BILL C-58, THE NEW REGIME IN

LIMITATION OF LIABILITY

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Introduction to Limitation

Bill C-58[(1)] is an Act to amend the *Canada Shipping Act* which was introduced in the House of Commons on September 19, 1996. The Bill was referred to Committee before second reading and was reported back from Committee on December 11, 1996. The amendments will update Canada's legislative provisions in the area of limitation of liability and will permit the 1976 Convention on the Limitation of Liability for Maritime Claims and its amendments contained in the Protocol 1996 to have the force of law in Canada. Notable changes from the current limitation regime will be a substantial increase of ship owner's limits of liability, expedited procedures for amendment of limits, special liability limits for ships less than 300 tons, special provisions for passenger claims and application to all ships at sea and inland, not just seagoing vessels.

Originating in the mid-1700's, limitation of liability is a rule that a shipowner can limit his liability for damage afflicted to the person or property of others. The privilege arose as a matter of public policy to encourage and maintain shipping which now has become a matter of International Convention. Before the first *Limitation Act* was passed in England in 1734, it was possible for a shipowner to sustain ruinous losses because of the acts of the master in some remote part of the world where the shipowner was unable to exert any actual control. To encourage shipping, it was deemed advisable to limit the liability of the owner to the value of the ship and her freight where there was a theft of cargo by the master and crew. Successive statutes extended the right to limitation of liability to other types of situations or cases until it reached its present form.[(2)]

Limitation of liability provisions are expressly designed for the purpose of encouraging shipping and providing protection to shipowners against bearing the full impact of the often crippling monetary damages which could be sustained because of the negligent navigation of their ships on the part of their crews. In Canada it is currently given effect by Canadian Federal Maritime Legislation in Part IX of the *Canada Shipping Act*[(3)] and Regulations based largely upon the outdated 1957 Limitation of Liability Convention.[(4)]

Broadly stated, the limitation of liability rule is that the owner of a negligent ship need not necessarily compensate fully those who have suffered as a result of a ship colliding with and damaging another vessel or causing the loss of life or personal injury to passengers or other persons. The current Canadian limitation provisions do not absolve the owner of a ship of the responsibility for the negligent operation of a ship, but rather provide that the owner's liability may be limited to an amount calculated on the basis of the ship's tonnage. The ship's owner must show a complete absence of any fault or privity where the loss has been caused by a person on board his ship.

With the exception of the last three decades, for most of the long period of time that this rule has been applied, parties have rarely been able to establish fault or privity on the part of a shipowner. Indeed, until recently parties attempting to avoid the limitation principal by showing a fault or privity of the shipowner faced almost certain failure. In the case called The "Princess Victoria"[(5)] the master refused to sail an unseaworthy ship but the shipowner told the master he would be fired unless he set sail. The ship proceeded and subsequently sank in poor weather with 133 people losing their lives. Notwithstanding that rather disconcerting set of circumstances, the shipowner was able to limit his liability.

The Current CSA Limitation Regime

Canada is a signatory to the 1957 Liability Convention but did not ratify or accede to the Convention rather, parliament amended the *Canada Shipping Act* to give effect to provisions of the Convention. Section 575(1) of the *Canada Shipping Act* is the important section. For the section to operate in the owner's favour, he has the onus to show that he personally was not at fault or in privity. The owner must also show that he was not at fault or in privity with the vessel operator's negligence. The current right to limit liability is provided, pursuant to Section 577, to charterers, operators, and other ships' agents when they are not in actual fault or privity and as well to the master and crewmen of a ship with or without actual fault or privity.

The concept of actual fault or privity of the owner must be looked at objectively on the facts of each particular case in order to see what the ship owners did, or omitted to do, which could fairly be said to constitute actual fault on their part. Where the owners are a limited company, it is necessary to look at the organization in order to see of what individual it can fairly be said that his act or omission is that of the company itself.(6) In other words, the company that owns the ship must discharge the burden of showing that the person who represented its managing or directing mind was not at fault in any way related to the negligence causing the loss. Questions arise then as to whether the ship owning company failed to do what ought to have been done by a reasonable owner. Was there a lack of managerial control over the navigation of the vessel or vessels?

