

## The Canadian Maritime Law Association



## L'Association Canadienne de Droit Maritime

22 April 2010

Brian.Dillon@gov.bc.ca

Financial and Corporate Sector Policy Branch  
Ministry of Finance  
Room 109 – 617 Government St.  
PO Box 9470 Stn Prov Gov't  
Victoria, BC V8W 9V1

Attention: Brian Dillon

Dear Mr. Dillon

We write in response to the Discussion Paper circulated by Brian Dillon of the BC Ministry of Finance entitled "Regulation of Marine Insurance in British Columbia".

The Canadian Maritime Law Association ("CMLA") is an organization consisting of practicing maritime lawyers and other companies and persons interested in the shipping and maritime industries. It includes constituent members representing various maritime industry groups. The CMLA is Canada's representative to the Comité Maritime International, an organization founded in 1897 to promote uniformity and reform in international maritime law and commerce.

The mandate of the CMLA is to advance the development of effective, modern commercial maritime law within Canada and the international shipping community. Maritime matters entwine with Canada's international trade, transportation and environmental obligations.

The importance of uniform maritime law across Canada as an element of the federal jurisdiction over navigation and shipping was emphasized by the Supreme Court of Canada in *Walley v Whitbread* [1990] 3 SCR 1273. The Court stated "the very nature of the activities of navigation and shipping, at least as they are practiced in this country, makes a uniform maritime law which encompasses navigable inland waterways a practical necessity."

In 1983 the Supreme Court of Canada emphasized that marine insurance is also an integral element of navigation and shipping (see *Triglav v. Terrasses Jewellers*, [1981] 1 SCR 283). On behalf of the Court Chouinard J., stated:

"Marine insurance, which preceded other forms of insurance by several centuries, originated as an integral part of maritime law....

In my opinion, the Attorney General of Canada is correct in regarding marine insurance as a matter falling within property and civil rights, strictly speaking, but one which has nonetheless been assigned to Parliament as a part of navigation and shipping....

It is wrong in my opinion to treat marine insurance in the same way as the other forms of insurance which are derived from it, and from which it would be distinguishable only by its object, a maritime venture. It is also incorrect to say that marine insurance does not form part of the activities of navigation and shipping, and that, although applied to activities of this nature, it remains a part of insurance.

**Marine insurance is first and foremost a contract of maritime law. It is not an application of insurance to the maritime area.”** (*emphasis added*)

It is important to understand that marine insurance was ruled in 1983 to be a matter of federal jurisdiction within the non-statutory body of Canadian maritime law even in the absence of a federal marine insurance act. The *Marine Insurance Act (Canada)* was not enacted until a decade later.

The CMLA appreciates that the objective of FICOM and the Insurance Council of BC is to protect the consumers of insurance products in BC.

At the same time, the CMLA believes that the regulatory changes proposed by FICOM and the Insurance Council of BC impact marine insurance in ways that are constitutionally impermissible, impact Canada’s international trade and treaty obligations and negatively affect BC businesses by increasing the cost of insurance and limiting market choices thereby making BC less attractive to ship owners and others as a place to do business.

### **Constitutional Issues**

The CMLA submits that regulation of the sale of marine insurance is subject to inter-jurisdictional immunity and that in any event, if the provinces purport to enter that field, that activity constitutes an impairment of the federal jurisdiction over navigation and shipping that would not be permitted.

The CMLA is familiar with the Supreme Court of Canada decision in *Canadian Western Bank v. Alberta* 2007 SCC 22, [2007] 2 S.C.R. 3 wherein the Court reached the conclusion that neither interjurisdictional immunity nor the paramountcy doctrine applied to render provincial laws regulating the sale of insurance products inapplicable or inoperative when those products were sold by a federally regulated bank.

The content of most insurance policies **except** for marine is determined and regulated by provincial legislation. The content of a marine insurance policy, on the other hand, is strictly governed by the *Marine Insurance Act (Canada)* and before the existence of that Act, by non-statutory federal maritime law (as stated in the *Triglav* case, above).

