

Arctic Waters Pollution Prevention **Amending Act**

An Act to Amend the Canadian Arctic Waters Pollution Prevention Act of 1985 based on the Sovereign Immunity Provisions of the United Nations Convention on the Law of the Sea

1. Explanatory Note

The purpose of this legislative drafting project is to ensure that the AWPPA conforms to the sovereign immunity provisions of Part XII of the UNCLOS. Canada ratified the UNCLOS on the 7 of November 2003. As a dualist State, Canada must implement international conventions into national law for them to be effective and enforceable. This explanatory note will clarify the rationale behind the amendment of section 12 (2) (2) of the AWPPA with regards to article 236 UNCLOS. After defining and analyzing the provisions of article 236 UNCLOS, this paper will explain what is the AWPPA and perform a comparison. Afterwards, this paper will propose to implement the provisions of article 236 UNCLOS directly into section 12 (2) (2) of the AWPPA. The explanatory note can be divided into three parts:

- a. Defining the UNCLOS and sovereign immunity under article 236 of the Convention;
- b. Explaining the AWPPA and why it should be updated; and
- c. How to amend AWPPA in order to adhere to the UNCLOS regime

I. Sovereign Immunity According to Article 236 of the UNCLOS

Article 236 of UNCLOS provides that the provisions concerning the protection and preservation of the marine environment will not apply to warships and other government vessels owned or operated by a State and engaged in government non commercial activity.¹ The title of this article is deceptive as the exemption of warships and government vessels goes beyond mere ‘sovereign immunity’. In fact, the immunity of sovereign vessels owned and operated by a sovereign State and engaged on government non commercial service can be assimilated to the immunity reserved to Heads of State,

¹ Alexander Proelss, *United Nations Convention on the Law of the Sea, A Commentary* (Verlag C.H. Beck 2017) 1591

according to the customary principle of international law *'par in parem non habet imperium'*.² There is a general exemption for such ships regarding all of the UNCLOS provisions on the protection of the marine environment. Indeed, it is presumed that the flag State of a naval vessel or aircraft in government service will ensure that the requirements of Part XII of UNCLOS are respected, so long as that does not interfere with the operational capabilities of that vessel.³ Article 236 UNCLOS reflects customary international law regarding the sovereign immunity of warships and government owned and operated aircraft and vessels, which are still expected to operate while respecting the environmental provisions of UNCLOS. The position in customary international law regarding States' jurisdiction over government owned and operated ships is codified in article 16 of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property.⁴ The rule of sovereign immunity of naval vessels is illustrated by abundant case law⁵⁶ and as well as treaties anterior and posterior to UNCLOS.⁷ It can also be remarked that within the context of marine pollution, all the IMO conventions provide express exceptions for government vessels.⁸

Historically, the negotiation and drafting of article 236 of UNCLOS has largely been uncontroversial. This was because there were many antecedents which the drafters of the article could draw upon. It was the Australian delegation that submitted a proposal at UNCLOS III for sovereign immunity of government-operated ships, aircrafts and other auxiliaries exempting these entities from compliance with the coastal State's environmental legislation.⁹ The Australian proposal was submitted in 1973 to the Sub-Committee of the Sea Bed Committee and requested that immunity to be granted to government operated vessels and aircraft, while maintaining that states

² Tim Hillier, *Sourcebook on Public International Law* (Cavendish Publishing Ltd 1998) 288-290

³ Above note 1.

⁴ UN Convention on the Jurisdictional Immunities of States and Their Property, 2004, online: <https://treaties.un.org/doc/source/recenttexts/english_3_13.pdf> accessed 20 December 2017

⁵ ITLOS, *The Ara Libertad Case* (Argentina v Ghana), Provisional Measures Order of December 15, 2012 para. 95 stating that 'in accordance with international law, a warship enjoys immunity including in internal waters'.

⁶ *The Schooner Exchange v McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *The Parlement Belge*, [1880] LR 5 PD 197; *The Porto Alexandre* [1920] AC 30

⁷ International Convention for the Unification of Certain Rules Concerning the Immunity of State Owned Ships (Brussels Convention) (1926), article 3 (1)

⁸ Alexander Proelss, *United Nations Convention on the Law of the Sea, A Commentary* (Verlag C.H. Beck 2017) 1592

⁹ Ibid.

have a duty to ensure that their government-operated entities comply to the greatest extent possible with the environmental provisions of UNCLOS.

