

# ABANDONED AND DERELICT SHIPS: WHERE DO WE GO FROM HERE?<sup>1</sup>

Eric Machum

## PART 1 – THE PROBLEM

A “*Study of the Extent of Abandoned and Derelict Vessels in Canada*” published by Transport Canada in November 2012 found that there were 397 abandoned and derelict ships in the country.<sup>2</sup> Many derelicts may not have been captured in that survey and survey participants noted that between 1 and 20 derelict ships and pleasure crafts are abandoned per year.<sup>3</sup>

Derelict and abandoned ships range from small pleasure craft such as the sunken sailboat with its rigging protruding from the sea in Halifax’s Northwest Arm, to the 222 meter “MV Miner” washed ashore on Nova Scotia’s Scattered Island and only recently removed at a cost of approximately \$14 million,<sup>4</sup> the “Lord Selkirk” in Selkirk, Manitoba, removed at a cost of approximately \$400,000,<sup>5</sup> or, the yet to be removed 12,300 dwt “Kathryn Spirit” in Beauharnois, QC,<sup>6</sup> or the “Viki Lyne II” in Ladysmith, B.C.,<sup>7</sup> to name but a few of the most celebrated Canadian derelicts.

Abandoned and derelict ships frequently create safety problems, obstructions to navigation, and threats to the marine environment and other ocean uses. They are also unsightly and are an

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<sup>2</sup> Transport Canada, *Study of the Extent of Abandoned and Derelict Vessels in Canada*, November 2012, page 6. Online: [http://avicc.ca/wp-content/uploads/2013/12/TransportCanada\\_Report\\_AbandonedDerelictVesselReport\\_Feb202013.pdf](http://avicc.ca/wp-content/uploads/2013/12/TransportCanada_Report_AbandonedDerelictVesselReport_Feb202013.pdf) [“**Transport Canada Study**”].

<sup>3</sup> *Ibid.*, p. 5.

<sup>4</sup> CBC News, “MV Miner finally removed from Cape Breton's Scattered Island” (June 22, 2015). Online: <http://www.cbc.ca/news/canada/nova-scotia/mv-miner-finally-removed-from-cape-breton-s-scattered-island-1.3122918>.

<sup>5</sup> CBC News, “Dismantling of MS Lord Selkirk II nearly complete” (November 2, 2015). Online: <http://www.cbc.ca/news/canada/manitoba/dismantling-of-ms-lord-selkirk-ii-nearly-complete-1.3300093>. Demolition costs of approximately \$400,000 were said to be funded by the city and the province.

<sup>6</sup> CBC News, “Kathryn Spirit: Political leaders call on federal government to remove abandoned ship” (January 19, 2016). Online: <http://www.cbc.ca/news/canada/montreal/beauharnois-ship-kathryn-spirit-1.3411171>.

<sup>7</sup> CBC News, “Derelict Viki Lyne II to be removed from Ladysmith Harbour” (May 27, 2016). Online: <http://www.cbc.ca/news/canada/british-columbia/viki-lyne-ladysmith-harbour-1.3603243>.

annoyance and liability for property owners where they are abandoned. They may become locations for illegal activity, illegal housing, and vandalism. Their removal is costly and often requires significant technical expertise. As a result, there has been growing momentum in Canada to develop a regulatory system better suited to prevent and deal with abandoned and derelict ships.

This paper will summarize the existing options for dealing with derelict and abandoned ships, comment on the inadequacies of the current system and survey some proposed solutions. However, as a starting point, we need to be clear as to what a derelict or abandoned ship is.

Traditionally, ownership of a wrecked ship remains with the person who was the owner at the time of the loss, unless the ship was considered a derelict. In *The Humboldt v The Escort (No 2)* (1914), 21 Ex. C.R. 179 at 181 Exchequer Court of Canada per Martin LJA held that: "'Derelict" is a term legally applied to a thing which is abandoned and deserted at sea by those who were in charge of it, without hope on their part of recovering it, and without intention of returning to it."<sup>8</sup>

There is no readily available definition of derelict or abandoned ship in the federal legislation. The *Canada Shipping Act 2001*, s. 153 includes derelicts in the definition of wreck.<sup>9</sup> An informative definition for our purposes is found in the Nova Scotia *Municipal Government Act*, SNS 1998, c. 18 at s. 3(v):

In this Act,

"derelict vehicle, vessel, item of equipment or machinery " includes a vehicle, vessel, item of equipment or machinery that

- (a) is left on property, with or without lawful authority, and
- (b) appears to the administrator to be disused or abandoned by reason of its age, appearance, mechanical condition or, where required by law to be licensed or registered, by its lack of licence plates or current vehicle registration;

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<sup>8</sup> See also *Court Line Ltd v R, The Lavington Court*, [1945] 2 All ER 357 at 362, and *The Zeta*, (1875) LR 4 A & E 460 at 462. In *Pierce v Bernis, The Lusitania* [1986] 1 All ER 1011 Sheen J held further that a derelict which sinks remains derelict.

<sup>9</sup> S.C., 2001, c. 26. Bill C-695, An Act to amend the Canada Shipping Act, 2001 (prohibition against abandonment of vessel), discussed below, would have introduced a definition of "deemed abandoned" vessels.

