

TRANSPORTATION BULLETIN

April 2004

RIDING NEW WAVES

CANADIAN MARINE AND PORT SECURITY DEVELOPMENTS POST 9/11

Geopolitics has placed transportation at the forefront of public policy in Canada. Transport Minister Tony Valeri has recently stated that his “primary objective is to do whatever needs doing to make our transportation system more efficient and more competitive” and that “one of the key challenges is certainly the security of marine transportation.”¹ Although the 2004 Federal Budget contains an additional \$605 million over 5 years to address security issues, it is still unclear how much of that funding will be earmarked for marine and port security initiatives.

CANADA’S RESPONSE IN 2003

The Minister’s enthusiasm builds on his predecessor’s efforts in 2003 which included:

- In January 2003, the federal government allocating \$172.5 million for marine and port security;
- In February 2003, Transport Canada releasing *Straight Ahead: A Vision for Transportation in Canada*, which sets out the government’s strategy for an improved, secure and sustainable transportation system in Canada; and
- In October 2003, the Standing Senate Committee on National Security and Defence releasing its final report *Canada’s Coastlines: The Longest Under-Defended Borders in the World*, which set out numerous recommendations in order to improve Canadian marine security.

But why has transportation in general, and marine and port security in particular, garnered such unprecedented attention in the last few years?

ECONOMICS AND SECURITY

The reason is twofold: economic impact and security exposure. There are over 250 commercial ports in Canada. These ports annually handle over 3,700 large ships carrying over 3.5 million containers (of which fewer than 3% are checked). Over 100 billion worth of goods pass through Canada’s 19 nationally-significant port authorities (“CPAs”), generating over \$20 billion annually, and 250,000 direct and indirect jobs. Capital expenditures for 10 of the CPAs are expected to be roughly \$700 million between 2002 and 2006. Furthermore, the number of passengers and containers passing through North America’s ports is estimated to double within 20 years and triple in 50 years.

That the marine infrastructure generates and acts as a conduit for impressive economic activity is clear, but the sheer amount of material transported via the marine transportation infrastructure also creates many security challenges.

LEGISLATIVE FRAMEWORK

A complex web of federal legislation, regulations, and administrative practices governs ports and other marine stakeholders. In terms of legislation, all of the following directly apply: the *Marine Liability Act*, *Marine Transportation Security Act*, *Canada Shipping Act*, *Canada Marine Act*, and the *Canada Transportation Act*. In addition, soon after 9/11, the federal government assembled the Interdepartmental Marine Security Working Group, which is composed of a myriad of departments and agencies involved in formulating improvements to Canadian marine security.

Since 9/11, Canada has focused its marine security initiatives into three main areas: (1) international security initiatives; (2) domestic security initiatives; and (3) Canada/US border control initiatives.

¹Speech to Association of Canadian Port Authorities 4th Port/Government Interface, Gatineau, Quebec, February 23, 2004.

INTERNATIONAL SECURITY INITIATIVES

ISPS CODE IN EFFECT JULY 1, 2004

The International Ship and Port Facility Security (ISPS) Code and revisions to the 1974 Safety of Life at Sea Convention were adopted by the International Maritime Organization (IMO) in 2002. The ISPS Code, which comes into effect on July 1, 2004, is a new, comprehensive security regime that seeks to establish an international framework of co-operation between governments, government agencies and the shipping and port industries in order to:

- detect and take preventative measures against security incidents affecting ships or port facilities used in international trade;
- ensure the early and efficient collection and exchange of security-related information; and
- develop plans and procedures to guide the response to changing security levels.

The Canadian government has publicly announced that it is adopting the ISPS Code.

The central component of the ISPS Code is the requirement that all vessels of more than 500 gross registered tons that operate internationally and their ports of call have security plans in place by July 1, 2004. In addition, Canada is extending these requirements to include any ship weighing more than 100 gross registered tons, towing vessels greater than 8 meters, and passenger vessels carrying more than 12 passengers, and their ports. The main reason for this extension is to ensure harmonization with the US Coast Guard so that ships from either jurisdiction can access the other's ports.

PROPOSED MARINE TRANSPORTATION SECURITY REGULATIONS - APRIL, 2004

Following extensive consultations with all sectors of the marine transportation industry, the federal government released on April 3, 2004 its proposed *Marine Transportation Security Regulations* ("Proposed Regulations"), which are available online at <http://canadagazette.gc.ca/partI/2004/20040403/html/regle6-e.html>. The Proposed Regulations introduce new security requirements for the marine transportation industry that meet or surpass the ISPS Code requirements. In addition, the Proposed Regulations implement other provisions determined to be necessary based on risk assessments and the need to ensure the unimpeded flow of Canadian maritime trade, such as new regulations affecting cruise ships, passenger vessels, and ferries operating in Canada.

