

6-1-2023

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Recommended Citation

Serena Feeney, "Who Will Rescue You in the Arctic? A Legal Perspective on Canada's Search and Rescue Obligations" (2023) 32 Dal J Leg Stud 61.

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WHO WILL RESCUE YOU IN THE ARCTIC? A LEGAL PERSPECTIVE ON CANADA'S SEARCH AND RESCUE OBLIGATIONS

Serena Feeney*

ABSTRACT

This paper analyzes the search and rescue obligation in the Canadian Arctic. It takes a forward-looking approach to potential legal issues and highlights legislative gaps and opportunities for improvement. The research question is: *what legal issues may arise in Canadian Arctic search and rescue operations, considering Canada's existing international obligations and current legal framework?*

Citation: (2023) 32 Dal J Leg Stud 61

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INTRODUCTION

Arctic waters are becoming more navigable, leading to more marine traffic, and an increase in Canadian search and rescue efforts in the region.¹ Given the severe Arctic climate and expansive geographic area, search and rescue efforts will become increasingly important within Canadian maritime jurisdiction. Specifically, Canada is responsible for search and rescues in the majority of the Northwest Passage.² The Northwest Passage denotes maritime navigational routes connecting the Atlantic and Pacific Oceans, along the northern coast of Canada and the US.³ It is predicted that the Northwest Passage will be used for resource development, along with imports that support the development, however is unlikely to be considered a realistic trans-Arctic route yet.⁴ When the Northwest Passage is safely navigable, vessels travelling between the Atlantic and Pacific Oceans will reduce their route distance by over 7,000 km.⁵ According to the Protection of the Arctic Marine Environment (PAME) report released in 2019, traffic along this route has increased 44 percent from 2013.⁶

The legal framework mandating states to perform search and rescue operations is complex, and may require inter-state, and inter-governmental cooperation. Performing a ‘forward-looking’ analysis of future legal problems in Canada will highlight gaps and improvements for the legislature and challenges for academic consideration. The research question is: *what types of legal issues may arise in Canadian*

¹ Ellis B & Brigham L, “Arctic Marine Shipping Assessment 2009 Report” (2009) at 2, online: *Arctic Council* <<https://oarchive.arctic-council.org/handle/11374/54>> [perma.cc/53UU-LEVY] [AMSA Report].

² “Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic” (19 January 2013) at 12, online (pdf): *Arctic Council* <https://oarchive.arctic-council.org/bitstream/handle/11374/531/EDOCS-1910-v1-ACMMDK07_Nuuk_2011_Arctic_SAR_Agreement_unsigned_EN.PDF?sequence=8&isAllowed=y> [perma.cc/S8GW-M49A] [*Arctic SAR*].

³ “Shipping in the Northwest Passage: Comparing 2013 with 2019: Arctic Shipping Status Report #3” (2021) at 2, online: *Protection of the Arctic Marine Environment* <<https://www.pame.is/document-library/pame-reports-new/pame-ministerial-deliverables/2021-12th-arctic-council-ministerial-meeting-reykjavik-iceland/795-ssr-3-shipment-in-the-northwest-passage-comparing-2013-to-2019/file>> [perma.cc/QS6H-P3E6] [PAME Report].

⁴ AMSA Report, *supra* note 1 at 114.

⁵ Tom Di Liberto, “Northwest Passage clear of ice again in 2016” (16 September 2016), online: *Climate.gov* <<https://www.climate.gov/news-features/event-tracker/northwest-passage-clear-ice-again-2016>> [perma.cc/A8DA-SU5T].

⁶ PAME Report, *supra* note 3 at 16.

Arctic search and rescue operations, considering Canada's existing international obligations and current legal framework?

This question will be answered by a combination of doctrinal research, commentary, and a practical perspective.

First, this paper will review Canada's existing international search and rescue obligations including the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *United Nations Convention on the Law of the Sea*, the *International Convention for the Safety of Life at Sea, 1974*, the *International Convention on maritime search and rescue, 1979*, and the *International Convention on Salvage, 1989*.

After an overview of international obligations, Canadian legislation will be analyzed, including the *Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic*. The focus will then shift to the implementation of search and rescue efforts in the Arctic, including an analysis of whether the infrastructure reflects the legislative objectives.

Lastly, the potential gaps in the existing legal framework will be identified, including possible solutions and additional research questions. Fragmented legislation, and lack of accountability may be a challenge. While international cooperation is volatile, Canada may be able to continue cooperating with allies.

CANADA'S INTERNATIONAL SEARCH AND RESCUE OBLIGATIONS

Canada's international search and rescue (SAR) obligations can be found in various international bodies of law that protect life, and life at sea. These include International Humanitarian Law, Law of the Sea, and Maritime Law.

International Humanitarian Law

The *Universal Declaration of Human Rights* (the "Declaration") was proclaimed by the United Nations in 1948 to codify the protection of fundamental human rights.⁷ The preamble of the Declaration proclaims that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the

⁷ *Universal Declaration of Human Rights*, 10 December 1948 (entered into force 10 December 1948) at 2, online (pdf): *United Nations* <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> [perma.cc/AUZ6-XF59] [UNDHR].

foundation of freedom, justice and peace in the world.”⁸ With this acknowledgement, Article 6 of the *Declaration* codifies the right to life. However, the *International Covenant on Civil and Political Rights* (the “ICCPR”) was adopted in December 1966, to implement the civil and political values protected by the *Declaration*.⁹ Similar to Article 6 of the *Declaration*, Article 6 section 1 of the ICCPR states, “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”¹⁰

The Human Rights Committee, which oversees the implementation of the ICCPR,¹¹ commented on Article 6 noting that it creates a positive obligation on states to protect life from actual and foreseeable risks.¹² Although most of the interpretation focuses on violence and state conduct, the Human Rights Committee makes a specific mention of respecting all lives on marine vessels. Emergency situations at sea are explicitly mentioned, and the positive duty to render assistance aligns with international obligations of rescue at sea.¹³ Both the right to life and the duty to rescue lives at sea have historical significance, and complimentary duties.

Law of the Sea

United Nations Convention on the Law of the Sea, 1982 (“UNCLOS”)

In part, UNCLOS was ‘prompted’ by similar goals to the *Declaration*: “the desire to settle...all issues relating to the law of the sea and aware of the historic significance of this convention as an important contribution to the maintenance of peace, justice

⁸ *Ibid.*

⁹ Olivier de Schutter, “International Human Rights Law”, 2nd ed (Cambridge: Cambridge University Press, 2014) at 18.

¹⁰ United Nations Human Rights Office of the High Commissioner, “International Covenant on Civil and Political Rights”, online: *United Nations Human Rights Office of the High Commissioner* <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>> [perma.cc/6LGM-Q9FX].

¹¹ United Nations Human Rights Office of the High Commissioner, “Human Rights Committee”, online: *United Nations Human Rights Office of the High Commissioner* <<https://www.ohchr.org/en/treaty-bodies/ccpr>> [perma.cc/E739-9MH5].

¹² Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, 2018, at paras 7, 21, online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/261/15/PDF/G1926115.pdf?OpenElement>> [perma.cc/X5GW-2WPD] [*HRC Article 6 Comments*].

¹³ *Ibid* at para 63.

and progress for all peoples of the world.”¹⁴ This convention codified the duty to render assistance, which is a rule recognized by international law, and the “manifestation of fundamental considerations of humanity.”¹⁵ In Article 98(2), the convention states:

Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.¹⁶

In addition, the master of a ship has a duty to render assistance unless the situation would prove dangerous for the rescuing vessel.¹⁷ The value to life is not explicit but is inherent in Article 98(2) and 98(1).

