Legislative Update, Bill C-7: AN ACT TO AMEND THE MARINE LIABILITY ACT AND THE FEDERAL COURTS ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

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Introduction

Prior to 2001, damage and injury claims under Canadian maritime law were governed by a patchwork quilt of different statutory and common-law authorities. Most of the established statutory principles governing maritime claims were scattered among a number of different statutes. Indeed, a number of the legal concepts that we now consider fundamental to modern damage or injury claims in general (such as contributory negligence, or family compensation for dependants of deceased accident victims) had no basis in federal statute at all, but rather were simply applied from existing provincial legislation. Needless to say, this often created inconsistency and uncertainty in Canadian maritime law concerning those areas – the law would differ depending on which provincial scheme was shown to apply, and eventually raised the question as to whether, constitutionally, provincial law applied at all. Ultimately, the need for uniform federal legislation governing those areas was clear.

The *Marine Liability Act* (the "MLA"),[1] enacted in 2001, sought to codify and consolidate many of those provisions under a single federal statute, and to create certainty and clarity in the law governing maritime injury and damage claims. As a result, many critical provisions concerning personal injury, cargo damage, passenger liability, oil pollution and limitation of liability for shipowners were centralized, harmonized and better integrated with one another.

That being said, however, while the original MLA certainly improved the law in a number of areas and filled many of the gaps in the federal law previously dependent upon provincial legislation to fill, the ensuing eight years revealed a number of areas in which further refinements or improvements to the MLA were needed. The result was a lengthy Parliamentary review of the MLA and other related statutes. That review produced input from a number of different private and public groups, including members of the Canadian maritime Bar, both individually and through groups such as the Canadian Bar Association (CBA) and the Canadian Maritime Law Association (CMLA), and private maritime industry stakeholders.

Ultimately, Parliament recommended a number of proposed changes to the MLA and other related statutes, which changes became Bill C-7. Some changes were controversial; others were not. The CBA and CMLA made a number of submissions to Government before and after introduction of Bill C-7 in the House of Commons. As outlined below, some (but not all) of those changes were adopted into the final draft of the Act.

Finally, on June 23, 2009, the Canadian Governor-General granted Royal assent to Bill C-7, thereby enacting the *Act to Amend the Marine Liability Act and the Federal Courts Act and to Make Consequential Amendments to Other Acts* (the "Act"). The Act imposes a number of changes and amendments to various Acts, primarily the MLA, which changes are discussed below. Of the changes discussed in this article, all <u>except</u> those concerning oil pollution liability provisions[2] have already come into force as of September 22, 2009.[3] Oil pollution provisions will be proclaimed in force by future Order of the Governor-in-Council, at some as-yet unspecified date.

Exemptions From *Athens Convention* Provisions

Adventure Tourism

The most influential amendment to the MLA concerns the exemption of certain groups of passengers from the ambit of the *Athens Convention*,[4] which was incorporated by reference into the original MLA and, with certain modifications, given the force of law in Canada.[5] *Athens* deals specifically with the carriage of passengers by sea, and imposes a rigid liability regimen for ship operators and their passengers. In exchange for a virtually unbreakable limitation of liability at 175,000 SDR[6] per passenger for injuries, death or

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damage to luggage suffered aboard a ship, shipowners must assume a presumption of liability against them for such losses shown to be caused by an incident aboard a ship. In addition, shipowners are specifically precluded from contracting with their passengers to further limit or exclude liability (i.e. through the use of waivers) beyond the limits shown above.

After the MLA was implemented, however, it became clear that this scheme was not well-suited to deal with a sector of the marine passenger industry that was described as "adventure tourism". Loosely interpreted, this term is meant to capture businesses that engage in higher-risk marine passenger activities (such as whale-watching, whitewater rafting, etc.). The problem arose in the context of the contemplated regulations to the MLA, which (among other things) called for mandatory liability insurance to be carried by all passenger operators. The concern among "adventure tourism" operators was that if they were not permitted to reduce their risk by contracting out of liability through the use of waivers, the premiums to purchase the required levels of mandatory insurance would be astronomical, and would go so far as to render certain small operators completely unprofitable.

