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Cruising the Great Lakes: A Report on the United States and Canadian Regulations for the Commercial Cruise Industry on the Great Lakes

Theodore V. Parran III

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CRUISING THE GREAT LAKES: A REPORT ON THE UNITED STATES AND CANADIAN REGULATIONS FOR THE COMMERCIAL CRUISE INDUSTRY ON THE GREAT LAKES

Theodore V. Parran III[†]

TABLE OF CONTENTS

Table of Contents	138
Introduction and Executive Summary	139
The Great Lakes Maritime & Tourism Industry	140
I. Overview of the Great Lakes-St. Lawrence Maritime Transportation System	140
II. Overview of Great Lakes Tourism and Commercial Cruising	140
III. Related Great Lakes Industries: Manufacturing and Shipping	142
IV. Looking Ahead: General Economic Indicators	143
V. Possible Impediments to Growth	144
Pilotage and Great Lakes Commercial Cruise Navigation	145
VI. Defining Pilotage	145
VII. Current Regulatory Framework for Pilotage on the Great Lakes	145
VIII. Regulating Coordination between the U.S. and Canada on Pilotage	149
IX. Pilotage Fees and Requirements: Inconsistent Rules and Implementation	151
X. Pending Regulatory and Oversight Changes	153
Safety & Security and Great Lakes Commercial Cruising	153
XI. Current Regulatory Framework for Safety and Security	153
A. Passenger Screening	154
B. Fire Safety & Passenger Safety and Security	156
XII. Regulatory Coordination between the U.S. on Safety and Security	159
XIII. Safety and Security Regulations: Areas of Divergence and Conflict	159
Cabotage Law on the Great Lakes	160
XIV. Review of International Cabotage Law	160
XV. Review of Cabotage Law in the United States and Canada	162

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XVI. Regulatory Interplay between Canada and United States Cabotage Laws 164
 Conclusion: Moving Forward with Regulatory and Legislative Innovation 165

INTRODUCTION AND EXECUTIVE SUMMARY

The Great Lakes Commercial Cruise Industry: Regulatory Hurdles and Opportunities

The tourism industry has undergone immense growth globally since the 1950’s. In today’s global economy, travel and tourism is the world’s largest service industry, contributing trillions to world GDP. Given that the industry has become such a diverse and potent economic driver, competition for increasingly informed and discerning consumers is fierce. Against this backdrop, North America is the fastest growing geographical region in the tourism industry, thanks in large part to the high-quality destinations and visitor experiences available in the United States and Canada.

In this context, the Council of the Great Lakes Region has recently conducted a study of the tourism industry in the Great Lakes to explore possible growth areas. A key finding from the Council’s study is that, while the Region punches above its weight in visitors and jobs, it only drives 15% of tourism related revenues and 19% of tourism related GDP in North America. The study also determined that domestic tourists account for 84% of all tourists to the Region.

In spite of the current data, the Council’s study, as well as other sources, indicate robust growth potential for tourism in the Great Lakes and for the cruise industry in particular. For example, The Great Lakes Cruise Strategy report found that, with the right marketing and economic development strategy, the Great Lakes cruise industry has the potential to grow to roughly 180,000 passengers served a year by 2028. While this opportunity exists, the commercial cruise industry in the Great Lakes remains relatively unknown and with limited service.

Aside from the concerted actions needed to promote the Great Lakes cruise industry, the unique nature of the shared U.S.-Canada border throughout the Great Lakes presents a novel legal and regulatory environment. In the commercial cruising context, long-standing maritime regulations and services such as cabotage, passenger screening and security, and pilotage present complex legal and regulatory challenges, resulting in added compliance and operating costs for potential cruise operators. This report seeks to provide a working guide for the Council and industry groups to aid in identifying where specific legal and regulatory hurdles exist, and provide a roadmap for possible resolutions to these issues.

THE GREAT LAKES MARITIME & TOURISM INDUSTRY

I. Overview of the Great Lakes-St. Lawrence Maritime Transportation System

The Great Lakes-St. Lawrence Maritime Transportation System² (MTS) is the longest deep-draft inland navigation system in the world. The MTS includes the five Great Lakes (Superior, Michigan, Huron, Ontario, and Erie), their connecting channels, and the St. Lawrence River. Canada and the United States share four of the Lakes and the St. Lawrence – only Lake Michigan is entirely within the United States. The MTS extends 2,300 miles (3,680 km) from the Gulf of St. Lawrence on the Atlantic Ocean to the North American heartland, and serves more than 100 ports in the eight Great Lakes U.S. states (Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania, and New York), as well as the Canadian provinces of Ontario and Québec.³

Lock infrastructure enables vessels to navigate the roughly 600-foot (180-meter) elevation change between the St. Lawrence River and Lake Superior. The section of the MTS between Montréal and the Gulf of St. Lawrence is open year-round to navigation, while the other portions of the system are seasonal.⁴ Given its unique geographic, geologic, and ecologic makeup, the MTS is best understood as a single, comprehensive system that spans two nations. As such, it is fundamentally different from other coastal regions in the U.S. and Canada and, in many ways, requires governance that recognizes and accounts for these specific characteristics.

II. Overview of Great Lakes Tourism and Commercial Cruising

The Great Lakes themselves, and the urban, cultural, and natural attractions that are located on and near them, have long been a compelling destination for vacationers. Beginning with natural attractions such as Niagara Falls, lake islands such as the Bass Islands in Lake Erie and Mackinac Island at the juncture of Lakes Michigan and Huron, and a number of scenic riverine ports on many of the lakes, increasingly urban populations began viewing Great Lakes as the perfect summer getaway as early as the 1870's.⁵ Formal tourist attractions like Cedar Point on Lake Erie and major urban centers with thriving arts and entertainment scenes like

² This project will be considering navigation on the entirety of the Great Lakes – St. Lawrence Maritime Transport System (MTS) for a number of reasons, chiefly that: (1) the MTS is in many ways a single system from a geographic, geologic, and ecologic perspective; and (2) the entire MTS is governed under Canadian and/or U.S. federal law that applies to significant portions, or even the entirety, of the system.

³ Mike Piskur, *Management of the Great Lakes-St. Lawrence Maritime Transportation System*, 42 CAN.-U.S. L.J. 228, at 229-230 (2018).

⁴ *Id.* at 230.

⁵ See *A History of Tourism*, NIAGARA FALLS NATIONAL HERITAGE AREA, <http://www.discoverniagara.org/heritage/history-of-tourism/a-history-of-tourism/#.XOAnSshKgjI> (last visited May 18, 2019); see Laura Johnson, *A Quick History of Sandusky Industry, from Ice Harvest to Tourism*, ROCK THE LAKE (Feb. 21, 2018), <http://www.rockthelake.com/buzz/2018/02/quick-history-sandusky-ice-harvest-tourism/>; see *Victorian Era*, MACKINAC.COM, <http://www.mackinac.com/about/history/victorian-era>.

Chicago, Illinois, also became major vacation draws in that same period.⁶

These above attractions have remained popular destinations across the Great Lakes. These destinations continue to attract tens of thousands of visitors a year, and while the Great Lakes commercial fishing industry is now a ghost of its former self, recreational fishing has become a multi-billion dollar industry.⁷ In terms of revenue, Great Lakes-wide income generated from tourism has grown steadily. For example, revenue generated from Great Lakes tourism has grown year-on-year since 2009.⁸ A snapshot of the industry gathered in 2015 showed that Great Lakes tourism generated \$492 million (U.S.) in revenue. Further studies project that, by 2020, revenue derived from the Great Lakes tourism industry will increase to roughly \$632 million (U.S.).⁹

The current strength and continued growth in Great Lakes tourism presents growth opportunities for the commercial cruise industry as well. In fact, there is already a limited but robust flow of visitors through the Great Lakes' more than 100 ports and commercial docks.¹⁰ In 2018, for example, Great Lakes waterways saw nearly 100,000 port visits by passengers.¹¹ In response, industry, NGO, and trade groups including the Great Lakes Seaway Partnership, the Conference of Great Lakes and St. Lawrence Governors and Premiers, and the Research and Traffic Group have also shown interest in exploring the future of Great Lakes commercial cruising. Recent reports show that industry groups consider the Great Lakes commercial cruise market to have a viable future and that there is market interest from consumers.¹²

More specifically, several developments indicate that industry groups are moving to capitalize on these opportunities. For example, industry stakeholders recently formed a consortium titled Cruise the Great Lakes in 2018 with the specific goal of creating "a new international partnership aimed at bringing more cruise passengers to the region."¹³ This partnership seeks to increase the overall economic impact of Great Lakes cruising, by marketing not only to passengers, but also to potential tour operators.¹⁴ This effort is underpinned by the realization that cruises on the Great Lakes of the United States and Canada are increasing in

⁶ See *Cedar Point*, Ohio History Connection, http://www.ohiohistorycentral.org/w/Cedar_Point (last visited May 18, 2019).

⁷ See *The Great Lakes Fishery: a World Class Resource*, GREAT LAKES FISHERY COMMISSION, <http://www.glfc.org/the-fishery>.

⁸ *Revenue of coastal and Great Lakes passenger transportation (NAICS 483114) in United States from 2009 to 2020* (in million U.S. dollars), STATISTA, <https://www.statista.com/forecasts/409670/united-states-coastal-and-great-lakes-passenger-transportation-revenue-forecast-naics-483114> (last visited Mar. 30, 2019).

⁹ *Id.*

¹⁰ DAVID C. HACKSTON & GORDON ENGLISH, ENVIRONMENTAL AND SOCIAL IMPACTS OF MARINE TRANSPORT 2 (Research and Traffic Group, 2013), <https://lakeerie.ohio.gov/Portals/0/GLRI/Environmental%20and%20Social%20Impacts%20Study.PDF>.

¹¹ *Id.*

¹² Craig Clark, *Cruise the Great Lakes – Great Lakes St. Lawrence Governors & Premiers Launch Cruise the Great Lakes*, GLOBE NEWSWIRE (Aug. 30, 2018), <https://www.globenews.wire.com/news-release/2018/08/30/1563727/0/en/Great-Lakes-St-Lawrence-Governors-Premiers-Launch-Cruise-the-Great-Lakes.html>.

