CANADIAN SHIPOWNERS ASSOCIATION
We are Short Sea Shipping

May 1, 2017

Delivered by Email

Senate Committee on Foreign Affairs and International Trade
c/o Ms. Marie-Eve Belzile, Clerk of the Committee
The Senate of Canada
Ottawa, ON K1A 0A4

To the Members of the Senate Committee on Foreign Affairs and International Trade,

Re: Written Submission of the Canadian Shipowners Association (CSA) further to the Committee Hearing on April 6th, 2017 regarding the proposed amendments to the *Coasting Trade Act* provided in Bill C-30 for the purpose of implementing the Canada-EU *Comprehensive Economic and Trade Agreement* (CETA)

The Canadian Shipowners Association (CSA) would like to thank the Senate Committee on Foreign Affairs and International Trade (the Committee) for the opportunity to participate in the discussion of issues relating to the implementation of the market access concessions for marine cabotage services under the Canada-EU *Comprehensive Economic and Trade Agreement* (CETA) at the hearing held on Thursday, April 6th. The CSA is also grateful for the invitation extended by Senator Downe during the hearing to provide written submissions to follow up on the points raised during the discussion and the questions asked by the Committee Members.

In particular, this submission responds to the questions raised by Senator Woo and Senator Pratte at the end of the morning session during the April 6th hearing, and also responds to the views expressed by the representatives of the Shipping Federation of Canada and the Port of Sydney Development Corporation. For your ease of reference, our submissions relate specifically to sections 92 through 94 of Bill C-30, which amend the *Coasting Trade Act* to implement the market access concessions granted by the Government of Canada to the European Union in relation to the Canadian cabotage services sector under paragraph 4 of Reservation II-C-14 in Canada's Schedule to Annex II of the CETA.

As noted during the hearings on April 6th and April 13th, key Canadian stakeholders in the domestic cabotage services industry, including the CSA and its members, were not consulted on the market access concessions granted to the European Union during the CETA negotiations. As a consequence, we found ourselves faced with a *fait accompli* in relation to the negotiated outcomes in the final text of the Agreement. These negotiated outcomes threaten to cause material injury to the Canadian shipowners and the Canadian seafarers who have long supplied

cabotage services in Canadian waters.[1] In this regard, the CSA agrees with the views expressed on behalf of the Seafarers' International Union of Canada, the International Transport Workers Federation, and the Nunavut Eastern Arctic Shipping (NEAS) Group, and we support their positions in principle.

We are also cognizant of the practical points raised by Senator Marwah and other Senators on the Committee. To the extent that the market access concessions at issue must be implemented, it is the CSA's view that the draft legislation in Bill C-30 to amend the *Coasting Trade Act* is consistent with the negotiated outcomes in the final legal text of the CETA. There is no need whatsoever to change sections 92 through 94 as they are currently drafted in order to fully satisfy Canada's market access commitments to the European Union. The CSA's position in this matter is substantively informed by its participation in the administrative working group on implementation of the CETA market access concessions for maritime cabotage services led by Transport Canada in 2015-2016.

For the reasons discussed further below, the amendments proposed by the Port of Sydney Development Corporation and the Shipping Federation of Canada are neither necessary nor appropriate, and they could result in unintended consequences to the further detriment of Canadian shipowners and Canadian seafarers, as well as other Canadian stakeholders.

The CSA is also deeply concerned about the practical realities of implementing an effective monitoring and enforcement regime to effectively administer the changes to the *Coasting Trade Act* — including the conditions, requirements, and limitations on market access established in the negotiated outcomes of the CETA — and also to ensure compliance with Canada's other laws and standards. We are concerned that, notwithstanding the theoretical application of Canadian law to foreign vessels and their crews, there are simply insufficient resources allocated in Canada to ensure actual application of the law in practice. Historically, Canadian departments and agencies such as, e.g., Employment Services and Development Canada (ESDC) and the Marine Safety division of Transport Canada have been unable to ensure compliance with the applicable laws and standards in Canada's protected cabotage market, where foreign vessels were only permitted to supply services pursuant to a licence issued under the *Coasting Trade Act*. There is no information available to suggest that the Government of Canada is now capable of effectively monitoring and enforcing a market that will be opened up for the first time to foreign vessels supplying a number of unlicensed commercial cabotage services throughout Canadian waters.

