

Legal Issues of Polar Shipping

Marc D. Isaacs
Isaacs & Co.
416-601-1348
marc@isaacsco.ca

Isaacs & Co.

BARRISTERS & SOLICITORS

11 King Street West, Suite 1200, Toronto, Ontario Canada M5H 4C7

Tel: 416.601.1348 | Fax: 416.601.1190 | www.isaacsco.ca

Topics

- Sovereignty and Jurisdiction
- *United Nations Convention on the Law of the Sea*
- IMO “Polar Code”
- Northern Sea route
- Canadian Legislation for the Northwest Passage
 - *Arctic Waters Pollution Prevention Act*
- Legal regimes going forward

Sovereignty & Jurisdiction

- There are 2 primary passages through the Arctic
- The Northwest Passage
 - From Greenland to the Bering Strait
- The Northern Sea Route
 - Along the northern coast of Russia
- Speculation of one day there might be a Central Arctic Route
- Jurisdiction is the ability to lawfully enforce legislate/regulate over an area

Sovereignty & Jurisdiction

- Canada claims NWP as part of its internal waters
 - Political expression of sovereignty
 - Ability to maintain it?
- The numerous islands of the Canadian arctic archipelago are Canadian lands (not disputed)
- Claim of Sovereignty is not fully settled
- Contested by other states including the United States of America

Legal Issues of Jurisdiction

- Primary legal issue is whether the NWP & NSR are Internal Waters, Territorial Waters, an International Strait or the High Seas
 - Categorization would give varying levels of ability to regulate
 - Has not mattered significantly up to present
- Canada and Russia are the primary coastal states
- Internal waters would give a nation the most control over shipping and activity in the area

Legal Issues of Jurisdiction

- Claim of internal waters likely to be subject to challenge by other nations
 - USA in particular opposes and takes position that they are international straits
- Not likely to come to a head until an incident
- Somebody will be caught in the middle – a commercial enterprise which runs afoul of the law exerted by one nation over another's vessel

An International Strait?

- A body of water can become an international strait because of the custom of nations using it to facilitate commerce
- Questionable if the NWP or the NSR is an international strait because of its lack of frequent and historical use as a shipping route
- This could change with increased usage by commercial entities of different nations

Northwest Passage

- The 12 mile limit of the territorial sea means there are parts of the Northwest Passage that cannot be transited without crossing through Canadian territorial waters (i.e. 24 miles between islands of the archipelago)
 - Barrow Strait and Prince of Wales Strait
- Ships will be subject to Canadian Law at parts of passage

Does classification matter?

- Even if the NWP is not Canadian internal waters and not an International Strait then it is partly (if not entirely at some points) Canadian Territorial Seas and as well as subject to the Canadian Exclusive Economic Zone
- Parts would still be subject to Canadian law such as the *Arctic Waters Pollution Prevention Act*
- Same for Russia and the NSR
- Application of s. 234 of the UNCLOS

United Nations Convention on the Law of the Sea (UNCLOS)

- Territorial Sea – 12 miles (Art. 3)
 - Right of innocent passage (Art. 17)
- Coastal State may regulate (Art. 21)
 - Safety of Navigation
 - Preservation of environmental and prevention/control of pollution
- Coastal state may charge for services (Art. 26)
 - Compulsory pilotage in the NWP?
 - Compulsory pilotage / icebreaking in the NSR

UNCLOS

- Exclusive Economic Zone (Art. 55 & 57)
 - 200 miles
 - Important for the exploitation of natural resources

Isaacs & Co.

BARRISTERS & SOLICITORS

11 King Street West, Suite 1200, Toronto, Ontario Canada M5H 4C7

Tel: 416.601.1348 | Fax: 416.601.1190 | www.isaacscsco.ca

UNCLOS

- Art 194. States are to take measures to prevent, reduce and control pollution of marine environment
- Art 194 (5):
 - The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

UNCLOS Article 234

- *Article 234: “Ice-covered areas”*

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. ...

Art. 234 (Continued)

... Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

Isaacs & Co.