¹³ *Id.*

¹⁴ *Id.*

popularity due to their easy access and lower costs associated when compared to other cruises.¹⁵

As such, major cruise operators are gearing up for expansion in the Great Lakes region, with European cruise line expected to enter the Great Lakes market in the 2019-2020 season. Specifically, French luxury cruise line Ponant is engaging in the Great Lakes area with new services.¹⁶ German Hapag-Lloyd Cruises will be joining the venture as well.¹⁷ Local and regional press have also reported that major cruise lines, including Viking Cruises, may be considering expansion into the Great Lakes for the first time.¹⁸ Finally, major destinations are also working to ensure that they are competitive draws for the cruise market. For example, the Detroit/Wayne County Port Authority recently spent \$21.5 million improving its port for security and to make it more appealing to cruises and tourists.¹⁹

III. Related Great Lakes Industries: Manufacturing and Shipping

The Great Lakes, as an overall economic unit, is one of the most productive on the planet. In 2015, the region accounted for nearly a third—30% in economic activity and 31% in employment—of combined Canadian and U.S. output, jobs and exports.²⁰ The total economic output (from both the Canadian and U.S. side) was estimated at \$5.8 trillion (U.S.).²¹ That number has now increased to over \$6 trillion (U.S.) since 2017.²² The two top trade exports in the Great Lakes Region have consistently been transportation equipment and machinery, with agricultural and food products, metals and chemicals playing secondary, but still prominent, roles.²³ Regarding cross-border trade between the U.S. and Canada, the region's trade linkages accounted for \$235 billion of total trade in 2015.²⁴

Regarding the shipping industry, the Great Lakes-St. Lawrence Seaway shipping industry, “supports 227,000 jobs, produces \$35 billion of business revenue, and adds nearly \$5 billion per year to federal, state and provincial revenues.”²⁵ More than 160 million metric tons of manufactured products,

¹⁵ Lori Rackl, *The next cruising hot spot is closer than you think: Get ready for more ships on the Great Lakes*, CHI. TRIB., Apr. 2, 2019, <https://www.chicagotribune.com/travel/sc-trav-great-lakes-cruises-0409-story.html>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Jonathan Oosting, *Cruise ship brings tourists to Detroit as officials tout economic potential of new \$21.5M port*, MLIVE MEDIA GROUP (Jul. 19, 2011), https://www.mlive.com/news/detroit/2011/07/cruise_ship_brings_tourists_to.html.

²⁰ *Id.* at 3.

²¹ *Id.*

²² Martin Associates, *Economic Impacts of Maritime Shipping in the Great Lakes – St. Lawrence Region Executive Summary*, 2 (2018), <http://greatlakesseaway.org/downloads/2018-gsls-executive-summary-en-hr.pdf>.

²³ *Id.* at 7.

²⁴ *Id.*

²⁵ Robert Kavcic, *Connecting Across Borders: A Special Report on the Great Lakes and St. Lawrence Regional Economy*, BMO CAPITAL MARKETS, 7 (2016), <https://www.gsgp.org/media/1818/2016-cglsigp-bmo-economic-report.pdf>.

agricultural commodities, and raw material are moved on the Seaway annually.²⁶ In 2017 specifically, cargo transporting across the Seaway totaled 143.5 million metric tons valued at \$15.2 billion U.S. dollars.²⁷ The commerce generated from this cargo transport supported 237,868 jobs and \$35 billion U.S. dollars in economic activity.²⁸ The wages and salaries accumulated from these 237,868 jobs amounted to around \$14.2 billion.²⁹

The most common cargoes “include iron ore for steel production, coal for power generation, limestone and cement for construction, and grain for both domestic consumption and export.”³⁰ The Seaway also provides a link between North America and more than 59 overseas markets.³¹ Because of these benefits, ramping up on the Seaway’s infrastructure will surpass \$1.1 billion through 2018 thanks to a combination of public- and private-sector investments.³² Clearly, the economic engine and infrastructure exists to support the growth of a Great Lakes cruise industry.

IV. Looking Ahead: General Economic Indicators

If the economic trends continue at the pace set in 2015, increased job and production opportunities will prevail across the Region. Real GDP expanded at a rate of 2.1% in 2015, “marking a second straight year of accelerating growth.”³³ However, there has been a shift in the prominence of specific industries within the Regional market: manufacturing employment took a 17% decrease hit compared to a decade ago, while education, healthcare and professional services have increased between 17% and 21%.³⁴ This shift from high-productivity industries to service sector industries implies less use of shipments and exports on the Great Lakes in the future.

On the other hand, some recent reports indicate advantages to Seaway transport rather than land transport in the Region. First, there are fuel-efficiency benefits: Seaway transport can move its cargo 14% farther (or 14% more fuel-efficiently) than rail and 594% farther (or 594% more efficiently) than trucks.³⁵ Second, there are environmental concerns: compared to Seaway transports carrying one ton of cargo one kilometer, rail would emit 19% more greenhouse gas, and the truck mode would emit 533% more greenhouse gas than marine.³⁶ Finally, in regards to efficiency, the largest Seaway vessels “typically 1,000 feet in length, can carry 62,000 tons of cargo — equivalent to 2,340 trucks or 564 rail cars.”³⁷

²⁶ HACKSTON, *supra* note 9, at 2.

²⁷ Martin Associates, *supra* note 21, at 6.

²⁸ *Id.*

²⁹ *Id.*

³⁰ HACKSTON, *supra* note 9, at 2.

³¹ *Id.*

³² Kavic, *supra* note 24, at 7.

³³ *Id.* at 3.

³⁴ *Id.*

³⁵ HACKSTON, *supra* note 9 at 6.

³⁶ *Id.* at 8.

³⁷ *Id.* at 12.

The concentration of manufacturing jobs in the Great Lakes Region is much higher than the American average (as of 2017).³⁸ However, there are fewer jobs in the leisure and hospitality industry, resulting in a lower average in the Great Lakes than the U.S. overall. Interestingly, manufacturing jobs in the Great Lakes region are only 1% higher than jobs in the leisure and hospitality industry.³⁹ In other words, when looking at only Great Lakes regional employment, manufacturing jobs make up 11% of the total jobs, while leisure and hospitality jobs make up 10%.⁴⁰ This data indicates that there is a lower percentage of leisure and hospitality jobs in the Great Lakes when looking at the labor force as a whole, and shows there is room for growth.

V. Possible Impediments to Growth

However, any projected growth in the Great Lakes commercial cruise industry is not without cost. Cruise line operators must comply with a plethora of regulatory obligations in order to gain market entry and maintain operations. Other regulations govern port operations vis-à-vis passenger cruises, often with associated costs in compliance measures and improved physical infrastructure. This project will closely examine the regulatory regimes for the major aspects of commercial cruising, including pilotage, safety and security, and cabotage in order to provide working information for industry stakeholders and other interested parties.

Image 1: The Great Lakes – St. Lawrence Maritime Transport System⁴¹



³⁸ Jeff Desjardins, *The Great Lakes Economy: The Growth Engine of North America*, VISUAL CAPITALIST (Aug. 16, 2017), <https://www.visualcapitalist.com/great-lakes-economy/>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ PORT OF MONROE, *The Great Lakes Network*, <https://portofmonroe.com/solutions/great-lakes-network/>.

PILOTAGE AND GREAT LAKES COMMERCIAL CRUISE NAVIGATION

VI. Defining Pilotage

Pilotage is “one of the principal subdivisions of navigation—the science and art of directing the movements of a vessel from one position to another in a safe and efficient manner.”⁴² In essence, pilotage, or piloting, is “the use of landmarks, aids to navigation, and soundings to conduct a vessel safely through channels and harbors, and along coasts where depths of water and danger to navigation require constant attention to the boat’s position and course.”⁴³ In this context, the United States and Canada already have an established pilotage relationship necessitated by their shared use of the Great Lakes and St. Lawrence Seaway.

As a result of decades of cooperation on operational and regulatory matters, the two countries’ pilotage schemes have converged in the areas of pilotage licensing and reciprocity, efforts to coordinate pilotage fees, and exceptions to pilotage requirements for inter-lake commercial travel. Currently, the strongest areas of cooperation exist where both countries have established statute-based alignment in pilotage regulation. In other areas, the two national pilotage systems retain regulatory discrepancies that impose differing compliance burdens on Great Lakes operators and will likely need innovation in order to support growth in a Great Lakes commercial cruise industry. While neither country is likely to sacrifice the autonomy of its individual regulatory systems, by expanding statute-based reciprocity and developing either joint or parallel systems, both countries would be able to benefit from a more seamlessly organized Great Lakes cruise industry.

VII. Current Regulatory Framework for Pilotage on the Great Lakes

In the U.S., Great Lakes pilotage is governed by Chapter 93 of Title 46, titled Great Lakes Pilotage.⁴⁴ The Canadian equivalent is the Pilotage Act, enacted in 1972.⁴⁵ While the Canadian Pilotage Act delegates powers to regulate Great Lakes pilotage to a series of local authorities, the US Great Lakes Pilotage statute reserves authority to the federal government through the USDOT, which subsequently delegated this responsibility to the USCG.⁴⁶

A pilot is defined as “any person who does not belong to a ship and who has the conduct of it.”⁴⁷ Furthermore, the concept of compulsory pilotage is defined as, “in respect of a ship, the requirement that the ship be under the conduct of a licensed pilot or the holder of a pilotage certificate.”⁴⁸ One of the main tenants of

⁴² ELBERT S. MALONEY, *Chapter 16: Basic Piloting Procedures*, in CHAPMAN PILOTING AND SEAMANSHIP 556 (64th ed. 2003).

⁴³ *Id.*

⁴⁴ *Id.*, at 249, citing 46 U.S.C.A. § 9302 (West 1996).

⁴⁵ *Id.*, citing CANADIAN MARITIME LAW 730 (Aldo Chircop et al. eds., Irwin Press 2nd ed. 2016).

⁴⁶ *Id.* at 250, citing Paul G. Kirchner et al, *Unique Institutions, Indispensable Cogs, and Hoary Figures: Understanding Pilotage Regulation in the United States*, USF MARITIME LAW JOURNAL, Vol. 23 No. 1 (San Francisco)

⁴⁷ *Id.*, citing *Pilotage Act*, RSC 1985, c P-14, s 1.1 [hereinafter *Pilotage Act*].

