COMMENTS ON BILL C-64 (AN ACT RESPECTING WRECKS, ABANDONED, DILAPIDATED OR HAZARDOUS VESSELS AND SALVAGE OPERATIONS

Submitted to the House Standing Committee on Transport, Infrastructure and Communities

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SHIPPING FEDERATION OF CANADA
300 Saint Sacrement, Suite 326, Montreal, Quebec, H2Y 1X4 (514-849-2325)

1. Introduction

The Shipping Federation of Canada is the voice of the owners, operators and agents of the foreign flag ships that carry Canada's imports and exports to and from world markets. Our members represent over 200 shipping companies whose vessels make thousands of voyages between Canadian ports and international markets every year, carrying hundreds of millions of tonnes of cargo, ranging from containerized consumer and manufactured goods – to dry bulk commodities such as grain and coal – to liquid bulks such as crude oil and oil products.

These ships play an essential role in the Canadian economy by facilitating the movement of Canada's international trade, and they do so safely, securely and efficiently day in and day out. Indeed, ocean shipping is one of the world's most highly regulated industries, and foreign flag ships are subject to a stringent regime of environmental, safety and crewing regulations when sailing in Canadian waters, which are based on the framework of international conventions that has been developed by the International Maritime Organization (IMO). Those conventions establish regulations on every aspect of shipping activity, from navigation and seaborne operations - to the prevention of maritime pollution – to the training and certification of seafarers – while national governments, which form the membership of the IMO, implement and enforce those rules through domestic legislation and regulations.

We appreciate this opportunity to provide comments on Bill C-64, *an Act respecting wrecks, abandoned, dilapidated or hazardous vessels and salvage operations*, which is currently before the Standing Committee on Transport, Infrastructure and Communities. We are particularly interested in Part 1 of the Bill and its provisions to implement the *International Convention on the Removal of Wrecks,* 2007 (also known as the *Nairobi Convention*) in Canada. This Convention, which was adopted by the IMO in 2007, fills a gap in the existing international legal framework by providing a set of uniform rules regarding the power of coastal states to take action with respect to wrecks occurring in their waters, and establishes a regime of strict liability and compulsory insurance on shipowners to cover the related costs (which the vast majority of shipowners will already have through their protection and indemnity – or P&I - insurance). We very strongly support the implementation of this convention in Canada (and its extension to our internal waters and Exclusive Economic Zone), as this will provide the government with a legal basis for ensuring the removal of wrecks that pose a hazard to the safety of navigation and / or to the marine and coastal environment, and to be compensated for the costs related thereto.

We also support Part 2 of the Bill, as it establishes a legislative framework that protects Canada's coasts and waters from the environmental and related impacts of vessels that are deemed to be abandoned, dilapidated or otherwise hazardous, and recognizes the liability and responsibility of the owners of such vessels.

2. Implementation of the Nairobi Convention in Canada

Rights of the State and the Shipowner:

A key feature of the *Nairobi Convention* is the balance that it strikes between the state's right to ensure the prompt and effective removal of wrecks from its waters (and to be compensated for the costs related thereto), and the shipowner's right to have a voice in the decision-making process regarding the manner in which the wreck (his or her property) will be managed. Towards that end, the convention provides that if a ship is involved in a maritime casualty and becomes a wreck within a state's EEZ, the master or the ship's operator must report it to the affected state without delay (Article 5.1). The affected state will then carry out an assessment (based on specific criteria) to determine whether a wreck poses a

navigational or major environmental hazard (Article 6), and if a hazard is found to exist, the state will have the power to not only locate and mark the wreck (Articles 7 and 8), but to also facilitate its removal (Article 9). However, the state's ability to act in this respect is not unlimited, as the vessel owner has the right to select and contract with the party of his or her choice to carry out the wreck removal operation (Article 9.4), and the state will only be able to set conditions for the removal process to the extent necessary to ensure safety and environmental protection (Article 9.4).

Our main concern with respect to Bill C-64 is that its approach to balancing the rights of the state with those of the shipowner in a wreck management situation is different from the approach set out under the *Nairobi Convention*, which creates a legislative framework that is potentially out of step with international practice, exposes the shipowner to significant new liability, and - just as importantly - potentially undermines the operational and environmental effectiveness of the removal operations that will be carried out under the Act. More specifically, under Bill C-64, the shipowner's ability to act in response to a wreck is restricted to implementing measures that are prescribed by the Minister, and which are circumscribed only by the requirement that they be "proportionate to the hazard" (21(1)(b)). Two of the *Nairobi Convention's* most important provisions -– the right of the shipowner to contract with the party of his or her choice to remove the wreck and the ability of the state to establish conditions for the wreck's removal only to the extent necessary to ensure safety and environmental protection (Article 9.4) – are not found in Bill C-64, and indeed, they are among the Nairobi provisions that the government chose NOT to include in the Canadian legislation.

