

CANADIAN SHIPPING ACT REFORM

(PARTS I, II, AND V)

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Presented at the Open Meeting of the
Canadian Maritime Law Association
at Vancouver, B.C., on March 23, 1998

I. BACKGROUND TO CSA REFORM

Following a meeting held by the Canadian Marine Advisory Council in May, 1996, Transport Canada set up a Canada Shipping Act Reform Project ("CSA Reform") under the direction of Carrie Hunter of Transport Canada. There were three stated objectives of CSA Reform. The first was simplification of the statutory framework to eliminate inappropriate sections, use plainer language and harmonize the *Canada Shipping Act* ("CSA") with other regimes. The second objective was to make the Act consistent with federal regulatory policies, including allowing the Minister greater freedom to choose from various regulatory standards such as compliance agreements, standards and industry codes. The third was to contribute to the economic performance of the shipping industry and modernize the regulatory framework of the CSA.

The proposed amendments were divided into two tracks. Track 1 included plans to introduce a new Part 0 dealing with ministerial authority, a new general part and amendments to Part I of the CSA. Part I pertains to matters such as nationality, ownership and registration of vessels and mortgages. Following a consultation process with the public, the objective was to send a memorandum to Cabinet by the spring of 1997 with a view to introducing legislation that year. Bill C-73 was introduced in 1997 and included amendments to the definition section, changes in the regulatory making authority under the CSA and amendments to Part I of the CSA but died on the order paper when the election was called in 1997. Bill C-15 which includes provisions on ministerial authority, updates the registration provision and adds a new general part to the CSA was introduced in Parliament on October 30, 1997. It has now passed first reading.

CSA Reform plans to complete Track 2 by the spring of 1999. It is proposed that Parts II (Certification of Masters and Seamen), III (Seamen) and IV (Provisions for Relief and Repatriation of Distressed Seamen and Seamen Left Behind Abroad) will be combined into a Personnel Part. Part V (Safety) may be combined with Part VII (Lighthouses, Buoys and Beacons, Sable Island) and Part VIII (Port Wardens) under a new CSA Part entitled Seaworthiness and Inspections. Other Parts of an amended CSA will include Pollution Prevention and Response, Navigation, Marine Incidents and Casualties, Violations, Enforcement and Penalties and Wrecks and Salvage.

Consultation meetings were held by CSA Reform with industry on personnel issues (Parts II, III, IV and XIII of the CSA) in September, 1997, safety issues (Parts V, VII and VIII of the CSA) in October, 1997 and enforcement issues (Parts VI, IX, XII, XIV, XV and XVI of the CSA) in January, 1998 in various cities across Canada. Minutes regarding the consultations are available on the CSA Reform website at <http://www.tc.gc.ca> . Attached are copies of the Transport Canada Overall

Plan for Track II and Discussion Documents on Personnel Issues and Safety Issues.

As of January, 1998, CSA Reform expected the CSA legislation would be drafted in the summer and fall of 1998, a bill would be introduced by January, 1999 and a new CSA would be in force by March, 1999.

II. CSA - PART I

Part I of CSA is to be replaced by Part 0.I (GENERAL) and Part I (Registration, Listing, Recording and Licensing) under Bill C-15.

Part 0.I

Part 0.I introduces an objects clause for the CSA. (s. 5) The Minister of Transport is responsible for administration of the Act although the Minister of Fisheries and Oceans is responsible for all matters under the Act relating to safety and licensing of pleasure craft. (s. 7)

All Canadian ships other than pleasure crafts must have an "authorized representative" responsible for acting with respect to all matters relating to the ship whose owner is bound by the act or omission of their representative with respect to any matter relating to the ship. (s. 9)

Provision is made for incorporation by reference. (s 10) Materials incorporated by reference are not regulations for the purposes of the *Statutory Instruments Act* and need not be published in the Canada Gazette. Some protection is given to industry under Section 11 which provides that no person shall be convicted for contravening a regulation incorporating material by reference unless it is proved that the material was reasonably accessible and reasonable steps had been taken to ensure it was accessible to persons or ships likely to be affected by the regulation or, alternatively, it had been published in the Canada Gazette.

