



COMMENTS ON POTENTIAL AMENDMENTS TO THE *CANADA SHIPPING ACT, 2001*  
TO STRENGTHEN MARINE SAFETY AND ENVIRONMENTAL PROTECTION

September 23, 2022

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We are writing on behalf of the Shipping Federation of Canada to submit comments on Transport Canada's proposed amendments to the *Canada Shipping Act, 2001*, which are aimed at strengthening marine safety and environmental protection. Our association is the national voice of ocean ships that carry Canada's exports and imports to and from world markets, and we therefore have a strong interest in the above-noted proposals and their impact on commercial shipping operations in Canadian waters.

We would like to preface our comments by noting that Transport Canada is proposing a wide range of amendments with a very limited amount of supporting information or detail, which makes it difficult to provide significant input, especially in the very short timeframe provided. Many of the proposals also relate to existing government initiatives that are in various stages of completion, thereby introducing even more complexity and uncertainty into an already confusing regime. Although we very much expect that Transport Canada will undertake a second round of stakeholder consultations informed by more substantive proposals before proceeding with the pre-publication of new regulations, we offer the following preliminary comments on the current discussion paper, based on our understanding of the proposals as currently presented.

We should also note that due to the lack of detail in the discussion paper, our comments are presented as a series of questions, potential red flags and reflection points for Transport Canada, and relate only to those proposals that have the most significant potential impacts on our members. As such, they do not represent fully formed positions or arguments, nor do they reflect the totality of our views on how Canada's marine safety and environmental regime should be upgraded and strengthened in order to ensure it is well positioned for future needs and challenges.

## **1. Comments on TC Proposals to Improve Marine Emergency Management**

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### **Proposal 1: Enable Transport Canada to direct vessels to take the necessary action where there is a major risk to marine safety.**

A key concern regarding the above proposal is the extent to which it may interfere with the responsibility that the Master has for the ship, cargo, crew and environment - and the resulting lack of clarity this may create as to who ultimately has responsibility for the vessel's movement during specific situations. In order to address this concern, it will be essential to establish clear criteria / guidelines under which Transport Canada could step in to take control of the ship away from the Master, and to place some parameters around the kinds of actions that the Master could be directed to undertake. This is key to ensuring that any new powers granted to Transport Canada do not unduly interfere with ship operations

or lead to its involvement in inappropriate activities such as marine traffic management, assignment of priority passage to certain vessels, etc.

We are also concerned that this proposal will add further complexity to an already complicated jurisdictional regime with respect to the management of marine incidents in Canadian waters, under which Transport Canada, the Canadian Coast Guard, and in some case, Canada Port Authorities (as per their powers under the *Canada Marine Act*) all have various levels of (sometimes overlapping) responsibility and ability to act – resulting in many opportunities for conflict between agencies and delays in decision making.

A concrete example of the problematic impacts that this patchwork of jurisdictional responsibility can create lies in the aftermath of the container spill that occurred on the west coast last year, with respect to which the charterer of the subject vessel observed that it was unclear to him who was coordinating response efforts and who was in charge overall. What is clear about the incident is that neither Transport Canada nor the Coast Guard had full and complete jurisdictional control over the evolving emergency, and that this created inefficient communications, led to delays in decision making, and left the Master of the ship being relatively unsupported.

In this respect, we reiterate the comments we have made in previous submissions (including in the attached brief on Canada's wreck removal legislation) on Canada's need for much more centralized command and control structure – which clearly sets out roles and responsibilities of the various parties involved - to manage marine safety incidents. The implementation of such a framework would greatly improve the timeliness and effectiveness of Canada's response to evolving marine incidents and create a more proactive system overall. It would also address the jurisdictional gaps that currently exist between Transport Canada, the Coast Guard, and the Port Authorities.

**Proposal 2: Require certain types and classes of commercial vessels to have arrangements in place to access emergency services, including marine firefighting and recovering a damaged or disabled vessel or its cargo.**

We are particularly interested in the proposal for vessels to have arrangements in place for recovering a damaged vessel, but are challenged by the lack of context or supporting information in the discussion paper. More specifically, it is unclear whether Transport Canada envisions a regime under which arrangements would be required for activities that take place after an incident has occurred (salvage operations only), or whether the regime would also encompass activities that take place during an incident to prevent the situation from worsening (emergency services). As an example, would the need for recovery arrangements extend to emergency towing services, or to salvage operations only? If the proposal were to encompass emergency towing, how would this link to the National Strategy on Emergency Towing that is already in place under the *Oceans Protection Plan*?