⁴⁸ *Id.*, citing *Pilotage Act* s 2.

the pilotage regulations is the creation of compulsory pilotage districts – however, not all ports and harbors require pilotage, and even in compulsory pilotage areas, certain classes of vessels may be exempt.⁴⁹

In the United States, Great Lakes pilots are required on “each vessel of the United States operating on register and each foreign vessel.”⁵⁰ On waters designated by the President of the United States under §9302(a)(2), pilots “direct the navigation of the vessel subject to the customary authority of the master.”⁵¹ In all other waters, pilots are required to be on board and be available to direct the navigation of the vessel subject to the authority of the master.⁵² Vessels may operate without a pilot only if: “(1) the master is notified that no registered pilot is available; or (2) the vessel or its cargo is in distress or jeopardy.”⁵³ However, a “documented vessel” which operates regularly between the Great Lakes and St. Lawrence River is not required to obtain a pilot under §9302(a)(1).⁵⁴ Members of the complement of US registered vessels and Canadian vessels may serve as a pilot in all waters not designated under §9302(a)(2), if they are licensed to do so under §7101 of this title or equivalent Canadian law.⁵⁵ Pilotage reciprocity with Canada will continue until Canada stops granting reciprocity for US pilots.⁵⁶

In the U.S., the Great Lakes – St. Lawrence System is divided into three pilotage districts. District 1 encompasses the Saint Lawrence Seaway and Lake Ontario, and is regulated by the Saint Lawrence Seaway Pilots Association.⁵⁷ District 2 encompasses the area from Lake Erie through the St. Clair Rivers, and is governed by the Lake Pilots Association.⁵⁸ District 3 encompasses Lakes Superior, Michigan, and Huron, as well as the St. Mary’s River and the Soo Locks, and is governed by the Western Great Lakes Pilots Association.⁵⁹ States may not regulate pilots on the Great Lakes.⁶⁰ The Secretary of Transportation has established the Great Lakes Pilotage Advisory Committee to review and make recommendations on potential pilotage regulations.⁶¹

46 U.S.C. § 9302(a)(2) delegates Great Lakes pilotage authority to the President, and executive rule making has established as follows:

⁴⁹ *Id.*

⁵⁰ *Id.*, citing 46 U.S.C.A. § 9302(a)(1) (West 1996).

⁵¹ *Id.*, citing 46 U.S.C.A. § 9302(a)(1)(A) (West 1996).

⁵² *Id.*, citing 46 U.S.C.A. § 9302(a)(1)(B) (West 1996).

⁵³ *Id.*, citing 46 U.S.C.A. § 9302(d) (West 1996).

⁵⁴ *Id.*, citing 46 U.S.C.A. § 9302(e) (West 1996).

⁵⁵ *Id.*, citing 46 U.S.C.A. § 9302(b) (West 1996).

⁵⁶ *Id.*, citing 46 U.S.C.A. § 9302(c) (West 1996).

⁵⁷ *Id.*, citing *Our Mission*, St. Lawrence Seaway Pilots Assoc., http://seawaypilots.com/?page_id=7.

⁵⁸ *Id.*, citing *About Us*, Lakes Pilots Association, Inc., <http://www.lakespilots.com/>.

⁵⁹ *Id.*, citing *About Us*, Western Great Lakes Pilots Association, <http://www.wglpa.com/about-us/>.

⁶⁰ *Id.*, citing 46 U.S.C.A. § 9306 (West 1996).

⁶¹ *Id.*, citing 46 U.S.C.A. § 9307 (West 1996).

Table 1: US Great Lakes-St. Lawrence Pilotage Districts⁶²

DISTRICT	REGULATION	REQUIREMENT
District 1	Pilots required to be used on “all waters of the St. Lawrence River between the international boundary at St. Regis and a line at the head of the river running between Carruthers Point Light and South Side Light extended to the New York Shore.”	Regulation requires licensed pilots to navigate vessels between the easternmost U.S. boundary in the St. Lawrence River, which begins near St. Regis, and where the St. Lawrence River opens into Lake Ontario, just south of Kingston.
District 2	Pilots required in all areas west of “Lake Erie [from one mile east] of ... Sandusky Pierhead Light at Cedar Point to Southeast Shoal Light... [through the] St. Clair River.”	Regulation requires licensed pilots to navigate vessels from just east of Sandusky through the mouth of Lake Huron.
District 3	Pilots required in all “waters of the St. Mary’s River [and] Sault Sainte Marie Locks.”	Regulation requires licensed pilots to navigate vessels from the end of Lake Huron through the beginning of Lake Superior.

In Canada, two local authorities established under the Pilotage Act regulate pilotage on the MTS.⁶³ The Laurentian Pilotage Authority is responsible for “all Canadian waters in and around the Province of Quebec, north of the northern entrance to St. Lambert Lock, except the waters of Chaleur Bay, south of Cap d’Espoir in latitude 48 degrees 25 minutes 08 seconds N., longitude 64 degrees 19 minutes 06 seconds W.”⁶⁴ The Great Lakes Pilotage Authority is responsible for “all Canadian waters in the Province of Quebec, south of the northern entrance to St. Lambert Lock,” as well as, “all Canadian waters in and around the Provinces of Ontario and Manitoba.”⁶⁵

The Great Lakes Pilotage Authority administers the compulsory pilotage areas within its boundaries, and determines what vessels must comply with its directives.⁶⁶ The compulsory pilotage areas, under the Great Lakes Pilotage Authority, are as follows: Cornwall District, International District 1, International District 2, International District 3, the Canadian waters of Lakes Ontario, Erie, Huron and Superior, as well as the navigable waters within the limits of the Port of Churchill, Manitoba.⁶⁷ Ships are subject to compulsory pilotage in these areas if they total more than 1500 gross tonnage, are not registered in Canada, and are over 35 m in length.⁶⁸ Ferries and tugboats are subject to different rules. Ferries that operate on a regular schedule are generally not required to use a pilot.⁶⁹

⁶² *Id.*, at 251 citing Proc. No. 3385, Designation of Restricted Waters, (codified as amended at 46 USC § 9302).

⁶³ *Id.*

⁶⁴ *Id.*, citing *Pilotage Act*, *supra* note 47.

⁶⁵ *Id.*, citing *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*, citing *Great Lakes Pilotage Regulations*, CRC, c 1266, s 3 [hereinafter *GLP Regulations*].

⁶⁸ *Id.*, citing *GLP Regulations* s 4.

⁶⁹ *Id.*, citing *GLP Regulations* s 4.1.

Tugboats, even if smaller in size and tonnage than specified in the general rule, may be required to use a pilot depending on the type of ship being towed or pushed.⁷⁰

The Laurentian Pilotage Authority establishes the following as compulsory pilotage areas: all the navigable waters of the St. Lawrence River between the northern entrance to St. Lambert Lock and a line drawn across the river approximately at latitude 48°N, longitude 69°W; all the navigable waters lying within the limits of any harbor situated within the area previously referred to; and all the navigable waters of the Saguenay River to the western limits of Baie des Ha! Ha!, and the Harbor of Chicoutimi.⁷¹ These designated areas are further divided into different districts (i.e. District 1, District 1.1, and District 2) which are sometimes subject to different vessel qualifications.⁷² Ships registered in Canada will generally require pilotage if they are over 70 m in length and 2400 gross tonnage (Districts 1, and 1.1); or over 80 m in length and 3300 gross tonnage (District 2).⁷³ On the other hand, ships that are not registered in Canada will require pilotage if they are over 35 m in length.⁷⁴ US pilots are recognized to some extent in Canadian legislation. The Great Lakes Pilotage Authority provides that where Canadian waters are contiguous with the waters of the United States, a ship subject to compulsory pilotage is permitted to be under the conduct of a pilot duly licensed by the appropriate US authority.⁷⁵ The Laurentian Pilotage Authority has not created an equivalent Canadian provision for U.S. vessels.⁷⁶

The St Lawrence Seaway requires alternate procedures for foreign-flagged vessels.⁷⁷ A “notice-of-arrival” must be submitted to the Marine Communications and Traffic Service in Halifax, Nova Scotia, 96 hours before entering North American waters.⁷⁸ Once the vessel has entered the Seaway system, it must employ a licensed Canadian pilot during its travel through the boundaries of the Laurentian Pilotage Authority.⁷⁹ This area, extending approximately from Halifax to Montreal, is subject to compulsory pilotage under the Laurentian Pilotage Regulations, and specifies that the pilot must be accredited in Canada.⁸⁰

Moving past the Montreal region, the vessel then moves into the boundaries of the Great Lakes Pilotage Authority, which extend to Duluth, Minnesota at the western end of Lake Superior.⁸¹ This also marks the beginning of shared waters between Canada and the United States.⁸² At this point, the vessel has the choice of

⁷⁰ *Id.*, citing *GLP Regulations* ss 4.2-4.3.

⁷¹ *Id.*, at 252 citing *Laurentian Pilotage Authority Regulations*, CRC, c 1268 Schedule I.

⁷² *Id.*, citing *Laurentian Pilotage Authority Regulations* Schedule II.

⁷³ *Id.*, citing *Laurentian Pilotage Authority Regulations* s 4(1)(a).

⁷⁴ *Id.*, citing *Laurentian Pilotage Authority Regulations* s 4(1)(b).

⁷⁵ *Id.*, citing *GLP Regulations*, *supra* note 37 s 6.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*, citing William Baumgartner & John Oliver, *Conditions of Entry of Foreign-Flag Vessels into US Ports to Promote Maritime Security*, 84:1 INTL. L. STUDIES. SERIES 4, 49 (2008).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

engaging either an American or a Canadian pilot.⁸³ If the vessel chooses to use a US pilot, they will have to employ three different pilots as the ship travels through the boundaries of the three associations that manage pilotage along the route to Duluth.⁸⁴ It may be simpler to use a Canadian pilot if travelling the full length of the waterway, to avoid switching between pilots frequently, considering there is only one authority regulating pilotage for the remaining length of the voyage.⁸⁵

Overall, pilotage requirements are complex – spread across the two national sets of requirements and multiple pilot authorities and districts. This complexity creates an impediment to new users and, regardless, higher costs for all users as compared to a more streamlined system.⁸⁶

VIII. Regulating Coordination between the U.S. and Canada on Pilotage

Under current regulations, both the United States and Canada have legislatively mandated reciprocal policy allowing each countries' pilots to operate in their respective waters. 46 U.S.C. § 9302(c) provides that:

The authority extended under subsections (a) and (b) of this section to a Canadian registered pilot or other Canadian licensed officer to serve on certain vessels in United States waters of the Great Lakes shall continue as long as Canada extends reciprocity to United States registered pilots and other individuals licensed by the United States for pilotage service in Canadian waters of the Great Lakes.⁸⁷

This reciprocity statute is mirrored by language in the Canadian Great Lakes Pilotage Regulations, ensuring that both statutes remain in effect.⁸⁸ Great Lakes Pilotage Regulations, SOR/2007-95, read in pertinent part:

(1) Subject to subsection (2), where Canadian waters are contiguous with waters of the United States, a ship subject to compulsory pilotage may be under the conduct of a person who is duly authorized to have such conduct by an appropriate authority of the United States.