The right of innocent passage is related to the duty to render assistance. Ships that are exercising their right to innocent passage in Canadian territorial waters can stop or anchor in order to render assistance to a ship in distress, pursuant to Article 18. However, it is unclear whether the vessel can dock at a port and was interpreted in a way that allows states to refuse a vessels request to dock.¹⁸ This concept is related to a place of refuge, however it is only considered refuge when lives are not at risk.¹⁹

¹⁴ *United Nations Convention on the Law of the Sea*, 10 December 1982, at 25 (entered into force 16 November 1994), online: *United Nations* <https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf> [perma.cc/Q266-SDJA] [UNCLOS].

¹⁵ Judge Tomas Heidar, “The Duty to Render Assistance at Sea under International Law” (2018) at 2, online (pdf): *International Foundation for the Law of the Sea Talks on the Duty to Render Assistance* <<http://www.iflos.org/wp-content/uploads/Presenation-Tomas-Heidar-1.pdf>> [perma.cc/BSC8-U3BC] [*IFLOS Duty to Render Assistance*].

¹⁶ UNCLOS, *supra* note 14, art 98(2).

¹⁷ *Ibid*, art 98(1).

¹⁸ Maritime Safety Committee, *Guidelines on the Treatment of Persons Rescued at Sea*, International Maritime Organization, Resolution MSC.167(78) (2004) at Appendix s 6, online (pdf): <[https://wwwcdn.imo.org/localresources/en/OurWork/Facilitation/Documents/MSC.167%20\(78\).pdf](https://wwwcdn.imo.org/localresources/en/OurWork/Facilitation/Documents/MSC.167%20(78).pdf)> [perma.cc/REP7-GDCY] [*IMO Guidelines on the Treatment of Rescued Persons at Sea*].

¹⁹ International Maritime Organization, *Guidelines on Places of Refuge for Ships in Need of Assistance*, Resolution A.949(23) (2004) at s 1.1, online (pdf): <[https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.949\(23\).pdf](https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.949(23).pdf)> [perma.cc/GU6A-WKXN] [*IMO Guidelines on Places of Refuge*].

Nevertheless, protecting the integrity of the vessel could prevent the situation from deteriorating and endangering the lives of those onboard.

In the Arctic, the right of a ship providing assistance to stop or refuel may effectively save lives and ensure safe passage. Stopping for refuelling supplies or necessities may be more dire due to the severe climate and lack of infrastructure. However, Canadian infrastructure along the Arctic coastline is particularly sparse. The Tuktoyaktuk port is along the Canadian Archipelago but is unsuitable for larger vessels. The government has also proposed to build a deep-water port in Nanisivik, primarily by the Department of Defence,²⁰ however it is not functional yet.²¹ There is also the Port of Churchill however it is located at 58 degrees latitude,²² whereas the Canadian Arctic is defined at or above 60 degrees of latitude.²³

In addition to *UNCLOS*, there are three Maritime Law treaties that elaborate on the duty to render assistance and save lives at sea: the *International Convention for the Safety of Life at Sea, 1974* (“*SOLAS*”), the *International Convention on maritime search and rescue, 1979* (“*SAR Convention*”),²⁴ and the *International Convention on Salvage, 1989* (“*Salvage Convention*”).

Maritime Law

SOLAS

The latest version of the *SOLAS Convention* was adopted in 1974 to address the safety of commercial vessels, and outline standards for the “construction, equipment and operation of ships, compatible with their safety.”²⁵ Chapter V, Safety of Navigation of *SOLAS* codifies the duty to render assistance, and the duty to maintain

²⁰ AMSA Report, *supra* note 1, 178.

²¹ Todd Coyne, “Military hopeful new Arctic port will open in 2022, but ‘significant’ uncertainty remains”, *CTV News* (9 July 2021), online: <<https://vancouverisland.ctvnews.ca/military-hopeful-new-arctic-port-will-open-in-2022-but-significant-uncertainty-remains-1.5502188>> [perma.cc/DFP2-CD23].

²² Arctic Maritime & Aviation Transportation Infrastructure Initiative Infrastructure Organization, “Churchill – Port”, online: <<https://arcticinfrastructure.org/amatiIDB/searcher/portAction.php?do=view&nr=237>> [perma.cc/4M4M-XRGQ].

²³ AMSA Report, *supra* note 1 at 20.

²⁴ *IFLOS Duty to Render Assistance*, *supra* note 15 at 2.

²⁵ International Maritime Organization, “*SOLAS*”, online: *International Maritime Organization* <<https://www.imo.org/en/KnowledgeCentre/ConferencesMeetings/Pages/SOLAS.aspx>> [perma.cc/LDX6-A]2U] [*IMO SOLAS*].

search and rescue operations.²⁶ Regulation seven outlines the mandate for search and rescue services, specifying that states receive distress signals, coordinate rescues in their jurisdiction, and rescue distressed persons.²⁷ It further specifies that search and rescue facilities should be maintained as necessary, based on the marine traffic and navigational hazards.²⁸

SOLAS is updated and maintained by the Maritime Safety Committee, a sub-committee of the IMO.²⁹ The MSC approved amendments to *SOLAS* at their 94th session, which included mandatory compliance with the *Polar Code* for vessels navigating in the poles.³⁰

The *Polar Code* was enacted to improve the navigation of shipping vessels in the poles, composed of a safety part and pollution prevention part.³¹ The *Polar Code* does not impose any obligation on coastal states regarding search and rescue, however it does state that a rescue should be conducted in the Arctic in under five days, in order to plan emergency provisions accordingly.³²

While *SOLAS* focuses on the safety of merchant vessels, the search and rescue capabilities did not create a unified search and rescue effort, which led to the adoption of the *International Convention on Maritime Search and Rescue*.

²⁶ *International Convention for the Safety of Life at Sea, 1974*, 1 November 1974, No. 18961 at Chapter V (entered into force 25 May 1980), online: *Arctic Portal* <http://library.arcticportal.org/1696/1/SOLAS_consolidated_edition2004.pdf> [perma.cc/B8HR-NL3K] [*SOLAS*].

²⁷ *Ibid.*, Chapter V Regulation 7(1).

²⁸ *Ibid.*

²⁹ International Maritime Organization, “Maritime Safety Committee (MSC)”, online: *International Maritime Organization* <<https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/MSC-Default.aspx>> [perma.cc/J3RJ-XCU8].

³⁰ International Maritime Organization, “IMO adopts mandatory Code for Ships Operating in Polar Waters” (21 November 2014), online: *International Maritime Organization* <<https://www.imo.org/en/MediaCentre/PressBriefings/Pages/38-nmsc94polar.aspx>> [perma.cc/MAP2-Y4WL].

³¹ International Maritime Organization, “International Code for Ships Operating in Polar Waters (Polar Code)”, online: *International Maritime Organization* <<https://www.imo.org/en/OurWork/Safety/Pages/polar-code.aspx>> [perma.cc/L6KP-2CKA].

³² Lloyd’s Register, “The International Code for Ships Operating in Polar Waters: A regulatory interpretation guide”, interpretation of *The International Code for Ships Operating in Polar Waters* at 23, online (pdf): *Maritime Cyprus* <https://www.maritimecyprus.com/wp-content/uploads/2019/07/the_polar_code_a_regulatory_interpretation_guide.pdf> [perma.cc/EN38-8SR5] [*Lloyd’s Interpretation of the Polar Code*].