Another unanswered question is how this proposal would impact / interact with the "Lloyd's open form" salvage contracts that are widely used in the industry today, and which play a key role in ensuring a supply of readily available, worldwide professional salvage capability. Would the requirement for vessels calling Canadian ports to have salvage arrangements in place – presumably as a condition of entry – jeopardize their ability to participate in and benefit from this international system?

In this respect, we would also note that salvage is already a risky, capital-intensive venture, with only a few, very specialized companies available to provide service here in Canada on an ad-hoc and "as-available" basis. If Transport Canada's intention is to set up a subscription-based regime similar to what is currently in place for oil spill response organization contracts, it will be essential to ensure that costs can be managed, and that the system does not become an uncontrollable monopoly where there are simply too many barriers for new entrants to access the market. A great deal of analysis would also be

required in order to create the various regional/area-based performance standards that the proposed “TC approved” salvage entity would presumably have to meet.

Finally, it is currently unclear what specific types and classes of vessels arrangements would be required for (i.e. would the requirement be based on vessel size or specifications, the type of cargo on board, the location of the vessel's ports of call, etc.), which is an important consideration in a context where a high number of subscribers would likely be needed to establish additional salvage capacity in Canada at a reasonable price, but where the available evidence would likely support the potential need for such capacity by a more limited number of vessels and cargoes on a limited number of routes.

### **Proposal 3: Give Transport Canada the power to direct ports and other marine facilities to let in vessels in need of help.**

We believe that this proposal could help address some of the jurisdictional issues – and potentially competing mandates – that currently exist between Transport Canada and Canada Port Authorities under the *Canada Marine Act* (our concerns over the impacts that these issues have on Canada's ability to effectively manage marine incidents are outlined on the previous page). Giving Transport Canada the authority to direct ports to accept vessels in distress would inject some much-needed clarity into at least one portion of Canada's marine safety response regime, by reducing the potential for port authorities to issue their own directions with respect to such vessels.

This being said, we do question the viability of extending this authority to other marine facilities, given that such facilities are, for the most part, either privately owned and operated, or owned by a port and under lease to a private terminal operator. This presents a number of commercial, legal, and liability issues which would require extensive consultation before such a proposal could move forward.

We also have questions as to how this proposal relates to / interacts with the places of refuge initiative that has been developed under the *Oceans Protection Plan*. It would seem logical that this regime would need to be re-visited in order to take into account the proposed changes, but this is not clearly articulated in the discussion paper.

## **2. Comments on TC Proposals on Incidents Involving Hazardous and Noxious Substances**

### **Proposal 1: Build on what is already in place for oil spills and apply it to hazardous and noxious substances**

From an international shipowner perspective, we have a strong interest in ensuring that Canada's HNS regime is consistent with international conventions that have been developed by the International Maritime Organization (IMO), and it is our understanding that amendments being proposed by Transport Canada would be implemented with a view to Canada acceding to the *OPRC-HNS Protocol*.

Given the foregoing, the proposal to make shipowners and HNS handling facilities take on additional responsibilities raises a number of questions and concerns. In the bulk and liquid trades, the different types of HNS that could be on a vessel at any given time is relatively small, making the creation of response plans fairly straightforward. However, vessels in the container trade could have a very high number of different HNS cargoes on board, all in separate containers, resulting in the need to create a relatively complex response plan. In these instances, it will be essential to ensure that Canada's requirements are equivalent to, but not more onerous than, what is already in place at the international level through the relevant IMO conventions. Creating a separate standard from what already exists under various IMO instruments would put Canada at a distinct competitive disadvantage by creating unique requirements that may not be aligned with the international regime.

## **Proposal 2: Make key definitions clearer**

Our key concern relates to the proposed extension of the new HNS requirements to shore-based facilities. More specifically, it is unclear to us how jurisdictional authority under the *Canada Shipping Act, 2001* could encompass such facilities, given that many operate under provincial jurisdictions. The inclusion of shore-based facilities would also mean that virtually every marine facility in Canada would need to become certified in order to meet the new requirements, due to the possibility of HNS being shipped in multiple forms and trades (bulk, breakbulk, container, etc.). Given these concerns, it will be essential for Transport Canada to develop very clear definitions with respect to shore-based facilities in the next iteration of this proposal.