Because marine insurance is part and parcel of federal maritime law, it is distinct from other lines of insurance which have been regarded primarily as part of provincial property and civil rights

since the Privy Council decision of *Citizens' Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96

The BC Ministry of Finance itself recognizes that the content of a marine insurance policy is strictly subject to federal law. As stated in the BC Ministry of Finance News Release 2009FIN0010-000331 dated September 15, 2009 with respect to amendments to the provincial *Insurance Act*:

“Proposed changes also include the repeal of the Insurance (Marine) Act. Marine insurance contracts are exclusively a matter of federal jurisdiction, and are subject to the federal Marine Insurance Act.”

Furthermore, BC's newly amended *Insurance Act* expressly provides that it does not apply to marine insurance.

Therefore, BC is purporting to regulate the sale of marine insurance policies when it will have no experience with or jurisdiction over the contents of those policies.

The *Canadian Western Bank* decision confirms that inter-jurisdictional immunity still applies to situations covered by precedent and to situations where its application is necessary to enable Parliament to achieve the purpose for which exclusive jurisdiction was conferred upon it. Both situations arise in relation to marine insurance and the federal jurisdiction over navigation and shipping.

As stated, the *Triglav v. Terrasses Jewellers* case stands for the principle that regulation of marine insurance is indispensable or necessary to Parliament's exclusive jurisdiction over navigation and shipping. The case is also a precedent for the application of the of the interjurisdictional immunity doctrine to marine insurance. Put simply, marine insurance is one of the exceptions recognized in *Canadian Western Bank* where the inter-jurisdictional immunity doctrine still applies.

In any event, the BC regulation of the sale of marine insurance would constitute an impairment of the federal jurisdiction over navigation and shipping. This is evidenced, in part, by the fact that the effect of the proposed provincial regulation will preclude or materially restrict access to marine insurance markets by the BC shipping industry and exporters/importers. This impairment is certain to occur because federal Canadian maritime law mandates that vessels have insurance for certain types of exposures and activities, as will be described herein.

Therefore, such regulation is a constitutionally impermissible intrusion on a federal power.

An analogous situation is recognized in the *Canadian Western Bank* decision, wherein the Supreme Court of Canada noted (at para. 54):

**Equally, a provincial law that purported to regulate the access of its residents to**

**banks would likely meet the same constitutional objections as provincial laws that purported to regulate the collection and discharge of international or interprovincial cargo and passengers.** In *Winner*, the Judicial Committee held that a provincial law which required a particular licence to be obtained before a bus company operating an interprovincial and international bus service could “embu[s] or debu[s]” passengers would “destroy the efficacy” of the federal undertaking (pp. 668 and 675). For a province to regulate that part of the undertaking would be to usurp the regulatory function of the federal government. Access to passengers and cargo, in other words, was absolutely indispensable and necessary to the carriers’ viability: see to the same effect *Registrar of Motor Vehicles v. Canadian American Transfer Ltd.*, 1972 CanLII 13 (S.C.C.), [1972] S.C.R. 811, and *R. v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd.*, [1960] O.R. 497 (H.C.J.).

Access to marine insurance coverages and competitive rates is absolutely indispensable and necessary to Canadian marine carriers’ and importers’/exporters’ viability, particularly where the federal government already requires and will require compulsory insurance for various and increasing types of marine activities and the sale of cargo internationally typically involves the assignment of a marine cargo policy along with title to the goods.

An insurance broker’s obligations and rights in relation to marine insurance are addressed in the *Marine Insurance Act (Canada)* (see ss 49, 50), as is the broker’s conduct as agent of the insured (ss. 21, 22, 48, 49) . Therefore, unlike other types of insurance, there is federal legislation specifically addressing the conduct of the sale of marine insurance and directly affecting the legal status and obligations of insurance intermediaries such as brokers.

Parliament's exclusive jurisdiction to legislate in respect of navigation and shipping would be impaired by provincial regulation of marine insurance because *the Marine Insurance Act (Canada)* addresses the conduct of marine insurance intermediaries and the federal government regulates off-shore marine insurers generally.

