CANADIAN SHIPOWNERS ASSOCIATION
We are Short Sea Shipping

April 4, 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 Brief of the Canadian Shipowners Association (CSA) regarding the proposed amendments to the *Coasting Trade Act* provided in Bill C-30 for the purpose of implementing the market access concessions for certain coasting trade and cabotage activities set forth in the Canada-EU *Comprehensive Economic and Trade Agreement* (CETA)

The Canadian Shipowners Association (CSA) thanks the Senate Committee on Foreign Affairs and International Trade (the Committee) for the opportunity to submit this written brief addressing its concerns relating to the implementation of the market access concessions for certain coasting trade and cabotage activities established under the Canada-EU *Comprehensive Economic and Trade Agreement* (CETA) through amendments to the *Coasting Trade Act* pursuant to Bill C-30.

The CSA is an industry association representing the interests of a group of Canadian companies that own and operate Canadian-flag vessels crewed by Canadian seafarers supplying short sea shipping and coasting trade (cabotage) services between Canadian ports in the Great Lakes, the St. Lawrence waterway, the Arctic, and eastern Canada.[1] The CSA was originally founded in 1903 with the mandate to promote an economic and competitive Canadian marine transportation industry. Today, the 83 vessels of the CSA fleet handle approximately 60 million metric tonnes every year of bulk commodities (including coal, grain, iron ore, aggregates, salt, and petroleum products), general cargo, and project cargo, providing Canadian industries and communities with reliable, safe, economic, and environmentally sustainable transportation services. These vessels transport goods between ports within Canada, including both domestic goods moving between Canadian ports, imported goods on their way to Canadian markets, and goods that are destined for export from a Canadian port. They constitute a vital domestic service industry and a major source of employment for Canadians, creating many high-paying jobs both aboard vessels and ashore. In 2016, the CSA concluded a merger agreement with the Chamber of Marine Commerce in order to best serve the interests of its members.

[1] The CSA's members include Algoma Central Corporation, Canada Steamship Lines, Group Desgagnes Inc., Lower Lakes Ltd., McKeil Marine, Sterling Marine Fuels, and McAsphalt.

The CSA's concerns focus on sections 91 through 94 of Bill C-30. These provisions set forth amendments to the *Coasting Trade Act* for the purpose of implementing the market access concessions granted by the Government of Canada to EU stakeholders under paragraph 4 of Reservation II-C-14 in Canada's Schedule to Annex II of the CETA with respect to the supply of certain limited coasting trade activities in Canada.

The Government of Canada did not consult at all with the Canadian domestic cabotage industry before making the market access offers to the European Union during the negotiations of the CETA. The members of the CSA first became aware of these negotiated outcomes after they had already been agreed in the draft text of the CETA, and were therefore faced with a *fait accompli*. The CSA then invested considerable resources to work with the Government of Canada in an administrative working group on the implementation of the CETA.

In the CSA's view, 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. In this respect, the Bill C-30 provisions implement not only the market access granted to EU stakeholders under the CETA, but also the requirements, conditions, and limitations of this access that were secured by the Government of Canada in its negotiations with the European Union. These requirements, conditions, and limitations must be respected as important elements of the negotiated outcomes, reflecting a careful balancing of concessions in the bargain struck by the CETA negotiators. They are as important to the proper implementation of Canada's rights and commitments under the CETA as the market access concessions themselves. Accordingly, the Bill C-30 provisions to amend the *Coasting Trade Act* do need to be changed and, moreover, they should not be revised during the Parliamentary process in any way that would expand, increase, or further liberalize the scope or effect of the market access concessions granted to EU stakeholders. Any further liberalization of Canada's domestic cabotage sector beyond the negotiated outcomes of the CETA would be highly detrimental to the Canadian shipowners supplying cabotage services in Canada and, in turn, our Canadian seafarers.

For the same reasons, the CSA is deeply concerned about the implementation of an effective monitoring and enforcement regime before the provisions of Bill C-30 enter into force. An effective monitoring and enforcement regime is essential to ensure that there is full compliance with the requirements, conditions, and limitations of the new market access provisions that will be implemented into the *Coasting Trade Act*.

