



# The Foghorn

Newsletter of the Maritimes Division of the  
Company of Master Mariners of Canada  
www.mastermariners.ca



September 2020

## From the Master Captain Marshall Dunbar

Good Day Everyone,

Hurricane season is now here and hoping that we will not see a direct hit as we had last year and in years past. For those who are at sea I am sure that all necessary preparations are practised and for those ashore that we are also prepared.

Our friends in the USA have taken the first wallop on the chin from Hurricane Laura and sure hope that the aftermath from this one and any others this year are not similar to some of the one storms they have endured in the past. I do remember being on the Mississippi River shortly after Katrina and at Port Arthur after Rita and the damage was memorable to say the least.

One of the things that helps us for situations that may occur from weather or other reasons is the training that we have participated in and that brings me to the topic of our next meetings (ZOOM) presenter to be held on Wednesday September 9<sup>th</sup> at 1900. We will have John Swain of Survival Systems Training Ltd give us a presentation on simulation using virtual reality to augment small boat training encompassing lifeboats including free fall, and rescue boats (FRB's).

He will describe and depict free fall simulation, LB and FRB training delivery as they currently utilize these three processes. He will summarize their collaborative research with TC and Virtual Marine, their technology developer, the changes in regulation derived from this work and further efforts being pursued. The advantages from a safety perspective and the attendant quality and efficiency aspects for both the training deliverer and Industry sides will be noted.

I believe that this is a very pertinent topic and one that should be of great interest to all parties. I really encourage our members and guests to join in and see what a local company is bringing to the marine industry.

Looking forward to hearing from and seeing the Members as to keep the organization current and growing.

All for this month and safely enjoy the rest of our dwindling days of summer.  
Marshall



## ANNOUNCEMENTS

Next Meeting (by Zoom -instruction will be sent in a separate email closer to the meeting)  
September 9, 2020 beginning at 1900 ADT

Guest Speaker will be  
John Swain  
Survival Systems Training Ltd.

The general theme is simulation using virtual reality to augment small boat training encompassing lifeboats including free fall, and rescue boats (FRB's). He will describe and depict free fall simulation, LB, and FRB training delivery as SSTL currently utilizes these three processes. John will summarize their collaborative research with TC and Virtual Marine, the technology developer, the changes in regulation derived from this work, and further efforts being pursued. The advantages from a safety perspective and the attendant quality and efficiency aspects for both the training deliverer and Industry sides will be noted.



**Capt. Rick Gates** is currently in the hospital but is still sending out text messages. Get well soon Rick.



## Quebec shipyard is setting up an Arctic icebreaking research centre

[/www.cbc.ca/news/politics/arctic-icebreaking-centre-1.5672800](http://www.cbc.ca/news/politics/arctic-icebreaking-centre-1.5672800)



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*Centre to serve as hub for innovation in Canadian Arctic, Davie Shipyard executive says*  
Describing itself as Canada's polar partner, the Chantier Davie Shipyard in Quebec plans to announce the creation of a national centre on Tuesday focusing on icebreaking in the country's Arctic.

It is, according to a senior executive at the Levis, Que., company, more than just an engineering centre and will encompass the climatic, economic and social factors that will drive the region for the next 30 years and beyond.

"It is a bigger discussion," said Spencer Fraser, the director of business development for the Inosea Group of Companies, which owns the shipyard. "It's not just around icebreaking and shipbuilding in Canada."

The Arctic icebreaking centre is intended to bring together community and business leaders as well as scientists and engineers — from both northern and southern Canada — in a conference later this year.

## ***Shaping the Arctic economy of the 21st century***

They'll be asked to envision and debate what kind of ships and infrastructure are needed to drive future economic and social development in Canada's Arctic, which is being transformed by climate change and shifting geopolitics.

"We're getting together to ask: In 2050, the North is going to look like this, what do we want the economy to look like? And what do we need to do today to get the wheels in motion so we can achieve that?" Fraser told CBC News.

More than that, he said, the centre is intended to be a place of ongoing dialogue that will hopefully produce the kind of innovation needed to restore Canada as a world-leader in Arctic operations.

By tapping into a wide range of expertise, he said the Chantier Davie initiative intends to showcase Canadian Arctic ingenuity on the world stage, which has for the last 20 years been dominated by Finland and Norway.

## ***Centre should focus on changes facing the Arctic: expert***

Rob Huebert, a professor at the University of Calgary and an Arctic expert, said an icebreaking centre of excellence is a novel and important idea.