## PART 2 - EXISTING TOOLS DEALING WITH DERELICT AND ABANDONED VESSELS

### *1. The Navigation Protection Act*

The *Navigation Protection Act*<sup>10</sup> (“*NPA*”) provides for the protection of marine waterways from obstructions. The *NPA* is administered and enforced by Transport Canada’s Navigation Protection Program (NPP). The main activity of the NPP is the review and authorization of “works” that may interfere with navigation in the prescribed navigable waters. Nonetheless, under the *NPA* the Minister of Transport, i.e. the NPP, has the power to deal with “obstructions” to navigation of any federal navigable waters.<sup>11</sup>

Under the *NPA*, an “obstruction” is “a vessel, or part of one, that is wrecked, sunk, partially sunk, lying ashore or grounded, or anything that obstructs or impedes navigation or renders it more difficult or dangerous...”<sup>12</sup>

Pursuant to section 15(3) of the *NPA*, “unless otherwise ordered by the Minister, the person in charge of the obstruction shall immediately begin its removal and shall carry on the removal diligently to completion.”

If the person fails to act appropriately, the Minister of Transport has the power to:<sup>13</sup>

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<sup>10</sup> RSC 1985, c N-22; 2012, c. 31. Formerly the *Navigable Waters Protection Act*, amended by the *Jobs and Growth Act, 2012*. According to the Canada Gazette summary, the *Act* was amended to “limit that Act’s application to works in certain navigable waters that are set out in its schedule. It also amends that Act so that it can be deemed to apply to certain works in other navigable waters, with the approval of the Minister of Transport. In particular, it amends that Act to provide for an assessment process for certain works and to provide that works that are assessed as likely to substantially interfere with navigation require the Minister’s approval. It also amends that Act to provide for administrative monetary penalties and additional offences. Finally, it makes consequential and related amendments to other Acts.”

<sup>11</sup> *NPA*, ss. 16 – 20. In addition, the NPP has responsibilities as the Receiver of Wrecks under the *Canada Shipping Act, 2001*, SC 2001, c. 26 (*CSA 2001*) and the *Private Buoy Regulations*. Navigation Protection Program (NPP) officials are designated as the Receivers of Wreck (ROW) and are responsible for administering the provisions of Part 7 of the *CSA, 2001*. See online: <https://www.tc.gc.ca/eng/programs-629.html>.

<sup>12</sup> *NPA*, s. 2.

<sup>13</sup> *NPA*, s. 16.

- a) Order the “person in charge” of an obstruction or potential obstruction in a navigable water to remove it if the situation has persisted for more than 24 hours. Similar provisions are made for vessels left anchored, moored or adrift in a navigable water.<sup>14</sup>
- b) Order “any person” to secure, remove or destroy a “wreck, vessel, part of a vessel or anything that is cast ashore, stranded or left on any property belonging to Her Majesty in right of Canada and impedes, for more than 24 hours, the use of that property as may be required for the public purposes of Canada”.

If the person to whom the order is given fails to comply, the Minister may cause the order to be carried out, and the obstruction sold at auction.<sup>15</sup> The proceeds of the sale may be applied to cover “the expenses incurred by the Minister in placing and maintaining any signal or light to indicate the position of the obstruction, wreck, vessel, part of a vessel or thing or in securing, removing, destroying or selling it”.<sup>16</sup> The costs incurred by the Minister are a debt due to Her Majesty in right of Canada and may be recovered as such.

With respect to “abandoned vessels” section 20 of the *NPA* provides that the Minister may authorize any person to take possession of and remove the vessel “for that person’s own benefit” provided that one month’s notice must be given the owner of the vessel , or, if not known, public notice for the same period in a publication specified by the Minister.

## **2. *Canada Shipping Act, 2001 (“CSA 2001”)***

### **a) Receiver of Wreck**

Part 7 of the *CSA 2001* establishes the office and duties of the Receivers of Wreck (ROW). Any person that finds a wreck must report it to the ROW, officer of Transport Canada.<sup>17</sup> Section 160 of the *CSA 2001* provides for the ROW, to dispose of or destroy a wreck, or authorize its disposition or destruction, if certain requirements are met. The relevant sections of the *CSA 2001* are outlined below:

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<sup>14</sup> *NPA*, s. 19.

<sup>15</sup> *NPA*, s. 16 and 19.

<sup>16</sup> *NPA*, s. 17, and 19(2)-(3) in respect of vessels anchored or adrift.

<sup>17</sup> *CSA 2001*, s. 155(1).

160 (1) A receiver of wreck may dispose of or destroy wreck, or authorize its disposition or destruction,

(a) after 90 days following the date that the wreck was reported under paragraph 155(1)(a); or

(b) at any time if, in the receiver's opinion, the value of the wreck is less than \$5,000, the storage costs would likely exceed the value of the wreck or the wreck is perishable or poses a threat to public health or safety.

153 wreck includes

(a) jetsam, flotsam, lagan and derelict and any other thing that was part of or was on a vessel wrecked, stranded or in distress

The *CSA 2001* specifically provides that a ROW “is not required to take any measures, or to direct that any measures be taken, with respect to wreck.”<sup>18</sup>

#### **b) Removal by the Canadian Coast Guard (CCG)**

If a derelict vessel becomes a source of pollution or is a pollution threat, and if the owner is unknown, unwilling, or unable to respond, CCG (as DFO's appointed agency) has the authority to take appropriate measures. Section 180 of the *CSA 2001* gives the Minister of Fisheries and Oceans (DFO) authority to repair, remedy, remove and destroy vessels which have discharged, are discharging, or are likely to discharge a pollutant including oil. In cases of oil pollution, the costs associated with this work can be recovered from the Ship Source Oil Pollution fund. However, the CCG does not have authority to remove the vessel itself.

