.

deposited in violation of the AWPP, individuals may be liable for the harm they cause. This liability extends to all persons and activities, whether exploring for or extracting natural resources,⁶² performing any undertaking on Canadian arctic land or waters,⁶³ or navigating through arctic waters.⁶⁴ In other words, introducing waste of any kind into the arctic, for any reason, is prohibited and gives rise to liability. While this kind of liability is sweeping, it is neither particularly surprising nor troubling.⁶⁵

It may be surprising, however, that the “owners of the cargo of any such ship” may be liable for waste committed in the Canadian arctic.⁶⁶ More surprising yet, “*in the case of the owner of a ship and the owners of the cargo thereof, [both] are jointly and severally liable.*”⁶⁷ In other words, if a ship makes inexplicable mistakes in judgment while transiting the Canadian arctic, this statutory joint and several liability may visit upon the cargo owner the consequences of the vessel’s mistakes. Because joint and several liability is without regard to fault, a cargo owner could be liable even when it enjoyed no opportunity to prevent or even affect the ship’s activities causing the pollution in the first place. Merely shipping goods through the Canadian arctic exposes a cargo owner to potential liability under the AWPP. This liability of a party that is likely free from fault, and in a relatively poor position to prevent or mitigate the harm in the first place, may be unique under maritime law throughout the world.

The effectiveness of joint and several liability will be further discussed below, after a brief introduction to the other major Canadian statute relevant to this discussion.

2. Marine Liability Act

The other Canadian statute relevant to this discussion is the Marine Liability Act (MLA).⁶⁸ This Act is a codification of much of Canadian maritime law, to include maritime personal injury,⁶⁹ vessel liens,⁷⁰ and passenger and cargo claims.⁷¹ A brief overview of the MLA’s contents is required to contrast the MLA with the joint and several liability provision under the AWPP.

The MLA establishes the liability regime for pollution claims for spills in Canadian waters.⁷² Rather than striking out on its own, the MLA generally incorporates the provisions of various international conventions.⁷³ For example, while there is joint and several liability under

⁶² Arctic Waters Pollution Prevention Act, *supra* note 53, at § 6(1)(a).

⁶³ *Id.* at § 6(1)(b).

⁶⁴ *Id.* at § 6(1)(c).

⁶⁵ Further reducing the general impact of this sweeping liability are potential exceptions allowed by statute. *See id.* at § 4(2)-(3).

⁶⁶ *Id.* at § 6(1)(c).

⁶⁷ *Id.* at § 6(1) (emphasis added).

⁶⁸ Marine Liability Act, S.C. 2001, c. 6.

⁶⁹ *Id.* at §§ 4-14.

⁷⁰ *See, e.g., id.* at § 139.

⁷¹ *Id.* at §§ 35-46.

⁷² *Id.* at § 47-90.

⁷³ *See, e.g., Id.* at §§ 48 (CLC), 57 (Fund Convention), 63 (Supplementary Fund Protocol), 69 (Bunkers Convention). By contrast, the United States struck out on its own with the passage of the Oil Pollution Act, 33 U.S.C. §§ 2701-2710. *See Guidelines on Oil Pollution Damage,*

the MLA, it comes from the international CLC. This liability is limited only among the vessel owners in multi-vessel incidents, and even then limited to the shipowners' relative degree of fault.⁷⁴ By giving these conventions the force of law, the Canadian Parliament simplified the liability regime at least as to shipping bulk oil in tankers.

There are additional domestic provisions in the MLA for spills and pollution not covered by international conventions. The MLA's domestic liability regime extends to spills and other pollution where the consequences are suffered anywhere in Canadian territory or waters, including Canada's EEZ.⁷⁵ Like other liability provisions under the MLA, a shipowner liable for domestic pollution has only a limited number of defenses available.⁷⁶

There are some stark contrasts between the MLA and AWPP. First of all, the geographic expanse of the MLA—all of Canada and its waters—is clearly more encompassing than the arctic waters where the AWPP is focused. Moreover, the AWPP's troubling joint and several liability for cargo owners is not part of the MLA, under either the MLA's domestic regime or under the international conventions as adopted by incorporation into Canadian law.

It is at least possible that the later MLA displaced entirely the earlier AWPP. The two acts are in agreement as to conflict of law questions: in the event of disagreement between the laws, the MLA will control.⁷⁷ These complementary cross-references, however, show that the AWPP is *not* displaced; if the MLA controlled for all purposes, there would be no reason for the AWPP to cross-reference the MLA as the controlling act, because the AWPP would have been repealed by statute or abrogated by decisional law. Instead, the AWPP is left with a cross-reference showing that, at least where it does not conflict with the MLA, it is still effective.

