Maritime Law
NOW – AND THEN

Cybersecurity and the Maritime Industry

Autonomous Vessels

CETA and the Legal Impact on the Canadian Shipping Industry
On December 1, 2017, BLG’s Maritime Practice Group hosted some 150 guests at our 29th Annual Maritime Law Seminar. Topics addressed included:

- cybersecurity concerns within a global shipping industry in which vessels are increasingly dependent upon systems that rely on digitization, integration and automation and hence, vulnerable to cyber-attacks (vulnerabilities will only increase with the potential introduction of autonomous vessels operating commercially);
- the revolutionary impact on all areas of the maritime industry by the inevitable introduction of autonomous vessels; and lastly,
- the legal impact on the Canadian shipping industry which flows from the coming into force of CETA, Canada’s trade pact with the European Economic Community (EEC).

As in past years, these different topics were introduced by special guest speakers who added real-life insights and experience to the legal framework which BLG provided.

The undersigned would like to personally thank our guest speakers, Chris South (West of England P&I Club), Jack Mahoney (Maersk Shipping Lines), Colin Clark (Lloyd’s Register) and Leanne O’Loughlin (Charles Taylor P&I) for their invaluable assistance in contributing to the success of the seminar.

In this issue of Maritime Law, we enclose brief articles addressing the above-mentioned seminar topics and trust that you will find them to be informative and thought provoking, and we welcome your feedback and comments.

Our current issue also features a “Fireside Chat” with P. Jeremey Bolger – Senior Counsel at BLG, in which Jeremy reflects upon his time as a lawyer and expands upon how the practice of Maritime law has changed and continues to evolve.

Recognized as one of Canada’s leading maritime lawyers, in addition to his other honours (The Best Lawyers in Canada (Maritime Law), Who’s Who Legal: Canada (Shipping & Maritime); The Canadian Legal Lexpert Directory; and “Maritime Lawyer of the Year 2010” by Best Lawyers), Jeremy was recently bestowed with “Senior Statesman” recognition by Chambers and Partners.

Sincerely,

Darren McGuire
National Practice Leader, Maritime Law
Insurance and Tort Liability Practice
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About Borden Ladner Gervais LLP

Borden Ladner Gervais LLP (BLG) is a leading, national, full-service Canadian law firm focusing on business law, commercial litigation and arbitration, and intellectual property solutions for our clients. BLG is one of the country’s largest law firms with more than 700 lawyers, intellectual property agents and other professionals in five cities across Canada. We assist clients with their legal needs, from major litigation to financing to trademark and patent registration.
The global shipping industry – much like air, road and rail transportation – is undergoing a technological revolution. From hull cleaning to collision avoidance systems, automation has made incredible advances in recent years. There is more to come, too. Norwegian company Yara has partnered with the engineering group Kongsberg with plans to launch the world’s first automated container ship in 2018. Rolls-Royce is also joining the fray, having revealed plans in September to build autonomous naval vessels.

There are good reasons for embracing these innovations. For starters, unmanned ships are thought to be potentially safer and more fuel efficient. Automation also frees seafarers from the drudgery of paperwork. But these benefits come at a cost. One of the key challenges in the coming years (and one of the focal topics of BLG’s Maritime Law Seminar on December 1, 2017), is how the shipping industry will cope with the growing threat from cyber attacks.

“Ships have an opening to the outside world,” Chris South, a senior underwriter for West of England P&I, told the audience present at the seminar in Montréal. “And wherever there is an opening there is a vulnerability.”

A recent case in point is shipping company Maersk, which suffered $300 million in damages following a hit by the NotPetya ransomware outbreak in June of 2017. The shipping giant picked up an infection that spread into its global network and was forced to halt operations at dozens of port terminals around the world.

“Four factors are at play in the maritime industry”, said South. The first is automation itself, as machinery on vessels is increasingly controlled by software. The second is integration. On any given vessel, there may be multiple systems connected together. The third is the ability of ship-to-shore systems that communicate via remote monitoring. “Ships are now talking to head offices continuously,” says South. The fourth factor is that all these systems are connected through the internet.

