
NEWS

November 27th, 2009

CRIMINALIZATION OF SEAFARERS - PILOT ACQUITTAL IN COLLISION CASE UPHELD ON APPEAL

An appeal judgment of November 23rd, 2009, has upheld the acquittal of a pilot charged criminally with breaching the Collision Regulations.

In August of 2004, the containership CANADA SENATOR collided with the ketch MONDISY in the St. Lawrence River near Quebec City. MONDISY was lost with two of four passengers.

CANADA SENATOR was under compulsory pilotage at the time of the collision. Unusually, several criminal charges were brought against the pilot, all of them alleging offences in way of various breaches of the Collision Regulations, including Rules 6 (safe speed), 7 (risk of collision) and 8 (action to avoid collision).

The duties or obligations delineated by the Collision Regulations are of course usually the subject of litigation before the civil courts. However, any breach of Colregs is also made a criminal offence by the Canada Shipping Act (fn1). The prosecution mechanism is summary conviction and an offender is made liable on conviction to a fine of up to Cdn\$100,000 (fn2).

The trial judge had acquitted the pilot on findings of fact, supported by expert opinion, that no breach of Colregs had been committed. It was not disputed that MONDISY had been circling across the navigation channel and finally altered into CANADA SENATOR. The trial judge found that the pilot had no reason to believe that there was anything unusual or to apprehend a risk of collision until MONDISY's final course alteration into CANADA SENATOR very shortly before the collision, and that maintaining speed and hard porting the helm, along with two

1. The charges were brought under the old Canada Shipping Act; the Canada Shipping Act, 2001 has the same provisions.

2. Present tense is used for convenience, but again this was the fine per the old CSA; the maximum fine per CSA2001 is now Cdn\$1Million and there is the additional possibility of imprisonment for up to 18 months.

series of repeated whistle blasts, were appropriate in the circumstances.

This is ultimately a case which turned on its own particular facts as regards the circumstances of the collision, but it does remind us of two points of principle:

- Criminalization of regulations such as Colregs brings with it the evidentiary trappings of the criminal law, as distinct from those applicable in civil cases. The prosecution must meet the heavier burden of proving its case beyond a reasonable doubt, but the defence, in seeking to raise reasonable doubt (here, by proving due diligence), need only meet a balance-of-probabilities burden (the same as in a civil case).
- The bar is set high (and this applies to civil cases as well) when it comes to appealing against findings of fact or appreciation of evidence made by a trial judge. The appeal judge concludes time and again on the various points taken in appeal that the trial judge had made reasonable assessments of the evidence, both as to its credibility and weight, and then arrived at rational conclusions in consequence. That was enough to dispose of the appeal, as an appeal court will not interfere with findings of fact made by the trial judge unless they are manifestly in error or unsupported by the evidence.

There has so far been little actual prosecution of mariners in Canada. It remains to be seen if this was a one-off case or if the increasing tendency worldwide toward criminalization in maritime matters will find fertile ground for more frequent prosecution in Canada, but as we note in [POLLUTION - CRIMINAL SANCTIONS AND OVERLAPPING](#) (available on our website), the legal basis for criminalization is already with us.