For our purposes, the MLA is silent on whether or not cargo owners can be liable for harm caused by the vessel carrying their cargo. The MLA is further silent on whether liability may be enhanced for spills in arctic waters. Against that silence, the AWPP provides for cargo owner liability in arctic spills. It would therefore seem there is no direct conflict between the MLA and the cargo owner liability in the AWPP, so that joint and several liability remains good law. Its purpose and efficacy should be assessed before discussing what, if anything, can be done about this curious part of the AWPP.

3. Purpose and Effectiveness of Joint and Several Liability Under AWPP

While the AWPP's joint and several liability for cargo owners seems harsh to cargo owners, it serves a laudatory goal. Joint and several liability is a concept from tort law that ensures the harmed party—usually the plaintiff in tort—is able to enjoy a full recovery if one of multiple tortfeasors (defendants) is insolvent or otherwise unable to satisfy the judgment. This

COMITE MARITIME INTERNATIONAL, <http://www.comitemaritime.org/Guidelines-on-Oil-Pollution-Damage/0,2726,12632,00.html> (last visited June 21, 2016) (discussing America's policy divergence in OPA away from the CLC).

⁷⁴ Marine Liability Act, *supra* note 69, at sched. 8, art. 5.

⁷⁵ *Id.* at § 76.

⁷⁶ *Id.* at § 77.

⁷⁷ Arctic Waters Pollution Prevention Act, *supra* note 53, at § 2.1; Marine Liability Act, *supra* note 69, at § 141.

ensures that the harmed plaintiff will fully recover for her injuries, while putting the onus on the defendants to apportion fault amongst themselves, but only after the plaintiff is compensated.⁷⁸

Under the AWPP, joint and several liability presents cargo owners with a choice—ship your goods through the Canadian arctic, or do not. But if you opt for the shorter trade routes and lower cost of arctic shipping, you, the cargo owner, enjoy those shorter shipping times at the risk of potential exposure under the AWPP’s joint and several liability provisions. If the vessel deposits waste in the arctic, even by mistake or accident, the cargo owner may be on the hook for some or all of the damage.

The effectiveness of this cargo owner liability is an open question in several respects. Insurance is a key component of managing shipping risk, and this question of cargo owner liability raises a question of insurability. It may be the case that the cargo owner’s exposure under AWPP is simply uninsurable. One commentator suggests that because the risk cannot be insured against, cargo owner liability is not an effective deterrent.⁷⁹

Another key way to measure the effectiveness of a remedial statute like the AWPP would be to see how often it is invoked by courts. More than just counting citations, a full census of decisions could look at success rates, judgment amounts, monies collected, and other key indicators of successful invocation of the statute. Unfortunately, there is no such data on the AWPP. It seems that only one case actually cites the cargo owner liability section of the AWPP, in a list of other similar statutes, and without particular comment.⁸⁰ There seems to be no other judicial citation relevant to a cargo owners’ joint and several liability under the AWPP.⁸¹ That is not a ringing endorsement of the clause’s efficacy. Paired with the concerns about insurability, cargo owner liability under AWPP does not seem particularly robust.

By way of counterpoint, however, consider that the party legally liable to pay may not be the same party that actually does pay. The most obvious example is a liability insurance policy, where the insurer pays to satisfy a liability that is the insured’s responsibility. Applied to this discussion, assume that a cargo owner’s exposure under the AWPP is a truly uninsurable risk. Assume as well that damages for a pollution event covered by the AWPP may be a massive environmental catastrophe, with significant damages. If the cargo owner cannot insure against this exposure, then the cargo company operates at risk of being put into insolvency, should it be held responsible for large damages that it cannot meet. An aggrieved plaintiff,⁸² or the Canadian government itself,⁸³ could use the AWPP to recoup crippling, perhaps company-ending payments from the cargo owner.

⁷⁸ See, e.g., *Cinar Corporation v. Robinson*, [2013] 3 S.C.R. 1168, para. 128-131 (disallowing joint and several liability for punitive damages in particular); see also *id.* at para. 120-132 (an alternate formulation to “joint and several” under Canadian law is when damages are awarded “on a solidary basis”).