The present limitation regime contained in the *Canada Shipping Act* based on the 1957 Convention provides two distinct limitation sums. In the case of personal injury or loss of life, the shipowner's liability will be limited to a total of 3,100 Gold Francs per ton. Where cases involve damage or loss to property alone, the shipowner will be entitled to limitation at the sum of 1,000 Gold Francs per ton. Pursuant to regulation, the equivalent dollar value of Gold Francs is determined by converting the Gold Francs into International Monetary Fund Special Drawing Rights (SDR) at the exchange rate of 15.075 Gold Francs per SDR. The SDRs are then converted into Canadian dollars according to published current exchange rates. Recently one SDR was valued at $1.893 Canadian. Therefore the calculation of limitation of liability for damage to property alone amounts to approximately $125 per ton, and for loss of life or personal injury together with property damage, to $376 per ton. Accordingly, for vessels 300 tons or less (deemed to be 300 tons) the limitation amounts for property alone and property together with injury or loss of life are approximately $37,500 and $113,000 respectively.(7)

For most of the last 30 years, courts in Canada have evidenced a reluctance to permit shipowners the privilege of limiting liability for damages. Clearly, judges were influenced by the knowledge that claimants would unfairly be burdened with a marine loss because the limitation figures were so low. Furthermore, some of the original policy reasons behind the limitation rule were no longer thought valid. In the early days of sail, the shipowner was out of communication with the ship, often for months. Underwriters were often reluctant to become involved in these ventures. However, satellite communication, global positioning, sat-nav and the like now allow shipowners immediate contact with their vessels around the world and marine insurance markets have developed to provide coverage for losses unavailable in the early days.

The international community also became increasingly concerned with some of the financial hardships to claimants. The 1976 Convention on Limitation of Liability(8) was felt to remedy some of these difficulties by creating a more equitable balance by expanding the right to limit liability while increasing the monetary amount of liability which could be recovered. Canada is not a party to the 1976 Convention being of the view that the limits were unreasonably low. The result over the last 20 years was the retention of the original limitation provisions and monetary limits discussed above. The obvious lack of currency or temporal relevance was reflected in the reluctance of Canadian courts to allow claims for limitation of liability by shipowners. Indeed, until the recent decision of the Supreme Court of Canada in The "Rhone"(9), it was considered by some that limitation of liability had been judicially extinguished in Canada. In The "Rhone", the Supreme Court of Canada revived the concept of limitation of liability as part of Canadian maritime law.

In The "Rhone", Canada's court of final resort permitted the tug owner to limit liability on the basis that the negligent navigation of the tug's skipper giving rise to liability could not on the evidence be attributed to that of the company itself. The Supreme Court noted that several commentators have drawn into question the continued need for a regime of limited liability in favour of ship owners, but stated:

"However, whether this regime is responsive to modern reality it is a question of policy to be determined by parliament and not the courts whose task is to interpret and give effect to the intention of parliament."(10)

Mr. Justice Lowry in The "Sea Imp VIII"(11) referred to the recent recognition of the privilege of limitation of liability by the Supreme Court of Canada and held that the tug owner was entitled to limit its liability as the master's error was in the way he conducted the transit, an error in navigation.

Throughout this time as the Canadian Courts were struggling with the antiquated limitation of liability provisions in the *Canada Shipping Act* based on the 1957 Convention, the international community was recognizing that many countries considered the limits in the 1976 Convention to be inadequate. Many contracting states were of the view that if the limits in the global limitation regime were not substantially revised, the ship owner's entitlement to limitation of liability for maritime claims, not a popular concept in many countries, particularly with the courts, might be in significant danger.(12)

In May 1996, a diplomatic conference was convened and the 1976 Convention was amended by the Protocol of 1996.(13) The Protocol that was adopted includes several important modifications to the international limitation regime. Of note, the monetary limits of the Convention have been significantly revised and increased and a simpler procedure for future amendment of monetary limits has been included. Also, the 1996 Protocol removes the overall limit of 25 million SDR in the case of passenger limits provided for in the 1976 Convention.

Bill C-58 - Canada's New Limitation Regime

For Canada then, the effect of Bill C-58 is to implement the 1976 Convention together with the amendments contained in the 1996 Protocol bringing Canada from the equivalent of the dark ages to the forefront of the international community with respect to limitation of liability.

Bill C-58 is structured such that the 1976 Convention and the 1996 Protocol are attached as schedule VI with the relevant existing sections of the *Canada Shipping Act* repealed or amended. New section 575 provides that Articles 1-15 of the 1976 Convention have the force of law in Canada. Section 576(2) sets out that Canada is a State Party to the Convention.