BARRISTERS & SOLICITORS

11 King Street West, Suite 1200, Toronto, Ontario Canada M5H 4C7

Tel: 416.601.1348 | Fax: 416.601.1190 | www.isaacscsco.ca

UNCLOS Article 234

- Described as one of the most ambiguous and controversial clauses in the treaty
- Allows Canada or Russia (and others) as a Coastal State to enact laws to protect environment and shipping
- Also gives international legitimacy to *Arctic Waters Pollution Prevention Act (AWPPA)*

The “Polar Code”

- Guidelines For Ships Operating In Arctic Ice-covered Waters
 - “Polar Code” was a name for earlier version
- Developed by the International Maritime Organization
- They are recommendations – Not binding
- Set out provisions for construction, equipment, operational, and environmental considerations
 - Some provisions are specific. Others are more general.

The “Polar Code”

- Describes classes of ships “Polar Class” similar to that of the International Association of Classification Societies
 - Classes 1 to 7
 - PC 1 is year round
 - PC 7 summer /autumn in thin ice

The “Polar Code”

- Intended to address additional provisions beyond existing SOLAS requirements
- Promotion of safety and prevention of pollution
- All ships should have an Ice Navigator
 - What are the real specifics of the requirements?
- Ships should be constructed to resist ice loads and materials should be ice strengthened
- Account for effect of icing in stability calculations
- Able to withstand flooding resulting from hull penetration due to ice

The “Polar Code”

- Additional life and safety requirements to take into account arctic conditions.
 - Address effects of ice-breaking and ice ramming operations
 - Address escape routes in iced or freezing temperatures
 - Dimensioned for polar clothing
- Address anchoring and providing assistance in case of breakdown or incident
 - Must consider capabilities of extreme and remote environment

The “Polar Code”

- Machinery, propulsion and electrical systems should be designed for operation in arctic conditions and minimizing pollution
- Fire protection systems must have extra precautions against freezing
- Lifesaving equipment must deal with thermal needs
 - Personal survival kits
 - Group survival kits
 - Lifeboats have to address freezing conditions from frozen fuel lines to drinking water and launching apparatus

The “Polar Code”

- Navigational devices for use in high latitudes as magnetic compasses may be unreliable
- 2 independent depth sounders; radar
- Ability to deal with and work in periods of prolonged darkness
- Ability to de-ice equipment and windows

The “Polar Code”

- Ice Navigators

The Ice Navigator should have documentary evidence of having satisfactorily completed an approved training program in ice navigation. Such a training program should provide knowledge, understanding and proficiency required for operating a ship in Arctic ice-covered waters, including recognition of ice formation and characteristics; ice indications; ice manoeuvring; use of ice forecasts, atlases and codes; hull stress caused by ice; ice escort operations; ice-breaking operations and effect of ice accretion on vessel stability.

The “Polar Code”

- Environmental protection and damage control
- All ships should be equipped and crews trained to control damage and conduct hull repairs
- Ability to take precautions to prevent escalation of damage to get to location where more substantial repairs can be effected
 - This could be a long time for a disabled ship in a closing weather window
- Hoses and couplings must be designed and made to minimize pollution

The “Polar Code”

- Incorporate as part of SOLAS?
- Incorporate as part of AWPPA, *Canada Shipping Act* or New Canadian legislation?
- Incorporate as part of legislation in Russia and other countries involved in the region?
- New convention on Polar Navigation?

Northern Sea Route

- Sometimes called the Northeast Passage
- Route along northern coast of Russia
- Same arrival point as the Northwest Passage – The Bering Strait
- Used almost exclusively by Russian shipping

Isaacs & Co.

BARRISTERS & SOLICITORS

11 King Street West, Suite 1200, Toronto, Ontario Canada M5H 4C7

Tel: 416.601.1348 | Fax: 416.601.1190 | www.isaacscsco.ca

NSR – Jurisdictional issues

- Similar to those of the NWP
- Russia claims jurisdiction as internal waters
- United States takes similar approach – it is an international strait
- Relies on UNCLOS ART 234 for legislative ability

Guide of Navigation through Northern Sea Route

- Legal basis for the guide is Art. 234 of UNCLOS
- Objectives are safe navigation and environmental protection
- Regulations include:
 - Regulations for Navigation on the Seaways of the Northern Sea Route
 - Regulations for Icebreaker-Assisted Pilotage of Vessels on the NSR
 - Requirements for Design, Equipment and Supply of Vessels Navigating the NSR

Regulations for Navigation on the Seaways of the Northern Sea Route

- Vessels intending to navigate the NSR shall submit a notification to Russian authorities
- Must provide information on guarantee of ice-breaking fees
- Must have certificate of financial responsibility for pollution damage
- Must follow the assigned seaway and adhere to recommended route
- Compulsory icebreaker assisted pilotage

Regulations for Icebreaker-Assisted Pilotage of Vessels on the NSR

- Defines procedure for making requests, organizing the pilotage etc.
- Marine Operations Headquarters determine matters of icebreaker support
- Master must have Russian charts and guides to navigation

Requirements for Design, Equipment and Supply of Vessels Navigating the NSR

- Requirement for the hull, machinery and systems
- Aim at safety of navigation and preventing environmental pollution

Canadian Legislation & the NWP

- *Canada Shipping Act & regulations*
- *Canadian Environmental Protection Act*
- *Coasting Trade Act*
- *Arctic Waters Pollution Prevention Act*

Isaacs & Co.

