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The legal authority of ice breaking on the great lakes between the united states coast guard and the Canadian coast guard, the implications of the ice breaking services fee by the CCG, and the potential liability of Canadian criminal code section 263 on the USCG

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CASE WESTERN RESERVE
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MEMORANDUM FOR THE UNITED STATES COAST GUARD
DISTRICT 9 LEGAL COUNSEL OFFICE

ISSUE: THE LEGAL AUTHORITY OF ICE BREAKING ON THE GREAT LAKES BETWEEN THE UNITED STATES COAST GUARD AND THE CANADIAN COAST GUARD, THE IMPLICATIONS OF THE ICE BREAKING SERVICES FEE BY THE CCG, AND THE POTENTIAL LIABILITY OF CANADIAN CRIMINAL CODE SECTION 263 ON THE USCG

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Fall Semester, 2017

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I. The Introduction

A. Scope

This memorandum of understanding discusses three separate legal issues posed by the United States Coast Guard 9th District (“USCG9”) surrounding ice breaking operations on the Great Lakes between the United States and Canada.¹ Specifically, this memorandum will discuss [1] the current legal authority, role, and responsibility of the USCG9 in relation to ice breaking, [2] the international legality of ice breaking fee collection by the Canadian Coast Guard (“CCG”), the fees role in any international agreements, and future costs incurred by the United States government and the government of Canada, and [3] the legal liability and enforcement of Canadian Criminal Code Section 263 on the USCG9’s ice breaking operations in Canadian territorial waters.

Also discussed, is the potential announcement from Canada, within the next decade, for the future commercialization and privatization of their coast guard, and how that would impact agreements with the United States. Additionally, the implications of the Jones Act on both the United States and Canadian coast guards in relation to port transits is addressed. Finally, recommendations will be discussed that can further enhance the cooperation of ice breaking operations between the governments of Canada and the United States.

¹ The Ninth Coast Guard District is responsible for ice breaking commercially navigable waterways with the government of Canada in the Great Lakes. What is the legal authority of the Coast Guard’s ice breaking operations? Additionally, the government of Canada charges a fee for ice breaking to commercial vehicles transiting the Great Lakes, the USCG does not. What is the legal implications of fee collection by Canada when USCG vessels are ice breaking in the Canadian territorial waters. Finally, Canadian Criminal Code Section 263 holds liable anyone who breaks ice for the safety of that opening, and any damage or death related to the opening. Is this provision applicable to the USCG and what are the legal implication of USCG commanders who violate it?

B. Summary of Conclusions

i. The USCG9 receives its legal authority for ice breaking operations on the Great Lakes from United States' statutes, regulations, and a bi-national agreement with Canada

The United States Coast Guard (“USCG”) received its first formal ice breaking authority from Executive Order 7521 by President Roosevelt in December of 1936. Since then various federal statutes and regulations have governed the conduct of ice breaking within the USCG. In 1980, the governments of the United States and Canada signed the “Agreement between the United States of America and Canada on ice breaking operations in the Great Lakes and St. Lawrence Seaway system” (“Agreement”). This Agreement further disclosed the cooperative nature between the two governments in ensuring open commercial waterways during the winter months. It remains the foremost authority for ice breaking cooperation between these two nations.

ii. The collection of an ice breaking fee by the Canadian government does not violate international law, even if the ice breaking is being done by the USCG

Under Section 47 of the Canadian Oceans Act, the CCG collects a fee from commercial vehicles that are transiting specific ice zones in the Great Lakes during the winter months in accordance with a legally binding fee schedule, subject to certain restrictions and exemptions. Given the quid-pro-quo relationship between the USCG9 and the CCG under the Agreement, occasionally USCG9 ice breaking vessels break ice in Canadian territorial water. When USCG9 vessels are breaking ice in Canadian territorial water, there is no violation of international law when Canada collects a fee from the commercial vehicles.²

² For the purposes of this research memorandum, I will not be discussing the domestic legality of Section 47 of the Canadian Oceans Act, which details that the CCG can collect fees for ice breaking services “provided by the Canadian Coast Guard”. It will be analyzed in terms of international law and its implications on USCG vessels.

- iii. The USCG and its officers would not be liable for violating Canadian Criminal Code 263 regarding liability of ice breaking, if the United States exercises its right to exclusive jurisdiction of members of the armed forces under the North Atlantic Treaty Organization Status of Forces Agreement (“NATO SOFA”)**

Canadian Criminal Code Section 263 holds individuals who make an opening in ice that is then open to or frequented by the public, liable for the legal duty to guard and warn of the opening in the ice. However, in June 1951 both the United States and Canadian governments entered into the NATO SOFA. Under this agreement, the United States enjoys exclusive jurisdictional control over crimes committed by the members of its armed forces in a host country. Therefore, any liability from USCG vessels ice breaking in Canadian territorial water would be first subject to NATO SOFA before applicable Canadian Criminal Code.

II. Factual Background

The USCG was formally established in 1915 as a member of the United States Armed Forces.³ It then took over the Lighthouse Service in 1939 to include the Great Lakes region under the order of President Roosevelt through President Reorganization Plan No. 11.⁴ After this consolidation, the USCG undertook all Great Lakes operations, including ice breaking on the Great Lakes.⁵ When the Department of Homeland Security (“DHS”) was created in 2003, the USCG was transferred from the Department of Transportation to the DHS in order to better handle the USCG

³ 14 U.S.C.S. § 1 (LexisNexis, Lexis Advance through PL 115-82, 2017). [Electronic copy provided in accompanying USB flash drive at Source 2].

⁴ T. Michael O’Brien, Guardians of the 8th Sea A History of the U.S. Coast Guard on the Great Lakes 71 (1976). [Electronic copy of inside cover provided in accompanying USB flash drive at Source 15].

