

A photograph of a derelict boat, possibly a fishing vessel, partially submerged in a calm lake. The boat is tilted and appears to be in poor condition, with some parts missing or broken. It is positioned near a wooden pier or dock structure on the left. The background features a dense forest of evergreen trees covering a hillside, with a mountain peak visible in the distance under a clear blue sky. The water reflects the surrounding landscape and the boat.

# Dealing with derelict and abandoned Ships

ERIC MACHUM

KYLE EREAUX

# Outline

- ▶ The Problem
- ▶ Existing tools to deal with derelict and abandoned vessels
- ▶ Legislative gaps
- ▶ Proposed solutions

# The Problem

- ▶ Approx. 400 abandoned and derelict ships counted in Canada.
- ▶ Safety concerns
- ▶ Obstructions to navigation
- ▶ Threats to marine environment
- ▶ Unsightly
- ▶ Locations for illegal activity, illegal housing, vandalism
- ▶ Removal is very expensive



# Kathryn Spirit





# MV Miner



# What is a derelict?

- ▶ No definition of derelict and abandoned vessel in the *Canada Shipping Act, 2001 (CSA 2001)*.
- ▶ *The Humboldt v The Escort (No 2)* (1914), 21 Ex. C.:  
"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.

# What is a derelict?

- *Municipal Government Act, SNS 1998, 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;

# Existing Tools to deal with derelicts

- ▶ Navigation Protection Act (NPA) – Navigable Waters Protection Program (NPP)
- ▶ Canada Shipping Act, 2001
  - ▶ Receiver of Wreck
  - ▶ Removal by Canadian Coast Guard (CCG)
  - ▶ Sale by Minister of Transport
- ▶ Canada Marine Act (CMA)
- ▶ Maritime claims in rem
- ▶ Contract and common law



# Navigation Protection Act

- ▶ NPP may cause a wreck or vessel to be removed if it obstructs or makes navigation of any federal **navigable waters** more difficult or dangerous (NPA, s. 16)
- ▶ If vessel is “abandoned” Minister may authorize any person to take possession of and remove the vessel for his own benefit provided that 1 month’s notice be given to registered owner if known (NPA, s. 20).