SAR Convention

The *SAR Convention* was adopted in 1979 to ensure global search and rescue capabilities and create an international system addressing search and rescue operations, which was not elaborated on in *SOLAS*.³³ To achieve this objective, the *SAR Convention* provides additional clarity on what search and rescue services are, including what a rescue is. Search and rescue services are considered “the performance of distress monitoring, communication, co-ordination and search and rescue functions, including provision of medical advice, initial medical assistance, or medical evaluation, through the use of public and private resources including co-operating aircraft, vessels, and other craft and installations.”³⁴ Rescue is defined as “an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety.”³⁵

A person is brought to a ‘place of safety’ when their basic human needs can be attended to, and the rescue operation is complete.³⁶ The meaning of a ‘place of safety’ also includes a place where the distressed persons can make transport arrangements.³⁷ The *SAR Convention* is more explicit regarding the coastal state duties to support and enable search and rescue efforts, through establishing rescue coordination centers, enable search and rescue facilities, cooperate with other states, and establish both a legal framework, and assign a responsible authority, among other responsibilities.³⁸

³³ International Maritime Organization, “International Convention on Maritime Search and Rescue (SAR)”, online: *International Maritime Organization* <[https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-\(SAR\).aspx](https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-(SAR).aspx)> [perma.cc/PN7W-KPLF].

³⁴ *International Convention on maritime search and rescue, 1979*, 27 April 1979, No. 23489 at Annex Ch 1 s 1.3.3 (entered into force 22 June 1985), online (pdf): *Onboard Aquarius* <<http://onboard-aquarius.org/uploads/2018/08/SAR-Convention-1979.pdf>> [perma.cc/4ZEF-3BF3] [*SAR Convention*].

³⁵ *Ibid*, Ch 1 s 1.3.2.

³⁶ “Legal Brief on International Law and Rescue at Sea”, brief, s 6, online (pdf): *United Nations Human Rights Commission* <<https://www.unhcr.org/media/legal-brief-international-law-and-rescue-sea>> [perma.cc/VKJ5-V5SE].

³⁷ *Ibid*.

³⁸ *SAR Convention*, *supra* note 34, Ch 2, s 2.1.

This duty to cooperate is facilitated by the International Maritime Rescue Federation (IMRF) that aims to improve search and rescue services globally through information sharing and encouraging cooperation.³⁹

Following the adoption of *SOLAS*, and the *SAR Convention*, the *Salvage Convention* was adopted.

Salvage Convention

The International Convention on Salvage (“*Salvage Convention*”) also outlines a duty to render assistance to anyone “in danger of being lost at sea,” and specifically requires coastal states to “adopt the measures necessary to enforce the duty” of rendering assistance.⁴⁰ This rescue is considered life salvage.⁴¹ Notably there is no reward for life salvage, only a claim against salvaged property.⁴² Although this duty reflects Article 6 of the *Declaration*, the *Salvage Convention* focuses on salvage, and determining what type of salvage is compensable, and when.

Reconciling UNCLOS, SOLAS, and SAR Conventions

When read together, these agreements create a duty on coastal states to ensure adequate search and rescue coordination around their coastlines, and receive distress communication.⁴³ Due to a lack of clarity between the similar duties outlined differently in each Convention, and a misalignment with international humanitarian law, the IMO developed guidelines for the rescue and treatment of persons at sea.⁴⁴ The objective of creating these guidelines was for governments to align their policies

³⁹ “Handbook for Maritime SAR in HNS Incidents” (2022), online: *International Maritime Rescue Federation* <<https://www.international-maritime-rescue.org/Pages/News/Category/sharing-sar-information>> [perma.cc/K83M-LZXJ].

⁴⁰ *International Convention on Salvage, 1989*, 14 November 1994, No. 93 at Article 10 s 1, 2 (entered into force 14 July 1996), online: <https://www.pravo.unizg.hr/_download/repository/1989_Salvage_convention.pdf> [perma.cc/4C8M-VLLM] [*Salvage Convention*].

⁴¹ Aldo Chircop et al, “Canadian Maritime Law” (Toronto: Irwin Law, 2017) 2nd ed at 803.

⁴² *Ibid*, Article 16 s 1, 2.

⁴³ European Union, “Search and Rescue in the Mediterranean” (2021) at 2, online: *European Parliament* <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/659442/EPRS_BRI\(2021\)659442_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/659442/EPRS_BRI(2021)659442_EN.pdf)> [perma.cc/BF3U-LDR6].

⁴⁴ *IMO Guidelines on the Treatment of Rescued Persons at Sea*, *supra* note 18, s 1.

and procedures to them. The majority of the guideline focuses on the meaning of “a place of safety,” which, from a legal perspective, is when the rescue ends.

The duty to render assistance includes providing a place of safety to those rescued, within a reasonable time.⁴⁵ This duty is owed by the state responsible for search and rescue in that zone. A place of safety is considered a place where the rescue efforts are complete, and both transportation efforts and basic human needs can be met.⁴⁶ There is the possibility of search and rescues happening in contiguous waters between states, in which case it remains to be seen which state would accept responsibility. For example, 80 percent of the population in Canada’s Arctic are estimated to reside close to the US border, which accounts for the majority of search and rescue requests.⁴⁷

A place of safety could be found onboard a rescue vessel, or “other suitable vessel or facility at sea that can serve as a place of safety,” however it will largely be context dependent.⁴⁸ In the Arctic, a place of safety may be particularly hard to find, and there may be long delays in finding one due to the severe climate and limited infrastructure. There is only one functioning port in the Canadian Arctic, Tuktoyaktuk, but it has a shallow approach channel,⁴⁹ and flying rescue helicopters from Trenton to the Canadian arctic north (north of 60 degrees latitude) can take 24 hours.⁵⁰ The basic human needs of distressed persons could be met onboard the Canadian Armed Forces AOPS vessels, which are outfitted to house 45 crew members with the ability to support an additional 40 people.⁵¹ However, it may be difficult to arrange further transportation, and could take days based on the transportation infrastructure.⁵² Additionally, the communities located in the North

⁴⁵ *Ibid*, s 2.1.2.

⁴⁶ *Ibid*, s 6.12.

⁴⁷ Royal Canadian Air Force, News Release, “Arctic survival and search and rescue” (23 February 2021), online: <<https://www.canada.ca/en/departement-national-defence/maple-leaf/rcaf/2021/02/arctic-survival-and-search-and-rescue.html>> [perma.cc/F2MN-7C88] [RCAF Arctic Survival 2021].

⁴⁸ *IMO Guidelines on the Treatment of Rescued Persons at Sea*, *supra* note 18, s 6.15.

⁴⁹ *AMSA Report*, *supra* note 1 at 178.

⁵⁰ RCAF Arctic Survival 2021, *supra* note 47.

⁵¹ “Naval Affairs Program Briefing Note #14: Arctic Offshore and Patrol Ships” (April 2023) at 1, online (pdf): *Royal Canadian Navy* <<https://www.navalassoc.ca/wp-content/uploads/2023/05/BN14-AOPS.pdf>> [perma.cc/K4CL-U8SE].

⁵² Canada, Senate, *Proceedings of the Standing Senate Committee on Fisheries and Oceans*, 42-1, Issue No. 28 - Evidence (19 April 2018) (Liane Benoit), online: <<https://sencanada.ca/en/Content/SEN/Committee/421/pof0/28ev-53958-e>> [perma.cc/Q92V-G4KP] [*Senate Standing Committee*].