## **3. Comments on TC Proposals to Modernize Regulatory Processes**

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### **Proposal 1: Enable Transport Canada to implement temporary ministerial orders to address local marine safety and environmental risks**

We view the proposal to implement temporary ministerial orders as part of a continuum that was preceded by the Department's increased reliance on the use of interim orders in cases where immediate action is deemed necessary to mitigate a specific risk, and where there is (in the regulator's view) insufficient time to go through the normal regulatory process and its consultative requirements. Although we can theoretically understand the rationale for the use of interim orders in cases requiring immediate action (provided the appropriate checks and balances are in place), we have much more difficulty understanding the rationale for the use of temporary orders in response to local risks, as the risks in these cases are clearly not sufficiently urgent to warrant the imposition of an interim order, but would nevertheless allow for the use a tool that similarly bypasses the normal regulatory process.

We are also challenged by Transport Canada's assertion that these temporary orders, which could remain in effect for up to two years, would give local communities and stakeholders an opportunity to provide their feedback before permanent regulatory changes occur, but would be fully enforceable during the entire temporary period they are in effect. Consequently, although this feedback period could conceivably lead to the conclusion that a given temporary order is not a useful or effective or appropriate tool, stakeholders would nevertheless be subject to the full range of enforcement tools that Transport Canada has at its disposal for non-compliance during the time such an order is in effect.

It is absolutely essential from our perspective that any proposal to give Transport Canada the power to implement temporary orders under the *Canada Shipping Act, 2001* be sufficiently circumscribed – through appropriate checks and balances AND clear criteria for triggering their imposition - to ensure that this does not open the door to governing by temporary order as a convenient mechanism to be broadly used outside the regulatory process. We have attached a copy of our brief to the Standing Committee on Transport, Infrastructure and Communities outlining our concerns over the (then) proposed use of interim orders by the Minister of Transport (submitted in November 2018), as we believe that our concerns regarding interim orders are equally relevant with respect to the use of temporary orders, if not even more so (given the already lower bar for the imposition of such orders).

### **Proposal 2: Make the regulatory process quicker and more efficient by enabling Transport Canada to incorporate by reference technical and administrative standards and requirements as part of federal regulations**

Although we fully understand that incorporation by reference is a commonly used regulatory practice, we nevertheless believe that it must be used with prudence and caution. This is particularly true with respect to the incorporation of non-mandatory measures such as standards, best practices, etc., which

have the potential to gain the force of regulation without being subject to any of the consultative guardrails that are an essential element of the normal regulatory process.

We also have some concerns about the impact that an excessive reliance on incorporation by reference could have on the government's ability to produce readable, transparent regulatory texts that facilitate, as opposed to hindering, the regulated party's ability to fully understand (and therefore comply with) their obligations.

#### **4. Comments on TC Proposals to Ensure Appropriate Enforcement**

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As a general comment, we take this opportunity to reiterate our longstanding concerns regarding the imposition of criminal sanctions on seafarers and our ongoing opposition to this practice. Although Transport Canada's ability to impose criminal sanctions for certain violations of the *Canada Shipping Act* has been in place for a number of years, this is nevertheless an issue of continuing concern, and particularly so in a context where the department is proposing to more than double the maximum criminal fine from \$10,000 to \$25,000.

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As noted at the beginning of this submission, these are preliminary comments only, based on our understanding of Transport Canada's proposals as currently written. We strongly encourage the Department to use the input it gathers from this initial round of consultations to further flesh out its proposals, with a view to submitting a more fulsome discussion paper that would allow for more substantive comments from stakeholders going forward.

Sincerely,



Chris Hall, President and CEO  
SHIPPING FEDERATION OF CANADA

#### Attachments:

- Shipping Federation brief to the House Standing Committee on Transport, Infrastructure and Communities on Bill C-86 (*Budget Implementation Act* as relates to the use of Interim Orders)
- Shipping Federation brief to Transport Canada on Bill C-64 (*Wrecked, Abandoned and Hazardous Vessels Act*)