

TRANSPORTATION

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CANADA MARINE ACT REVIEW UPDATE - WELCOME NEWS FOR MARINE INDUSTRY STAKEHOLDERS

With the *Canada Marine Act* (“CMA”) having recently passed its fifth anniversary, the four-member panel appointed by the Minister of Transport to review the CMA in May 2002 recently delivered its much-anticipated report.

Entitled *The Canada Marine Act—Beyond Tomorrow*, the review is the end product of an extensive series of consultations with marine industry stakeholders that took place in eleven cities in seven provinces across Canada during the latter part of 2002. More than 140 written submissions and 75 presentations were provided by a cross section of the marine transportation industry and its associations, as well as representatives from all three levels of government.

RECOGNITION OF VITAL ROLE PLAYED BY MARINE SECTOR

Throughout the report, the panel members underscored the growing importance of international trade to Canada’s economy and the vital role played by marine transportation in providing access to international markets.

The panel agreed with the observation made by many stakeholders that Canada is at risk of losing marine traffic to competing US ports and suggested that the Government of Canada take responsibility for fostering and developing the construction and maintenance of marine infrastructure. Contrary to one of the stated objectives of the National Marine Policy, the panel concluded that the financial burden for developing and maintaining an efficient marine transportation system cannot be shifted from taxpayers to users.

COMPETING VISIONS OF MARINE TRANSPORTATION

In comparing Canada with other countries, the panel noted that the federal government views the marine transportation industry as a source of revenue, not as an integral component of generating and facilitating trade. The report explicitly recognized that the public support provided to ports in countries like the US has created an increasingly uneven playing field for Canadian ports.

The panel recommended that the CMA be amended to include a preamble that would set out the “historical and present-day significance of marine transportation to our national heritage, sovereignty and economy.”

WELCOME NEWS FOR CPAS

Canada’s 19 Canada Port Authorities (“CPAs”) will be pleased to learn that many of the recommendations in the review address the port-related concerns that were raised in submissions to the panel last fall. Access to capital, enhancing port infrastructure and the possible use of alternative financing vehicles (such as tax-exempt bonds) figure prominently in the report. For more details from the perspective of CPAs, please see our June 2003 Transportation Law Bulletin available at www.mcmillanbinch.com under “Publications”.

ELIMINATION OF CANADIAN COAST GUARD MARINE SERVICES FEES

Marine Services Fees were established in the mid-1990's under the *Oceans Act* to cover the costs of such Canadian Coast Guard services as icebreaking, navigation aids and St. Lawrence ship channel maintenance. Marine industry users, including the National Marine and Industrial Coalition, have long sought the abolition of such fees, saying that marine services fees have increased vessel operating costs in contrast with other modes of transport. The panel agreed with and supported these submissions, observing that reduced traffic increases operating costs, which, in turn, leads to a further loss of business to US ports and other modes of transportation.

The panel also observed that the Government of Canada should continue to pay for dredging in waters up to the boundaries of a port. The Canadian Coast Guard had previously indicated to ship owners that the costs of dredging such waters as the St. Lawrence River channel should be borne by marine users. As for public ports that have yet to be divested, the panel recommended that the Government of Canada continue to pay for maintaining port infrastructure and providing dredging services.

The recommendations and observations made by the CMA review panel stand in stark contrast to those presented by the *Canada Transportation Act* review panel in its 2001 report, *Vision and Balance*. That report endorsed the principle of full cost recovery from users and noted that continuing to provide subsidies for marine services amounted to an “anomaly” in national transportation policy.

RECOMMENDATIONS AND OBSERVATIONS RELATING TO PILOTAGE

Many stakeholders in the marine transportation industry have called for the abolition of compulsory pilotage for Canadian-registered vessels in certain areas, citing the unnecessary cost, the relative experience of Canadian vessel operators and recent technological advances in on-board navigation equipment.

As the introduction of the CMA resulted in only minor amendments to the *Pilotage Act*, the panel had a limited mandate on which to make recommendations concerning pilotage.

In a 1999 report, the Canadian Transportation Agency (“CTA”) made several recommendations with respect to

pilotage. Financial self-sufficiency and the cost-effective delivery of pilotage services were key aspects of the CTA report. Many of the CTA's recommendations have already been implemented, but the CMA review panel noted that a number have yet to be acted upon.

Key issues from the 1999 review, such as (i) the scope of application of the Pilotage Risk Management Methodology, (ii) the process for developing a system to assess masters', officers' and pilots' competence and quality of services, and (iii) the Great Lakes Pilotage Authority enhancement of requirements to exempt vessels from compulsory pilotage, remain outstanding. The panel noted with concern the current tensions between domestic ship owners and the Laurentian Pilotage Association regarding exemption from compulsory pilotage and pilotage certifications. The panel also stated that the current system of attempting to balance financial self-sufficiency with a fair and reasonable approach to the pricing of pilotage services “virtually enshrines the application of perpetual and potentially unwarranted tariff increases.”

