CONVENTIONS OF INTEREST

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The negotiation and implementation of International Conventions has always been a complex and difficult government function in a federal country[1]. Canada has, however, enthusiastically embraced its responsibility to participate in United Nations and a variety of other international organizations to develop world-wide uniformity and certainty in international law.

In maritime matters the exclusive federal power over navigation and shipping, the sea coast and fishing and its other powers[2] has encouraged federal authorities to play a particularly active and energetic role. For many years despite this considerable effort Canada was slow to complete the process of ratifying and implementing international conventions in maritime law. In recent times, however, under the able direction of Alfred Popp, Q.C., Senior General Counsel of Admiralty and Maritime Law in the Department of Justice, Canada has not only made significant contributions in the negotiations of international conventions but has followed through with their ratification and implementation. The work continues, however, and while we have accomplished a great deal, we still have a great deal to do.

Law of the Sea Convention

In 1973 the United Nations began the most ambitious diplomatic endeavour ever attempted --- the negotiation of a comprehensive international convention on the law of the sea. Many believed that the job was impossible to complete. I recall as a law student

the enthusiasm of Dr. Edgar Gold when he provided us with the "Single Negotiating Text" in 1975, the"Revised Single Negotiating Text" in 1976 and the "Informal Composite Negotiating Text" in 1977, engaged us in the detailed study of each of the articles and provided reports of the negotiations and strategy of various groups within the international community.[3] The nations of the world negotiated the new convention over a 15 year period and adopted it in 1982 as the United Nations Convention on the Law of the Sea. Most nations signed it and over 60 have ratified it. On November 16, 1994 the convention entered into force. The parties made significant changes to the deep sea mining provisions and most hope that wide spread ratifications will follow the coming into force of the convention.[4]

Despite these changes neither the United States of America nor Canada has ratified the convention. While some parts of the convention are generally regarded as forming part of international customary law, most people would agree that formal ratification would reduce the uncertainty of the application of the provisions of the convention and lead to greater security in the knowledge that the convention was in force and formally ratified by all of the major maritime nations in the world. Some observers regarded Canada's failure to ratify the convention as a strategic advantage during the recent fisheries dispute with Spain but hopefully Canada will ratify the convention soon particularly given the leading role which she played in drafting and negotiating its terms and promoting its adoption.

Admiralty Law is not simply private international law read together with national legislation

and jurisprudence but can only be fully understood in the broader context of public international law. The Canadian ratification of the United Nations Convention on the Law of the Sea is an important step which should not be subject to further delay.

Salvage Convention

I attended my first International Conference of the Comite Maritime International (CMI), which is the international umbrella organization for the various national maritime law associations in the world, in Montreal in 1981. The two major subjects for discussion were salvage and carriage of hazardous and noxious substances by sea (HNS). The negotiation of the salvage convention was the golden boy of the conference. Salvage is always an engaging topic with tales of adventure, danger and tragedy all hanging by the thread of a "No-Cure, No-Pay" contract. I attended this subcommittee in the lower meeting rooms of the Hotel Bonaventure and watched delegates grouped according to flag or country in a United National atmosphere each having prepared a position, proposing amendments and engaged in diplomatic and respectful, if some times heated, debate. The primary area of discussion was how to amend the international maritime law of salvage so as to ensure the protection of marine environment.[5] The CMI draft formed the basis of the IMO legal committee draft at the diplomatic conference which was held in London, England in April of 1989.[6] Seventeen countries became signatories to the convention but all signatures were subject to ratification or acceptance. In 1990 the Public Review Panel on Tanker Safety concluded:

> Thus, the terms of the Convention are important to Canada, were mainly put forward by Canada, and the Convention should be ratified by Canada.[7]

According to the CMI Year Book for 1994 the 1989 Salvage Convention has been ratified or acceded to by only 7 countries. It fails to note that Canada has acceded to the convention by incorporating it by reference into the Canada Shipping Act as of June 23rd, 1993.[8]

