THE COASTING TRADE ACT

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INTRODUCTION

Coasting trade is explained by the Canadian Government to entrepreneurs as "marine transportation of goods and people between two points in Canada, as well as any other marine activity of a commercial nature" (http://www.canadabusiness.ca/servlet, last updated 2004-05-18). It refers to activity only within Canada, as opposed to between Canada and another country.

The Canadian Government has a vested interest in ensuring marine commercial activity in Canada is as often as possible facilitated by Canadian ships, in order to stimulate Canadian business generally. The Government, as a means to this end, has implemented the *Coasting Trade Act*, S.C. 1992, c. 31 (*Act*), to regulate who will be permitted to participate in the marine transportation of goods and people, and other marine commercial activity, in Canada.

Canadian ships are the Government's preferred participants. They are not, however, always suitable or available to perform a given marine activity. The *Act* is therefore the method by which the Canadian Government will determine the circumstances in which non-Canadian ships will be permitted to participate in the Canadian coasting trade.

This paper will outline the Canadian coasting trade regime, including the *Act* by which it is governed, the process hopeful non-Canadian ships must follow on wanting to participate, key rulings that have made or not made this possible, and in what circumstances non-Canadian ships will be welcomed into the Canadian coasting trade.

WHAT IS COASTING TRADE?

The *Act* provides a detailed definition of coasting trade in s. 2(1), of which the main elements are the following:

- the carriage of goods:
    - by ship alone or ship and another mode of transport;
    - from one place in Canada or above the continental shelf of Canada to any other place in Canada, or above the continental shelf of Canada;
    - either directly or via a place outside Canada; and
    - for waters above the continental shelf of Canada, includes the carriage of goods only related to the exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf of Canada;
- the carriage of passengers by ship from one place in Canada to another, including to and from above the continental shelf (where the carriage of passengers is related to the exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf of Canada), either directly or via a place outside Canada; and

- engaging by ship in any other commercial marine activity in Canadian waters, and for waters above the continental shelf of Canada, in such other commercial marine activities that are related to the exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf of Canada.

More specifically, the meaning of "a place above the continental shelf of Canada" includes, per s. 2(2) of the *Act*, "any ship, offshore drilling unit, production platform, artificial island, subsea installation, pumping station, living accommodation, storage structure, loading or landing platform, dredge, floating crane, pipelaying or other barge or pipeline and any anchor, anchor cable or rig pad used in connection therewith."

According to the *Act*, the Canadian coasting trade is reserved for Canadian ships, except when there is no suitable Canadian ship available to carry out the activity.

If there is question as to whether a given activity is properly considered coasting trade pursuant to the definition in the *Act*, the particulars of the activity are referred to Transport Canada, who will then be charged with deciding whether the activity falls within the *Act*.

WHAT IS A COASTING TRADE LICENCE?

A coasting trade licence will permit a ship to engage in the coasting trade in Canada.

The Canadian Transportation Agency defines a coasting trade licence as "a licence issued by the Minister of National Revenue to a Canadian resident who has applied for permission to bring a foreign flagged vessel into Canadian waters to perform a service or activity within Canadian waters over a specified period of time... [It] is issued when there are no suitable Canadian vessels available to perform the service or activity" (<http://www.cta-otc.gc.ca/marine>, updated 2003-01-06). Added to this definition should be that a coasting trade licence will also apply to a non-duty paid ship.

Section 2(1) of the *Act* indicates a coasting trade licence is "a document, issued pursuant to this *Act*, authorizing a foreign ship or a non-duty paid ship to engage in the coasting trade while in Canadian waters or in waters above the continental shelf of Canada."

Hierarchy of Ships

A Canadian ship, as defined in the *Act*, will not require a coasting trade licence. It is only in reference to Canadian ships, however, that a coasting trade licence will be awarded.

Both non-duty paid ships and foreign ships wishing to engage in the Canadian coasting trade require a licence.

The hierarchy of ships in the coasting trade is as follows:

(1) Canadian ships;

(2) Non-duty paid ships; and

(3) Foreign ships.

A coasting trade licence will therefore only be issued to a non-duty paid ship if there is no suitable Canadian ship available to perform the service or activity described in the coasting trade licence application (and if the other requirements in the *Act* are met).

It will only be issued to a foreign ship if there is no non-duty-paid or Canadian ship available to perform the service or activity described in the coasting trade licence application (and if the other requirements in the *Act* are met).

In order to qualify for a coasting trade licence, therefore, non-duty paid ships must show the one type of ship above them in the hierarchy (Canadian ships) will not be suitable and available to perform a given activity, and foreign ships must show the two types of ships above them in the hierarchy (Canadian ships and non-duty paid ships) will not be suitable and available to perform a given activity.

Canadian Ship

The *Act* defines a Canadian ship as "a ship registered or listed under Part 2 of the *Canada Shipping Act, 2001* and in respect of which all duties and taxes imposed under the *Customs Tariff* and the *Excise Tax Act* have been paid" (s. 2(1)).

There are therefore two parts to this definition: a ship must be registered or listed, and a ship must have met all duties and taxes imposed.

REGISTERED OR LISTED

For a ship to be registered in Part 2 of the *Canada Shipping Act, 2001*, S.C. 2001, c. 26 (*CSA*), per s. 46(1) of the *CSA* that ship is "not a pleasure craft…is wholly owned by qualified persons…and is not registered, listed or otherwise recorded in a foreign state."

For a ship to be considered listed under Part 2 of the *CSA*, it must be a bare-boat chartered vessel, registered in another country, which has suspended the foreign flag it usually flies. This is explained in s. 48 of the *CSA* as follows:

> 48. A vessel that is registered in a foreign state and that is bare-boat chartered exclusively to a qualified person may be listed under this Part as a bare-boat chartered vessel for the duration of the charter if, for the duration of the charter, the registration is suspended in respect of the right to fly the flag of that state.

Section 2 of the *CSA* generally notes a bare-boat charter arrangement is "a vessel charter agreement under which the charterer has complete possession and control of the vessel, including the right to appoint its master and crew."

Note that the inclusion of listed ships in Part 2 of the *CSA*, and thereby in the *Act*'s definition of Canadian ship, is recent, having occurred July 1, 2007, pursuant to SI/2007-65. This has allowed for an additional means by which ships may meet the highest level in the ship hierarchy.

ALL DUTIES AND TAXES ARE MET

Both the *Customs Tariff*, S.C. 1997, c. 36 (*CT*) and the *Excise Tax Act*, R.S., 1985, c. E-15 (*ETA*) set out duties and taxes that must be paid with respect to ships. See the final section of this paper, titled Duties, Taxes, and Coasting Trade Licences, for a discussion on the interaction between these pieces of legislation, related regulations, and coasting trade licences.

Non-duty Paid Ship

A non-duty paid ship is defined in the *Act* as "a ship registered in Canada in respect of which any duties and taxes under the *Customs Tariff* and the *Excise Tax Act* have not been paid" (s. 2(1)).

Foreign Ship

A foreign ship is defined as "a ship other than a Canadian ship or a non-duty paid ship" (s. 2(1)).

Why is it important to obtain a coasting trade licence?

Without a coasting trade licence, a foreign or non-duty paid ship may not participate in the coasting trade in Canada. The *Act* specifically sets this out:

> 3(1) Subject to subsections (2) to (5), no foreign ship or non-duty paid ship shall, except under and in accordance with a licence, engage in the coasting trade.

The exceptions to this rule in 3(2) to (5) of the *Act* indicate that a coasting trade licence is not required by any foreign or non-duty paid ship that meets any of the following descriptions:

- used as a fishing vessel as defined by the *Coastal Fisheries Protection Act*, and that does not carry goods or passengers other than incidentally to its fishing activity (s.3(1)(a));
- is engaged in ocean research commissioned by the Department of Fisheries and Oceans (s.3(1)(b));
- is operated or sponsored by a foreign government that has the consent of the Minister of Foreign Affairs to conduct marine scientific research (s.3(1)(c));
- is engaged in salvage operations, except where such operations are performed in Canadian waters (s.3(1)(d));
- is engaged in activities related to a marine pollution emergency or to a risk of a marine pollution emergency, as determined by a pollution prevention officer or person authorized to carry out inspections (pursuant to the *CSA*) (s. 3(2));
- is providing assistance to persons, ships or aircraft in danger or distress in Canadian waters (s. 3(3));
- is engaged in operations permitted by the *United States Wreckers Act* (s. 3(4)); or

- is a ship owned by the United States Government and used for the sole purpose of transporting goods of Canadian or United States origin owned by the Government of the United States to supply Distant Early Warning Sites (s. 3(5)).

If a foreign or non-duty paid ship does participate in the coasting trade in Canada without a coasting trade licence, s. 13(1) of the *Act* sets out that "the ship is guilty of an offence and is liable on summary conviction to a fine not exceeding fifty thousand dollars," with each day this occurs being representative of a separate offence (s. 13(2)). This offence can be tried in any court that would have had jurisdiction "if that offence had been committed within the limits of the court's ordinary jurisdiction" (s. 14(1)).

If an enforcement officer on reasonable grounds suspects that a ship has engaged in the coasting trade without the appropriate licence, the enforcement officer may stop and board the ship and with the benefit of a warrant seize any evidence of this offence (s. 15(1)). No warrant is required where there are exigent circumstances making it impracticable to obtain a warrant (s. 15(2)).

The enforcement officer may go so far as to require the owner, master, or any other person to produce the official log book or other ship document that may provide evidence of the offence (s. 15(3)(a)), and to give the enforcement officer "all reasonable assistance" (s. 15(3)(b)). An enforcement officer may also order a ship detained on believing on reasonable grounds that an offence has been committed (s. 16(1)), when the ship is in Canadian waters or in waters above the continental shelf of Canada (s. 16(2)).

What information does a coasting trade licence include?

The Minister of National Revenue has wide discretion in setting the terms and conditions of a coasting trade licence, given s. 6(1) of the *Act* stipulates the Minister may include any terms and conditions he/she considers appropriate. A licence will most often include parameters on the service or activity to be performed (s. 6(1)(a)), and the locations in which the service or activity may be performed (s. 6(1)(b)).

The licence will also indicate the length of time for which it is valid. There is no minimum time period; however, the maximum duration for a foreign ship is the earlier of 12 months or the expiration of any certificate or document relating to Canada's shipping conventions (s. 6(2)(a)), and 12 months for a non-duty paid ship.

Note that a coasting trade licence can be suspended, cancelled, or its terms and conditions varied where the owner or master of the ship is convicted of an offence under any Canadian statute related to navigation or shipping (s. 6(3)(a)), or any term or condition of the licence has not been complied with (s. 6(3)(b)).

THE CANADIAN TRANSPORTATION AGENCY

NOTE: the following information is taken from the *Canadian Transportation Agency Guidelines respecting Coasting Trade Licence Applications*, available at <http://www.cta-otc.gc.ca/marine/coasting-cabotage/guidelines_e.html>, last updated 2003-08-27 [*Guidelines*] and *About the CTA*, available at

<http://www.cta-otc.gc.ca/about-nous/index_e.html>, last updated 2007-12-17.

The main purpose of the *Coasting Trade Act* is to "protect the interests of operators of Canadian registered ships while allowing access to foreign ships when suitable Canadian registered ships are not available." The Minister of National Revenue is charged with issuing coasting trade licences authorizing foreign or non-duty paid ships to pursue commercial activity in Canadian waters; however, he/she cannot do so unless the Canadian Transportation Agency (Agency) first has determined that "no suitable Canadian ship or non-duty paid ship, where applicable, is available to perform the activity described in the application." When the coasting trade licence application concerns the transportation of passengers, the *Act* mandates the Agency must establish whether "an identical or similar adequate marine service is offered."

The Agency more generally is an independent, quasi-judicial tribunal that rules on economic matters involving federally-regulated modes of transportation (air, rail and marine). It also facilitates dispute resolution for transportation rate and service complaints.