The first fully drafted precursor to 236 UNCLOS was a ‘non-paper’: a draft article that reflected the position of the Chairman of the Conference regarding sovereign immunity of vessels *vis-à-vis* coastal State environmental regulations. Such an informal proposal wasn’t legally binding and did not compromise the position of the potential parties to the convention. This informal draft was submitted by the Chairman in 1975 to the UN during the second session of UNCLOS III.¹⁰ In order to understand article 236 of UNCLOS, this paper will now systematically examine the different elements that constitute the relationship between coastal State environmental legislation and sovereign immunity of vessels.

A. Provisions of UNCLOS Regarding Protection and Preservation of the Marine Environment

By these terms, the Convention expresses that all the provisions of UNCLOS regarding the protection of the marine environment do not apply to warships, naval vessels and their auxiliaries and aircrafts owned and operated by a State and used on exclusive government service. This element has to be read with UNCLOS’s Part XII in mind, particularly article 211 UNCLOS which provides for the right of coastal states to regulate pollution from vessels.¹¹ According to article 211 (2), coastal states have an obligation to adopt laws and regulations to prevent, reduce and control pollution from vessels flying their flag. Likewise, according to 211 (3), coastal states have the same obligations regarding foreign vessels that navigate their internal and territorial waters. We can therefore see that the obligation of coastal states to enact regulation for the prevention of pollution from vessels is total: all vessels entering and subsequently leaving the ports of coastal states party to UNCLOS must be subject to some form of environmental pollution regulation. This is a good example of the regime of compromise between the *mare clausum* and *mare liberum* principles that govern UNCLOS.

B. Definition of Warship or Naval Auxiliary According to UNCLOS

¹⁰Alexander Proelss, *United Nations Convention on the Law of the Sea, A Commentary* (Verlag C.H. Beck 2017) 1593

¹¹ Ibid.

Article 29 of UNCLOS defines warships as

‘a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline’

Such a definition leaves no room for interpretation. This provision should also be read in tandem with article 102 UNCLOS, which provides that a warship with a crew that has mutinied no longer qualifies as a warship and therefore no longer has immunity. Of note also is the link between article 29 and 303 (4) UNCLOS, according to which sunken warships may be protected for their ‘archaeological and historical value.’¹²

On the other hand, the term ‘naval auxiliary’ it is not defined by any of the articles of UNCLOS. In fact, this term is only employed once in the entire convention at article 236.¹³ Therefore, a definition can be based on the writings of eminent scholars.¹⁴ ‘Naval auxiliary’ is used to designate naval support vessels that provide assistance to warships, such as the ships that carry provisions and bunkers destined for warships or the navy’s own tows.¹⁵

Article 236 of UNCLOS must be read in tandem with the provisions of Part II, Section 3, Subsection C of the Convention.¹⁶ According to those articles warships and other government ships operated for non commercial purposes enjoy immunity from the jurisdiction of all coastal states as a consequence of their status as a naval vessel. This type of immunity also exists in customary international law¹⁷, and has been illustrated by case law.¹⁸ This immunity is akin to the wider *ratione personae* immunity attached to diplomatic agents and Heads of State. However, the coastal State still retains the right to request warships (and their naval auxiliaries) to leave the territorial sea immediately if they do not comply with the laws and regulations of the coastal State concerning innocent passage.¹⁹ However, this right to request warships to leave the territorial sea does not exist for violating coastal State environmental legislation. The Canadian Government cannot exempt naval vessels with sovereign immunity from applying the AWPPA regulations (as stated in the

¹²Alexander Proelss, *United Nations Convention on the Law of the Sea, A Commentary* (Verlag C.H. Beck 2017) 1594

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ UNCLOS, articles 29-32

¹⁷ Article 16 (2) of the UN Convention on the Jurisdiction of States and Their Property 2004, online <https://treaties.un.org/doc/source/recenttexts/english_3_13.pdf> accessed 16 December 2017

¹⁸ *The Schooner Exchange v McFaddon*, 11 U.S. (7 Cranch) 116 (1812)

¹⁹ UNCLOS, article 19

owned by the State enjoy immunity but only if they are employed by the government on sovereign acts.²³

The ICJ observed in the *Jurisdictional Immunities of the State Case*²⁴ that many states draw this distinction when limiting the immunity applicable to foreign states. This restrictive approach, especially in the maritime context has been illustrated by abundant case law.²⁵ Many jurisdictions have adopted legislation²⁶ that applies the same distinction. Within the UNCLOS itself, article 96 regarding the immunity of ships used only on government non commercial service illustrates this principle regarding the immunity of State owned or operated ships on the high seas.