(2) Subsection (1) does not apply unless persons holding licences or pilotage certificates under the Act and any regulations made pursuant to the Act are granted similar authority by the Government of the United States for the United States waters of the Great Lakes, their connecting and tributary waters and the St. Lawrence River as far east as St. Regis in the Province of Quebec.⁸⁹

These statutes provide a substantial basis of coordination between the United States and Canada, and prevent either country from having to modify their pilot

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 252.

⁸⁶ *Id.*

⁸⁷ 46 U.S.C. § 9302(c) (2018).

⁸⁸ Great Lakes Pilotage Regulations, SOR/2007-95 (Can.).

⁸⁹ *Id.*

licensing requirements to remain in compliance when entering the other's waters.

Canada and the United States Coast Guard have also produced two detailed "Memorandums of Understanding" – agreements stipulating areas of coordination and cooperation on Great Lakes policy and practice.⁹⁰ In 2002, the United States Coast Guard and Transport Canada issued the memorandum of understanding "Respecting Mutual Recognition of Domestic Mariner Qualifications."⁹¹ This memorandum allows for the recognition of the regulatory hours of rest as well as personal certifications mandated by the U.S. and Canada in an effort to avoid violations during ship inspections that might hamper trade and travel between the two countries.

A further 2013 memorandum between the United States Coast Guard and the Canadian Great Lakes Pilotage Authority specifically addresses pilotage concerns.⁹² The memorandum establishes a coordinated pilotage service between the United States and Canada, which created a register of authorized pilots, simplifying maritime operations between the two countries. The memorandum also arranges for cost sharing for facilities and/or services jointly provided by the countries for pilotage purposes. In addition, the memorandum establishes a pilot assignment system for all ships entering the Great Lakes that requires alternate assignments between Canadian and U.S. pilots.⁹³ As a part of this alternating system, the memorandum announced the intent to arrange for the establishment of regulations that impose "comparable rates and charges" based on the size and weight of the instant vessel.⁹⁴

Since these joint efforts are already taking place, the possibility that the two countries would fail to meet a coordinated agreement is unlikely. Some of the issues with predictability on matters like pilotage fees, for example, arise from the differences between pilotage fees imposed on and by U.S. and Canadian pilots. Because the 2013 Memorandum of Understanding is a voluntary agreement that only dictates an intent to work towards consistency on issues like more

⁹⁰ Although there are technically more than two Memorandums of Understanding on Great Lakes issues, the 2002 and 2013 memorandums are the only memorandums with a material effect on pilotage in the Great Lakes and Great Lakes maritime issues for these purposes. Other unrelated examples include the *Memorandum of Understanding for Approval of Personal Lifesaving Appliances*, stipulating joint efforts to regulate testing of new life-saving devices like life boats or life jackets for commercial vessels, and the *Memorandum of Understanding Between the United States Coast Guard Auxiliary and the Canadian Coast Guard Auxiliary*, coordinating efforts between the U.S. volunteer agency and the Canadian non-profit on issues of boating safety.

⁹¹ MARINE SAFETY, TRANSPORT CAN., MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. COAST GUARD AND TRANSPORT CAN. RESPECTING MUTUAL RECOGNITION OF DOMESTIC MARINER QUALIFICATIONS (2002).

⁹² U.S. COAST GUARD, MEMORANDUM OF UNDERSTANDING GREAT LAKES PILOTAGE BETWEEN THE UNITED STATES COAST GUARD AND THE GREAT LAKES PILOTAGE AUTHORITY, (2013).

⁹³ *Id.* There are some exceptions to this system of alternating pilots. Canada exclusively services the Welland Canal, and in District 3 waters (all of the waters of Lake Huron north of Latitude 43° 05' 30"N, Lake Michigan and Lake Superior, and the St. Mary's River) Canadian pilots are only to be assigned as often as to receive 18.9% of the total revenue of the district for the season.

⁹⁴ *Id.*

homogenous fees and other maritime regulations, there is no long-term guarantee that these memorandums will serve as effective influences on U.S. or Canadian policy. Cementing the terms of these memorandums in respective statutes would ensure long-term predictability in Great Lakes pilotage regulation, and the industry would not be subject to the risk of changing priorities in each country's respective pilotage agencies.

IX. Pilotage Fees and Requirements: Inconsistent Rules and Implementation

While the general Canada-U.S. paradigm for licensing and allocating pilotage has significant levels of convergence, pilotage regulations retain areas of divergence and ambiguity, particularly regarding fees and pilotage requirements for certain ship classes. While the 2013 Memorandum of Understanding detailed above calls for coordination on pilotage fees, United States pilotage fees remain considerably higher than Canadian fees, and are continuing to increase.⁹⁵ The United States calculates and updates their pilotage charges annually in accordance with the Great Lakes Pilotage Regulations, establishing an hourly pilotage rate for different districts on the Great Lakes. The Canadian Authority does so in yearly updated Regulations under the authority of the Pilotage Act, typically basing its rate on tonnage shipped and distance travelled.⁹⁶ Given that the U.S. rates are localized and based on a number of factors, and the Canadian rates are more standardized based on tonnage and distance, there can be considerable variation in pilotage fees depending on a ship's itinerary and ports of call.

Currently, the cost associated with pilot services on the Great Lakes are subject to varying rates from corporations and fees from each country's governing bodies. The American Great Lakes Ports Association, who represents commercial ports and port users, brought a lawsuit against the United States Coast Guard after pilot firms, who provide pilots to the Great Lakes, increased their rates. In the case, the nonprofit association challenged the Coast Guard's new rules that allowed for a 10% increase in pilot fees for international shippers.⁹⁷ While this case is pending appeal, the District Court's decision found that the U.S. Coast Guard had acted "arbitrarily and capriciously" in deciding on the above rate increase and in choosing a specific weighting factor in its rate calculations.⁹⁸ While the Court did find that the U.S. Coast Guard did act improperly, the court stopped short of instituting a judicial remedy regarding rates. So, there remains some uncertainty in the near term about possible pilotage rates at U.S. ports in the Great Lakes.

⁹⁵ See John C. Martin Associates, *Analysis of Great Lakes Pilotage Costs on Great Lakes Shipping and the Potential Impact of Increases in U.S. Pilotage Charges* (2017), <https://www.greatlakesports.org/wp-content/uploads/2017/09/Analysis-of-Great-Lakes-Pilotage-Costs.pdf>.

⁹⁶ See *Great Lakes Pilotage Rates – 2019 Annual Review and Revisions to Methodology* (Oct. 17, 2018), <https://www.federalregister.gov/documents/2018/10/17/2018-22513/great-lakes-pilotage-rates-2019-annual-review-and-revisions-to-methodology> (U.S.); *Regulations Amending the Great Lakes Pilotage Tariff Regulations* (Dec. 15, 2018), <http://gazette.gc.ca/rp-pr/p1/2018/2018-12-15/html/reg4-eng.html> (Canada), respectively.

⁹⁷ *Am. Great Lakes Ports Ass'n v. Zukunfi*, 296 F. Supp. 3d 27, 45 (D.D.C. 2017), case currently pending appeal.

⁹⁸ *Id.* at 56.

In another forum, some pilots have complained and legally challenged the U.S. Coast Guard's low rates. The Lakes Pilot Association claimed that, as the result of low rates, there was a lack of funding for pilot training and a large number of pilots leaving the Great Lakes to work in other waters around the U.S. and even abroad.⁹⁹ These issues raised concerns from a different perspective for the Great Lakes pilotage authority in Canada. As recently as 2016, the Director of Great Lakes Pilotage, Todd Haviland, was quoted as saying, "[w]e don't want to scare those crew ships out of the Great Lakes because of exorbitant pilotage fees."¹⁰⁰ In sum, the uncertainty surrounding pilotage rates and fees presents a major headache for commercial vessel operators on the Great Lakes. In order to aid a fledgling commercial cruise industry on the Great Lakes, it would behoove the U.S. and Canada to (1) resolve existing uncertainty with fees and rates, and (2) harmonize those regulations.

Another area where commercial cruise operators may encounter regulatory uncertainty is in determining when pilots are required for commercial cruise navigation on the Great Lakes. Under U.S. law, pilots are specifically required on "each vessel of the United States operating on register and each foreign vessel."¹⁰¹ However, there is an exception to this general pilotage requirement, in that, "documented vessels" that operate regularly on the Great Lakes and St. Lawrence River are not required to obtain a pilot under §9302(a)(1).¹⁰² Pilots on the Great Lakes are, however, required on all ocean-going ships.¹⁰³ In Canada, location, size of a vessel, and weight of cargo all play a factor in whether pilots are required, but any cruise ship would likely be subject to compulsory pilotage based on its size and weight alone.¹⁰⁴ However, Canada has waived compulsory pilotage in cases where vessels only navigate the Great Lakes and are under the conduct of a master officer or deck watch officer that has a certificate of competency issued by the United States.¹⁰⁵ This means that although Canada does not have its own exception for vessels that constrain themselves to Great Lakes travel, they effectively recognize the U.S. exception allowing as much.

Based on the above piloting requirements, cruise ships may be able to operate on the Great Lakes without a certified pilot if those vessels were limited in range to the Great Lakes, have a certificate of documentation, and are overseen by a master or deck watch officer certified by the U.S.¹⁰⁶ However, it is unclear if cruise

⁹⁹ Stephen Kloosterman, *Higher Pilot Fees unpopular on the Great Lakes from freighters to Viking boat*, https://www.mlive.com/news/muskegon/2017/01/higher_pilot_fees_unpopular_on.html (last visited Mar. 21, 2019).

¹⁰⁰ Richard D. Stewart, *Regulations and Policies that Limit the Growth of the U.S. Great Lakes Cruising Market*, NAT'L CTR FOR FREIGHT & INFR. RES. & ED. (Apr. 4, 2019, 9:28 PM), http://www.wistrans.org/cfire/documents/FinalPaper_CFIRE0221.pdf.

¹⁰¹ 46 U.S.C.A. §9302(a)(1) (West 1996).

¹⁰² 46 U.S.C.A. §9302(e) (West 1996). See 46 U.S.C.A. § 12103 (detailing what constitutes a "documented ship", i.e. any U.S. flag vessel of 5 or more tons).