The Agency's enabling legislation is the *Canada Transportation Act*, S.C. 1996, c. 10 which is a reflection of the Federal Government's transportation policy. The Agency, created in July 1996, continued the National Transportation Agency. It houses five full-time members, a maximum of three temporary members, and 270 employees and administrative staff.

The mission of the Agency is to "administer transportation legislation and Government of Canada policies to help achieve an efficient and accessible transportation system by education, consultation and essential regulation." Part of its mandate is to protect Canadian marine vessel operators when deciding on allowing foreign vessels to operate in Canadian waters.

The *Act* sets out that the Canadian coasting trade is reserved for Canadian-registered ships. However, when a suitable Canadian ship is not able to carry out the activity, a foreign ship may be permitted to take up the commercial activity in Canadian waters.

THE COASTING TRADE LICENCE APPLICATION PROCESS

NOTE: the following information is taken from the *Canadian Transportation Agency Guidelines respecting Coasting Trade Licence Applications*, available at <http://www.cta-otc.gc.ca/marine/coasting-cabotage/guidelines_e.html>, last updated 2003-08-27 [*Guidelines*].

General

In order to be permitted to use a foreign-registered or non-duty paid ship in the Canadian coasting trade, one must apply simultaneously to the Canada Customs and Revenue Agency (CCRA) and the Agency to obtain the required coasting trade licence. The Agency is charged with determining whether a suitable Canadian ship is available to perform the activity identified in the application and, in the case of the carriage of passengers, the Agency must also determine whether Canadian vessels offer adequate, similar passenger services.

The Agency must first make its ruling on the above and, second, the CCRA will be permitted to issue a coasting trade licence to use a foreign-registered or non-duty paid ship. A decision by the Agency does not grant the authority to start the operations indicated in the application. The authority comes from the Minister of National Revenue, who officially grants the licence.

The necessary application submitted both to the CCRA and the Agency is properly referred to as an application for a Vessel Temporary Admission to the Coasting Trade of Canada.

Timelines for Applications

Applications for coasting trade licences ought to be filed with the Agency as early as possible before the start of the proposed service or activity. The Agency has set out guidelines on applicable time periods for applications, depending on the nature or urgency of the activity.

Coasting trade applications must be filed 30 days before the start of the proposed service or activity for non-urgent, long-term services or activities. This includes pre-planned services with dates and locations which are known in advance, and activities related to offshore resource exploration and development.

Fifteen days is the required time for non-urgent short term services or activities, which includes single-trips, isolated or non-repetitive operations, and pre-planned services or activities.

Eight days is the required time for oil tanker operations.

There also exists a fast track process which applies to urgent services and activities that will not be adequately accommodated by the above timelines, which also includes situations or circumstances beyond the Applicant's control. Further, the fast track process may be used for commercial opportunities of a short duration where any economic consequences would negatively impact on a business or community.

For a fast track, the onus is on the Applicant to obtain from the Agency a list of any potential operators of Canadian registered ships, contact those operators, and advise the Agency as to whether there will be a Canadian registered ship offered. An urgent application with no suitable Canadian ship available can be processed in one day or less.

The Pleadings Stage

The *Guidelines* refer to the application process as the pleadings stage. After the submission of an application to the CCRA and the Agency, the following takes place.

The Agency combs its database of Canadian registered ships to determine which operators have requested notification of coasting trade applications. The Agency then issues a Notice of Coasting Trade Application (Notice) to the identified Canadian registered ships, requesting those operators reply as to whether they have ships that are suitable and available to perform the activity or service identified in the application, and in the case of an application with respect to the carriage of passengers, whether the operators offer identical or similar marine services.

If no objection or offer is received, the Agency will determine there is no suitable and available Canadian registered ship, and will remit a decision reflecting this.

Canadian registered ship operators can object to an application, and may offer a Canadian registered ship to perform the service or activity. Objections and offers must be presented to the Agency and Applicant.

Next, the Applicant is given the opportunity to respond to the objections and offers, and operators are permitted a reply to the Applicant's response to the operator's initial objection and offer.

The Agency then examines all the evidence submitted to determine whether offered ships are in fact suitable and available to provide the service or activity set out in the application, or for the carriage of passengers, whether the operators offer identical or similar marine services.

The time limits (in business days) for the pleadings process are the following:

Advance notice:	**30 days**	**15 days**	**8 days**	**Fast track**
1st answer from Respondent(offer, if any):	8 days	3 days	2 days	*
Applicant's comments:	5 days	3 days	2 days	*
2nd answer from Respondent (reply):	2 days	1 day	1 day	*

* Fast track time limits will be assessed on a case-by-case basis.

Section 9 of the *Act* sets out the following:

> 9. In making a determination referred to in subsection 8(1), the Agency may request from the applicant for the licence to which the determination relates, and from the owner of any Canadian ship or non-duty ship to which the determination relates, such information and documentation as the Agency deems necessary.

The Agency therefore suggests parties bring forward all relevant information before being asked.

Per s. 8(2) of the *Act*, the Governor in Council may make regulations indicating the criteria for the Agency to use in hearing licence applications. There are no regulations, nor have there ever been any, prescribed by the Governor in Council for this purpose.

A coasting trade licence may only be applied for by a Canadian resident, acting on behalf of the foreign or non-duty paid ship.

Onus on the Applicant

The onus is on the Applicant to establish the justification for the importation of a foreign ship, and must therefore state all facts, circumstances, and grounds for the licence. The *Guidelines* suggest the application include the following information:

- a detailed description of the activity or service identified in the application;
- the type of ship required, size, capability and any other specifications that are pertinent to the proposed activity or service;
- reasons for the proposed dates and why they cannot be changed, if applicable;

- identify operators of Canadian registered ships who have been contacted before the filing of the application;

- why the Applicant determined that there was no alternative but to import the foreign ship identified in the application; and

- any other relevant information supporting the application.

An Objecting or Offering Party

A party submitting an objection or an offer in response to an application must provide specific facts outlining its offered ships or available service. The *Guidelines* suggest a response should include

- the name, description and specifications of the offered ship(s), including type, size, capacity, capability, on-board equipment, and any other relevant information justifying the offer;

- how is(are) the ship(s) going to perform the activity or provide the service described in the application;

- availability of the offered ship(s) with respect to the time period identified in the application, or its opinion with respect to another period when the activity could be performed; and

- in the case of the carriage of passengers, all pertinent information on the deemed identical or similar adequate marine service.

The Tests

When a ship is offered, the onus falls on the Applicant to satisfy the Agency that it is not suitable and/or not available for the activity set out in the application.

This test is reflected in s. 4(1)(a) of the *Act* for foreign ships:

> (a) the Agency has determined that no Canadian ship or non-duty paid ship is suitable and available to provide the service or perform the activity described in the application [...],

and in s. 5(a) of the *Act* for non-duty paid ships:

> (a) the Agency has determined that no Canadian ship is suitable and available to provide the service or perform the activity described in the application [...]

Nowhere in the *Act* are the terms "suitable," "available," or "identical or similar adequate marine service" defined. Applications will therefore be heavily fact specific.

In assessing suitability, given the *Act* does not say an offered Canadian ship must be identical to the applied for ship, the Agency will not assess suitability of the offered ship by comparing it

with the applied for ship. It will, rather, examine the requirements of the activity, and determine whether the Canadian ship is capable of performing that activity.

The Agency has, however, identified technical, operational, and commercial suitability as factors it will consider in making a determination, and will only consider these if they are raised in pleadings. Technical suitability means the "technical characteristics of the ship and equipment," and operational and commercial suitability means "the operational and/or economic implications of using the foreign ship versus the Canadian ship offered." The onus is on the Applicant to show the impact on the project of using a Canadian ship, given the implication is that Canadian registered and crewed ships will have operating costs that foreign ships will not have.

With respect to availability, the *Act* does not say an offered Canadian ship must be available for the exact dates in the application. The Agency has previously decided that, based on particular circumstances, the time period for a proposed activity could be "reasonably flexible without affecting the parties' interests." The *Guidelines* note the Agency may use the following factors related to this point:

- why the dates stipulated in the application are crucial and why alternatives could not be considered;
- the capability of the offered ship to be at the required site on time; and
- location of the offered ship and repositioning delay.

In applications relating to the carriage of passengers and passenger services, the *Act*, in addition to determining suitability and availability, requires the Agency to decide, under s. 4(1)(b) for a foreign ship and in s. 5(b) for a non-duty paid ship, "that an identical or similar adequate marine service is not available from any person operating one or more Canadian ships [...]."

Rendering a Decision

The Agency, pursuant to s. 29(1) of the *CTA*, must render its decisions a maximum of 120 days after having received an application. The parties do, however, have the option of extending this time.

At any time before the Agency delivers a decision, an Applicant may withdraw its application, or an offeror can withdraw its offer of a Canadian ship. Also, applications or offers can be modified prior to the release of an Agency decision, so long as the modifications do not significantly change the application or offer.

Contesting a Decision

Once an Agency decision is rendered, there are three options for contesting it set out in the *CTA*.

First, reviewing, rescinding, or variation is an option per s. 32, "if, in the opinion of the Agency, since the decision or order or the hearing of the application, there has been a change in the facts or circumstances pertaining to the decision, order or hearing." If a licence has already been issued, the issue is considered moot, and a licence will not subsequently be revoked.

Second, per s. 40, the Governor in Council may vary or rescind a decision.

Third, as indicated in s. 41, an appeal can be made to the Federal Court of Appeal by filing an application for leave to appeal, within 30 days of the Agency making its decision, on a question of law or jurisdiction.

RELATED LEGISLATION AND REQUIREMENTS

Having a licence issued is not the sole requirement to be satisfied when engaging in the coasting trade. Other requirements must be met, with the most common involving Human Resources and Social Development Canada and Citizenship and Immigration Canada for matters such as employment authorizations and visas required by foreign crew members (if the work by foreign crew members is considered employment in Canada and does not meet any applicable exemptions), and Transport Canada for matters related to ship safety.

A coasting trade-licensed ship will also remain subject to all other Canadian rules and regulations, which is obvious for a non-duty paid ship but made explicit for a foreign ship, with ship safety and pollution rules and regulations addressed specifically at s. 4(2) of the *Act*:

> 4(2) For greater certainty, the issuance of a licence pursuant to subsection (1) does not affect the application of any law of Canada that imposes safety or pollution prevention requirements in respect of ships.

Related, for foreign ships to obtain a coasting trade licence, is s. 4(1)(d) which specifically sets out that a licence will only be awarded when, in addition to the other requirements in s.4(1) being met,

> 4(1)(d) all certificates and documents relating to the foreign ship issued pursuant to shipping conventions to which Canada is a party are valid and in force; and
>
> 4(1)(e) the foreign ship meets all safety and pollution prevention requirements imposed by any law of Canada applicable to that foreign ship.

The *Act* does not set out requirements mirroring s. 4(1)(d) and (e) for non-duty paid ships since, as non-duty paid ships are not foreign ships, they will not have the particular documentation stemming from shipping conventions referred to in s. 4(1)(d), and a system is already in place to ensure non-duty paid ships meet all Canadian safety and pollution prevention requirements.

INTERPRETATION OF THE *COASTING TRADE ACT*

As set out above, the key to any coasting trade licence application will always be whether there is a Canadian or non-duty paid ship suitable and available to provide the service or perform the activity described in the licence application, and will, in the case of the carriage of passengers, additionally be whether there is an identical or similar adequate marine service available from any person operating one or more Canadian ships.

Crucial to answering these questions, and therefore to logically structuring arguments for and against coasting trade licences, will be definitions, explanations, and interpretations of the terms

"suitable," "available," and "identical or similar adequate marine service." As noted about, these terms are not defined in the *Act*.

The *Guidelines* provide an outline of what these terms mean, but do not offer concrete fact-specific applications. The two potential sources of fact-specific applications are judicial considerations of the *Act* and Agency rulings.