[1] For a detailed explanation of the threat of injury to the Canadian cabotage industry, please see the CSA's written brief to the Committee (April 4th) and its opening statement (submitted in writing on April 5th and presented in person on April 6th).

Senator Pratte's question regarding the application of Canadian labour, environmental, and safety laws to foreign vessels supplying cabotage services in Canadian waters

During the hearing on April 6th, near the end of the morning session, Senator Pratte asked a question regarding the application of all Canadian laws — labour laws, environmental laws and safety laws — to European and foreign ships while those ships are in Canadian waters.

This question goes to the heart of the CSA's concerns in relation to the implementation of the CETA market access concessions affecting the market for marine cabotage services in Canada. On the one hand, there is the text of what the Canadian law requires. On the other hand, there is what the application of Canadian law will actually allow in practice. This gap can only be filled by the implementation of an effective monitoring and enforcement regime to ensure that entities using foreign vessels to supply cabotage services in Canada operate in strict compliance with the conditions and requirements of the *Coasting Trade Act* and all other applicable Canadian laws and standards, including those pertaining to labour and employment, environmental protection, and marine safety. Another issue that is relevant to this question is the ambiguity regarding whether or to what extent Canadian statutory deduction requirements apply to employers of foreign crews working aboard foreign vessels to supply marine cabotage services within Canada. Each of these issues is addressed below.

As a starting point, the CSA would like to note with approval the evidence provided during the hearing on Thursday, April 13th by Mr. James Given on behalf of the Seafarers' International Union of Canada, and by Mr. Peter Lahay and Mr. Terry Engler on behalf of the International Transport Workers' Federation. These witnesses provided cogent evidence demonstrating that the Government of Canada has failed to enforce its own labour laws and standards with respect to foreign crew members on foreign vessels that supply services in Canadian waters. One of the reasons for this is that, historically, there have been insufficient personnel and resources to monitor and enforce compliance with Canadian laws in relation to foreign vessels.

This evidence emphasizes the importance of ensuring that an effective monitoring and enforcement regime is implemented — including sufficient administrative infrastructure, personnel, and other resources — on the day when Bill C-30 and the amendments to the *Coasting Trade Act* enter into force. In the absence of an effective monitoring and enforcement regime, there will be nothing to ensure compliance with the requirements of Canada's labour, employment, and safety laws in relation to the workers aboard foreign vessels entering Canada to supply services pursuant to the CETA market access concessions. The same is true with respect to the application of Canada's environmental protection and marine safety requirements to such vessels, some of which might remain in Canada indefinitely to provide unlicensed marine cabotage services on a continuous basis.

The CSA notes that Canada has committed under Chapter 23 of the CETA to uphold the levels of protection afforded under its domestic labour laws and standards. Specifically, Canada "shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law and standards" or "through a sustained or recurring course of action or inaction, fail to effectively enforce its labour law and standards" for the purposes of encouraging trade or investment in Canada.[2] Similarly, Canada has committed under Chapter 24 of the CETA to uphold the levels of protection afforded under its environmental law.[3] Thus, Canada is prohibited from failing to enforce its laws and standards pertaining to labour and environmental protection, e.g., through sustained or recurring inaction. An effective monitoring and enforcement regime is therefore an essential requirement of CETA implementation.

Unfortunately, no information is available regarding the development or implementation of the kind of monitoring and enforcement regime that will clearly be needed in order to ensure compliance with Canadian laws on the date when foreign vessels begin entering Canada to supply unlicensed cabotage services pursuant to the CETA. Further, there is no evidence of any budgetary allocations to support the development or implementation of such a regime. If Canada's laws are not effectively applied and enforced, then the practical result is to permit non-compliance.

Where foreign vessels are permitted to operate in the Canadian market without regard to Canadian laws and standards, they pose risks to marine safety and to Canada's environment. Further, they gain an unfair competitive advantage in terms of extremely low operating costs.

In contrast, Canadian shipowners using Canadian-registered vessels crewed with Canadian seafarers operate in strict compliance with Canada's laws, regulations, and standards. We provide reliable, safe, and environmentally sustainable cabotage services to Canadian industries and communities. Further, we are a major source of employment for Canadians, creating many high-paying, middle-class jobs aboard our vessels and ashore. While we incur significant operating costs and capital investments (i.e., for safety equipment, environmental protection features, upgrades, and maintenance in accordance with Canada's strict regulatory regime), these are the costs of doing business in Canada. Suppliers of cabotage services in the Canadian market should not be permitted to circumvent compliance with Canadian laws and standards, or the costs they entail, through the use of foreign vessels under the CETA market access concessions.