⁵ Id. See O’Brien, Guardians of the 8th Sea (for a complete history of the USCG from 1790 and the construction of the first cutter vessel, through 1832 and the establishment of the Revenue Cutter Service, until 1939 and the total consolidation into the current make-up of the USCG).

readiness and effectiveness.⁶ As it operates today, the USCG, during times of peace, remains under the authority of the DHS, and, during times of war or designation by the President of the United States, transfers authority to the Department of the Navy.⁷ This allows the Coast Guard to serve as both a federal agency under DHS, and as a member of the armed forces through its statutory authority, making it a unique institution in regard to federal law.⁸

A. Authority for ice breaking operations on the Great Lakes between the United States and Canada, the implications of potential CCG privatization, and addressing the Jones Act

The USCG⁹ “is responsible for all Coast Guard operations throughout the five Great Lakes,” including ice breaking.⁹ The USCG⁹ employs 6,000 men and women that focus on a variety of missions throughout the Great Lakes.¹⁰ There are currently ten active United States Coast Guard cutters operating in all five Great Lakes.¹¹ According to the USCG, a “cutter” is any vessel 65 feet in length or greater and can support a crew to live on board.¹² USCG cutters can

⁶ CNN, Coast Guard Joins Homeland Security Department, 1-2, (Feb. 26, 2003), <http://www.cnn.com/2003/ALLPOLITICS/02/25/homeland.security/index.html> [Electronic copy provided in accompanying USB flash drive at Source 16].

⁷ 14 U.S.C.S. § 3 (LexisNexis, Lexis Advance through PL 115-73, 2017). [Electronic copy provided in accompanying USB flash drive at Source 3].

⁸ 14 U.S.C.S. § 1 (LexisNexis, 2017).

⁹ United States Coast Guard Atlantic Area, Welcome to the Ninth Coast Guard District, <http://www.atlanticarea.uscg.mil/Our-Organization/District-9/>, 1, (last visited Nov. 5, 2017). [Electronic copy provided in accompanying USB flash drive at Source 28].

¹⁰ Id.

¹¹ United States Coast Guard Atlantic Area, Ninth Coast Guard District Units, <http://www.atlanticarea.uscg.mil/Atlantic-Area/Units/District-9/Ninth-District-Units/>, 4-5, (last visited Nov. 5, 2017). [Electronic copy provided in accompanying USB flash drive at Source 29].

¹² United States Coast Guard, Office of Cutter Forces (CG-751), <http://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Capability-CG-7/Office-of-Cutter-Forces-CG-751/Coast-Guard-Cutter-Fleet/> (last visited Nov. 21, 2017). [Electronic copy provided in accompanying USB flash drive at Source 30].

serve multiple purposes and functions.¹³ The USCG9’s ten active vessels are separated into three types of cutters: six Bay-Class, three Juniper-Class, and one Polar-Class. The Bay-class and Juniper-class are small and medium sized ice breakers. The USCGC Mackinaw is the only Polar-Class ice breaker, the highest level in terms of ice breaking force, in operation on the Great Lakes.¹⁴

The CCG was officially created in 1962 and has continued a founding mission of ice breaking throughout Canadian territorial waters in the Arctic and on the Great Lakes.¹⁵ The CCG Central and Arctic Region (“C&A”) is responsible for maintaining ice breaking operations on the Great Lakes.¹⁶ “The icebreaking program in C&A supports international and domestic shipping in the Saint Lawrence Seaway system and on the Great Lakes in partnership with the USCG offering the marine industry a fully integrated, bi-national service.”¹⁷ They accomplish this ice breaking mission with a combination of different ice breaking vessels, including heavy, medium, and light service ice breaking vessels.¹⁸ Together, the USCG9 and CCG vessels dominate the ice breaking

¹³ Id.

¹⁴ Id.

¹⁵ Canadian Coast Guard, History of the Canadian Coast Guard, <http://www.ccg-gcc.gc.ca/eng/CCG/History>, 1-2, (last modified Feb. 10, 2017). [Electronic copy provided in accompanying USB flash drive at Source 31].

¹⁶ Canadian Coast Guard, Canadian Coast Guard – Central and Arctic Region, <http://www.ccg-gcc.gc.ca/central-and-arctic>, 1, (last modified Oct. 16, 2017). [Electronic copy provided in accompanying USB flash drive at Source 32].

¹⁷ Canadian Coast Guard, ARCHIVED – Canadian Coast Guard Information Kit, <http://www.ccg-gcc.gc.ca/eng/CCG/Publications/Information-Kit/Central-and-Arctic#Centr/Arct>, 2, (last modified July 11, 2013). [Electronic copy provided in accompanying USB flash drive at Source 33].

¹⁸ Canadian Coast Guard, Ice Breaking Services, <http://www.ccg-gcc.gc.ca/Icebreaking/home>, 1, (last modified Dec. 20, 2016). [Electronic copy provided in accompanying USB flash drive at Source 34].

operations in the Great Lakes, and ensure waterways remain open for commerce and other required services.¹⁹

B. The CCG ice breaking fee schedule and its implications for the USCG9, including a potential amendment to Agreement

In 1996, the Canadian government passed the Oceans Act, which recognized all Canadian territorial water, established rules and regulations on services and navigation in the waterways, and established the powers of the Minister for Fisheries and Oceans.²⁰ Under the Oceans Act, the Minister is able to set forth regulations regarding fees for services provided by any department or agency of the Canadian government.²¹ In 1998, the Minister established a fee schedule for all ice breaking operations provided by the CCG, including the ice breaking services in the Great Lakes.²² Under United States federal law, the Secretary of the department in which the USCG is currently operating has the authority to establish and collect fees “for a service or thing of value provided” by the USCG.²³ However, the USCG, nor the Secretary, does not charge a fee for any operations surrounding ice breaking in the Great Lakes under the statute.²⁴

¹⁹ Canadian Coast Guard, *supra* note 17, at 2.

