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READY, AYE, READY, BUT NOT PERMITTED
CANADA'S NAVY AND THE MARITIME POLLUTION CONUNDRUM

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INTRODUCTION

Early on the morning of 25 November 1998, HMC Ships HURON, PROTECTEUR and VANCOUVER were returning to Esquimalt following the successful conclusion of a ten-day training exercise. Approximately 20 miles southwest of the entrance to the Straits of Juan de Fuca, the MV *Aristotelis* reported to Seattle Traffic that she had broken down and was advising shipping in the area that she was "Not Under Command (NUC)." This information was relayed to the warships and the Victoria Rescue Coordination Centre asked them to provide any required assistance.

By mid-morning the Canadian warships had closed the *Aristotelis.* The weather was overcast with winds out of the south-south-west at approximately 30-35 knots; sea and swell was at 2-3 metres. The vessel was less than 30 miles from the Canadian coastline and drifting at 2-3 knots to the northeast. The Master of the *Aristotelis* indicated that he should have his engines repaired in "about an hour" and declined any offers of assistance. The ships remained in company and after two hours with no evident progress, HMCS HURON offered to send over her Deck Officer and an engineer to see what assistance could be rendered. After much radio discussion, the Master reluctantly agreed and a boat transfer was conducted. By this time the vessel was less than 20 miles from the coast. It was evident that repairs would take, in the Master's estimate "about four hours." This prompted the HURON to inquire about taking the vessel in tow. The Master flatly refused this offer as he had done in previous discussions with Seattle Traffic regarding tugs.

As the four hours elapsed, the vessel was now within Canadian territorial waters and still NUC. The Master continued to refuse any assistance and the ships were powerless to stop the relentless drifting of the *Aristotelis* towards the Canadian coast. The Master decided to focus his efforts on going to anchor.

Several questions arose onboard the Canadian naval ships. What if the vessel was not able to let go its anchor? Given its lack of control and propulsion,

even if the anchor did let go would it hold in the waters exposed to the wind, sea and swell? Should either of the two events occur, the *Aristotelis* would be aground before they could prevent it. If she went aground, it was probable that she would break up on the rocky shore and be wrecked with a significant potential for loss of life and marine pollution. Given the Master's refusal for assistance, however, what could they do? Fortunately, at approximately 1700 hours, the *Aristotelis* successfully anchored less than two miles from shore.

In this case, through either good luck or good management on the part of the Master of the *Aristotelis,* disaster was averted. One must question though, why would he refuse any assistance? Presumably, the ship and cargo were insured against loss. Indeed, the most likely to suffer damage were the local residents and fishermen from the effects of pollution, and the Navy from the fallout from headlines such as "*NAVY IDLY WATCHES MARINE DISASTER."*

So, why did the Navy not take action to override the Master? In essence, Canadian Naval ships do not have the legal authority to act in a constabulary role to enforce domestic law. Had they acted without the Master's consent, they could have been charged with a variety of offences under the Criminal Code of Canada. Additionally, article 433 of the Canada Shipping Act stipulates that Masters are allowed to repel persons attempting unauthorized boarding by "such force as is reasonably necessary."[1] Notwithstanding Article 451 (1)'s obligation to "render assistance to every person…found at sea and in danger of being lost", if the Master refuses to accept assistance there is little that can be done in such a situation under the current legislative framework.[2a]

Traditionally, legal concerns regarding the movement of goods by sea have focussed on only two issues – freedom of the seas and the regulation of commerce. The environment of the sea itself as an ecological system requiring management and protection did not become an issue until the latter half of the 20th century. Although the risks and dangers of transporting the world's fossil

[a] Art 451 states: "The master or person in charge of a vessel shall, in so far as he can do so without serious danger to his own vessel, its crew and passengers, if any, render assistance to every person, even if that person is a subject of a foreign state at war with Her Majesty, who is found at sea and in danger of being lost,

fuels were understood, primarily in the context of losses due to enemy action in the two world wars, the environmental fallout from major marine disasters only became evident following accidents of large petroleum tankers. Arguably, the wreck of the *Torrey Canyon* on the Brittany Coast in March of 1967, which released some 860,000 barrels of oil onto the shores of England and France, was the same active catalyst for marine oil pollution issues that Chernobyl was for nuclear concerns some twenty years later. These disasters made environmental concerns a "top item in the world's political agenda."[3]

In Canada, however, reaction to the *Torrey Canyon* was muted. Amazingly, despite widespread media coverage of this disastrous spill and the inept attempts to contain it, "There was [, however,] no debate in the House of Commons or its committees on the implications of the incident for Canada."[4] By 1968, Canada had also experienced several small marine pollution incidents, however, only one question had been raised in the House of Commons. This came following the November 1968 sinking of the ship *Scheidyk* in Nootka Sound that released 300 tons of oil.[5] While IMCO was galvanized into action, Canadian participation in that body's Legal Committee and its various working groups continued to be "minimal" and "in keeping with its past record."[6] It was not until the announcement by the US of its intention to send the supertanker *Manhattan* through the Canadian waters of the Northwest Passage that Canadian parliamentarians became interested. Arguably, this interest initially stemmed more from concerns of national pride and sovereignty than altruistic motives of saving the oceans as the "heritage of mankind." From the Canadian government's perspective, however, the only successful means to counter this American sovereignty challenge was to follow a strategy of promoting environmental jurisdiction. These heightened interests were given an even sharper focus when the oil tanker *Arrow* ran aground and spilled 20,000 tons of oil in Chedabucto Bay, Nova Scotia in February 1970.[7] These two incidents in particular set the stage for Canada to take a leading role in the development of many of the environmentally related aspects of UNCLOS III.

Despite this initial leading role, however, Canada has still not established the necessary domestic legal regime to enable all arms of the government to be employed in safeguarding our marine environment *seventeen years after signing the Convention*. Has Canada slipped back to the lethargy that existed in 1968? It is submitted that Canadians want their government and their federal fleets to be proactive in preventing marine pollution in Canadian waters. Therefore, this paper explores the development of international maritime law as applied to environmental concerns and assesses what changes have to be made in our legislation to give the Canadian Navy the authority to intercede to prevent such disasters from occurring on our shores.

