BRIEF ON BILL C-86

(*Divisions 22 and 23 of the Budget Implementation Act, 2018, No. 2 – proposing amendments to the Canada Shipping Act, 2001 and the Marine Liability Act)*

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

November 6, 2018

SHIPPING FEDERATION OF CANADA

1. Introduction

The Shipping Federation of Canada is the voice of the owners, operators and agents of the ships that transport Canada's imports and exports to and from world markets. Our members' vessels make thousands of voyages between Canadian ports and international markets every year, carrying over 500 hundred million of tonnes of cargo, ranging from commodities such as grain, coal, and steel – to crude oil and oil products - to the containerized consumer and manufactured goods that we all use on a daily basis.

Although we are writing to provide the perspective of shipowners on the proposed amendments to the *Canada Shipping Act,* 2001 and the *Marine Liability Act* that were introduced in the House of Commons on October 29, 2018 as part of Bill C-86 (Divisions 22 and 23), we wish to preface our comments by expressing strong concern over the accelerated timeframe under which these proposals are proceeding through Parliament. Indeed, not only are we preparing to appear before this Committee on November 6th – a mere seven days after the Bill's introduction in Parliament - but it is also our understanding that the schedule for this bill will only enable the Committee to hold a single day of hearings.

Although Transport Canada has discussed some of the concepts included in Bill C-86 with stakeholders in the past, there is a significant difference between participating in consultations on general concepts and assessing actual specific legislative proposals. Given that the devil is almost always in the details, we believe that the current timeframe makes it very challenging to provide an informed perspective on the complex issues that are contained in the amendments proposed in Divisions 22 and 23 of Bill C-86.

Recommendation:
In view of the above, we respectfully request that the Committee consider making a recommendation to extract the proposed amendments to the *Canada Shipping, 2001* and the *Marine Liability Act* from Bill C-86 and incorporate them into a stand-alone bill instead. This would ensure the ability of both stakeholders and the members of this Committee to conduct a thorough review of the new bill, which is particularly important given the scope and potential ramifications of the amendments proposed.

This being said, the remainder of our brief will outline the key issues we have thus far identified in our preliminary review of Bill C-86, with a view to substantiating our concerns on the need to either proceed with a stand alone-bill in which the proposed amendments can be properly considered OR, should the above suggestion not be retained, to (at a minimum) proceed with some amendments to Divisions 22 and 23 of Bill C-86.

2. New ministerial "interim" powers under the *Canada Shipping Act, 2001*

Through Bill C-86, the Minster of Transport is seeking broad powers that would be exercised outside the normal regulatory process. These kinds of powers should be surrounded by proper safeguards which, in our opinion, are not found in the proposed amendments.

Section 690 of Bill C-86 would amend the *Canada Shipping Act, 2001* to enable the Minister of Transport to make interim orders if *he or she believes that immediate action is needed to deal with a direct or indirect risk to marine safety or the marine environment*. The scope of such interim orders could be quite broad, covering issues such as vessel design and equipment, compulsory routes, the imposition of navigational procedures on vessels, and much more – all actions with potentially significant impacts on shipowners and their vessels. Furthermore, Bill C-86 states that an interim order can remain in effect for up to one year under the sole authority of the minister, with the possibility for the Governor in Council (GiC) to extend the order for a period up to another two years. In other words, ministerial interim orders affecting maritime

transportation under the *Canada Shipping Act, 2001* could remain in effect for up to three years without the basic safeguards provided in the regulatory process (namely, consultations with affected stakeholders and a regulatory impact assessment).

Although interim orders also exist in the aviation mode, these are, in our opinion, more narrowly constructed. Under the *Aeronautics Act*, interim orders are limited to cases where there are *significant* safety risks, or where there is a need to deal with an *immediate* security or safety threat, or in the aftermath of an aviation accident or incident. Furthermore, the duration of a ministerial interim order under the *Aeronautics Act* is limited to 14 days, unless the GiC, within that fourteen-day period, extends the life of the interim order to a maximum period of one year. In summary, Parliament originally envisioned interim orders in the aviation sector to be limited to situations that meet a high threshold (i.e., significant risks or immediate threats) and to be of a short duration (14 days), unless otherwise approved by the GiC (maximum of one year). This, in our opinion, recognises that such "interim instruments" are adopted outside of the normal regulatory process and should therefore be limited in application and time.

Our brief review of Canadian legislation reveals a similar approach to circumscribing ministerial powers for interim orders in at least six other pieces of Canadian legislation covering subjects such as health, hazardous products, food, pest control, etc. Under each of these Acts, interim orders are limited to "significant" risks, have a stand-alone duration of 14 days, and require GIC approval to be extended for up to a maximum of one year. In two other pieces of legislation - the *Canadian Environmental Protection Act* and the *Transportation of Dangerous Goods Act* - ministerial powers to adopt interim orders apply in the event of "significant risk" or "immediate threat" and require approval by GIC within the same 14-day period, but have (in those cases) a maximum duration of 2 years.