West Passage are not equipped to handle a bigger population, which would impact basic provisions, and sewage.⁵³

Notably, the Polar Code has safety provisions to enhance the survivability of vessels and crew in emergency provisions, however the estimated time to a rescue is five days.⁵⁴ The predicted five days to rescue is currently being assessed by researchers at Dalhousie University, to determine if that timeline is realistic or understated.⁵⁵

The duty to render assistance also includes relieving any civilian vessels that supported the search and rescue effort.⁵⁶ In the Canadian Arctic, the Coast Guard Auxiliary (servicing remote regions) is volunteer based,⁵⁷ and local communities support search and rescue efforts, so this guidance may be less applicable.

CANADIAN JURISPRUDENCE

Canada's international search and rescue obligations have been incorporated into domestic legislation in a fragmented legal framework that includes multiple statutes, and unclear accountability. The legislation that refers to protecting human life or relate to marine search and rescue can be found in public law and maritime law. Within public law, the *Constitution Act, 1867* and *1982* refer to federal jurisdiction and the right to life. The *National Defence Act*, and the *Royal Canadian Mounted Police Act* were reviewed to identify any duties relating to search and rescue. Maritime law stipulates marine search and rescue obligations and responsibility in the *Canada Shipping Act* ("CSA"), *Oceans Act*, and the *Wrecked, Abandoned, and Hazardous Vessels Act* ("WAHVVA"). Related to these concepts are territorial laws that were enacted to facilitate search and rescues in the Arctic.

⁵³ *Ibid.*

⁵⁴ *Lloyd's Interpretation of the Polar Code*, *supra* note 33 at 23.

⁵⁵ Dalhousie University Faculty of Engineering, News Release, "Dal Researchers Investigate Emergency Response Times up North" (31 January 2022), online: <https://www.dal.ca/faculty/engineering/news-events/news/2022/01/31/enhancing_search_and_rescue_efforts_up_north.html> [perma.cc/S44A-LDXR] [*Dalhousie Arctic Research*].

⁵⁶ *IMO Guidelines on the Treatment of Rescued Persons at Sea*, *supra* note 18, at s 3.1.

⁵⁷ "About Us", online: *Canadian Coast Guard Auxiliary* <<https://ccga-gcac.ca/about-us/>> [perma.cc/3N6G-CNGA] [*Canadian Coast Guard Auxiliary Website*].

Public Law

Constitution Act, 1867 and 1982

The *Constitution Act, 1867* outlines the federal jurisdiction for navigation and shipping, whereas the *Constitution Act, 1982* codifies the right to life. The *Constitution Act, 1867* stipulates that navigation and shipping is a federal power.⁵⁸ Since search and rescue relates to navigation, it would normally be considered a federal power. However, this responsibility is shared amongst all levels of government within Canada, including the Canadian Coast Guard and the Canadian Armed Forces.⁵⁹

Prior to enacting the *Constitution Act, 1982*, Canada entered various human rights agreements including the *Universal Declaration of Human Rights* in 1948, and the *International Covenant on Civil and Political Rights* in 1966.⁶⁰ These agreements were considered when drafting the *Charter of Rights and Freedoms*.⁶¹ In the *Charter*, section 7 recognizes the right to life.⁶² The *Charter* only applies to governmental actors, so it remains to be seen whether all the actors involved in search and rescue missions would be subject to *Charter* compliance, and a duty to respect human life. However, the right to life would also be recognized by the Canadian judiciary as part of the common law, stemming from Article 6 of the *Declaration*, as customary international law.⁶³

National Defence Act

The *National Defence Act* does not explicitly mandate the armed forces to support search and rescue efforts, however it is included in Canada's Defence Policy, which was released in 2017. The policy stipulates that search and rescue are part of the core missions for the armed forces, and responsibilities include aerial searches and

⁵⁸ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(10), reprinted in RSC 1985, Appendix II, No 5, online: <<https://laws-lois.justice.gc.ca/eng/const/page-3.html#h-18>> [perma.cc/3B6Q-J73J].

⁵⁹ Government of Canada, "Search and rescue" (modified 20 January 2022), online: *Royal Canadian Air Force* <<https://www.canada.ca/en/air-force/programs/search-rescue.html>> [perma.cc/5KME-65JP] [*RCAF Search and Rescue Website*].

⁶⁰ Robert J Sharpe & Kent Roach, "The Charter of Rights and Freedoms" (Toronto: Irwin Law Inc., 2017) at 15.

⁶¹ *Ibid.*

⁶² *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

⁶³ *Nesun Resources Ltd v Araya*, 2020 SCC 5 at para 68.

coordinating maritime search and rescue with the coast guard.⁶⁴ The *National Defence Act* also includes a miscellaneous offence to prosecute any person that impedes or interferes with a duty that a CAF member is required to perform, and could be liable for a \$1,000 fine and/or up to twelve months imprisonment.⁶⁵ This offence could include uncoordinated search and rescue operations!

Royal Canadian Mounted Police Act

Similar to above, the *Royal Canadian Mounted Police Act* does not specifically reference a responsibility to locate missing persons. However, the RCMP is responsible for the National Centre for Missing Persons and Unidentified Remains, a multi-jurisdictional and multi-institutional program, which provides law enforcement and specialized investigation services.⁶⁶

While these duties provide a background for marine search and rescue, several Acts provide further detail.

Maritime Legislation

Canada Shipping Act

The *CSA* has many broad objectives. For the purposes of this paper, the relevant objectives include protecting participants in marine transportation and commerce, promoting marine safety, and ensuring Canada meets international obligations regarding navigation and shipping.⁶⁷

Part 5 of the *CSA* delegates search and rescue to the Department of Fisheries and Oceans (“DFO”). This power allows the coordinator of the search and rescue to

⁶⁴ Canada, Department of National Defence, “Strong, Secure, Engaged: Canada’s Defence Policy” (2017) at 82, 87, online (pdf): *Government of Canada* <<https://www.canada.ca/en/departement-national-defence/corporate/policies-standards/canada-defence-policy.html#>> [perma.cc/9M7R-UPMP].

⁶⁵ *National Defence Act*, RSC 1985, c N-5, at s 301(a).

⁶⁶ Royal Canadian Mounted Police, “National Centre for Missing Persons and Unidentified Remains” (6 April 2018), online: *Royal Canadian Mounted Police* <<https://www.rcmp-grc.gc.ca/en/national-centre-missing-persons-and-unidentified-remains-ncmpur>> [perma.cc/NT3D-5PC6].

⁶⁷ *Canada Shipping Act, 2001*, S.C. 2001, c. 26, ss 6(a), (b), (g).

direct all vessels to render assistance, and anything necessary to carry out SAR, with mandatory compliance.⁶⁸

CSA section 35 allows the DFO minister to implement regulations, but there is none that relate to search and rescue. This statute empowers the minister to meet part of the international obligations related to search and rescue. Additional duties including the rescue coordination and the responsibility of the DFO Minister is elaborated in the *Oceans Act*.

Oceans Act

The *Oceans Act* delegates the responsibility of providing coast guard services to the minister of DFO, which includes the marine component of search and rescue responsibilities.⁶⁹ As the statute outlines the minister's responsibility for providing coast guard services, the Canadian Coast Guard ("CCG") does not have a codified mandate or recognition as an independent service. Furthermore, the Minister of DFO is appointed by the Prime Minister and has been reappointed along with the party in power,⁷⁰ which could provide inconsistent priorities to the CCG.