LAW AND ROE

Given that this question is essentially legal in nature, it is appropriate to first gain an appreciation of law and its relation to Rules of Engagement (ROE). The first component, "*law* " is defined by the Oxford dictionary as the "body of enacted or customary rules recognized by a community as binding."[8] The functions of law are outlined in DND's recently released CD on Military Justice. It notes that law has two primary functions in western society; to regulate the affairs of all persons, and to act as a standard of conduct and morality. "In short, … the law seeks to promote and achieve a broad range of social objectives."[9] The Canadian Forces are an instrument of the Canadian Government and are continuously subject to the rule of law whether operating in peace or war. In the conduct of operations there may be occasions where they may be required to use force. The lawful application of force in peacetime is governed by ROE, which are laws in the sense that they are orders that must be obeyed. They incorporate legal authority and provide the framework within which policy and operational decisions are exercised.

The Canadian Forces publication "Use of Force in Canadian Forces Operations Vol. 1" provides significant detail with respect to this subject. The

following excerpts highlight the definition of ROE, their source and purpose, and their importance in situations other than war:

- Definition. “Directions issued by competent military authority which delineate the circumstances and limitations within which force may be applied to achieve military objectives in furtherance of national policy.”[10]
- Source and Purpose. “The Government of Canada, through the CDS, issues ROE, which consist of directions and orders regarding the use of force by Canadian forces in domestic and international operations in peacetime, periods of tension and armed conflict. They constitute lawful commands and are designed to remove any legal or semantic ambiguity that could lead a commander to violate national policy….”[11]
- Importance. “During operations which include law enforcement, sovereignty protection and peacekeeping, a commander may need to use military force against non-military objects, platforms or persons. The use of force in these situations will normally be a politically and diplomatically sensitive issue with potentially far-ranging ramifications. Commanders must therefore have clear direction on the use of force.”[12]

The decision to authorize the use of force is a political one. It is given legal authority in a military context through their authorization as a military order provided by the Chief of Defence Staff. In the Canadian domestic context, the use of force must be in compliance with Canadian law. Internationally, the application of force by members of the CF is constrained by both Canadian law and other obligations and restraints that may be imposed through international treaties and conventions. While the CF do not have a standing mandate to enforce the laws of Canada and are not normally authorized to use force in day-to-day domestic situations, there may be instances when they can be given authority to use force in support of domestic law enforcement. The legal authority to act is found in governing legal instruments like the National Defence Act (Aid of the Civil Power), Canadian Forces Armed Assistance Directions (an Order in Council-Cabinet Authority) or the Counter Drug MOU. The authority to use force is typically found in section 25 of the Criminal Code. Most government officials tasked with enforcing domestic laws are cloaked with the protection of being peace officers. Section 25 of the Criminal Code of Canada provides protection to peace officers (amongst others) “if he acts on reasonable grounds, justified in

doing what he is required or authorized to do and in using as much force as is necessary for that purpose."[13] The key point, however, is that the peace officer must be "authorized by law" in order to be able to enforce the law.

The CF also provides support to other government departments, most notably from a maritime perspective, the Department of Fisheries and Oceans. The provision of support is governed by Memoranda of Understanding (MOU) which provides the basis for the activities conducted in support of that department. While these MOU may provide individuals with certain authority, they are not authorized to enforce the law. Typically, only powers derived from a statutory basis (such as a statute or a statutory instrument such as an Order in Council) can provide such protection. Prior to considering the existing Canadian legal regime, however, it is worthwhile to gain a historical appreciation of the development of international maritime law, particularly that which relates to the protection of the maritime environment.

DEVELOPMENT OF INTERNATIONAL MARITIME LAW

As noted previously, law relates to "a body of enacted or customary rules recognized as binding." Throughout the chaos of human existence, many rulers have attempted to codify the customs of their religion, culture or state into laws. From a land or territorial perspective, perhaps by virtue of their position, each considered that they had the power to regulate the order of their worlds. The clash of prominent cultures, religions, and empires affected the direction and development of law in the territories that they governed. For almost 5,000 years, however, the law of the sea has lived its own separate existence by developing and maturing as a body of law unfettered by the vagaries of continuous control of man. The nature and power of the sea sets its own rules and the "mariners of all waters had common lives, fears, and experiences, guided by the sun by day and the stars at night and regulated by the common custom of the sea merchants – the ancient sea law."[14] Edgar Gold asserts that the law of the sea was "not a

sovereign formulation, but one that although only slowly and gradually codified, was obeyed by all – at times even by the outlaw of the sea, the pirate."[15]

The development of the "Law of the Sea", therefore, stretches continuously throughout the development of "modern" mankind. Its roots are found in the ancient civilizations that used the sea then much the same as the seas are used today, namely as a means of expanding their wealth and influence through commerce. Effective commerce, however, could not exist in a regulatory void. Although no records of their sea law remain, many attribute the development of modern maritime law to the early traders of the Phoenician Empire, an empire that existed for over a thousand years in the Mediterranean. Records do exist, however, from succeeding civilizations, most notably the Greeks, Rhodians and the Romans. What is most interesting to note is that the substance of these early laws does not differ significantly from that which exists today. In Greek law, as early as 400 BC, there were maritime provisions to deal with the treatment of shipwrecked sailors, embargoes, blockades, piracy and jurisdiction of courts to deal with maritime contract disputes and prizes.[16] Perhaps one of the first truly "international" laws dealt with pirates. A pirate was considered an outlaw – "an enemy of every state and can be brought to justice anywhere."[17] The threats posed to commerce by these "outlaws" were the impetus for the development of navies. Arguably, one state's navy could be another state's "outlaw", but it is here that we discern a difference between private and public law. Private laws were derived for the benefit of private commercial interests (regulations respecting trade, contracts, insurance), while public laws were those developed for protection of the common, or rather public, interest of international commerce.