Factual Background and Context: Coasting Trade Industries in Canada and Other Countries

To begin with, our Canadian seafarers are among the most highly trained and qualified in the world. Our Canadian vessels are among the most advanced and well-maintained. Both our seafarers and our vessels operate to the world-renowned Canadian standards of safety and environmental protection. We have made tremendous investments in recent years to ensure that our Canadian fleets are in full compliance with the uncompromising requirements imposed by Canada's regulatory regime for domestic vessels. We can, and we do, compete on a level

playing field in Canada, always with safety in mind, and always with respect for the environment in which we operate. Ensuring that we meet these important standards necessarily means incurring significant operating costs.

Most countries throughout the world, including the United States of America, protect their domestic cabotage markets from foreign vessels in order to maintain a level playing field for their domestic service suppliers. The reason for this is that entities operating vessels registered on the registries of certain countries, including the registries of EU Member States such as Denmark and the Netherlands, are permitted to pay such low wages to their crews that the day-to-day operating costs of such vessels are a mere fraction of the day-to-day operating costs of the vessels registered in other jurisdictions (i.e., where better crew wages and benefits are required). For example, the average monthly crewing costs of vessels registered in Denmark or the Netherlands are a fraction of the average monthly crewing costs of an equivalent vessel registered in Canada. Such crewing costs constitute the majority of a vessel's day-to-day operating costs. Opening Canada's market for domestic cabotage services to such foreign vessels results in an uneven playing field to the detriment of the competitive opportunities of Canadian-owned, Canadian-registered vessels crewed by Canadian seafarers.

Prior to the CETA, Canada's market has been protected by the *Coasting Trade Act,* which generally prohibits foreign vessels from engaging in the supply of coasting trade services except in accordance with a licence. The Act provides that a licence is generally only issued in circumstances where no Canadian vessel is suitable and available to provide the required services or to perform the required activity. This general prohibition and licensing requirement are subject to legitimate exceptions for certain vessels (e.g., fishing vessels) and certain activities (e.g., ocean research activities or rendering assistance to persons, ships or aircraft in danger or distress).

The CETA Market Access Concessions and the Bill C-30 Amendments to the *Coasting Trade Act*

Subsection 92(2) of Bill C-30 adds a number of new exceptions to the *Coasting Trade Act* for the purpose of implementing the CETA market access concessions granted by the Government of Canada to the European Union for the purpose of liberalizing certain cabotage and coasting trade services in Canada.[2] Briefly summarized, these market access concessions will permit foreign vessels to engage in the supply of the following commercial services in Canada without a coasting trade licence:

- An EU entity or a Canadian entity may operate a foreign vessel of any registry (i.e., registered on the registry of any country in the world) to transport the entity's owned or leased "empty containers" between any ports within Canada, provided that such "repositioning" services are provided "without consideration"; a third-country entity

[2] As noted above, these market access concessions are set forth under paragraph 4 of Reservation II-C-14 in Canada's Schedule to Annex II of the CETA.

under EU or Canadian control may engage in the same activity, provided that it uses a foreign vessel registered on the first (national) or second (international) registry of an EU Member State;

- An EU entity, a Canadian entity, or a third-country entity under EU or Canadian control may operate a foreign vessel registered on the first (national) registry of an EU Member State to provide either "single trip" feeder services or "continual" feeder services involving the carriage of international cargo (i.e., inbound cargo that is being imported into Canada or outbound cargo that is destined for export from Canada) in either direction between the ports of Halifax and Montreal;

- An EU entity, a Canadian entity, or a third-country entity under EU or Canadian control may operate a foreign vessel registered on the second (international) registry of an EU Member State to provide "single trip" feeder services involving the carriage of containerized international cargo in either direction between the ports of Halifax and Montreal; and

- An EU entity or a Canadian entity may operate a foreign vessel of any registry to engage in the supply of dredging services (other than dredging services under an agreement with the Federal Government of Canada or a government entity listed in Annex 19-1 of the CETA); a third-country entity under EU or Canadian control may engage in the same activity, provided it uses a foreign vessel registered on the first (national) or second (international) registry of an EU Member State. It should also be noted that although foreign vessels will continue to require a licence to supply dredging services pursuant to an agreement with the Federal Government or a listed government entity, the key requirement that no Canadian vessel is suitable and available to provide such services will be waived for EU-registered vessels under agreements equal or greater in value to 5 million special drawing rights (SDR).