²⁰ Oceans Act, S.C. 1996, c. 31 (Can.) at Section 1-4. [Electronic copy provided in accompanying USB flash drive at Source 40].

²¹ *Id.* at Section 47.

²² Canadian Coast Guard, *Marine Services Fees*, http://www.ccg-gcc.gc.ca/eng/CCG/Ice_Service_Fee_Schedule, 1, (last modified June 24, 2013). [Electronic copy provided in accompanying USB flash drive at Source 35].

²³ 46 U.S.C.S. § 2110 (LexisNexis, Lexis Advance through PL 115-82, 2017). [Electronic copy provided in accompanying USB flash drive at Source 4].

²⁴ *Id.*

C. Canadian Criminal Code Section 263 and the liability it imposes on the USCG9 in light of NATO SOFA and applicable international law, and a potential amendment to the Agreement

Under Section 91(27) of the Canadian Constitution Act of 1867, “Parliament has exclusive legislative authority in relation to” the criminal law of Canada.²⁵ In 1985, the Canadian Criminal Code consolidated numerous acts and was amended to include Section 263(1) “Duty to safeguard opening in ice.”²⁶ The relevant sub-sections and language of the law is below:

“**Duty to safeguard opening in ice: 263 (1)** Every one who makes or causes to be made an opening in ice that is open to or frequented by the public is under a legal duty to guard it in a manner that is adequate to prevent persons from falling in by accident and is adequate to warn them that the opening exists. **Offences (3)** Every one who fails to perform a duty imposed by subsection (1) or (2) is guilty of **(a)** manslaughter, if the death of any person results therefrom; **(b)** an offence under section 269, if bodily harm to any person results therefrom; or **(c)** an offence punishable on summary conviction.”²⁷

While the intent of the law was to highlight the need for responsibility of individuals and organizations that use a number of techniques to keep water from freezing, it ended up causing alarm among many Canadian residents that seek to protect their property, such as docks and boathouses, from the damage of ice.²⁸ Since its passage, many individuals and companies have been advised that the new law could apply to ice-fisherman and “bubblers.”²⁹ According to the

²⁵ Joseph Magnet, *The Criminal Law Power*, Constitutional Law of Canada (2013), 1, http://www.constitutional-law.net/index.php?option=com_content&view=article&id=17&Itemid=31, [Electronic copy provided in accompanying USB flash drive at Source 17].

²⁶ Justice Laws Website, *Criminal Code (R.S.C. 1985, c. C-46)*, <http://laws-lois.justice.gc.ca/eng/acts/C-46/section-263.html>, 1, (last modified Nov. 2, 2017). [Electronic copy provided in accompanying USB flash drive at Source 36].

²⁷ *Id.*

²⁸ Al Last and Lesley Last, *Safety issues surrounding ice-away systems*, 1-2, (Apr. 2, 2014), <https://www.parrysound.com/opinion-story/4442982-safety-issues-surrounding-ice-away-systems/>. [Electronic copy provided in accompanying USB flash drive at Source 18].

²⁹ The Muskoka Ratepayers Association, *Township Watch – November 2013*, <http://www.muskokaratepayers.ca/news/township-watch/page/5/Article/Township-Watch-November->

Alberta Conservation Association, as of January 2016 no one has been criminally prosecuted under this section, and "[t]he likelihood of being charged is very low, but the severity of being charged is very high."³⁰ The USCG9 is concerned with the application of the criminal code on USCG personnel and captains when they are breaking ice on the Great Lakes in Canadian territorial water, specifically if Section 263(3) offenses can be brought against them.

When determining the applicability of foreign state law on United States military personnel, the United States often looks at Status of Forces Agreements with host countries. A Status of Forces Agreement "define[s] the legal status of U.S. Department of Defense (DoD) personnel, activities, and property in the territory of another nation and set forth rights and responsibilities between the United States and the host government."³¹ Currently, the United States and Canada are bound by NATO SOFA, which was signed on June 19, 1951 and remains in effect today.³² In accordance with federal law, the USCG is included in the definition of armed forces,

[2013/](#) (for information on "bubblers"); CBCnews, [Criminal code section on holes in ice draws reaction](#), (Jan. 16, 2013), <http://www.cbc.ca/news/canada/saskatchewan/criminal-code-section-on-holes-in-ice-draws-reaction-1.3402498> (for information related to the impact of CCC Section 263 on ice fisherman). [Electronic copy of both articles provided in accompanying USB flash drive at Source 19a and 19b].

³⁰ Edmonton AM & CBCnews, [Ice fisherman could face manslaughter charge for drilling holes in a frozen lake](#), 1, (Jan. 11, 2016), <http://www.cbc.ca/news/canada/edmonton/ice-fishermen-could-face-manslaughter-charge-for-drilling-holes-in-a-frozen-lake-1.3398570>. [Electronic copy provided in accompanying USB flash drive at Source 20].

³¹ International Security Advisory Board, [Report on Status of Forces Agreements](#), 1, (Jan. 16, 2015), <https://www.state.gov/documents/organization/236456.pdf>. [Electronic copy provided in accompanying USB flash drive at Source 21].