A complete assessment of 24 centuries of maritime law development is, however, beyond the scope of this paper. The purpose of this brief review was to demonstrate maritime law's early roots and to note that little has changed in the essence and focus of maritime law over the centuries. From the times of the early Phonecians until the mid-20th century, the principal international maritime legal focus has been on codifying private law for the benefit of private commerce,

and public law to promote “freedom of the seas” to safeguard the conduct of that commerce. It has only been in the latter half of the 20th century that a third focus has developed. It too is in the “public” realm, but its purpose is much broader than merely the protection of commercial interests for the common good. Mankind finally recognized the requirement to protect the sea itself for the benefit of future generations.

RISE OF ENVIRONMENTAL CONCERNS

Perhaps the root cause of the previous regulatory neglect by man of the maritime environment is due to his ignorance of that environment. The effects of wind, sea, and tide were appreciated because they had shaped man’s use of the sea over the centuries. These were, however, merely the surface effects that were visible to man. Modern understanding of the environment itself commenced in the eighteenth century with hydrographic voyages sponsored in large part by the Royal Navy. It was not until the late nineteenth century, however, that “the real ocean science – oceanography – was born.”[18] In 1872, the Royal Society commissioned the wooden steam corvette *Challenger* to conduct a comprehensive three and a half-year expedition to “investigate the physical conditions of the deep sea and the great ocean basins….”[19] In the execution of that expedition, the *Challenger* crisscrossed the Atlantic and Pacific oceans, crossed the Arctic Circle and gathered enough information to fill fifty published volumes. The product of this expedition was “the first systematic storehouse of human knowledge of the oceans.”[20]

This expedition was “a landmark in the history of undersea exploration,”[21] but it seems to have had little effect on the intended agenda of the International Maritime Conference that was held in Washington in late 1889.[22] This was the first conference of its kind and was intended to discuss and seek international agreement on a broad range of items primarily related to safety at sea. Although soon embroiled in the technical discussions of proposed regulations for the prevention of collisions at sea, it did attempt to establish an international maritime

commission. Unfortunately, the major maritime powers were not interested in ceding any sovereignty to a body that had no recognized membership nor legislative authority. Indeed, this concept would have to wait until the development of the broader international institutions such as the League of Nations and the United Nations in the 20th century. Nonetheless, within the maritime community itself the benefits of creating a politically independent body of like-minded professionals and practitioners of maritime commerce were evident. Consequently, in June 1897, the Comite Maritime International (CMI) was formed and held its first conference in Brussels. The primary focus of CMI was limited to general technical, legal and commercial aspects, and although it had little access to wider marine-policy issues, subsequent meetings provided the consultative mechanisms for progress in areas of policy that would be gained at later conventions.[23]

The increasing interest in developing policy for managing the environment of the sea itself stemmed from the use and transportation of petroleum products. Arguably, if oil wasn't such an obvious and obnoxious substance we probably still wouldn't be too deeply concerned about its effects on the marine environment today. The discovery of petroleum and the subsequent development of the internal combustion engine in the latter half of the 19th century "fuelled" the rapid development of the modern transportation age. Steam ships, motor vehicles and industrial complexes created huge markets for this "black gold." Since these markets were usually located some distance from the source of supply, specialized tanker vessels were created to transport the product. As the developed world was transitioning to petroleum as its principal source of fuel, the First World War erupted generating even greater demands for this resource. The unrestricted anti-commerce war at sea during the period unleashed millions of barrels of fuel into the world's oceans and may have been a factor in raising concerns in the 1920s about the effects of oil pollution. Indeed, in 1924, the Chamber of Shipping of the United Kingdom recommended "the establishment of a prohibited zone…within which ships could not discharge oil and oily water."[24] Shortly after, at a conference in Washington in 1926, the United States and the

League of Nations attempted to solicit international agreements to combat ship-generated oil pollution. Unfortunately, the modest draft convention was never ratified by the attending 13 states and little action was taken.[25] Subsequent conferences, held at the Hague in 1929-30, focussed their attentions not on this "public" issue, but on the public commercial interest of defining the territorial seas.[26] The major maritime powers at the time, principally Great Britain and the United States, agreed neither on the width of the territorial sea nor on the right of coastal states to exercise any jurisdiction over the adjacent or contiguous seas. As a consequence, these conferences were failures.[27] In essence, the jurisdictional rights of coastal states were subservient to the importance of the ship itself.[28] Further discussions in this area would have to wait until the world experienced the horrors of the second major conflict of the 20th century.

The Second World War was a decisive point in the development of today's concept of maritime law. This was not so much from the evidence of marine pollution wrought by the destruction of thousands of ships, but from the quest for resources necessary to conduct the war effort. Depletion of then available land-based resources pushed the major maritime powers into the offshore regions of both their and their allies' territorial and contiguous seas. These major powers were faced with a dilemma. How to safeguard the traditional notion of "freedom of the high seas," which was considered to be everything beyond the three mile jurisdictional territorial limit, while securing the right and security of access to the critical living and non-living resources which lay beyond this existing jurisdiction? The compromise arrived at was to extend the jurisdictional rights of the coastal state for resource exploitation and management in the contiguous zone but preserve the rights of passage and navigation by all states through these zones. This position was clearly demonstrated in article 6 to the 1942 Treaty of the Gulf of Paria, signed by Great Britain and Venezuela. It states: "nothing in this Treaty shall be held to affect in any way the status of the waters of the Gulf of Paria or any rights of passage or navigation on the surface of the seas outside the territorial waters of the contracting parties."[29] In a similar vein, US President Truman made two Proclamations on 28 September, 1945. The first dealt with the

establishment of “fisheries conservation zones”, and the second extended the jurisdictional rights of the United States over the natural resources of the sub-soil and seabed of the Continental Shelf beneath the high seas, but contiguous to the US coast. In the second Proclamation, the right of transit was assured: “The character of the high seas above the waters of the Continental Shelf and the right to their free and unimpeded navigation are in no way thus affected.”[30] The jurisdictional logjam that had existed, perhaps largely due to the intransigence of the major maritime powers, had been broken.