The Carriage of Hazardous and Noxious Substances by Sea Convention

The other major topic at the CMI Conference in Montreal was the carriage of hazardous and noxious substances at sea. I recall the rumours and opinions expressed about the HNS meetings in the hallways of the Hotel Bonaventure. The urgency and excitement of the salvage convention were not present. Delegates were concerned about oil pollution and oil tankers and the salvage of both ship and cargo. The industry seemed to be on the verge of coping with oil cargoes but not other cargoes. The final document which the conference forwarded to the International Maritime Consultative Organization (IMCO) was a discussion paper rather than a draft and began in quite a cool tone:

> For the purposes of discussing this subject with a view to providing some result which would be of use to the Legal Committee of IMCO the XXXIInd Conference of the CMI had to make certain fundamental assumptions. The Conference did not discuss the desirability or usefulness of a Convention on Hazardous and Noxious Substances but assumed that there will be a Convention as a result of the work of IMCO. The comments made by the Conference in this paper should not therefore be taken as unanimous agreement that a Convention is either desirable or practical.[9]

IMCO provided the initiative on this subject and had presented to the CMI a draft convention. The CMI could not agree on the substances covered under this proposed regime and raised a long list of troublesome questions in its report. They were not overly enthusiastic. The subject, however, remained an important one for IMCO and its successor, the International Maritime Organization (IMO), with the result that after 14 years the Legal Committee of IMO has completed a draft convention which governments will discuss at a diplomatic conference in London between April 15 and May 3, 1996. The draft proposes the establishment of an HNS Fund similar to the IOPC Fund, which compromise came about as a result of the comprehensive work done by Canada, Australia and Norway to find this solution. The main issues which governments will debate are:

(1) **Exclusions**:

The list of cargoes that might be excluded from the convention such as coal and low hazard bulk cargoes and radioactive material;

(2) **Linkage to Limitation Convention**:

Limitation of the shipowner's liability is an important subject in many maritime conventions and IMO expects that a significant portion of the

debate will focus on this issue together with the limitation applicable to the Fund;

(3) **Contribution to Fund and Calculation of Amount**:

The draft proposes to make the shipowner and the receiver of the goods responsible to pay into the HNS Fund. Earlier versions of the Convention had identified the shipper. The diplomatic conference will be required to complete negotiations on how to calculate the amount of the contributions.

The negotiation of a draft convention on HNS had a very slow beginning but IMO and the CMI have made steady progress which hopefully will result in a successful diplomatic conference.[10]

Protocol To Limitation of Liability for Maritime Claims Convention

Since at least April of 1994 Canada had decided to accede to the 1976 Convention for Limitations of Liability of Maritime Claims. In doing so, however, Canada intended to impose higher, made in Canada, limits.

With the loss of the "Estonia" in September of 1994 government, industry and the public realized the inadequacy of the limits for passenger liability claims. At the CMI Conference

in Sydney, Australia in October of 1994 Barry Oland, Chair of the CMLA Sub-Committee on Limitations of Liability, suggested that a discussion of appropriate limits would assist the IMO in their initiative. IMO later proposed that the revision of the limits in the 1976 LLMC Convention be addressed at the April, 1996 diplomatic conference.

As a result Canada has decided to proceed with the drafting of its legislation but will not take any further steps until April of 1996 so that the government may assess the outcome of the diplomatic conference.

The diplomatic conference will address a number of issues including:

(1) the revision of limits in the various tonnage categories including increases in the limitation applicable to passenger liability;

(2) an amendment procedure that would permit changes in the limit without having to do so by protocol at a diplomatic conference;

(3) the linkage between the LLMC Convention and the HNS Convention.

Canada is well-positioned to be able to bring legislation before the House of Commons by the Fall Session of 1996.[11]

Offshore Mobile/Craft Convention

At the 1977 CMI Conference in Rio de Janeiro the participants prepared a Draft Convention on Offshore Mobile Craft. In 1990 the Secretary General of IMO requested that CMI prepare an updated version of the Convention. An International Sub-Committee prepared a draft in October of 1994 which the Conference adopted and submitted to IMO.

The most interesting aspect of this process, however, was the adoption of a resolution to establish a working group "for the further study of, and development of where appropriate, an international convention of offshore units and related matters".