In comparison, Bill C-86 would enable ministerial interim orders for the maritime sector to be made for any type of risks (not circumscribed to "significant risks" or "immediate threat"), provided the minister is of the opinion that he or she needs to take "immediate actions." Such ministerial order could remain in effect for up to one year without any concurrence by Cabinet (contrary to the requirement for GiC approval within 14 days in other Canadian legislation) and could have a maximum duration of up to 3 years. We would also add that under the scheme proposed under Bill C-86, shipowners can be found to be in non-compliance even if the order has not been published in the Canada Gazette, provided that *the person or vessel had been notified of the interim order or reasonable steps had been taken to bring the purport of the interim order to the notice of those persons or vessels,* and the fine for contravention of published or unpublished order can be up to $1,000,000 (on summary conviction) or imprisonment of up to 18 months. As all of this clearly illustrates, the proposed regime for interim order can have verify significant consequences.

Finally, it is our understanding that Transport Canada is seeking ministerial powers to make interim orders as a means of addressing situations such as that which occurred in the Gulf of St. Lawrence in 2017, when a number of North Atlantic Right Whales died. It is worth noting that in the above case, the Minister did issue slowdown measures for immediate application under the *Collision Regulations*, and these "emergency" measures had significant consequences within the industry and in some regional economies – including, for example, the cancellation of cruise ship calls in Gaspé (for example). Although we are not disputing the need for emergency actions in these kinds of situations (whether through interim orders or some other form), we do wish to highlight the major ramifications that such measures can have on stakeholders. Consequently, it is essential that the proposal to give the Minister the power to adopt interim orders under the *Canada Shipping Act, 2001* be sufficiently circumscribed - through the appropriate checks and balances - to ensure that this does NOT open the door to governing by interim order as a convenient mechanism to be broadly used outside the regulatory process.

Recommendation:
In view of the above, we recommend that section 690 of Bill C-86 be amended to introduce some safeguards around the use of the interim ministerial power and we have provided language to that effect in Annex A. We also recommend that the department develop a strong set of public policies to bring further clarity, consistency and transparency to the departmental use of interim orders under the *Canada Shipping Act, 2001.*

3. Scope of the new regulatory powers under the *Canada Shipping Act, 2001*

We have a history of safe shipping in Canada and vessels operating in Canadian waters are governed by a strong regulatory and safety framework. According to a recent study on the risks of marine shipping, this mode of transport *has fewer incidents and accidents – and fewer fatalities – than other modes,* and fewer than 2 percent of commercial marine incidents and accidents in Canadian waters have involved a known release of pollutants into the environment (based on data from the Transportation Safety Board up to 2013).[1]

Section 692 of Bill C-86 would amend the *Canada Shipping Act, 2001* to enable the GiC to adopt new environmental regulations ~~t~~that would be applicable to a broad range of matters, from ship design, construction, machinery and equipment to compulsory routes, speed, anchoring and cargo operations, in order to protect the marine environment from the impacts of navigation.

Although we support the objective of the proposed new GiC regulatory powers, which is to provide Canada with a strong toolbox for ensuring sustainable maritime transportation in Canadian waters, we have some concerns with the framework under which these new regulatory powers would be exercised:

- **Powers to amend GiC regulations through ministerial order:** Section 692 of Bill C-86 goes one step further than simply introducing new GiC regulatory powers, as it also in some cases enables the Minister to modify the content of some of those GiC regulations (relating to compulsory/recommended routes, cargo loading, and navigation and anchoring) by using a ministerial order for up to one year. Moreover, the Act sets out a minimal requirement for the government to publish these ministerial "variation orders" (i.e. through publication on Transport Canada's website or any other means that the department considers appropriate), despite the fact that the ramifications of these sudden orders on stakeholders can be quite high. In view of the above, we respectfully submit that such power should be exercised with great caution.
  Recommendation:
  We recommend that section 692 of Bill C-86 be amended to introduce some safeguards around the use of the ministerial power to "vary" GiC regulations (outside of the normal regulatory process) and we have provided language to that effect in Annex A. We also recommend that the department develop a strong set of public policies to bring further clarity, consistency and transparency to the departmental use of such powers under the *Canada Shipping Act, 2001.*
- **International obligation:** Foreign vessels navigating in Canadian waters (those vessels that carry virtually all of Canada's imports and exports) are already governed by a strong body of international conventions. Canada – as a signatory to those conventions - cannot impose unilateral standards that differ from international standards on ship design, construction and equipment, nor can it extend its environmental and pollution jurisdiction beyond what is currently provided under

[1] Report from the Council of Canadian Academies, commissioned by the Clear Sea Center for Responsible Marine Shipping, *Commercial Marine Shipping Accidents: Understanding the Risks in Canada*, 2016, page 22

the *United Nations Convention on the Law of the Sea* and other applicable international conventions. In view of the foregoing, it will be important to ensure that the new regulatory powers provided under section 692 of Bill C-86 are exercised in accordance with Canada's international obligations.