WAHVA

Canada enacted *WAHVA* in 2019, "which promotes the protection of the public, of the environment, including coastlines and shorelines, and of infrastructure... and, in certain cases, Canada's exclusive economic zone."⁷¹ The *Act* also gives certain provisions in the *Salvage Convention* the effect of law, including paragraph 1 and 3 of Article 10, but specifically excludes paragraph 2 that the state parties should be able to enforce the duty to conduct life salvage.⁷²

Territorial Legislation

Several territories have enacted local legislation pertaining to search and rescue missions. For example, the Nunavut *Emergency Measures Act* authorizes community

⁶⁸ *Ibid*, ss 130(1), (2).

⁶⁹ *Oceans Act*, SC 1996, c 31, at s 41(1)(b) [*Oceans Act*].

⁷⁰ "Our Country, Our Parliament", online (pdf): *Parliament of Canada* <https://learn.parl.ca/staticfiles/Learn/assets/PDF/ParliamentaryPrimer/our_country_our_parliament-e.pdf > [perma.cc/95ME-T4HM].

⁷¹ *Wrecked, Abandoned or Hazardous Vessels Act*, SC 2019, c 1, s ii.

⁷² *Ibid*, s 50(1).

based search and rescue operations.⁷³ These local Search and Rescue Organizations (“SAROs”) are “to act as the sole agent...for and carrying out a community-based search.”⁷⁴ The policy on Community Based Search and Rescue Contributions expired on April 1, 2022,⁷⁵ however is still listed on the Nunavut Emergency Management site.⁷⁶ The legislature has not confirmed the date for the policy update, which is part of a larger effort to review and condense emergency management policies.⁷⁷

Remarks on Canadian Legislation

The duty to rescue is interwoven in many legislative pieces, as is the ministerial responsibility. Although the legislation related to maritime matters doesn’t specify a positive duty to search and rescue, it can be inferred through section 7 of the *Charter of Rights and Freedoms*.

Importantly, the practical search and rescue operations that are authorized by legislation could overlap (for example the Nunavut *Emergency Measures Act* and the search and rescue responsibilities in the *Oceans Act*). This overlap could have severe consequences, including imprisonment.

There was a hypothetical scenario conducted by the Senate Committee that found if a Senior Administration Officer (“SAO”) in the territory took responsibility for a search and rescue, the JRCC would arrest the SAO for impeding a military operation, and the CCG representative agreed on that categorization of the SAO’s actions.⁷⁸ This highlights the risk posed for local volunteers and SARO’s when conducting local search and rescue operations, and how the legislation is not conducive to harmonization or cooperation.

⁷³ *Consolidation of Emergency Measures Act*, S NU 2007, c 10, s 10(1), (2).

⁷⁴ Nunavut, Nunavut Legislative Assembly, *Community Based Search and Rescue Contributions Policy*, (31 January 2017) at 1, online (pdf): *Government of Nunavut* <https://www.gov.nu.ca/sites/default/files/community_based_search_and_rescue_contribution_policy_-_english-april_1_2022.pdf> [perma.cc/56UQ-PX93] [*Nunavut SAR policy*].

⁷⁵ *Ibid.*

⁷⁶ “Nunavut Emergency Management” (n.d.) online: *Government of Nunavut* <<https://www.gov.nu.ca/community-and-government-services/information/nunavut-emergency-management-0>> [perma.cc/8SPT-EAUP] [*Nunavut Emergency Management Website*].

⁷⁷ Nunavut Legislative Assembly, Question 142 - 6(1): Search and Rescue, (21 March 2022) at 21 (Hon David Joanasic), online (pdf): *Nunavut Legislative Assembly* <<https://assembly.nu.ca/sites/default/files/20220321-Blues-English.pdf>> [perma.cc/57KX-TTM8].

⁷⁸ *Senate Standing Committee*, *supra* note 52.

Search and rescue in the Arctic

Canada's International Efforts

As tourism, shipping, and resource exploitation increase in the Arctic, so does the risk of emergency situations that will require search and rescue.⁷⁹ Due to the harsh conditions, expansive geographic area, and limited infrastructure, international cooperation is a “prerequisite” to search and rescue in the Arctic.⁸⁰ To facilitate international cooperation, and improve capabilities for arctic search and rescue missions, the Arctic Council (the “Council”) signed the *Agreement on Cooperation on Aeronautical and Maritime Search and Rescue* in the Arctic (the “*Arctic SAR*”).⁸¹ In addition to the *Arctic SAR*, Canada is also a member of the International Cospas-Sarsat Programme Agreement (the “Programme”).

The Arctic Council has a unique structure, which supports the implementation of the *Arctic SAR* agreement. The Council was formed in Ottawa in 1996, to promote intergovernmental cooperation in the Arctic.⁸² The Council is comprised of eight Arctic states, including Canada, Denmark, Finland, Iceland, Norway, Sweden, the United States, and the Russian Federation.⁸³ The competent authorities for Canada and Russia outlined in the *Arctic SAR* are the Minister of Defence, and the Ministry of the Russian Federation for Civil Defence.⁸⁴ The council also includes six permanent participants that represent the Arctic Indigenous Peoples.⁸⁵ Permanent participation allows for consultation regarding decisions and negotiations, which is beneficial as many decisions will directly affect the Arctic Indigenous Peoples. Canada specifically endorsed Indigenous participation in the Arctic Council,⁸⁶ which is important given their role in Arctic governance, and search and rescue.

There are six working groups and an expert group, which enable the Council to make informed decisions. In addition, non-member states can be ‘Observers’ and

⁷⁹ AMSA Report, *supra* note 1 at 57.

⁸⁰ *Ibid* at 13.

⁸¹ *Arctic SAR*, *supra* note 2 at 2.

⁸² “About the Arctic Council”, online: *Arctic Council* <<https://arctic-council.org/about/>> [perma.cc/2J7F-DVV8] [*Arctic Council Website*].

⁸³ *Ibid*.

⁸⁴ *Arctic SAR*, *supra* note 2, Appendix I.

⁸⁵ *Arctic Council Website*, *supra* note 82.

⁸⁶ “Statement on Canada’s Arctic Foreign Policy”, at 22, online: *Government of Canada* <http://library.arcticportal.org/1886/1/canada_arctic_foreign_policy-eng.pdf> [perma.cc/Q2X7-BUG9].

contribute to the working groups previously mentioned.⁸⁷ One of the working groups is the Emergency Prevention, Preparedness and Response Working Group. This group works to address gaps in emergency responses, by developing and supporting initiatives to improve emergency preparedness.⁸⁸ Within the EPPR, there is a Search and Rescue Expert Group (“SAR EG”), which supports the implementation of the *Arctic SAR*, and focuses on search and rescue.⁸⁹

The *Arctic SAR* was adopted in 2011 and is legally binding on member states of the Arctic Council.⁹⁰ The objective of the agreement is to “strengthen aeronautical and maritime search and rescue cooperation and coordination in the Arctic.”⁹¹ The agreement is based on the obligations elaborated in *UNCLOS*, the *Maritime SAR Convention*, and the cooperation required to deliver effective search and rescue operations in the Arctic.⁹² While it is modelled after the international search and rescue obligations, it elaborates on the duty to cooperate. For example, if a state believes there is a distress situation in another state’s jurisdiction, they are mandated to warn the state and provide all relevant information.⁹³

Of specific note in the *Arctic SAR* are Articles 8, 9, and 10. Article 8 outlines the ability of a different state to enter territorial jurisdiction for search and rescue purposes (including to refuel). The request is sent to the rescue coordination center directly, and the border crossing must be as ‘expeditious’ as possible.⁹⁴ For Canada specifically, there are no border check in points along the Arctic coast for small vessels, and only one for commercial vessels in Tuktoyaktuk.⁹⁵ Regulating the entry

⁸⁷ *Arctic Council Website*, *supra* note 82.