Virtually any company that now relies on these systems is exposed to a cyber cascade of sorts, South added, “where one part of the industry ends up infecting another.” So a shipping company’s systems might get infected at headquarters. The infection then spreads to the ship and charterers before moving on to ports and terminals, the logistic companies and ultimately the manufacturing plants receiving the merchandise.

Too big to cover?

The alarming question for insurers in the maritime industry, who view cyber as a growing systemic risk, is “where does the liability stop?” Insurers have voiced concern that the risks are too big for them to cover alone – without government intervention.

Understandably, cyber and data risk insurance is limited when it comes to coverage. “A typical cyber risks policy will cover breach costs, such as forensic investigations, legal advice and those associated with notifying customers and regulators”, said South. It will also cover business interruption; repair and replacement
of websites, programs and data caused by hackers; extortion; and the cost to defend and settle claims made for failing to keep customers’ personal data secure. “But it does not substitute or replace the covers lost,” South warned.

New laws on the horizon

One area where governments are stepping in is on the legislative front. Data security breaches are nothing new, but gone are the days when organizations could conveniently sweep them under the rug. “Canada is the latest country about to implement a new breach notification regime”, said Éloïse Gratton, a BLG partner and nationally renowned expert in privacy and data protection.

Following recent amendments to Canada’s Personal Information Protection and Electronic Documents Act (PIPEDA), private-sector organizations doing business in Canada must report the breach to the Privacy Commissioner and, generally, notify customers if there is a risk of significant harm resulting from a data security breach. Gratton expects regulations prescribing the breach notification process in Canada to be in place as early as during the first quarter of 2018.

“There are record-keeping obligations,” she added. “When you have a security incident you’re supposed to keep the data.” The duration of record keeping is still being decided by the Privacy Commissioner, but could possibly extend to as long as five years. Organizations that suffer a breach must also be mindful of additional provincial breach notification regimes in Québec, Alberta and British Columbia. Additionally, most states in the U.S. also have breach notification laws on the books.

Another game changer, said Gratton, is the coming into force in May 2018 of the European Union’s General Data Protection Regulation (GDPR), which applies to any processing of personal data, namely its collection, use, disclosure or storage. Under the GDPR, organizations that suffer a breach must notify the relevant national data protection regulator as well as anyone who has been affected, and where the breach is likely to result in high risk to their rights and freedoms. Fines for non-compliance are considerable — up to 4 percent of an organization’s annual worldwide turnover or €20m. The GDPR also creates a right of private action against data controllers and data processors.

“Complicating matters further”, Gratton said, “the EU regulation has extra-territorial reach”. It applies to organizations that offer goods and services to European residents or who monitor their behaviour, through the use of persistent cookies for instance. That includes businesses based outside of the EU.

How far liability extends will also depend in part on the contractual terms. Contractors are increasingly required to meet cybersecurity standards, and can be held liable for damages to a company’s systems as a result of a virus or malware introduced by an agent or employee.

Being prepared and mitigating the damage

To safeguard ships from cyber threats, companies should follow International Maritime Organization approved guidelines on cyber risk management, which focus on identifying the systems, data and capabilities that pose a risk to operations, when these are disrupted. To do that, companies must implement risk control processes and have the ability to detect cyber events in a timely manner. They must also be able to back-up and restore systems necessary for shipping operations or services impaired following a cyber event.

To mitigate the damage that can result from a breach, Gratton urges organizations to have a breach incident response plan in place well in advance. “You have to know who your internal core team is, and who your external team is,” she said. That includes legal, forensic, PR, and information security experts.

It is also advisable, when responding to a breach, to ask legal counsel to retain and deal with cyber forensic experts for the purposes of maintaining solicitor-client privilege.
A Fireside Chat with P. Jeremy Bolger
Partner, Insurance and Tort Liability Practice, BLG

P. Jeremy Bolger is Senior Counsel in BLG’s Montréal office and one of the leading Canadian practitioners in maritime law. He represents clients in significant commercial and litigation matters, and has watched the industry evolve since his start in law in 1979. Yves Faguy, an independent journalist, sat down with Jeremy to discuss how the practice of maritime law has changed, where the industry is headed, and the skills that practitioners in the field will need to succeed in the years ahead.

YF: What attracted you at first to a maritime law practice?