The results of these precedent setting acts went far beyond what was envisioned by the US and Great Britain and lay the foundation for the multitude of conventions that followed. Using these precedents, Latin American countries quickly followed suit and several declarations of varying jurisdictional degrees of exclusivity ensued.[31] Outside of the Western Hemisphere, the rise of new nations from colonial entities and the development of archipelagic states created a flurry of similar such declarations. Clearly, the new international body – the United Nations – had its work cut out for it.

The 1950’s saw the development of parallel tracks towards the resolution of the issue. On the one hand, pollution control was recognized as a serious problem, but the international community experienced significant difficulty in designing a method of dealing with it. The 1954 International Convention for the Prevention of Pollution of the Sea by Oil was the first of the modern attempts at regulating oil pollution through prohibiting discharge of oil within 50 miles of land and requiring that ships be fitted with pollution-avoiding equipment. The convention came into force in 1958, but its enforcement measures required that the flag state, not the affected coastal state, be responsible for investigating and prosecuting offences under the convention. This stipulation required the full cooperation of participating states and, given the difficulty of gathering sufficient conclusive prosecutorial evidence, resulted in an act with few real teeth.[32] In 1959, another convention followed that made some minor recommendations to the 1954 Convention. More importantly, however, it recommended to the newly constituted UN body “Inter-Governmental Maritime Consultative Organization

(IMCO)" that another oil-pollution convention be held. Another convention was negotiated in London in 1962, but once again little substantive headway was achieved.

At about this time, another track aimed at further defining the broader issues relating to commerce and states' rights resulted in the Geneva Convention on the High Seas in 1958, the first United Nations Convention on Law of the Sea (UNCLOS I) in 1959, and UNCLOS II in 1960. Unfortunately, concerns regarding pollution were only dealt with in passing as they were subsumed in the battles over definition of territorial seas. Of significance from these conventions, however, was that the concept of pollution was broadened to consider pollutants other than just oil. The logjam that had existed prior to WWII, however, was reforming in the face of the shipping industry's total opposition to all anti-pollution measures, buttressed by the stalemate created by the Cold War and the confusion of competing claims of developing states.[33] As is true in many endeavours, however, it often takes a catastrophe to galvanize action. The grounding of the *Torrey Canyon* provided the necessary catalyst.

On 18 March 1967, the Liberian-registered *Torrey Canyon,* carrying 120,000 tons of crude oil ran aground off the southwest coast of England. At least 80,000 tons spread over an arc of 200 miles covering the Brittany and French coasts. This disaster caught the maritime world completely unprepared and the visibility of the anti-pollution campaign was raised from a few environmentally conscious individuals to state-level. [34] It was at this point that the interests of a variety of international communities converged. IMCO, which previously had been involved solely in technical and advisory matters, now became involved in matters of policy.[35] The private law interests of marine transport and the public law interests of state territorial rights, duties and obligations were now bridged. As a result, pressure mounted for communal action. IMCO, at Great Britain's request, convened a special council in 1967 to examine the disaster. In August of that year, in a brilliant presentation to the United Nations General Assembly, Malta's Ambassador Pardo promoted the idea that "the time had come to declare the ocean floor to be the 'common heritage of

mankind'."[36] Although this idea was not necessarily original, this was the first time that it had been proposed in such a broad international forum.[37] The UN General Assembly agreed and established the ad hoc Seabed Committee in December 1967. It would be this committee that would lay the foundation for UNCLOS III.

The talks leading to the UNCLOS III convention began in late 1973. It would take eleven formal sessions, numerous informal meetings and more than nine years to produce the convention that was placed before the nations at Montego Bay in December 1982. Following closing statements by delegates, the convention was opened for signature on 10 December 1982. On that day, signatures from 119 delegations and one ratification were received. Never before in international law had such overwhelming support been demonstrated.[38] This broad span of support was, no doubt, largely influenced by the oil pollution carnage that had been experienced during the decade that it took to finalize the convention. The *Torrey Canyon* marked only the first of 11 major tanker disasters during the lead up to the convening of UNCLOS III. Over 237.1 million gallons of oil was spilled.[39c] During the period of UNCLOS III discussions, an additional 937.8 million gallons of oil was spilled of which roughly 50% was attributable to ships and shipping accidents.[40d]

These disasters shaped the diplomatic environment in which the meetings and working groups toiled to produce the draft convention. Several key statements were made in various international fora about the duties of states with respect to preventing pollution. For example, at a meeting of the Intergovernmental Working Group on Marine Pollution in Ottawa in late 1971, participating states were enjoined:

> …in the event of an accident on the high seas, which might be expected to result in major damage from pollution, a coastal state, facing serious and imminent danger to its coastline and coastal interests, is permitted to take appropriate measures that may be necessary to prevent, mitigate, and even eliminate such dangers…[41]

[c] See table at Annex A
[d] See table at Annex B

Similarly, Charles C. Hyde noted: “A State may endeavour to prevent, in times of peace or war, the commission of certain acts by foreign ships or the occupants thereof… without claiming that the place where they occur is a part of its domain.”[42] The IMO conference of 1969 also recognized the need for states to respond quickly to situations such as the *Torrey Canyon*. One of its articles stated that coastal states may “take such measures on the high seas as may be necessary to prevent, mitigate, or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil...”[43]

At a 1972 meeting of the Law of the Sea Committee two statements in particular are of note:

> On the prevention and control of marine pollution, we think that coastal states being the direct victims of marine pollution, have the full right as well as necessity to exercise direct jurisdiction and control over areas within given limits, which are adjacent to their territorial seas, in order to protect the health and security of their people…
>
> Chen Chih-Fang PRC delegate.[44]