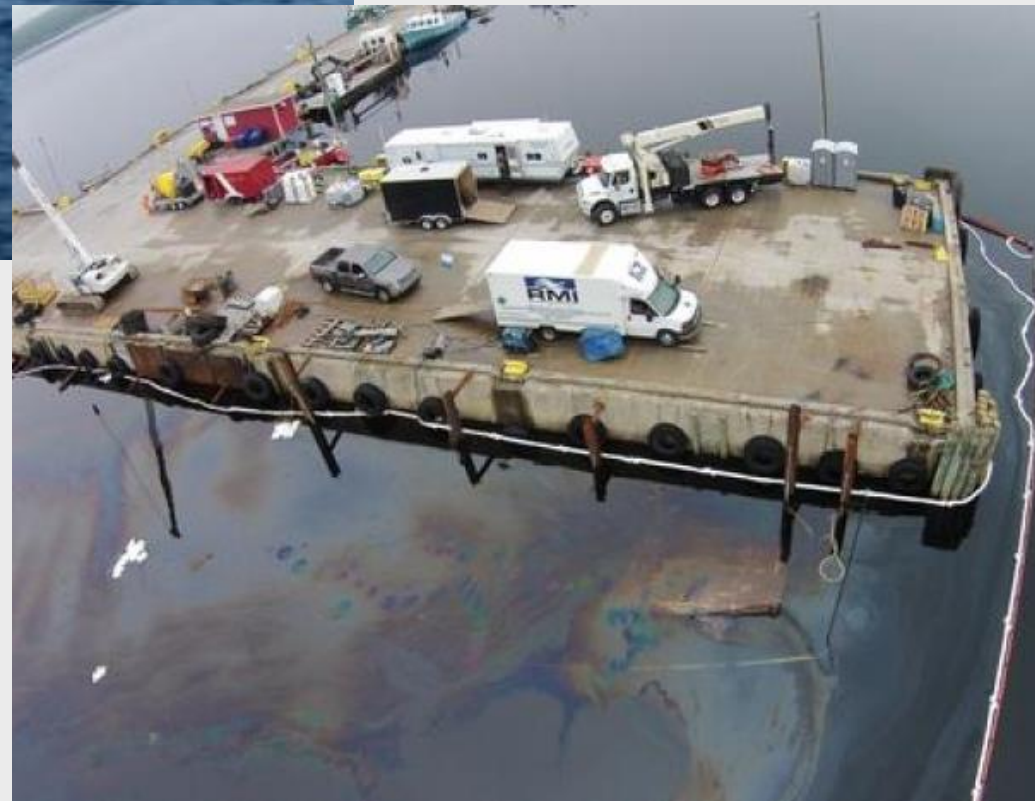
# Canada Shipping Act, 2001

- ▶ Receiver of wreck
  - ▶ Appointed by Transport Canada – part of NPP.
  - ▶ Authorized to dispose or destroy a wreck *if*
    - ▶ 90 days gone by since reported
    - ▶ Wreck is less than \$5,000, storage costs exceed value of wreck or poses public health hazard.

# Canada Shipping Act, 2001

- ▶ “Removal” by CCG
  - ▶ CCG authorized to take measures if derelict vessel becomes a source of pollution or is a pollution threat, and if the owner is unknown, unwilling, or unable to respond.
  - ▶ If oil pollution threat Ship Source Oil Pollution Fund may cover the cost.

# MV Farley Mowat







# Canada Marine Act

- ▶ Canada Port Authorities and Harbour Masters authorized 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 (CMA, s. 123).
- ▶ Costs of removal recoverable from owner in the same manner as fees under the CMA.
- ▶ Claims for berthage have priority under s. 122 of the CMA.

# Maritime claims in rem

- ▶ If a maritime claim is available, e.g. claim for “dock charges” under s. 22(2)(s) of the Federal Court Rules, property owner may proceed in rem in the Federal Court.
  - ▶ Claims for dock charges are not defeated by transfer of ownership of the ship and service of the action can be done on the ship itself (don't need to find the owner).
  - ▶ Action in rem may lead to Court ordered sale.

# Maritime claims in rem

- ▶ Issues with priorities of claims (***Ballantrae Holdings Inc. v. The Ship Phoenix Sun***, [2016 FC 570](#)):
- ▶ A claim for berthage will not ordinarily to be granted priority nor will it rank as a maritime lien.
- ▶ Berthage is not a “necessary” and enjoys no priority under s. 139 of the *Marine Liability Act*.
- ▶ 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)” - independent port authorities enjoy no special priority.
- ▶ Other services and supplies such electricity that benefit all creditors. The Court may exercise its equitable jurisdiction to give it priority ranking.
- ▶ If Marshal put in possession then both berthage and the supply of other necessities would rank as Marshal’s costs.



# Contract and common law

- ▶ Contractually parties are free to frame their rights. Property owners can preserve the right of removal and probably incorporate the provisions of warehousemen's liens acts.
- ▶ Canadian maritime law recognizes trespass to property by ships. Trespass law may be used to obtain an order for the removal of the ship by its owner.
  - ▶ Failure to comply with the Order may result in finding of contempt.
- ▶ Existing provincial trespassing legislation may be applicable as a result of "cooperative federalism"

# Legislative Gaps

- ▶ Difficulties in identifying the Vessel owner.
- ▶ Limited and discretionary scope of the legislation (ROW, CMA and *NPA*).
- ▶ Fed Ct sale is only as good as the value of the ship.
- ▶ Regulatory system is fragmented.



# Difficulties finding the vessel owner

- ▶ Identification of owners is critical
  - ▶ Reduces incentives to abandon vessel.
  - ▶ Helps determine person responsible for removal costs and increases pool of assets to cover those costs.
  - ▶ 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.