It is also important to note that, in some cases, the interpretation and application of Canadian laws are unclear with respect to the foreign vessels and the crews working aboard them that will enter Canada to supply cabotage services when the amendments to the *Coasting Trade Act* enter into force.

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[2] See Article 23.4 (Upholding levels of protection).

[3] See Article 24.4 (Upholding levels of protection).

An important example of this ambiguity is whether or to what extent EU entities, Canadian entities, or third-country entities under EU or Canadian control that use foreign vessels to supply cabotage services in Canada will be required to collect and remit statutory deductions in respect of Canada Pension Plan (CPP) payments, Employment Insurance (EI) premiums, and Canadian income tax in relation to the crew members working aboard such vessels. It is our understanding that any temporary foreign worker operating in Canada under a work permit is subject to the above-referenced statutory deductions, although Canadian income tax may be subject to bilateral tax treaty provisions designed to preclude the double payment of income tax in both Canada and a worker's home jurisdiction.

It is not clear, however — including to the officials of Finance Canada with whom we have discussed this issue — exactly how applicable tax treaty provisions, if any, might affect an employer's obligations to remit income taxes and other statutory deductions from the wages paid to crew members working in Canada as temporary foreign workers aboard foreign vessels engaging in unlicensed cabotage activities. As indicated above, such vessels may remain within Canada indefinitely, supplying certain services on a continuous basis (i.e., carriage of empty containers, continuous feeder services, and private dredging services). Similarly, it is not clear how these obligations would be monitored and enforced by Canadian authorities.

Any failure to ensure that the statutory deductions required under Canadian law are being collected and remitted by entities using foreign vessels to supply cabotage services within Canada will confer an improper and unfair economic advantage. This will contribute to the uneven competitive landscape under the CETA market access concessions to the detriment of Canadian shipowners and, in turn, Canadian seafarers supplying such services in Canada.

Questions from Senator Cordy and Senator Woo regarding the request to extend the CETA market access for feeder services to Canadian ports beyond the ports of Halifax and Montreal

During the hearing on April 6th, both Senator Cordy and Senator Woo asked questions relating to the request made on behalf of the Port of Sydney Development Corporation to expand the CETA market access for feeder services (i.e., marine transport services between ports within Canada) beyond the ports of Halifax and Montreal to include "all ports in Atlantic Canada". Senator Marwah also made reference to this request in one of his questions.

The further liberalization that the Port of Sydney Development Corporation has requested would depart substantially from the negotiated outcomes in the text of the CETA, unilaterally granting a tremendous market access concession to the European Union with no reciprocal value for Canada negotiated in exchange.[4] At the same time, it would cause significant harm to

[4] In his regard, the CSA notes the explanations provided by Mr. Steven Verheul to the Committee during the hearing on March 1st, 2016: "the fact is most countries are very restrictive when it comes to cabotage. Canada

the Canadian shipowners and Canadian seafarers who are ready and available to supply feeder services to and from the Port of Sydney, the Ports of Hawkesbury, Saint John, and Yarmouth, and other ports throughout Atlantic Canada. As the CSA has previously explained, any action that further liberalizes market access for domestic cabotage services beyond the negotiated outcomes of the CETA would be highly detrimental to Canadian shipowners supplying domestic cabotage services and their Canadian workers.[5]

It is very important to note that expanding the scope of the CETA market access for feeder services to and from ports within Canada is not necessary for the Port of Sydney (and other Canadian ports) to benefit from increased international shipping traffic to and from EU countries and other CETA beneficiaries. Currently, there is nothing in the CETA that prevents or discourages foreign vessels from delivering inbound cargo or loading outbound cargo at the Port of Sydney. To the extent that such increased international shipping creates an increased demand for domestic cabotage services between the Port of Sydney and other Canadian ports, this represents an important opportunity for not only the Port of Sydney, but also for the Canadian shipowners and Canadian seafarers ready and available to supply those services.