- **Using all the tools in the tool box:** We also take this opportunity to note that regulations should not be viewed as the be all and end all, as management tools such as voluntary measures implemented on an industry-wide basis have a proven record of mitigating threats in an efficient, adaptative and relatively swift manner compared to regulatory tools. Such tools are as important as regulation with respect to supporting sustainable maritime transportation in Canadian waters.

4. Maximum amount for Administrative Monetary Penalty (AMP):

Although it is important to have an effective compliance framework in place, we are by no means facing a situation of blatant disregard of regulations by shipowners operating in Canadian waters. As an illustration of the seriousness with which the majority of shipowners view their regulatory obligations, the compliance rate with the mandatory speed reduction measure to protect North Atlantic Right Whales in the Gulf of St. Lawrence is well over 98 percent.

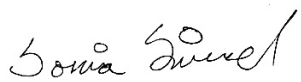
Section 709 of Bill C-86 proposes to increase the maximum amount of an AMP that can be fixed by regulation to $250,000, which represents a 10-fold increase from the current level. However, we do not see any comparative information regarding the level of AMPs in other Canadian legislation, which would be extremely beneficial in helping both stakeholders and members of this committee properly assess the reasonableness of the proposed approach.

Furthermore, AMPS are administrative in nature – insofar as they are imposed by governmental authorities as opposed to being determined by a court following judicial proceedings. As such, they lack some of the legal protections that are available in Court prosecutions, and continuous increases in the maximum level of such penalties may lead to an increase in issues regarding due process.

5. Amendments to modernize the Ship-source Oil Pollution Fund (Division 23 of Bill C-86)

Given the extremely short timeframes involved, we have been unable to undertake a meaningful review of the proposed amendments to the *Marine Liability Act* under Division 23 of Bill C-86. We will, however, continue to examine those amendments, with a view to submitting additional comments when the Bill is submitted for study by the Standing Senate Committee on Transport and Communication.

Respectfully submitted,



Sonia Simard
Director, Legislative and Environmental Affairs
SHIPPING FEDERATION OF CANADA

Annex A

Our proposed amendments to Bill C-86 are underlined and highlighted in yellow

i. Section 690 of Bill C-86

Interim order — Minister of Transport

10.1 (1) *The Minister of Transport may make an interim order that contains any provision that may be contained in a regulation made, under this Act, on the recommendation of only that Minister, if he or she believes that immediate action is required to deal with a significant, direct or indirect risk, or an immediate threat, to marine safety or to the marine environment.*

Cessation of effect

(2) *An interim order made under this section has effect from the time that it is made but ceases to have effect on the earliest of -*

> ***(a)*** *14 days after the interim order is made, unless the effective period is extended by the Governor in Council; and*
>
> ~~***(a)***~~ ***(b)*** *the day on which it is repealed;*
>
> ~~***(b)***~~ ***(c)*** *the day on which a regulation made under this Act that has the same effect as the interim order comes in-to force;*
>
> ~~***(c)*** *one year after the interim order is made or any shorter period that may be specified in the interim order, unless the effective period is extended by the Governor in Council; and~~
>
> ***(d)*** *the day that is specified in the order of the Governor in Council, if the Governor in Council extends the effective period of the interim order.*

Extension — Governor in Council

(3) *The Governor in Council may extend the effective period of the interim order for a period of no more than ~~two~~ one year~~s~~ after the end of the applicable period referred to in paragraph (2)~~(c). (a)~~*

> Note: We are of the opinion that a maximum duration of one year for an interim order should be sufficient time to allow Transport Canada to issue regulations embodying the content of an interim order. Interim orders should indeed be "interim" and we respectfully submit that stakeholders should not be deprived of the safeguards contained in the regulatory process due to concerns regarding the department's ability to draft and proceed with the introduction of regulations within an appropriate timeframe.

AND add a new section 10.1 (3.1) providing for a consultation requirement

Consultation

10.1 (3.1) *Before making an interim order, the Minister must consult with any person or organization that the Minister considers appropriate in the circumstances.*

> Note: Similar consultation requirements are provided for under the *Aeronautic Act* in recognition of the significant impacts that interim orders can have on stakeholders in the transportation sector.

ii. Section 692 of Bill C-86

Amendment by Minister of Transport

35.1 (2) *A regulation made under any of paragraphs (1)(h), (j) 20 and (k) may*

> ***(a)*** *authorize the Minister of Transport to amend, by order, that regulation; and*
>
> ***(b)*** *set out the terms and conditions under which the regulation may be amended by that order.*

add a new section 35.1 (2.1) providing for a consultation requirement

Consultation

35.1 (3.1) *Before making an order under section 35.1 (2), the Minister must consult with any person or organization that the Minister considers appropriate in the circumstances.*