⁷⁹ A.H.E. POPP & J.G. O’CONNOR, *THE ERIKA AND THE EROSION OF THE CIVIL LIABILITY CONVENTION: VETTING, NON-USE AND ENVIRONMENTAL DAMAGE BEFORE THE FRENCH COUR DE CASSATION* 4 (2013).

⁸⁰ *Imperial Oil Ltd. v. Que. (Minister of the Env’t)*, [2003] 2 S.C.R. 624, para. 23.

⁸¹ Memorandum from Nils Goeteyn to Peter Pamel, Borden Lardner Gervais (June 13, 2016) (on file with author).

⁸² Arctic Waters Pollution Prevention Act, *supra* note 53, at § 6(2)(b).

⁸³ *Id.* at § 6(1)(b).

A possible solution to square this seemingly outsized risk may be found in the recently adopted Polar Code, which will be examined before suggesting a potential solution.

C. Recent Development: the Polar Code

The International Maritime Organization (IMO), the body that administers international conventions at the bedrock of worldwide shipping, recently adopted guidance for shipping in the polar regions called the Polar Code. Going into effect in 2017, the Polar Code will provide specific requirements for polar shipping that are intended to ensure both safer shipping in arctic waters, and reduce the likelihood of pollution and other contaminants in sensitive polar waters.⁸⁴

The Polar Code is applicable to both Arctic and Antarctic waters.⁸⁵ It includes training, certification, equipment requirements for vessels and crews, discharge controls for polar transits, and other key provisions. For example, ships are required to be suitable for low air temperatures with ice strengthened hulls.⁸⁶ Ships are to be certified as Category A, B, or C ships, in decreasing order of ruggedness: Class A ships must be able to operate “in at least medium first-year ice, which may include old ice inclusions,” Class B in “at least thin first-year ice, which may include old ice inclusions,” and Class C in polar waters less severe than Class A or B.⁸⁷ Other portions of the Polar Code discuss ship stability, machinery, and safe navigation.⁸⁸

Later portions of the Polar Code include limits on discharges in polar waters. For example, oil and noxious substances may not be discharged in polar waters.⁸⁹ Class A and B ships with cargo tanks for carrying oil are given specific structural requirements (take for example the space requirement between the cargo tank and the outer shell of the hull).⁹⁰ The regulations contained in the Polar Code will be useful in examining how to reconcile cargo owners’ joint and several liability under Canada’s AWPP with more generally applicable concepts of maritime liability.

III. PROPOSAL: POLAR CERTIFICATION TO MITIGATE CANADIAN LIABILITY

As discussed above, joint and several liability represents a large, potentially uninsurable risk for cargo owners shipping through the Canadian arctic. The recent Polar Code provides a common reference for the shipping industry around the world, and may allow cargo owners to better understand and mitigate their risk of shipping in those waters. What follows is a proposal to synthesize the AWPP with the Polar Code.

⁸⁴ *Shipping in Polar Waters*, INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/en/MediaCentre/HotTopics/polar/Pages/default.aspx> (last visited July 21, 2016).

⁸⁵ Polar Code, *supra* note 6, at Preamble § 6.

⁸⁶ *Id.* at Part I-A, § 3.2.

⁸⁷ *Id.* at Introduction §§ 2.1–2.3.

⁸⁸ *Id.* at Part I-B.

⁸⁹ *Id.* at Part II-A §§ 1.1–2.1.

⁹⁰ *Id.* at Part II-A § 2.1; Despite relatively detailed regulation in parts of the Polar Code, a chapter entitled “Prevention of Pollution by Harmful Substances Carried to Sea in Packaged Form” is left blank. *Id.* at Part II-A, Ch. 3.

A. Proposal

A cargo owner should be relieved of all potential exposure under the AWPP if the cargo owner confirms a polar vessel's compliance with the category certifications under the Polar Code. This is not a categorical relief of liability, but is instead an affirmative defense: if a cargo owner can prove that it shipped its goods on a vessel that was appropriately categorized for the conditions reasonably foreseeable on that particular transit, then the cargo owner has done no wrong, and will bear no liability under the AWPP.

There are, of course, several factual issues that the cargo owner would need to prove under this "Polar Code" affirmative defense. For example, did the cargo owner sufficiently investigate the ship's categorization under the Polar Code? Were the conditions the ship encountered reasonably foreseeable? These questions would be factual issues in a trial after the fact; before a voyage, these issues would lead a prudent cargo owner to fully investigate and follow up on inconsistencies. While this proposal would place some administrative burden on a cargo owner, it is similar to the requirement to ensure proper insurance certificates are in place before sailing, which is standard industry practice even now.⁹¹ To examine the efficacy of this proposal, it needs to be applied to the above hypothetical.

