Giaschi & Margolis
BARRISTERS AND SOLICITORS

401-815 Hornby Street
Vancouver, B.C.
V6Z 2E6
CANADA

Telephone (604) 681-2866
Facsimile (604) 681-4260
Email: giaschi@AdmiraltyLaw.com
Internet: www.AdmiraltyLaw.com

Bill C-7 Amendments to the *Marine Liability Act*

By: Christopher J. Giaschi and Sonja J. Mills

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Introduction

Bill C-7: An Act to amend the Marine Liability Act and the Federal Courts Act and to make consequential amendments to other Acts ("Bill C-7") entered the House of Commons on January 29, 2009 and received Royal Assent on June 23, 2009. The majority of the act came into force on September 21, 2009. The sections dealing with oil pollution entered into force on January 2, 2010.

Throughout this paper, section numbers will be referred to as they now appear in the amended *Marine Liability Act*, S.C. 2001, C. 6 ("MLA").

Brief Legislative History

Bill C-7 was the culmination of many years of work on the part of the Marine Policy Group of Transport Canada, headed by Jerry Rysanek. In 2002 this group commissioned The Mariport Group Inc. to research and make recommendations on compulsory insurance for passenger vessels. The Mariport Group report was released in January 2003 and public input was sought. As a result of this public input, further issues for discussion and possible inclusion in the Bill were identified. Following this initial round of consultations, the Marine Policy Group published a Discussion Paper proposing variations of the amendments that have found their way into Bill C-7. The Discussion Paper was widely circulated and numerous public consultations were again held across Canada. The Canadian Maritime Law Association ("CMLA"), Canadian Bar Association ("CBA") and various other organizations involved in shipping made extensive submissions. The Marine Policy Group then went into "stealth" mode to prepare the final draft of the Bill which was ultimately introduced in Parliament on 29 January 2009 when it received first reading. Thereafter, the Bill proceeded rapidly (some might say with unseemly haste) through Parliament. It received second reading on 30 March 2009 and was then sent to the Transport Infrastructure and Communities Committee for hearings. The CMLA and CBA both made written submissions to, and attended before, the Committee. The Committee Report was published on 8 May 2009. The Bill was sent back to House of Commons where it received Third Reading on 14 May 2009. It then went to the Senate where it went through first and second readings, was sent to the Senate Transport and Communications Committee, and was returned to the Senate for third reading which was held on 22 June 2009. Royal Assent followed the next day on 23 June 2009.

Summary of Key Amendments

The key amendments to the MLA enacted by Bill C-7 are:

- Removal of commercial canoeing and kayaking operations from the liability regime established by the Athens Convention as enacted by Part 4 of the MLA;

- Establishment of a class of operations called "Adventure Tourism" and removal of these from the liability regime established by the Athens Convention as enacted by Part 4 of the MLA;
- Creation of a general three-year limitation period for maritime claims;
- Creation of a new maritime lien for Canadian ship suppliers and ship repairers in respect of foreign vessels;
- Provision of a legislative basis for Canada to accede to the Supplementary Fund Protocol 2003 which provides increased compensation for oil pollution damage caused by tankers;
- Provision of a legislative basis for Canada to accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage (the "Bunker Convention");
- Clarification that trespassers, stowaways and other persons carried on board a ship involuntarily are not covered by the liability regime established by the Athens Convention as enacted by Part 4 of the MLA and are not entitled to the potentially higher limits of liability enacted by s. 28 of the MLA;
- Inclusion of a Canadian reservation to Art. 2 of the Limitation Convention removing limitation of liability in respect of wreck removal claims;
- Amendment to the Federal Courts Act provisions respecting sistership arrest to bring the English text in line with the French; and
- Update of the provisions concerning the establishment and administration of the Ship-source Oil Pollution Fund ("SOPF").

Adventure Tourism, Canoes & Kayaks

Background

Part 4 of the MLA enacts *Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974* and makes it applicable to all passengers carried for a commercial purpose both internationally and domestically. Part 4 of the MLA also lays the groundwork for the eventual implementation of a compulsory insurance regime in respect of carriage of passengers.