Judicial Consideration of the *Coasting Trade Act*

There has been only minimal judicial consideration of the *Act* and, as a result, the Courts have not provided any significant analysis on its interpretation and application.

Canadian Transportation Agency Decisions

General

Given the scarce judicial consideration of the *Act*, Agency rulings are the main source of guidance on the practical application of the *Act*, and the source to use when searching for previously successful arguments in favour of or against an application. Agency rulings are available at <http://www.cta-otc.gc.ca/rulings-decisions/index_e.html>.

Note that the rulings are heavily fact-dependant. The *Guidelines* themselves indicate that the "Agency's consideration of applications is based on the merits of each application, including the offer and related pleadings as there are no unique criteria or standards to determine whether a Canadian registered ship is suitable and available or, in the case of passenger services, whether there is an identical or similar adequate marine service available."

Below is a discussion of notable Agency decisions applying the terms "suitable," "available," and "identical or similar adequate marine service," and the same for the sub-categories of technical, financial, and commercial suitability. While the *Guidelines* list financial and commercial suitability as separate criteria, the Agency decisions, likely given the interrelated nature of these criteria, deal with these together. There is also one ruling listed as using as a consideration the provision of a service or activity on an urgent basis, which is included as an illustration of an urgency argument used successfully in a licence application.

Note that the majority of rulings are only one or two pages total. The rulings below represent lengthier decisions in which the Agency clearly gave additional analysis. In searching Agency rulings, the focus ought therefore to be on lengthier decisions, given that in shorter decisions it is not always clear how particular conclusions were reached.

Suitability and Availability

In **Decision No. 447-W-2001**, Logix Marine, the Applicant, on behalf of the TGS-NOPEC Geophysical Company ASA, applied for a coasting trade licence to use the RV Northern Access, a Cyprus-registered seismic research vessel, to conduct a multi-client 2-D seismic survey off the east coast of Canada. The activity was to take place on parts of the Scotian shelf and Grand Banks, between June 30, 2001 and November 30, 2001. Geophysical Service Incorporated (GSI) on June 1, 2001 objected to the application, and filed an offer for use of its Canadian-registered vessel GSI Admiral.

The issue before the Agency, pursuant to s. 8(1) of the *Act*, was whether there was a suitable Canadian vessel available to provide the proposed seismic survey service or activity described in the application.

The Applicant made several submissions discounting GSI's offer and vessel. First, it submitted that GSI's June 1, 2001 correspondence, because it did not include the proposed commercial terms of the offer, was not in fact a bona fide offer filed. The Applicant further submitted that, notwithstanding this, the GSI Admiral was not suitable to conduct the described survey activity as it had not received a full term Transport Canada safety inspection certificate, and therefore there was no certainty that the GSI Admiral would comply with Canadian regulatory requirements, in time for the Applicant's activity. Additionally, the Applicant noted its seismic survey activity required a minimum 8,000 meter streamer cable, while the GSI Admiral's was 7,200 and, although capable of a temporary conversion, the 7,200 meter cable would not meet the 8,000 meter requirement on which its 6 month seismic program relied. Also, the Applicant claimed the GSI Admiral's recording software was limited to recording data up to 6,000 meters of seismic cable, the previous industry standard, and there were no plans for extending this to accommodate the Applicant's 8,000 meter industry standard cable. Finally, the Applicant argued the GSI Admiral's seismic recording software was not Y2K compliant.

In sum, the Applicant believed it was using tried and true resources, in an economical fashion, with its technology used for seismic survey activities representative of the technology expected in the industry in 2001. The technology offered by GSI was not unacceptable, however it was not what was expected by the modern industry.

GSI, in objecting to the application, indicated its Canadian-flagged vessel, owned by a Canadian company and crewed with Canadians, would be a contribution to the Canadian economy; the Applicant's beliefs on suitability and equipment were inaccurate; the Applicant's timeline would result in unnecessary foreign capacity in Canadian waters; GSI's equipment was Y2K compliant and it could provide the required equipment; the GSI Admiral would not change its survey system until it became involved with an activity requiring a new system; and the *Act* did not result in Canadian vessel owners having to "argue the fine points of recording equipment and software," with the Applicant's arguments on these points representing merely an attempt to take away from the conversation on suitability and availability.

The Agency noted that with respect to the issue of whether GSI's letter of objection of June 1, 2001 was a commercial offer, the process required by the Agency is for Canadian operators to offer their vessels, with subsequent negotiations left to the parties themselves.

On the issue of suitability, the *Act* "does not require that the Canadian or non-duty paid vessel offered to conduct an activity in Canadian waters be identical to the foreign vessel for which a coasting trade licence is requested, but rather that the Canadian or non-duty paid vessel be suitable to perform the activity described in the application."

The Agency found that the survey equipment made available by GSI on the GSI Admiral, while not identical to that found on the RV Northern Access, was "suitable to perform the activity described in the subject coasting trade licence application," finding no evidence that the GSI Admiral is not suitable for the proposed activity. With respect to the equipment on the GSI Admiral, while not identical to that of the Applicant's vessel, it would be suitable for the activity

set out in the licence application. The equipment required would be satisfied by a combination of GSI obtaining the necessary equipment, and already having comparable equipment.

With respect to whether the technology proposed by GSI was acceptable, the Agency noted that its mandate under the *Act* is not to determine whether the survey equipment of the offered vessel is identical to the Applicant's vessel, or whether the offered vessel has the best technology available. Instead, "the Agency must determine whether the Canadian-registered vessel is suitable to perform the seismic survey activity described in the application, including through the acquisition of additional equipment, where deemed necessary, to perform such an activity."

The Applicant initially stated the GSI Admiral was not suitable due to a lack of the equipment required for the survey activity, however later indicated the reason was its "absence of history" in this activity. The Agency found that "reduced, or absence of, previous experience of a refitted vessel in a certain work area, cannot be interpreted as the vessel being unsuitable for the work."

With respect to availability, the Applicant failed to show any evidence that the GSI Admiral would not be available to start the activity on the required date.

The Agency therefore found per s.8(1) of the *Act* that there was a suitable Canadian vessel available to perform the service or activity described in the application made by Logix Marine.

Suitability

In **Decision No. 304-W-2007**, A. E. Horne and Son Limited, on behalf of Cianbro Corporation, applied for a coasting trade licence to use a Flexifloat Barge and Trestle during the construction of a bridge between New Brunswick and Maine from April 13, 2007 to December 13, 2007.

The Applicant gave evidence that the barge required must be sectional, such as its Flexifloat, given the construction of the bridge will take place on a river between two river damns, and only a sectional will allow delivery to the project site by truck. The barge will be used to transport material and personnel back and forth across the river during the construction of the bridge. Given the barge would be situated in waters 0 to 15 feet in depth, any barge with more draft than Flexifloat will be more susceptible to puncture on rocks in the shallow waters.

In response to the offers, the Applicant noted two of the offerors owned or could provide vessels; however, having Flexifloats provided by another firm would be impracticable since they could not be delivered from the Canadian side of the river as an access road had not been constructed on the Canadian side of the project. The Applicant indicated it would be counter-productive to import barges into the United States, then redeploy them into Canada.

The Agency, in response to the Applicant's acknowledgement that Canadian operators possessed sectional barges that could be used for the project, dismissed the Applicant's argument that it would be impracticable to bring these to the United States from Canada then have them re-enter Canada. The Agency found this technically possible and, as a result, "the Canadian barges or sections cannot be considered unsuitable."

The Agency found the Applicant did not show Canadian barges and floating sections were unsuitable for part of the project. Given Canadian barges and floating sections were available and capable of being used for the portion of the project in Canadian waters, per s. 8(1) of the *Act*

that meant there were suitable Canadian ships able to provide the service or perform the activities described in the application.

Availability

In **Decision No. 250-W-2001**, P.F. Collins Customs Broker Limited, the Applicant, on behalf of Polar Ship Management AS applied for a coasting trade licence to operate the Polar Princess, a Norwegian research vessel, to conduct a 2-D seismic survey off the east coast of Canada. This was to take place exclusively on the continental shelf zone, from April 16, 2001 to August 20, 2001. Geophysical Service Incorporated ("GSI") filed an offer for a Canadian ship on April 9, 2001.

The issue for the Agency was whether, pursuant to s. 8(1) of the *Act*, there was a suitable Canadian vessel available to provide the service or activity proposed by the Applicant.

The Application made the following arguments as to why the offered vessel was not appropriate: the offered vessel was Panamanian, not Canadian registered, and had not been taken over by GSI; equipment installation and conducting dry-dock would not start until GSI took over the vessel; it did not have the same capabilities to perform the work as the Polar Princess had; it had been laid up for 16 months and substantial efforts were needed to make her operational; and the vessel's sellers had only put minimum attention into the vessel during her lay-up, and she therefore may not be in good condition.

The Applicant also indicated that GSI did not provide information that its vessel would be available at the same time as the Polar Princess, therefore the time required by the Applicant.

GSI gave evidence countering each of these arguments.

With respect to availability, GSI stated that its vessel being available at the same time as the Applicant's ought not in fact to be an issue, given survey operations done during a June to October period (the period which GSI could accommodate) have similarly favourable weather as the April to August period (the period for which the Applicant had requested a vessel).

The Agency framed its analysis by stating the intent of the *Act* is to allow foreign vessels to be used in Canadian waters where there are no Canadian vessels available for the proposed activity. The Agency concluded GSI's vessel was a suitable Canadian vessel available for the service or activity described in the application, given it was registered in Canada, was of comparable size and capacity to the Applicant's vessel, and the Applicant had not questioned GSI's suitability to perform seismic research, thereby failing to show the offered Canadian vessel was not suitable for the activity proposed.

With respect to the timing of the project, the application was for a period starting April 16, 2001, with the Applicant's vessel arriving in Canada around April 28, 2001. GSI's vessel would be operational by about May 25, 2001. The Agency noted the Applicant gave no reason for why the survey had to be done over this specific time period, while GSI argued the activity could be performed later in time. The Agency also noted that it "examined applications received in the past years for seismic research and survey, and found that the period for similar activities ranged from April to November." The Agency therefore found that GSI's vessel, a suitable Canadian vessel, was available to perform the proposed activity.

The Applicant applied for a review of the Agency's decision (see **Decision No. 448-W-2001**) based on new information coming to light regarding the suitability and availability of the GSI Admiral, specifically regarding its seismic configuration capability, delay in its availability, and the seismic program schedule. To determine whether to allow the review, the issue before the Agency became whether there had been a change in the facts or circumstances, within the meaning of s. 32 of the *Canada Transportation Act*, warranting a review of its prior decision, as the Agency may review, rescind or vary its previous decisions when new facts or circumstances have arisen since it released its decision.

The Applicant argued GSI's updated indication that its vessel would be available June or early July of 2001, coupled with GSI having previously advised it would be available no later than May 25, 2001, showed uncertainty with respect to the availability of GSI's vessel to perform the work intended by the Applicant and was therefore a change in circumstances. The Applicant also stated that the Agency had in the past ruled that delivery dates for service could not be arbitrarily changed, and the Agency could not therefore determine a vessel to be available if it was not ready to undertake work during the dates set out in the original application.

The Applicant argued its activity would have to be rescheduled due to operational reasons including the weather, and the delayed availability would jeopardize timely completion of the proposed program.

GSI replied that GSI Admiral would be available June 25, 2001, and the month delay should not justify a review of the previous Agency decision. GSI identified that the Agency had already noted that the normal period for seismic research on the east coast is April to November and therefore had already determined GSI's vessel would be considered available to perform the activity, and the Agency had already found the Applicant did not justify that its survey program had to be completed within a specific time period.

GSI also stated that the Applicant was misinformed as to the seismic survey equipment that GSI had available.