#### **c) Sale by Minister of Transport**

The Minister of Transport “may sell a vessel that is deemed abandoned under the regulations”.<sup>19</sup> However, we understand this power has not been invoked by the Minister in the past and would only be invoked if it is shown to be in the “best interests of Canada”. In addition, despite the statutory language there are no regulations and it is unclear when the Minister would deem a vessel to be abandoned.

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<sup>18</sup> *CSA 2001*, s. 155(3)

<sup>19</sup> *CSA 2001*, s. 226.

### **3. Canada Marine Act**

The *Canada Marine Act*, SC 1998, c 10 (“*CMA*”) regulates ports and other marine infrastructure in Canada and includes the power, duties and responsibilities of port authorities and public ports.

Section 123 of the *CMA* deals with abandoned ships and gives enforcement officers at port authorities and public harbours, typically the harbour master, the right to remove “a ship or goods left abandoned within the enforcement officer’s area of designation” if it impedes or interferes with safe use or operation of the port. The enforcement officer may detain the ship and cause it to be removed at the owner’s expense if the owner does not comply with a removal order. Section 123(2) reads as follows:

#### Detention and removal

(2) If a person fails to remove a ship or goods as directed by an enforcement officer under subsection (1) or if no person appears to be in charge of the ship or goods, the officer may detain the ship or goods and remove them to a place that the officer considers suitable, and the costs of the detention and removal are recoverable in the same manner as fees payable under this Act.

Similar powers are granted to enforcement officers appointed under *Fishing and Recreational Harbours Act* with respect to harbours scheduled under that Act.<sup>20</sup> If the person fails to comply with the enforcement officer’s removal order he may seize the vessel and remove it with the costs recoverable as a debt due to Her Majesty in right of Canada for charges under the Act.

### **4. Maritime claims in rem**

If the vessel appears to have value, a port or other interested party may commence an action *in rem* in the Federal Court of Canada. A claim for “dock charges, harbour dues or canal tolls including, charges for the use of facilities supplied in connection therewith” under section 22(2)(s) of the *Federal Court Rules* may be pursued purely *in rem*.<sup>21</sup> In other words, the warrant for arrest and statement of claim may be served on the vessel itself as opposed to any particular person.<sup>22</sup>

Once the action is commenced the plaintiff can apply to the court for an order for appraisal and sale of the vessel, either *pendente lite* or upon getting a default judgment. Where service on the

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<sup>20</sup> *Fishing and Recreational Harbours Act*, R.S.C. 1985, C. F-24, s. 14.

<sup>21</sup> *Federal Courts Act*, RSC 1985, c F-7, s. 22(2)(s) in conjunction with s. 43(3).

<sup>22</sup> *Federal Courts Rules*, SOR/98-106, R. 479 & 482.

owner has not been made, the court will not likely grant a Sale Order unless it is satisfied sufficient efforts to locate the owner have been made. However, if there is evidence that the vessel is derelict or appears to be abandoned the degree of effort required may not be very onerous.

Usually the Sale Order will require that the sale be advertised. To save costs, the advertisements may be done in local newspapers and/or online. The advertisement notifies all creditors of the pending sale and sets a date by which any creditors must file their claims in the court. As well, the advisement will invite interested parties to submit an offer to purchase the vessel.

### **Priority of Claims**

Once all claims are filed a court hearing will determine the order of priority in which the claims will be paid from the proceeds of the sale (assuming the vessel actually sells). The usual order of priorities under Canadian maritime law is:

1. Court costs and marshal's expenses related to the seizure and sale of the vessel.
2. Claims secured by a statutory or maritime lien;
3. Mortgages; and
4. Statutory rights *in rem* (which includes claims for goods and services to Canadian vessels, and claims for dock charges).

The recent decision of Justice Harrington in *Ballantrae Holdings Inc. v. The Ship Phoenix Sun*, 2016 FC 570 clarified certain issues with respect to a port facility's claims against a derelict or abandoned ship at its wharf:

- a) A claim for berthage will not ordinarily to be granted priority nor will it rank as a maritime lien. "Berthage" while necessary for most ships under arrest is not to be confused with "necessaries" under section 22(2)(m) of the *Federal Courts Act* and section 139 of the *Marine Liability Act*.
- b) The priority given under section 122 of the *Canada Marine Act* only benefits Canada Port Authorities and persons that "entered into agreement under s. 80(5)" with respect to parts of the Saint Lawrence Seaway. Berthage claims by independent port authorities therefore enjoy no special priority.

- c) A distinction may be drawn between berthage and other services supplied by the port facilities such as electricity, water and security. Such supplies may benefit all creditors and the Court may exercise its equitable jurisdiction to give it priority ranking.
- d) If upon the arrest, any party moves to have the Marshal put in possession then both berthage and the supply of other necessities would rank as Marshal's costs.