Notably, important conditions, requirements, and limitations apply to each of the above-referenced market access concessions. For example, only "empty containers" may be transported without restriction between ports within Canada by a foreign vessel. Only foreign vessels registered on the first (national) registry of an EU Member State may engage in the supply of "continual" feeder services between the ports of Halifax and Montreal, remaining in Canada indefinitely and operating continuously between these two ports. A foreign vessel registered on the second (international) registry of an EU Member State may only engage in the supply of "single trip" feeder services of "goods in a container", where the container must measure "at least 6.1 metres in length", have an "internal volume of at least 14 cubic metres", while also satisfying other requirements. After unloading its containerized cargo, such a vessel may not engage in any further unlicensed transportation services until it has departed from either Canada's exclusive economic zone (i.e., 200 nautical miles beyond Canada's coastal baseline) or Canada's inland waters (ostensibly at the Canada-US border in the Saint Lawrence

River, just south of the eastern tip of the Island of Cornwall). Only foreign vessels operated by EU entities, Canadian entities, or third-country entities under EU or Canadian control, as defined under the implementing legislation, are eligible for the market access concessions that will be incorporated as new exceptions under the *Coasting Trade Act*. These rules have important implications for practical implementation.

From February through June 2016, Transport Canada led an administrative working group involving a number of Federal Government departments and agencies and domestic industry stakeholders to discuss the implementation of the CETA market access concessions for cabotage services in Canada. The CSA and its members are grateful for the efforts of the team at Transport Canada for curating, organizing, and hosting the technical meetings and discussions of the working group. This process allowed the domestic industry to better understand the scope and the implications of the market access concessions — including the conditions, requirements, and limitations established in the negotiated outcomes — and to identify and share with Transport Canada important and practical industry insights, considerations, and perspectives that would not otherwise be readily available to the Government of Canada.

The CSA has thoroughly reviewed the relevant sections of Bill C-30. Participation in the administrative working group has informed and provided helpful context for this analysis. As noted above, the CSA's view is that this draft legislation is consistent with Canada's rights and commitments under the CETA, accurately reflecting the negotiated outcomes of the final text of the Agreement, including in particular the requirements, conditions, and limitations on the market access concessions granted by Canada to EU stakeholders. As such, these provisions should not be amended in any way that would expand the scope or effect of the market access concessions. Not only would such amendments exceed the careful balance of concessions negotiated and agreed by the Governments of Canada and the European Union, but, for the reasons discussed above, the further liberalization of Canada's domestic cabotage sector would be highly detrimental to Canadian shipowners supplying cabotage services in Canada as well as our Canadian seafarers.

The Need to Implement an Effective Monitoring and Enforcement Regime

The CSA is deeply concerned about the apparent absence of an effective monitoring and enforcement regime to ensure that foreign vessels engaging in the supply of cabotage services pursuant to the CETA market access concessions comply with all of the conditions, requirements, and limitations set forth in the implementing legislation, as well as with other important requirements under Canadian law. Unless a vigilant and effective monitoring and enforcement regime is implemented when Bill C-30 enters into force, there will be nothing to prevent or discourage foreign vessels from testing or transgressing the boundaries of the new exceptions for unlicensed cabotage services in Canada. This would result in an unintended shift in the competitive opportunities within Canada, resulting in a *de facto* detrimental impact on

the opportunities of Canadian companies supplying cabotage services with Canadian-owned, Canadian-registered vessels crewed by Canadian seafarers.

The CSA is concerned with all of the relevant compliance issues, including, for example, the applicable "owner"/operator requirements (i.e., a foreign vessel must be owned/operated by an EU entity; or a Canadian entity; or a third-country entity that is owned or controlled by an EU or Canadian entity, but only if the vessel is registered under the first (national) or second (international) registry of an EU Member State) and the applicable registry requirements. However, there are two issues of particular importance that are specifically addressed below.

First, an effective monitoring and enforcement regime is essential to ensure that only the narrow activity of repositioning "empty containers" is permitted under the new subsection 3(2.1) of the *Coasting Trade Act.* Without an effective compliance program, there is a real risk that the activity of repositioning "empty containers" will be intermingled with the activity of transporting containerized cargo. To the extent that such intermingling of cabotage activities is allowed to occur — e.g., where the probability of detection is low and/or the penalties are not material — an unintended consequence would be the unlicensed transportation of containerized cargo between ports throughout Canada by foreign vessels of any registry. Not only would this activity be contrary to the provisions in the *Coasting Trade Act,* as amended by Bill C-30, but it would also result in a *de facto,* unintentional liberalization of the domestic cabotage market beyond the negotiated outcomes of the CETA. In this regard, we note that while the Canada Border Services Agency (CBSA) tracks containers entering into Canada and containers leaving Canada, there currently exists no system or mechanism to track the movements or usages of containers between ports within Canada. Stated another way, there is currently no program to monitor what vessels are doing with containers within Canada's inland waters.