Prior to the enactment of the *Athens Convention*, carriers of passengers were governed by the common law and many relied upon exclusion and/or limitation clauses in their contracts or tickets. The *Athens Convention* changed this by imposing a fairly strict liability regime on all carriers with limited defences. It further rendered exclusion clauses void. The regime applied regardless of the size or type of vessel or the activity carried on. This meant that those operating inherently higher risk marine activities such as sea kayaking and white-water rafting

were subject to the same liability regime as large passenger ferry operators such as BC Ferries and Marine Atlantic.

Perhaps surprisingly, at the time the MLA was originally passed in 2001, there was very little opposition to the provisions of Part 4. However, after the MLA was passed, there were apparently a number of complaints to MLAs and other government officials from river rafting and other commercial tourism operators. These operators objected to their being subject to the *Athens Convention* and, more importantly, were very concerned about the eventual implementation of compulsory insurance. They said that compulsory insurance in the amounts that were being contemplated, namely, the maximum limit of liability established by Part 3 of the MLA, was not available to them and, even if it was, the cost would be prohibitive. These operators found a sympathetic ear, either with their respective MLAs or with others with influence.

Amendment

Bill C-7 was the mechanism to deal with the concerns of these operators and it does this in two ways. First, in s. 36(1)(a) the definition of ship applicable to Part 4 of the MLA was changed to specifically exclude "vessels propelled manually by paddles or oars". Second, new s.37.1 defines an adventure tourism activity and specifically excludes such activities from the provisions of Part 4 as follows:

> *37.1 (1) This Part does not apply to an adventure tourism activity that meets 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 paragraph 39(c).*

Paragraph 39(c) provides that further conditions may be prescribed by regulation made by the Governor in Council.

It is interesting (and perhaps somewhat incongruous) that although adventure tourism and canoeing and kayaking operations were removed from Part 4 of the MLA, the amendments enacted by Bill C-7 still impose the global limits of liability applicable to all passenger carriers under Part 3. This is achieved by the creation of a new definition of "passenger" in s.24 that

specifically includes a participant in an adventure tourism activity or a person carried on board a vessel propelled manually or by oars and operated for a commercial purpose. Therefore, the global limits of liability under Part 3 for adventure tourism and canoeing and kayaking operations remain unchanged. Pursuant to s.28(1) these operators are subject to a global limitation of at least 2 million SDRs (approximately Cdn$3,330,000). If they carry more than 11 passengers this limit increases by 175,000 SDR (approx. Cdn$290,000) per passenger.

It is also perhaps noteworthy that the initial draft of the definition of passenger in Bill C-7 in relation to canoes and kayaks was "a person carried on board a vessel propelled manually by paddles or oars." This definition omitted the need for the canoe or kayak to be operated for a commercial purpose. The effect was to make all canoes and kayaks, even those operated for pleasure purposes, subject to the higher limits of liability established by s.28. This was a clear mistake which was identified by the CBA and CMLA and corrected before the Bill was passed.

Implications and Issues

An interesting, and probably unanticipated, result of the removal of the adventure tourism industry from Part 4 is that most will now be exposed to higher limits of liability. When these operators were covered by Part 4, their liability to each participant/passenger was limited to 175,000 SDRs (approx. Cdn$290,000). However, now that they are excluded from Part 4 there is no per passenger limit but only the much higher global limit established by s.28. Thus, where one passenger/participant is injured, instead of having a limit of liability of $290,000, they now have a limit of $3,330,000.

The newly amended MLA now permits adventure tourism operators to rely upon contractual waivers or limitations. This may, however, not provide them or their underwriters with as much protection as they might wish. Although waivers are valid and enforceable, there is still some reluctance on the part of the courts to enforce them, especially in jurisdictions other than British Columbia. Waivers are frequently found unenforceable because they have not been sufficiently brought to the attention of the other party. They are also often interpreted very strictly. Further, the Supreme Court of Canada has not yet given its final word on the validity of such waivers in all cases. Finally, s.37.1(1)(d) has some interpretation difficulties. What risks need to be presented? How fully do they have to be explained? When do the risks have to be presented? Can one participant (a parent) waive the risks for another participant (a child)?

There is also much uncertainty as to exactly how s. 37.1(1)(b) and (c) will be interpreted. With respect to s.37.1(1)(b), what sorts of safety equipment and procedures will be required? With respect to s.37.1(1)(c), how much greater must the risk be and what sort of risk? Is the risk of getting wet sufficient or is something more required? Must there be a greater risk of serious bodily injury? These are questions which the courts will have to deal with.