³² North Atlantic Treaty Organization Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792, TIAS No. 2846, 1, https://www.nato.int/cps/pl/natohq/official_texts_17265.htm. [hereinafter NATO SOFA]. [Electronic copy provided in accompanying USB flash drive at Source 11].

which is governed by the NATO SOFA, regardless if it is under the DHS during times of peace, or under the Department of Navy during times of war.³³

III. Legal Analysis

A. The legal responsibilities for ice breaking on the Great Lakes between the United States and Canada

The roles and responsibilities of the USCG in relation to ice breaking are well defined in federal statutes, regulations, and an executive order. The Agreement defines the legal authority of cooperation for ice breaking on the Great Lakes between the USCG and CCG.

i. Legally applicable statutes, regulations, and an executive order for USCG authority in relation to ice breaking

Under current federal law, one of the main duties of the USCG is to “develop, establish, maintain, and operate...ice breaking facilities...” and “pursuant to international agreements, develop establish, maintain, and operate ice breaking facilities on...waters subject to the jurisdiction of the United States.”³⁴ Additionally, the USCG is authorized to provide aids to navigation “to serve the needs of the armed forces or of the commerce of the United States.”³⁵ In accordance with both its non-homeland security missions and homeland security missions, the USCG is legally authorized to ice break on the Great Lakes through these various statutes.³⁶

³³ 10 U.S.C.S. § 101 (LexisNexis, Lexis Advance through PL 115-82, 2017). [Electronic copy provided in accompanying USB flash drive at Source 5].

³⁴ 14 U.S.C.S. § 2 (LexisNexis, Lexis Advance through PL 115-82, 2017). [Electronic copy provided in accompanying USB flash drive at Source 6].

³⁵ 14 U.S.C.S. § 81 (LexisNexis, Lexis Advance through PL 115-82, 2017). [Electronic copy provided in accompanying USB flash drive at Source 7].

³⁶ 6 U.S.C.S. § 468 (LexisNexis, Lexis Advance through PL 115-82, 2017). [Electronic copy provided in accompanying USB flash drive at Source 8].

Furthermore, United States federal regulations currently enhance the legal authority of the USCG to provide ice breaking services on the Great Lakes, including defining of navigation waterways in the Great Lakes and the authority of the Commandant of the Coast Guard to authorize vessels to support the duties of the USCG under 14 U.S.C.S. § 2.³⁷

Finally, through the now Department of Homeland Security, the USCG is responsible for keeping open “navigation by means of ice breaking operations” of all the commercial navigation demands of the United States economy, including on the Great Lakes via Executive Order.³⁸

ii. Legal authority of cooperation between the United States and Canada for ice breaking operations on the Great Lakes

The United States and Canada in 1980 signed the Agreement that legally solidified their cooperation with ice breaking missions on the Great Lakes in 1980.³⁹ The goal of the Agreement was to coordinate between the USCG⁹ and the CCG regarding ice breaking operations to keep navigable waterways open on the Great Lakes for commerce.⁴⁰ The Agreement is divided into two legally operative sections, the Note section and the Annex section.⁴¹ The Note section contains legal clauses that are written by the respective signatories of the Agreement and deal with clauses

³⁷ 33 C.F.R. § 165.901 (LexisNexis, Lexis Advance 2017) (in regards to defining navigation waterways); 32 C.F.R. 700.603 (LexisNexis, Lexis Advance 2017) (in regards to Commandant authority to regulate Coast Guard vessels). [Electronic copy provided in accompanying USB flash drive at Source 9a & 9b].

³⁸ Exec. Order No. 7521, 1 C.F.R. § 2527 (1936), <http://www.conservativeusa.net/eo/1936/eo7521.htm>. [Electronic copy provided in accompanying USB flash drive at Source 10].

³⁹ Agreement between the United States of America and Canada on ice breaking operations in the Great Lakes and Saint Lawrence Seaway, Can.-U.S., 1, (Dec. 5, 1980), <http://www2.ecolex.org/server2neu.php/libcat/docs/TRE/Full/En/TRE-152352.pdf> [hereinafter Ice Breaking Agreement] [Electronic copy provided in accompanying USB flash drive at Source 12].

⁴⁰ Id. at 4.

⁴¹ Id. at 2-4.

such as term and termination procedures.⁴² The Annex section contains the legal language of the roles and responsibilities of the parties in relation to ice breaking operations on the Great Lakes.⁴³

Additionally, the Agreement provides that both the United States and Canada would designate agencies, the USCG and the CCG respectively, to coordinate with each other to meet the needs of ice breaking, ensuring an efficient way to provide the service.⁴⁴ One of the main features of the Agreement states that “the designated agencies of the Parties shall allocate between themselves areas of responsibility for the coordination of ice breaking activities” and that “these areas of responsibility need not correspond with the waters over which the Parties exercise their sovereignty.”⁴⁵ Accordingly, the USCG has the legal authority to ice break in the territorial waters of the Canada and the CCG has the legal authority to ice break in the territorial waters of the United States, as long as, they have permission of the other party to perform such operations.⁴⁶

This Agreement was put into effect on Dec. 5, 1980, and according to the Note Section of the Agreement, has a term of ten years, which and may be renewed for additional terms of five years.⁴⁷ The Agreement is therefore valid under international law, as long as, it is renewed. According to personnel of the USCG⁹, they do not believe that the Agreement was renewed in 2015.⁴⁸ However, given the incredibly close relationship between the United States and Canada,

⁴² Id. at 3.

⁴³ Id. at 4-7.

⁴⁴ Id. at 5.

⁴⁵ Id.

⁴⁶ Id. at 5, 6.