The significant differences between the current Canadian limitation regime and the proposed amendments to the *Canada Shipping Act* contained in Bill C-58 are as follows:

1. The burden of proving that the ship owner is not entitled to limit his liability falls on the injured party. Article 4 of schedule VI sets out the conduct which will bar the right of limitation. A person seeking to limit his liability will be denied that right:

if it is proved that the loss resulted from his personal act or omission, committed with intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

The burden of proof has now shifted from the ship owner to the injured party. The injured party could try to prove a personal act or omission was committed with intent to cause loss. If successful, then the ship owner's right to limit liability would be denied. Marine underwriters of course would be interested in this result in order to avoid liability under a marine insurance policy leaving the insured party with the less appetizing prospect of recovery from the ship owner alone. It is not difficult to envision the ship owner abandoning the

arrested vessel as he deftly pulls the corporate veil closed. The second part of the test is that the personal act or omission was committed recklessly and with knowledge that such loss would probably result. This wording raises questions as to what acts would constitute reckless acts on the part of a director of a ship owning company. How the Courts will consider the wording is unknown, but as necessity is the mother of invention, claimants and their legal counsel will no doubt be creative. However, under the second part of the test, it is not expected that the ship owner would be faced with a denial of coverage which, likely, would provide the claimant with a better chance of recovery.

2. A second difference between the current regime and the proposed amendments is that the unit of account of calculating the limits is no longer the gold franc but the Special Drawing Rights (SDR) of the International Monetary Fund (IMF). This has eliminated the calculations and formula currently required to determine the appropriate limit for a particular vessel.

3. The third difference is that a greater class of persons is now entitled to limit liability. Article 1 provides that the ship owner, salvor, insurer, and "any person for whose act, neglect or default the shipowner or salvor is responsible" shall be entitled to avail themselves of the limitation of liability provided for the Convention. Section 576(3) expands Article 1 by stating that a ship owner includes a person with an interest in or possession of a ship as well as the charterer, manager or operator whether the ship is seagoing or not.

Of considerable importance on the British Columbia coast, is the monetary limits for smaller vessels. Article 15 of the Convention in schedule VI to Bill C-58 permits each state to make its own system of limitation for vessels under 300 tons as well as for ships navigating on inland waters. Section 578(1) of Bill C-58 provides that the maximum liability for a ship with a tonnage of less than 300 tons is $1 million for claims for loss of life and personal injury; and all other claims, $500,000 (contrasted with approximately $113,000 and $37,600 respectively under the present regime).

It must be noted that the loss of life/personal injury fund will no longer represent the full extent of liability in respect of all claims as it presently does. Where there are both property claims and personal injury or loss of life claims together arising out of the same accident, and where the loss of life/personal injury fund is insufficient, the new regime will maintain the right to proceed rateably with the other claims against the property loss fund.

Another important distinction with the new regime is that the tonnage figures represent gross tonnage which is a figure much higher than limitation tonnage used currently. The obvious effect is that vessels will attract higher limits.

Section 579 of Bill C-58 provides for a more expedient process by way of Order in Council to amend or increase the monetary limits.

For larger vessels, Bill C-58 contemplates reference to Article 6 of the schedule VI. Article 6 is divided into two funds, one for loss of life/personal injury and the other for all other claims. The following graph sets out the limits in units of account (SDRs).

The limits of liability set out in Article 6 can be shown as follows:

Bill C-58 Limits of Liability (SDR)

Personal Injury/

Ship Tonnage (GRT) Loss of Life Other Claims (Prop.)

0-2,000 2 million 1 million

2,001-30,000 add 800 for each GRT add 400 for each GRT

3,001-70,000 add 600 for each GRT add 300 for each GRT

over 70,000 add 400 for each GRT add 200 for each GRT

Below is a table comparing the limits of liability between the present *Canada Shipping Act* Part IX regime and the new limits in Bill C-58. The limits are calculated based on a SDR value of CDN$1.893 as at 28 February 1997 and are in Canadian dollars.

Comparison of Limits Between CSA Part IX

and Bill C-58 (CDN Dollars)

Canada Shipping Act-Part IX

Personal Injury/

Ship Tonnage Loss of Life Bill C-58

300 113,000 1,000,000

500 188,000 3,700,000

3,000 1,130,000 5,300,000

30,000 11,300,000 46,189,000

70,000 26,370,000 91,600,000

100,000 37,600,000 114,300,000

Any Other Claims (Prop.)

300 37,600 500,000

500 62,700 1,890,000

3000 376,000 2,650,000

30,000 3,760,000 23,091,000

70,000 8,790,000 45,800,000

100,000 12,500,000 57,100,000

As mentioned above, Article 6(2) allows that if the fund for personal injury/loss of life claims is insufficient, then the fund for other claims will be available on a pro-rata basis.

