

MARITIME LAW REFORM

Transport Canada has now set out its plans for law reform in the maritime sector by way of a Discussion Paper (TP-14370E May 2005). The paper deals with policy proposals that would require changes in that part of Canadian Maritime Law which finds its source in statutes and regulations.

Transport Canada is seeking input from the marine industry in order to determine how and if it will proceed with the various initiatives outlined in the Discussion Paper and many affected and interested organizations are formulating their responses to these important proposals.

Transport Canada has grouped the proposals into three categories as follows:

1. Proposals affecting marine liability;
2. Proposals requiring miscellaneous amendments to Canadian Maritime Law; and
3. Proposals of a housekeeping nature.

Marine Liability

The proposals in the category of marine liability are subdivided into Chapter One dealing with proposed Canadian response to four international conventions and Chapter Two which deals with possible changes to the *Marine Liability Act* with regard to the implementation of a compulsory insurance and revised liability regime for the carriage of passengers in Canada.

Chapter One within the Marine Liability category deals with Canada's response to the following four conventions:

1. *International Convention on the Limitation of Liability for Maritime Claims (1976) as amended by its 1996 Protocol;*

2. *Supplementary Fund Protocol of 2003 to the International Oil Pollution Compensation Fund (1992);*
3. *International Convention on Civil Liability for Bunker Oil Pollution Damage (2001);*
4. *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (1996).*

Limitation of Liability

While Canada has implemented the provisions of the 1976 Limitation Convention, the question remains whether Canada should officially ratify the Convention. If it does ratify that Convention, there is an ancillary issue of whether Canada should make any reservations available to it under the Convention (e.g. wreck removal claims and claims covered under the HNS Convention).

Compensation for bulk oil pollution

The discussion with respect to the Supplementary Fund Protocol of 2003 to the IOPC Fund (1992) is whether Canada should adopt this voluntary Supplementary Fund in order to obtain compensation beyond the existing IOPC Fund limits of approximately \$545 million. It is calculated that if Canada were to suffer an oil pollution event similar to the Prestige, which occurred recently off the coast of Spain and France and, after exhausting the coverage available under the 1992 CLC and IOPC Funds and the Canadian SOP Fund, Canada would still have to absorb approximately \$1 billion of uninsured compensation and clean-up costs. The obvious analysis is of course one of risk versus the cost of buying into the Supplementary Fund cover and the further risk that Canada would reinstitute a “domestic levy” on oil should a serious incident occur without the benefit of coverage through the Supplementary Fund.

Compensation for bunker oil pollution

While there has been an international regime in place for the carriage of bulk oil through the CLC and the IOPC Fund, there has been a lack of international uniformity on civil liability for bunker oil spills. While Canada's current legislation already contains most of the elements of the Bunker Convention, it does not provide for compulsory insurance for bunker spills. Aside from the issue of compulsory insurance, ratification of this and other IMO Conventions is seen as a support for international uniformity in maritime law and increases Canada's ability to negotiate in an international context in environmental matters.

Hazardous and Noxious Substances

The HNS Convention was signed by Canada in 1997 but not ratified. The Convention is now awaiting the threshold level of support by way of ratification in order to bring the Convention into force. While Canada currently has a liability regime which would cover chemical spills, such spills would be subject to Part VI of the *Marine Liability Act* which has lower limits of liability than found in the HNS Convention and is not supported by compulsory insurance or additional compensation available from the proposed HNS Fund. Implementation of the HNS Convention, in addition to the higher limits and compulsory insurance, provides for a direct action against underwriters and the HNS Fund.

Whether Canada ultimately ratifies the HNS Convention is, according to Transport Canada, dependent on several policy issues which will be considered with the assistance of the input following their Discussion Paper.

Liability for Passengers

Chapter Two under the Marine Liability category of the Discussion Paper deals with the liability and insurance for carriage of passengers by water. While Canada has adopted the Athens Convention into the *Marine Liability Act*, the question of compulsory insurance, which would be brought in through regulations pursuant to Section 39 of the *Act*, has proved contentious. In particular, certain industries such as white water rafting, kayaking and adventure tourism have objected to the affect on their operations due to the difficulty of obtaining affordable insurance and the status of waivers of liability (prohibited by the *Marine Liability Act*).

There appears to be a desire within Transport Canada to accommodate this sector of the marine industry. However, in this writer's view, they are having difficulty finding a rational basis for such exclusion. Whether the industry and Transport Canada will be able to find a rational basis to exclude these activities should be an interesting debate over the next few months.

Miscellaneous Amendments to Canadian Maritime Law

The second category of amendments to Canadian Maritime Law deals with a number of problems that have manifested themselves in the area of maritime law and proposed changes would include the following:

1. Implementation of a federal limitation period to cover those claims which do not already have prescription periods under the *Marine Liability Act* e.g. personal injury and death claims (two years), passenger claims (two years), cargo claims (one year), collision claims (two years) and pollution damage (three years or six years as applicable).

2. Rectification in respect of preferential treatment given by the Canadian Courts for US necessary's suppliers. US necessary's suppliers are afforded a maritime lien under US law and such lien survives a change in ownership of the vessel. Under Canadian law, such claims are not afforded a proper maritime lien but are provided with a statutory right *in rem*. Such a statutory right would not survive a change of ownership. Therefore, while a Canadian court would not provide Canadian suppliers with a maritime lien, the Canadian courts will honour US law and allow American suppliers to exercise their maritime lien for their unpaid invoices in Canada. While this is seen as unfair by Canadian suppliers, it must be remembered that the US position affording a maritime lien for such claims is relatively unique in the world and the debate is whether Canada should provide a maritime lien for its suppliers or deprive US claimants of their maritime lien status by statute.
3. The scope of arrest in Canada and in particular, the arrest of property other than the property which is the subject matter of the claim itself (sister ship arrest), has been a contentious issue for several years. While the debate for expansion of the right to arrest property other than the ship or property which is the subject matter of the claim has not been put to rest, the Discussion Paper merely sets forth a proposal to bring the English and French versions of the *Federal Court Act* dealing with arrest into harmony. There may be pressure from certain groups to expand the proposal, primarily to include claims against ships generated by demise charterers.