¹⁰³ *Great Lakes Marine Pilotage*, AM. GREAT LAKES PORTS ASS'N, <http://www.greatlakesports.org/issues/short-sea-shipping/> (last visited Mar. 24, 2019).

¹⁰⁴ *Id.*

¹⁰⁵ Great Lakes Pilotage Regulations, SOR/2011-136 (Can.).

¹⁰⁶ 46 U.S.C.A. §9302(e)-(f) (West 1996).

ships that travel internationally would be able to operate under a similar arrangement, and would likely have to request an American or Canadian pilot to travel in the Great Lakes Region in order to operate without concern over regulatory discrepancies. As with pilotage fees, piloting requirements remain an area where a harmonized approach would aid commercial cruise operators in complying with the bi-national regulatory requirements.

X. Pending Regulatory and Oversight Changes

Pilotage on the Great Lakes is monitored by three pilotage agencies: (1) the Office of Great Lakes Pilotage, a U.S. agency that regulates the three U.S. Great Lakes pilot associations; (2) the Great Lakes Pilotage Authority, a Government of Canada non-agent Crown corporation established pursuant to the Pilotage Act that is the sole administer of pilotage regulation on Canadian waters; and (3) the Laurentian Pilotage Association, which specifically covers pilotage on the Saint Lawrence River.¹⁰⁷ Together, these agencies regulate and mandate requirements on pilotage for their respective national waters as well as portions of the Great Lakes that are shared between both Canada and the U.S. These organizations also collectively provide all of the available pilots for travel on the Great Lakes.

One concern on the horizon with coordinated pilotage requirements is that recent reviews of Canada's Pilotage Act are suggesting a major change in the country's Pilotage Authorities.¹⁰⁸ The 2018 review proposed 38 recommendations to modernize the Pilotage Act including a complete amalgamation of the four existing Pilotage Authorities: the Atlantic Pilotage Authority, the Great Lakes Pilotage Authority, the Laurentian Pilotage Authority, and the Pacific Pilotage Authority.¹⁰⁹ The review also suggested eliminating the Authorities and creating a single not-for-profit pilotage corporation based on other existing models.¹¹⁰ The implementation of these changes could have an impact on U.S.-Canada relations, which could create unpredictability for a newly established Great Lakes Cruise system. Fortunately, the review encourages more cooperation with the United States, although in vague terms. Like Canada, organizations in the United States have also proposed changes to the governance of the United States Pilotages Services in the Great Lakes.¹¹¹ As of the writing of this report, these discussions have not materialized into concrete legislation in either Canada or the U.S.

SAFETY & SECURITY AND GREAT LAKES COMMERCIAL CRUISING

XI. Current Regulatory Framework for Safety and Security

On Great Lakes waters under U.S. jurisdiction, the U.S. Coast Guard has primary jurisdiction over all aspects of safety and security for both commercial

¹⁰⁷ *Analysis of Great Lakes Pilotage Costs*, supra note 95.

¹⁰⁸ Transport Can., *Pilotage Act Review Final Report*, DEP'T OF TRANSPORT, (Apr. 30, 2018), https://www.tc.gc.ca/documents/17308_TC_Pilotage_Act_Review_v8_final.pdf.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See *Joint Letter to Congress* (July 10, 2018), <http://www.gsgp.org/media/2085/coalition-pilotage-letter-7-10-18.pdf>.

and private watercraft. Specifically, the U.S. Coast Guard's 9th District is responsible for all waters of the Great Lakes and St. Lawrence Seaway. Based in their general congressional authorizations, the U.S. Coast Guard, U.S. Department of Transportation, and St. Lawrence Seaway Development Corporation (SLSDC) have shared rule-making authority for safety and security regulations in the Great Lakes – St. Lawrence system. The U.S. Coast Guard then has primary enforcement responsibility for the rules and regulations promulgated by each agency.¹¹² While outside the scope of this project, the Federal Maritime Commission also has ancillary jurisdiction over commercial cruising in the U.S., particularly in areas of consumer protection and casualty insurance.¹¹³

On Great Lakes waters under Canadian jurisdiction, a similar framework exists. The Canadian Coast Guard has primary jurisdiction over all aspects of safety and security for both commercial and private watercraft, with shared rule-making authority with Transport Canada and the St. Lawrence Seaway Management Corporation (SLSMC). Safety and security in the commercial cruise industry implicates several interrelated operational areas, including fire safety of a vessel, passenger safety, and passenger screening.

A. Passenger Screening

Passenger screening, much like with air travel, is a primary means of ensuring safety and security on cruise ships, as well as ensuring adequate protections against entry of unauthorized persons at ports of entry. Most passenger screening activities occur at cruise ship terminals, facilities at various ports that function much the same way as commercial airport facilities operate for air travelers. In 2019, the U.S. government streamlined regulations for cruise ship terminals into the Terminal Screening Program (TSP).¹¹⁴ The TSP dictates the requirements for cruise ship terminals in the United States. Under this regulation, terminals must, "...ensure all persons, baggage, and personal effects are screened at the cruise ship terminal prior to being allowed into a cruise ship terminal's secure areas or onto a cruise ship."¹¹⁵ The TSP also provided an updated Prohibited Items List (PIL) that more closely mirrors TSA's prohibited items for air travel. The TSP also requires that all cruise terminal operators document both their procedures for passenger screening, as well as the results of screening each individual passenger.¹¹⁶ The U.S. Coast Guard has primary responsibility for enforcing these regulations.

¹¹² U.S. Coast Guard, "Ninth Coast Guard District Units" (11 January 2017), *US Department of Homeland Security*, <https://www.uscg.mil/d9/units.asp>. See also, *Cruise Industry Oversight: Recent Incidents Show Need for Stronger Focus on Consumer Protection: Hearing on S. Comm on Commerce, Science, and Transportation*, 113th Cong. 1 (2013) (statement of Rear Admiral Joseph Servidio, U.S. Coast Guard Assistant Commandant for Prevention Policy), <https://www.dhs.gov/news/2013/07/24/written-testimony-uscg-senate-committee-commerce-science-and-transportation-hearing>.

¹¹³ See generally Federal Maritime Commission, *About Us*, <https://www.fmc.gov/about-the-fmc/>.

¹¹⁴ See generally 46 C.F.R. §§ 70.1-1—80.40 (2010). See also Consolidated Cruise Ship Security Regulations, 83 Fed. Reg. 53, 12086-12104 (April 18, 2018) (providing guidance on the updated regulations contained in 33 C.F.R. §§ 101, 104, 105, 120, 128).

¹¹⁵ 33 C.F.R. § 105.505(a)(1) (2019).

¹¹⁶ *Id.*

Since the processing of passengers is the responsibility of the cruise ship terminal owner/operator (generally the port authority), the cost of adequate passenger screening, as well as any possible civil penalties for non-compliance, remains with that operator.¹¹⁷ Additionally, in an attempt to prepare for the increase in cruises many ports are investing to improve their facilities. The cost of adequate facilities for passenger screening has been a deterrent for American ports in the past, but government streamlining of regulations, such as the Terminal Screening Program mentioned above, helps ports meet the requirements.¹¹⁸ In its 2018 guidance on the TSP, the U.S. Coast Guard estimated that building a TSP from the ground up over the course of one year would cost \$166,171 (USC), with \$156,397 (USD) going toward designing and implementing the program (procedures and personnel) and \$9,775 (USD) going toward updating the PIL (procedures and personnel training).¹¹⁹

Importantly, the U.S. Coast Guard's rulemaking in the TSP drew a marked distinction between cruise ship terminals and ports of call. Terminals, or the dock facilities where cruise lines first embark or finally disembark passengers, are covered by the more stringent security protocols similar to air travel. Ports of call, or short stay-over locations during a cruise itinerary, are specifically exempt from terminal screening procedures, and the cruise line's own on-board passenger verifications (also already mandated under U.S. Coast Guard rules) are considered acceptable security provisions.¹²⁰

Regarding Canadian ports and passenger screening, "Facility owners and operators within the ports (i.e., terminals) are...responsible within their premises for meeting...regulatory requirements."¹²¹ Under Canadian federal law,

Transport Canada is responsible for implementing the marine security regulatory regime covering facilities, vessels and perimeter of ports and facilities within ports. Canada Port Authorities are responsible for putting in place and maintaining security measures to meet the requirements of the regulations (e.g., access controls, perimeter security).¹²²

Unlike in the U.S., Canadian federal regulations allocate passenger screening responsibilities to the cruise ship operator.¹²³ Under this regulation, it is the cruise operator's responsibility to have a trained and certified security screener on staff, and to have that screener adequately check passengers for weapons, explosives, or

¹¹⁷ Consolidated Cruise Ship Security Regulations, 83 Fed. Reg. 53, 12086, 12092 (Apr. 18, 2018).

¹¹⁸ Kayla Smith, *Great Lakes ports open their docks for cruise lines*, GREAT LAKES ECHO (Mar. 31, 2016), <https://greatlakesecho.org/2016/03/31/great-lakes-ports-open-their-locks-for-cruise-lines>.

¹¹⁹ Consolidated Cruise Ship Security Regulations, 83 Fed. Reg. 53, 12086, 53,12098 (Apr. 18, 2018). It should also be noted that the TSP does not mandate hardware like x-ray machines or body scanners.

¹²⁰ *Id.* at 12098.

¹²¹ Lauren Kinney, *Canada's Marine Security*, 4 CAN. NAVAL REV. 15, 17 (2009).