As a result, the amended Act now contains a provision at s. 24, specifically excluding participants in "adventure tourism" from the definition of a "passenger" for the purposes of applying *Athens* under the MLA. The amended Act also contains a specific set of criteria to be used in determining whether a passenger operator is engaging in "adventure tourism",[7] requiring that such an activity meet all of the following conditions:

"(*a*) it exposes participants to an aquatic environment;

(*b*) it normally requires safety equipment and procedures beyond those normally used in the carriage of passengers;

(*c*) participants are exposed to greater risks than passengers are normally exposed to in the carriage of passengers;

(*d*) its risks have been presented to the participants and they have accepted in writing to be exposed to them; and

(*e*) any condition prescribed under [further regulation]".

The CMLA made two recommendations to Government regarding modification of the above definition, neither of which were ultimately adopted. The first was to require that operators exercise due diligence before the voyage to make the ship seaworthy. The second was to narrow the definition by requiring under (c) above that participants are exposed to "significantly greater risks" than normal. In the case of the latter, however, it is expected that either way, litigation over the interpretation of this section will focus on the meaning given to the terms "greater risks than passengers are normally exposed to", and equipment and procedures "beyond those normally used" in passenger carriage.

Assuming one qualifies as an "adventure tourism" participant, there are a number of significant new changes affecting the impact of *Athens* on such operators. As before, adventure tourism operators can still limit their liability by statute under the MLA. Now, however, the applicable limitation scheme is found under Part 3 of the MLA, under which liability is limited at the greater of either (a) 2,000,000 SDRs in total; or (b) 175,000 SDRs times the number of passengers permitted under the vessel's operating certificate. The far more important change here, however, is that "adventure tourism" operators may now once again contract to limit or completely exclude their liability, a clear departure from the *Athens* scheme. In other words, waivers are back.

In addition, such operators are also exempted from the mandatory insurance provisions otherwise applying under the MLA.[8] The rationale behind these changes, it is argued, is that by permitting adventure tourism operators to once again control their own risk through the use of waivers, insurance premiums for such high-risk activities will once again become affordable for many operators, and will no longer act as a disincentive to the growth or maintenance of a vibrant adventure-tourism industry. It remains to be seen, however, whether (under this return to the old days of a freedom-of-contract regime) adventure tourism operators will indeed buy liability insurance for injured passengers, which insurance the MLA was of course originally intended to ensure was in place from a public-protection standpoint.

Stowaways and Shipwrecked / Distressed Persons

Another group of passengers now excluded from the provisions of the *Athens Convention* are those persons who find themselves on a passenger ship on an urgent or involuntary basis, without the permission of the shipowner. Under the original MLA, such persons would all receive the same protection under *Athens* as, for example, regular paying customers. Thus, stowaways or people rescued by a ship (i.e. from shipwrecks or other distress) would get the benefits of *Athens* protection, even if the carrier would not have normally contemplated (or even agreed to) their being aboard.

In order to address this issue, s. 37(2)(b) of the amended MLA now contains two new exclusions to the application of Part 4 of the MLA (and thus of the *Athens Convention*). Under the new provisions, the MLA now applies to neither of:

"(iii) a person carried on board a ship in pursuance of the obligation on the master to carry shipwrecked, distressed or other persons or by reason

of any circumstances that neither the master nor the owner could have prevented, and

(iv) a stowaway, a trespasser or any other person who boards a ship without the consent or knowledge of the master or the owner."

These provisions are, in fact, nothing new to the MLA; the more general limitation of liability scheme found under Part 3 of the MLA already contains similar exemptions. Consequently, this change simply brings the Part 4 scheme applying to commercial passenger carriage in line with the more general limitation provisions under Part 4.

Maritime Lien for Necessaries Suppliers

Historically, Canadian suppliers of "necessaries" (such as fuel, provisions, etc.) to vessels have enjoyed the ability to proceed *in rem* against the subject ship in order to enforce or secure their claims. The recognition of this right, however, was limited under the law to conferring upon the supplier a mere "statutory right *in rem*". While this allowed to the supplier to claim *in rem* against the ship being served, it also left the supplier in a position of low priority relative to other types of creditors (including ship mortgagees), essentially treating the claim as any other type of miscellaneous, unsecured claim.

In other jurisdictions, however (such as in the United States), such was not the case. Rather, U.S. law specifically recognized a "maritime lien" in respect of such claims. This lien created two important protections for the supplier: (1) it allowed the charge (and thus the lien) to travel with the vessel (whereas a statutory right *in rem* would be lost upon transfer of the vessel after creation of the charge to a different owner); and (2) most importantly, it gave the claim a right of high priority and protection to the lien holder, allowing such claims to rank ahead of ships' mortgages.

