

October 2009

MARINE LIABILITY ACT

The *Marine Liability Act* is largely a consolidation statute, collecting together statutory liability issues such as apportionment of liability, limitation of liability, civil liability for pollution, and liability for carriage of passengers. The various liability regimes under the act, and which incorporate international conventions by reference, are as follows:

1. Canadian provisions governing the identification of "dependants" in personal injuries and fatalities, provisions governing the apportionment of liability in tort claims and the two year time limitation with respect to causes of action arising from collision.

2. Limitation of Liability – 1976 Convention and 1996 Protocol

The Convention and the Protocol have formally been incorporated into legislation with one reservation. On May 9, 2008, Canada ratified the Convention and the Protocol which came into force on August 7, 2008, thus allowing shipowners and claimants to rely on the Convention and Protocol in limitation proceedings in other party states. In its ratification, Canada's sole reservation was with respect to claims for "raising, removal, destruction or rendering harmless of a ship which is sunk, wrecked, stranded or abandoned."

3. Passengers – Athens Convention, 1974, and 1990 Protocol

The 1974 Convention and 1990 Protocol have been

incorporated into Canadian legislation. Parliament has restricted the meaning of "ship" to exclude air cushion vehicles and vessels propelled manually by paddles or oars. In addition, the statute has been amended to exclude certain adventure tourism activities that meet the following conditions: participants are exposed to the aquatic environment, existence of safety procedures and equipment beyond the norms used otherwise in the carriage of passengers, and participants are exposed to greater risks which have been explained and accepted in writing. However, these adventure tourism operators would nevertheless retain their entitlement to limit their liability under other parts of the act.

The Canadian Department of Transport still has the intention of proceeding with a regulatory plan under the *Marine Liability Act* to implement the compulsory insurance requirement of the Athens Protocol 2002, now that the concerns of adventure tourism operators who are not able to obtain adequate insurance cover have been addressed.

4. Carriage of Goods by Water – forum conveniens, waybills and rail carriers' issues

Canada has long since adopted and incorporated the Hague-Visby Rules. The Canadian government as of September 10, 2009, has not announced whether Canada will sign on to the Rotterdam Rules.

Canada has given a statutory right to claimants, whether carriers or shippers, to sue in Canada on

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contracts of carriage of goods, regardless of whether they had agreed to litigate or arbitrate in another forum. The Federal Court of Appeal in the **Cougar Ace** decision has decided that the court still retains jurisdiction to decide whether the Canadian court is the convenient forum for the dispute in question.

Canada has not yet amended its bills of lading legislation which is still modeled on the British 1855 Bills of Lading Act. The Federal Court in **Cami Automotive v Westward Shipping** has recently decided that the House of Lords' decision in the **Raffaella S** is the law in Canada and that waybills are not subject to the Hague-Visby Rules unless the carrier voluntarily incorporates those Rules into the contract.

The Federal Court of Appeal in **Canadian Pacific Railway v Boutique Jacob** has decided that a rail carrier has the option of either setting up a limitation of liability clause under the Confidential Rate Agreement it has with container lines, or invoking a limitation of liability contained in a bill of lading under the Himalaya Clause. In Canada, the rights of rail carriers in multi-modal transport are considered to have been settled as opposed to the diverse range opinion in the US, although the US Supreme Court has just agreed to hear a case on point.

5. Pollution regimes (civil liability) – for penal/criminal see [Pollution – Criminal Sanctions](#)

In addition to the already enacted CLC '92 and Fund Conventions schemes, Parliament has recently incor-

porated into legislation the implementation of the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, as well as the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001. The enacting legislation comes into force on January 2nd, 2010.

6. Maritime Lien – a new maritime lien has been created in favour of ship suppliers, **who carry on business in Canada**, for goods, materials and services to vessels which are not Canadian vessels. The Act imposes the requirement that goods, materials and services must be shown to have been provided at the request of owner of the foreign vessel or someone acting on its behalf. With respect to ship repairs, this is not required. The Act does not impose any condition that the goods, services, and materials or the repairs actually have to be performed in Canada, however.

7. General Limitation Period – Under the **Marine Liability Act**, unless it or another statute provides otherwise, for example, the one year time for suit under the Hague-Visby Rules or the two-years in collision cases, there is a general suit-time period of three years if the subject matter of the action is maritime in nature.