BARRISTERS & SOLICITORS

11 King Street West, Suite 1200, Toronto, Ontario Canada M5H 4C7

Tel: 416.601.1348 | Fax: 416.601.1190 | www.isaacscsco.ca

Coasting Trade Act

- Cabotage law. Similar to laws that exist in other countries i.e. U.S.A. has “the Jones Act”
- Applies to the internal waters and territorial sea of Canada
- Canadian shipping reserved for Canadians
- Prohibits carriage of goods / passengers from a place in Canada to another place in Canada unless Canadian flagged

Isaacs & Co.

BARRISTERS & SOLICITORS

11 King Street West, Suite 1200, Toronto, Ontario Canada M5H 4C7

Tel: 416.601.1348 | Fax: 416.601.1190 | www.isaacscsco.ca

Coasting Trade Act

- Prohibits the engaging, by ship, in any other marine activity of a commercial nature in Canadian waters and, with respect to waters above the continental shelf of Canada, in such other marine activities of a commercial nature that are in relation to the exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf of Canada;
 - Floating dry dock?
 - Interesting to see how this unfolds due to the lack of infrastructure and services in the arctic
- Licenses can be obtained to use foreign flagged vessels in Canadian waters
- Presents opportunities for Canadians

Isaacs & Co.

BARRISTERS & SOLICITORS

11 King Street West, Suite 1200, Toronto, Ontario Canada M5H 4C7

Tel: 416.601.1348 | Fax: 416.601.1190 | www.isaacscsco.ca

Arctic Waters Pollution Prevention Act (AWPPA)

- Canadian federal legislation
- Creates 100 mile pollution prevention zone around arctic coasts
- Described not as an “assertion of jurisdiction but a functional approach to the problem”
 - Describe it however you want, it is still an assertion of jurisdiction.
- “Zero discharge” act
- “Polluter pay” principle

AWWPA

- S. 4 – No person shall deposit “waste”
 - Waste is broadly defined. Anything that is detrimental
- S.6 – Liability for deposit of waste
 - Owner of a ship
 - Owner of cargo
 - Jointly and severally
 - Clean up costs
 - Actual loss or damage
 - Caused by or “otherwise attributable to the activity”

AWPPA

- S.7 – Liability absolute and does not depend on fault or negligence
- S.8 – Any person that carries on activity in arctic waters that will or is likely to result in the deposit of waste or owner of a ship (and cargo) that proposes to navigate within a shipping safety control zone, may be required to have evidence of financial responsibility
 - Insurance or indemnity bond
 - Must permit direct action
 - i.e. no “pay to be paid” indemnity cover

AWPPA

- Wide regulatory power
- Enforcement officers can seize ships and have power to sell ships to enforce penalties
- Fines are steep
 - Personal – up to \$5,000 a day
 - Ship – up to \$100,000 a day
 - Each day a separate offence
 - A slow leak, with no easy way to repair could be financially ruinous

Arctic Shipping Pollution Prevention Regulations

- Specifies where ships may navigate and when
- Requirements for construction of ships
- Fueling and provisioning of ships
- Ships must be “Safety Convention Ships” or must comply with certain Canadian regulations

Arctic Shipping Pollution Prevention Regulations

- Sets requirements for ice navigators
- s. 26(3) The ice navigator on a ship shall:
- (a) be qualified to act as a master or person in charge of the deck watch in accordance with regulations made pursuant to the *Canada Shipping Act*; and
- (b) have served on a ship in the capacity of master or person in charge of the deck watch for a total period of at least 50 days, of which 30 days must have been served in Arctic waters while the ship was in ice conditions that required the ship to be assisted by an ice-breaker or to make manoeuvres to avoid concentrations of ice that might have endangered the ship.