With p&c insurance there is no doubt that the contents of the policies are regulated by BC law. Therefore, it may be reasonable that aspects of the sale of such general commercial policies be subject to both federal and provincial authorizations. However, the sale of marine insurance should be subject to only federal law.

## International Obligations

Canada has long been a party to international conventions regulating the liability for and compulsory insurance of heavy oil cargoes carried in bulk. The *Canada Shipping Act, 2001*, outlines a mandatory insurance regime to respond to the discharge of oil from vessels which carry oil as a cargo (see s. 167).

Canada recently also enacted the international Bunker Convention by scheduling it to the *Marine Liability Act*. S. C. 2009, c. 21, s. 17, Schedule 8. The practical commercial effect of the Bunker Convention is to extend the requirement for compulsory insurance to thousands of Canadian registered commercial vessels that do not carry petroleum cargoes but do carry marine fuels to operate their engines or other machinery on board. The Bunker Convention applies not only to ships with engines but to all vessels over 1000 GRT, such as barges without their own propulsion that carry petroleum fuel for operation of cranes, cargo pumps, electrical lighting generators, etc. This could potentially impact the operators of any of the 285 Canadian barges over 1000 GRT registered in the Pacific region alone.

The Bunker Convention requires that vessels of certain sizes carry mandatory insurance in the amounts set out below and carry proof of this:

Tonnage	Insurance Required (SDRs <sup>a</sup> )
2,000 or less	1,000,000
2,000 – 30,000	400 per ton
30,001 – 70,000	300 per ton
Over 70,000	200 per ton

To use a local example, this would mean that the mandatory insurance for a fuel pollution spill from a collision involving a 4715 GRT crane barge would be \$ 2,650,720. This would be the mandatory insurance amount only with respect to pollution claims pursuant to the Bunker Convention and does not include any prudent liability amounts for personal injury or third party property claims

To explain how proof of satisfying this demand for mandatory insurance is customarily given, we cite from the Transport Canada web page dealing with the Bunker Convention:

### *1. What is a Bunkers Convention Certificate?*

*A Bunkers Convention Certificate is issued by a State party certifying that insurance is in*

---

<sup>a</sup> An SDR, or Special Drawing Right, is an international currency figure which fluctuates daily. Its current value is approximately 1 SDR = Cdn \$ 1.52.

*force. A ship over 1,000 GT must have on board a Bunkers Convention Certificate when flying the flag of a State party or trading to a State party. Without evidence/proof of insurance, States will not issue a Bunkers Convention Certificate.*

## **2. What is an acceptable form of security?**

*Security can be in the form of insurance policy or contract, a bank guarantee, letter of credit, etc. Most ships are insured with a Protection and Indemnity (P&I) Club, which issues a "Blue Card".*

## **3. What is a P&I Club and a "Blue Card"?**

*A P&I Club is a protection and indemnity association of shipowners or operators, offering mutual insurance, generally for third-party liability risks and the defense of claims. There are 13 Clubs that are a member of the International Group of P&I Clubs, which insure the majority of the world's tonnage. A "Blue Card" is issued by the P&I Club to provide evidence that there is in place insurance meeting the liability requirements of the Bunker Convention.*

The *Marine Liability Act* also confers authority to prescribe mandatory insurance for commercial passenger vessels, but necessary regulations are not yet in place. The Government of Canada intends to implement compulsory insurance requirements for all other passenger vessels. Such a requirement would also demand the availability of competitively priced coverage from P&I Clubs to provide the necessary capacity and limits.