¹²² *Id.* at 18

¹²³ Marine Transportation Security Regulations, SOR/2004-144 § 261 (Can.).

incendiaries before and during a voyage.¹²⁴ Failure to comply with this provision carries possible civil and criminal penalties including a fine of up to \$5,000 (CAN) and six months imprisonment for individuals and a fine of up to \$100,000 (CAN) for corporations.¹²⁵

B. Fire Safety & Passenger Safety and Security

Cruise lines are also responsible for providing a safe and secure environment for their customers while on-board. Aside from general civil standards of due care, Canadian and U.S. federal regulations require specific actions on the part of cruise operators, with significant civil administrative penalties for non-compliance. In the U.S., 46 U.S.C. Ch. 32 details the passenger safety steps required of cruise vessels. The general safety requirement for passenger vessels apply to any U.S. vessel defined as a “passenger vessel” or “small passenger vessel” that is carrying more passengers than the prescribed minimum by U.S. Coast Guard rule (currently 6 passengers for any vessel under 100 tons).¹²⁶ Canadian vessels qualify as “Foreign Vessels”, and are governed by 46 U.S.C. Ch. 32 if they are transporting more than 12 passengers.¹²⁷ Any discretionary rulemaking regarding applicability and particular standards is vested with the Secretary of the Department of Homeland Security (the supervising Secretary of the U.S. Coast Guard), or with the Secretary of the Department of Transportation in the case of St. Lawrence Seaway regulations.¹²⁸

Regarding fire safety, 46 U.S.C. § 3503 governs all United States registered vessels with stateroom capacity for 50 or more passengers. In sum, any qualifying vessel must be constructed of fire-retardant materials, and have its propulsion, electrical, and fire suppression systems certified to meet U.S. Coast Guard regulations. Generally, without such certification, the U.S. Coastguard does not allow passenger vessels to operate commercially, can impose a civil penalty of \$10,000 (USD) under 46 U.S.C. § 3504 for non-compliance, and can even impound vessels at ports of call under 46 U.S.C. § 3505. U.S. regulations appear to consider Canadian registered vessels as foreign under this scheme. All “Foreign Vessels” engaged in passenger cruising are required to comply with the International Convention for the Safety of Life at Sea (SOLAS), and if they fail to do so, they also are subject impoundment.¹²⁹

Under Canadian federal law, the Shipping Act of 2001, paragraph 35(1)(d) and subsection 120(1), provide the Minister of Transportation authority to promulgate regulations for vessel safety.¹³⁰ For fire safety, Consolidated Regulation SOR/2017 Vessel Fire Safety lays out the applicable standards for all

¹²⁴ *Id.*

¹²⁵ Marine Transportation Security Act, S.C. 1994, c 40 § 5(2) (Can.).

¹²⁶ 46 U.S.C. § 3202(b) (2018). *See also* PREVENTION DEP’T VESSEL INSPECTION, U.S. COAST GUARD SECTOR N.Y., SMALL PASSENGER VESSEL GUIDE 5, <https://homeport.uscg.mil/Lists/Content/Attachments/1926/Small%20Passenger%20Vessel%20Guide%20NY%20published.pdf>.

¹²⁷ 46 U.S.C. § 3202(a) (2018).

¹²⁸ 46 U.S.C. § 70031(2) (2018).

¹²⁹ 46 U.S.C. § 3505 (2018).

¹³⁰ Canada Shipping Act, S.C. 2001, c 26 § 35(1)(d) (Can.).

vessels either registered in Canada or operating out of Canadian ports.¹³¹ Importantly, with the Shipping Act of 2001, Canada brought its legislation and regulations in continuing compliance with SOLAS as noted in SOR/2017. Much like with applicable U.S. regulation, Canadian ships and those visiting Canadian ports must have proper construction of its propulsion, electrical, and fire suppression systems, and be constructed of proper fire retardant materials. The penalties for operators of vessels (both individuals and corporations) for non-compliance can reach a maximum of \$1 million (CAD) and up to 18 months imprisonment.¹³²

Under U.S. law, the requirements for passenger safety under Title 46, Chapter 35, cover a number of areas ranging from stateroom safety to on-board video monitoring and law enforcement assistance. Notably, the 2010 Cruise Vessel Safety and Security Act (CVSSA) expanded the security responsibilities of cruise operators greatly, and instituted civil and criminal penalties for non-compliance. The following requirements and penalties under the CVSSA apply to passenger vessels capable of carrying 250 or more passengers overnight and embarks or disembarks passengers in the United States.¹³³

Table 2: United States Cruise Ship Passenger Safety Requirements¹³⁴

Operator Allocation	Requirement	Purpose
Passenger Staterooms	Peep hole or other ID means	Maintain secure guest quarters
	Security Latches	
	Time sensitive key technology	
	Security guide	
External Deck Areas	Passenger overboard system	Monitor guest security, aid in rescue/recovery
Common Areas	Public communication system	Emergency communication
	Video surveillance system	Crime detection and investigation
	Ship railings	General passenger safety
Medical Facility	Sexual assault treatment	Response to sexual assault incidents
	SANE LPN on-staff	
Crew & Crew Areas	Crew stateroom access policy	Crew policy and education, crime investigation, and crime reporting
	Incident log book	
	<i>Criminal and safety laws</i>	
	<i>Invest-trained crew member</i>	
Exterior	Acoustic/visual warning system	Communication w/other vessels

¹³¹ Vessel Fire Safety Regulations, SOR/2017-14 (Can.).

¹³² Canada Shipping Act, S.C. 2001, c 26, § 121 (Can.).

¹³³ 46 U.S.C. § 3507(k) (2018).

¹³⁴ 46 U.S.C. §§ 3506, 3507, 3508 (2018).

Website	Security Guide	Public notice on safety and security
	Incident Information	

46 U.S.C. § 3506, 46 USC § 3508

Table 3: United States Civil and Criminal Penalties for Non-Compliance

Statute Violation	Violation Classification	Possible Fine	Other Action
46 U.S.C. § 3506	Civil – strict liability	\$200	NA
46 U.S.C. § 3507	Civil – strict liability	\$25,000-\$50,000	Denial of Entry
	Criminal – willful violation	Max. \$250,000	Prison max. 1 year
46 U.S.C. § 3508	Civil – strict liability	\$50,000	Denial of Entry

Canadian safety and security regulations for commercial cruising are authorized by the Marine Transportation Security Act (S.C. 1994, c 40) and are contained in the Marine Transportation Security Regulations (SOR/2004-144).¹³⁵ Under the MTSR, “cruise ships” are any non-exempt vessel that can carry 100 more persons in sleeping facilities.¹³⁶ Cruise Ships, under Part 2 of the MTSR, are required to follow a number of requirements for safety and security ranging from proper ship safety certification to personnel composition and training to vessel alert systems and ship security inspections.

Table 4: Canadian Cruise Ship Passenger Safety Requirements¹³⁷

Operator Allocation	Requirement	Purpose
Headquarters	Company Security Officer	Establish & oversee security plan
Crew & Crew Areas	Vessel Security Officer	Implement and maintain security plan, respond to emergency contingencies
	Vessel Security Personnel	
	Vessel security plan	
	Safety & training certificates	
Exterior	Security alert system	Communication w/other vessels
Common Areas	Public communication system	Emergency communication

¹³⁵ Marine Transportation Security Act, S.C. 1994 c 40 (Can.); Marine Transportation Security Regulations, SOR/2004-144 (Can.).

¹³⁶ Marine Transportation Security Regulations, *supra* note 123, § 1.

¹³⁷ Marine Transportation Security Regulations, *supra* note 123, §§ 202, 203, 204, 207, 210, 213, 261.

Failure to comply with these provisions carries possible civil and criminal penalties including a fine of up to \$5,000 (CAD) and six months imprisonment for individuals and a fine of up to \$100,000 (CAD) for corporations.¹³⁸ Canadian law also requires that all foreign vessels visiting Canadian ports maintain proper safety documentation in compliance with SOLAS, and that the documented compliance is commensurate with actual compliance in ship conditions and policies.¹³⁹

XII. Regulatory Coordination between the U.S. on Safety and Security

Based on the above-described regulatory measures, there does not appear to be any overt regulatory harmonization between U.S. and Canadian federal governments on cruise vessel safety and security. However, this does not mean that cruise vessel operators are subject to two differing standards when operating on the Great Lakes. Importantly, the U.S. and Canada are signatories to SOLAS, and both countries are in substantial compliance from a regulatory perspective with SOLAS guidelines for cruise ships.¹⁴⁰ Canadian safety and security regulations specifically state that they adhere closely to the SOLAS guidelines, and the U.S. safety and security regulations state that the U.S. is a signatory, and carves out expectations to several requirements for SOLAS compliant foreign vessels. Operators should therefore feel comfortable in satisfying the majority of both Canadian and U.S. safety and security regulations should they follow SOLAS recommendations for their vessel class.

XIII. Safety and Security Regulations: Areas of Divergence and Conflict

However, there remain areas where U.S. and Canadian regulations diverge, resulting in possible added costs and additional regulatory compliance measures for operators. First are the law enforcement requirements contained in 46 USC §§ 3507 and 3508 and outlined in Table 2 above. These regulations effectively make cruise vessel personnel organs of law enforcement, with precisely defined areas where operators must take concrete investigative steps and cooperate with all U.S. federal law enforcement. There exists no analogous requirements imposed under Canadian law, and it appears these United States regulations apply to some Canadian flag cruise vessels operating on the Great Lakes, i.e. any vessels capable of carrying 250 or more passengers overnight and that embark or disembark passengers in the United States.

Though no analogous requirements exists under Canadian law, MTSR SOR/2004-144 Part 2 requires that vessels allocate security personnel and conduct training in all relevant security competencies that apply to their vessel class.¹⁴¹ While there are substantial pieces of U.S. vessel security and operations law that mirror these requirements, there do not appear to be identical requirements in U.S. law for the broad range of training and preparedness competencies mandated under Canadian law. Given that the two countries' regulatory schemes contain such

¹³⁸ Marine Transportation Security Act, S.C. 1994, c 40 §5(2) (Can.).

¹³⁹ Vessel Certificates Regulations, SOR/2007-31 (Can.) (citing Canada Shipping Act, S.C. 2001, c 26 §§ 35(1)(d), 120 (Can.)).

¹⁴⁰ 46 U.S.C. § 3505 (2018); SOR/2007-31, *supra* note 139.

¹⁴¹ Marine Transportation Security Regulations, *supra* note 123, § 1213.

provisions that are not contained in their counterpart laws, these discrepancies represent possible areas where cruise operators may encounter added cost and duplicitious efforts.