### ***5. Contract and common law***

In situations where a maritime claim is not available (for instance dock charges/harbour dues were never agreed to and are not owing) or where the *NPA* and *CMA* are not applicable, a property owner dealing with an abandoned vessel on its premises is left with his or her contractual and common law rights.

Contractually, parties are at liberty to frame their rights as they please absent any overriding public policy concerns. This means that a property owner can preserve the right of removal by agreement and even incorporate by reference the provisions of provincial warehousemen lien acts authorizing the right of detention and sale.<sup>23</sup> The ability to incorporate provincial statutes by reference into a contract was recognized in *False Creek Harbour Authority v Shodan (The)*, 2002 FCT 275. Of course, contractual rights depend entirely on the other party's willingness to honour its obligations and their value is limited to situations of pre-arranged moorage and berthage etc. or, if the terms of berthage are clearly publicized in notices, online, etc.

If there is no contract a property owner's last resort is the common law prohibition against trespass to property. A number of Canadian cases recognize trespass to property by ships (see e.g. *Western Forest Products*, ([2011] F.C.J. No. 1858 (trespass to land); *North King Lodge Ltd. v. Gowlland Towing Ltd.*, 2005 BCCA 557 (trespass to chattels); *Quadra Island Harbour Authority v. The Ship "St. Nicholas" et al.*, Court File T-1038-11 (unreported) and *Campbell River Harbour Authority v. The "ACOR" et al.*, Court File T-1003-10, Order of Tremblay-Lamer J. dated July 13, 2010 (unreported) and *Town of Shelburne v. The Ship "Farley Mowatt" et al.*, Court File T-624-15, Order of Fothergill J. dated December 31, 2015 (unreported Interlocutory Injunction). In addition, existing provincial trespassing legislation may be applicable as a result of "cooperative

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<sup>23</sup> Note that these acts also tend to frame the relationship between the warehousemen and the client as bailment. Property owners should be careful to spell out in the moorage/berthage contract that the warehousemen is not a bailee.

federalism” (see e.g. *Jackson v Fisheries and Oceans Canada*, 2006 BCSC 1492 and *Morrison v Halifax Regional Municipality*, 2008 NSSC 375 where provincial and municipal laws of general application were determined to be applicable to wharf owners).

## PART 3 - LEGISLATIVE GAPS

Notwithstanding the various tools described above, the prevalence of derelict and abandoned vessels on the Canadian coast and the cost property owners and taxpayers incur to deal with them indicate that the current legal regime is not well-suited to accomplish widespread prevention and removal of abandoned vessels in Canada. In particular, several core challenges exist:

- Difficulties in identifying the Vessel owner.
- Limited and discretionary scope of the legislation (ROW, *CMA* and *NPA*).
- Right of arrest and sale is only as good as the value of the ship.
- Overall, the regulatory system is fragmented.

### *1. Difficulties identifying the vessel owner*

Finding the owner is the first step in the removal process of an abandoned and derelict vessel. The *CMA* and *NPA* require Transport Canada and port enforcement officers to attempt to direct the owner of an abandoned vessel to remove it before stepping in and organizing the job themselves. More importantly, if, as is frequently the case, the costs associated with removal exceeds the value of the vessel, the costs can only be recovered if the owner is known and has assets himself.

However, vessel registration is incomplete and many ships in Canada cannot be linked to a specific owner. Section 46 of the *CSA 2001* exempts all pleasure craft from mandatory registration under Part 2 of the *Act*. There are thousands of pleasure craft in Canada and many owners do not register their vessels.

In addition, the Transport Canada pleasure craft licencing system (not to be confused with the ship registry), which is required for all pleasure craft powered by an engine of 10 horsepower (7.5W) or more, is not designed to identify the vessel owner based on the properties of the vessel. For instance, searches of the system can only be carried out using two pieces of information – the identification number (ID) assigned to the vessel and the name of the owner. In cases of abandoned vessels, the ID number can be easily removed thereby rendering it nearly impossible to identify

the owner.<sup>24</sup> In addition, searches may only be carried out by recognized authorities such as the RCMP, CCG or a local police force and principally for the purpose of search and rescue operations.<sup>25</sup>

In the commercial sphere, although all vessels over 15 gross tonnes (GT) must be registered in the ship registry, vessels less than 15 GT and powered by an engine of less than 10 horsepower (7.5 kW) are exempt. Furthermore, although failing to register a vessel constitutes a summary conviction offence, the maximum penalty is \$10,000<sup>26</sup> so some vessel owners may not be deterred from failing to register.

As a result, it is too often the case that the owner of an abandoned vessel cannot be found. This creates obvious difficulties with respect to ordering removal. Likewise, even where government has the authority and motivation to cause removal itself, it is impossible to recover removal costs without a named defendant (other than whatever, if anything, is recovered from the disposal of the ship). Accordingly, property owners and municipalities are often on the hook for removal bills in the thousands or even hundreds of thousands of dollars.

## ***2. Limited Scope of the NPA and CMA***

### **a) Limitations of the NPA**

While the *NPA* is a very useful and necessary piece of legislation, the *NPA* only applies to obstructions in a navigable water that is listed in the schedule to the Act. Accordingly, if a vessel does not pose a risk to navigation or is not located in scheduled waters the NPP will not intervene. As we all know, many derelict and abandoned vessels do not create an obstruction to navigation, or are located in “minor waters” not scheduled in the *NPA*.<sup>27</sup>

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<sup>24</sup> Transport Canada Study, *supra*, page 5.