This approach is of concern because in many cases, it is the shipowner and his or her insurer (the P&I Club) who have significant experience and expertise in managing a wreck removal process. Indeed, in cases of wrecks involving large commercial vessels, the shipowner's P&I club is normally involved in every facet of a wreck removal operation, from overseeing the tender for the removal contract, to selecting the successful bidder, to managing the overall operation to its conclusion. The ability of the shipowner's P&I Club to draw upon its vast experience and leverage its network of contacts and specialized expertise adds immense value to a wreck removal from both an operational and an environmental perspective. Removing this expertise from the equation will not only impact the effectiveness and efficiency of the removal process, but will also result in potentially greater risks to the environment and affected marine ecosystems. Given that the removal of a wrecked ship is a complex and expensive undertaking that requires highly trained personnel and specialised equipment, it is in the interests of all parties – from the shipowner to the affected state to the coastal communities in which the wreck is located – to ensure that the acquired expertise of the shipowner and insurer play a concrete and direct role in the wreck removal process.[1]

Recommendation 1: Ensure that the expertise of the shipowner and his or her P&I club can play an integral role in a wreck removal operation by incorporating Nairobi Article 9.4 (which sets out the right of the shipowner to contract with the party of his or her choice to carry out a wreck removal operation, and enables the state to lay down conditions for a wreck removal only to the extent necessary to ensure safety and environmental protection) into Bill C-64.

[1] The importance of preserving the shipowner's expertise in the wreck removal process is also highlighted in a 2013 report published by the Lloyd's insurance market (entitled "The Challenges and Implications of Removing Shipwrecks in the 21st Century"). More specifically, the report states that "ensuring that there is a vigorous, competitive market among capable contractors is important to the shipping industry in order that wrecks may be safely dealt with. There are a small number of contractors with the experience, competence and financial wherewithal to undertake major wreck removal . . . A pool of experienced and capable wreck removal operators is vital to maintain the health of the industry."

Proportionality of Response:

Canada's approach is also of concern because any wreck involving a large commercial vessel is likely to generate intense public and political interest, and pressure on the government to move swiftly to remove the wreck due to environmental concerns. This, in turn, increases the likelihood of a removal operation becoming unchecked in scope and size, and leading to the imposition of measures that may exceed what is necessary to ensure safety and environmental protection - particularly in a legislative context in which the vessel owner has limited ability to affect the decision-making process regarding the removal of the wreck. It is worth noting that this phenomenon was highlighted in a review of large-scale salvage and wreck removal cases that was recently conducted by an international working group of P & I clubs.[2] The study identified intervention by governments or other authorities as key factors that increase wreck removal costs and lead to the implementation of operational requirements that are disproportionate to the benefits being sought. In this respect, the study also noted that technological developments and more sophisticated engineering approaches have increased the scope of what is possible in a wreck situation, making it feasible to carry out complex operations that may not be necessary from an environmental perspective.

Although Bill C-64 provides that the measures prescribed by the Minister in relation to a wreck must be "proportionate to the hazard" posed by the wreck (21(1)(b)), we are not certain that this is sufficient to ensure that such measures do not escalate beyond what is necessary in terms of environmental protection. Our concern in this respect is based on a number of other provisions in the Bill, including the Minister's ability to authorize other entities to act on his or her behalf:

> *6(1). The Minister may . . . enter into agreements or arrangements for carrying out the purposes of this Act and authorize any person, including a provincial government, a local authority and a government, council or other entity authorized to act on behalf of an Aboriginal group, with whom an agreement or arrangement is entered into to exercise the powers . . . or perform the duties or functions under this Act that are specified in the agreement or arrangement.*

This essentially means that any action the Minister is authorized to engage in under the Bill could potentially be outsourced to a third party, including determination of whether a wreck poses a hazard (which is the trigger for any wreck removal operation that ensues), and prescription of the wreck removal measures that the shipowner must undertake (which includes ensuring that those measures are proportionate to the hazard posed by the wreck). As a result, a multiplicity of third parties – ranging from provincial authorities to local governments to others - each with their own concerns with respect to the protection of the affected coastlines and waters - could potentially have a role in the management of a wreck removal operation at any level. Not only could this lead to uncoordinated and undisciplined decision-making with respect to how a wreck is to be removed (particularly in terms of the operational and environmental effectiveness of the efforts deployed), but it also exposes the shipowner to huge financial liability in a context where he or she is responsible not only for the costs of locating, marking and removing a wreck (as mandated under the *Nairobi Convention*), but also for the costs of determining whether a wreck poses a hazard (23(a)), and for any loss or damage caused by the resulting measures (23(b)).