Unfortunately, this situation often led to an unusual (and unfair) paradox in Canadian maritime law concerning Canadian necessaries suppliers. It is well settled in Canadian law that characterization of a claim in Canada as a maritime lien (as opposed to as a mere statutory right *in rem*) is to be determined not necessarily by Canadian law, but by the law of the jurisdiction in which the claim initially arose.[9] In other words, if a ship arrested in Canada had received necessaries in two jurisdictions (for example, the U.S. and Canada), the U.S. supplier's lien arising under American law would be recognized by a Canadian court. The Canadian supplier's claim, however, would not be afforded the protection of a lien in Canadian court proceedings, and thus would often be left on the outside looking in when it came to repayment from the shipowner's available assets.

Needless to say, there was considerable desire to address this problem through statutory reform. The ultimate result was to add the new s. 139 to the MLA, which specifically creates a maritime lien in favour of Canadian necessaries suppliers. The new provision protects not only necessaries suppliers in the strict sense, but is also made available to stevedores by making s. 139 subject to s. 251 of the *Canada Shipping Act* (which itself creates rights *in rem* for stevedores against shipowners and charterers, but does not specify the priority of such claims).

Granted, the new provision does come with some limitations to its scope. The most important is the proviso that the new lien applies only in favour of necessaries supplied to "foreign vessels", adopting that term as it is defined under the *Canada Shipping Act*. That definition includes not only Canadian-flag vessels of any type whatsoever, but also pleasure vessels of <u>any</u> nationality whatsoever.

While Bill C-7 was being debated in the House of Commons, the CMLA argued that the adoption of such a definition made the application of the lien unnecessarily narrow, and recommended against the adoption of that definition (which recommendation was not incorporated into the final legislation). Oddly enough, the CMLA also found itself arguing that the new lien was at the same time too broad in another sense – namely, that the new provision did not require that the subject services giving rise to the lien had been requested either by the shipowner themselves, or by the owner's authorized representative. That argument was accepted by the House, and the finished law now contains such a requirement under s. 139(2.1).

In the end, however (and despite its somewhat limited scope), this new provision is clearly designed to level playing field for Canadian necessaries suppliers in competing with similar foreign claims. As such, it still represents a significant improvement in the law in this area for securing the claims of Canadian necessaries suppliers.

General Limitation Period

Previously, there was no federal limitation period that applied uniformly throughout Canada for maritime claims. Rather, the limitation scheme was truly a "patchwork quilt" of provisions that arose under a number of different federal or provincial statutes, depending on the particular type of claim being considered.[10] Before the implementation of the original MLA, parties generally tended to rely on limitation periods created under provincial statutes (and thus found the timeliness of their claims dependent on which provincial scheme should be held to apply in a given circumstance). Ultimately, the Supreme Court of Canada called into question whether, on constitutional grounds, it was even *intra vires* provincial legislation to govern or apply to a federally regulated

head of power such as "navigation and shipping".[11]

In response to this development, the original MLA contained specific provisions dealing with limitation periods for a number of different types of maritime claims. Ultimately, however, it became clear that there were still a number of types of claims that were "falling through the cracks" in terms of readily applicable limitation periods. For example, the MLA created a two-year limitation period for accidents involving collisions between two or more ships, but made no provisions for accidents involving a single ship (i.e. allisions with docks, land or other objects). Other claims, such as marine insurance coverage claims, also had no applicable limitation provision under the MLA.

The newly-amended MLA, therefore, contains a new, general "catch-all" limitation period provision under s. 140:

> Except as otherwise provided in this Act or in any other Act of Parliament, no proceedings under Canadian maritime law in relation to any matter coming within the class of navigation and shipping may be commenced later than three years after the day on which the cause of action arises.

It is somewhat curious that Parliament elected to impose a three-year general limitation period, when the vast majority of limitation periods applicable to other types of claims are two years in length; this runs the risk of creating continued uncertainty as to the applicable period. In addition, the new section includes no accompanying provisions (despite the CMLA's recommendations to such effect) for the suspension or extension of time under the new period. Nonetheless (and like the new maritime lien provision discussed above), the new section, while imperfect, still represents a significant improvement in creating certainty and predictability in the law.