He said the country was, until the 1980s, a world leader in the field, but interest and investment waned after Far North oil and natural gas development plans were shelved.

However, he said it needs to be more than just window-dressing and a business vehicle for Chantier Davie.

"If they're being serious, they'll not just be focused on their product," Huebert said.

"If it is just simply, 'look at what good icebreakers we have and look at how we can provide work' then that, in my mind, will really be just a PR exercise."

What the centre needs to do is go beyond what one company or another produces and focus on how the changing Arctic will be affected by a myriad of circumstances and conditions and the technology Canada will need to address them, he added.

Climate change and shifting geopolitical rivalries are but two examples.

The Trump Administration recently appointed a career diplomat to become the country's first Arctic coordinator — a sign that the country is taking the region more seriously.

The U.S. Air Force also recently published an Arctic strategy intended to counter Russia and China's growing influence and ambitions in the region.





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## Minutes of the August 12th Meeting



At 1905 with 15 members in attendance including the Secretaries from NL and GL Divisions, Capt. Dunbar introduced our guest speaker, Dr. John Ross of PRAXES Medical Group.

Dr. Ross began by introducing his company which has been providing 24/7 medical advice to the Canadian Coast Guard, the Royal Canadian Navy, and various shipping companies for the past 25 years. Further information is available on their website at [www.praxes.ca](http://www.praxes.ca)

With 4 doctors available, their response time is within 2 minutes and a great deal of assistance is provided via video. They are able to provide remote treatment advice which often results in the avoidance of voyage interruption/diversion or MEDIVAC. After discussion of a few situations, the question of COVID among seafarers was brought forth.

While Canadian COVID numbers are presently good, there is concern in the medical community about the Fall and Winter seasons and “second wave” infection. Testing is improving but it has been discovered that it is of primary value when the test results are positive but less accurate when they are negative. It is also to be remembered that the results are only valid for the moment at which they were taken so that a negative today may be a positive tomorrow or a few days later. There is also a need to increase testing to include asymptomatic persons who may be carriers. The testing of antibodies is only effective in indicating if you have had COVID not if you presently have it so we must be aware of testing procedures.

Masks are effective if worn properly. They should be sealed around the nose and fully cover the nose and mouth. Face shields are not as effective as non-medical masks and cloth masks, unless constructed of a close weave fabric, do not adequately protect either the wearer or those in proximity.

Vaccines are still questionable. The common cold is one type of corona virus and we still don't have a vaccine for that so it is difficult to assume that we will easily come up with a COVID 19 vaccine. Viruses depend upon their “food” source so it is likely that most viruses, including COVID 19, will mutate over time into something less dangerous in order to protect that source of supply.

At 2025, in closing, Dr. Ross reiterated that the medical profession is still learning about COVID 19 and there remain many unknowns. In order to avoid possible “double jeopardy” of annual flu and COVID 19, it is advisable to get your flu shot this year.

### Old Business

A steering committee for the redevelopment of the website is being formed and there will be an update after the upcoming AGM in September.

### New Business

While crew fatigue is being highlighted as a major problem, it may not be dramatically affecting Canadian crew repatriation.



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The Strategic Plan, as put forth last month, seems to be acceptable but the Action Plan will be a telling factor.

The new all electric boat which was put into service recently is the old Peggy's Cove Express and is the first approved vessel with Lithium batteries.

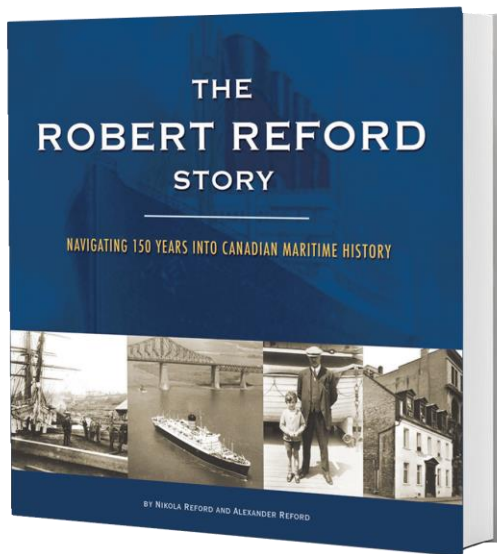
Capt. Dunbar will be involved with the upcoming CMAC.