⁸⁸ “EPPR About”, online: *Arctic Council* <<https://eppr.org/about/>> [perma.cc/66WT-F7ZM].

⁸⁹ “Search and Rescue”, online: *Arctic Council* <<https://eppr.org/expert-groups/sar/>> [perma.cc/CU5W-WBJ2].

⁹⁰ Arctic Portal Library, “Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic” (21 September 2011), online: *Arctic Portal* <<http://library.arcticportal.org/1474/#:~:text=Abstract-Agreement%20on%20Cooperation%20on%20Aeronautical%20and%20Maritime%20Search%20and%20Rescue,Arctic%20Council%20Nuuk%20Ministerial%20Meeting.>>> [perma.cc/PZ2X-92QC].

⁹¹ *Arctic SAR*, *supra* note 2 at 3.

⁹² *Ibid* at 2.

⁹³ *Ibid*, Article 7 s 3(c).

⁹⁴ *Ibid*, Article 8 s 1–3.

⁹⁵ “Tuktoyaktuk”, (7 May 2019), online: *Canada Border Services Agency* <<https://cbsa-asfc.gc.ca/do-rb/offices-bureaux/575-eng.html>> [perma.cc/5NFQ-6LP4].

of non-Canadians into Arctic towns could pose an issue, due to the lack of infrastructure and clarity on due process.

Article 9 outlines the cooperation required between the parties, including sharing information regarding search and rescue facilities, available airfields and ports for refueling and supply, arranging exchanges of visits, and sharing information systems, among others.⁹⁶ In principle this approach makes sense, and could prove valuable when navigating the severe Arctic climate.

Article 10 stipulates that the parties should meet on a regular basis to discuss and resolve issues, proposals, collaboration on communication systems, and any other relevant items.⁹⁷ On a related note, the Arctic Coast Guard Forum (“ACGF”) was formed to facilitate multilateral cooperation in the Arctic.⁹⁸ ACGF is an independent organization that organizes meetings to “foster safe, secure, and environmentally responsible maritime activity in the Arctic.”⁹⁹ One of the strategic goals of the organization is to improve multilateral cooperation within Arctic waters, and parties to the Arctic Council are members of the forum.¹⁰⁰ However, the chair of the forum aligns with the chair of the Arctic Council, and rotates every two years. Russia is the current chair of the forum, until 2023.

In light of the recent war in Ukraine, seven of the parties to the Arctic Council are refusing to meet with Russia (the eighth state) or convene for the Arctic Council,¹⁰¹ and are unlikely to comply with Article 9, 10, or cooperate during this conflict. The

⁹⁶ *Arctic SAR*, *supra* note 2, Article 9 s 2, 3.

⁹⁷ *Ibid*, Article 10.

⁹⁸ “Arctic Coast Guard Forum” (11 March 2022), online: *Government of Canada* <<https://www.ccg-gcc.gc.ca/corporation-information-organisation/partnerships-partenariats/arctic-forum-arctique-eng.html>> [perma.cc/36QH-WUWM] [*Arctic Coast Guard Forum Pause*].

⁹⁹ “About the ACGF” (n.d.), online: *Arctic Coast Guard Forum* <<https://www.arcticcoastguardforum.com/about-acgf>> [perma.cc/PP5K-4YJR] [*ACGF Website*].

¹⁰⁰ *Ibid*.

¹⁰¹ “Who we are” (n.d.), online: *Arctic Council* <<https://arctic-council.org/#:~:text=The%20leading%20intergovernmental%20forum%20promoting%20cooperation%20in%20the%20Arctic.&text=The%20Arctic%20Council%20is%20pausing,su bsidiary%20bodies%20until%20further%20notice.>>> [perma.cc/W499-GZWT].

pause on meetings includes all subsidiary bodies,¹⁰² including Canada's participation in the ACGF.¹⁰³

In addition to the Arctic Council, Canada's endorsement of the Programme (Cospas-Sarsat) aims to improve search and rescue. This is a satellite Programme that relays distress signals to support the IMO and the International Civil Aviation Organization ("ICAO") realize search and rescue objectives.¹⁰⁴ Canada has given the Programme the status of a corporation, with immunities outlined in the *Foreign Missions and International Organizations Act*.¹⁰⁵ The Cospas-Sarsat satellite capabilities are crucial to search and rescue efforts in the Arctic to provide alert and location data.¹⁰⁶

Canada's Internal Search and Rescue Capabilities

Aside from Canada's international efforts, search and rescue operations within Canadian Arctic waters are very collaborative. Canadian search and rescue operations could include the Canadian Armed Forces, Canadian Rangers, Canadian Coast Guard, Canadian Coast Guard Auxiliary ("CCGA"), and local emergency response.

Canada has divided search and rescue operations into three sectors, each with a respective Joint Rescue Coordination Center ("JRCC"). The Canadian arctic falls into Trenton's region, with an aggregate of 2,295 search and rescue incidents in the region in 2017.¹⁰⁷

¹⁰² Global Affairs Canada, Joint Statement, "Joint statement on Arctic Council cooperation following Russia's invasion of Ukraine" (3 March 2022), online: *Global Affairs Canada* <<https://www.canada.ca/en/global-affairs/news/2022/03/joint-statement-on-arctic-council-cooperation-following-russias-invasion-of-ukraine.html>> [perma.cc/44YU-W4RW].

¹⁰³ *Arctic Coast Guard Forum Pause*, *supra* note 98.

¹⁰⁴ *International Cospas-Sarsat Programme Privileges and Immunities Order*, SOR/2005-112 (2005) at Schedule 1.

¹⁰⁵ *Ibid*, s 2(1).

¹⁰⁶ National Search and Rescue Secretariat, "Canadian Search and Rescue in the Arctic" (delivered at the IAP Workshop, Copenhagen, 12 March 2012) at 12, online (pdf): *ESA Space Solutions* <<https://business.esa.int/sites/business/files/Canadian%20experience%20in%20Arctic%20Search%20%26%20Rescue%20JACKSON.pdf>> [perma.cc/DF68-DLB7].

¹⁰⁷ Fabian Manning & Marc Gold, "When Every Minute Counts: Maritime Search and Rescue" (2018) at 9, online (pdf): *Senate of Canada* <[https://sencanada.ca/content/sen/committee/421/POFO/Reports/MaritimeSARReport_e\(forweb\)_e.pdf](https://sencanada.ca/content/sen/committee/421/POFO/Reports/MaritimeSARReport_e(forweb)_e.pdf)> [perma.cc/4DLQ-QSU8] [*Senate SAR Report*].