PJB: After law school in Ottawa, I came to Montréal, took the bar courses and went to work at McMaster Meighen. I worked in financial services for the patriarch of the firm at the time, Ross McMaster. But occasionally, I was asked to assist in the maritime department which I thoroughly enjoyed. For one, it got me out of the office. It seemed that there were all kinds of investigations being conducted – onboard investigations, ship fires, loss of life, collisions. There was a fair amount of travel involved, which I always enjoyed. Also, I found it significantly more interesting than financial work. Fortunately I had had exposure to and knew the shipping industry. Among other jobs which I held, I had also worked for a ship repair company, J. & R. Weir Ltd., in the summer time during my university studies. My father was a sea captain who came to this country at the end of the Second World War from Ireland. I had grown up with the lingo so to speak. As children, we didn’t refer to a wall as a wall but rather it was a bulkhead. The ceiling was the deckhead. When my father was driving the car we’d say, “Watch the guy who’s off to starboard there!” — that type of thing. So I could go aboard a ship and although I was inexperienced, somehow there was greater acceptance of me because I appeared to know what I was talking about.

YF: What were some of the early cases that stood out for you?

PJB: There were some extremely interesting cases. I never finished Christmas dinner one year because Sean Harrington – now a judge at the Federal Court – rang me with an urgent matter. We both jumped on a private jet and flew to Matane because of a very tragic incident. Halco Inc. was the name of the ship owning company. One of its vessels, the Hudson Transport, was on fire – and several lives were tragically lost. Sean and I also worked on the Mekhanik Tarasov casualty. This Soviet ship sank the day after the Ocean Ranger incident. The incident occurred off the coast of Newfoundland. A huge North Atlantic storm, the kind you only get every 100 years or so, had taken place. We were able to prove that in court when the case ultimately went to trial. Similarly, when the Ocean Ranger (a drill rig platform) sank, there was also significant loss of life. It too resulted from the same storm that led to the loss of the Mekhanik Tarasov. There were other vessels in the area that were available to rescue crew from the ship but given the state of affairs and politics with the Soviets in those days, the crew refused help. They insisted upon being assisted only by another Soviet vessel.
YF: How has the practice changed over the years?

PJB: When I was a neophyte, young practitioners starting in this business cut their teeth on cargo claim work. In 1979, it was still relatively early days for the container trade. A lot of ships traded internationally moving break bulk cargo. They were discharging cargo with nets and slings and that often resulted in extensive damage. Today, we open a file for a single claim but back then we would open up a file for a whole voyage and there might be anywhere between 40 or 50 claims on each voyage. Technology has changed all that. For example, anti-collision radar was rare when I first started and the number of collisions was high - one or more a month. Today, that number has been reduced significantly and collisions average perhaps two or three a year.

YF: What does your practice look like today? What types of cases are you currently involved in?

PJB: My work continues to grow – and you know, it continues to interest me – gives me something to look forward to all the time. I work on a wide variety of both corporate commercial matters and dispute resolution/litigation ones. To give you an idea of the breadth of these, I have, for example, a ship financing transaction that is expected to close early in 2018. I’m also working on a multi-ship purchase, and long-term charter transaction for a Singapore-based client. On the litigation side, together with one of my partners, Robin Squires, I’m representing the Mediterranean Shipping Company with respect to a claim related to damages arising from a train derailment in 2015. Other examples of the work I’m currently involved in include: defending the owners of a vessel with respect to a collision with a tug that occurred in January 2017; a substantial claim concerning the arrest of cargo in relation to an international sales dispute; and I am also working again with Robin Squires in defending a claim asserted by the Elgin Maritime Museum for alleged breach of contract in connection with the transport by sea of a submarine from Halifax to Port Burrell, where it has been installed as a museum. So, as you can see, the claims are increasingly complex, but thankfully do not involve huge losses of life anymore.

YF: How do you see maritime trade evolving in the years to come?

PJB: I sometimes predict tongue-in-cheek that the day will come when there will only be one shipping company, one insurer and one bank! I expect that there will be more consolidation in the market place going forward. Today there are probably fewer than ten shipping lines left of the 50 or so that were trading to, from and within Canada when I started practicing law. Autonomous shipping has had, and will continue to have a huge impact. When I started, there were anywhere between 35 to 45 crew members on a ship. Today, it is typical to have 12 or fewer. It’s really quite fascinating.