B. Proposal Applied to *Hesperus II*

Recall that the *Hesperus II* was certified as a Category C ship under the Polar Code. As such, it was rated to endure polar transits thinner than first-year ice, and without old ice incursions (meaning, no ice that has survived a summer's melt).⁹² The foot-thick ice the *Hesperus II* encounters is considered thin first-year ice.⁹³ Polar vessels rated at Class A or B should be able to withstand those conditions.⁹⁴ However, as a Class C vessel, the *Hesperus II* was not rated to withstand first-year ice like it encountered off Baffin Island.⁹⁵ Applying the above proposal, PetroCorp's "Polar Code" affirmative defense would require it show that its contracted shipping vessel was appropriately rated for the polar conditions the vessel encountered.

Unfortunately for PetroCorp, this new affirmative defense will be unavailing. The *Hesperus II* opted for the northern route of the Northwest Passage, taking the McClure Strait from the Beaufort Sea to Baffin Bay. While a more direct route, this northern option of the Northwest Passage is known for being more prone to ice blockages than slower, less direct routes.⁹⁶ Given the propensity for ice build-up in this area, a Class A or Class B polar vessel should have been used to transit this route. The Class C *Hesperus II* was not sufficiently rugged for the icy conditions the vessel encountered, and those conditions should have reasonably been expected. Thus, PetroCorp relied on an inappropriately classed vessel to take a riskier transit than

⁹¹ Peter Wetterstein, *Environmental Impairment Liability after the Erika and Prestige Accidents*, 46 SC. ST. L. 229, 244 (2004).

⁹² Polar Code, *supra* note 6, at §§ 2.1–2.9.

⁹³ *Id.* at § 2.4.

⁹⁴ *Id.* at §§ 2.1–2.4.

⁹⁵ *Id.*

⁹⁶ RONALD O'ROURKE, CONG. RESEARCH SERV., R41153, CHANGES IN THE ARCTIC: BACKGROUND AND ISSUES FOR CONGRESS, CONGRESSIONAL RESEARCH SERVICE 23 (2016).

was warranted. PetroCorp will still face exposure for the uninsurable risk of joint and several liability under the AWPP.⁹⁷ This “Polar Code” affirmative defense did not alleviate PetroCorp of liability; instead, it gave PetroCorp an opportunity to ensure it shipped its cargo on a reliable, prudent vessel. Having failed to do so, PetroCorp may still face joint and several liability for the mistakes of the Owner and crew of the *Hesperus II*.

IV. CONCLUSION

As the arctic region opens to commercial shipping, the overlapping regimes of international conventions and national enforcement statutes may come into conflict. A close review of the laws and conventions soon to come into effect shows there is at least ambiguity, and perhaps actual uninsurable exposure, for cargo owners shipping through the arctic. While Canada’s AWPP serves a commendable goal, it was enacted decades ago, long before the Polar Code came into being.

As the foregoing discussion shows, the AWPP’s effects on innocent cargo owners should be curbed when diligent cargo owners take reasonable steps to comply with the Polar Code. When responsible cargo owners ensure their goods are safely shipped through the arctic, they should not bear the risk of liability without fault. The Canadian Parliament might consider taking up a modest modification such as the affirmative defense discussed above, to bring the AWPP into closer harmony with the Polar Code. While the fictitious PetroCorp was unable to take advantage of this new affirmative defense, perhaps the next cargo owner that ships goods through the arctic will be more diligent, and that caution will merit protection from joint and several liability currently risked under the AWPP.

⁹⁷ Should PetroCorp have other financial troubles, it might find itself casting about for options for restructuring, to include bankruptcy. As PetroCorp is a U.S. company, it could file for bankruptcy in the American bankruptcy system. The Canadian government, however, would likely enjoin a priority claim in U.S. bankruptcy courts, jumping the line in bankruptcy to collect its claim ahead of others claimants, even secured creditors. *See, e.g.*, David W. Houston & J. Patrick Warfield, *A ‘Plug’ for Priority Claims in Oil and Gas Cases*, 35 AM. BANKR. INST. J., No. 6, June 2016 (discussing various bankruptcy court decisions where clean-up costs by state agencies were granted priority claims under 11 U.S.C. § 503(b)(1)(A)); *but see* Arctic Waters Pollution Prevention Act, *supra* note 53, at § 4 (placing individual claimants ahead of the Canadian government’s cleanup charges).