The Canadian Armed Forces (“CAF”) are responsible for coordinating aeronautical and maritime rescue efforts through the JRCC.¹⁰⁸ Aeronautical search and rescue is performed by the CAF; however, they can provide medical evacuations.¹⁰⁹

The SAR response in the Arctic is also supported by the Canadian Rangers, comprised of 1,800 members (both indigenous and non-indigenous) and 60 communities.¹¹⁰ The Canadian Rangers are members of the CAF’s Reserve Force, and are paid for 12 full days in addition to being paid per mandate.¹¹¹ Training to be a Canadian Ranger includes a search and rescue component.¹¹²

The Canadian Rangers operate on the sea by boat in summer, and use snow machines in winter.¹¹³ Generally the boats used are personal, and expenses are reimbursed through the CAF to promote local operations and ensure the vessels are capable of sustaining operations in the Arctic.¹¹⁴ However, it could be challenging to coordinate responsibilities between the Canadian Rangers and the CCG, who may take on a larger role in search and rescue at sea.¹¹⁵

The CCG is a special operating agency within the DFO, with a mission to “support government priorities and economic prosperity and contribute to the safety, accessibility and security of Canadian waters.”¹¹⁶ The scope of CCG’s responsibilities was reviewed in a 2016 brief from the Union of Canadian Transportation Employees and were found to be extremely broad. The agency supports the DFO, RCMP, CBSA,

¹⁰⁸ *RCAF Search and Rescue Website*, *supra* note 59.

¹⁰⁹ *Ibid.*

¹¹⁰ *RCAF Arctic Survival 2021*, *supra* note 47.

¹¹¹ “Frequently Asked Questions” (2 March 2021), online: *Canada.ca* <<https://www.canada.ca/en/army/corporate/canadian-rangers/frequently-asked-questions.html>> [perma.cc/386S-JSA7].

¹¹² *Ibid.*

¹¹³ Peter Kikkert & P Whitney Lackenbauer, “The Royal Canadian Navy and the Canadian Rangers’ Maritime Role: An Unclear Proposal”, statement (13 October 2021) at 1, online (pdf): *NAADSN* <<https://www.naadsn.ca/wp-content/uploads/2021/10/21-Oct-13-PK-PWL-Quick-Impact-Rangers-Maritime-Role.pdf>> [perma.cc/343R-Y757] [*NAADSN Statement*].

¹¹⁴ *Ibid.*

¹¹⁵ Mackenzie Scott “Royal Canadian Navy ship completes Northwest Passage journey for first time since 1954”, *CBC News* (30 September 2021), online: <<https://www.cbc.ca/news/canada/north/canadian-navy-ship-completes-northwest-passage-1.6194739>> [perma.cc/J9CC-6PW5].

¹¹⁶ Canada Coast Guard, “Mandate” (26 July 2019), online: *Government of Canada* <<https://www.ccg-gcc.gc.ca/corporation-information-organisation/mandate-mandat-eng.html>> [perma.cc/A6ZP-KD39].

DND, Environment Canada, provincial police forces, Northern Agencies, and universities, as well as the private sector.¹¹⁷ In regard to the DFO, the CCG supports some of the core responsibilities of the DFO.¹¹⁸ This broad scope of responsibilities, coupled with the potential for lack of consistent priorities and direction from changing Ministers of DFO, could allow marine search and rescue capabilities to be de-prioritized.

In 2018, the Standing Senate Committee on Fisheries and Oceans produced a report on maritime search and rescue to identify the current scope, challenges, and opportunities (the “Senate SAR Report”). The Committee took a comprehensive approach to the analysis which included document review, site visits in Canada, and knowledge-sharing with select countries similar in climate to Canada.¹¹⁹

Notably, the Senate SAR Report recommended adding primary search and rescue stations in the Arctic, training coastal communities to develop SAR competencies, renewing the Arctic SAR roundtable, and increasing funding.¹²⁰

The CCG also leverages the CCGA, which is comprised of six federally incorporated not for profit organizations with the aim to save lives on the water.¹²¹ The auxiliary units are comprised of members of the communities that volunteer, who have extensive local knowledge,¹²² and could be the sole responder to an emergency.¹²³ The CCGA may be authorized to address SAR incidents by the JRCC, RCMP, or the Maritime Rescue Sub-Center.¹²⁴ Note the Marine Rescue Sub-Center is out of scope. The CCGA expanded when the CCG improved relationships with Inuit and took the time to understand the risks and requirements of each

¹¹⁷ Union of Canadian Transportation Employees, “The Canadian Coast Guard: A case for change” (January 2016) at 2, online (pdf): *Senate of Canada* <https://sencanada.ca/content/sen/committee/421/POFO/Briefs/UCTE_CCG_E.pdf> [perma.cc/5ETY-6WFT] [*UCTE Report*].

¹¹⁸ Department of Fisheries and Oceans, “Annual Report to Parliament on the Administration of the Access to Information Act” (2020) at 1, online (pdf): *Fisheries and Oceans Canada Library* <<https://waves-vagues.dfo-mpo.gc.ca/Library/40957196.pdf>> [perma.cc/9DHQ-U7FH].

¹¹⁹ *Senate SAR Report*, *supra* note 107 at 1.

¹²⁰ *Ibid* at vi.

¹²¹ Canada Coast Guard, “Canadian Coast Guard Auxiliary National Guidelines” (6 June 2017) at 1, online (pdf): *Canadian Coast Guard Auxiliary* <[https://ccga-gcac.ca/files/library/National_Guidelines_English_Combined_\(2017\).pdf](https://ccga-gcac.ca/files/library/National_Guidelines_English_Combined_(2017).pdf)> [perma.cc/3PWN-WF78] [*CCGA National Guidelines*].

¹²² *Canadian Coast Guard Auxiliary Website*, *supra* note 57.

¹²³ *Senate SAR Report*, *supra* note 107 at 32.

¹²⁴ *CCGA National Guidelines*, *supra* note 121 at 2.

community.¹²⁵ In 2021, the CCGA responded to an additional 12 search and rescue emergencies than the CCG.¹²⁶

To provide an idea of local emergency response, the Nunavut Emergency Management Organization was researched. There is a program specific to search and rescue, which provides training, support with equipment, and communication systems.¹²⁷ Within this program, the Minister is accountable, and the Deputy Minister is responsible for the administration of the policy provisions.¹²⁸ The policy provides for community based ground search and rescues, and notifying the RCMP of the ongoing search and rescue.¹²⁹ Although there is no specific mention of marine search and rescue, it may be quicker to reach an area by boat.¹³⁰ If marine search and rescue resources are used, this could blur the lines of responsibility and classification.

Due to the collaborative nature of search and rescue in the Arctic, the Kitikmeot Roundtable Search and Rescue was created.¹³¹ The objectives of the roundtable are to develop relationships with agencies operating in the Canadian Arctic, and share knowledge.¹³² The last roundtable ended in February 2020, and had 55 community responders in attendance, including members of the CCGA, Canadian Rangers, Nunavut Emergency Management team, Canadian Armed Forces, and CCG.¹³³ While these discussions produced actionable issues and outcomes, no action plan was included, and improved cooperation does not necessarily result in clarification to responsibility or accountability.

¹²⁵ *NAADSN Statement*, *supra* note 113 at 2.

¹²⁶ Government of Canada, News Release, “Canadian Coast Guard Completes 2021 Arctic Operational Season” (21 December 2021), online: <<https://www.canada.ca/en/canadian-coast-guard/news/2021/12/canadian-coast-guard-completes-2021-arctic-operational-season.html>> [perma.cc/ZY4K-CT3R].

¹²⁷ *Nunavut Emergency Management Website*, *supra* note 76.

¹²⁸ *Nunavut SAR policy*, *supra* note 74 at 3.

¹²⁹ *Ibid* at 3, 4.

¹³⁰ Peter Kikkert & P Whitney Lackenbauer, “Search and Rescue, Climate Change, and the Expansion of the Coast Guard Auxiliary in Inuit Nunangat / the Canadian Arctic” (2021) Vol 1: No 2 CJEM at 45, online: <<https://cdnjem.ca/wp-content/uploads/2021/07/CJEM-Vol1-No2-Kikkert-and-Lackenbauer.pdf>> [perma.cc/P9GU-9DKP] [*CCGA SAR Paper*].