E. Obligations of State Parties According to Article 236 UNCLOS

Article 236 of the UNCLOS provides for sovereign immunity of certain vessels and aircraft according to their status and function.²⁷ This provision is coupled with the obligation of State Parties to the Convention to

‘ensure by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable with this Convention’

This element gives considerable discretionary power to the flag State in deciding whether or not to adhere to the marine environmental protection standards set out in Part XII and in the other chapters of UNCLOS. Remarkable is the fact that article 236 UNCLOS does not provide for a regime of international State responsibility of the flag State of a vessel that has immunity in case of damage to the coastal State caused by non-compliance with the minimal environmental regulations of Part XII

²³ Alexander Proelss, *United Nations Convention on the Law of the Sea, A Commentary*, Verlag C.H. Beck, Munich, 2017, p. 1594

²⁴ *Jurisdictional Immunities of the State* (Germany v. Italy), ICGJ 434 (ICJ 2012), 3 February 2012, pp. 22-23

²⁵ *The Parlement Belge* (1879); *The Philippine Admiral* (1976); *The Ara Libertad Case* (Argentina v Ghana) [2012] ITLOS Rep 21

²⁶ US Foreign Sovereign Immunities Act (1976); UK State Immunity Act (1978); Canadian State Immunity Act, R.S.C., 1985, c. S-18

²⁷ Alexander Proelss, *United Nations Convention on the Law of the Sea, A Commentary*, Verlag C.H. Beck, Munich, 2017, p. 1594

UNCLOS.²⁸ This element should be contrasted with the regime of article 31 of UNCLOS that provides that flag states of warships and other government owned and operated vessels are internationally responsible for any damage sustained by the coastal State caused by the violation of its laws of passage.

II. The Current Regime of the AWPPA and Why it Should be Updated

A. What is the AWPPA?

The Canadian AWPPA complements the Canadian Shipping Act of 1985, which was amended in 2001. It is a specialized environmental legislation with focus on the Canadian Arctic, drafted in 1970. It is not nor was it intended to be a standalone act; the AWPPA must be understood within the context of other maritime legislation such as the Canadian Oceans Act of 1996²⁹ and the MLA. AWPPA pre-dates UNCLOS and its article 234, which provides for the right of coastal states to unilaterally adopt and enforce laws within the limit of the EEZ in ice-covered areas in order to prevent, reduce and control marine pollution.³⁰ In fact, article 234 UNCLOS was introduced by Canada at UNCLOS III to seek justification for the AWPPA.³¹ This was done in reaction to the *SS Manhattan* incident of 1969-1970 when four American oil tankers transited through the Northwest Passage, stirring public outrage in Canada.³² By the incorporation of article 234 into UNCLOS, the AWPPA regulations became generally accepted at an international level.

The AWPPA is an enacting act that aims to prevent pollution in Canadian Arctic waters. The AWPPA is a 'zero discharge' law, which states that 'no person or ship shall deposit or permit the deposit of waste of any type in the Arctic waters.'³³ The AWPPA describes offences and

²⁸ Ibid.

²⁹ Oceans Act S.C. 1996, c. 31

³⁰ Alexander Proelss, *United Nations Convention on the Law of the Sea, A Commentary* (Verlag C.H. Beck 2017) 1569

³¹ Aldo Chircop, William Moreira, Hugh Kindred and Edgar Gold, *Canadian Maritime Law* (2nd edn, Irwin Law 2016) 1003-1004

³² Ibid.

³³ AWPPA, Section 4 (1)

punishments, and outlines the powers that may be given to pollution prevention officers so that they may enforce the Act.³⁴ Exceptions to the AWPPA are allowed only according to regulation.