<sup>25</sup> *Ibid.*

<sup>26</sup> *CSA 2001*, s. 79

<sup>27</sup> “Navigable water” is defined as “a canal and any other body of water created or altered as a result of the construction of any work”. In the 1906 Supreme Court of Canada case *Attorney-General of Quebec v. Adams*, 1906 CanLII 58 the Court adopted the “floating canoe” threshold and concluded that: “What is navigability of a river is a question of fact. I do not think the size of the boat has much to do with it. Until a little over one hundred years ago all the great rivers of Canada, including the Saguenay, the Ottawa and the St. Lawrence, above Montreal, were navigated by canoes and flat-bottomed boats... A river may not be capable of navigation in parts, like the St. Lawrence at the Lachine Rapids, at the Cascades, Coteau and Long Sault rapids, the Ottawa at Carillon, the Chaudière and the Chats rapids, and yet be a navigable river, if, in fact, it is navigated for purposes of trade and commerce. The test of navigability is its utility for commercial purposes.”

**b) Limitations of the *CMA and Fishing and Recreational Harbours Act***

The provisions of the *CMA* only apply to Canada port authorities and scheduled public ports. Currently, there are only 18 port authorities and several dozen public ports.<sup>28</sup> Similarly, the provisions of the *Fishing and Recreation Harbours Act*, only apply to specified scheduled harbours. On the other hand, the Canadian coastline is 202,080km long and includes hundreds of thousands of harbours, bays and coves, many of which are *not* under the control of port authorities, public ports, or DFO.

Since the introduction of the National Marine Policy in 1995 there has been a concerted effort by the Federal Government to divest public ports to local interests. Most recently, The Port Asset Transfer Program aims to transfer Transport Canada owned and managed ports to local interests including other federal departments and crown corporations, provincial governments and municipalities, the general public and indigenous groups. The effect of these transfers is that port facilities lose their status as “public ports” under the *CMA*. Similarly, DFO’s Small Craft Harbours program has transferred the management of “small craft harbours” to volunteers and not-for-profit organizations. As a result, there is a growing list of marine facilities which fall outside the scope of *CMA* and *Fishing and Recreational Harbours Act* and have no statutory authority to, among other things, order the removal vessels and obstructions in their port or harbour.

In these cases, the best a port can hope for is that it had enough foresight to require the owner of an abandoned vessel to enter into a berthing agreement preserving the right of removal contractually, failing which, the port will have to rely on the common law prohibition against trespass to property as discussed above.

**c) Discretionary powers under *CMA, NPA and CSA, 2001***

Last but not least, even if the *CMA* or the *NPA* apply or the preconditions in the *CSA, 2001* are met, Transport Canada and port enforcement officers are never required to remove an abandoned vessel. All three acts use the permissive language akin to “may order removal”. In particular, the

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<sup>28</sup> *Public Ports and Public Port Facilities Regulations*, SOR/2001-154, Schedule 1 and Transport Canada De proclamation Notifications, online: <https://www.tc.gc.ca/eng/programs/ports-deproclamationnotices-1113.htm>.

ROW's powers are entirely discretionary; he can choose to do nothing. If the owner of the vessel is known but missing, the ROW will take the position that he has no authority to act. This may occur for example, if the RCMP, DFO or CBSA orders a vessel into port, seizes it and the owner subsequently disappears leaving behind a derelict vessel.<sup>29</sup> Similarly, Harbour Masters regularly refuse to exercise their powers under the CMA to order removal of a derelict.

Absent the political will, many derelicts are not dealt with. Clearly not all abandoned ships need to be removed or destroyed and it would not be sensible to force governments to remove all derelict and abandoned vessels.

### ***3. Traditional right of arrest and sale insufficient***

Although the power of arrest and sale of a ship is significant, the legislation is premised on the fact that the arrested ship has value and can be purchased through the court process by a buyer willing to remove it from the wharf owner's premises. The problem is that many derelict vessels are liabilities rather than assets and finding a buyer can be difficult if not impossible.

When the scrap steel market is competitive, it may be worthwhile for ship breakers to buy abandoned steel vessels through the court process to be dismantled and sold for scrap. However, scrap steel prices have declined sharply in recent years and there is currently no appetite to buy old ships. Other materials such as fiberglass, asbestos, wires, etc. simply add to the disposal costs.

In short, success depends on finding a buyer and there are no guarantees of that ever happening. If a buyer is found, it may be several months or years after the action is commenced. Clearly, up-front legal costs are required to commence the action and proceed with the sale, not all of which may ultimately be recovered.

## **PART 4 – SOME PROPOSED SOLUTIONS**

A number of solutions, which may be cumulative, have been proposed including:

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<sup>29</sup> See e.g. *Town of Shelburne v. The Ship Known as "Getaway" et al.*, Court File T-1697-12.

## ***1. Defining “Derelict vessel” and “Abandoned Vessel”***

The 2012 Transport Canada Study on derelict and abandoned vessels recommended that definitions of the terms “derelict vessel” and “abandoned vessel” be adopted.<sup>30</sup> As stated above, there is currently no definition for these terms in the Canadian federal legislation. The definition in the Nova Scotia *Municipal Governments Act* may be a good start.