¹³¹ Peter Kikkert & P Whitney Lackenbauer, “Kitikmeot Roundtable on Search and Rescue” (1 February 2020) Kitikmeot Search and Rescue at 5, online (pdf): *NAADSN* <<https://www.naadsn.ca/wp-content/uploads/2020/04/Kitikmeot-Roundtable-on-SAR-MRO-Tabletop-Exercise-Report-Feb-2020.pdf>> [perma.cc/56PQ-DHSN] [*Kitikmeot Roundtable*].

¹³² *Ibid*.

¹³³ *Ibid*.

DISCUSSION

Within the search and rescue framework in the Arctic, several potential issues may emerge that include the legislative framework, political circumstances, infrastructure, and accountability.

The Canadian legislative framework that requires state action to conduct search and rescue is quite fragmented, and not all the responsibilities are codified. For example, the Canadian Armed Forces role in search and rescue missions is included in their mission statement, as opposed to the *National Defence Act*. Practically however, this is unlikely to make a big difference. Within this fragmented framework, it is clear that the Department of Fisheries and Oceans is responsible for the Coast Guard,¹³⁴ but how far does that duty extend? No positive duty has been codified in Canadian legislation. In a Senate Standing Committee, evidence was presented that there is no national SAR policy or responsibility, and the current fragmentation of operations was discussed.¹³⁵ It would be prudent to codify a positive obligation for search and rescue and align with Canada's international obligations. However, this is unlikely to be a significant barrier to search and rescues.

It would be valuable to update the regulations, or policy statements, on how the CAF can collaborate with local rescue units. There should be no risk for local rescue units of facing penal consequences for conducting search and rescues, especially in such remote areas.

At the international level, the duty to render assistance is mentioned in various Conventions. The *SOLAS* Convention was amended to include the *Polar Code*, which gives search and rescue operations five days to rescue endangered persons in the Arctic. This presumption is reflected in the quantity of provisions a vessel will have for an emergency situation. Based on the future assessment of the Dalhousie University research on the time to rescue in the Arctic,¹³⁶ the Polar Code may be modified to reflect a realistic rescue time. Another potential issue is the definition of a 'place of safety' as it relates to Arctic rescues. Since there aren't many large ports, leaving rescued persons in a place where they are able to organize transport will be quite difficult and likely costly. Furthermore, it will place unsustainable strain on the

¹³⁴ *Oceans Act*, *supra* note 69, s 41(1).

¹³⁵ *Senate Standing Committee*, *supra* note 52.

¹³⁶ *Dalhousie Arctic Research*, *supra* note 55.

Inuit communities.¹³⁷ The IMO may consider updating the interpretation of a ‘place of safety’ to address the unique circumstances of the Arctic.

Politically, search and rescue efforts will be impacted at an international and national level. Search and rescue in the Arctic will require extensive cooperation between states, which is subject to political volatility. This volatility is highlighted by the war in Ukraine, which prompted all member states party to the *Arctic SAR* (except Russia) to pause cooperation and meetings. However, Canada may still be able to cooperate with allies.

At a national level, the Coast Guard mandate and priorities may shift with the minister of DFO, and the political party in power. For example, in 2013 the federal government shut down a coast guard station in Vancouver due to budget cuts, despite the central location and volume of calls the station received.¹³⁸ In 2015, following a change in federal government, the station was re-opened.¹³⁹ In addition to political priorities, the CCG is currently supporting many different departments, and the scope of work is quite large. A report produced by the Union of Canadian Transportation Employees recommended that the CCG become a separate statutory agency, which would increase the autonomy of the agency and remove redundancies from the system.¹⁴⁰ While administratively this would be difficult, the operational effects may prove advantageous as marine traffic and the risk of emergencies increases.

As mentioned above, infrastructure in the Canadian Arctic is sparse and under construction. Aside from the port in Nanisivik that is under construction, there were a number of proposals discussed at the EPPR meeting in January 2021. Some of those proposals focused on improving surveillance efforts in the Arctic, including an aerial surveillance proposal submitted by Canada.¹⁴¹ Although the infrastructure is sparse and currently ill-equipped to deal with emergency situations, there are many initiatives to improve and build on the existing infrastructure. This is evidenced by the strong

¹³⁷ *Senate Standing Committee*, *supra* note 52.

¹³⁸ The Canadian Press “Vancouver coast guard station officially closes”, *CBC News* (20 February 2013), online: <<https://www.cbc.ca/news/canada/british-columbia/vancouver-coast-guard-station-officially-closes-1.1366464>> [perma.cc/TS2K-E7AQ].

¹³⁹ Max Haberstroh, “Trudeau orders Kitsilano Coast Guard station re-opened”, *CBC News* (13 November 2015), online: <<https://www.cbc.ca/news/canada/british-columbia/trudeau-orders-kits-coast-guard-open-1.3318028>> [perma.cc/39KT-R7TU].

¹⁴⁰ *UCTE Report*, *supra* note 117 at 1.

¹⁴¹ Emergency Prevention, Preparedness and Response, “EPPR Working Group Meeting”, meeting agenda, (19 January 2021) at s 4.1.

international cooperation (up until the war in Ukraine), which include the EPPR proposals, and the Arctic Council Coast Guard Forum, to name a few.

Accountability for search and rescue missions in the Arctic is perhaps one of the most important components. If a search and rescue mission goes wrong, it's unclear who would be responsible. Does the DFO Minister answer for the Coast Guard? Do the Canadian Armed Forces face any consequences? Do the Canadian Rangers (part-time trained members of the CAF) or the Canadian Coast Guard Auxiliary (volunteers) hold any accountability? Furthermore, are all actors subject to compliance with the *Charter*? The Canadian Coast Guard and the Canadian Armed Forces would likely meet the government actor test in *McKinney* and be subject to compliance.¹⁴² However, it remains to be seen whether the Canadian Coast Guard Auxiliary or the Canadian Rangers would be considered government actors, and whether the *Charter* would apply to these rescuers.

CONCLUSION

It is clear that there are significant efforts being made within Canada, and internationally, to prepare for future search and rescue emergencies in the Arctic. What remains to be seen however, is whether the accountability and responsibility of these operations becomes clearer, as, and when, they expand.

From a legal perspective, clarity on duties, accountability, and operational cooperation will be paramount. Nobody considers the consequences of an emergency gone wrong, until it happens. This is evidenced by the Titanic, which prompted the first *SOLAS* convention,¹⁴³ and as Liane Benoit stated in her presentation to the Senate, “it will only take one mass-casualty event for things to change.”¹⁴⁴ Codifying accountability for search and rescue, the duties of each operating body, and the ideal cooperation, would help streamline operations and minimize risk.

There is a lot of material on this topic, and a comparable review of the legislation regarding search and rescue in other Arctic states could add a valuable perspective. Immigration and border control in the Arctic, and how the Canadian Border Services Agency or CCG will accept requests to fuel or leave foreign passengers in Canadian jurisdiction is an area of potential future research. Defining a “place of safety” in

¹⁴² *McKinney v University of Guelph*, [1990] 3 SCR 229, [1990] SCJ No 122.

¹⁴³ *IMO SOLAS*, *supra* note 25.

¹⁴⁴ *Senate Standing Committee*, *supra* note 52.

Arctic waters from a legal perspective could also provide some insight, due to the harsh conditions and lack of infrastructure.