> There are three principles on the rights of coastal states:
> 1. A state may exercise special authority in areas of the sea adjacent to its territorial waters where functional controls of a continuing nature are necessary for the effective prevention of pollution which could cause damage or injury to the land or marine environment under its exclusive or sovereign authority.
> 2. A coastal state may prohibit any vessel which does not comply with internationally agreed rules and standards or, in their absence, with reasonable national rules and standards of the coastal state in question, from entering waters under its environmental protection authority.
> 3. The basis on which a state should exercise rights or powers, in addition to its sovereign rights or powers, pursuant to its special authority in areas adjacent to its territorial waters, is that such rights or powers should be deemed to be delegated to that state by the world community on behalf of humanity as a whole. The rights and powers exercised must be consistent with the coastal state’s primary responsibility for marine environmental protection in the areas concerned: they should be subject to international rules and standards and to review before an appropriate international tribunal.
>
> This principle, of course, reflects the general Canadian approach to the whole range of problems of the law of the sea and to marine pollution in particular…
>
> J. Alan Beesley Canadian representative[45]

In the development of UNCLOS III, Canada’s interest dealt with promoting the rights of coastal states. As noted at the outset, however, initial Canadian governmental response to the *Torrey Canyon* was muted and the general

Canadian approach cited by Mr. Beesley, was painfully slow in developing. It was not until Canadian Arctic sovereignty and jurisdiction was challenged by the voyage of the *Manhattan* that the government took a substantial and proactive position. Under Prime Minister Trudeau, Canada became a leading proponent of coastal states' rights regarding jurisdiction for marine pollution prevention. In the October 1969 throne speech, Canada indicated its intention to act unilaterally to set pollution standards in the Arctic. As well, at IMCO's next Convention on Marine Pollution Damage, held in November 1969 in Brussels, a strong Canadian delegation made significant contributions. Led by Mr. Donald Jamieson, then Minister of Transport, with Mr. Jack Pickersgill head of the president of the Canadian Transport Commission and a former Minster of Transport, and supported by the Canadian Ambassador to Denmark and veterans of the Legal Division of the Department of External Affairs, the delegation set out to take an uncompromising position with respect to the victims of pollution, the coastal states. As the only foreign delegation headed by a Cabinet Minister, Canada was invited to address an early plenary session. Mr. Jamieson's address "astounded the conference" as this was "the first time that a developed state was challenging its traditional European maritime allies and was asserting a completely coastal-state orientation."[46] Indeed the abrupt change of the Canadian attitude was noted by several maritime representatives as a politically motivated "stab in the back."[47] Nonetheless, in this and subsequent conferences, Canada gained substantial support for many of its proposals and the leadership role which it assumed amongst the coastal states. Indeed, Canada became "the leading advocate of extended coastal state jurisdiction and general obligations to protect the environment in the Seabed Committees and IMCO from 1969-73 and at UNCLOS III in 1974."[48]

Although Canada was "the leading advocate," not all of her perspectives gained the necessary support to become international maritime law. Nonetheless, Canada successfully influenced the environmental perspectives of both the UN Seabed Committee and UNCLOS III such that a balance was achieved between the interests of coastal states and those of the shipping

industry. The Third Committee recognized the jurisdictional right of coastal states to legislate certain pollution prevention measures "under normally accepted international rules and standards", and the Second Committee achieved a balance between coastal state environmental concerns and the right of navigation and non-coastal freedoms.[49] It was not a total victory, but by August 1972 there was sufficient foreign acquiescence in this realm that Canada was able to proclaim the Arctic Waters Pollution Prevention Act. This Act, while not directly asserting Canadian sovereignty over Arctic waters, did establish a 100-mile pollution control zone which enabled Canada to set shipping standards and proscribe liability and compensation for pollution.[50] Canada's primary aims had been achieved.

Returning to the Convention itself[e], by 1979 significant committee consensus was achieved with respect to duties of states, rules for ships and enforcement of those rules.[51] This consensus was the basis for several of the articles of the UNCLOS III Convention. In considering the Convention, what is clearly evident is that it has obliged Coastal States to protect the marine environment (articles 192 and 235); given them the jurisdiction (articles 56 (exclusive economic zone), 221 (beyond the territorial sea) and 211 (territorial sea)); and, empowered them to take action (articles 73, 194, 211, 221 and 224). The question is, therefore, has Canada fulfilled its obligation and lived up to the positions it took when developing the convention? To answer this, it is appropriate to turn to the two principal Canadian statutes that have jurisdictional interests regarding maritime pollution in Canadian waters – the Canada Shipping Act (CSA) and the Environmental Protection Act (EPA).[f]

[e] Those articles of particular reference to this discussion are included at Annex C.
[f] Excerpts from the CSA and EPA are attached at annexes D and E respectively. Given size of the parent documents, the excerpts presented are narrowly focused on the most applicable topics of marine pollution jurisdiction and enforcement. The Canada Marine Act is not included as it focuses primarily on harbours and ports and, given the nature of this discussion, is not applicable.

THE CANADIAN LEGAL REGIME

The first requirement is to examine the current legal regime[g]. As noted at the outset, the statutes provide the legal authority for undertaking any actions sanctioned by them. This legal basis provides the authority for governing the lawful use of force in peacetime through ROE.