CABOTAGE LAW ON THE GREAT LAKES

XIV. Review of International Cabotage Law

The international community has yet to ratify one universally accepted definition of cabotage that is binding upon all states.¹⁴² In fact, while international law has long recognized the customs, practices, and unspoken rules of cabotage, cabotage has never been defined under international law. One might think it incapable of precise delineation since, even today, regional and national definitions vary widely.¹⁴³ For centuries, cabotage was understood by the international community to refer to the carrying on of trade, transport of cargo, or transport of passengers between two or more ports within the same country.¹⁴⁴

Under the law of nations, the maritime and trade customs known today as ‘cabotage’ were premised upon the right of every sovereign to remain, “absolutely free and independent with respect to all other men, all other nations, as long as [the sovereign had] not voluntarily submitted to them,” subject only to the limits of the natural law and tolerance of its citizenry.¹⁴⁵ Under this regime, a nation exercised complete dominion and control over its territory and the administration of its affairs. This includes matters of self-governance, such as the regulation of its economy and right to monopolize its commercial engagements, and international relations, particularly diplomacy, foreign policy, and treaties with other nations.¹⁴⁶

The territory of a single nation included its land, coast, shores, ports, harbors, and vessels. The State retained exclusive domain, “even in parts of the sea subject to a foreign dominion” on the theory that extraction, not place of birth, was the

¹⁴² SEAFARERS’ RIGHTS INTERNATIONAL, CABOTAGE LAWS OF THE WORLD (2018), available at <https://seafarersrights.org/seafarers-subjects/cabotage/>.

¹⁴³ *Id.*

¹⁴⁴ *Cabotage*, in BLACK’S LAW DICTIONARY (10th ed. 2014), Westlaw.

¹⁴⁵ EMER DE Vattel, THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY 3, 72 (Cambridge Univ. Press 2011). See also, BLACK’S LAW DICTIONARY (11th ed. 2019), which defines International Law as, “The legal system governing the relationships between countries; more modernly, the law of international relations, embracing not only countries but also such participants as international organizations and individuals (such as those who invoke their human rights or commit war crimes). — Also termed public international law; law of nations; law of nature and nations; jus gentium; jus gentium publicum; jus inter gentes; foreign-relations law; interstate law; law between states (the word state, in the latter two phrases, being equivalent to nation or country)”

¹⁴⁶ See *Gibbons v. Ogden*, 22 U.S. 1, 67, 6 L.Ed. 23 (1824) (explaining that the law of nations confers imperfect rights which can become “perfect only by treaty; the effect of which, is to secure to a nation rights of commerce or intercourse, which it before enjoyed at the will of another” and the right of traveling, entering into, and residing in one nation by the citizens or subjects of another depends on the same principles of international law” and a nation possessed the right to control its borders, based entirely in particulars: by foreign subjects in particular cases, under particular circumstances, or as to particular individuals, and for particular purposes, or may prohibit entrance altogether, and annex what conditions to place on permission to enter”).

more determinative factor.¹⁴⁷ The State also retained exclusive domain to all sea “within cannon-shot of the coast” under the law of nations.¹⁴⁸ It was over this territory that a nation possessed the right, not duty, to oversee home trade and engage in foreign trade, which was conducted exclusively through treaties.¹⁴⁹ Freedom of contract was paramount in such treaties: every commercial treaty, “which does not impair the perfect right of others, is allowable between nations; nor can the execution of it be lawfully opposed.”¹⁵⁰ For instance, if a nation engaged to another that it would sell certain merchandise or produce to the latter only, it could no longer sell it to any other nation, and “[t]he case is the same in a contract to purchase certain goods of that nation alone.”¹⁵¹

By the law of nations, a country possessed the absolute right to control its trade and commerce.¹⁵² Unlike the foreign sovereign, a private citizen was amenable to the jurisdiction of another nation for violations of municipal law. While only enforceable within the limits of that nation’s territory, the practice officially recognized as lawful the prosecution of the foreign citizen who, in the course of “spread[ing] themselves through another [country] as business or caprice may direct, mingling indiscriminately with the inhabitants of that other” happened to break the law.¹⁵³ This concept also applied to private vessels, including *privateers* and “merchant vessels enter[ing] for the purposes of trade.”¹⁵⁴

Such jurisdiction was based on the belief that it would be inconvenient, or even dangerous, to society if individuals or merchants did not owe temporary and local allegiance, and to opt otherwise would subject the laws to continual infraction and, consequently, the government to degradation.¹⁵⁵ As applied to cabotage, if a private person or vessel undertook mercantile activities in another country that affected its local and national trade (whether by impeding its treaties to buy or sell goods with another, transporting its citizens between places or ports within that country, or otherwise) such insubordinate acts would have been committed in violation of the law of nations and the national or municipal law.¹⁵⁶ In addition, it may have posed a threat to national security and international

¹⁴⁷ Vattel, *supra* note 145 at 131.

¹⁴⁸ *Id.* at 158.

¹⁴⁹ *Id.* at 3; *see also id.* at 72-73 (stating that under the law of nations, the people of a nation owed the duty to make home trade flourish, while the nation was obliged to promote and carry on foreign trade).

¹⁵⁰ *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 144, 3 L. Ed. 287 (1812). *See also Nathan v. Com. of Virginia*, 1 U.S. 77, 1 L. Ed. 44 (Pa. Com. Pl. 1781) (explaining that “if a sovereign state turns merchant, and draws or accepts bills of exchange, its property ought in like manner to be subject to the law merchant, and answerable in the state where it happens to be imported”).

¹⁵¹ Vattel, *supra* note 145 at 172.

¹⁵² WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND OF ENGLAND IN FOUR BOOKS 4 (1753).

¹⁵³ *The Schooner Exchange v. McFaddon*, *supra* note 150.

¹⁵⁴ *Id.*; *See Hudson v. Guestier*, 10 U.S. 281, 283, 3 L. Ed. 224 (1810) (explaining that “a seizure, beyond the limits of the territorial jurisdiction, for breach of a municipal regulation, is warranted by the law of nations”).

¹⁵⁵ *Id.*

¹⁵⁶ *See* BLACKSTONE, *supra* note 152 at 4.

relations on grounds of breach of contract or “trading with the enemy.”¹⁵⁷ Undoubtedly, the modern concept of cabotage mirrors these roots. At present, over 91 member-states recognize and regulate cabotage.¹⁵⁸

XV. Review of Cabotage Law in the United States and Canada

Across many sectors, Canada and the United States have liberal trade intentions contained within their trade agreements. However, this liberal trade policy did not result in a liberal cabotage policy.¹⁵⁹ The United States’ policy, contained within the Jones Act, restricts cabotage. It states that cargo may not be transported between two U.S. ports unless the vessel transporting it was built in the U.S. and owned by U.S. citizens.¹⁶⁰ This allows domestic vessels to be protected from foreign competition without receiving direct subsidies.¹⁶¹

These laws have effectively created a barrier between domestic and international shipping, as it makes it difficult for ships who are qualified to operate internationally to operate domestically, and vice versa.¹⁶² The Jones Act provides the U.S. Navy with vessels to move cargo in case of war. The U.S. military relies on the availability of a U.S. commercial fleet to supplement its ships to transport cargo during war.¹⁶³ This should also provide professional crew for U.S. cargo vessels for the military in times of war. If the Jones Act did not exist, there may not be U.S. crew available to support the military in times of war.¹⁶⁴ The Jones Act also helps keep the U.S. shipbuilding industry for oceangoing commercial vessels afloat.¹⁶⁵

Under the Merchant Marine Act of 1920, or the Jones Act, foreign-flagged vessels are generally prohibited from engaging in the coastwise transport of passengers and freight of goods.¹⁶⁶ The Jones Act is applicable to all 41,009 kilometers of the United States’ waterways (19,312 kilometers of which are used for commerce) containing eleven cargo ports and five cruise departure ports, in

¹⁵⁷ *Id.* See also *The Santissima Trinidad*, 20 U.S. 283, 338, 5 L.Ed. 454 (1822).

¹⁵⁸ CABOTAGE LAWS OF THE WORLD, *supra* note 142 at 52.

¹⁵⁹ J. R. F. HODGSON & MARY R. BROOKS, CANADA’S MARITIME CABOTAGE POLICY: A REPORT FOR TRANSPORT CANADA, Marine Affairs Program Dalhousie University 60 (2004), https://www.researchgate.net/profile/Mary_Brooks/publication/255970572_Canada%27s_Maritime_Cabotage_Policy_A_Report_for_Transport_Canada/links/004635212827919ce7000000/Canadas-Maritime-Cabotage-Policy-A-Report-for-Transport-Canada.pdf?origin=publication_detail [hereinafter CANADA’S MARITIME CABOTAGE POLICY].

¹⁶⁰ *Id.*

¹⁶¹ Loren Thompson, *Why Repealing the Jones Act Could be a Disaster for the U.S.*, FORBES (Oct. 17, 2017), <https://www.forbes.com/sites/lorenthompson/2017/10/17/maritime-security-five-reasons-the-jones-act-is-a-bargain/#6ade9a43d960> [hereinafter *Repealing the Jones Act*].

¹⁶² J.R.F Hodgson & Mary R. Brooks, *Towards a North American Cabotage Regime: A Canadian Perspective*, 1 CAN. J. TRANSP. 19, 30 (2007).

¹⁶³ Repealing the Jones Act, *supra* note 161.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ 46 U.S.C. § 55102, 55103. See *Chicago Convention on International Civil Aviation*, arts. 1-4 (Dec. 7, 1944), https://www.icao.int/publications/documents/7300_orig.pdf. See generally *Convention on the International Maritime Consultative Organization*, Chapter XII, Vol. 2 (Mar. 6, 1948).

addition to the 3,611 United States-owned commercial vessels and myriad of foreign-flagged vessels that tread into U.S. waters on an annual basis.¹⁶⁷ At a minimum, and with limited exceptions, the Act imposes two preconditions for a ship to lawfully carry cargo between two points in the United States; (1) the ship must have been “built in the United States,” and (2) the ship must be “wholly owned by the citizens of the United States.”¹⁶⁸

By supporting merchant marines, shipbuilding and repair facilities, the Jones Act serves dual purposes. First, to promote the national defense and second, to aid in the development of U.S. commerce at all levels.¹⁶⁹ The United States shares the Saint Lawrence Seaway of 3,769 km, including the Saint Lawrence River of 3,058 km, with Canada.¹⁷⁰ The United States is not alone in its Jones Act provisions. At least 40 countries have similar exclusionary cabotage laws that use national preference as the basis for permitting entry into their domestic waterborne trade, 37 countries have sovereign ownership provisions, 17 countries have “some sort of domestic fleet subsidy,” and 13 countries provide indirect subsidies.¹⁷¹

Canada has implemented the Coasting Trade Act and the Customs Tariff. The Coasting Trade Act allows only ships registered in Canada, and either built in Canada or who have paid the import duty, to have unrestricted access.¹⁷² Shipping companies must apply for permission to operate a non-Canadian flagged vessel between Canadian ports.¹⁷³ Often, the companies that make these requests are Canadian companies that wish to use their foreign flagged vessels within Canada, or to charter a foreign vessel for a period of time.¹⁷⁴ If they are approved, they can operate in Canadian waters under the flagged country’s labor rules with their crew being granted foreign worker permits.¹⁷⁵

In Canada, the Coasting Trade Act (S.C. 1992, c.31) and the Canada Shipping Act (S.C. 2001, c.26), govern cabotage.¹⁷⁶ Coasting trade, or cabotage, refers to “the carriage of goods by ship, or by ship and any other mode of transport, from one place in Canada or above the continental shelf of Canada, either directly or by way of a place outside of Canada but, with respect to waters above the continental shelf of Canada, includes the carriage of goods only in relation to the exploration, exploitation, or transportation of the mineral or non-living resources of the

¹⁶⁷ *World Factbook* (CIA), (last visited Mar. 26, 2019), <https://www.cia.gov/library/publications/resources/the-world-factbook/rankorder/2108rank.html>.