The motion to adjourn as put forth and approved at 2100.



## NAVIGATING 150 YEARS INTO CANADIAN MARITIME HISTORY

<https://www.robertrefordstory.ca/>



The story of Robert Reford age 14 arriving from Ireland, by sailing ship docking at Quebec City in the 1840's, is far from unique, but what is unusual is that the company he founded in Montreal in 1866 continues today, 150 years and five generations of the Reford family later.

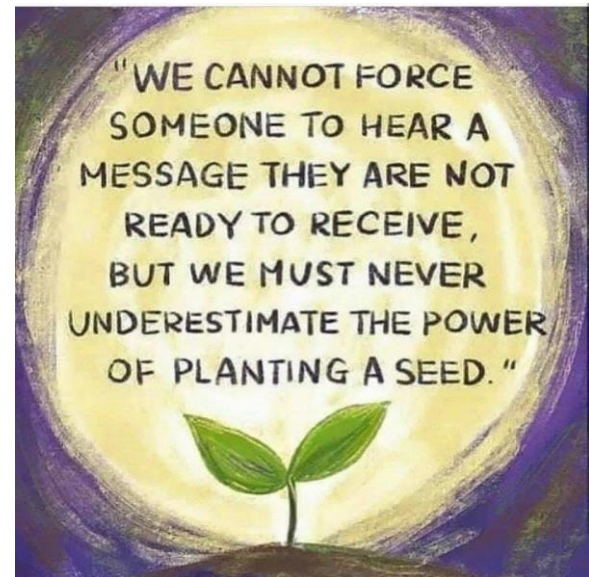
This book is a collection of snapshots from a century and a half, tidbit views into the past, a collection you can pick up for a few minutes or an hour.

Together with my cousin Alexander Reford, who has a deep love and respect for history, we tried to convey the Robert Reford Story through the centuries. We hope you enjoy reading through these pages... as much as we did!

– Nikola Reford



## Mentoring is Our Responsibility



'Most people think about their immediate circle of friends as their audience. However, research in the study of social networks has shown they are wrong. Your ideas and behaviors ripple out from you, influencing your friends, friends of friends whom you may not even know, and friends of those friends as well.'

*"We don't rise to the level of our expectations;  
we fall to the level of our training."*

*Archilochus, Greek Poet, 680-645 BCE*



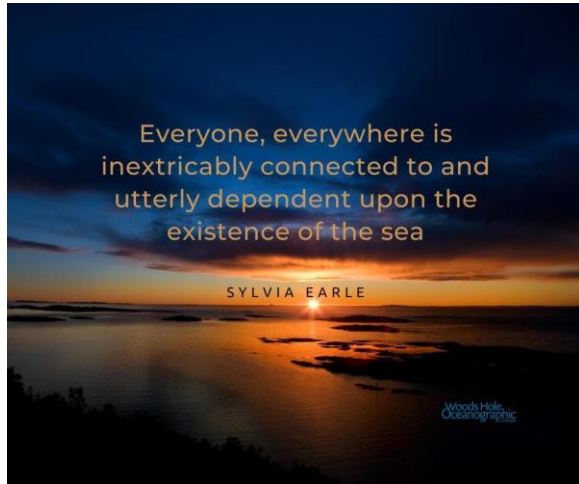


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## Mission to Seafarers Up coming BBQ

Please mark your calendars for another TAKE OUT BBQ on **September 11<sup>th</sup>**, which will be sponsored by **D R Brenton Ltd.** The last one was so popular that we've been called upon to do again. We will offer 1/3 lb hamburger on a bun or sausage on a bun or a veggie burger with potato salad, tomato, slice of cheese and onion plus dessert. We prefer all orders be emailed or called in by Tuesday, September 8<sup>th</sup> to establish numbers. Large orders should be picked up by 11:30 and as orders come in we will allocate a pick up time. Payment in advance is required for large orders. I will send out friendly reminder one week before the event.

Regrettably, we have decided to cancel the golf tournament for this year. Please accept our apologies for late notification on this. We hope to get back on track in 2021.

We are delighted to announce that we are receiving seafarers at our Mission, many of whom have not seen shore leave for over one year.

Thank you all for everything you do. You are all very much appreciated.