Limitation Period

Background

Prior to the passage of Bill C-7, there was no general federal limitation period for claims governed by maritime law. For many years this was not considered to be a problem because limitation periods were considered part of the procedural law of the place where the dispute was determined and the general limitation periods provided by the various provincial limitation statutes were routinely applied to maritime cases. Two key rulings by the Supreme Court of Canada changed this line of thinking. First was the decision in *Tolofson v. Jensen* [1994] 3 SCR 1022 where the Supreme Court held that limitation periods were substantive law in nature as opposed to procedural. Second was the decision in *Ordon v. Grail* [1998] 3 SCR 437 where the Supreme Court stated that the substantive law applicable to maritime claims was federal Canadian Maritime Law and not the law of any province. The court went even further and said that it would be very rare that a provincial statute of general application would apply to a matter otherwise governed by Canadian Maritime Law. The combined effect of these two decisions made it very doubtful that provincial limitation statutes would apply to maritime matters. This created a situation where a large number of maritime claims did not have a limitation period.

Shortly after the decision in *Ordon v Grail*, the CMLA brought the limitation period issue, among others, to the attention of the Marine Policy Group. Due to the mysteries of Parliament and the legislative agenda, nothing happened. However, the Mariport Report and the possibility of amendments to the MLA to deal with the concerns of "Adventure Tourism" provided an opportunity for other amendments to be put forward. The Marine Policy Group was approached and agreed to include an amendment to provide for a general limitation period for maritime claims.

Amendment

New s. 140 of the *MLA* provides a general, catch-all, three year limitation period for all marine-related claims that previously lacked any federally-prescribed limitation period. The following is the text of the new section:

> *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.*

Implications and Issues

The creation of a general limitation period for maritime claims is viewed as a positive step forward for Canadian Maritime Law. However, it is unfortunate that the amendment did not

deal with other limitation period issues that are frequently encountered. For example, general limitation statutes often contain provisions that provide for when the period commences to run, whether and/or how the period may be extended or abridged, whether and under what circumstances the period may be suspended and whether a court may relieve against the expiry of the limitation period. S.140 of MLA is silent on all of these issues, thus, leaving them uncertain.

Maritime Lien

Background

Despite the United States being Canada's largest trading partner, rules governing shipping between the two nations have not been consistent. In the United States, unpaid suppliers of necessaries to ships enjoy a maritime lien under the *Commercial Instruments and Maritime Liens Act*[1]. In contrast, prior to the enactment of the amendments in Bill C-7, Canadian ship suppliers had only a statutory right *in rem* which gave them no priority. That Canada and the United States have different laws is not unusual and is, by itself, not a justification to change Canadian law. However, the difference in how the two countries treat necessaries suppliers combined with the way in which Canadian courts deal with conflict of laws issues created what was perceived as an injustice in situations where a ship was under arrest and had to be sold to satisfy multiple claimants. In this situation, the Canadian courts would apply American law and recognize the status of American necessaries suppliers as maritime lien claimants thereby giving them a priority above that of a mortgagee. The Canadian necessaries suppliers who supplied the ship in Canada would, however, be governed by Canadian law and were given no priority. These suppliers often received nothing in priorities disputes as they came after the mortgagee. This was a difficult pill for Canadian necessaries suppliers to swallow given that they performed exactly the same service as their American counterparts.

The Canadian Ship Suppliers Association has been trying to remedy this situation for years but had absolutely no success. However, when the Marine Policy Group began its consultations on the adventure tourism amendments, the Canadian Ship Suppliers Association saw their opportunity and managed to get an amendment into Bill C-7 that would give them a maritime lien. They also sought and obtained the limited support of the CMLA.

Amendment

The creation of a new maritime lien is contained in new s.139 to the MLA. The text of the new section is as follows:

[1] 46 U.S.C. 31342 (1994).

Maritime Lien

Definition of "foreign vessel"

139. (1) In this section, "foreign vessel" has the same meaning as in section 2 of the Canada Shipping Act, 2001.

Maritime lien

(2) A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise

(a) in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; or

(b) out of a contract relating to the repair or equipping of the foreign vessel.