Part I

Registration, Listing, Recording and Licensing

A Chief Registrar is appointed to maintain the Canadian Register of Ships. (s. 13) Under the old CSA, the Chief Officer of Customs approved by the Governor in Council was to be a Registrar.

The requirement of the present CSA that a ship must be a British ship (which includes a Canadian ship) is deleted.

Every ship exceeding 15 tons owned by qualified persons and not registered in a foreign country must be registered under Part I of the CSA. (s. 16(1)) A qualified person includes a Canadian citizen or permanent resident or a corporation incorporated under the laws of Canada or a province. (s. 1(2))

Provision is made for registration of ships within Canada not registered in a foreign country owned by a foreign corporation if a Canadian subsidiary or ship management company is acting with respect to all matters relating to the ship or an employee or director in Canada of a branch office of the corporation carrying on business in Canada is doing so. (s. 17)

A ship registered in a foreign country which is bare-boat chartered to a qualified person may be listed as a bare-boat chartered ship for the duration of the charter if its registration is then suspended in respect of the right to fly the flag of the foreign country. (s. 18)

Authorized Representative

The "authorized representative" of the ship is required to notify the Chief Registrar within 30 days after certain events occur. (s. 28(1)) These events include a change in name or address of the owner or a registered mortgagee. (s. 28(1)(c)) The Chief Registrar may suspend or cancel registration if the authorized representative of a ship has not complied with Section 28. (s. 30(1)(d)) While Transport Canada does not contemplate that an authorized representative unaware of a change in name or address would be prosecuted, it may be prudent for mortgage deeds to include an obligation of the mortgagee to advise the owner of any changes in name or address and the agreement of the mortgagor or owner to require the authorized representative to notify such change to the Registry within 30 days. The Chief Registrar may suspend or cancel registration if the authorized representative of a ship has not complied with Section 28. (s. 30(1)(d))

Mortgagee Power of Sale

Section 51 of the CSA provides as follows:

Every registered mortgagee has power absolutely to dispose of the ship or any share therein in respect of which he is registered as a mortgagee,
....

Section 41(1) of Bill C-15 reads as follows:

A mortgagee of a ship or a share in a ship has the power, to the extent set out in the mortgage, to sell the ship or the share.

Under the present wording of Section 41 of Bill C-15, the ability of the mortgagee to use a power of sale may be severely restricted. While it provides for a power of sale to the extent set out in the mortgage, the conditions to which the mortgage is subject may be incorporated by reference in documents which cannot be registered with the Registry of Ships.

III. Part II (Certification of Masters and Seamen)

Present CSA Part II

Part II was the subject of amendments in 1985 which came into effect on July 30, 1997. It provides for certification of masters and seamen, gives the Governor in Council extensive power to make regulations regarding the types of classes of certificates that may be granted, examinations relating to the certificates and fees to be paid. (s. 110(1)) No person may perform any duty on a ship prescribed by regulation unless he holds a valid certificate of the class required or is exempt. (s. 110(3))

Fishermen are entitled to certificates of service as a fishing master or fishing mate if within five years preceding the application and before December 1, 1965 have served a fishing season as a fishing master or fishing mate. (s. 113)

CSA Reform - Part II

CSA Reform proposes to reintroduce the role of a Chief Examiner who will be responsible to prescribe forms and procedures for examinations and set qualifications for persons authorized to conduct them. It is possible certain functions may be delegated to marine institutes although concern was expressed regarding privatization by a number of those who attended the consultation

meetings.

The present requirement that the master, chief engineer, second engineer and first mate positions of a Canadian ship must be held by Canadian citizens or permanent residents will be retained. However, CSA Reform proposes to open certification to persons other than Canadian citizens and permanent residents where there are foreign-owned Canadian flag ships operating solely outside the coasting trade. This is intended to encourage the adoption of Canadian standards. It is proposed that foreign crews will be permitted to work aboard Canadian flag ships operating outside Canada so long as the positions of master, chief officer, second engineer and first mate would continue to be held by Canadians.