⁴⁷ Id. at 8

⁴⁸ Interview with Rob Poitinger, Lieutenant, United States Coast Guard District 9, Federal Building Office of the Coast Guard 9th District, 2, (Nov. 10, 2017) (Lt. Rob Poitinger is a staff attorney who works in the

and the quid-pro-quo ice breaking cooperation the countries have established, there is not an immediate concern to renew the agreement.⁴⁹ While the Agreement may have lapsed in its effective term, the USCG9 and the CCG will continue to operate under this Agreement and all its legal authority, until it can be renewed.⁵⁰

iii. The potential privatization of the CCG and its implications on the Agreement and the USCG

The USCG9 is also concerned with the implications surrounding the potential privatization of the CCG within the next decade.⁵¹ Back in 2014, under the Conservative government in Canada, the CCG was faced with significant budget cuts to the Department of Fisheries and Oceans.⁵² Additionally, the previous Conservative government also sought to privatize certain aspects of the Coast Guard, including the sea support for search and rescue operations.⁵³ However, the current Liberal government under Prime Minister Trudeau has promised to support the Canadian Coast Guard and the Department of Fisheries and Oceans with a surge of \$1.2 billion dollars in the budget

⁹th District of the United States Coast Guard. He works as a legal advisor for the Lake Michigan, Buffalo, and AIRSTA Traverse City Sectors. Additionally, he counsels operations on four USCG cutters) [hereinafter Interview] [Electronic copy of interview notes provided in accompanying USB flash drive at Source 13].

⁴⁹ Id. (Interview, Lt. Poitinger, 2017).

⁵⁰ Id. (Interview, Lt. Poitinger, 2017).

⁵¹ Id. (Interview, Lt. Poitinger, 2017).

⁵² Jamie Baker, The axeman cometh for the DFO and Coast Guard?, CBCnews, 1, (Jan. 5, 2014), <http://www.cbc.ca/news/canada/newfoundland-labrador/the-axeman-cometh-for-dfo-and-coast-guard-1.2483004>. [Electronic copy provided in accompanying USB flash drive at Source 22].

⁵³ CBCnews, Privatized search and rescue alarms N.L. officials, CBCnews, 1-2, (Jul. 24, 2011), <http://www.cbc.ca/news/canada/newfoundland-labrador/privatized-search-and-rescue-alarms-n-l-officials-1.1058024>. [Electronic copy provided in accompanying USB flash drive at Source 23].

allocated to these entities over the next six years.⁵⁴ Given the new push to fund the CCG, and the lack of evidence that the CCG plans to privatize as a whole, or even its ice breaking division, the privatization of the CCG seems very unlikely.

However, in the event that the CCG were to privatize itself, or its ice breaking operations, it would drastically change how the USCG performs its ice breaking responsibilities under the Agreement. Because the Agreement is a formal bi-lateral agreement between the United States and Canada, the dissolution of the CCG would essentially nullify the Agreement. All of the provisions of the Agreement are specific to a “designated agency of the Government of...” Canada and the United States.⁵⁵ The privatization of the CCG would have broad implications for the future of USCG9 ice breaking operations on the Great Lakes, but those implications will not be covered as they are outside the scope of this memorandum.

iv. The Jones Act, its perceptions on the Great Lakes, and its legal implications for the USCG and CCG

All ships on the Great Lakes in US territorial waters are subject to the terms and regulations of the Maritime Marine Act of 1920, also known as the Jones Act.⁵⁶ Essentially, the Jones Act requires that ships transiting between two United States ports must be built in the United States, crewed by American nationals, and owned by a United States company.⁵⁷ The original intent of

⁵⁴ Lee Berthiaume and Jim Bronskill, Liberals promise new funds for cash-strapped coast guard, fisheries department, CBCnews, 1-2, (Oct. 25, 2017). <http://www.cbc.ca/news/politics/liberals-fiscal-update-coast-guard-1.4372059>. [Electronic copy provided in accompanying USB flash drive at Source 24].

⁵⁵ Ice Breaking Agreement, *supra* note 39, at 5.

⁵⁶ Benjamin E. Ford Esq. and Verrill Dana, Op-Ed: Freezing the Jones Act, Marine Log, 1, (Oct. 13, 2016), http://www.marinelog.com/index.php?option=com_k2&view=item&id=23426:op-ed-freezing-the-jones-act&Itemid=230. [Electronic copy provided in accompanying USB flash drive at Source 25].

⁵⁷ Id.

the Jones Act was to protect the domestic shipping industry from competition of foreign states.⁵⁸ However, over time the Act has become a source of frustration within the international shipping industry because it is often expensive to abide by the Act's regulations.⁵⁹ According to Lt. Robert Poitinger, the USCG⁹ is concerned with the perception that United States ships are bound by the regulations established in the Jones Act, but then are receiving ice breaking support solely from the CCG.⁶⁰ The understandable frustration from the shipping industry is that why should cargo and passenger ships be bound by the Jones Act, but not the CCG vessels.⁶¹ However, as currently written, the Jones Act does not apply to CCG ice breaking vessels because they do not meet the statutory requirements of a cargo or passenger ship.⁶² If the Jones Act were to be expanded to include ice breaking vessels of the CCG or any ships that have a purpose other than transporting cargo or passengers, then those ice breaking vessels would be forced to comply with the Act, limiting them to only United States built, operated, and owned vessels.⁶³ Therefore, until such changes to the Jones Act are made, CCG ice breaking vessels should have no legal obstacles when performing their services in regards to the Act.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Interview, Lt. Poitinger (2017) *supra* note 48, at 1.

⁶¹ Id.

⁶² Ford and Dana, *supra* note 55; U.S. Congress, Office of Technology Assessment, Competition in Coastal Seas: An Evaluation of Foreign Maritime Activities in the 200-Mile EEZ-Background Paper, Washington, DC: U.S. Government Printing Office, p. 34, (July 1989), <https://www.princeton.edu/~ota/disk1/1989/8908/8908.PDF>. [Electronic copy provided in accompanying USB flash drive at Source 26].