# Difficulties finding the vessel owner

- ▶ Vessel registration and licencing is incomplete
  - ▶ Pleasure craft are exempt from mandatory registration under Part 2 of the CSA 2001.
  - ▶ Pleasure craft licencing system is not designed to identify the vessel owner based on the properties of the vessel.
    - ▶ Only search vessel ID and owner's name. If ID removed owner nearly impossible to find.
- ▶ Buyers are ultimately responsible for filing transfer of ownership papers with the registry.
- ▶ Commercial vessels less than 15 GT and powered by an engine of less than 10 horsepower (7.5 kW) are also exempt from registration (eg. small barges).





# Limited scope of NPA and CMA

- ▶ NPA only applies to obstructions in a navigable water that is listed in the schedule to the Act. NPA does not apply to
  - ▶ Derelicts in “minor waters” not subject to the Act.
  - ▶ Derelicts not a hazard to navigation.
- ▶ CMA only applies to Canada Port Authorities and scheduled public ports.
  - ▶ Independent ports do not have statutory authority to order removal or priority for berthage costs.

# Discretionary powers with unclear guidance

- ▶ Even if the CMA or the NPA apply or the preconditions in the CSA, 2001 are met the exercise of powers is entirely discretionary;
  - ▶ ROW may refuse to act if owner of vessel is identified but MIA.
  - ▶ Harbour Masters regularly refuse to exercise the powers granted under the CMA.

# Traditional right in rem and sale is insufficient

- ▶ The power to sell a ship is no good if it has no value – many derelicts cost more to dispose of than they are worth.
  - ▶ Success depends on finding a buyer – could take a long time and there are no guarantees.
  - ▶ Scrap steel used to be a reliable cost-offset but prices have been depressed for a few years. Fiberglass has no residual value.
  - ▶ Legal fees and sale expenses must be incurred.

# Proposed solutions

- ▶ Prohibition on abandonment
- ▶ Improve registration and licencing regime
- ▶ Federal Court sales considerations
- ▶ Reduce ship disposal costs
- ▶ Disposal fund
- ▶ Other proposals

# Prohibition on abandonment

- ▶ Bill C-695: Summary conviction offence for a vessel owner to intentionally abandon his or her boat. Offenders would be liable to a fine of not more than \$100,000 or to imprisonment for a term of not more than one year, or both.
- ▶ Consistent with *CEPA 1999* and *London Convention 1972/1996*.



# Improve registration and licencing regime

- ▶ Require *all* commercial vessels to be registered.
- ▶ 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 licencing system searchable by the general public.
- ▶ Increase the penalty for failing to register/licence.
- ▶ Require sellers to report the sale of a ship and commence transfer of ownership.

# Federal Court Sales

- ▶ Federal Court should direct the officer commissioned to sell a 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).



# Reduce ship disposal costs

- ▶ Reduce the cost of scrapping ships by e.g.:
  - ▶ Tax break on ship disposal income (scrap dealers or shipbreakers) or
  - ▶ Enhanced tax credit for expenditures by ship owner on responsible ship disposal costs.

# Disposal fund

- ▶ Funds have been created in the U.S.A. (Washington, Oregon)
  - ▶ Reimbursement of up to 90% of disposal costs.
  - ▶ Fund sourced from annual vessel registration fees and non-resident vessel permit fees.

# Other Proposed solutions

- ▶ Designating CCG as Receiver of Wreck.
- ▶ Mandatory Insurance and direct action – adopt *Nairobi Wreck Removal Convention*.
- ▶ Create a statutory lien for berthage at all port facilities, not just CPAs.
- ▶ Revisit disposal at sea program.





► Questions?

► Eric Machum

► Email: [ericmachum@metcalf.ns.ca](mailto:ericmachum@metcalf.ns.ca)

► Telephone: 902-420-1990.

► Kyle Ereaux

► Email: [kyleereaux@metcalf.ns.ca](mailto:kyleereaux@metcalf.ns.ca)

► Telephone: 902-420-1990.