With respect to the availability of the GSI Admiral, the Agency found new information on its available dates may be considered new facts and circumstances, given some of this information was not available when the Agency heard the licence application. Key, however, is that the Agency had initially found that the normal period for the type of activity proposed would run between April and November of any given year, and although June 25, 2001 was one month later than the date originally offered by GSI, it still fell within the April to November period. The Agency also noted that in its decision in the original application, no justification was filed by the Applicant to show why April 16, 2001 as a start date was necessary. The Agency therefore found on review that the Applicant's statement that its Polar Princess remained available to start the seismic research showed that the activity it planned to pursue was feasible during this period and that the start date it had indicated was not critical. The Agency dismissed the application.

In **Decision No. 500-W-2002**, Lydon Dredging and Construction Company Limited applied for a coasting trade licence to use an American trailing suction hopper dredge called Padre Island to perform maintenance dredging of a shipping channel off the Magdalen Islands, Quebec, originally with a termination date of September 15, 2002, subsequently amended to September 30, 2002.

The issue for the Agency was whether there was a Canadian ship or non-duty paid ship suitable and available to provide the service or activity described in the application.

Several offers of Canadian vessels were filed. In particular, offeror Dragage Verreault stated that July 21 to September 30 is very short to perform this type of work and the dredging period could be much longer; the dredging required could instead take place from April 1 to October 31 and could still meet the environmental constraints; it would be "deplorable" for the Applicant to be able to use a foreign ship simply by restricting the period of activity from July 21st to September 30th when Canadian vessels could have done the work if the period had been "reasonable." Its dredge was available May 27th to perform the work, could complete the work in the spring of 2003, and could join with Harbour Development to complete the work. It indicated the Agency must deny any application for a foreign ship if a Canadian ship is suitable and available to perform the job, and "it must also ensure the licence is granted to use a foreign ship only for the portion of the work that a Canadian ship cannot perform."

In response to the offers, the Applicant stated the following: the project could not be postponed since its federal and provincial environmental permits were set to expire October 31 and December 31, 2002; an offered vessel being available for the activity prior to the period in which the Applicant required it was not relevant; and sharing the work between vessels would pose problems with respect to completing the work and the division of responsibility.

Canadian Salt was granted intervenor status, and submitted there were environmental constraints due to a fragile ecosystem, and only the Applicant met the technical requirements of the federal and provincial environmental permits, and only it guaranteed the work would be completed pursuant to the timelines set out in the permits.

Offeror Harbour Development, while aware of the Agency's mandate to determine whether there is a suitable Canadian vessel available to meet the Applicant's demand, argued the Agency must, using the intent of the *Coasting Trade Act*, consider whether there were Canadian operators willing to do the work, and the Agency could thereby cause a postponement of the dredging project until 2003.

The Agency had two main issues on which to rule: (1) Whether the Agency is bound by all terms and conditions found in the initial application to import a foreign vessel when deciding whether a Canadian vessel is suitable and available; (2) Whether the Agency has a mandate to find a Canadian vessel is suitable and available to perform only a portion of the proposed activity.

With respect to the first issue, the Agency had to determine what is included in "the service or... activity described in the application" in the context of s. 4(1)(a) of the *Coasting Trade Act*, which states the Agency must determine whether there exists a Canadian vessel that is suitable and available to provide the service or perform the activity as stated in the application.

The Applicant and Intervenor argued this phrase should include terms and conditions with respect to the activity that are found in the application, like type of equipment or time constraints. They also cited previous Agency decisions that they argued set out that the Canadian vessel being offered ought to be able to meet the criteria indicated in the application.

Dragage Verreault argued in response that, given this phrase, such an interpretation would defeat the purpose of the *Act*, which is to protect the Canadian marine industry. The phrase ought to be

interpreted to refer to the goal of the activity. It referred to previous Agency decisions indicating the Agency looks to whether the Canadian vessel is able to perform the work, not whether it is the best available vessel, and to decisions where the Agency found that certain conditions found in the application were not essential to performing the activity.

The Agency found that in interpreting s. 4(1)(a) of the *Act*, regard ought to be had to the purpose of the legislation. The purpose, as cited by the then Minister of Transport when the Bill introducing the *Coasting Trade Act* became law, was "to reserve what is commonly called the coasting trade to Canadian ships in waters over which we have jurisdiction...this *Act* protects operators of Canadian flagships which seem to work within Canadian waters." In speaking to this section in particular, he noted "we must appreciate that there is not always a suitable Canadian ship available capable of carrying out the task needed."

The Agency therefore found that the purpose of the *Act* is to protect the Canadian marine industry, with s.4(1)(a) existing "only as a necessary exception to this general purpose." The Agency therefore found "the service or...the activity described in the application" must be read to refer only to the actual task. The Agency did, however, recognize restrictions regarding deadlines for completing the work, equipment needed, etc., are often legitimate requirements, and in response noted the "onus is on the Applicant to prove to the Agency, however, that any such requirement is necessary for the work." On doing so, the Agency will therefore take these into account.

With respect to the second issue of whether ss. 4(1)(a) and 8(1) of the *Act* gives the Agency the mandate to find a Canadian vessel suitable and available to perform only a portion of the activity set out in the application, the Agency again referred to the purpose of the *Act* as a whole, namely protecting the Canadian marine industry. The Agency noted that restricting its mandate to determining whether a Canadian ship is able to provide the entire service requires clearer language, but if an Applicant can prove it is necessary for a single ship to complete the entire activity, the Agency would take this into account. The Agency therefore found "in suitable circumstances [it could] determine that a Canadian vessel could perform an activity only during the particular time period."

In determining suitability and availability of a Canadian vessel in this situation, the Agency found the first step is to determine what activity the vessel will be required to perform, using the analysis of the activity as a task to be accomplished, considering it is the Applicant who must show additional requirements or constraints are necessary to perform the task. Here, the task was considered by the Agency to be maintenance dredging, and the Agency found that the Applicant and Intervenor argued there were additional requirements that the work must be done by a particular type of dredge called a trailing suction hopper dredge, and the work must be completed by September 30, 2002.

The Applicant pointed to its environmental permits to support the restriction as to equipment type, as one set out that this dredge must be used. Regarding time limits, the Applicant and Intervenor argued the winter storm season starts in September and continues through the winter, making dredging operations then hazardous. Further, in response to suggestions the work could be completed instead in time for 2003, the Intervenor stated that the federal and provincial permits in 2002, and additional permits, could not be obtained in time.

The Agency accepted that it was uncertain whether additional permits could be obtained in time for the work to start in 2003. The Agency also found that starting the work and finishing it in 2003 would impose an unreasonable burden on the company. Regarding the winter storm season, however, contradictory evidence was presented, and the Agency found, in the end, dredging had to be completed by October 31, 2002.

After defining the service or activity, the Agency then in taking the second step, considered per s. 4(1)(a) of the *Act* whether the vessel offered was suitable and available to provide the service or perform the activity. It is open to the Agency to consider technical aspects, and financial and commercial arguments. The Intervenor had submitted the offered vessel would not be technically the best suited due to its smaller capacity, resulting first in longer periods required to dredge the channel, thereby adversely affecting the mussel and scallop population, and second, dredging as a result would take place in the winter storm season, being more dangerous and prone to weather related delays.

The Agency, however, found that the offered vessel was technically suitable for the project as the Environment Canada permit did not note any requirements as to size of vessel, and the permit set out that the impact on the mussel and scallop populations will be monitored during and after the project.

The Agency then noted that there was a challenge to the availability of the offered vessel. Generally, a statement by the Canadian offeror that its vessel is available is sufficient; however, when availability of a vessel is challenged, the offeror must convince the Agency of the availability. The Agency accepted evidence given by the offeror that the vessel would be available by the required date. The offeror, however, admitted it would be impossible to complete the project by the October 31, 2002 deadline set out in an environmental permit.

The Agency therefore determined this was a case where a Canadian vessel was suitable and available to perform **only part** of the activity described in the application and, as such, "the Agency will make a determination to that effect unless the Applicant shows that it is necessary for a single ship to perform the entire project." The Intervenor argued it would be impossible for it to contract with more than one operator for the project as it would be difficult to divide the work between the vessels since it would be impossible to allocate liability should work be improperly done, given the timeline. The offeror retorted with evidence that previously multiple operators had been brought on to such a project without problems.

The Agency found that the Intervenor had flexibility in dividing the work between two or more operators, while still respecting the terms and conditions of the environment permits. It would therefore be feasible to divide any work between several operators. Liability would be a contractual matter to be addressed between the parties, "and is the responsibility of the civil courts should a problem arise."

It is clear the Agency had considered more information than fully reported by it in rendering this ruling. In its closing comments, the Agency noted that a restrictive period for the work, the onerous contractual conditions in the tender, and the Intervenor's refusal to meet with the Canadian operators during the tendering, "all had the cumulative effect of shutting out from the tender process the limited number of Canadian operators who were in a position to offer the specialized equipment requested for this major project."

The Agency, in the next breath, noted that "these factors did not have any bearing on the Agency's determination as to whether there is a Canadian or non-duty paid ship that is suitable and available to perform the dredging project." However, the Agency noted it took a "dim view of the actions that are designed to circumvent the spirit and intent of the [*Act*]."

The Agency therefore determined that as of September 15, 2002 there was a suitable Canadian vessel available to perform the activity described in the application, even though it was only a portion of the proposed activity.

Technical Suitability

In **Decision No. 298-W-2002**, the Applicant, Avalon Customs Brokers, on behalf of Thales Geosolutions (Canada) Limited, applied for a coasting trade licence to use the Baruna Jaya III, an Indonesian geophysical survey ship, to conduct a pipeline route survey off the east coast of Canada from May, 2002 until November, 2002. Secunda Marine Services Limited, Clearwater Deep Sea Trawlers, and Star Line Incorporated objected to the application and each offered their respective Canadian ships for the activity described in the application. Using the analysis below, the Agency determined there was a suitable Canadian ship available to provide the service or perform the activity described in the application.

The Applicant stated that the equipment permanently installed on its vessel, including a hull-mounted multi-beam system, was specifically requested by the client for the activity, but no offered ships were equipped with such a system. While the Applicant recognized Secunda's ships could be equipped to perform the proposed survey, it argued first, the financial impact of doing the equipping, given the short duration of the project, would not be practical, and second, the specifications for modern engineering surveys would not allow temporary fitting of survey equipment on vessels.

The Applicant noted Clearwater's vessel met some of the survey requirements, however, the vessel's size and limited onboard accommodations were not sufficient for the activity, and the vessel would not be able to stay at sea for the entirety of the proposed activity without requiring fuel and water.

Secunda recognized that the Applicant's ship, by already having the required equipment, would mean a significant competitive advantage over a Canadian ship in terms of minimizing mobilization costs. However, the Applicant's ship had no unique features justifying the application. Secunda further noted its ships are suitable given they are recognized by the industry as "appropriate platforms for this type of work," and the survey equipment required can be easily installed. Further, prior to this occasion, Secunda had been asked by the Applicant to provide quotes for the use of its ships, which Secunda argued indicated its ships were deemed to be suitable for the activity. Finally, Secunda noted there is no requirement that the Canadian ship offered must be the most economical.

Clearwater indicated its ship was equipped and available on short notice, and had previously been refitted for the purpose of deep sea pipeline route surveys and, as such, has successfully completed this type of activity before. It also gave evidence that some requirements in the application were not, in fact, needed for the type of survey contemplated.

Star Line similarly indicated the ship is available and equipped, and had recently been modified to include equipment such as the equipment needed by the Applicant.

The Agency noted that with respect to suitability of the Canadian flagged ships, as stated in previous Agency decisions, the *Coasting Trade Act* does not require Canadian or non-duty paid ships offered to be necessarily identical to the ship for which the licence is requested, but rather it must be suitable to perform the activity as set out in the application. The Agency found that the offered ships, although not identical to the Applicant's ship, could perform the work described in the application once fitted with the necessary equipment. The requirements important to the Applicant, such as a hull-mounted multi-beam system, the ability to stay at sea, and adequate onboard accommodations, could be met by the offered ships.