The Discussion Paper also discusses and makes proposals for reform in respect of certain Common Law rules affecting maritime property and obligations as follows:

(i) Survival of Actions

While the Marine Liability Act now permits the dependants of deceased persons to claim, it does not extend those rights to estates of deceased persons to recover for wrongs committed during the individual's lifetime. In

order to bring maritime and non-maritime claims in to sync, an amendment would be sought which preserves these legal obligations and the right to claim in the estate of the deceased.

(ii) Property of Rights of Married Women

At Common Law, married women's rights to own property or contract was restricted and a statutory provision is required in order to preclude the application of this obviously outdated principle.

(iii) Rights of Assignees

A provision is proposed which would allow assignees to sue in their own name rather than through the name of the assignor.

(iv) Rights of Assignment and Transfer of Property

While the Provinces have adopted legislation allowing for broader rights of assignment and the transfer of personal property among joint owners, natural persons and corporations, the maritime commercial sector does not enjoy the same flexibility under Federal Law and an amendment is proposed to bring the two commercial regimes on to a common footing.

(v) Guarantors' Rights

At Common Law a guarantor can be ruled liable to pay or perform the whole obligation guaranteed without recourse, even if other solvent guarantors exist or other debts can be recovered from a person not subject to the contract. This restriction is seen as a clog on commerce, raising transaction costs. A change, similar to those adopted by the Provinces for land based commerce, is proposed in order to affirm the right of guarantors called upon to pay, the right to claim upon co-guarantors or other collateral.

(vi) Abolition of the Doctrine of Merger

At Common Law a person who releases one of a number of defendants

liable under a joint obligation was precluded from claiming against any of the other defendants. In essence, the original right to sue under the joint obligation was merged in respect of the other defendants in to the settlement or judgment. Such a doctrine seriously limits the settlement possibilities available in a piece of litigation with some defendants being dragged through the litigation simply because there is no alternative. The proposal would abolish the doctrine of merger in respect of dealings with maritime property and the settlement of maritime claims.

(vii) Performance of Contracts Under Protest

At Common Law, one cannot perform in the way demanded by the other party and later object that the demanded performance was unreasonable or not in accordance with the contract. The proposed provision would mirror the provincial adoption of legislation allowing for performance of contractual obligations “under protest” thus reserving the party’s rights to contest the validity of the demanded performance at a later date.

(viii) Alternative Contract Remedies

The Common Law remedies of monetary damages or an order for the return of property are seen as being limiting to the development of maritime commerce. Statutory incorporation of equitable principles in provincial legislation have solved a number of issues for land based dealings. The proposed change would provide that, in contracts governed by federal legislation, equitable rules are to prevail over rules of the Common Law.

(ix) Mortgages and Security Interests in Maritime Property

It is proposed that there be new provisions to the effect that the granting of security interests in maritime property generally is to be governed by the same principles, legal and equitable, as govern mortgages over other personal property, subject to any particular statutory rules such as those provided for mortgages over registered vessels. This would include

procedural and substantive rights, including a number of creditor's remedies generally available under Provincial law.

(x) Vesting Orders

A Vesting Order allows a court to grant clear title in certain property. The *in rem* judicial sale available for maritime property through the courts is seen as being procedurally complex and expensive. The *in rem* sale is also potentially inappropriate in disputes between buyers and sellers, estate administration and property with uncertain ownership. The proposal would provide for vesting orders for all manner of maritime property, including non-registered vessels and property under a lien holder's contractual power of sale, similar to those available through provincial legislation.

(xi) Enforcement of Rights: Cross and Third Party Claims

"No action" clauses in insurance contracts have been used by underwriters to preclude the right of an assured to claim indemnity until the assureds legal liability to others has been decided. The Common Law will enforce such contract clauses but such clauses may put parties in the position of having to defend claims without knowing whether insurance benefits or other rights of recourse from third parties are available to them should the defence prove unsuccessful. The right to overlay these contractual arrangements within an action determining the primary liability is already recognized for maritime tort actions in Section 22 of the *Marine Liability Act* and the proposal would render inoperative any "no action" clauses which might impair that right.

Housekeeping Amendments

The principle housekeeping amendment in the Discussion Paper involves moving the salvage provisions currently contained in the *Canada Shipping Act* to the *Marine Liability Act* as those provisions are more closely aligned with the scope and application of the latter *Act*.

Comment

A full exploration of the scope and implication of the proposed reforms as set out in the Discussion Paper is certainly beyond the space available for this note. We expect that further columns will be dedicated to more specific areas in this law reform process.

Transport Canada is calling for a response to this Discussion Paper by October 2005 and, given the release of the Discussion Paper in May and the difficulty of various interest groups meeting through the summer months, the October deadline is in this writer's view insufficient time in which to consider and respond to these important initiatives. The Canadian Maritime Law Association will be approaching Transport Canada for an extension in order to fully consider the Discussion Paper and hopefully others will join in this request.

While many of the areas of proposed reform have been the subject of discussion for many years, the attempt of Transport Canada to "package" these reforms should not impair a full and complete discussion on each of the components.

All members of the marine community are urged to obtain a copy of the Discussion Paper from Transport Canada, consider the effect of these various reforms and respond individually or through an appropriate industry group.