IV. Part V - Safety

Part V (Safety) is proposed to be amalgamated and rewritten together with Parts VII (Lighthouses, Buoys and Beacons; Sable Island) and VIII (Port Wardens) into a Seaworthiness and Inspections Part.

Present CSA Part V

The present Part V deals with steamship inspection, issuance of safety and inspection certificates, and the design and construction of ships. It also provides for regulations to implement the International Convention for the Safety of Life at Sea, 1974 and the 1978 Protocol (SOLAS) (s. 339(1)) and various IMO codes (s. 339.1(1)).

Bill C-15

Bill C-15 enables regulations to be passed implementing the International Safety Management Code ("ISM") of the IMO Safety Convention for ships other than Safety Convention ships. (s. 314.1) The relative advantages and disadvantages of applying ISM domestically were discussed at the consultation meetings. While adoption of a safety management system was generally approved, concern was expressed regarding the cost of complying with ISM, particularly so far as small vessel operators are concerned.

With respect to steamship inspection, the Minister may authorize any person, classification society or other organization to conduct inspections under CSA. (s. 317) Such a person does not have the powers of a Steamship Inspector but may issue any certificate which might be issued by a Steamship Inspector other than an exemption certificate. (s. 317.2)

The minimum tonnage for vessels exempt from annual inspection is increased from 5 to 15 tons provided they carry no more than 12 passengers and are not pleasure vessels. (s. 406)

Provision is made for regulations pertaining to small vessels, including those pertaining to their construction and inspection. In addition, regulations may be passed authorizing issuance of certificates to small vessels. (s. 421.1) The extent to which inspection of small vessels would be delegated and the manner in which such a system would be implemented is unclear.

CSA Reform - Seaworthiness and Inspections

As mentioned above, CSA Reform proposes to rewrite and combine Part V with Parts VII and VIII under a new CSA Part entitled Seaworthiness and Inspections.

Under the proposals to amend Part V, CSA Reform proposes to use the term "Canadian Maritime

Document" to include any license, certificate or other document issued under CSA or the regulations. It is proposed the Minister could, where appropriate, suspend, cancel or refuse to renew any such document.

In the event of suspension or cancellation of a document, a party would have a right of appeal, for example, to the Board of Steamship Inspection and a further right of appeal to an administrative tribunal. During one of the consultation meetings, it appeared the intention may be to provide the tribunal with powers not only with respect to certificates but also possible jurisdiction over some regulatory offenses similar to the authority of the Civil Aviation Tribunal under the *Aeronautics Act*.

Responsibilities of an Operator

CSA Reform proposes having a vessel operator (which includes the owner of a ship or any other person who has assumed responsibility for its operation) have considerable responsibility, not only for ensuring the ship is in compliance with all appropriate Parts of CSA and its regulations but also maintaining a seaworthy ship. Those persons who may assume responsibility for the operation of a ship could include time-charterers, cruise vessel operators, ship's agents and other parties who may not under present law be responsible for maintaining a ship's seaworthiness. It may not be practical or appropriate to impose a seaworthiness obligation on parties who may have nothing to do with the actual maintenance or navigation of a vessel.

Inspections

It is proposed that the Minister appoint qualified persons to inspect and survey vessels, including those who are presently steamship inspectors or port wardens. The maritime inspectors aboard a ship would conduct any inspection necessary in the interest of safety and could detain a ship or suspend certificates as they considered warranted.

Inspectors may have a dual role under the proposals, including those of acting on complaints and auditing vessels as in the case of Port State Control and also conducting the regular inspections. Concern was raised at one of the consultation meetings regarding the manner by which inspectors will set priorities and the availability of sufficient inspectors, particularly given the trend to government downsizing.