Bill C-695: *An Act to amend the Canada Shipping Act, 2001 (prohibition against abandonment of vessel)* introduced by former Conservative MP John Weston and received first reading on 17 June 2015 provided that a vessel would be “deemed abandoned” if it is left anchored or adrift in Canadian waters for more than 30 days, is left of private property without authorization, or is “left anchored, moored or adrift in any Canadian waters and is in danger of sinking or breaking up, is obstructing a waterway or poses a serious and imminent danger to human health or safety, the environment or property” and give the Minister the right to sell free and clear a vessel that is “deemed abandoned”. The Bill died on the order paper as a result of the October 2015 federal election.

Other definitions may also be considered. For example, the Florida Statutes - 2011 provide that:<sup>31</sup>

823.11 Abandoned and derelict vessels; removal; penalty.—

(1) “Derelict vessel” means any vessel, as defined in s. [327.02](#), that is left, stored, or abandoned:

(a) In a wrecked, junked, or substantially dismantled condition upon any public waters of this state.

(b) At any port in this state without the consent of the agency having jurisdiction thereof.

(c) Docked or grounded at or beached upon the property of another without the consent of the owner of the property. ...<sup>32</sup>

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<sup>30</sup> Transport Canada Study, *supra*, page 20.

<sup>31</sup> Online: <https://www.flsenate.gov/Laws/Statutes/2011/705.101>.

<sup>32</sup> The remainder of s. 823.11 provides for a prohibition against abandonment of vessels, penalties payable for abandonment, and sets out the rights of state and private property owners to deal with abandoned vessels on their on public or private property, respectively. In addition, the definition of “abandoned property” in s.705.101(3) of the Florida Statutes, specifically includes “derelict vessels as defined in s. 823.11(1)” (Online: <https://www.flsenate.gov/Laws/Statutes/2011/823.11>).

Notwithstanding the foregoing, Florida Fish and Wildlife Conservation Commission and law enforcement officers will first “tag” a vessel if it is observed with indicators that it may become a derelict vessel in the near future.<sup>33</sup> The tagged vessel is classified as an “At Risk Vessel” and entered into a state database of such vessels. The registered owner is sent a notice that the vessel has been “tagged” and given an opportunity to take steps to remove the ship’s “At Risk” classification failing which the State may charge him under a public nuisance law and remove the vessel at the owners cost. The system is useful in that it complies with a ship owner’s procedural right to be appraised that its vessel is deemed “at risk” and also shifts the responsibility for the ultimate determination of the “derelict/abandoned” condition to the registered owner because of their failure to act on the notice.

## ***2. Prohibition on abandonment and Minister’s authority to sell***

Bill C-695, referred to above, would have added a section to Part 11 of the *CSA 2001* making it a summary conviction offence for a vessel owner to intentionally abandon his or her boat. Offenders would be liable for a fine of not more than \$100,000 or imprisonment for a term of not more than one year, or both.

The Bill is consistent with the spirit of the *London Convention, 1972* and *Protocol* of 1996 to which Canada is a party and the provisions of the *Canadian Environmental Protection Act, 1999* against disposal of ships at sea.<sup>34</sup> While the *London Convention* does not apply to internal waters it does specifically state that:

4 .1 "Dumping" means: ... .2 any deliberate disposal into the sea of vessels, aircraft, platforms or other man-made structures at sea; ...

6. "Vessels and aircraft" means waterborne or airborne craft of any type whatsoever. ...

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<sup>33</sup> Florida Fish and Wildlife Conservation Commission website: “Derelict, Abandoned & At Risk Vessels”. Online: <http://myfwc.com/boating/waterway/derelict-vessels/>.

<sup>34</sup> *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972* and the *1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972*; *Canadian Environmental Protection Act, 1999* (S.C. 1999, c. 33), s. 123.

Given that there is currently no clear prohibition against intentionally abandoning a vessel in Canada other than incidental pollution prevention regulations, a legislative change akin to Bill C-695 is a good idea. While a mere prohibition won't stop unscrupulous people from engaging in bad behaviour, it would likely have some deterrent effect and it's a relatively easy legislative change that requires very few resources to implement and manage.

### ***3. Improve the Registration and Licencing Regime***

One of the critical changes required to reduce the number of abandoned and derelict vessels is to facilitate and improve the identification of the owner of the ship. That requires amendment to the registration and licensing regime in Canada. Some proposed changes could include:

- Amend the *CSA 2001* and its regulations so that *all* commercial vessels must be registered, regardless of whether or not they are powered;
- The pleasure craft licencing system should include information on vessel ownership, tonnage, construction material and type, mortgage details and vessel characteristics so that a specific vessel can be more readily linked to its owner;
- Make the pleasure craft licencing database searchable by the general public. According to Transport Canada's website "Information may be disclosed to parties involved in search and rescue activities, as well as law enforcement agencies for the purpose of carrying out a lawful investigation and enforcing any law of Canada, including the requirement to pay provincial sales tax", however, private property owners and port facilities cannot search the registry.
- Increase the penalty for failing to register/licence.
- Require sellers to report the sale of a ship and commence transfer of ownership.