Kind regards,

Helen Glenn  
Mission Manager

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## Might Makes Right (of way)

**Sometimes Common Sense is less than  
common**



## COVID Meets Maritime: Strange Bedfellows

Volume 264—NO. 39 Tuesday, August 25, 2020

Admiralty Law Expert Analysis  
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[www.NYLJ.com](http://www.NYLJ.com)

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PAGE**



ADMIRALTY LAW

Expert Analysis

## COVID Meets Maritime: Strange Bedfellows

*There's a port on a western bay  
And it serves a hundred ships a day  
Lonely sailors pass the time away  
And talk about their homes*

—“Brandy” by Looking Glass



By  
**James E.  
Mercante**



And  
**Kristin E.  
Poling**

**C** OVID-19 stopped the world, particularly transportation ... many ships were not being “served” in port at all and many a lonely sailor couldn’t get ashore or even relieved of duty. Recently, it led many to inquire: Is the COVID pandemic a force majeure?

### Extraordinary Circumstances

Force majeure is an unusual and extraordinary circumstance that was not envisioned when a contract was made. Indeed, even if a shipment contract does not contain a force majeure defense,

the Carriage of Goods by Seas Act (COGSA) steps in and provides the functional equivalent that says: “A carrier and the vessel are not liable for loss or damage arising from—dangers of the sea or other navigable waters ... acts of God ... seizure under legal process ... public enemies ... saving or attempting to save life or property at sea, including a deviation in rendering such a service.” 46 U.S.C. §30706.

That said, the force majeure defense is strictly construed and evaluated pursuant to the precise terms set forth in the clause. Thus, even when an event may rise to the level of being a force majeure, courts are reluctant to cancel the contract. *TGI Office Automation v.*

*Nat'l Elec. Transit Corp.*, 2014 U.S. Dist. LEXIS 189880 (E.D.N.Y. 2014) (finding “act of God” defense did not apply to destroyed shipment because flooding from Hurricane Sandy was not completely “unforeseeable,” and in order to invoke the “act of God” defense, human activities cannot contribute to the loss in any degree). Like any defense, the burden of proving a force majeure rests with the party asserting it, with the “added burden of establishing lack of fault in order to be exonerated from liability.” See James E. Mercante,

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Many sailors from a wide range of countries have been on lock down aboard cargo ships, cruise ships and the like, with no return date in sight.

*Hurricanes and Act of God: When the Best Defense is a Good Offense*, 18 U.S.F. Mar. L.J. 1, 17-18 (2005-06).

A typical marine force majeure clause sounds something like this: “Neither [vessel owner] nor the [vessel] shall be responsible for

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any loss or damage, or delay or failure in performing hereunder arising from: act of God, act of war, act of public enemies, pirates or thieves, arrest or restraint of princes, rulers, dictators, or people, or seizure under legal process ... or riot or civil commotion." *Tug Blarney v. Ridge Contr.*, 14 F. Supp. 3d 1255 (9<sup>th</sup> Cir. 2014) (finding issue of fact existed as to whether vessel sinking constituted "force majeure"). Note that the clause does not contain "pandemic," "virus" or similar wording.

The Supreme Court recently made clear that additional wording will not be read into a maritime contract. "Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent .... In such circumstances, the parties' intent can be determined from the face of the agreement and the language that they used to memorialize [that] agreement." *CITGO Asphalt Ref. Co. v. Frescati Shipping Co.*, 140 S.Ct. 1081 (Mar. 20, 2020) (internal citations omitted). In *CITGO*, a disastrous oil spill from the tanker ATHOS I, the Supreme Court held that a centuries old "safe berth" clause contained in a charter party form contract unambiguously established an absolute warranty of safety for the ship. The court refused to read the clause as imposing a lesser obligation of "due diligence" absent specific wording.

The basic premise of a force majeure clause is to relieve a party from its contractual duties when the purpose of the contract is frustrated by extraordinary circumstances. Mere impracticality or unanticipated difficulty is not enough to excuse performance. The Second Circuit determined that the event must not only be one included in the force majeure wording, but must be unforeseeable as well. *Phillips Puerto Rico Core v. Tradax Petroleum*, 782 F.2d 314 (2d Cir. 1985) (finding that Coast Guard detention of cargo ship did

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COVID-19 may be an act of bat (or originated with some animal virus), but so far it has not been described as an act of God.

not constitute a force majeure as defined in the agreement).