YF: Is there a downside to that?

PJB: It certainly has its advantages but an immense problem and risk has presented itself, and that is cybersecurity. I often wonder what might happen should any of the electronics and the aids to navigation fail. Will today’s seafarers be able to pull a sextant out of its box and take a sight of the sun to ascertain where they are located on the face of the earth? Many of today’s crew members are used to just pushing a button to fix a position. They depend on GPS that can specify their location – with accuracy to within three metres. There are bound to be failures at some point. I ask myself “how will they be prepared to deal with these?”

YF: How is this all going to impact practice of law?

PJB: I expect that there will be fewer lawyers strictly practicing maritime law. Commercial lawyers may end up doing the shipping work on the solicitor side. The pure shipping or admiralty lawyers will be few and far between. But they’ll have that specialized expertise that nobody else will have. From a client’s perspective, it will become a race of the swiftest. The company which gets to the lawyer with the best experience and knowledge first, will be the one to prevail. An expert in the maritime practice will have true specialized knowledge and that’s going to make all the difference in the world – whether that’s in the conduct of negotiations, settlement of claims, or going to trial.

YF: What advice would you have for a young lawyer starting out in maritime law today?

PJB: In the long term, they’re going to make a pretty good living because there will be so few people doing this work. But, at first, there are going to be some lean years. They will make some terrific relationships with people all around the world and they’ll get to see a lot of it as well. What’s really important though is that in order to ensure success, in order to become a really good lawyer, they must learn the business. They’ve got to ask to be exposed to the daily operational end of the business; ask to go on a ship; ask to go into an engine room; ask to go down to a container terminal. Read up on advocacy. Learn the law of England because it’s the predominant law internationally for the shipping industry. Ask clients to work onsite in their offices for one day a week or for the next three or four weeks. In a nutshell: observe and learn what’s developing in the industry, learn the terminology, understand the business and become extremely proficient in the field.

YF: The maritime industry is obviously a global one. What is your take on the current climate – this pushback we’re seeing against globalization?

PJB: I don’t think the pushback is going to last. Globalization is the future, there’s no stopping it. Many young people today speak two, three, and even four languages. Even my own daughters speak English, French and Spanish. Globalization may slow occasionally, but it’ll ramp up again. It’s about communications, cultural exchanges. Transportation is part of it. I mean if you want to look really far into the future, at some point, 50, 60, 100 years from now, who knows how different it will be? There may not be a future for shipping because it may all be done by reasonably priced suborbital transport. Maybe Sir Richard Branson and Elon Musk are not so far off the mark. You’ll probably see great huge flying machines of some kind crossing the Atlantic in three hours and bringing 20,000 tonnes of cargo with them. That’s the promise of technology. Fascinating stuff!
For as long as ships have sailed our oceans, seafaring skills and knowledge have been fundamental to ensuring safety in maritime transport. Over the centuries those skills have also had to evolve to meet technological advances in the industry. Now, as autonomous ships are fast becoming a reality, the question is not just how seafarers will once again have to adapt to new technology, but how the legal environment will have to adjust as well.

According to Colin Clark, President of Lloyd’s Register Applied Technology Group, the reason why the skills issue is so critical is that “as autonomous shipping [systems] become more and more evolved, there’s less opportunity for us to train our future seafarers.”

Shipping certainly is evolving at a fair clip. The marine company Rolls-Royce Holdings Plc recently shared its ambitious vision of a near future in which autonomous ships operate commercially, possibly within a decade. By 2020, it reckons it will have remotely operated local vessels. By 2025, it will have deployed remote-controlled, unmanned-coastal vessels. Unmanned ocean-going ships will be next by 2030, and autonomous unmanned ocean-going ships will be ready by 2035.