Services requested by owner

(2.1) Subject to section 251 of the Canada Shipping Act, 2001, for the purposes of paragraph (2)(a), with respect to stevedoring or lighterage, the services must have been provided at the request of the owner of the foreign vessel or a person acting on the owner's behalf.

Exception

(3) A maritime lien against a foreign vessel may be enforced by an action in rem against a foreign vessel unless

(a) the vessel is a warship, coast guard ship or police vessel; or

(b) at the time the claim arises or the action is commenced, the vessel is being used exclusively for non-commercial governmental purposes.

Federal Courts Act

(4) Subsection 43(3) of the Federal Courts Act does not apply to a claim secured by a maritime lien under this section.

Implications and Issues

The new maritime lien created by s.139 is very broad. It applies to supplies of all goods, materials or services. It also applies to ship repairs and to "equipping of a vessel". Importantly, there are no words restricting the types of goods and services to which the lien will attach. The only limitation is that the suppliers must carry on business in Canada.

Providers of stevedoring and lighterage services are treated somewhat differently than other suppliers. Pursuant to s.139(2.1), these services must have been provided at the request of the owner or a person acting on behalf of the owner. There is no similar restriction applicable to providers of other goods or services which means that there is probably no similar requirement applicable to those providers. This is a substantial change in law and one which both the CMLA and CBA argued against. Previously, suppliers of goods or services only had a right of action *in rem* if they contracted with the owner or a person authorized by the owner. Now there is no such requirement except for stevedore and lighterage services.

Section 139(2.1) is also made subject to s.251 of the *Canada Shipping Act*, 2001 which gives stevedores the right to maintain an action *in rem* when they contract with the authorized representative or bareboat charterer of a vessel but, when they contract with the bareboat charterer, their *in rem* right can be exercised only while the vessel remains under charter. Thus, stevedores who contract with only the bareboat charterer will not have a maritime lien and will only have an action *in rem* so long as the vessel remains under charter.

Pollution

Background

Part 6 of the MLA has always dealt with liability and compensation for pollution damage. Under this part claimants for marine oil pollution damage in Canadian waters have had access to both a national and international liability and compensation regime. The national regime made shipowners liable for pollution damage caused by a discharge of oil of any kind or in any form. Claimants who suffered damage as a result of a discharge of oil from a ship could claim either against the shipowner or, if the claim against the owner was not successful or the owner or ship could not be identified, against the Ship-Source Oil Pollution Fund ("SOPF"). The current total compensation available from this fund is approximately $154.392 million.[2]

The international regime implemented by Part 6 of the MLA provided for liability and compensation for oil tanker spills. Specifically, Part 6 enacted the Protocol of 1992 to the International Convention on Civil Liability for Oil Pollution Damage (CLC), 1969 ("1992 CLC") and the Protocol of 1992 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1971 ("1992 IOPC Fund"). The current limits of liability and compensation available under these instruments together provide approximately $382.777 million for oil tanker spills[3]. Unlike the domestic regime, these international funds did not and do not apply to bunker fuel spills.

[2] Ship-source Oil Pollution Fund, *The Administrator's Annual Report 2008-2009*.
[3] Ship-source Oil Pollution Fund, *The Administrator's Annual Report 2008-2009*.

When account is taken of both the domestic and international regimes, the total amount of compensation available under Part 6 of the MLA before Bill C-7 for each oil tanker spill incident was $537.169 million and for each bunker or other non-persistent oil spill incident was $154.392 million.

In recent years, the International Maritime Organization has adopted two new instruments to increase the compensation available for marine oil pollution damage. The Supplementary Fund Protocol of 2003 to the 1992 IOPC Fund ("*Supplementary Fund*") was adopted to increase available funds for oil tanker spills and the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 ("*Bunkers Convention*") was adopted as the first international convention to govern bunker spills. Despite their increased popularity with the international maritime community, Canada had failed to implement these two conventions prior to Bill C-7.

Amendment

The Bill C-7 amendments to the MLA provided the legislative basis for Canada to ratify the Supplementary Fund and the Bunkers Convention which Canada has since done. These conventions came into force on 2 January 2010.