The Canada Shipping Act (CSA) [52]

Canada recognizes its obligation to protect the marine environment under the CSA as the objectives of the Act clearly specify that they are to "protect the marine environment from damage due to…shipping activities; [and] establish an effective inspection and enforcement regime." It details Canada's jurisdictional responsibilities in Part XV *Pollution Prevention and Response* at article 655. (1) (a) as "all Canadian waters and waters in the exclusive economic zone of Canada", and (b), "to all ships in waters described in paragraph (a)." Regarding the ability to act proactively, article 562.18(1)(v) talks about "reasonable apprehension of pollution in the Vessel Traffic Services Zone" and article 654 defines an "oil pollution incident" as an occurrence "likely to result in a discharge of oil in water." Furthermore, article 662.(1)(f) states that a pollution prevention officer may direct any ship within jurisdictional waters "if that officer is satisfied by reason of weather…the condition of the ship or any of its equipment…that such a direction is justified to prevent the discharge of a pollutant." From the enforcement perspective, at article 317.1, the Act enables The Minister to authorize "any person…to conduct inspections under this Act" and empowers the Commissioner of the Coast Guard with the ability to direct ships "about to enter or within Vessel Traffic Services Zone" at article 562.18 (1). It further enables the Commissioner to designate "marine traffic regulators" to exercise his powers at 562.18(2). In part XII *Legal Proceedings,* article 618.(1) permits that if "a ship is

[g] From the perspective of completeness and interest, included at Annexes F and G are exerpts from the Canada Interpretation Act and the Criminal Code.

to be or may be detained," that "any commissioned officer on full pay in the naval, army or air service of Her Majesty or in the Canadian Forces" may detain such ship under the Act. Finally, Part XV, article 661.(1) (a) enables the Minister to "designate any person…as a pollution prevention officer" and, at article 662.(1) gives him the powers to direct ships in or about to enter Canadian jurisdictional waters. Article 662.(3) requires ships to obey directions given by pollution prevention officers and article 666 provides for a fine not exceeding $200,000 dollars for disobeying a pollution prevention officer.

The CSA, therefore, recognizes Canada's obligation and jurisdiction with respect to prevention of maritime pollution. It also permits proactive action by marine traffic regulators and pollution prevention officers. Finally, it provides an enforcement regime that gives designated personnel the authority to board, inspect, direct and, if necessary, detain ships. Regarding the specified authority that permits commissioned CF officers to detain ships, it must be noted that the ship requires previous identification as requiring detainment. Additionally, while article 237(1) theoretically enables "an officer or person in Her Majesty's Service" to go aboard a ship "without the permission or against the order of the Master," he is not permitted to use force to compel the Master to do anything because no where in the act is peace officer status provided. It is this status that provides the clearest protection and authority to use force to compel compliance if required.

Environmental Protection Act[53]

This act also recognizes the obligation to protect the maritime environment through the preamble that indicates that "Canada is committed to implementing pollution prevention" and will employ "the precautionary principle" in order "to fulfill its international obligations in respect of the environment." Its definition of sea as "the territorial sea of Canada" and "any exclusive economic zone that may be created by Canada" confirms that Canada is willing to accept jurisdiction over the waters off our coasts. Proactive measures are indicated both by the preamble and by article 193(b)'s definition of "environmental emergency" as "the

reasonable likelihood of such a release into the environment." Enforcement powers are conferred through article 217.(1)(a)'s provision that the Minister may designate "as enforcement officers…persons or classes of persons who, in the Minister's opinion, are qualified to be so designated." The principal areas applicable to the situation noted here deal with Part 5 "*Release of Toxic Substances*", Part 8 "*Environmental Matters Related to Emergencies"* and Part 10 "*Enforcement*". In Part 5 article 95.(5) and Part 8 article 194.(4), should any person fail to take required measures, enforcement officers "may take those measures, cause them to be taken or direct any person…to take them." Finally, under article 217.(3) it grants enforcement officers "all the powers of a peace officer", caveated with "the Minister may specify limits on those powers…."

Like the CSA, the EPA recognizes both Canada's obligation and jurisdiction with respect to the prevention of maritime pollution. As well, the enforcement provisions permits the designation of "enforcement officers" by the Minister and, if the term "reasonable measures" is construed broadly, gives them a wide range of powers which are further enhanced vis-à-vis the use of force through granting them "peace officer" status. The ability for enforcement officers to detain or seize ships, however, is generally limited to situations such as intentional or negligent dumping and is primarily considered as being after the fact. Article 225 (1) states that an enforcement officer may make a detention *order* if the officer has "reasonable grounds to believe…a ship *has committed* an offence under section 272." Endeavouring to be proactive under this article is, therefore, more challenging, but still may be achieved through interpretation of 272(1)(a)'s "provision of the Act or the regulations", or (b)'s "obligation or prohibition" in a manner favourable to seizing and taking control before disaster strikes.

While the legal regime provided by these Acts does provide for appropriately designated personnel to take some action, it is not clear that that action can be taken in the situation described here. It would appear that this shortfall prevents *any* government vessel, Coast Guard, Fisheries or Navy from

taking action, unless there was an individual embarked who had the powers and authority of either a pollution prevention officer (CSA) or an enforcement officer (EPA). Even if this individual happened to be on the government vessel that happened upon such a merchant vessel, and that government vessel had the capability to apply force, the legal authority to use force to compel compliance with any direction given is tenuous at best. One might even question whether an RCMP officer, although a peace officer, would have the necessary legal jurisdiction to intervene as a pollution prevention officer if he or she was embarked by happenstance and not for pollution prevention duties. While there may be a desire from a moral perspective to intervene, there is no legal authority and, consequently, no legal protection for the intervener. Therefore, given the lack of clarity and authority in the existing legislation, one can only deduce that Canada has not done everything it can to fulfill the obligations charged to it by UNCLOS III.