The additional aim of the AWPPA is to limit and reduce the risk of accidents and spills by making sure that ships only navigate in areas that are appropriate for their capabilities.³⁵ As such, it prescribes a reporting system for route and position of any vessel that intends to go through the Canadian Arctic waters.³⁶ This is intended to make sure that the adequate safety infrastructure is available to the vessels going through that remote area. The AWPPA has two key regulations, namely the Arctic Shipping Pollution Prevention Regulations (ASPPR), and the Arctic Waters Pollution Prevention Regulations (AWPPR). The AWPPR apply to the deposit of waste in Arctic waters or in any location on the mainland or islands of the Canadian Arctic. Additionally, the AWPPR provides for a liability regime of such deposits. The AWPPR regulates the deposit of domestic and industrial waste in Arctic waters and on land in the Arctic, and the deposit of waste by ships in Arctic water. This Act also describes the limits of liability in case of pollution. In the event of an inconsistency between the provisions of the AWPPA (or any regulation made pursuant to it) and the MLA, the MLA shall prevail to the extent of the inconsistency.³⁷ This last point is of particular importance as the provisions on civil liability (individual liability and liability of the shipowner) of the AWPPA³⁸ are outdated, when referred to the CLC and IOPC Fund Conventions.

B. Comparison between Section 12 (2) (2) of the AWPPA and article 236 UNCLOS

Section 12 (2) (2) of the AWPPA reads as follows

Orders exempting ships of foreign powers

³⁴ Transport Canada, 'Arctic Waters Pollution Prevention Act (AWPPA)', (19 July 2012) <<https://www.tc.gc.ca/eng/marinesafety/debs-arctic-acts-regulations-awppa-494.htm>> accessed 2 February 2018

³⁵ AWPPA, Section 12 (1)

³⁶ AWPPA, Section 11 (1)

³⁷ AWPPA, Section 2.1

³⁸ AWPPA, Section 6 (1) provides for individual liability and liability of the shipowner with outdated limits of liability, particularly since Canada has ratified the CLC and its sister convention, the IOPC Fund Convention. However, the MLA has been updated correspondingly in its Schedule 5 (Section 48-50) which addresses oil pollution, Schedule 6 which addresses the creation of the IOPC Fund and Schedule 8 (Section 69) which specifically address civil liability in the case of bunker oil pollution.

(2) The Governor in Council may by order exempt from the application of any regulations made under subsection (1) any ship or class of ship that is owned or operated by a sovereign power, other than Canada, where the Governor in Council is satisfied that

- (a) appropriate measures have been taken by or under the authority of that sovereign power to ensure the compliance of the ship with, or with standards substantially equivalent to, standards prescribed by regulations made under paragraph (1)(a) that would otherwise be applicable to it within any shipping safety control zone; and
- (b) in all other respects all reasonable precautions have been or will be taken to reduce the danger of any deposit of waste resulting from the navigation of the ship within that shipping safety control zone.

This law provides for the discretionary power of the Governor in Council of Canada to exempt ships owned by sovereign powers from the application of the AWPPA regulations. The ‘Governor in Council’ is the term used in Canada to designate the Ministers Cabinet acting in full legal capacity.³⁹ The Governor in Council is the executive power in the Canadian Parliament, responsible for proper application of Canadian legislation.

However, upon comparing the provisions of 12 (2) (2) of the AWPPA with article 236 of UNCLOS, there is an inconsistency. The UNCLOS provides that the environmental regulations of the convention do not apply to warships, aircrafts and naval auxiliaries. This provision provides for no discretionary power of the State Parties, as can be deduced from the definite terms ‘do not apply’ as opposed to the discretionary ‘may not apply’. This was a definite choice of the drafters of UNCLOS.⁴⁰ The Convention also provides that State Parties shall not impair the operational capacities of vessels and aircraft owned by a foreign power and used on government non commercial service. Thus, section 12 (2) of the AWPPA is incompatible with article 236 of the UNCLOS. The Governor in Council may not exercise such a discretionary power over the ships of sovereign states, according to UNCLOS. It is rather ironic that Canada did not implement the provisions of article 236 of UNCLOS into the AWPPA, knowing that article 234 of UNCLOS, to this day still referred to as the ‘Arctic Article’⁴¹ was originally proposed by Canada at UNCLOS III

³⁹ Privy Council Office of Canada, ‘Governing Responsibility: A Guide for Ministers and Ministers of the State’ (20 May 2004) <http://www.uccs.mun.ca/~kbell/cod/General_info/GovnrInCouncil.html> accessed 20 February 2018

⁴⁰ Alexander Proelss, *United Nations Convention on the Law of the Sea, A Commentary*, Verlag C.H. Beck, Munich, 2017, p. 1594

⁴¹ Above note 38, p.1569

to justify AWPPA internationally. For the sake of consistence, therefore, this paper submits that article 236 of UNCLOS must be directly incorporated into AWPPA.