The CSA also notes that there is no definition for the "empty containers" contemplated in subsection 3(2.1) of the draft legislation under subsection 92(2) of Bill C-30. In contrast, the containers contemplated under subsection 3(2.4) of the draft legislation ("Feeder Services – Single Trip") are defined clearly and in detail (i.e., "the container is at least 6.1 metres in length and has an internal volume of at least 14 cubic metres, is designed for carrying goods more than once and by one or more modes of transportation, and does not have wheels or is not otherwise built for being driven or drawn"). This leaves the meaning of what constitutes an "empty container" open to interpretation and equivocation. While the ordinary meaning of the word "empty" seems straightforward, in the competitive commercial market for containerized cargo transportation, the term "empty" could be interpreted to mean "substantially empty" or "mostly empty" in order to justify any potential competitive advantage.

Second, an effective monitoring and enforcement regime is essential to ensure that the applicable Canadian labour and employment standards are properly applied with respect to foreign crews working in Canada aboard foreign vessels engaging in the supply of unlicensed cabotage services pursuant to the new exceptions under the *Coasting Trade Act,* as amended

by Bill C-30. This is particularly important where such foreign crews and foreign vessels are operating regularly or indefinitely in Canadian waters (i.e., supplying "continual" feeder services under the new subsection 3(2.4)). Further to the technical meetings and discussions of the working group, it is our understanding that all foreign officers and foreign crew aboard foreign vessels entering Canada to undertake the supply of such unlicensed cabotage services will be required to obtain work permits pursuant to a positive Labour Market Impact Assessment (LMIA) issued to their employers by Employment and Social Development Canada (ESDC). As a mandatory requirement of an LMIA, the employers must make a commitment to pay the foreign workers, at a minimum, the "prevailing wage" in Canada for the type of work and the region in which the work will be performed.

Considering the tremendous competitive advantage that extremely low crewing costs afford to foreign vessels registered under the registries of certain EU Member States, actual compliance with the "prevailing wage" requirement of an LMIA may be low if non-compliance is unlikely to be detected and/or the penalties for non-compliance are not material. Further, to the extent that work permits are issued under a discretionary exemption or waiver of the LMIA requirement, there will be no commitment on the part of the employer to pay the foreign officers and foreign crew the "prevailing wages" in Canada. In this regard, the CSA notes that CETA Article 23.4 (Trade and Labour — Upholding levels of protection) provides that Canada shall not "waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law and standards, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory" or "through a sustained or recurring course of action or inaction, fail to effectively enforce its labour law and standards to encourage trade or investment".

For the foregoing reasons, the implementation of an effective and meaningful monitoring and enforcement regime within Canada's inland waters is vital to ensure that the detrimental impact caused by the CETA market access concessions on the competitive opportunities of Canadian companies operating Canadian-owned, Canadian-flagged vessels crewed by Canadian seafarers is at least mitigated and restricted to the boundaries of the negotiated outcomes. If an effective compliance program is not implemented when the amendments to the *Coasting Trade Act* enter into force, the domestic industry — which operates in strict compliance with Canadian laws and regulations, and incurs high operating costs in doing so — will be unable to compete in the Canadian market with foreign vessels that are permitted to operate by a different set of rules and standards.

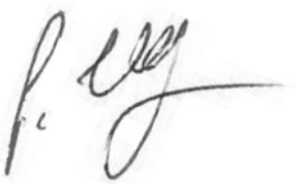
Practical considerations relating to the development and implementation of an effective monitoring and enforcement program include not only how it will be designed and integrated into Canada's existing compliance framework, but also the availability of sufficient budget, personnel, and other Government resources to conduct the necessary monitoring and enforcement actions, including, among other activities: inspections; investigations; audits; seizures; tracking, verification, and record-keeping; and imposing meaningful penalties. As a practical matter, these processes are essential to proper implementation

Conclusion

We thank the Committee for taking the time to consider the concerns outlined above, and we respectfully request that you take them into account in the course of your analysis of sections 91 through 94 of Bill C-30.

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

Yours very truly,



Kirk Jones
Acting President, Canadian Shipowners Association