The Agency supported this point on technical suitability by drawing on the reputation of Canadian ships in this area, noting that despite the technology on the offered ships not exactly matching the technology requested by the Applicant, Canadian ships have an excellent record in completing the required pipeline route survey work.

In response to the Applicant's concerns over refitting costs, the Agency found the Applicant had not presented adequate evidence on this point, and that "the test of suitability of Canadian ships does not require the Agency to determine which ship is the most economical to use to perform the activity described in the application."

The Agency therefore found there was a suitable Canadian ship available to provide the service or perform the activity described in the application.

In **Decision No. 392-W-2002**, the Applicant, General Electric Canada (Hydro) Incorporated, applied for a coasting trade licence to use an unknown foreign vessel to transport a hydro turban runner between Montreal, Quebec and Trail, British Columbia, via Portland, Oregon for one month, starting August 2002. The application dealt only with the shipment between Montreal and Portland as the final destination in British Columbia had not been finalized at the time of the application. Four companies objected to the application and offered their Canadian ships.

The Applicant, in response to the offers, submitted conditions specified in its application, namely under-deck stowage (to protect the shipment from corrosion), not wanting to use a tug and barge (due to stability concerns), requiring a self-geared vessel, and having a ship equipped with its own heavy lifting device, had not been met by the offers. As a result, industry shipping norms would not be satisfied. Further, the Applicant submitted that its insurance underwriters may not accept the tug and barge as a transportation option, given it may present unacceptable risks.

McKeil Marine, an offeror, had available tugs and barges, and its company was experienced in carrying large equipment. It had been investigating protective devices like shrink wrap or other water-tight shells to protect the shipment from corrosion. It proposed its stability book be submitted to enable an architect to reassure the Applicant that no stability problem existed.

The Agency noted that the *Act* would not require an offered ship to be identical to a foreign ship. Rather, an offered ship must be suitable to perform the activity as set out in the application. Unique here was that the foreign ship was unknown – it had not yet been decided on.

Regarding the Applicant's concerns related to risk of transporting the shipment on a tug and barge, the Agency found stability and load security are marine safety issues and not within its jurisdiction, but rather within the mandate of Transport Canada Marine Safety. The Agency did consider that the offerors had experience in carrying special cargo and had performed similar activities as to that set out in the application. Regarding protecting the goods from corrosion, the Agency found that various protective methods were offered.

Regarding the Applicant requiring a ship equipped with its own heavy lifting device, the Agency found the Applicant failed to provide adequate evidence on this point, showing this requirement was critical for the transportation of the runner or that the heavy lifting equipment found at the ports to be visited was not adequate.

The Agency therefore found there were suitable Canadian ships available to provide the service or perform the activity described in the application.

Financial and Commercial Suitability

In **Decision No. 461-W-2001**, the Applicant, Irving Oil Limited, applied for a licence to use one or more unknown foreign tankers to transport oil products between Saint John, New Brunswick and the Statia Terminal, Point Tupper, Nova Scotia between June 15, 2001 and November 15, 2001. A smaller Canadian tanker was offered by Algoma Tankers, who submitted that while it did not have tankers of the size set out in the application, its Canadian ship could conduct the activity after July 15, 2001.

The Applicant, after having discussions with Algoma, remained of the opinion the offered vessel was not suitable. It could only carry 10,000 metric tonnes of oil products per voyage, and the total number of voyages the smaller tanker would take to complete the transfer would cause the Applicant's refinery difficulties due to it producing the intended cargoes at a higher rate than the tanker could accommodate. Further, the Applicant noted this would result in a severe reduction of earnings and efficiency.

The Agency found that the capacity of the Canadian ship offered was substantially lower than required by the Applicant, and the offered smaller tanker would not provide sufficient capacity to suitably transfer the oil products between the refinery and the terminal. The Agency concluded, therefore, that the offered vessel was not a Canadian ship available to perform the service or perform the activity described in the application.

In **Decision No. 606-W-1996**, P.F. Collins Customs Broker Limited (the Applicant) applied for a coasting trade licence to import three German-registered tractor tugs to perform assembly work for the Hybernia Production Platform from February 23, 1997 until April 30, 1997. The Applicant argued that the Canadian tugs offered by the objector were technically suitable, however, costs associated with them were excessive and therefore not commercially acceptable - the offered tugs had to be equipped with a particular Z-drive system, and would have to have a minimum pull of 45 tonnes to be able to carry out the required manoeuvring needed for top-side assembly.

The Applicant argued that while the *Act* protects Canadian shipowners, "it does not require the acceptance of non-competitive bids in the domestic and international marketplace," and the mobilization and demobilization rates for the offered tugs were excessive.

The offeror, in reply, stated that its costs were appropriate given the three tugs were built in Canada, operating under the Canadian flag, had Canadians working onboard, and had met other Canadian government operating conditions.

The Agency found that the "primary purpose of the [*Act*] is to protect Canadian shipowners who have made significant investments through having Canadian built, registered and crewed vessels," and went on to state that this "implies costs and operating conditions that are not applicable to foreign vessels but which are standard for operating in Canada. Thus one of the main purposes of the *Act* is to safeguard Canadian owners and to ensure that they have an opportunity to recoup investments and operate in a viable manner."

In reply to the Applicant's view that the *Act* does not include the requirement to accept non-competitive bids, the Agency found "there is no specific reference in the legislation of this as a criterion to be considered by the Agency when making a determination." The Agency went on to state that its governing legislation indicates that the Governor in Council may make regulations on criteria to be used by the Agency, but since no regulations had been enacted, the issue was therefore at the Agency's discretion.

The Agency therefore determined the costs of the offered vessels were not excessive; they compared favourably with other Z-drive tug operators and, as such, there were suitable Canadian ships available to provide the service or perform the activity described in the application.

In **Decision No. 285-W-2007**, Great Lakes Feeder Lines Incorporated applied for a licence to use the CFL Prospect, a container ship registered in the Netherlands, to operate a newly established dedicated container feeder line between Halifax, Montreal, and Hamilton, from August 1, 2007 until July 31, 2008. Several objections to granting the application were filed, with offerors indicating they had suitable and available Canadian flagged vessels to perform the proposed work.

The Applicant argued the availability of service for 12 months uninterrupted was essential, and the performing vessel had to be able to carry containers of a certain size, and must have watertight and fully enclosed holds, strengthened tank tops, and a weather deck able to carry containers stacked three high, in addition to being able to operate between Halifax and Montreal on a year-round basis.

The Agency indicated that while the *Act* has a provision stating the Governor in Council may make regulations on the criteria to be used by the Agency in making determinations, no criteria have been prescribed since the legislation came into effect in 1992. The Agency has therefore developed criteria used to assess suitability of Canadian vessels offered in response to a coasting trade application.

The Agency has established three criteria: technical, economic, and commercial suitability, as noted in the Agency's current guidelines. The Agency would therefore consider economic and commercial aspects of using Canadian vessels, and decide what weight to attach to these criteria. Referring to **Decision No. 500-W-2002**, the Agency indicated "the service or ... the activity described in the application" ought to be read to refer only to the actual task. The Agency therefore noted there are instances when specific requirements must be met by Canadian vessels for service or activity to be completed successfully.

With respect to the Applicant's proposal, the Agency found there to be economic and commercial requirements that were necessary conditions for the container feeder service between Halifax and Montreal, and not meeting these economic conditions would result in a feeder service that would not be commercially viable. The Agency concluded that only by using the CFL Prospect would there be a possibility of meeting the required cost threshold for a viable service, and using the offered vessel would mean no possibility that a commercially viable container feeder service could be implemented between Halifax and Montreal, to serve a new market.

In making this determination, the Agency balanced the interests of an existing Canadian operator with the aspirations of a Canadian company pioneering a new service with a purpose-built ship that no present Canadian operators had already. The Agency found that the service could only be performed using a purpose-built, modern ship, and per s. 8(1) of the *Coasting Trade Act*, that there were no suitable Canadian ships available to provide the service or perform the activities described in the application.

Carriage of Passengers - Identical or Similar Adequate Marine Service

In **Decision No. 230-W-1997**, Kaleidoscope Communications Incorporated (the Applicant) applied for a coasting trade licence to operate the vessel Bounty, an American full-rigged sailing vessel, to provide sail training on overnight sails around Ontario and the eastern waters of Canada, from May 26, 1997 until September 5, 1997. The vessel would be open for tours to the general public to view exhibits, it would host receptions, and goods and merchandise would be sold onboard when in port. The Applicant stated that suitable alternative vessels would have to be Canadian-built, and the operators of suitable vessels must be members of a sail training association. Three operators of Canadian registered vessels offered vessels, and several objections to the application were filed.

Schooner Co. offered two vessels and stated there were up to seven Canadian sailing ships which could be used for all or part of the proposed activity. Nautical offered one vessel and indicated it was aware of seven Canadian sailing vessels and over 30 Canadian power vessels which could be used for excursions similar to those proposed in the application. Murphy's indicated its registered passenger sailing vessel could also fulfill the activities applied for.

Toronto Brigantine also objected to the application. It had offered tall ship experiences since 1964, and gave evidence that its operations could be jeopardized by the Applicant's competition. Canamac Cruises similarly objected, stating that between itself and 10 other operators in the area there were about 20 passenger vessels serving that area of Ontario.

With respect to the objections received, the Applicant responded that some offered vessels did not have sails and therefore sail training could not be provided, there was not adequate overnight accommodation, and the vessels ought to be ready to meet all the requirements of the Bounty itinerary, not part of the itinerary. The Applicant further submitted that the purpose of s. 4 of the *Act* is to permit Canadians to enjoy the benefits a foreign vessel can provide, where that vessel offers what a Canadian vessel does not. Also, the Applicant maintained that it would not be carrying passengers, rather it would carry only special purpose personnel. The offerors argued the Applicant would be carrying passengers.

The Agency determined the activities included the carriage of passengers, and therefore the Agency would make an assessment using ss. 4 (1)(a) and 4(1)(b) of the *Act*. The Agency was therefore to consider whether suitable Canadian vessels were available, and given the carriage of passengers, whether identical or similar marine services were available.

The Agency noted that while the Applicant may wish to specify requirements, like the vessels must be Canadian built tall ships and the operators must be members of a sail training association, these are not criteria set out in the *Act*. The *Act* only refers to Canadian registered ships without acknowledging the country where the vessels were built, and similarly the *Act* does not specify offered vessels must be of the same type that an Applicant wants to bring into Canada. What ought to be considered is "whether the Canadian vessels are suitable for the proposed activities." The *Act* also does not set out any requirement that Canadian vessel owners or operators must belong to any association related to a particular activity.

The Agency found, regarding suitability and availability of Canadian vessels, that some offered vessels were considerably smaller than the Bounty and not equipped for carriage of passengers on overnight trips. However, they were suitable for sail training even though not able to carry 150 trainees at one time. Other offered vessels would be made available the entire period, could be fitted for the appropriate accommodation for the required number of people, and while the Applicant indicated a service speed of 12 mph to meet its schedule, an offered vessel's lesser service speed would not likely affect a proposed vessel's ability to meet the Applicant's itinerary.

The Applicant had argued that for a vessel to be available, it ought to be available for the whole period of the proposed tour and dividing the tour between several vessels would not be acceptable. The Agency, from previous decisions, had determined that a proposed activity could be divided between several suitable vessels, and therefore the Agency here found suitable Canadian vessels were available for the proposed activities indicated in the application with the exception of the carriage of passengers overnight between ports identified.

Because the Agency found the persons to be carried on the Bounty were passengers, under the *Act* it was next required to determine availability of identical or similar marine services. The *Act* does not specify that those identical or similar marine services must be provided "with the same type of vessel as proposed in an application."