III. How to update the Arctic Waters Pollution Prevention Act in order to conform to article 236 of the UNCLOS.

A. Incorporating UNCLOS Provisions into Canadian Law

This paper submits that provisions of UNCLOS must directly be incorporated into Canadian law for them to be effective, due to Canada's dualist legal tradition. Dualism means that international law and domestic law are two separate legal systems; while international laws may be valid internationally, they cannot be applied domestically unless they are first given force of law in domestic legislation.⁴² According to the Supreme Court of Canada⁴³ treaties signed by the State do not automatically become law in Canada: Canadian lawmakers must first domestically implement the treaty in question.

Such implementation of international law into Canadian domestic law can be done through a variety of means: through enactment of new legislation; through amendment of old legislation to bring it into line with international law; or through retention of pre-existing laws which fulfill the State's obligations under the treaty.⁴⁴ This paper analyzed the differences between UNCLOS and the AWPPA to come to the conclusion that the AWPPA needs to be updated with regards to the provisions on sovereign immunity in the context marine pollution regulations.⁴⁵ Therefore the implementation of article 236 of UNCLOS will be done by amending pre-existing legislation (the AWPPA) to bring it in line with international law. This is especially important because of the current factual and legal developments in the Arctic. We must take into account these developments to explain why Canada has to respect sovereign immunity of government owned and operated

⁴² Azeezah Kanji, 'Applying International Law in Canadian Courts: A Pocket Guide for the Perplexed' (*CLAIHR-Canadian Lawyers for International Human Rights*, 1 January 2015) <<http://claihr.ca/2015/01/01/applying-international-law-in-canadian-courts-a-pocket-guide-for-the-perplexed/>> accessed 1 January 2018

⁴³ *Canada (AG) v. Ontario (AG)* [1937] AC 326, this is the famous 'Labour Conventions' case that sets the principle that the incorporation of international treaties is a power vested exclusively in the Parliament of Canada. This case provides for federal jurisdiction over provincial jurisdiction when it comes to the incorporation of international law into national law.

⁴⁴ Above note 39

⁴⁵ UNCLOS, Part XII, Section 10

vessels. First, from a legal perspective, Canada, along with the seven other members of the AC has ratified the ASRA which entered into force on January 19, 2013.⁴⁶ This agreement is the first of its kind: a legally binding treaty negotiated under the auspices of the AC. The ASRA is not a circumpolar cooperation agreement on search and rescue between the Arctic nations. Indeed, the area to be covered is far too large. Instead, this agreement cleverly dissects the Arctic area into eleven different zones, that fall under the shared search and rescue capacities of each of the member States. Canada shares its search and rescue delimitation area with the USA to the West and Denmark (Greenland) to the East. This Agreement perfectly reflects the founding principle of the AC, which is peaceful cooperation between the Arctic nations and co-management of this unique area which is arguably one of the most inhospitable in the world. It is therefore paramount for Canadian environmental legislation, such as AWPPA, to respect the principles of sovereign immunity so as not to interfere with the joint search and rescue missions in the Canadian Arctic with the Royal Danish Navy⁴⁷, the US Navy and any other future collaborators.⁴⁸

B. Incorporating article 236 UNCLOS into section 12 (2) of the AWPPA

This paper concludes with a proposition of incorporating article 236 of UNCLOS directly into section 12 (2) of the AWPPA. The current section 12 (2) of the AWPPA must be repealed. This will be done by an outright repeal of all the provisions of that paragraph which provide for orders of the Governor in Council to exempt ships of foreign powers from the application of AWPPA. The newly drafted amendment will focus on the exemption of the application of the AWPPA, not on the orders permitting such exemptions. Indeed, to conform with article 236 of UNCLOS, the Governor in Council will not be capable of making such orders, since under UNCLOS State parties may not exercise such a discretionary power.