⁶³ Competition in Coastal Seas, at 34.

v. Conclusion

The USCG derives its authority to pursue its responsibilities of ice breaking on the Great Lakes from federal code, regulations, and an executive order, which continue to be renewed and enforced throughout the jurisdiction of the United States. Additionally, the cooperation between the USCG⁹ and the CCG in keeping open navigable waterways for commerce in the Great Lakes is legally authorized by the Agreement. While the Agreement should be renewed, both parties will continue to operate in accordance with the Agreement and cooperate on efficiently and effectively ensuring open water navigation in the winter months through their ice breaking responsibilities, based on the mutual cooperation and special relationship that the United States enjoys with Canada.

Any potential privatization of the CCG would have significant implications for the Agreement, essentially nullifying it and requiring the USCG to examine new ice breaking options on the Great Lakes, including a possible new agreement with a commercialized CCG. Additionally, The Jones Act does not have any implications on the ice breaking operations of the CCG on the Great Lakes, as long as, they remain a service vessel and are not in the business of transporting goods or passengers between United States ports.

B. Fee collection by the government of Canada and its application to USCG⁹ ice breaking operations in Canadian territorial waters

In Section 9 of the Agreement, “[e]ach Party shall bear its own costs of operations conducted pursuant to this Agreement.”⁶⁴ The Agreement is silent in any other regard to fees administered by either country. While the United States does not charge a fee for the services that it provides, the CCG, authorized by Canadian law, does.

⁶⁴ Ice Breaking Agreement, *supra* note 39, at 7.

i. The CCG ice breaking services fee schedule

The CCG has the legal authority to perform ice breaking operations to ensure the efficient movement of ships under Section 41(1)(a)(iii) of the Oceans Act.⁶⁵ Under Section 47 of the Oceans Act, “[t]he Minister may...fix the fees to be paid for a service or the use of a facility provided under this Act by the Minister....”⁶⁶ The Ice Breaking Services Fee is applicable to commercial ships operating in Canadian waters that need route assistance, ice routing, information services, and marine and port maintenance.⁶⁷

Legally, the fee is applied to all commercial ships that transit the ice zone during the winter ice season.⁶⁸ The fee schedule defines the ice zone as “...that part of Canada in which icebreaking services are available in support of commercial shipping as described in Annex I.”⁶⁹ The winter ice season is defined in the fee schedule and was amended in 2012 to mean “each period of time starting with and including December 21 up to and including May 15 of the following year.”⁷⁰ Technically, the fee is not a “fee for service,” but instead is legally described as a transit fee.⁷¹ This

⁶⁵ *Oceans Act*, *supra* note 20, at Section 41.

⁶⁶ *Id.* at Section 47, *see* note 20.

⁶⁷ Canadian Coast Guard, *Marine Services Fees*, <http://www.ccg-gcc.gc.ca/marine-services-fees>, 1, (Last Modified July 7, 2016). [Electronic copy provided in accompanying USB flash drive at Source 37].

⁶⁸ Canadian Coast Guard, *Icebreaking Services Fee Schedule*, http://www.ccg-gcc.gc.ca/eng/CCG/Ice_Service_Fee_Schedule, 1-2, (Last Modified June 24, 2013). [Electronic copy provided in accompanying USB flash drive at Source 38].

⁶⁹ *Id.* at 1.

⁷⁰ *Id.*, *Oceans Act, Amendments*, <http://www.ccg-gcc.gc.ca/folios/00030/docs/2012-Amendments-ISF-Schedule.pdf>, 2655-2656, (Sep. 15, 2012). [Electronic copy provided in accompanying USB flash drive at Source 39].

⁷¹ *Ice Breaking Services Fee Schedule*, *supra* note 68, at 2.

means that all ships transiting the ice zone in the winter ice season must pay the fee “regardless of whether or not an icebreaker provides direct route assistance.”⁷²

ii. Conclusion

Under the Agreement, the USCG9 is sometimes called to provide ice breaking services in Canada, as previously mentioned.⁷³ Due to the fee being charged as a transit fee by the CCG, regardless if a USCG9 ice breaking vessel is doing ice breaking services in Canadian territorial water, the commercial vessel will still be liable for such a payment to the CCG under the current legal structure of their transit zone. The USCG9 is concerned with the fee being waived or applied to vessels when they are doing the ice breaking in Canadian waters. The USCG9 has no authority to challenge the domestic law of Canada, and because the fee is a transit fee applied to any ship that transits the ice zones in the winter season, there is no relevance to which country’s specific ship is performing the ice breaking service. Additionally, because the transit fee only applies to ships that are navigating the territorial waters of Canada, the CCG cannot charge or recoup any funds for when its ice breaking vessels perform operations in the territorial waters of the United States as it would be outside the jurisdictional authority given to the CCG in the Oceans Act.⁷⁴

iii. Potential amendment to Agreement regarding fees

The USCG9 is interested in potentially changing the language or adding an amendment to the Agreement that would further specify and clarify how the cost of ice breaking operations are applied to each country, especially when one country’s ice breaking vessels are performing

⁷² Id.

⁷³ Ice Breaking Agreement, *see* note 39, at 6-6.

⁷⁴ Ice Breaking Services Fee Schedule, *supra* note 68, at 1-2; *See also* Oceans Act, *supra* note 20.

services in the territorial waters of the other country.⁷⁵ The USCG could propose at a future meeting that the Agreement should be amended to include a specific section on the domestic application of fees under the Agreement.

In this section, the USCG⁹ could clarify that under United States law it does not charge any ships or vessels that require the ice breaking service of the USCG. Additionally, Canada can include a section in the Amendment addressing their authority to collect fees under the Oceans Act. While the Canadian law is clear on the authority to charge a fee, Canada can further clarify that its icebreaking services fee schedule recoupment of funds is only applicable in its territorial waters. Adding this clause would further explain that when USCG ships are performing ice breaking operations in Canadian water, commercial ships are still required to pay the fee because they are transiting Canadian territory. At a minimum, Canada could include a clause that highlights how their ice breaking fee service schedule works, and that it is a transit fee, not a fee for service.