Sistership Arrest

Generally speaking, the concept of sistership arrest is designed to enhance an aggrieved party's ability to enforce and secure an *in rem* claim against a ship. Typically, an *in rem* claimant can arrest a ship that is alleged to be involved in some way in the subject-matter of the dispute. Sistership arrest simply expands that power so as to allow an aggrieved party to arrest not only the ship directly involved in the claim itself, but also any other vessel owned by the same shipowner as the ship directly involved.

Sistership arrest powers are conferred under s. 43(8) of the *Federal Courts Act*. Like other pieces of federal legislation, that Act's provisions are set out in both English and French versions. Unfortunately, however, it was recently pointed out[12] that the French and English versions of s. 43(8) were, in fact, different from one another (and mutually inconsistent) in a critical respect. The difference essentially made the French version of the law considerably wider in scope than the English version, allowing the aggrieved party to arrest any vessel owned by the same party that was the "beneficial owner" of the vessel involved in the subject-matter of the action.

Needless to say, it was agreed that change was necessary in order to harmonize the two versions of that provision, and make them mutually consistent. The question became which one to change – by changing the English version to match the French, the broader and more permissive French provision would make sistership arrest easier and more readily available, whereas the opposite would happen if it were the English version to be preserved. Ultimately, however, it was decided to go the former route, and to change the English version to conform to the broader French formulation of the law.

Even now, it is argued by some lawyers that the amended versions are still not precisely the same. Whether that is the case or not, however, the obvious inconsistency as between the two versions has now been resolved.

Pollution Liability

As pointed out above, the new provisions of the MLA governing liability for marine oil pollution are not yet in force (unlike the other provisions reviewed above). Suffice to say at this juncture that the new provisions, when proclaimed in force, will simply incorporate into Canadian maritime law two further international conventions concerning marine oil pollution and its enforcement:

(a) The *International Convention on Civil Liability for Oil Pollution Damage, 1992*, commonly referred to as the "Civil Liability Convention" or "CLC", and which deals with pollution from oil carried as cargo on ships (i.e. crude oil tankers, etc,); and

(b) The *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*, commonly known as the "Bunkers Convention", and which concerns oil carried as fuel for ships.

Once enacted, the new legislative scheme will incorporate the CLC and Bunkers Convention into the MLA and give them force of law in Canada, much as is done in other Parts of the MLA dealing with other areas of liability. These conventions are designed to dovetail with other existing provisions, such as those regarding the Ship-source Oil Pollution Fund (SSOPF).

As stated above, these provisions are not yet in force, but rather are subject to a future Order of the Governor-in-Council. That being said, the changes contemplated are not terribly controversial, in that they are designed to simply bring Canada

in line with accepted international standards in this area.

Conclusion

In summary, the changes implemented under Bill C-7 comprise an omnibus of improvements and refinements designed to improve upon the function of the MLA, and to fill certain gaps where that statute has been found wanting. Without a doubt (and particularly in the "adventure tourism" context), there will be future litigation to help determine what some of the new language means. For the moment, however, Bill C-7 represents further steps forward in lending uniformity and certainty to liability for injury and damage claims under Canadian maritime law. It will be interesting to see what the next ten years hold for the MLA, and to see what further changes or issues arise in future cases.

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Endnotes

1. S.C. 2001, c. 6.
2. Specifically, ss. 1-7, 9, 10, 12 and 18 of Bill C-7.
3. See s. of the amended MLA, which provides that those changes are proclaimed in force on a date 90 days after the amendments receive Royal Assent. That assent was provided June 23, 2009.
4. The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, as amended by the Protocol of 1990 to amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974.
5. See Part 4 of the MLA.
6. Currently, approximately $350,000 CAD.
7. See s. 37.1, MLA.
8. See s. 39, MLA.
9. See e.g. *Fraser Shipyard and Industrial Centre Ltd. v. Atlantis Two (The)* (1999), 170 FTR 1 (Fed. TD).
10. For example, the old Carriage of Goods by Water Act (now repealed) incorporated the Hague-Visby Rules into Canadian maritime law, which Rules in turn contain a one-year limitation period for bringing claims concerning carriage of goods by water (Art. III-6). The Hague-Visby Rules are now incorporated under Part 5 and Schedule 3 of the MLA.
11. See *Ordon Estate v. Grail*, [1998] 3 SCR 437.
12. See *Norcan Electrical Systems Inc. v. Feeding Systems A/S* et al. (2003), 235 FTR 237 (Fed. TD).