

Some Issues respecting Stowaways and Deserters: The *Immigration and Refugee Protection Act* and *Regulations*

By Peter Swanson
A Vancouver lawyer with Bernard & Partners

Mass smuggling of people by ship is not new, but it certainly attracts the attention of the press. This is especially true in light of the relatively recent arrivals on our shores of vessels like the SUN SEA and OCEAN LADY, . events which specifically prompted the Federal government to take legislative steps to enhance marine security. For example, before the election was called, Bill C-49, *an Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act* had passed first reading in the House. And now that the election is over, it is quite probable that similar draft legislation will be re-introduced to Parliament to tighten up our laws in this area.

It is worth noting that smuggling people is not the only way in which individuals can and do enter Canada in an irregular fashion by ship. Less sensational, but likely a more typical way in which irregular immigration occurs, is the frequent arrival into Canada of stowaways and deserters from ships,

Given the frequency in which all kinds of irregular forms of entry occur in Canada by ship, it is not surprising to learn that for some time we have had laws designed to address the arrival of stowaways and deserters, and, importantly, had laws designed to pass the cost of such entry onto others – the evolution of which is interesting.

The Federal government, as distinct from provincial governments, is constitutionally responsible for immigration laws and laws relating to navigation and shipping. As such, Federal laws address the issue of illegal immigrants (deserters and stowaways) entering Canada on board ships. Typically, the Federal government looks to pass on the cost of illegal immigration to others, where possible. To that end, the Federal government, through past and current immigration legislation, has looked to local ship agents in an attempt to recover removal costs where the shipowner is non-Canadian, or where any security posted by the shipowner is insufficient.

Not surprisingly, the Federal government is always working to tighten these laws. In the late 1980's these laws were fairly basic. For example, Part 5 of the then *Immigration Act* set out the obligations of a "transportation company". A transportation company was essentially obliged to pay for the removal of a deserter or stowaway. Of course, from a timing point of view, this rarely, if ever, happened before the vessel left Canadian waters and the deserter or stowaway exhausted their legal avenues – including a multitude of appeals.

Importantly, a "transportation company" was defined as follows:

"transportation company" means a person or group of persons carrying or providing for the transportation of person,

...
and includes any agent thereof ...”

There are 2 key features to this definition: 1) it includes “an agent thereof”; and 2) it talks of the transportation of people. In other words, it did not seem to apply to vessels engaged in the transportation of cargo.

This point is important when one looks at the amendment to this definition which occurred in December 1992. At that time the definition was altered to read as follows:

“transportation company”

*(a) means a person or group of persons, including any agent thereof ...
transporting or providing for the transportation of person or goods by
vehicle or otherwise ...”*

Quite clearly, the 1992 amendments was enacted to broaden the definition of “transportation company” to include vessel owners involved in the carriage of passengers or cargo. Also, importantly, both definitions contained a reference to “any agent thereof”.

A number of cases went before the Federal Court of Canada to try to grapple with the meaning of these changes, and what precisely was meant by the reference to agent. While not determining the issue in any way, Prothonotary Hargrave, in the 1998 case of *International Chartering Services Ltd. v. the Minister of Citizenship and Immigration*, raised serious question about the government’s stance that an agent of a charterer came within either definition. The government, in that case, backed down after the decision of Prothonotary Hargrave was given, so the court never actually had to decide whether an agent of a charterer was responsible for the subsequent removal costs of a deserter or stowaway.

Subsequently, in 2001 the scope of the definition of agent went before the Federal Court of Canada in the case of *Greer Shipping Ltd. v. the Minister of Citizenship and Immigration*. That case involved removal costs of a crewmember that deserted from a ship prior to December 1992. As such, the pre-December 1992 definition of “transportation company” quoted above was in issue, not the definition referring to the transportation of goods. At the initial hearing, the Judge concluded that to be an agent within the meaning of the legislation required a true legal agency relationship to exist. However, the Judge found that such a relationship did exist in this case. Importantly, she concluded that the definition of “transportation company”, as existing prior to December 1992, captured the agent of a vessel engaged exclusively in the carriage of cargo. Given the absence of the words “or goods” in the pre-1992 definition, this conclusion seemed incorrect and, thus, was appealed to the Federal Court of Appeal. In the appeal, the Court of Appeal concluded that since the vessel was only engaged in the carriage of cargo, not passengers, it did not come within the definition of “transportation company” as it existed at the time of illegal entry, i.e. pre-1992. As such, the Court of Appeal overturned the initial decision, creating in the process some renewed uncertainty about the meaning of “agent” as used in both the new and old provisions.

This uncertainty was finally addressed in the 2006 decision of *Colley West Shipping Company Ltd. v. the Minister of Citizenship and Immigration*. That case involved a stowaway who entered

Canada on board a vessel some 12 years earlier. While in Canada, he committed a multitude of crimes, but the appeal and removal process took more than a decade. What then happened was not unusual. Immigration Canada, realizing the security deposit they had obtained in 1994 was not sufficient, simply looked to the local agent to either arrange the removal of the stowaway from Canada or pay for his removal. The local agent, not surprisingly, considered it quite unfair and inappropriate for the government to make such a request so many years after the fact. After all, they had no long-term relationship with the shipowner, they had only ever worked once for the shipowner (and that was in 1994), and they had no real way of seeking or obtaining repayment from the shipowner. Consequently, a court challenge was launched.

Justice Phelan of the Federal Court heard the case and wrote a very interesting decision. He noted the applicable definition was the one in force in 1994, not the current legislation. He then concluded that for an agent to be an agent within the meaning of the 1994 law, there had to be true legal agency; it was not enough that the agent merely did some work for the shipowner. In Justice Phelan's opinion, more was required in order to be an "agent" as referred to in the definition of "transportation company." Justice Phelan therefore concluded that there was insufficient evidence to establish a true legal agency relationship. As a result, the removal request was quashed, and Colley West Shipping Company was declared to have no liability in relation to the removal of the stowaway in issue.

Despite the conclusions set out in the *Colley* decision, all is not well for agents in Canada. As mentioned, the *Colley* case involved the law as it existed in 1994. That is not the law today. Again, recognizing problems with the scope of the legislation, the Federal government made some substantial changes to our immigration laws in 2001. Noteworthy from an agents perspective is the addition in the *Immigration and Refugee Protection Act* of the following definition of "agent":

"agent" includes

- (a) for the purposes of section 148 of the Act, any person in Canada who provides services as a representative of a vehicle owner, a vehicle operator or a charterer; and
- (b) for the purposes of paragraph 148(1)(d) of the Act, in addition to the person referred to in paragraph (a), a travel agent, a charterer, and an operator or owner of a reservation system.

This is quite a broadly worded definition, and it would appear to cast a very wide net. It seems to clearly capture a charterer, operator or owner of a vessel, and may also include a general ship's agent who provides services "as a representative" of a vessel owner, operator or charterer. Despite the broadly worded definition, there remains some uncertainty in this definition, and it is likely we will only ever have a true understanding of what (and who) it captures once it is considered and addressed by our Federal Court.

For the moment, however, our immigration officials seem to appreciate the unfairness in burdening local shipping agents with the cost of removing a stowaway or deserter from Canada some years after the offending vessel's departure. Now they tend to seek sufficient security to cover possible future removal costs, thereby minimizing the risk to local agents. Nevertheless,

the risk remains, and only time will tell if our local agents will be forced through another round of court challenges.