C. Under NATO SOFA, United States military personnel would likely enjoy legal protection from Canadian Criminal Code Section 263, if it were to be applied in most situations

In a hypothetical situation, a member of the USCG could be charged with a crime for failing to meet the statutory requirements of a Canadian criminal statute when performing ice breaking operations under the Agreement in Canadian territorial water.

i. Canadian Criminal Code Section 263

As stated previously, the USCG⁹ has the legal authority to perform its ice breaking missions and responsibilities in the territorial waters of Canada, with permission, under the Agreement.⁷⁶ The legal liability arises out of Canadian Criminal Code Section 263, when USCG⁹

⁷⁵ Interview, Lt. Poitinger (2017) *supra* note 48, at 2.

⁷⁶ Ice Breaking Agreement, *supra* note 39, at 5.

military personnel are performing their ice breaking operations in the waters of Canada potentially creating an “opening in ice” under the statute, and then failing to “guard” the opening to prevent the public from falling in or providing an “adequate” warning to the public.⁷⁷ The legal implications of this statute bare the potential for criminal prosecution of USCG personnel to be guilty of manslaughter, or another offense if there is just bodily harm, for failing to take the necessary precautions under the statute.⁷⁸ The statute is relevant to openings that are “frequented by the public,” and there is a strong argument that ports and navigation zones of Canadian territorial water would meet the public frequency requirement.⁷⁹

ii. Applying the NATO SOFA Agreement

If the Canadian government were to charge a USCG member with a crime under Canadian Criminal Code Section 263, because Coast Guard personnel are members of the military, the NATO SOFA would apply. According to the Agreement, Section 8 provides that:

“The Government of the United States shall, in accordance with its laws, be liable for damages caused by the negligent acts of the United States Coast Guard agents or employees conducted pursuant to this Agreement, *unless otherwise provided by international agreement*. The Government of Canada shall, in accordance with its laws, be liable for damages caused by the negligent acts of Canadian Coast Guard agents or employees conducted pursuant to this Agreement, *unless otherwise provided by international agreement*.”⁸⁰ [emphasis added].

Seemingly, under this section, military personnel or employees of the USCG⁹ would be liable for negligent acts that they commit, which could include not providing for the safety and notice of any and all openings that are made during their ice breaking

⁷⁷ § 263 (Criminal Code R.S.C 1985), *supra* note 26.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Ice Breaking Agreement, *supra* note 39, at 7.

operations in Canadian waters. This would subject them to the offenses liability section in the statute under § 263(3).⁸¹ However, as emphasized above, the Agreement is subject to provisions “otherwise provided by international agreement.”⁸²

The provisions in the NATO SOFA detail the legal implications and procedures for members of the military between two signatory countries, such as the United States and Canada, when applying host country criminal law.⁸³ According to Article VII(1)(a), “the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State.”⁸⁴ Additionally, Article VII(3) says that

“In case[s] where the right to exercise jurisdiction is concurrent the following rules shall apply: a. The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to i. offences solely against the property or security of that State, or offenses solely against the person or property of another member of the force or civilian component of that State or of a dependent; ii. *offenses arising out of any act or omission done in the performance of official duty.*” [Emphasis added].⁸⁵

This protection hinges on the last phrase “offenses...done in the performance of official duty.” The USCG9 has the legal authority to operate ice breaking missions on the Great Lakes,

⁸¹ § 263 (Criminal Code R.S.C 1985) *supra* note 26.

⁸² Ice Breaking Agreement, *supra* note 39, at 7.

⁸³ NATO SOFA, *supra* note 32, at 3, 4.

⁸⁴ NATO SOFA, *supra* note 32, at 4.

⁸⁵ Id.

through the language of the ice breaking Agreement.⁸⁶ Furthermore, according to federal statute, one of the primary duties of the USCG is ice breaking operations.⁸⁷

The United States Supreme Court also spoke on the issue of “official duty” in *Wilson v. Girard*.⁸⁸ The Court noted that “[a] sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction.”⁸⁹ In this case, Girard was a member of the military stationed in Japan, who at the time had very similar SOFA language as the NATO SOFA established in 1951, and while on duty shot and killed a woman that he lured onto his base.⁹⁰ The United States claimed that since he was acting within his “official duty” the United States has primary jurisdiction over him, while Japan claimed it had proof that Girard was acting outside the scope of his official duty when he shot the Japanese woman.⁹¹ The Court found that when dealing with a question of “official duty,” as long as the agreement was legally sound, it was outside the jurisdiction of the Court to apply the language, and that “official duty” declarations should be left to the Executive and Legislative branches.⁹²

⁸⁶ Ice Breaking Agreement, *supra* note 39, at 5.

⁸⁷ § 81, *supra* note 35.

⁸⁸ *Wilson v. Girard*, 354 U.S. 524, 77 S. Ct. 1409 (1957). [Electronic copy provided in accompanying USB flash drive at Source 1].

⁸⁹ *Id.* at 529, *citing* *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 136 (1812).

⁹⁰ R. R. Baxter, *The International and Comparative Law Quarterly*, Vol. 7 No. 1 (Jan., 1958), p. 77, <http://www.jstor.org/stable/755648>. [Electronic copy provided in accompanying USB flash drive at Source 14].

⁹¹ *Girard*, *supra* at 529.