RECOMMENDATIONS FOR CHANGE

Canadian leaders can take either a reactive or proactive approach to address this shortcoming. The reactive approach depends upon a flurry of timely phone or radio calls to provide some legal authority while the incident is ongoing. Perhaps the Minister or Governor in Council could authorize the ship to perform a "public service."[h] It is submitted, however, that the importance of preventing such a pollution incident, the sensitivity of taking such action, and the visibility that taking such action would have both domestically and internationally, requires

[h] Section 87, PART V, *MISCELLANEOUS PROVISIONS HAVING GENERAL APPLICATION* amends the National Defence Act by adding article 273.6 regarding public service. It states:

> 273.6 (1) Subject to subsection (2), the Governor in Council or the Minister may authorize the Canadian Forces to perform any duty involving public service.
> (2) The Governor in Council, or the Minister on the request of the Solicitor General of Canada or any other Minister, may issue directions authorizing the Canadian Forces to provide assistance in respect of any law enforcement matter if the Governor in Council or the Minister, as the case may be, considers that
> (a) the assistance is in the national interest; and
> (b) the matter cannot be effectively dealt with except with the assistance of the Canadian Forces.

more careful forethought and planning than that which may occur in the hour or two one might have to effectively act. Clearly, proactive action must be taken to change the Act(s) in order to provide clear direction and the necessary legal authority. This will provide those who may have to use force with the legal protection they require and those who may have to authorize the use of force with the opportunity to develop and promulgate the appropriate ROE to govern that force.

Legislative changes can be made to either the CSA or the EPA or both. Given the existing legislation, however, it is submitted that the CSA's description of the pollution prevention officer's responsibilities, duties, rights and authorities provide the best framework for the requirements as seen here. While the appropriate legislative and legal wording remains the purview of those of the legal profession, the following are seen to be the minimum required changes necessary to provide CF personnel with the legal authority to act in this situation. It must be noted that the changes to the Act are crafted in such a manner that they are applicable to all government vessels, not solely those of the CF.

- In Part XV, *POLLUTION PREVENTION AND RESPONSE*, add the definition of "government ship" to the list of definitions.
  ' "government ship" means a ship or vessel that is owned by and is in the service of Her Majesty in right of Canada or of any province or is, while so employed, wholly employed in the service of Her Majesty in that right;'
- To article 662, add new section (1) with wording similar to that contained in article 217(3) of the EPA to provide pollution prevention officers with the powers and status of "peace officers."
  "(3) For the purposes of this Act and the regulations**,** pollution prevention officers have the status and powers of a peace officer, but the Minister may specify limits on those powers when designating any person or class of persons."
- Renumber remainder of article 662. Add new section (iv) to renumbered 662.(2)(f) "*A pollution prevention officer may… direct any ship that is within or about to enter waters to which this Part applies*"
  "To submit to a boarding and accept assistance from a government or designated vessel,"

Other than some editorial housekeeping, it is submitted that the foregoing represent all of the required changes to the CSA. With current section 662(3) directing all ships to "obey directions given by a pollution prevention officer under

paragraph…(f)….", and article 666 making it an offence to disobey pollution prevention officer direction given under current 662(1)(f), the above changes provide the necessary legislative authority for those designated as pollution prevention officers to compel compliance. The term "designated vessel" is added in the event that the government vessel is not suitable to provide assistance and another, more suitable vessel is available. In this manner, a pollution prevention officer may require the master to accept tugs, which if one recalls, were refused by the *Aristotelis*. One may also wish to include a definition of "government aircraft" in PART XV, because it may very well be a government aircraft that locates a vessel in this situation.

It must be noted that these changes do not provide CF personnel with the requisite authority; they merely broaden the legal authority for persons designated as pollution prevention officers. It is submitted that an Order in Council or Ministerial Order is required to designate CF personnel as pollution prevention officers and to provide whatever bounds on their powers as peace officers as may be desired (ie. use of deadly force is not authorized). These bounds can also be provided or reiterated through ROE which, as a result of these changes to the CSA, would now have the legal basis to authorize the lawful use of force in domestic situations. In this manner, rather than changing the CSA to merely stipulate CF personnel, other government departments, if appropriate, may also pursue having their personnel designated as pollution prevention officers through their own Order-in-Council.

IMPLICATIONS

Clearly, these changes will have an impact on the approach that the CF takes to domestic law enforcement. Modifications will have to be made to various directives, and operational commanders will have to account for this in their direction and guidance to their forces. The potential to conduct such an enforcement operation will require ships' Captains to have a more complete consideration of the implications of such an effort – not only from the legal

perspective of gaining entry to the ship, but also from the technical perspective of physically taking it in tow. Fortunately, from the perspective of training, Canadian ships are already organized and trained to conduct both boarding and rescue operations. It must be noted, however, that in rescue operations the focus is on the saving personnel vice protection of the environment. Making the vessel the principal object of saviour may impose some additional but worthwhile training burdens.

Perhaps the greatest challenges will be the legal questions of liability. Will the provision of such an emergency enforcement measure provide a legal *obligation* to provide that measure? Will the liability of the individual who offers such preventative measure be protected under article 201.(7) of the EPA that states that they are "not personally liable …unless it is established that the person acted in bad faith"? Would provision of such powers provide an avenue for demanding Canadian state involvement when commercial involvement is available and would suffice? Who is obligated to pay for provision of such services if required to accept them under the orders of a pollution prevention officer? Finally, who is liable should intervention efforts fail or they exacerbate the situation and the ship is lost? In considering the *Aristotelis*, while the real situation was resolved without incident, what would have happened if we had intervened but the actions proved not only unsuccessful, but also prevented the ship from anchoring and she went aground? It is submitted that these are questions for lawyers to resolve. What our leaders must determine, to the satisfaction of the Canadian public, is whether averting a potential major marine disaster costing millions of dollars to clean up, is worth the potential for a few claims for liability?

CONCLUSION

It is recognized that situations demanding such intervention are rare. Nonetheless, they do occur and the opportunity to successfully intervene in a timely fashion will be limited. The saying, "an ounce of prevention is worth more

than a pound of cure", is certainly applicable. Suppose the *Aristotelis* was not a cargo vessel travelling in ballast, but a fully loaded tanker making a run between Alaska and Washington? Should our ability to respond be constrained by the requirement to seek higher approval or should we plan in advance? Should we let recalcitrant Masters threaten our marine environment through refusal of assistance or should we empower our fleets with the ability to intervene? Should Captains have to question their moral certitude that their government would support their actions or should they be given the necessary Rules of Engagement beforehand? Should legalistic questions of liability prevent decisive action or should the Canadian government fulfill its stated obligation to present and future Canadians to protect the marine environment? From the perspective of a simple sailor who watched the situation of the *Aristotelis* unfold, and who experienced that sinking feeling as the window of opportunity to intervene closed, the answers to these questions are clear. Today's environmentally conscious and proactive Canadian citizens expect their Navy to be both able and empowered to support the protection of their marine environment.