There is a lot to get excited about as a result of these developments — fewer accidents, more optimized shipping routes, and the lower cost of seaborne transport. Yet, at the same time, crewless ships are controversial, as there are issues about their long-term impact on jobs in the maritime industry. They also raise a number of concerns about the legal implications for insurers, in the absence of updated legislation that can address issues surrounding liability. According to Leanne O’Loughlin, a Claims Director at Charles Taylor P&I Management, “before insurers can ever have a chance to properly evaluate the risk, we need to properly understand the extent of our members’ liabilities.”
In June 2017, the International Maritime Organization (IMO), Maritime safety committee commenced a scoping exercise to determine how the safe, secure and environmentally sound operation of autonomous ships may be introduced in IMO instruments. As part of that process, the committee will carry out a full review of existing IMO regulations as presently drafted and their ability to respond to reduced crew and autonomous ships. “It’s a huge undertaking,” said O’Loughlin.

Under the United Nations Convention on the Law of the Sea (UNCLOS), which defines the rights and duties of states with regard to international shipping, masters of vessels sailing under the flag of signatory states must assist those in distress at sea. “Well, what if there is no master?” O’Loughlin asked. “Does that duty transfer to someone sitting shore-side playing with a joystick?”

The International Convention for the Safety of Life at Sea (SOLAS) also requires an update. SOLAS includes minimum manning requirements, which will have to be adapted, as they were not drafted with crewless ships in mind.

The Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGs) – commonly known as the Rules of the Road at Sea – relies heavily on physical watch-keeping and the onboard presence of someone to carry out the functions of the ship. It is most likely, according to O’Loughlin, that the COLREGs are not “fit for purpose” when it comes to autonomous ships.

The obligations of the carrier to ensure that a vessel is seaworthy will be found in contract of carriage documents, such as a bill of lading. These are governed by international conventions such as the Hague-Visby Rules. Under these rules, carriers must ensure that vessels are seaworthy. But in the age of autonomous ships, it is unclear what constitutes performing due diligence at the beginning of a voyage.

Other matters need to be considered as well, such as errors of navigation by the autonomous vessel in the event that cargo is damaged, lost or delayed. How do we address cyber-attacks? What measures will a fully crewless ship take to prevent pirate/terrorist take over? The list goes on. “Everything is going to have to be reviewed at some point in the future,” O’Loughlin said.

A major issue not to be overlooked is the human factor. O’Loughlin cited figures showing that 70-80 percent of maritime casualties result from human intervention or omission. The advancements in terms of safety are significant, she said, but “what’s less easy to compute is how many incidents have been avoided by seamanship.”

Indeed, experienced navigators who have spent years at sea have a sense of when things go wrong. At a time when cyber vulnerabilities are top of mind, there are worries in the industry about skill fade – a phrase used in the aviation industry that describes the phenomenon of pilot skills degrading over time, due to automation. The marine industry will have to give some thought to how it will go about avoiding that fate.

From an underwriter’s perspective, figuring out how to rate the risks associated with autonomous ships is bound to be a challenge, as underwriters have little historical data to guide them. As a result, pioneers in the autonomous shipping space may have to wait for the regulatory and insurance markets to catch up with the technology, O’Loughlin warned. Over time, insurers will most likely refocus how they assess risk. The traditional maritime risks may become less significant, she said, whereas “cyber and product liability may take on a much greater position in the ship-owner’s portfolio.”

Autonomy eventually will bring safety and efficiency to the maritime industry. But we should expect there to be a lengthy transitional period in which autonomous vessels will co-exist alongside traditional ships and terminals...

Autonomy eventually will bring safety and efficiency to the maritime industry. However, we should expect there to be a lengthy transitional period in which autonomous vessels will co-exist alongside traditional ships and terminals, O’Loughlin said. During that period, regulatory framework will have to cater to all forms of shipping until transition to automation is complete.

For centuries the insurance industry has adapted to innovation alongside the shipping industry. The legal and regulatory framework governing it will have to keep up. “The insurance industry has adapted to innovation alongside shipping industry for hundreds of years... will continue to find creative solutions in future.” said O’Loughlin.
These are early days, but Canada’s trade pact with the European Union is having an immediate impact on demand for transatlantic maritime transportation between the two partners.

A case in point is Danish ocean carrier Maersk Line. It was the first in Canada to use its own ships to position its own equipment between Montréal and Halifax for perishable exporters immediately after the Comprehensive Economic and Trade Agreement (CETA) allowed Maersk Line to do so. It also joined Hapag-Lloyd’s JMCSA service from Mediterranean ports to Montréal in September, a fortnight after CETA provisionally took effect, demonstrating its confidence in the beneficial effect of CETA to trade between Montréal and the Mediterranean. Maersk Line Canada president Jack Mahoney told attendees at BLG’s Maritime Law Seminar in Montréal that the “pro-trade mindset” in this country is a big driver in his company’s growing interest in the Canadian market.