⁹² *Id.* at 530.

iii. Conclusion

If a member of the USCG9 were to violate the Canadian Criminal Code Section 263 and be charged with an offense, the United States government would have jurisdiction over the member. The United States government would have the authority to not only decide if the member of the Coast Guard was acting within their “official duty,” but also whether or not to charge the individual regardless. Given the longstanding, mutually beneficial relationship that the United States and Canada share, it is unlikely that the government of Canada would charge a member of the Coast Guard with a violation under this code section. Even so, the USCG9 would enjoy strong protections against prosecution from the NATO SOFA.

iv. Potential amendment to Agreement, waiving liability of USCG from Canadian Criminal Code Section 263

In the interview with Lt. Poitinger, he discussed how he wanted to ensure that USCG9 personnel would not be subject to the criminal code violation regarding ice breaking in Section 263. Outside of the NATO SOFA, one additional way to circumvent this statute would be to amend the Agreement to include a clause that waives the code section for members of the USCG while they are performing their ice breaking operations in Canadian water. This could be in the form of a release or waiver. The language can be curtailed to identify that it only applies to members of the USCG that are in performance of their “official duty.” This assurance by Canada would resolve any concerns that the legal department of the USCG9 would have about the potential violation of this statute and criminal charges against its own members.

IV. Additional Recommendations to the Agreement

Lt. Poitinger also requested that the memorandum cover any additional recommendations that can be made to the Agreement between the USCG and CCG regarding the legality of ice

breaking operations and cooperation on the Great Lakes. In addition to the recommendations above, some additional miscellaneous recommendations that are covered below.

A. Automatic renewal clause

As mentioned above, the Agreement has an initial term of 10 years, and must be renewed by both parties every five years.⁹³ One of the recommendations that could be made to the Agreement is to add an automatic renewal clause. In the past, the USCG and CCG have run into problems renewing the Agreement when it expires.⁹⁴ There is little incentive for both parties of the Agreement to meet and formally renew it because of the strong relationship and mutual cooperation that the United States and Canada share. When the Agreement lapses, the USCG and CCG continue to abide by the Agreement as if it were still in force.⁹⁵ Additionally, whether or not the Agreement is renewed, there is a quid pro quo “calling” arrangement between the two coast guards to stay in contact and assist each other in any ice breaking operations on the Great Lakes.⁹⁶

Given the extremely cooperative and strategic relationship between the United States and Canada, the USCG should propose an amendment to the Agreement that changes the required five-year renewal process into an automatic five-year renewal. The language of the amendment could look something like this:

Automatic Renewal. This Agreement shall be automatically renewed for successive five (5) year terms, thereafter (each a Renewal Term) until and unless either Party provides to the other Party within sixty (60) days prior written notice to the end of the Initial Term or any Renewal Term.⁹⁷

⁹³ Ice Breaking Agreement, *supra* note 39, at 8.

⁹⁴ Interview, Lt. Poitinger (2017), at 2.

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Ice Breaking Agreement, *supra* note 39, at 3.

The terms of this Agreement could be worked out to the agreed specifications of the USCG and the CCG, such as the term length for any renewal term and the termination notice of sixty (60) days. However, given the difficulties of keeping up with the constant renewal of the Agreement between the United States and Canada, a renewal clause would have substantial benefits.

B. Agreement format and structure

The current Agreement is separated into the Notes and Annex sections, each of which contain legally binding covenants on the parties. Note 322, written by Ambassador Kenneth M. Curtis, contains certain legal provisions relevant to the Agreement.⁹⁸ Following Note 322 is the Annex, which contains the actual Agreement regarding ice breaking operations and procedures between the United States and Canada.⁹⁹ Following the Annex, the Canadian Ambassador for External Affairs, Mark MacGuigan, responded with Note GNT-766, in which he stated that the Government of Canada accepted the provisions located in Note 322 and the Annex.¹⁰⁰ Thereinafter, the Agreement was legally binding between the two parties.

While the Agreement is legally sufficient, the current structure of the Agreement could cause a layperson, future signatory, or judge to be confused on which sections are part of the actual Agreement, and which parts are not. Without changing the provisions of the Agreement, the parties could make it less confusing by writing one Agreement that would incorporate all of the legally binding sections found within the Notes, such as the term and termination clause found in Note 322. This would provide that the two Notes serve as context and formal acceptance by the two respective governments of the Agreement, while all of the legal language on ice breaking

⁹⁸ Id. at 2, 3.

⁹⁹ Id. at 4-7.

¹⁰⁰ Id. at 8, 9.

coordination is found in the Annex. Having a clearer Agreement will not only allow for efficiency amongst the signatories, but will also help in any potential disagreement or future challenge to the Agreement.

V. Looking Forward

For the foreseeable future, cooperation between the USCG and CCG will be instrumental for ice breaking operations on the Great Lakes. Both the governments of the United States and Canada realize the importance of ensuring the navigational waters of the Great Lakes remain open to commerce during the winter season.¹⁰¹ The United States and Canada have both included in their budgets more money for coast guard operations, including supporting ice breaking on the Great Lakes with new cutters.¹⁰² With a new influx of money by both nations, and a renewed commitment to see both coast guards operate effectively and efficiently, the USCG and CCG can continue to work together to provide for a strong economic future between the two nations.

¹⁰¹ Interview, Lt. Poitinger (2017), *supra* note 48, at 1.

¹⁰² Berthiaume and Bronskill, *supra* note 54, 1-2, (regarding Canadian budget increase for CCG). Sydney J. Freedburg Jr., Coast Guard Dodges Big Trump Budget Bullet; But Coasties Fix Roofs, Breaking Defense, 1-2, (Apr. 12, 2017, 1:53 PM), <https://breakingdefense.com/2017/04/coast-guard-dodges-big-trump-budget-bullet-but-coasties-fixing-roofs/> (regarding 2017 US budget in relation to the USCG). [Electronic copy provided in accompanying USB flash drive at Source 27].