### Impact on Shipping

Courts are already grappling with the extent of COVID-19's effect on commercial shipping. In *D'Amico Dry D.A.C. v. McInnis Cement*, 2020 U.S. Dist. LEXIS 114749 (S.D.N.Y. June 30, 2020), the Southern District of New York upheld a Rule B attachment against a cement cargo distributor. Rule B attachments are particular to maritime law. The attachment is issued against property within a court's district under Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims of the federal rules of civil

procedure. The court may attach a defendant's property up to the value of the claim as security for a judgment.

In *D'Amico*, the cement company entered into a four-year contract with plaintiff, guaranteeing regular shipments of cement. Shortly into the COVID-19 pandemic, the cement company stopped shipments, claiming force majeure prevented it from performing the contract. The plaintiff argued that the cement company's inability to perform existed prior to the COVID-19 pandemic and was not a result of force majeure. It appears that the cement company could not perform the contract at a profit, and that its continued performance would cause financial hardship. The case will be arbitrated, but in the meantime, the New York federal court upheld the Rule B attachment on the cement company's property. A lesson that financial troubles will not be a force majeure lifeline.

In *The Matter of the Arbitration between Seascope Shipping and Trading v. Metalex 2000 S.A.*, S.M.A. No. 4390 (Jul. 15, 2020), the Society of Maritime Arbitrators determined that the charterer breached a contract by failing to load certain cargo aboard claimant's vessel. The charterer argued that the cargo could not be loaded due to restrictions put in place by the Venezuelan government. Citing to a force majeure clause in the charter contract, which

included “arrest and/or Restraints of Rulers, Princes and People,” the charterer took the position that it was excused from performing and not liable for any breach. The arbitrators disagreed, finding that the cost of the cargo changed during loading operations and for that reason, the charterer would not load. The panel found in favor of the claimant vessel owner which included damages incurred by the vessel sitting at its berth for several days during the stand-off between the parties.

### Lonely Sailors

In addition to the business implications of this viral pandemic, there is the marine employment aspect as well. Many sailors from a wide range of countries have been on lock down aboard cargo ships, cruise ships and the like, with no return date in sight. This is a result of travel restrictions implemented as the pandemic began to spread rapidly throughout the world. Essential crewmembers wound up quarantined aboard ship waiting to be repatriated. While thousands of other crewmembers remained ashore without pay awaiting approval for a crew change.

Recently, a shipping company was fined under 33 CFR §160.215 for failing to report that a crewmember had coronavirus before the vessel entered the Port of

New York. That federal regulation requires a vessel bound for the United States under force majeure to report “any hazardous condition” to the captain of the port. The virus quickly spread to other crewmembers forcing the ship to anchor and be delayed for several days.

The expense of a ship under charter laid up idle even for a few days can be enormous. While such ship will lay dormant to clear COVID, both sides will have already laced up their gloves with maritime counsel over who is responsible and whether force majeure offers an escape hatch.

On Aug. 4, 2020, a class action lawsuit was filed in Florida against a cruise line by seamen allegedly trapped onboard the ship and required to work, some without pay. In their complaint, the crewmembers allege that when the COVID pandemic halted all sailings, defendants required all crewmembers aboard the ship to sign a document stating they were voluntarily staying onboard without pay. *Janicijevic, et al. v. Bahama Paradise Cruise Line, et al.*, 20-cv-23223 (S.D. Fla. Aug. 4, 2020). This will be an interesting case to follow.

Strikingly hard to believe, and somewhat reminiscent of the book *The Man Without a Country* written by Edward Everett Hale, hundreds of cruise ship employees remained

stuck at sea with nowhere to go during the crisis.

### On the Horizon

COVID-19 may be an act of bat (or originated with some animal virus), but so far it has not been described as an act of God. It could be a “restraint of princes” (being locked out of a port by government mandate, for example). What is certain, these unique defenses will be in the lineup for some interesting maritime litigation due to COVID-19. However, “pandemic” is not a word specifically included in the present day force majeure clause, so there is a bit of an uphill battle that courts, arbitrators, marine insurers and maritime lawyers will have to grapple with. Negotiating the inclusion of the word “pandemic” in maritime contracts will likely become the new normal, not unlike wordings that surfaced for terrorism in the wake of Sept. 11, 2001, and “cyber” attacks thereafter.

On the somewhat positive side of things, while most maritime clauses and laws are ancient and steeped in history (like the “safe berth” clause in the ATHOS I case), we may be on top of the wave of a brand new clause, the COVID 2020 Force Majeure clause. Something to think about over a “Brandy” and that song!