### ***4. Designating the CCG as receiver of wreck: Bills C-231 (2011)***

Bill C-231: *An Act to amend the Canada Shipping Act, 2001 (derelict vessels and wreck)* was first introduced by former NDP MP for Nanaimo, British Columbia, Ms. Jean Crowder and received first reading on 16 June 2011. The Bill did not become law but has been re-introduced at least twice.<sup>35</sup> The Bills would have designated the CCG as a receiver of wreck for the purposes of Part 7 of the Act and mandated that receivers of wreck “shall” take reasonable steps to “determine and locate” the owner of the wreck and, subject to regulations to be enacted, “shall” take reasonable steps to remove, dispose of or destroy wreck.<sup>36</sup>

The efficacy of Bill C-231 would have been limited. The Bills would have shifted responsibility for derelict ships from the NPP (Transport Canada) to the CCG (DFO). The need and mechanics of this transfer of responsibilities need to be carefully considered. In any event, neither Bill addressed the underlying difficulties in identifying derelict ship owners without which there is a real risk that by obliging DFO (or any Federal agency or Department) to remove all abandoned vessels at its own expense, vessel owners would be incentivized to dump, instead of recycle, aging ships.

### **5. Disposal Fund**

Like the Ship Source Oil Pollution Fund for oil pollution, a fund for removing abandoned and derelict vessels has been proposed.<sup>37</sup> Such a fund is already in place in some US jurisdictions, including Washington and Oregon. For example, the Washington State Department of Natural Resources (DNR) Derelict Vessel Removal Program provides expertise and financial assistance to public entities to remove and dispose of abandoned vessels. Under the program, DNR provides reimbursement of up to 90% of the cost of removal and disposal of an abandoned vessel.<sup>38</sup> Reimbursements are paid out from a disposal fund which is replenished from a variety of sources

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<sup>35</sup> Bill C-638: *An Act to amend the Canada Shipping Act, 2001 (wreck)*, introduced by Jean Crowder, NDP MP for Nanaimo – Cowichan (B.C.), defeated as of May 13, 2015 and Bill C-219: *An Act to amend the Canada Shipping Act, 2001 (wreck)*, introduced February 4, 2016 by Sheila Malcolmson, NDP MP for Nanaimo – Ladysmith (B.C.).

<sup>36</sup> Both bills would have amended section 155(2) of the *CSA 2001* so that the receiver of wreck shall take steps to locate the vessel’s owner and shall take measures, subject to the regulations, “to remove, dispose of or destroy wreck”.

<sup>37</sup> See e.g. CBC News, “Derelict boat fee proposed to pay for cleanup of wrecks” (February 2, 2016). Online: <http://www.cbc.ca/news/canada/british-columbia/derelict-boat-fee-proposed-to-pay-for-cleanup-of-wrecks-1.3430318>.

<sup>38</sup> Washington State Department of Natural Resources, *Recovering Derelict Vessels*. Available at: <http://www.dnr.wa.gov/programs-and-services/aquatics/recovering-derelict-vessels>

including annual vessel registration fees and non-resident vessel permit fees.<sup>39</sup> Funding is provided on a case by case basis with priority allocated to abandoned vessels in danger of breaking up, sinking, or blocking a navigational channel, or vessels that present a risk to human health, safety or the environment.<sup>40</sup> Since 2002 more than 580 abandoned or neglected vessels have been removed including larger ships such as the former drug running ship *Helena Star* at a cost of more than USD \$1.8M.

In Canada, a similar fund could be created with a tax on vessel ownership, or transfer of ownership, and/or a levy on all vessel imports into Canada. A disposal fund is likely the most effective method of dealing with abandoned vessels and it helps keep the cost of dealing with derelict ships within the ship owning community. However, the creation of a fund may incentivize vessel dumping by owners and it should be created together with the enactment of a strict prohibition on the intentional abandonment of ships and amendments to the licencing and registration systems as discussed above.

#### **6. Mandatory insurance and direct action – “Nairobi Wreck Removal”**

Recognizing that it is crucial that shipowners have the financial resources to meet their obligations for abandoned vessel removal, another potential solution is mandatory insurance for vessel owners.

This approach has been instituted for larger ships. The IMO *Nairobi International Convention on the Removal of Wrecks* provides the legal basis for states to remove, or cause to be removed, wrecks which may have the potential to adversely affect the safety of lives, goods and property at sea, as well as the marine environment. “Wreck” is defined to include “... sunken or stranded ships ...” of parts thereof, “... any object that is lost at sea from a ship that is stranded, sunken or adrift ...” and ships that may become sunken or stranded.<sup>41</sup> Although the Convention does not apply to abandoned and derelict vessels *per se*, there is some overlap. Importantly, the Convention requires all shipowners to carry mandatory insurance to cover liability for wreck removal for all vessels in

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<sup>39</sup> State of Washington, *Abandoned and Derelict Vessel (ADV) Legislative and Administrative Review – 2015*. Available at: [https://marinedebris.noaa.gov/sites/default/files/ADV-Docs/WASHINGTON\\_ADV\\_Legal\\_Review\\_2015\\_NOAA\\_MDP.pdf](https://marinedebris.noaa.gov/sites/default/files/ADV-Docs/WASHINGTON_ADV_Legal_Review_2015_NOAA_MDP.pdf).