Compliance with the Proposed Regulations will be time-consuming and costly for all in the marine sector. But, as the following cost-benefit assessment from the Regulatory Impact Analysis Statement attests, Canada cannot afford not to comply:

A single day of lost trade due to a complete national shutdown in the marine sector can be estimated to cost the Canadian economy approximately \$280 million. This exceeds the first year implementation costs of the Proposed Regulations by a factor of more than 2.5:1. The predicted costs for year 1 equal about 0.1 percent of the value of marine trade in 2002. This does not take into account the value of preventing a potential attack in terms of major human, environmental or economic costs.

DOMESTIC SECURITY INITIATIVES

The government of Canada has also invested significant resources into:

- ensuring the Canadian Coast Guard can provide necessary safety services by funding major repairs to its fleet for shore-based infrastructure and capital replacement purchases;
- hiring private security analysts to improve anti-terrorism scrutiny at marine ports;
- increasing surveillance and tracking of marine traffic, including "near real-time" identification and tracking of vessels in Canadian waters;

- screening of passengers and crew on board vessels;
- installing new detection equipment in ports to screen containers for radiation;
- new funding for the enhancement of the RCMP Emergency Response Teams and the establishment of permanent investigator positions at major ports;
- enhancing collaboration and coordination among government departments and agencies;
- making further improvements to port security by establishing restricted areas and requiring people working within these areas to undergo thorough background checks; and
- increasing the requirement for advance notice by vessels entering Canadian waters to 96 hours.

CANADA/US BORDER CONTROL INITIATIVES

On December 12, 2001, Canada and the US entered into the Smart Border Declaration, an agreement containing a sweeping and open-ended 30-point action plan to improve Canada/US border security while at the same time ensuring trade between the two countries is not adversely impacted. Some of the marine-related initiatives arising from this Declaration include:

- enhancing security screening procedures for ships entering the St. Lawrence Seaway-Great Lakes system;
- supporting the US initiative that advance electronic cargo and information be supplied 24 hours (a) before landing at a US port, and (b) before leaving a US port with goods; and
- supporting the 24-hour advance vessel manifest filing rule which requires ocean carriers and non-vessel operating common carriers to provide US Customs with data (via an automated system) covering each container being loaded on the vessel bound for the US at least 24 hours prior to the loading of the container on the vessel, during which time the US Customs may review the filed data and issue a “no load” order if it feels that the container should not proceed to the US.

MARINE SECURITY – BEWARE OF THE UNDERTOW

In light of successive waves of marine security enhancements post 9/11, shippers and marine facilities (including ports) must be vigilant and ride the new requirements with care. Getting caught in the undertow by running afoul these requirements will threaten the ability of such players to participate efficiently and effectively in the marine transportation system both at home and abroad.

Written by Bill Hearn and Jeff Scanlon (Student-At-Law)

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.

TRANSPORTATION LAW GROUP

McMillan Binch is one of Canada's leading business law firms. Since its founding over a century ago, the firm has had a long association with the transportation industry. Our Transportation Group represents owners, carriers, shippers, ports, facility operators and insurers operating across all modes of transportation, particularly those in marine, road and air. In addition to providing day-to-day transportation law advice, we participate in major commercial transactions such as the purchase or sale of a transportation business and the sophisticated financing of transportation equipment, including cross border sale/leaseback and leasing contracts. We are also engaged in the regulatory and public policy aspects of transportation law. Members of the Transportation Group draw on the firm's other practice areas for advice on labour, taxes and duties.

Our particular experience includes:

- importation of non-Canadian vessels into Canada and coasting trade waivers
- shipbuilding
- transportation of dangerous goods
- financing of equipment purchases with cross-border leases and other forms of offshore financing
- restructuring of airline debt
- code sharing agreements between air carriers
- charter agreements for passenger and cargo aircraft
- bills of lading and the liability of carriers for damage to goods
- insurance claims
- oil pollution
- mediation and alternative dispute resolution

For further information, please contact one of the following members of the Transportation Law Group listed below:

Bill Hearn	416.865.7240	bill.hearn@mcmillanbinch.com
W.S. (Steve) Vaughan	416.865.7931	steve.vaughan@mcmillanbinch.com

MCMILLAN BINCH LLP

TELEPHONE: 416.865.7000
FACSIMILE: 416.865.7048
WEB: WWW.MCMILLANBINCH.COM