

The Canadian Maritime Law Association



L'Association Canadienne de Droit Maritime

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**Submissions of the Canadian Maritime Law Association with respect to
the Discussion Paper: *Marine Transport of Hazardous and Noxious Substances:
Liability and Compensation***

THE CANADIAN MARITIME LAW ASSOCIATION

The Canadian Maritime Law Association (CMLA) was founded in 1951 by Canadians interested in Canadian and international maritime law. Our mandate is to promote effective modern maritime laws within Canada and internationally. CMLA is Canada's representative association to Comité Maritime International, known as CMI, a private non-governmental international organization founded in Belgium in 1897 whose main purpose is the promotion of uniformity in and unification on international maritime law.

CMLA has two groups of members – individual and constituent. Our individual members represent all facets of the Canadian Marine industry including maritime lawyers, members of the marine insurance community, marine average adjusters, ship operators and suppliers and others. Our constituent members are associations with particular but varying interests in maritime matters. They include: The Association of Average Adjusters of Canada, The

Association of Maritime Arbitrators of Canada, The Canadian Bar Association, The Canadian Board of Marine Underwriters, Canadian International Freight Forwarders Association Inc., The Canadian Merchant Service Guild, Chamber of Shipping of British Columbia, Marine Insurance Association of British Columbia, The Company of Master Mariners of Canada and The Shipping Federation of Canada.

CMLA has a very broad constituency. It is not a lobby group for any particular interest.

Executive Summary

The CMLA makes the following submissions with respect to the Discussion Paper *Marine Transport of Hazardous and Noxious Substances: Liability and Compensation* dated October 2010:

- CMLA supports Transport Canada's policy recommendation that Canada ratify the HNS Convention along with proposed methods for proceeding with the implementation of the various aspects of the HNS Convention in Canada as soon as is practicable.
- CMLA supports the amendment of the *Marine Liability Act* to implement the HNS Convention in Canada.

Introduction

The CMLA has consistently spoken out in favour of pollution control since Canada's first marine pollution legislation was enacted in the 1970s. We took an active role in the redrafting of the *Canada Shipping Act, 2001* which is Canada's principal legislation prohibiting ship-source pollution. We have also been actively engaged with respect to amending legislation (such as Bill C-7) promoting changes to and development of the *Marine Liability Act*.

The HNS Convention was adopted under the auspices of the IMO in 1996 in response to a perceived gap in the marine liability system to compensate claimants in the event of spills involving chemical and other hazardous substances. Canada signed the HNS Convention in 1997 following consultation with industry stakeholders. However, as a result of primarily three concerns, the 1996 Convention was not ratified or implemented. A Protocol was developed to address the issues raised inhibiting entry into force of the HNS Convention, particularly:

1. levies for LNG cargos are imposed on the title holder of the cargo immediately prior to discharge, but many such title holders may not be under the jurisdiction of Contracting States thereby potentially frustrating the ability of the HNS Fund to collect levies from them in the case of an LNG incident;
2. difficulty with ascertaining exact figures on the quantity of packaged HNS received in states at any given time. This is attributable to the uncertainty of the identity of receivers of packaged HNS goods, given the highly complex logistics chain involved in the transportation of packaged goods; and
3. concerns over the integrity of cargo reports that threaten the integrity of the

scheme.

The 2010 Protocol to the HNS Convention addressed these practical problems and was adopted by the IMO at a diplomatic conference held on April 26-30, 2010 in London. The CMLA was invited to and did send a representative to join the Canadian Delegation at the diplomatic conference and was able to witness the tremendous work carried out by the permanent members of the Canadian Delegation throughout the conference.

The 2010 Protocol establishes a shared liability regime to compensate claimants for damages arising from the carriage of HNS by seagoing vessels. Under the regime, tier 1 liability is combined with the HNS Fund made up of contributions from receivers or importers of HNS cargo (referred to as tier 2 liability). This two tier model of compensation is similar to the structure of other international conventions adopted by Canada, such as CLC and the IOPC Fund. Under Canada's current legal regime, shipowners' limits of liability for pollution damage for HNS are set out in Part 3 of the *Marine Liability Act*. The CMLA acknowledges the example set out in the Discussion Paper, namely: the maximum liability of a vessel of 20,000 gross registered tonnes would be about \$16,000,000, compared to \$74,000,000 under tier 1 of the HNS Convention. Combined with tier 2, the maximum compensation under the HNS Convention would be \$500,000,000.

Policy Options

Consideration of the relevant policy issues supports ratification of the HNS Convention.

CMLA supports Transport Canada's position that the HNS Convention should be enacted as being applicable in Canada to "carriage by water". There should be no doubt that seagoing vessels operating in Canada's internal waterways and carrying HNS cargo should be covered in the event of any incident. CMLA also supports the premise that the HNS 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*.

CMLA also supports the exclusion from the HNS Convention of seagoing vessels not exceeding 200 GRT engaged in domestic carriage of HNS in packaged form. Their liability should continue to be governed by Part 6 of the *Marine Liability Act*.

The CMLA supports the adoption of the definition of "receiver in Article 1.4(a)" under the HNS Convention.

CMLA believes it is sensible that the regulations be adopted to set out the reporting requirements of receivers and the role and functions of a designated authority responsible for enforcing these requirements in Canada. CMLA further supports that this system of reporting begin 12 months in advance of the Canadian ratification of the HNS Convention.

CMLA supports the adoption in Canadian law of a lower annual threshold of 17,000 tonnes for receivers of non-persistent oil, LPG and other bulk HNS falling under the General Account.

CMLA supports the adoption of the same definition of "associated persons" as contained in

sections 60 and 66 of the *Marine Liability Act* to assess aggregate quantities of HNS received by several related entities.

The CMLA agrees with Transport Canada that fines for not carrying an appropriate insurance certificate be set at a level consistent with Part 8 of the *Marine Liability Act*. It is important to ensure legislative consistency.

The CMLA also agrees with the recommendation that levies to the HNS Fund in respect of persistent and non-persistent oil be paid from the SOPF and that the Administrator of the SOPF assumes the same roles and responsibilities for this obligation to the HNS Fund as the Administrator currently has for the IOPC Fund.

Respectfully submitted this 14th day of June, 2011.

CANADIAN MARITIME LAW ASSOCIATION



Per: Christopher J. Giaschi
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