

TRANSPORTATION

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CANADA MARINE ACT REVIEW PANEL RELEASES REPORT

With the *Canada Marine Act* ("CMA") having recently celebrated its fifth anniversary, the four-member review panel appointed by the Minister of Transport to review the CMA in May 2002 has finally 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 such participants as the St. Lawrence Seaway Management Corporation, various Canada Port Authorities ("CPAs") and pilotage authorities, terminal operators, business associations and community groups, 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 report's authors agreed with the observation made by many stakeholders that Canada is at risk of losing marine traffic to competing U.S. ports. In short, the panel recommended that the Government of Canada take responsibility for fostering and developing the construction and maintenance of marine infrastructure. In contrast 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 INDUSTRY

In comparing Canada with other countries, the panel notes 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 U.S. has created an increasingly uneven playing field for Canadian ports.

WELCOME NEWS FOR CPAS

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.

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The panel also recommended that the gross revenue charge payable to the federal government be calculated as a percentage of net income (as opposed to gross revenue, as is currently the case). The majority of ports, led by the Association of Canadian Port Authorities, had called for the complete abolition of the gross revenue charge on the basis that it diverted much-needed port development funds to the federal treasury.

As for the thorny issue of payments in lieu of taxes, the panel concluded that the federal government should make the payments on all federal lands managed by the CPAs, as is currently the case for the St. Lawrence Seaway Management Corporation.

The panel also noted that CPAs require access to direct federal funding to improve infrastructure, especially for those ports that are facing direct competition with U.S. ports.

Other key recommendations include the following:

- that the definition of "fees" in the CMA be clarified to specifically exclude lease and rental payments;
- that the process for approving real property transactions be streamlined, giving CPAs greater authority and flexibility with respect to disposing of surplus real property;
- that CPAs be allowed to retain proceeds from the sale of surplus real property in a trust or segregated fund for future port infrastructure investments;
- that the CMA be clarified so as to allow CPAs to participate in federal government programs available to Canadian companies generally; and
- that the process for increasing the borrowing limits in a CPA's Letters Patent be simplified and streamlined.

Notably absent from the report is any discussion of whether CPAs should be granted taxation powers, a benefit enjoyed by a number of ports in the U.S. The issue of allowing CPAs to enter into public-private partnerships—a growing trend in large-scale infrastructure projects—was also not addressed.

The panel also recommended the elimination of Canadian Coast Guard Marine Services Fees and

expressed the opinion that the Government of Canada should continue to pay for dredging in waters up to the boundaries of a port.

PORT GOVERNANCE AND CORPORATE MATTERS

The panel recommended amending the CMA to permit mergers of CPAs where certain conditions are met. As for directors, the panel suggested allowing individuals who serve as directors, officers or employees of users to also serve as directors of a port authority, a measure that would increase the available pool of potential directors for CPAs located in smaller communities. However, allowing for director and officer liability insurance under the CMA—or, for that matter, providing an indemnity for such individuals from the Treasury Board—did not form part of the panel's recommendations.

SUPPORTING THE ENVIRONMENT AND ENHANCING SECURITY

On an interesting note, the panel observed that increasing the use of marine transportation could help Canada reduce its production of greenhouse gases. The Panel also recommended that the federal government indemnify the CPAs, their directors and their officers for claims arising from environmental conditions that pre-date the CMA and bear responsibility for identifying, monitoring and reporting such hazards. CPAs, in turn, would shoulder the task of maintaining information about these environmental problems on a going-forward basis.

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.

PROMOTING THE MARINE INDUSTRY TO CANADIANS

Canadians generally lack a proper appreciation for the size and scope of the marine transportation sector, let alone its importance to the health of the nation's economy. The panel made note of this fact and proposed that measures be taken to raise the profile of the industry within the community at large.

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. The authors of the report 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 U.S. study regarding Seaway modernization. The report notes that the Government of Canada has not provided any funding for the operation of the Seaway for the past five years.

FUTURE REVIEWS OF THE CMA?

In order to deal with the rapid pace of change in the marine sector, the panel suggested that formal reviews of the CMA take place every five years.

CONCLUSION: CAUTIOUS OPTIMISM IS THE ORDER OF THE DAY

It remains to be seen how many of the panel's recommendations will ultimately be incorporated into legislation. The panel seems to have pointed the Minister of Transport in the right direction. Marine industry stakeholders therefore have good reason to remain optimistic about future changes to the CMA.

OBTAINING FURTHER INFORMATION ABOUT THE CMA REVIEW

The CMA review also contains recommendations and observations concerning public ports, pilotage and ferries. 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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