The Agency determined, by looking at Canadian operators at the ports mentioned in the application, that sail training, daytime cruises, excursions and receptions were available from Canadian operators. The Agency therefore determined "many of the activities proposed to be carried out with the Bounty are already available to the public from existing Canadian operators who provide identical or similar marine services." Considering the purpose of the *Act* was to protect owners and operators of Canadian registered vessels, foreign vessels are permitted coasting trade licences only where "Canadian operators do not have vessels that are capable of carrying out certain activities."

Considering s. 8 (1) of the *Act*, the Agency found there were suitable Canadian ships available to provide the services and to perform the activities indicated in the application, even though sail training activities to 29 persons on overnight sails could not be accommodated. The Agency also found there were identical or similar adequate marine services available from operators of

Canadian ships, again notwithstanding that none could provide sail training activities to 29 persons.

In **Decision No. 63–W-1998**, David Langley applied for a coasting trade licence to use the Regina Chatrina, a British registered traditionally rigged schooner, to offer sailing excursions along the east coast of Canada from May 15, 1998 to October 10, 1998. Several objections were filed, indicating there were several operators with Canadian registered vessels already conducting excursions in the proposed areas, and the proposed service would directly compete with existing services, thereby negatively impacting existing Canadian operations.

The issues to be considered were whether there are Canadian vessels suitable and available to provide the proposed service, and whether identical or similar adequate marine services were available from persons operating Canadian vessels.

The offeror, Murphy's, indicated its Mar II could provide the excursions, and there was no need for the proposed service given there was no demand for additional day excursion vessels. Fundy objected, concerned the Applicant's vessel would be in direct competition with its services. Other objectors indicated that the proposed areas were already saturated with Canadian tour boat operators, and a foreign vessel would be detrimental to existing Canadian operators.

The Applicant submitted its proposed Regina Chatarina would be the only vessel providing overnight excursions, and the chance to sail a tall ship overnight is a strong tourist attraction which would support local tourism and offer a level of service not currently available.

The Agency found the application was for a broad spectrum of marine services in several Atlantic locations for day and night excursions, meaning the proposed vessel would offer the "same kind of services that existing Canadian operators already offer through day trips/excursions."

The Agency noted that objectors indicated the availability of their services and other operators' services using Canadian registered vessels; there was no need for more competition in the market; and "the objectors referred to the under-utilization of existing Canadian vessels, the saturation of the market for tour/excursion boats and the fact that Canadian operators have gone out of business." Suitable and available Canadian vessels were therefore found to exist.

In referring to identical or similar adequate marine services, the Agency noted that offered Canadian vessels need not be identical or of the same type as the one applied for, nor must Canadian operators offer the same sort of vessels or level of services. Instead, "the test that is to be made out is whether existing services are similar in scope." Using this test, the Agency found that the Regina Chatarina "is very broad in scope covering daytime and overnight excursions."

The Applicant did not indicate its focus is carriage of overnight passengers, and the Agency therefore found existing Canadian registered vessel services are similar to the Applicant's proposed services. The Agency considered that overnight excursions are not presently available, however "this aspect only represents a part of the very broad range of activities that the Regina Chatarina would be engaged in, many of which are already provided with Canadian registered vessels." Identical or similar adequate marine services were therefore found to exist.

In **Decision No. 462-W-1999**, the Chambre De Commerce et d'Industrie du Quebec Metropolitain applied for a coasting trade licence to use the Grande Caribe, an American passenger ship, to carry 100 passengers on cruises lasting 12 days from Quebec to Newfoundland from June 30, 2000 to July 12, 2000. Econertours in response offered its Echo des Mers which accommodated 49 passengers and 16 crew, and indicated it runs cruises on the St. Lawrence and intended for the 2000 season to add a ship accommodating 86 people.

The Applicant indicated the offered vessel could not perform an identical or similar adequate service because its vessel had the unique characteristics of an access ramp, retractable pilot house, and 50 cabins with private bathrooms. The Applicant also indicated the owner and operator of the American vessel had its own distribution network targeting mature American clientele and thus had a closed market, which would not adversely affect the market targeted by the offeror.

The Applicant required a ship holding 100 passengers, and submitted that because the offered vessel had a capacity of only 49 passengers, it would not meet the demand evidenced by the fully-booked cruises offered by the Applicant's cruise line. Also, the level of comfort and service provided by the Applicant would not be available on the offered vessel.

By way of minimal analysis, the Agency determined that no Canadian ship was suitable and available to perform the activities described in the application, and no identical or similar services were available from any person operating one or more of Canadian ships. With a capacity of only 49 passengers, the offered vessel would not be able to provide the same capacity as the Applicant required, and it could not provide the same level of service.

In **Decision No. 1-W-2006**, Classic Motor Yachts applied for a coasting trade licence to use the MY Northwind, an American passenger vessel, to charter along the coast of British Columbia from January, 2006 until December, 2006.

The Applicant indicated it intended to operate its vessel as a charter passenger vessel to attract a new segment, European cruise clients, to British Columbian waters. With a unique heritage and luxury greater than anything currently offered on the British Columbia coast, its vessel would not take away business from any of the current operators. The Applicant proposed to offer cruise packages starting at $50,000 (U.S.) per week. Further, while it could operate out of the United States, a coasting trade licence would maximize benefits to Canadians.

Mothership objected to the application, claiming it operated a similar marine service on the coast of British Columbia using Columbia III, a 68 foot heritage vessel, emphasizing native, natural, and local history at $30,000 (Can.) per week, with a reputation for fine dining.

The Agency first found there was no suitable Canadian ship available to provide the service or perform the activities described in the application, given "there has been no offer of and no allegation that there would be a suitable Canadian vessel available for the proposed activity." Mothership had only given evidence with respect to its operation of a similar adequate marine service, and had not addressed suitability.

With respect to the second point on offering a similar adequate marine service, the Agency found that the Applicant's vessel was larger and would offer services that are essentially different, to a

different targeted clientele. This was found to constitute a distinct activity in itself. Mothership therefore would not offer an adequate identical or similar marine service.

The Agency therefore found there was no suitable Canadian ship available to provide the service or perform the activities described in the application, given Mothership had not advanced these arguments, and there was no identical or similar adequate marine service available from any person operating one or more Canadian ships.

The Provision of a Service or Activity on an Urgent Basis as a Consideration

In **Decision No. 473-W-2006**, King Bros. Limited, on behalf of Global Marine Systems Limited, applied for a coasting trade licence to use the Wave Venture, a British cable ship, to prepare and maintain the AmeriCan 1 submarine fibre optic cable system on an as required basis on the west coast of Canada from June 15, 2006 until June 14, 2007. The issue before the Agency was whether there were Canadian vessels that were suitable and available to provide the service or perform the activity described in the application.

The Applicant indicated that due to the highly specialized nature of the requirements of the needed repairs, there was no Canadian vessel available that could meet these requirements. The Applicant, in reply to an offer, indicated the offeror's offshore support vessels were not suitable since they were not specialized cable vessels or currently modified to the necessary specifications. Also, the offeror had not given any information of the use of the offered vessels on an urgent basis – the Applicant required a fully-equipped cable vessel that would be available to perform cable repair within 24 hours of notification. The Applicant described this as critical, and wanted a vessel to be stationed at one of the harbours on its cable route.

The offeror responded that it had experience in fibre optic cable maintenance and repairs and, after having reviewed the Applicant's technical requirements, the Applicant's requirements would be within the tasks possible by its vessels, given its vessels were equipped for rapid installation and deployment of remote operated vehicles. Further, the offeror indicated mobilization of its vessels could occur easily.

The Agency acknowledged this application was for emergency repair and maintenance on an as required basis, and the 24 hour response time requirement was critical to the activity. The Agency found the offeror's assertion that "its vessels can be retained in port of choice of the vessel charter, even on the west coast of Canada" to have been "unsubstantiated, theoretical, and hypothetical" since the vessels were not currently chartered on the west coast of Canada. The costs associated with a mobilization and demobilization of the offeror's vessels to the west coast of Canada would be considerable.

For these reasons, the Agency found that the offeror's vessels were not in fact available for the service described by the Applicant and concluded that, as no Canadian vessels were available, it was not necessary to address any suitability issues raised.

Summary of Canadian Transportation Agency Rulings on the Terms "Suitable," "Available," and "Identical or Similar Adequate Marine Service"

The following are the salient points that can be taken from the above Agency rulings:

- An offered ship need not be identical to a proposed ship; rather the offered ship must be suitable to perform the activity set out in the application;
- Suitability does not mean the best technology available and can be met by a ship acquiring additional equipment;
- An absence of experience with a certain activity does not make an offered ship unsuitable;
- If it is technically possible to use an offered ship, it may still be considered suitable despite the presence of other factors reducing its suitability;
- Suitability does not require the Agency to determine which ship is the most economical to use to perform the activity described in the application;
- The Agency will consider technical, economic, and commercial suitability;
- The Agency can find a time period outlined in an application to be flexible and therefore an offered ship can perform the proposed activity at another date;
- The Agency is not bound by all terms and conditions found in the initial application when deciding whether an offered ship is suitable and available. The service or activity must be read to refer only to the actual task.
- The Agency recognizes that certain restrictions, for example deadlines for completing work, emergency response time capabilities, and the equipment needed, can be legitimate requirements. The onus is on the Applicant to prove to the Agency any requirement that is necessary for the work and, on doing so, the Agency will take this into account.
- The Agency can find an offered ship is suitable and available to perform only a portion of the proposed activity. The onus is on the Applicant to prove to the Agency that it is necessary for a single ship to perform the entire project and, on doing so, the Agency will take this into account.
- With respect to whether identical or similar adequate marine services are available from persons operating Canadian vessels, the test is whether existing services are similar in scope.

DUTIES, TAXES, AND COASTING TRADE LICENCES

The *Customs Tariff*, S.C. 1997, c. 36 (*CT*) and the *Excise Tax Act*, R.S., 1985, c. E-15 (*ETA*), as well as their related regulations, interact with the *Act* and licences issued pursuant to it. Note, however, the *CT* and *ETA* exist independently of the *Act* and resultant licences, apply more widely than only to ships or ships with licences, and would exist as duty and taxing regimes even in the absence of the *Act*.

The *Act*'s s. 2(1) definitions indicate a Canadian ship has paid these amounts, and a non-duty paid ship has not paid these amounts.

In addition to meeting the suitability and availability test and the other criteria identified thus far, for a foreign or non-duty paid ship to be granted a coasting trade licence, pursuant to ss. 4(1)(c) and 5(c) of the *Act*, arrangements must be made for the payment of duties and taxes under the *Customs Tariff* and the *Excise Tax Act* related to its temporary use in Canada.

Put simply, for a foreign ship to engage in the coasting trade via a coasting trade licence, it must be temporarily imported into Canada. All goods imported into Canada, even temporarily, are subject to duty and tax on their full value (although such duty and tax may be subject to reduction as discussed below). The temporary importation of a ship will therefore trigger duty (regulated by the *CT*) and imported goods tax (regulated by the *ETA*) obligations. A non-duty paid ship must meet the same obligations, because, although registered in Canada, by definition the ship has not yet met its duty and imported goods tax obligations.

The key in terms of the *CT*, *ETA*, and related regulations is that, prior to any ship receiving a coasting trade licence, arrangements must have been made for the payment of applicable duties and imported goods taxes.

Costs pursuant to the *CT* and *ETA* are significant and will likely be the principal costs associated with obtaining a coasting trade licence. For this reason, and the likely complexity of determining the required *CT* and *ETA* amounts, licence applicants should consider engaging the expertise of a customs broker to assist in dealings with customs authorities and with the determination of the applicable duty.

At the outset of the Coasting Trade Licence Application Process section of this paper, it was indicated that an Applicant for a coasting trade licence must apply simultaneously to the CCRA and Agency to obtain a licence. The CCRA is charged with making determinations with respect to duties and taxes owing.