The panel did recommend that the *Pilotage Act* be amended to permit an arbitrator engaged in the final offer regime under that Act to request additional information from the parties if such information is pertinent to the arbitration process.

Some groups that made submissions to the panel called for changes in the composition of the boards of directors of the pilotage authorities in order to allow for greater representation from user groups. The panel did not call for major changes in this regard, but recommended that the selection process be formalized to recognize the current practice of selecting two members from each of the transportation industry, pilots and the public, together with the requirement that such individuals have the requisite knowledge and experience to serve in that capacity.

SUPPORTING THE ENVIRONMENT AND ENHANCING SECURITY

The panel observed that increasing the use of marine transportation could help Canada reduce its production of greenhouse gases and assist in meeting its targets under the Kyoto Protocol.

The panel did not, however, address the issue of ballast water exchange in inland waters. Transport Canada has indicated in *StraightAhead: A Vision for Transportation in*

Canada, its strategic vision paper (released earlier this year), that cleaner water is a priority for the federal government. It is widely expected that mandatory regulations to control the introduction of invasive foreign species through ballast water exchange (such as those that currently exist in the US) are forthcoming. As for enhancing marine security, the panel noted that the Government of Canada (not users) should bear the cost of additional security measures that ultimately benefit all Canadians. While Transport Canada has committed \$172.5 million over five years to enhance marine security, key industry players have argued that current funding commitments are not sufficient to bring Canada on par with the US in terms of the level of security provided.

PROMOTING THE MARINE INDUSTRY TO CANADIANS

The panel made note of the fact that Canadians generally lack a proper appreciation of the size and scope of the marine transportation sector, let alone its importance to the health of the nation's economy. While the marine mode is the dominant means of transport to and from other countries (excluding the US) and accounts for nearly 70% of such exports and 40% of such imports by value, the business of transporting goods by ships is largely invisible and unknown to the general public. The panel observed that measures should be taken by the Government of Canada and the industry to strengthen the profile of the marine transportation sector among Canadians.

PUBLIC DISCUSSION OF THE ROLE OF THE SEAWAY

While the commercialization of the management and operation of the Canadian component of the St. Lawrence Seaway has been "a resounding success," the panel also recognized that the use of the Seaway has been on the decline in recent years and is now used at only 50% capacity. The panel called for all levels of government to consider the role that the Seaway should play in Canada's future transportation network, especially in light of a possible US study regarding Seaway modernization. Because the business plan targets have been achieved or surpassed, the Government of Canada has not been required to provide any funding for the operation of the Seaway for the past five years.

To improve efficiency and cost effectiveness, the panel recommended that the Seaway Management Corporation be permitted to locate its head office "wherever the board deems most appropriate." Currently, the head office is in Cornwall, Ontario, as required by the CMA. The panel saw no commercial or practical justification for this requirement.

EFFICIENCY OF ENFORCEMENT MECHANISMS

The panel also recommended that Part 4 of the CMA ("Regulations and Enforcement") be re-examined to ensure that the provisions for detention, guarantees and release of ships accused of offences under the CMA are economically viable and efficient, especially for minor infractions.

CONCLUSION

Transport Canada will study the panel's report over the course of the summer. A response is expected by the fall and new legislation is possible within one year. It remains to be seen which of the panel's recommendations and observations will ultimately result in legislative change.

Events occurring contemporaneously with the release of the report underscore the need for Transport Canada to deliver a timely and effective response:

- Stan Keyes, Liberal Member of Parliament and former chair of the Transport Committee of the House of Commons, presented a motion to the Transport Committee on May 26 calling for the Minister of Transport to consider changes to the *Pilotage Act* that would exempt Canadian domestic ship owners from mandatory pilotage, provided that certain conditions were met by the vessel and its operators. Although the Committee did not vote on the motion prior to the summer break, it is likely that the pilotage issue will arise again in Committee business this fall.
- On May 30, Fisheries and Oceans Canada announced a 9% increase for maintenance dredging fees for ships using the St. Lawrence River; the announcement came late on a Friday afternoon without prior notice to the marine industry.

OBTAINING FURTHER INFORMATION ABOUT THE CMA REVIEW

The entire 67-page report is available free of charge by contacting Transport Canada's Marine Policy Directorate at 613.990.8079. The report is also available on the Internet at <http://www.tc.gc.ca/pol/en/Marine/cma_report.htm>.

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The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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