<sup>40</sup> Washington State Department of Natural Resources, *Recovering Derelict Vessels*. Available at: <http://www.dnr.wa.gov/programs-and-services/aquatics/recovering-derelict-vessels>

<sup>41</sup> *Nairobi International Convention on the Removal of Wrecks*, IMO Doc. LEG/CONF 16/19.

excess of 300 GT and has a significant number of operational provisions that would be relevant in the context of a wreck removal operation.

The *Nairobi Convention* entered into force on April 14, 2015. Canada should adopt the terms of the Convention and extend its application to territorial and inland waters as permitted by Article 4 as recommended in Transport Canada's Policy Paper of April 2010.<sup>42</sup>

Canada could consider, in addition, to lower the tonnage threshold of Canadian flag ships to which the *Nairobi Convention* applies so that smaller Canadian vessels are also required to carry insurance. However, doing so would require significant legislative amendment since insurance can only be required if the registration and licensing system is updated. In addition, the domestic insurance market may be unwilling to issue policies for aging vessels therefore offering no real solution to the problem. Furthermore, unlike wrecks, abandoned vessels are often the result of intentional neglect by the owners which may result in policy coverage issues.

### ***7. Berthage and removal lien***

As indicated above, private ports and ports transferred from Transport Canada do not benefit from the provisions of the *CMA* and have no statutory lien for unpaid berthage. Given that abandoned ships frequently occupy valuable berthage space, that the independent ports are typically run by local governments and continue to be maintained for the benefit of the public it is unclear why they should not receive the same priorities and authority as the large CPAs. In many cases, the port facility is the one most directly affected by the derelict ship's presence in terms of lost revenue, public perception and ultimately, the cost of safeguarding and dealing with the derelict (to the benefit of all other creditors, if any). An enactment providing all ports with removal powers corresponding to those available to *CMA* ports would give port facilities a little more security to take action against vessels abandoned at their wharves.

### ***8 Revisit Disposal at Sea***

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<sup>42</sup> Transport Canada, online: <https://www.tc.gc.ca/eng/policy/acf-acfi-nairobi-menu-2210.htm>.

For much of Canada's history, it was common to scuttle old ships by sending them to the ocean floor. Dumping of ships at sea is prohibited under the *London Convention 1972* and the 1996 Protocol, as well *Canadian Environmental Protection Act, 1999*. In each case, a permit is required authorizing the disposal at sea. Although there is the possibility for the creation of artificial reefs, it is currently very difficult if not impossible to get approval for disposal at sea under the *Canadian Environmental Protection Act, 1999*. However, disposal at sea is an attractive option for wharf owners dealing with floating but valueless abandoned vessels. In these cases, the cheapest option may be to have the vessel cleaned, towed away from the owner's premises and sunk in deep water.

In this regard, there is some merit to revisiting the law regarding environmentally safe disposal of ships at sea which have been cleaned of all pollutants. For example, as long as all oil and pollutants are removed from a ship (for which the Ship Source Oil Pollution Fund is already partly liable), its disposal in deep water has no effect on navigation and minimum disruption to the natural environment. In some cases, municipalities may even see increased tourism as a result of new dive sites.

### ***9. Modify the Federal Court Sale Process***

As indicated above, abandoned vessels can be arrested and sold through the court process. However, many ships which end up causing problems are churned through the Federal Court's sale process multiple times before eventually being purchased at "bargain" prices and subsequently abandoned by the owners when they realize the ship is worthless. Typically such buyers take the ship from its current location and dump it at another. The victimized port/facility has no idea of the plans and therefore cannot intervene at Court to object to the sale. Accordingly, it may be worth considering whether the Federal Court should direct the officer commissioned to sell the ship to take into account the viability of ship removal/disposal plans when it recommends and/or approves a sale for less than a threshold value or the market value of the ship (or a combination of both factors).

### ***10. Tax rebates for ship disposal facilities***

In many cases the underlying problem is that disposal costs are more than the ship is worth. Accordingly, another potential solution may be to try to reduce the cost of scrapping ships by

giving ship disposal facilities a tax break on their income tax or giving the shipowner an increased tax credit on responsible ship disposal. This may help “close the funding gap” of disposal costs.

## **PART 5 – CONCLUSION**

The Honourable David McGuinty, Liberal MP for Ottawa South, summarized the problem with abandoned vessels succinctly when he stated in Parliament that “everybody's job is nobody's job”.<sup>43</sup>

As indicated above, Transport Canada can become involved in a case of an abandoned or derelict vessel if it is an obstruction to navigation. On the other hand, should an abandoned vessel involve pollution, the CCG is called upon to address the issue. However, once the pollution has been dealt with, the CCG has no authority to move or destroy the ship. A derelict which is cleaned of oil but otherwise decomposing may be left at the wharf (see e.g. MV “Farley Mowatt”).

Although the CCG is in a position to recover its expenses related to oil pollution from the Ship Source Oil Pollution Fund, the liability of the Fund is limited to incidents “in relation to oil”.<sup>44</sup> As a result, the CCG is unable to recover any costs associated with removing other common pollutants such as asbestos and mold from an abandoned vessel.

Altogether, confusion reigns and the system lacks unity. The foregoing provides a few suggestions to promote discussion on the matter.

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<sup>43</sup> Open Parliament, Bill C-638 (Historical). Available at: <https://openparliament.ca/bills/41-2/C-638/>

<sup>44</sup> *Marine Liability Act*, SC 2001, c 6, s 101.