[2] IG Large Casualty Working Group presentation 'The increasing cost of wreck removal… preliminary trends identified by the International Group's Large Casualty Working Group', Lloyd's Marine Wreck Conference November 2012 and IG Large Casualty Working Group presentation 'Examining the escalating cost of salvage and wreck removal', Informa Salvage and Wreck Conference, London, December 2012

Recommendation 2: Ensure that wreck removal measures are proportionate to the hazard by amending section 6(1) of Bill C-64 to specifically exclude determination of whether a hazard exists and prescription of a wreck removal plan to the shipowner from the Minister's ability to enter into agreements or arrangements with other parties.

Establishing Effective Command and Control:

Given these and other concerns, we believe that a key means of ensuring Canada's ability to successfully manage a wreck removal situation will be contingent on the establishment of a strong (and centralized) maritime casualty decision-making authority, which would not only ensure that decisions are made in a timely manner, but also that the management of the removal operation is devoid of undue political interference. Although this is not an issue that can be addressed through Bill C-64, we raise it here because the establishment of such an authority will be an essential next step in ensuring that the Bill's provisions are effectively implemented.

Recent events involving maritime casualties in Canadian waters (including the M/V Marathassa) have highlighted the difficulty of coordinating the roles of various government agencies in any response effort, and of effectively managing external factors such as public concern, political pressure and media involvement. These challenges were also highlighted in the phase two report of the Tanker Safety Expert Panel ("A Review of Canada's Ship-Source Spill Preparedness and Response, Setting the Course for the Future"), which noted the following with respect to managing a maritime casualty (which is the starting point for situation evolving into a wreck removal):

> *Managing a marine casualty in Canada is a complex endeavour. It can involve multiple federal, provincial/territorial, and municipal authorities . . . The sheer number of authorities involved and the different powers that may be brought to bear in a marine casualty can make decision-making very complex, challenging, and, at times, slow – all of which increase the risk of spills . . . In some instances, the distribution of powers and authorities can lead to "decision-making by committee: as the authorities involved debate over the best course of action and who has the jurisdiction or power to make key decisions . . . This approach may not ensure the timeliness of decisions that is required to ensure the best possible outcome.* (Pages 81 to 84)

The importance of establishing a centralized command and control structure to manage a maritime casualty situation is also underlined in the Lloyd's publication entitled "The Challenges and Implications of Removing Shipwrecks in the 21st Century," which cites the SOSREP (the U.K. Secretary of State's Representative for Maritime Salvage and Intervention) as a model for the coastal state's role in managing casualty, salvage and wreck operations. The SOSREP is an independent and impartial entity (appointed by the U.K. Secretary of State), which is responsible for overseeing responses to maritime casualties posing a risk of pollution, and may intervene in a response operation - or take over its management altogether - if such action is deemed necessary for a successful outcome. Although the SOSREP has wide ranging powers of intervention which extend to both the state and the shipowner, the system is widely recognized for its rapid and effective decision-making (free from political intervention), and is therefore viewed as a model that could be replicated in other states.

Recommendation 3: Ensure Canada's ability to successfully manage a wreck removal process by highlighting (in the standing committee's report on Bill C-64) the need to establish a strong and centralized maritime casualty decision-making authority as a necessary next step following the Bill's passage.

3. Managing Vessels and Wrecks of Concern

We are also interested in Part 2 of Bill C-64, which establishes a regime for managing a range of vessels that are deemed to be "of concern," including vessels that have not been involved in a maritime casualty but are nevertheless considered to be a "wreck" by virtue of the fact that they are "sunk, partially sunk, adrift, stranded or grounded, including on shore" (27(a)), and could therefore be subject to a wide range of interventions from the government if they are deemed to pose a "hazard." The Bill very broadly defines "hazard" as any condition or threat that may reasonably be expected to cause harm to any interest, including the health, safety, well-being and economic interest of the public (27)).

Although we appreciate that Part 2 may have been very widely framed in order to ensure that the Act captures a wide range of problem and potentially dangerous vessels in Canadian waters, it is important to ensure that this section does not employ too broad a brush in doing so. This is particularly important given the far-reaching range of interventions that the government could undertake in response to a hazard - including repairing, securing, moving or removing the wreck or its contents, or selling, dismantling, destroying or otherwise disposing of them (36(a)) – all at the vessel owner's expense (45(1)(b)(i)).

Given the above, it is essential that the provisions outlined under Part 2 are clearly defined and appropriately framed, with a view to ensuring that shipowners engaged in legitimate operations are not subject to unwarranted and unnecessary action on the part of the government.

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We trust that you will give our comments due consideration and would be pleased to provide any additional information you may require.

Respectfully submitted,

Michael Broad
President
SHIPPING FEDERATION OF CANADA