Canadian military and political leaders have an obligation to our sailors, to the Canadian public and, through UNCLOS III, to the international community to ensure that our personnel have the tools, training and lawful authority to respond. Enacting the changes suggested herein provides the basis for that response and may ensure that other *Aristotelis, Arrow, or Amoco Cadiz*[i] never hit the front page. The Canadian Navy is committed to being *Ready, Aye, Ready* – let us ensure that they are permitted as well.

[i] Amoco Cadiz ran aground on 16 March 1978 off the Brittany coast, spilling 1.6 million barrels of oil following a failure of her steering mechanism.

ENDNOTES

[1] *Canada Shipping Act -- CHAPTER S-9* R.S., 1985, c. S-9, s. 433; R.S., 1985, c. 31 (1st Supp.), s. 103. [Hhttp://canada2.justice.gc.ca/FTP/EN/Laws/Chap/S/S-9.txtH] Art 433.
[2] Ibid. Art 451.
[3] Ved P. Nanda, "Environment", in *UN Legal Order*, Vol 2., ed by Oscar Schacter and Christopher C. Joyner., (Cambridge, UK., Press Syndicate of the University of Cambridge, 1995), P 636.
[4] R. Micheal M'Gonigle and Mark W. Zacher, "Canadian Foreign Policy and the Control of Marine Pollution," in *Canadian Foreign Policy and the Law of the Sea*, ed. by Barbara Johnson and Mark W. Zacher., (Vancouver, University of British Columbia Press, 1977), p. 106.
[5] Ibid, p. 108.
[6] Ibid.
[7] Ibid, p. 118.
[8] J.B., Sykes, Ed. "Law", in *The Concise Oxford Dictionary*, 7th ed., (Oxford. Clarendon Press, 1982), P.568.
[9] *Military Justice At The Summary Trial Level*, DND CD produced by Directorate of Law/Training, Office of the Judge Advocate General, Version 1.1, September 1999. p. 1-1.
[10] "Rules of Engagement". Glossary, *Use of Force in CF Operations*. [http://bbs.cfc.dnd.ca/Admin/jointdocs/cdnpubs/useforcev1/uf1ch4glos.html]
[11] Ibid, Art. 201, para 4.
[12] Ibid., para 5.
[13] Section 25. *Criminal Code*. R.S., c. C-34, s. 1.http://canada.justice.gc.ca/
[14] Edgar Gold. *Maritime Transport.* (Toronto, Canada. Dalhousie University, Lexington Books, D.C. Heath and Co., 1981), p. 4.
[15] Ibid.
[16] Ibid, p. 6.
[17] Douglas, Botting, *The Pirates,* as quoted by Gold, pg. 6.
[18] Gold, p. 125.
[19] Ibid. This quote is merely a small part of the more detailed directions that were given by the Society and the Admiralty to *Challenger*. Greater details are provided at the reference.
[20] Ibid.
[21] "Challenger Expedition," *New Encyclopedia Britannica*, 1990., Vol 3, p. 62.
[22] Gold., p. 122. Gold provides an overview of the 13 items on the intended agenda which he gleaned from the *Protocol of Proceedings of the International Marine Conference 1889* published by the US GPO in 1890.
[23] Ibid, p. 209.
[24] Ibid, p. 250. supra, Joseph C. Sweeney, "Oil Pollution on the Oceans," *Fordham Law Review* 37 (1968):115; 118.
[25] Ibid, p. 284.
[26] Ibid, p. 205.
[27] Ibid.
[28] Ibid, p. 249.
[29] Ibid, p. 252.
[30] Ibid, p. 253
[31] Ibid, pp. 253-255.
[32] Ibid, p. 285.
[33] Ibid, p. 286. This dynamic environment of international conventions is more fully covered in pp.264-286.
[34] Ibid, p. 287.
[35] Ibid.
[36] Ibid, p. 311.
[37] United Nations, *The Law of the Sea.* Official Text of the United Nations Convention on the Law of the Sea. (New York, NY. United Nations. 1983), p. xx.
[38] Ibid, p. xxiv.

[39] Oil Spills Involving More Than 10 Million Gallons' (excerpted from H*International Oil Spill Statistics:1997H*)[http://environment.tqn.com/culture/issuescauses/environment/gi/dynamic/offsite.htm?site=http://www. cutter.com/osir/biglist.htm].
[40] Ibid.
[41] Gold, p. 325.
[42] Burdick H., Brittin. *International Law for Seagoing Officers*. Annapolis, Maryland. US Naval Institute. 1994. p. 143.
[43] Ibid, p. 162.
[44] Ibid, p. 163.
[45] Ibid. pp. 164-165.
[46] M'Gonigle, *Canadian Foreign Policy and the Control of Marine Pollution,* p.114.
[47] Ibid, p. 115.
[48] Barbara Johnson and Mark W. Zacher, "An Overview," in *Canadian Foreign Policy and the Law of the Sea*. ed. by Barbara Johnson and Mark W. Zacher.,(Vancouver, University of British Columbia Press, 1977) p. 369.
[49] Douglas M. Johnston, "Canada and the New International Law of the Sea". (Toronto, University of Toronto Press. 1985) p. 21.
[50] M'Gonigle, p. 117.
[51] Britten. pp.166-167.
[52] Canada Shipping Act—Chapter S-9. At [http:/canada2.justice.gc.ca/ftp/en/laws/chap/s/s-9.txt].
[53] The Environmental Protection Act, 1999. [http://www.parl.gc.ca/36/1/parlbus/chambus/house/bills/government/c-32/c-32_3/c-32toce.html]

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