The *Marine Liability Act* compensation regime for injury to ship passengers and their baggage under the Athens Convention extends to government ferries as well as private carriers. Since Parliament has mandated a regulatory regime to provide for compulsory insurance at least to Athens Convention limits, a passenger vessel would need coverage of at least \$266,000 for every passenger it is authorized by regulation to carry. There are 1,683 Canadian registered passenger vessels in the Pacific region alone to which a compulsory passenger liability insurance regime could apply. Of these 1683 vessels, 39 are over 1000 GRT and these must also have insurance certificates for Bunkers Convention limits. It is important to note that implementation of compulsory insurance will almost certainly be cumulative in order that there be the capacity to respond to both fuel spill and passenger risks. A study conducted for Transport Canada ([www.tc.gc.ca/eng/policy/report-acf-marine-rcpi-201.htm](http://www.tc.gc.ca/eng/policy/report-acf-marine-rcpi-201.htm)) shows the domestic Canadian marine insurance market itself simply lacks the capacity to meet planned passenger liability insurance requirements.

Should BC continue to restrict the access of BC ship owners to P&I Clubs, BC ship owners may be prevented from complying with federally mandated insurance requirements with respect to cargo, fuel and bunker pollution and, in due course, passenger liabilities.

## **Impact on International Maritime Business in BC**

Obtaining authorization as an insurer in BC involves submitting to the regulatory authority of the Financial Institutions branch of the BC government and complying with disclosure requirements including financial information.

A challenge that the shipping industry faces in BC is that the small collective amount of marine insurance premiums for BC risks means that the cost and potential benefit return of registration is simply not attractive to some foreign insurers. While the BC maritime community needs the participation of those insurers to ensure competitive insurance rates, those insurers do not need BC business.

Since 1986, BC has promoted itself as an International Maritime Centre. The present IMC objectives are:

- Provide advice and input to the federal and provincial governments regarding the legislative and regulatory framework required to enhance the development of the international shipping sector in Canada and British Columbia;
- Promote British Columbia to the international shipping industry as a maritime centre location and actively solicit shipping companies to relocate operations; and
- Provide advice, information and assistance to shipping companies interested in establishing, expanding or retaining shipping operations in British Columbia.

*(See [www.tted.gov.bc.ca/MIT/SBIIO/IBC/Pages/InternationalMaritimeCentre.aspx](http://www.tted.gov.bc.ca/MIT/SBIIO/IBC/Pages/InternationalMaritimeCentre.aspx) )*

The benefits for BC are the local employment of hundreds of people as well as the establishment of companies providing service to vessel owners.

Many of those vessel owners go directly to the London market for their insurance. If they have to layer in a cost for using BC brokers, BC becomes a less attractive place to do business. If the proposed regulations continue to apply to marine insurance, it is possible that BC ship owning companies which need P&I Club insurance will have to:

- a. place their business with the one P&I Club that is registered in BC,
- b. if that Club does not have the capacity or coverage that the shipowner wants, the ship owner can place it abroad. But they can only do this using a BC licensed broker and pay that increased cost.
- c. if a second P&I Club was to register in BC, then it is likely that the BC ship owner **MUST** place their business with one of the two P&I Clubs, as there would be no reason that coverage in BC was not available. In other words, instead of choosing amongst the 13 Clubs that are members of the International Group, they would be limited to the one or two registered clubs. They would have vastly reduced choice as to price and available coverage.

As described, there is insufficient capacity amongst BC authorized insurers to meet the need for insurance that responds to marine liabilities, particularly when the federal government has made liability insurance mandatory for certain vessel owners.

There is no federal requirement for a vessel to obtain hull insurance. However, it is doubtful that the BC authorized marine insurance market place has the capacity to meet the demand for hull insurance.

If the sale of marine insurance remains subject to provincial regulation and the proposed restriction on broker licenses, a BC ship owner would not be permitted to obtain hull insurance elsewhere, even if premiums were cheaper or the claims handling services were superior, until the capacity of the BC authorized marine insurance hull market was exhausted. Except for those ship owners who sought insurance *after* the exhaustion of the capacity of the BC authorized hull insurers, this would limit the market choices available to a BC ship owner and would presumably increase the cost of insurance.

With respect to cargo insurance, not only would every shipment involving the typical assignment of insurance be illegal if the insurance was not placed in the first instance with a BC insurer, the same restrictions to finding competitively priced insurance would arise.