For the foregoing reasons, it is neither necessary nor appropriate for Parliament to amend Bill C-30 to expand the scope of the CETA market access for feeder services under the *Coasting Trade Act* to ports beyond those established in the negotiated outcomes.

The definition and use of "owner" in the *Coasting Trade Act* broadly encompasses EU and Canadian operators pursuant to contractual rights of possession and use, and does not preclude EU and Canadian entities engaging in vessel pooling or sharing agreements

In its written brief dated April 6th, 2017, the Shipping Federation of Canada expresses concern that "[t]he wording used in Bill C-30 … is such that only a very limited number of E.U. shipowners would actually be able to reposition empty containers between Canadian ports". In this regard, it asserts that "[a]s currently written, Bill C-30 would only allow the E.U. owner of a ship that is serving as the 'master carrier' under a vessel sharing agreement (i.e. the owner whose ship is serving as the transporting vessel) to reposition its empty containers between two Canadian ports".

The CSA does not agree with this interpretation. Subsection 2(1) of the *Coasting Trade Act* broadly defines the term "owner", in relation to a ship, to mean "the person having for the time

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is included among those. We're not the most restrictive; the U.S. is far more restrictive than we are. We were not intending to provide openings to our cabotage market. That's largely protected for Canadian suppliers. … The EU did make the request in this one particular route [*i.e., between the ports of Montreal and Halifax*]. We saw an opportunity there to accommodate some of their concerns, some of their interests, because it was not currently being filled by Canadian operators. That's what led to that particular outcome. We were not interested in giving them more than they asked for."

[5] See the written submission of the CSA to the Senate Committee dated April 4th, 2017, pp. 2-3.

being, either by law or by contract, the rights of the owner of the ship with respect to its possession and use" (underline emphasis added). Thus, an entity holding rights of possession and use of a vessel under the terms and conditions of a contractual agreement (i.e., a vessel pooling or sharing agreement) falls within the definition of "owner" for the purposes of the *Coasting Trade Act*. This definition clearly encompasses the concept of a vessel "operator", i.e., an entity exercising possession and usage rights pursuant to a contractual agreement. **It is important to note that the wording in this definition does not place restrictions or limitations on such rights of possession and use, but rather permits them to be defined by the terms and conditions of the contractual agreement that creates them.**

The CSA considers this definition to be extremely broad in scope, and has identified nothing that creates the restriction alleged by the Shipping Federation of Canada. There is no express or implied "master carrier" requirement. Under the proposed subsection 3(2.1), the only limitation that is placed on an "owner" seeking to use a foreign vessel to reposition its owned or leased empty containers is that it must be an EU entity, a Canadian entity, or a third-country entity under EU or Canadian control. This is consistent with the negotiated outcomes of the CETA.

Further, the CSA is deeply concerned with the practical implications of the amendment proposed by the Shipping Federation of Canada, which is to add the term "operator" to subsection 3(2.1), and to pluralize the term "owner" in the chapeau of this provision. As noted above, the existing definition of "owner" already encompasses the concept of a vessel "operator", providing a broad scope for the contractual terms and conditions creating operational rights of possession and use. The term "operator" is not defined under the *Coasting Trade Act*. Simply adding this undefined term, which is redundant with the defined term "owner", would create unnecessary and latent ambiguity in the interpretation and application of this provision and could lead to unintended consequences. For the same reasons, attempting to define the term "operator" would create unnecessary complexity without adding any substantive value.

One of the problems that arises with including the undefined term "operator" in subsection 3(2.1) is that it could unintentionally extend the CETA market access benefits to partnerships comprising or including third-country entities not under EU or Canadian control that establish a minimal "commercial management" entity in the European Union or Canada for the purposes of "operating" a pool of vessels in Canada. While the "operator" would be an EU or Canadian entity in principle, the actual benefits of preferential market access would flow to third-country shipowners outside the scope of the negotiated outcomes of the CETA. Considering the definitions of "Canadian entity" and "EU entity", such an "operator" would not necessarily need to be a corporation or other "juridical person" established by statute; rather, it could be a creature of contractual construction or some "other association".