R. v. Chene No. 1, (1987)

- Prosecution under the AWPPA
- 87 cubic metres (19,140 gal.) of jet fuel spilled
- No environmental damage to sea or land
- Accidental discharge, but likely due to a hose that required replacement
- Guilty plea
- Accused failed to take all reasonable care and do all that he could have done to have avoided the discharge

R. v. Chene No.1

- With the great potential for harm to the northern environment, people and business operating in the northern extremes of Canada have a substantial burden to take precautions to protect the delicate balance of nature in this remote part of the country which can be so easily damaged, and when damaged is so difficult and sometimes even impossible to repair.

R. v. Chene No.1

- The courts should deal with pollution offences with resolution and should stress the deterrent aspect of sentencing in the hope that offences will not be committed that might damage or have the potential of injury to a sometimes fragile Northern environment.

Isaacs & Co.

BARRISTERS & SOLICITORS

11 King Street West, Suite 1200, Toronto, Ontario Canada M5H 4C7

Tel: 416.601.1348 | Fax: 416.601.1190 | www.isaacscsco.ca

R. v. Chene No.1

- Fine of \$14,000.00
- Decision was April 1987
- This is 2 years before *Exxon Valdez*
- Before the current climate of “going green” and increased concern of environmental protection
- Government agencies have made it clear that they will no longer tolerate “economic considerations” when it comes to pollution

Predictions for environmental offences in the Arctic:

- Courts will hand down tough sentences, even for minor non-damaging infractions
- Expect sentences to be on the higher end of the scale
- Pollution incidents that cause damage, particularly irreversible damage, will draw severe sanctions
- Somebody will be made to be “the example”
 - By both the enforcement officers and the courts
- Will serve as a means of enforcement of all regulations and safety concerns generally

Isaacs & Co.

BARRISTERS & SOLICITORS

11 King Street West, Suite 1200, Toronto, Ontario Canada M5H 4C7

Tel: 416.601.1348 | Fax: 416.601.1190 | www.isaacscsco.ca

International Legal Regimes

- Historically as maritime legal regimes have developed the focus has shifted
 - Freedom of seas and navigation
 - Promotion of commerce
 - Suppression of piracy
 - Safety of Life at Sea
 - SOLAS
 - Environmental protection
 - MARPOL
 - CLC

Legal regime for the Arctic

- International law as presently stands is insufficient
- Unilateral law is insufficient
- Regional, multinational treaty of arctic states
- Amendments to UNCLOS or SOLAS

Isaacs & Co.

BARRISTERS & SOLICITORS

11 King Street West, Suite 1200, Toronto, Ontario Canada M5H 4C7

Tel: 416.601.1348 | Fax: 416.601.1190 | www.isaacscsco.ca

Legal regime for the Arctic

- Arctic shipping is marginal at present
- Mainly by regional players
- Expected to increase in future – possibility of oil and gas exploration.
 - How will recent events involving BP's Deepwater Horizon offshore rig change the future?
 - i.e. OPA-90 was a swift response to *Exxon Valdez*

Legal regime

- Protection of the fragile ecosystem of the marine environment, particularly where pollution control / abatement is restricted due to climate and lack of resources will become a dominant facet of legal regimes dominating polar shipping
- Legal regimes will be enforced from an “environmental perspective”
- The expense of compliance with regulations and the potential financial risk of non-compliance / violations will weigh heavily in the cost benefit analysis of polar shipping development

Way Forward

- Difficult to find sufficient international interest to muster the international political will for issues that appear to affect only a few
- Multilateral treaty of Arctic regional states to implement polar code or other requirements
- National adoption of the Polar Code by principal players i.e. Canada & Russia
- Polar Code as part of SOLAS

Isaacs & Co.

BARRISTERS & SOLICITORS



Isaacs & Co, one of Canada's leading full service marine and transportation law firms, concentrates on all areas of maritime law and related civil litigation. Representing domestic and international clients, we focus on all facets of the industry from the buying and selling of ships, preparation of shipping contracts and insurance claims to litigation of all marine conflicts.

The Expert Navigators in Maritime Law

24 Duncan Street, 5th Floor, Toronto, Ontario Canada M5V 2B8

Tel: 416.601.1348 Fax: 416.601.1190 | www.isaacscsco.ca

Isaacs & Co.

BARRISTERS & SOLICITORS

11 King Street West, Suite 1200, Toronto, Ontario Canada M5H 4C7

Tel: 416.601.1348 | Fax: 416.601.1190 | www.isaacscsco.ca