### **Other Jurisdictions**

For the constitutional and business reasons described herein, the CMLA submits that BC should not regulate the sale of marine insurance at all.

There may be some merit in reviewing the regulatory regime applicable to marine insurance in Australia.

Australia has recognized the unique or “atypical” nature of marine insurance and that sophisticated consumers of marine insurance do not need the same protection as the consumer of a home owner’s policy.

Following the insolvency of the p&c insurer HIH in Australia in 2001, Australia commenced a massive review of the regulation of insurers. It enacted the *Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Act, 2007, No. 149, 2007*. It uses the “carrying on business in Australia” test akin to how our federal test now operates. Nevertheless, its regulatory exceptions are useful for FICOM to consider with respect to the international and atypical nature of marine insurance.

Insurance business in Australia must be conducted with an Australian authorized insurer except for:

- a. insurance policies placed by high valued insureds (income of at least A\$200 million/year or A\$200 million in assets in Australia or at least 500 employees)
- b. atypical risk contracts including owning, chartering, managing, operating or being in possession of vessel other than a pleasure craft (which has a statutory definition)
- c. risks that cannot reasonably be placed in Australia by reason of there being no insurer in Australia, the terms (including price) are substantially less favourable or there is another circumstances which would be substantially less favourable. (The example given is a pre-existing relationship and maintenance of that relationship has significant benefits for the insured).
- d. the law of the foreign country requires a certain insurer

There is no exemption for cargo insurance. However, cargo insurance policies placed by shippers or consignees abroad would not be caught because the test for licensing of insurers in Australia is whether they are “doing business in Australia”. The proposed BC test, based on location of the risk would require an exemption.

Therefore, the CMLA suggests that if BC is considering the exceptions that Australia applies, it should add an exemption for cargo insurance. Otherwise BC shippers and importers could not legally accept the assignment of a marine insurance cargo policy as part of a sales transaction unless that policy was placed with a BC authorized insurer, even if the transaction was handled abroad. Under the regulatory amendment, before the cargo leaves BC or after it arrives by vessel, the risk of its loss is located in BC (assuming that it is then owned by a BC resident) and it can only be insured by a BC authorized insurer. Enforcement of such a requirement would be impossible with cargo shipments unless FICOM found a means of intercepting the insurance documents of every individual cargo shipment on every ship attending at a BC port. The Port of Vancouver is the largest port in Canada and handles the largest tonnage of goods on the west coast of North America.

Likewise, an exemption for any marine insurance product mandated by the federal government should be included to ensure that there is sufficient capacity and price competitiveness to meet the demand.

## **SUMMARY**

The application of “risk located in BC” test and the proposed changes to the sale of marine insurance makes our province insular when we should be striving to be international. These changes could discourage ship owners and any business relying heavily on international marine trade from locating in BC as their freedom to contract for marine insurance on the international market would be seriously restricted.

The Supreme Court of Canada has clearly mandated uniformity in maritime law across Canada and specified that marine insurance is an integral element of Parliament's jurisdiction over navigation and shipping. The regulation of marine insurers by 10 provinces and 3 territories would fragment the goal of uniformity and would be an unjustified intrusion by the provinces on the Parliament's exclusive jurisdiction over navigation and shipping. We expect that inclusion of marine insurers under the BC regulatory regime will lead to constitutional challenges over jurisdiction resulting in more uncertainty to maritime law, not less.

Should the province be concerned about exempting marine insurance generally, notwithstanding the fact that it is an integral part of navigation and shipping even on inland waters, as held by the Supreme Court of Canada in *Whitbread v. Walley*, we encourage the Ministry and Council to consider implementation of exceptions similar to those used in Australia as well as a general exemption for marine cargo insurance.

We would be pleased to respond to any questions or concerns that you may have that arise from our submissions.

Yours Truly,

Canadian Maritime Law Association



---

Christopher J. Giaschi  
National Vice-President  
(604) 681-2866/giaschi@admiraltylaw.com



---

Shelley Chapelski  
Chair Marine Insurance Committee  
(604) 641-4809/sac@bht.com