The Supplementary Fund, as the name suggests, provides a third tier level of funds to supplement the compensation available under the 1992 CLC and IOPC Fund. As with the 1992 CLC and IOPC Fund, the Supplementary Fund only applies to oil tanker spills in Canadian waters. It has the effect of increasing the compensation available for these types of spills from the previous total of $500 million to almost $1.5 billion for a single incident.[4]

The Bunkers Convention applies to:

- *Bunker oil* defined as "any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues such as oil"; and
- *Ships* defined as any seagoing vessel and seaborne craft, of any type whatsoever. This includes any vessel that carries bunker oil for the operation of generators or other equipment on board.

The shipowner, including the registered owner, bareboat charterer, manager and operator, are liable under the Bunkers Convention. Liability may be limited based on the tonnage of the

[4] Transport Canada, "Canada's Government Takes Action to Protect Environment with Changes to the Marine Liability Act", News Release No.H096/09, June 25, 2009.

vessel:

	Tonnage	**SDR** (1 SDR ~ $1.66 Cdn)
Tonnage not exceeding	2,000	1 million in full
AND for each ton from	2,000 – 30,000	400 per ton
AND for each ton from	30,001 – 70,000	300 per ton
AND for each ton from	70,001 and above	200 per ton

Ships over 1,000 gross tonnage (GT) are required to maintain insurance or some permitted form of financial security. Additionally, if the ship is registered in a State party or leaving a port or terminal in the territory of a State party, it is also required to carry a Bunkers Convention Certificate certifying that insurance is in force. This requirement applies to tankers also carrying 1992 CLC Certificates.

Wrecks

Background

Schedule 1 of the *MLA* contains the text of the 1996 LLMC Protocol providing shipowners and salvors rights to limit their liability for certain maritime claims. Part 1 provides the majority of the text of the 1996 LLMC Protocol. Part 2 contains, inter alia, Article 18 which allows State parties to make specific reservations under the convention to exclude shipowners from limiting their liability for certain claims.

Amendment

As a result of Bill C-7, a new Part 3 was added to Schedule 1 which creates a reservation by Canada under Article 18 of the 1996 LLMC Protocol. The reservation essentially excludes the application of Article 2, paragraph 1(d), thereby excluding claims dealing with wrecks from limitation of liability. Now with the passage of Bill C-7, shipowners and salvors may not limit their liability with respect to claims:

> *…in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship.*

Implications

The implications of this amendment, by way of example, are that a shipowner is no longer able to limit liability for maritime claims by government authorities who incur the expenses to remove a wrecked or abandoned vessel.

Athens Convention Exemption: Distressed & Rescued Persons

Background

For various reasons, a master and shipowner may find themselves carrying a person on board their vessel involuntarily. For example, masters are obligated to carry shipwrecked or distressed persons. They may also find themselves carrying stowaways, trespassers or others under circumstances without their knowledge or consent. Prior to Bill C-7, it was arguable that these persons were passengers and that they were covered by Part 4 of the MLA and the Athens Convention.

Amendment

In order to deal with this issue, new s.37(2)(b)(iii) and (iv) specifically exclude these persons from Part 4 of the MLA and the Athens Convention.

Additionally, new s.28(3)(c) and (c.1) exclude these persons from the higher limits of liability established by s.28(2).

Sistership Arrest

Background

Section 43(8) of the Federal Courts Act as it was before Bill C-7 provided a right of sistership arrest in the following terms:

> *The jurisdiction conferred on the Federal Court by section 22 may be exercised in rem against any ship that, at the time the action is brought, is beneficially owned by the person who is the owner of the ship that is the subject of the action.*

This provision has been narrowly construed in a number of court decisions and, as a result, there have been many discussions amongst the legal community for a change to the section that will broaden the right of sistership arrest. The legal community was, however, never able to come to a consensus on whether or how the section should be changed. Nevertheless, during the course of these discussions, it was discovered that the English version of this section was different from the French version and it was agreed that the English version should be changed so that it would agree with the French.

Amendment

Bill C-7 amended the English version in the Federal Courts Act to harmonize it with the French version. The new version is as follows:

> *The jurisdiction conferred on the Federal Court by section 22 may be exercised in rem against any ship that, at the time the action is brought, is owned by the beneficial owner of the ship that is the subject of the action.*

Since the passage of Bill C-7 there have been some who have suggested that the French and English versions are still not identical in meaning.