The *Customs Tariff* and the *Vessel Duties Reduction or Removal Regulations* (SOR/90-304)

A foreign or non-duty paid ship wishing to engage in the Canadian coasting trade via a coasting trade licence will have to pay customs duty dictated by the *CT* and the *Vessel Duties Reduction or Removal Regulations (SOR/90-304)* (*Vessel Regulations*).

The *CT* dictates the amount of duty that is normally applicable at the time of importation of vessels or other goods, assuming permanent importation.

The *Vessel Regulations* set out that for the temporary importation of ships, there is a reduction of the duty applicable. The duty is reduced because the ship will be in Canada only temporarily, as opposed to permanently.

The duty reduction allows the temporary importation of the ship on payment of an amount totalling 1/120th of the full duty that would normally be applicable, for each month the ship will be engaged in the coasting trade in Canada. The test under the 1/120th rule is essentially the same as for obtaining a coasting trade licence – the Applicant must show there is no ship above it

in the hierarchy that is suitable and available to perform the work. The 1/120th duty reduction will be granted for a maximum of 12 months.

Even if the activity for which the ship has received the licence will last under one month, for example only a few hours, and will result in the ship being in Canada for less than one month, the 1/120th figure applicable to one full month would still have to be paid.

The full duty (determined by the *CT*), to which the 1/120th calculation is applied, is a percentage of the value of the ship. The particular percentage, or duty rate, depends on the country of the ship's origin, meaning where the ship was constructed or its value substantially created (s. 16(1) *CT*), as opposed to its flag state or the country from which it sailed to Canada.

Section 29(1) of the *CT* indicates the General Tariff rate of customs duty is 35%, and this applies to goods originating in a country not indicated in the *CT*'s List of Countries; goods originating in a country indicated in the List of Countries that fail to meet the conditions for entitlement to any other *CT* tariff treatments; and goods to which the General Tariff otherwise applies via s. 31(1)(b) or any regulation or order made under the *CT*. Lower duty rates apply to other countries of origin.

By way of example, if the country of the ship's origin is one where the *CT* states the duty is 35% of the ship's value, the amount paid in duty on temporary importation to fulfil an activity set out in a licence would be 1/120th of the 35% figure, per month the ship is engaged in the coasting trade in Canada.

Chapter 89, Schedule I of the *CT* covers "ships, boats, and floating structures," with very specific itemizations listed within it. Several tariff treatment rates are listed. Chapter 89, Schedule I ought to be consulted when determining the appropriate tariff rate.

Duty Remission

Duty remission is possible under the *CT*. Section 115 states:

> 115. (1) The Governor in Council may, on the recommendation of the Minister or the Minister of Public Safety and Emergency Preparedness, by order, remit duties.
>
> (2) A remission under subsection (1) may be conditional or unconditional, may be granted in respect of the whole or any portion of the duties and may be granted regardless of whether any liability to pay the duties has arisen.
>
> (3) If duties have been paid, a remission under subsection (1) shall be made by granting a refund of the duties to be remitted.

Remission Orders are listed with *Regulations* pursuant to the *CT*.

The *Excise Tax Act* and the *Value of Imported Goods (GST/HST) Regulations* (SOR/91-30)

By way of simplified explanation from the Government of Canada, "when goods are manufactured in Canada, excise tax is payable at the time the goods are delivered to the purchaser. When they are imported, excise tax is payable by the importer, at the time the goods are imported" (<http://www.canadabusiness.ca/servlet/>, last updated 2008-01-22).

The *ETA* sets out that GST is applicable on all imports unless a specific exemption is available. The GST is calculated upon the value of the imported item plus the applicable duty. However. the *Value of Imported Goods (GST/HST) Regulations (SOR/91-30)* provides for a reduction in the value of GST payable for ships temporarily imported into Canada. A foreign or non-duty paid ship can benefit from a reduction, similar to the 1/120th rule applicable to duty, for the amount of GST payable.

CONCLUSION

The process by which a non-Canadian ship (as defined in the *Act*) can become a part of the Canadian coasting trade is clear. However, whether a foreign or non-duty paid ship wishing to obtain a coasting trade licence will satisfy the Agency that a Canadian ship is not suitable or available or, in the case of the carriage of passengers, providing identical or similar adequate services, is highly fact-dependant. Agency rulings have established criteria that may be considered by the Agency. However, given the fact-sensitive nature of the analysis and the protective mandate of the Agency, the treatment of the criteria remains fluid.

Understanding the Canadian coasting trade regime and the mechanics of the *Act*, the process associated with applying for and obtaining a coasting trade licence, and past Agency rulings, is essential in assessing to the extent possible the circumstances in which non-Canadian ships will be welcomed into the Canadian coasting trade.

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Partner, Stewart McKelvey Stirling Scales (Halifax, Nova Scotia)
Born Grand Falls, Newfoundland, August 23, 1966

Post Secondary Education

- St. Francis Xavier University, Antigonish, Nova Scotia.
  Bachelor of Science, Physics (First Class Honours) 1988.
- University Silver Medal.
- Dalhousie Law School, Halifax, Nova Scotia. LLB 1991.
- Law Foundation of Nova Scotia Scholarship.
- Oxford University, Hertford College, England, BCL 1992.
- Rhodes Scholarship.

Bar Admission 1993

Practice Description

Litigation practice in the maritime, energy and natural resources, environmental and insurance fields, combined with maritime, energy and natural resources and environmental commercial practice. Experience includes:

Maritime

- Various aspects of maritime litigation, including collisions, submarine cable contacts, cargo claims, personal injury, charterparty disputes, limitation of liability, oil pollution, debt collection, tendering disputes, regulatory matters and marine insurance.
- Vessel registration, conveyances and financing and commercial marine contract advice, including charterparties, ship building contracts, ship repair contracts, and tendering issues.
- Advising Canadian and international ship owners, Canadian cargo interests, Canadian and international marine insurers (both protection and indemnity and hull insurers), and offshore and inshore fishing interests.

Energy and Natural Resources

- Importation, registration, conveyances, financing and commercial contract advice, including charterparties, ship building contracts and ship repair contracts, in relation to drill rigs, seismic vessels and support vessels.
- Advice on coasting trade issues.
- Advising operators of Cohasset-Panuke Project, and vessel operators involved in the project, on various matters pertaining to project operation on the Nova Scotia Continental Shelf.
- Member of project team advising proponents of the Sable Offshore Energy Project on litigation arising during the course of the project's development.
- Advising operations of Deep Panuke Project on marine construction contracts.

Environmental

- Defence of environmental prosecutions.
- Advising industrial interests on environmental and regulatory matters and contract negotiations.
- Advice upon and pursuit and defence of environmental claims.

Insurance

- Representation of a variety of property and liability insurers.
- Defence of claims in the fields of personal injury, property damage, professional negligence, products liability and construction.

Other Professional Activities

Publications and Presentations

- "Canadian Maritime Law Update: 1992-1993" (1994), 25 Journal of Maritime Law and Commerce 421.
- "Canadian Maritime Law Update: 1994" (1995), 26 Journal of Maritime Law and Commerce 413.
- "Canadian Maritime Law Update: 1995-1996" (1997), 28 Journal of Maritime Law and Commerce 469.
- Conference materials: "Maritime Law for the General Practitioner", CBA Nova Scotia Branch and CLE Society of Nova Scotia, contributor and presenter, 1997.
- "Canadian Maritime Law Update: 1997" (1998), 29 Journal of Maritime Law and Commerce 411.
- "Canadian Maritime Law Update: 1998" (1999), 30 Journal of Maritime Law and Commerce 431.
- Presentation on recent decisions in Canadian maritime law at Admiralty Law Conference of Canadian Maritime Law Association and Federal Court of Canada, 2000.
- "Canadian Maritime Law Update: 1999" (2000), 31 Journal of Maritime Law and Commerce 447.
- Presentation on environmental legal issues at course for commercial real estate agents offered by Nova Scotia Association of Realtors, 2001.
- "Canadian Maritime Law Update: 2000" (2001), 32 Journal of Maritime Law and Commerce 399.
- Presentation on Federal Court Practice at Canadian Bar Association, Civil Litigation Conference, 2002.
- Presentation on environmental legal issues at course for commercial real estate agents offered by Nova Scotia Association of Realtors, 2002.
- "Canadian Maritime Law Update: 2001" (2002), 33 Journal of Maritime Law and Commerce 293.
- "Canadian Maritime Law Update: 2002" (2003), 34 Journal of Maritime Law and Commerce 391.

Publications and Presentations (Cont'd)

- "Canadian Maritime Law Update: 2003" (2004), 35 Journal of Maritime Law and Commerce 341.
- "Canadian Maritime Law Update: 2004 (2005), 36 Journal of Maritime Law and Commerce 279.
- "Canadian Maritime Law Update: 2005 (2006), 37 Journal of Maritime Law and Commerce 331.
- "Canadian Maritime Law Update: 2006 (2007), 38 Journal of Maritime Law and Commerce 335.

Professional Associations and Memberships

- Nova Scotia Barristers' Society, Member 1993 to present.
- Canadian Bar Association, Member 1993 to present.
- Canadian Maritime Law Association, Member 1993 to present.
- Association of Maritime Arbitrators of Canada, Member 1993 to present.
- Dalhousie Legal Aid Service Board of Trustees, Chair 1994-1998.
- Rhodes Scholarship Selection Committee (Maritime Provinces), Member 1996-2000, Secretary 2004 to present.
- Eastern Admiralty Law Association, Secretary-Treasurer 2000-2002, Chair 2003 to 2007.
- National Maritime Law Section of Canadian Bar Association, Secretary-Treasurer 2002 to 2004, Vice-President 2004 to 2006, President 2006-2008.
- Canadian Maritime Law Association Committees on International Places of Refuge and Fair Treatment of Seafarers, Chair 2002 to present.
- Journal of Maritime Law and Commerce, Member of Editorial Board, 2002 to present.
- Canadian Maritime Law Association Executive Committee, Member 2003 to 2007.

The Coasting Trade Act

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Canadian Maritime Law Association
Conference – June 9, 2008

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Introduction – The Coasting Trade Act

- Coasting Trade – means marine transportation of goods and people between two points in Canada and other marine activity of a commercial nature in Canadian waters
- Policy is to ensure marine commercial activity in Canada is facilitated by Canadian ships to stimulate Canadian business
- Canadian ships are not always suitable and available
- Coasting Trade Act prescribes process by which non-Canadian ships may be permitted to participate in Canadian coasting trade

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Statutory Definition of Coasting Trade

- Section 2(1) of the Act
- Carriage of goods
  - By ship alone or ship and another mode of transport
  - From one place in Canada or above continental shelf to any other place in Canada or above the continental shelf
  - Directly or via place outside Canada
- Carriage of passengers by ship
  - From one place in Canada to the same place or another place, including the continental shelf
  - Directly or via place outside Canada
- Engaging by ship in any other commercial activity in Canadian waters

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Statutory Definition of Coasting Trade – Cont'd

- For waters above continental shelf, includes carriage or commercial activity only related to exploration, exploitation or transportation of mineral or non-living natural resources of continental shelf
- Place above continental shelf includes ship, off-shore drilling unit, production platform, artificial island, sub-sea installation, pumping station, living accommodation, storage structure, loading or landing platform, dredge, floating crane, pipe laying or other barge or pipe line and any anchor, anchor cable or rig pad used in connection therewith
- Transport Canada has jurisdiction to decide whether activity falls within definition of coasting trade

Exceptions

- Used as fishing vessel as defined by Coastal Fisheries Protection Act
- Engaged in ocean research commissioned by DFO
- Operated or sponsored by foreign government with consent of Minister of Foreign Affairs to conduct marine scientific research
- Engaged in salvage operations, except where performed in Canadian waters
- Engaged in activities related to marine pollution emergency or risk thereof
- Providing assistance to persons, ships or aircraft in danger or distress in Canadian waters
- Engaged in operations permitted by United States Wreckers Act
- Ship owned by U.S. government and used for sole purpose of transporting goods of Canadian or U.S. origin owned by U.S. government to supply Distant Early Warning Sites