International maritime shipping companies are very sophisticated and competitive businesses. They are experienced and adept at developing complex business structures and relationships in order to maximize jurisdictional advantages and market opportunities. There is no doubt that an "entity" could be formed in an EU Member State or Canada with little difficulty or expense in order to play the role of an "operator" for the benefit of non-EU, non-Canadian entities beyond EU or Canadian control. This emphasizes the importance of ensuring that the new market access exceptions in the *Coasting Trade Act* that implement the negotiated outcomes of the CETA are carefully defined and administered.[6]

The Shipping Federation of Canada represents the interests of foreign shipping companies, shipowners, operators, and agents with offices located in Canada.

For the foregoing reasons, the CSA's view is that no changes to section 92 of Bill C-30 are necessary in order to address the concerns expressed by the Shipping Federation of Canada. Moreover, no such changes are appropriate under the circumstances, as they would unnecessarily give rise to ambiguity and a risk of unintended consequences.

The negotiated outcomes of the CETA do not include "equipment"

In its written brief dated April 6th, 2017, the Shipping Federation of Canada also asserts that "the term 'empty container' … is inconsistent with what was envisioned under CETA". It suggests that the "definition of empty containers should be broadened to include equipment that is NOT permanently affixed to the container, provided such equipment is essential to the container's proper functioning".

Again, the CSA does not agree with this interpretation. Subsection 3(2.1) provides that foreign vessels may be used for the unlicensed carriage of "empty containers … and any ancillary equipment that is permanently affixed to the containers". The negotiated outcome set forth in subparagraph 4(a) of Reservation II-C-14 of the CETA contemplates a market access concession for "repositioning owned or leased empty containers" only, and it does not include any mention of equipment whatsoever. Thus, the proposed subsection 3(2.1) of the *Coasting Trade Act* is

[6] During the hearing on March 1st, 2017, Ms. Louise Laflamme explained that the definition and use of the term "owner" under the *Coasting Trade Act*, as amended to implement the CETA, ensures that "what we've negotiated in CETA is met" and that "we don't extend the agreement benefits to non-parties". Further, she confirmed that: (i) "[t]he existing language of the *Coasting Trade Act* includes the person who has, by law or contract, the possession or use" of a vessel; "when more than one company uses the same vessel, usually they have a contract of ownership for a portion of that vessel to move the cargo they would like, at the tariffs that they've negotiated. In most cases, those people have a contract in law for the use of the vessel"; and "every qualifying owner of a space on a vessel, if they meet all the conditions in the *Coasting Trade Act* to implement CETA, then they will benefit from what's been negotiated", while "the ones that have an ownership portion of a vessel but are not an EU entity and don't meet the conditions of the *Coasting Trade Act* to implement CETA, they will be excluded" (underline emphasis added).

not only consistent with the negotiated outcomes of the CETA, but it goes further. The inclusion of the phrase “ancillary equipment that is permanently affixed to a container” is a practical addition for the purposes of implementation. Such equipment is part and parcel of the container itself, as an integral component that is essential to the container’s operation.

In contrast, equipment that is not permanently affixed to an empty container cannot be said to be essential to the proper functioning of the empty container. Such equipment cannot be said to be a part of an “empty container” itself. Rather, such equipment is cargo.

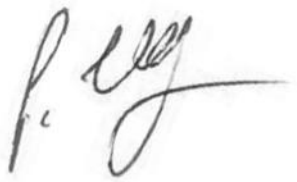
The CSA is deeply concerned with the difficulty in (i) clearly defining the scope of such separate and distinct equipment, and (ii) administering that definition in practice. The Shipping Federation of Canada has provided no examples of what kind of equipment would fall within this definition. Its proposal to delete and replace the clear requirement for “ancillary equipment” that is “permanently affixed to the containers” with the very broad description “necessary to ensure the safety, security, containment and preservation of the goods (carried in those containers)” is problematic. This wording conflates the transport of “goods” with the repositioning of “empty containers”. In the CSA’s view, only equipment that is permanently affixed to an empty container can be said to be ancillary — that is, necessary — to the empty container itself.

Conclusion

Again, we thank the Committee for your consideration of this submission and, more broadly, the concerns of the CSA and its members in relation to CETA implementation. This submission builds upon and should be read together with the CSA’s written brief (submitted to the Committee on April 4th) and the CSA’s opening statement (provided in writing to the Committee on April 5th and presented in person on April 6th).

If you have any questions relating to the contents of this submission, or if you would like to discuss these issues further with the representatives of the CSA, please do not hesitate to contact the undersigned.

Yours very truly,



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