⁴⁶ Douglas C. Nord, *The Changing Arctic: Creating a Framework for Consensus Building and Governance within the Arctic Council* (Palgrave MacMillan 2016) 114-115

⁴⁷ Andreas Østhagen, 'Coast Guard Collaboration in the Arctic - Canada and Greenland (Denmark)', paper for the Munk-Gordon Arctic Security Programme, Walter Duncan Gordon Foundation, University of Toronto, 13 April 2016, <https://www.researchgate.net/publication/301232736_Coast_Guard_Collaboration_in_the_Arctic_Canada_and_Greenland_Denmark>, accessed 20 January 2018

⁴⁸ The AC has been the forum of the negotiation of two other legally binding instruments: the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (signed 2013) and the Agreement on Enhancing International Arctic Scientific Cooperation (signed 2017). Both of these treaties have yet to enter into force. But the fact that these agreements have been signed, and are legally binding, is indicative of greater cooperation in the AC among the member-states.

Under the current regime of the AWPPA, a foreign ship must apply to the government of Canada to be granted permission to be exempted from AWPPA. The act of requesting an exemption is contrary to article 236 UNCLOS which provides for the principle that government owned and operated vessels engaged on government non commercial service are, by their status as naval vessels, exempted from the provisions of AWPPA. Therefore the amending legislation will modify 12 (2) of AWPPA to reflect this principle, and also include the provisions of 236 UNCLOS regarding naval auxiliaries, or ships accompanying naval vessels; and aircrafts for which 12 (2) does not provide for. This paper submits that the modified section 12 (2) of AWPPA will help bring Canadian legislation in line with UNCLOS and ultimately bring consistency in Canadian legislation concerning Arctic Waters.

Arctic Waters Pollution Prevention Act

R.S.C., 1985, c. A-12

An Act to prevent pollution of areas of the arctic waters adjacent to the mainland and islands of the Canadian arctic

Preamble

WHEREAS Parliament recognizes that recent developments in relation to the exploitation of the natural resources of arctic areas, including the natural resources of the Canadian arctic, and the transportation of those resources to the markets of the world are of potentially great significance to international trade and commerce and to the economy of Canada in particular;

AND WHEREAS Parliament at the same time recognizes and is determined to fulfil its obligation to see that the natural resources of the Canadian arctic are developed and exploited and the arctic waters adjacent to the mainland and islands of the Canadian arctic are navigated only in a manner that takes cognizance of Canada's responsibility for the welfare of the Inuit and other inhabitants of the Canadian arctic and the preservation of the peculiar ecological balance that now exists in the water, ice and land areas of the Canadian arctic;

NOW THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short Title

Marginal note:

Short title

1 This Act may be cited as the Arctic Waters Pollution Prevention Act.

- R.S., c. 2(1st Supp.), s. 1.

Interpretation

Marginal note:

Definitions

2 In this Act,

analyst means a person designated as an analyst under the Canada Water Act, the Mackenzie Valley Resource Management Act or the Nunavut Waters and Nunavut Surface Rights Tribunal Act; (*analyste*)

arctic waters means the internal waters of Canada and the waters of the territorial sea of Canada and the exclusive economic zone of Canada, within the area enclosed by the 60th parallel of north latitude, the 141st meridian of west longitude and the outer limit of the exclusive economic zone; however, where the international boundary between Canada and Greenland is less than 200 nautical miles from the baselines of the territorial sea of Canada, the international boundary shall be substituted for that outer limit; (*eaux arctiques*)

ice-breaker means a ship specially designed and constructed for the purpose of assisting the passage of other ships through ice; (*brise-glace*)

owner, in relation to a ship, includes any person having for the time being, either by law or by contract, the same rights as the owner of the ship with respect to the possession and use thereof; (*propriétaire*)

pilot means a person licensed as a pilot pursuant to the Pilotage Act; (*pilote*)

pollution prevention officer means a person designated as a pollution prevention officer pursuant to section 14; (*fonctionnaire compétent*)

ship includes any description of vessel or boat used or designed for use in navigation without regard to method or lack of propulsion; (*navire*)

shipping safety control zone means an area of the arctic waters prescribed as a shipping safety control zone by an order made under section 11; (*zone de contrôle de la sécurité de la navigation*)

waste means

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water to an extent that is detrimental to their use by man or by any animal, fish or plant that is useful to man, and

(b) any water that contains a substance in such a quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water to the extent described in paragraph (a), and without limiting the generality of the foregoing, includes anything that, for the purposes of the *Canada Water Act*, is deemed to be waste. (*déchet*)

R.S., 1985, c. A-12, s. 2; 1992, c. 40, s. 49; 2002, c. 7, ss. 80, 278, c. 10, s. 177; 2009, c. 11, s. 1; 2014, c. 2, s. 4.