¹⁶⁸ 46 U.S.C. § 12112(a)(2)(A), 55102(b)(1). See 46 U.S.C. § 12112(a)(2)(B) (explaining that a vessel captured and construed as a prize of war, a vessel acquired as a result of civil forfeiture, or a qualifying wrecked vessel may also receive a coastwise endorsement).

¹⁶⁹ 46 U.S.C. § 50101.

¹⁷⁰ *World Factbook*, *supra* note 167.

¹⁷¹ CABOTAGE LAWS OF THE WORLD, *supra* note 142 at 46.

¹⁷² Canada’s Maritime Cabotage Policy, *supra* note 159 at 65.

¹⁷³ Peter Ziobrowski, *Shipping News: Canadian ship owners manipulate cabotage rules*, THE CHRONICLE HERALD (Sept. 26, 2018), <https://www.thechronicleherald.ca/business/shipping-news-canadian-ship-owners-manipulate-cabotage-rules-244585/>.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ CABOTAGE LAWS OF THE WORLD, *supra* note 142 at 16.

continental shelf of Canada.”¹⁷⁷ In contrast to the United States, Canada’s cabotage laws govern roughly 4,000 kilometers of inland waterways, including the Saint Lawrence Seaway that it shares with the United States, thirteen ports and terminals, as well as 657 Canadian-owned commercial vessels.¹⁷⁸ Since the Treaty of Paris in 1763, all British ships (all vessels registered in the Commonwealth) have been permitted to engage in the Canadian coasting trade whether registered in Canada or elsewhere in the Commonwealth.¹⁷⁹

The United States’ cabotage goals with any country are to further the purposes articulated under the Jones Act. Namely, to enhance domestic commerce, provide for the national defense, and minimize risk to national (including border) security.¹⁸⁰ Specifically with Canada, the United States strives to promote education and awareness of coastwise laws on both sides of the border, so that both countries’ cabotage protocols are consistently enforced.¹⁸¹ Unlike the United States, Canada’s cabotage policies are set out in various parliamentary reports. Similar to the United States under the Jones Act, Canada’s cabotage policies recognize the merits of governmental control of shipping, which include financial security and stability (collateral bargaining), stability of trade and shipping services, promoting national defense, and promoting the domestic shipbuilding and repairing industry in Canada.¹⁸² The goals of Canada-U.S. cabotage include peaceful resolution of their transnational maritime boundary disputes, promoting trade consistent with international policies, and encouraging the free flow of trade while protecting their borders.¹⁸³

XVI. Regulatory Interplay between Canada and United States Cabotage Laws

Shipping in the Great Lakes creates a confluence of U.S. and Canadian private and public sectors. The private sectors in each country own most of the ships and terminals within the ports. Short sea shipping in the context of the United States and Canada is often defined as “a multi-modal concept involving the marine transportation of passengers and goods that does not cross oceans and takes place with and among Canada, the United States, and Mexico.”¹⁸⁴ Short sea shipping is

¹⁷⁷ *Id.* at 57.

¹⁷⁸ TRANSPORT CANADA, MARINE TRANSPORTATION ANNUAL REPORT (2011), <http://www.tc.gc.ca/eng/policy/anre-menu-3019.htm>

¹⁷⁹ ROYAL COMMISSION ON THE COASTING TRADE, REPORT OF THE ROYAL COMMISSION ON THE COASTING TRADE (Dec. 9, 1957), http://publications.gc.ca/collections/collection_2016/bcp-pco/Z1-1955-40-1-eng.pdf. See generally, U.S. Office of the Trade Representative: North American Free Trade Agreement (1994) (stating that the purpose and scope of NAFTA is to allow the free movement of goods across the border for international activities, but not to facilitate access to the domestic labor market).

¹⁸⁰ U.S. Dept. of Homeland Security office of U.S. Customs and Border Protection, *CBP furthers partnership with cruise industry*, (Jul. 13, 2018), <https://www.cbp.gov/newsroom/local-media-release/cbp-furthers-partnership-cruise-industry>.

¹⁸¹ *Id.*

¹⁸² CABOTAGE LAWS OF THE WORLD, *supra* note 142 at 73.

¹⁸³ See generally *id.*

¹⁸⁴ Riad Mustafa, Ming Zhong & Michael Iracha, *Short Sea Shipping in Canada Regulatory and Policy Issues*, CANADIAN TRANSPORTATION RESEARCH FORUM 1, 4 (last visited Mar. 28, 2019), <https://ctrf.ca/wp-content/uploads/2014/07/24MustafaZhongIrachaShortSeaShippinginCanada.pdf>.

beneficial for many of the companies as “on average, one sea vessel can replace about 870 trucks or 225 rail cars.”¹⁸⁵ The Canadian and U.S. governmental agencies are responsible for making sure that the waterways are open, and that trade can flow through them. A ship on the Great Lakes involved “in cross border trade will have to comply with approximately thirty sets of U.S. and Canadian regulations that are administered by ten different departments on the federal and provincial level alone.”¹⁸⁶

The U.S. cabotage laws, the Jones Act and the Passenger Vessel Services Act, require that, “vessels be built in the U.S., that U.S. citizens own a majority of its stock, and that it is crewed by U.S. citizens.”¹⁸⁷ This requirement applies to any vessel engaged in trade (in merchandise or passenger transport) between two ports of call in the U.S.¹⁸⁸ The Canadian Coasting Trade Act of 1992 requires that only Canadian flagged vessels crewed by Canadian citizen carry freight or passengers between two contiguous Canadian ports.¹⁸⁹ It is important to note that the Jones Act only applies to the U.S. ports that originate and receive merchandise or passengers – a vessel is permitted to travel between two shipping and/or receiving U.S. ports with foreign stop-overs in between.¹⁹⁰ Likewise, if the vessel traveling between two Canadian ports stops in the U.S., it is not subject to the Canadian Coasting Trade Act.

When considering how cabotage impacts Great Lakes commercial cruising, it is worth remembering that restrictive cabotage regulations in both Canada and the United States were envisioned to protect commercial shipping markets. More specifically, these cabotage laws were designed to protect national oceangoing commercial fleets. Their purpose and substance did not consider the intricacies that would later present themselves on the Great Lakes in the commercial cruising context. It is in this context that possible exceptions to general cabotage requirements could be beneficial to the cruising industry, while at the same time leaving the stated regulatory goal of protecting national merchant marine fleets intact.

CONCLUSION: MOVING FORWARD WITH REGULATORY AND LEGISLATIVE INNOVATION

The Great Lakes themselves and all their related attractions will continue to be compelling destinations for vacationers from North America and beyond. Great Lakes tourism remains strong and is poised to grow further, presenting opportunities for the commercial cruise industry. However, as with any industry, any projected growth in the Great Lakes commercial cruising faces hurdles. In

¹⁸⁵ *Id.* at 2.

¹⁸⁶ Richard D. Stewart, *Great Lakes Marine Transportation System*, MIDWEST FREIGHT CORRIDOR STUDY 1, 4 (last visited Mar. 28, 2019), http://wupcenter.mtu.edu/education/great_lakes_maritime/lessons/Grt-Lks-Maritime_Transportation_System_Report_Stewart.pdf.

¹⁸⁷ *Id.* at 10.

¹⁸⁸ 46 U.S.C. § 55102, 46 U.S.C. § 55103.

¹⁸⁹ Stewart, *supra* note 186 at 10.

¹⁹⁰ *Id.*

order to gain market entry and maintain operations, cruise line operators must comply with a plethora of regulatory obligations, often in both Canada and the United States. In this context, long-standing maritime regulations such as cabotage, passenger screening and security, and pilotage present complex legal and regulatory challenges as defined throughout this work. These requirements result in added compliance and operating costs for potential cruise operators.

When discussing pilotage, commercial cruise operators face regulatory uncertainty across the border in the following: variation in pilotage fees depending on a ship's itinerary and ports of call; and, possible necessity of engaging multiple pilots for a complete Great Lakes transit. These issues can and should be addressed by the relevant governing bodies in both Canada and the United States. Specifically, the Department of Homeland Security and Transport Canada have the rule-making authority under the acts discussed above to enact regulations that will both (1) remain true to the legislative intent of Congress and Parliament, and (2) alleviate the regulatory burden on a fledgling industry.

Regarding safety and security, alleviating possible disjoints in regulation (particularly in passenger screening and passenger safety and security) may present a more difficult task. Since several of the regulations at issue are contained in federal law itself, and not simply agency rule making based on federal authority, further legislation would be necessary. However, given a concerted effort on the part of all stakeholders, the proper changes would likely be reasonable and palatable for lawmakers.

Regarding cabotage, the prohibition on foreign vessels effecting transport between Canadian and United States ports certainly can present an impediment to certain desirable itineraries. Again, since this prohibition is contained in both countries' federal law, a legislative effort would be necessary to fully rectify the issue. Given a concerted effort on the part of all stakeholders, the proper changes would also likely be reasonable and palatable for lawmakers, as a workaround could be crafted that does not undermine the original intent of both countries' protective cabotage laws.

A final, more holistic solution may also be possible, one that would allow the United States and Canada to examine the Great Lakes as a whole – a Great Lakes Navigation Treaty.¹⁹¹ This solution would have many benefits, chiefly that it would allow the two countries to examine the Great Lakes – St. Lawrence Maritime System as the unit it truly is, and come to mutual agreement on how best to both use and steward a unique and precious resource. While the scope of such an agreement would undoubtedly reach well beyond the confines of commercial cruising, cruising would be one major area of discussion and joint policy making during such an endeavor.

¹⁹¹ Piskur, *supra* note 2 at abstract.