CETA, which covers a wide range of areas from goods and services, investment, intellectual property and government procurement, eliminates 98 percent of tariffs on trade between Canada and the EU. Roughly 47 percent of trade between the two partners is carried by ship, and the trade deal is projected to increase bilateral trade by 20 percent according to Global Affairs Canada.

There are also provisions, contained in Chapter 14 of the trade pact, that are specific to the maritime industry. CETA introduces significant changes to Canada’s coasting trade regime, which for years has protected Canadian shipowners against competitors registered under foreign flags.

That’s because under the Coasting Trade Act, only Canadian-flagged vessels — or duty-paid vessels — can carry goods or passengers between two Canadian ports. Foreign shipowners, however, must apply for a coasting trade license. But Canadian authorities will only grant one if no Canadian vessel is available and capable of doing the work. Even then the license is limited in time and place, and to a specific service or activity.
“CETA changes this”, Nils Goeteyn, an expert in international law in BLG’s Montréal office, told the seminar. “It gives preferential market access to EU entities. It allows more ships into the Canadian coasting trade for a number of specific activities.”

There are three such activities that no longer require a coasting trade license if performed by EU vessels. The first is that EU shipping lines can now provide feeder services on both continuous and single trip bases between the ports of Montréal and Halifax, provided the service is part of carriage involving the importation of inbound goods into Canada or of outbound goods from the country. Normally, foreign vessels can only perform single trip feeder services. For anything more in Canadian waters, they would need a coasting trade license.

Practically speaking, that means vessels that are registered in the first national registry of an EU member state can simply leave a vessel stationed between Halifax and Montréal. Then, according to Goeteyn, they can move between the two ports “picking up containers and dropping them off.” “That’s perfectly fine under CETA,” he said. Vessels on an international voyage and that are registered on an EU member state second registry can also load full containers in Montréal and discharge them in Halifax on their way overseas.

“It makes it easier for us to move things between Canadian ports,” said Mahoney. “That makes it easier for Canadian products to reach foreign markets.”

The second activity is the repositioning of empty containers within Canada. “This is a measure simply to make life easier for everybody,” Goeteyn told the seminar. It’s important to note that there can be no financial gain involved in repositioning containers, meaning that CETA will only allow European vessels to transport their own empty containers on a non-revenue basis. They cannot offer the service to others.

The last activity is dredging services. Canadian companies can now hire EU vessels for dredging anywhere in Canadian waters – though this does not apply to Federal government agencies who must follow CETA’s procurement rules if the contract is valued at more than 8.81 million CAD. “When the government wants to do big dredging works they will have to respect certain conditions, go through Canadian shipowners, or they will have to work with coasting trade licenses,” said Goeteyn.

As transformative as CETA is expected to be in terms of bringing about a more liberalized cabotage market in Canada, there are still outstanding issues, not the least of which is the question surrounding foreign work permits. CETA has made it far easier on EU-registered shipowners who no longer need to apply for the coasting licenses, said Goeteyn. “But that was the easy part. The hard part is getting the work permits.” Indeed, most foreign nationals entering Canada on a vessel as crew members engaging in the coasting trade need a work permit from Immigration, Refugees and Citizenship Canada. Before hiring a foreign worker in Canada, employers also generally need to get a Labour Market Impact Assessment to show that there is a need for a foreign worker to fill the job.

Of course, with new trade agreements it always takes time to work through various domestic rules. But in the shipping industry there is plenty of optimism about the impact CETA will have. As Mahoney told the audience, “With CETA, we’re anticipating that, like a lot of trade agreements that we have seen implemented in the past, it will be slow and steady. But we’ll see almost irreversible progress in the trade between Canada and Europe.”
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With a history spanning more than 150 years, BLG lawyers have unsurpassed depth of knowledge and experience in Maritime Law and are committed to delivering insightful, pragmatic legal advice to drive value and advance our clients’ objectives.

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