Coasting Trade License

- Hierarchy of ships
  - Canadian ship
  - Non-duty paid ship
  - Foreign ship
- Only Canadian ships can engage in coasting trade as a matter of right
- Non-duty paid ships and foreign ships require coasting trade license
- Ship is eligible for coasting trade license only if there is no ship, superior in the hierarchy, suitable and available to perform the service or activity

Categories of Ships

- Canadian Ship – ship registered or listed under Part 2 of Canada Shipping Act 2001 in respect of which all duties and taxes imposed under Customs Tariff and Excise Tax Act have been paid
  - Listed ships (foreign registered but bare-boat chartered to qualified person under Canada Shipping Act 2001) now included as Canadian ship since July 1, 2007
- Non-Duty Paid Ship – ship registered in Canada in respect of which duties and taxes under Customs Tariff and Excise Tax Act have not been paid
  - Does not include listed ships
- Foreign Ship – ship other than Canadian ship or non-duty paid ship

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Enforcement

- Ship engaging in coasting trade without license guilty of offence and liable on summary conviction to fine not exceeding $50,000 – Section 13(1)
- Each day separate offence – Section 13(2)
- Enforcement officer (Transport Canada) may stop and board ship and seize evidence with warrant – Section 15(1)
  - No warrant required where exigent circumstances make it impracticable to obtain warrant – Section 15(2)
- Where enforcement officer has belief on reasonable grounds offence has been committed, may detain ship in Canadian waters or waters above continental shelf – Sections 16(1) and (2)

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Coasting Trade License Application

- Application must be made to Canadian Transportation Agency
  - Independent, quasi-judicial tribunal established under Canada Transportation Act
- Agency charged with determining whether suitable Canadian ship is available to perform activity identified in application
  - In case of passengers, Agency must also determine whether Canadian vessels offer adequate, similar passenger services

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Coasting Trade License Application (Cont'd)

- Must make simultaneous application to Canada Customs and Revenue Agency (CCRA)
- Following favorable decision by Agency, Minister of National Revenue issues license
- License can be issued for maximum of 12 months (although renewals are possible)

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Application Process

- Following application, Agency consults its database of Canadian registered ships to determine which operators have requested notification of applications
- Operators of Canadian registered ships can object to an application and may offer a Canadian registered ship to perform the service or activity
- If objection or offer is received, applicant is given opportunity to respond, and operators are permitted to reply
- If no objection or offer is received, Agency will render favorable decision on application. If objection or offer is received, Agency will make decision based on materials filed

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Canadian Transportation Agency Guidelines Respecting Coasting Trade License Applications

- Prescribe timelines for applications
- Prescribe information to be included in applications and responses
- In making decision, Agency will assess technical, operational and commercial suitability
- Not necessary that offered Canadian ship be available for exact dates in application. Agency will use the following factors in assessing flexibility of dates:
  - Why dates in application are crucial and why alternatives could not be considered
  - Capability of offered ship to be at the required site on time
  - Location of offered ship and repositioning delay

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Duties and Taxes

- For foreign ship or non-duty paid ship to engage in coasting trade, must be temporarily imported into Canada
- Therefore subject to duty and taxes on full value
- Vessel Duties Reduction or Removal Regulations – made under Customs Tariff
  - Permit temporary importation of ship on payment of 1/120 of full duty for each month ship will be engaged in coasting trade
  - Test is same as Coasting Trade Act – no higher ranked ship suitable and available

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Duties and Taxes (Cont'd)

- Value of Imported Goods (GST/HST) Regulations – made under Excise Tax Act
  - Provide for reduction in GST payable for ship temporarily imported into Canada – 1/120 per month
  - Same test regarding suitability and availability

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Jurisprudence

- Appeal can be made to Federal Court of Appeal on questions of law or jurisdiction – Section 41
- No significant judicial consideration of Act exists
- Agency rulings are main source of guidance on application of Act
  - Available on website – http://www.cta-otc.gc.ca/rulings-decisions/index_e.html
  - Rulings heavily fact dependent

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Suitability and Availability Generally

- Logix Marine v. Geophysical Service Incorporated (Decision No. 447-W-2001)
  - Application for foreign vessel to undertake seismic survey
  - GSI objected and offered Canadian vessel
  - Issue was whether there was suitable Canadian vessel available
  - Applicant argued GSI's offer was not bona fide because it did not propose commercial terms. Also that vessel was not suitable because the equipment was not what was expected by the modern industry
  - Agency ruled that GSI's objection was a commercial offer, as negotiations on terms are to be left to the parties themselves

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Suitability and Availability Generally (Cont'd)

- Suitability – Agency held that GSI's vessel and equipment, while not identical to the Applicant's vessel, were suitable for the activity, as the equipment required would be satisfied by a combination of GSI obtaining the necessary equipment and already having comparable equipment. Also held that lack of experience of GSI's vessel could not be interpreted as vessel being unsuitable
- Availability – Agency also rejected Applicant's argument that GSI's vessel had not received a full term Transport Canada safety inspection certificate and therefore may not comply with Canadian regulatory requirements in time for Applicant's activity
- Application for coasting trade license denied

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Suitability Generally

- A. E. Horne and Son Limited on behalf of Cianbro Corporation (Decision No. 304-W-2007)
  - Application to use barge during construction of bridge between New Brunswick and Maine
  - Canadian operators offered barges
  - Applicant argued only means of transporting barge to Canadian construction site was by U.S. road. Counterproductive to import barges into U.S., then re-deploy them into Canada.
  - Agency found this was technically possible and therefore Canadian barges could not be considered unsuitable
  - Application for coasting trade license denied

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Availability Generally

- Polar Ship Management AS v. GSI (Decision No. 250-W-2001)
  - Application for foreign vessel to conduct seismic research activity above continental shelf
  - GSI offered Canadian ship
  - Decision focused on availability of GSI's vessel
  - Application was for activity to take place April to August. GSI's vessel was undergoing refit and would not be operational until May. However, GSI argued the same weather conditions would persist until October

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Availability Generally (Cont'd)

- Agency noted Applicant gave no reason why survey had to be done over the particular time period in the application and found GSI's vessel was available
- Applicant later applied for review of Agency's decision under Section 32 of Canada Transportation Act, when GSI advised its vessel would not be available until late June
- Agency held that this new information gave it jurisdiction to review its decision. However, as the work could still be completed in the time period that was the basis for its original decision, Agency dismissed the application for review

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Availability Generally (Cont'd)

- Lydon Dredging and Construction Company Limited (Decision No. 500-W-2002)
  - Application to use American dredge in shipping channel off Magdalen Islands
  - Several Canadian operators offered their vessels, which could perform the work but not quickly enough to complete the work within the time period prescribed in the application
  - Agency was obliged to consider whether it was bound by the time period in the application and whether it could reject the application based on a finding that a Canadian vessel was available to perform only a portion of the proposed activity

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Availability Generally (Cont'd)

- Agency held onus was on Applicant to establish that the time period was a legitimate requirement. It succeeded in doing so because its environmental permits required the work to be performed within a particular season
- However, application was rejected on the basis that the work could be performed within the required time period by contracting with more than one Canadian vessel. Agency rejected the argument that Applicant should not be obliged to incur the liability complications associated with contracting with multiple operators
- Application for coasting trade license denied

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Technical Suitability

- Thales Geosolutions (Canada) Limited (Decision No. 298-W-2002)
  - Application for license to use geophysical survey ship to conduct pipeline route survey
  - Applicant argued that offered Canadian vessels would require equipment refits and would still not be as suitable technically as the Applicant's ship
  - Agency concluded that, despite the technology in the offered ships not exactly matching the technology requested by the Applicant, Canadian ships had an excellent record of performing this sort of work and were technically suitable
  - In response to Applicant's concerns over refit costs, Agency held that test of suitability does not require it to determine which ship is the most economical
  - Application for coasting trade license denied

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Financial and Commercial Suitability

- Irving Oil Limited (Decision No. 461-W-2001)
  - Applicant sought license to use foreign tankers to transport oil products between Saint John, N.B., and Point Tupper, N.S. Algoma Tankers offered a smaller Canadian tanker
  - Applicant argued the Algoma vessel was not suitable, because the number of voyages the smaller tanker would have to take would cause its refinery difficulties
  - Agency held the offered smaller tanker did not provide sufficient capacity and was therefore not suitable
  - Application for coasting trade license granted

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Financial and Commercial Suitability (Cont'd)

- P. F. Collins Customs Broker Limited (Decision No. 606-W-1996)
  - Application to import 3 German registered tugs to perform assembly work for Hybernia production platform
  - Applicant argued Canadian tugs offered by objector were technically suitable, but costs associated with them were excessive, particularly given they had to be equipped with particular Z-drive system

Financial and Commercial Suitability (Cont'd)

- Offeror argued its costs were appropriate given its vessels were built in Canada, operating under Canadian flag, had Canadians working on board and met other Canadian government operating conditions
- Agency held one of the main purposes of the Act is to ensure Canadian owners have an opportunity to recoup their investments. Therefore the Canadian tugs were suitable, notwithstanding they were more expensive than the German tugs
- Application for coasting trade license denied

Financial and Commercial Suitability (Cont'd)

- Great Lakes Feeder Lines Incorporated (Decision No. 285-W-2007)
  - Application to use Dutch container ship to operate new container feeder line between Halifax, Montreal and Hamilton
  - Applicant argued that for service to be commercially viable, it had to operate for 12 months uninterrupted and performing vessel had to be able to carry containers of a certain size and be able to operate between Halifax and Montreal on year-round basis
  - Agency balanced interests of existing Canadian operators with aspirations of Applicant as Canadian company pioneering a new service. Held that only by using the Applicant's vessel was there a possibility of meeting the required cost threshold for the service to be viable
  - Application for coasting trade license granted

Carriage of Passengers – Identical or Similar Adequate Marine Service

- This is an additional requirement which must be met in relation to carriage of passengers
- Kaleidoscope Communications Incorporated (Decision No. 230-W-1997)
  - Applicant sought to operate vessel "Bounty", American full-rigged sailing vessel, to provide sail training on overnight sailing around Ontario
  - Several Canadian operators objected. None could carry the number of passengers that the Bounty could or could meet the speed necessary to accommodate the Applicant's proposed itinerary
  - Agency nevertheless found there were similar marine services available from operators of Canadian ships
  - Application for coasting trade license denied

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Carriage of Passengers – Identical or Similar Adequate Marine Service

- Chambre De Commerce et d'Industrie du Quebec Metropolitain (Decision No. 462-W-1999)
  - Application to use American passenger ship to carry 100 passengers on cruises lasting 12 days from Quebec to Newfoundland
  - Objector offered smaller ship which accommodated 49 passengers
  - Applicant argued offered vessel could not meet the demand evidenced by the fully booked cruises of Applicant's cruise line and would not have the same level of comfort and service
  - Agency concluded no identical or similar services were available from Canadian ship, because offered vessel could not provide the same capacity or level of service as Applicant required
  - Application for coasting trade license denied

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Summary of CTA Rulings

- Offered ship need not be identical to proposed ship to be considered suitable
- Suitability does not mean best technology available and can be met by ship acquiring additional equipment
- Absence of experience does not make offered ship unsuitable
- Suitability does not require assessment of which ship is most economical
- Agency can find time period in application to be flexible

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Summary of CTA Rulings (Cont'd)

- In some cases, time periods can be legitimate requirement. Onus is on Applicant to prove this
- Agency can find offered ship suitable and available to perform only a portion of the activity. Onus on Applicant to prove that it is necessary for a single ship to perform the entire activity
- In assessing whether identical or similar adequate marine services are available for passenger service, test is whether existing services are similar in scope

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