Salvors

Article 1(1) allows salvors to limit their liability with ship owners, although salvors are treated differently.

Article 6(4) provides that where the claim is made against the salvor who is not operating from a ship or who is operating on the ship which is the object of salvage, then the limit of liability is based on the gross tonnage of 1,500 tons. If the claim is against the owner of a ship involved in salvage from that ship, or the salvor carrying out its task from that ship, then the standard limitations tabled above apply.

Passenger Claims

The limits for carriage of passengers are also treated separately under section 577 in Bill C-58. Where claims made by the passenger of a ship for which no certificate is required under part V of the *Canada Shipping Act* (i.e. pleasure yachts and vessels under 5 tons not carrying more than 12 passengers), the ship owner's maximum liability will be the greater of 2 million SDRs ($3,786,000 at 28 February) and the number of SDRs calculated by multiplying 175,000 SDRs by the number of passengers onboard. For ships required to have a certificate under part V of CSA, the ship owner's maximum liability will be calculated in accordance with Article 7 of the Convention, that is, 175,000 SDRs multiplied by the number of passengers the ship is authorized to carry.

Dock, Canal or Port

Section 583 of the proposed amendments contained in Bill C-58 provides for the maximum liability of an owner of a dock, canal or port calculated as the greater of CDN$2 million and multiplying $1000 by the number of tons of the tonnage of the large ship that, at the time of the damage, or within five years prior to that time, had been within the area of the dock, canal or port.

Lastly, section 580 specifies that the Admiralty Court has exclusive jurisdiction in relation to the constitution and distribution of a limitation fund. Admiralty Court is defined in section 2 of the CSA as meaning the Federal Court of Canada.

Pollution Damage

Limitation of liability for claims for pollution damage have also changed. In the case of ships which are not Convention ships (i.e. a seagoing ship carrying oil in bulk as cargo) a ship owner's maximum liability is calculated, for ships below 300 tons in accordance with section 578 and for ships exceeding 300 tons in accordance with Article 6 (see tables above).

Under section 679, the maximum of liability of an owner of a Convention ship or ship that does not exceed 5,000 tons is 3 million SDRs ($5,679,000). For ships larger than 5,000 tons, limitation is the lesser of 59.7 million SDRs and 3 million SDRs plus 420 SDRs for each additional ton over 5,000 tons. A ship owner will not be entitled to limit if it is proved that the oil pollution damage resulted from his personal act or omission with intent to cause that pollution damage, or recklessly and with knowledge, that pollution damage would probably result.

In conclusion, when Bill C-58 with the amendments to the *Canada Shipping Act* is passed into law, the 1976 Convention on Limitation of Liability as amended by the Protocol of 1996 will come into force in Canada. Clearly, this will significantly alter the limitation of liability regime for ship owners and claimants. By providing the ship owner with a right to limit his liability that is far more difficult to break, coupled with the significantly increased monetary limits, one would expect the amendments will remove a great deal of the uncertainty existing under the present limitation regime.

1. [1] Bill C-58, an act to amend the *Canada Shipping Act* (maritime liability), 2nd sess. 35th parl., 1996.

2. [2] Vancouver v. Rhodes [1955] D.L.R. 139, at 140.

3. [3] R.S.C. 1985, c.S-9.

4. [4] International Convention relating to the limitation of the liability of owners of seagoing ships, Treaty 355 Brussels, October 10, 1957, U.K.T.S. 52 (1968) Singh 1348.

5. [5] [1953] 2 Lloyds Reports 619.

6. [6] The "Lady Gwendolen" [1965] 1 Lloyds Rep. 335.

7. [7] Canada Shipping Act, s. 579, Note 2 above.

8. [8] Convention on Limitation of Liability for Maritime Claims, Treaty 695, London, November 19, 1976. 16 J.L.M. 606.

9. [9] "Rhone" (The) v. "Peter A.B. Widener" (The), [1993] 1 S.C.R. 497.

10. [10] "Rhone" (The), ibid at 531.

11. [11] Meeker Log and Timber Ltd. v. "Sea Imp VIII" (The) (1994) 1 B.C.L.R. (3d) 320 upheld on appeal.

12. [12] See paper presented by A.H.E. Popp, Senior General Counsel, Admiralty & Maritime Law Secretariat, Department of Justice at the 11th Commonwealth Law Conference, Vancouver, B.C., August 25-59, 1996, where it is also noted that the Convention took ten years to enter into force and so far as at August 1996 has only attracted 28 contracting states.

13. [13] 1996 Protocol, Conference document LEG/CONF. 10/8.