Application to arctic waters

3 (1) Except where otherwise provided, this Act applies to the arctic waters.

Marginal note:

Adjacent waters included in arctic waters

(2) In so far as this Act applies to or in respect of any person described in paragraph 6(1)(a), the expression “arctic waters” includes all the waters described in the definition of that expression in section 2 and all waters adjacent thereto lying north of the sixtieth parallel of north latitude, the natural resources of whose subjacent submarine areas Her Majesty in right of Canada has the right to dispose of or exploit, whether the waters so described or those adjacent waters are in a frozen or liquid state, but does not include inland waters.

- R.S., c. 2(1st Supp.), s. 3.

Section 12 (2) (1) of the AWPPA, for context

1. Section 12 (2) of the Arctic Waters Pollution Prevention Act, R.S.C., 1985 c. A-12 is maintained as follows:

Regulations relating to navigation in shipping safety control zones

12 (1) The Governor in Council may make regulations applicable to ships of any class specified therein, prohibiting any ship of that class from navigating within any shipping safety control zone specified therein

(a) unless the ship complies with standards prescribed by the regulations relating to

(i) hull and fuel tank construction, including the strength of materials used therein, the use of double hulls and the subdivision thereof into watertight compartments,

(ii) the construction of machinery and equipment, the electronic and other navigational aids and equipment and telecommunications equipment to be carried and the manner and frequency of maintenance thereof,

(iii) the nature and construction of propelling power and appliances and fittings for steering and stabilizing,

(iv) the manning of the ship, including the number of navigating and look-out personnel to be carried who are qualified in a manner prescribed by the regulations,

(v) with respect to any type of cargo to be carried, the maximum quantity thereof that may be carried, the method of stowage thereof and the nature or type and quantity of supplies and equipment to be carried for use in repairing or remedying any condition that may result from the deposit of any such cargo in the Arctic waters,

(vi) the free-board to be allowed and the marking of load lines,

(vii) quantities of fuel, water and other supplies to be carried, and

(viii) the maps, charts, tide tables and any other documents or publications relating to navigation in the Arctic waters to be carried;

(b) without the aid of a pilot, or of an ice navigator who is qualified in a manner prescribed by the regulations, at any time or during one or more periods of the year, if any, specified in the regulations, or without ice-breaker assistance of a kind prescribed by the regulations; and

(c) during one or more periods of the year, if any, specified in the regulations or when ice conditions of a kind specified in the regulations exist in that zone.

Amended articles of section 12 (2) (2) of the AWPPA

2. Section 12 (2) of the Arctic Waters Pollution Prevention Act, R.S.C., 1985 c. A-12 is replaced by the following:

Exemption regarding the ships and aircraft of foreign powers

12 (2) The Governor in Council is to exempt by order from the application of any regulations made under subsection (1) all ships, class of ships and aircraft that is owned or operated by a sovereign power, other than Canada, when

(a) the ship or class of ship is under the authority of a sovereign State; and

(i) the ship or class of ship is used exclusively on government non commercial service of that sovereign State;

(b) the aircraft owned and operated by a sovereign power employed exclusively on government non commercial service is accompanying the naval ship; or

(i) the aircraft is engaged in other exclusive government non commercial service.

Bibliography

Cases:

- *The Schooner Exchange v McFaddon*, 11 U.S. (7 Cranch) 116 (1812)
- *The Parlement Belge*, [1880] LR 5 PD 197
- *Canada (AG) v. Ontario (AG)*, [1937] AC 326
- *The Porto Alexandre*, [1920] AC 30
- *The Philippine Admiral*, [1977] AC 373
- *Jurisdictional Immunities of the State (Germany v. Italy)*, ICGJ 434 (ICJ 2012)
- *The Ara Libertad Case (Argentina v Ghana)*, [2012] ITLOS Rep 21

Statutes and Statutory Instruments:

- US Foreign Sovereign Immunities Act (1976)
- UK State Immunity Act (1978)
- Arctic Waters Pollution Prevention Act R.S.C., 1985, c. A-12
- Canadian State Immunity Act, R.S.C., 1985, c. S-18
- Oceans Act S.C. 1996, c. 31
- Marine Liability Act S.C. 2001, c. 6
- Arctic Waters Pollution Prevention Regulations, C.R.C., c. 354

- Arctic Shipping Pollution Prevention Regulations, C.R.C., c. 353

International Conventions and Instruments:

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