This resolution was the result of a Canadian initiative to broaden the scope of the convention to include all offshore units whether in a mobile or fixed mode of operation and when engaged in all other offshore functions including exploration and exploitation of petroleum and seabed mineral resources.[12]

Courts have often considered whether offshore units are "ships" which is analogous to the attempts in the early history of aviation to adapt maritime law to meet the needs of the aviation industry. Such efforts failed and the legal regime for aviation evolved from a growing knowledge of its particular characteristics, functions and requirements.

The CMI, in response to the resolution, established an international working group which

has supported the Canadian position and which is required to report to the Executive Council by December, 1995 with further recommendations. [13]

Other Conventions of Interest

The CMI and IMO are involved in other efforts to develop uniform rules for the conduct of maritime activities.

Over the next year and a half IMO will also address proposals for conventions on the arrest of ships (which began with the CMI Conference in Lisbon in 1985), wreck removal (a new proposal of European countries) and liability and compensation for bunker oil spills from ships (a new proposal by the Maritime Environment Protection Committee).[14]

The CMI will sponsor further work on arrest of ships and wreck removal but also classification societies, maritime agents, and EDI. This organization will also direct special attention to carriage of goods by sea and attempt to bridge the gulf between the Hague Rules, the Hague/Visby Rules and the Hamburg Rules.[15]

Conclusion

International conventions often appear in national jurisprudence to be shadows of what the law might actually be within a country or of what the law might well become. Lawyers and judges look for national ratification to see if they must consider their meaning and

rarely enter the darker waters of customary international law. National maritime law, years ago, seemed static to the casual observer and international maritime conventions, whether ratified by Canada or not, also seemed a static body of law. Closer examination reveals a more complex picture.

International organizations such as IMO and CMI are always developing new ideas concerning the clarification and uniformity of maritime law. Canada has taken an active role in this process and has worked to encourage international consensus and national ratification of her efforts. Over the last 15 years the Canadian Maritime Law Association has played a significant role in the negotiations and completion of a wide range of maritime initiatives in the world community. The Canadian government, particularly through the Admiralty and Maritime Law Branch of the Department of Justice and the Canadian Coast Guard, has also made a special contribution in these proceedings. Canada was an acknowledged leader in the negotiation of the Law of the Sea Convention. This country hosted the CMI Conference in 1981 which lead to the 1989 Salvage Convention. Other speakers have described Canada's role in the conventions and protocols concerning oil pollution. The diplomatic conferences on the carriage of hazardous and noxious substances by sea and limitation of liability will begin in the Spring of 1996. All of these represent concrete achievements for Canada and the world community. Other conventions are at an earlier stage of development, notably offshore craft, arrest of ships, wreck removal, bunker oil spills, classification societies, maritime agents and EDI. The future will see both the Canadian Government and the Canadian

Maritime Law Association continuing with their substantial efforts to bring clarity and uniformity to new regimes of international maritime law and to promote their ratification.

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FOOTNOTES

1. Hugh Kindred, Jean-Gabriel Castel et al., International Law Chiefly as Interpreted and Applied in Canada (Toronto: Emond Montgomery Publications Limited, 1993) pp. 160-174

2. Constitution Act, ,1867, Revised Statutes of Canada, 1985, Appendix II, No. 5

3. Edgar Gold, Maritime Transport: The Evolution of International Marine Policy and Shipping Law (Toronto: Lexington Books, 1981), pp. 316-321

4. John R. Stevenson and Bernard H. Oxman "The Future of the United Nations Convention on the Law of the Sea" (1994), 88 American Journal of International Law 488

5. David Brander - Smith, Q.C. et al., Public Review Panel on Tanker Safety and Marine Spills Response Capbaility: Protecting Our Waters Final Report, September, 1990, pp. 85-87

6. Comite Maritime International, Yearbook 1994 Annuaire, p. 364

7. David Brander Smith, Protecting Our Waters, pp. 86-87

8. Statutes of Canada, 1993, Chapter 36, Section 1

9. XXXIInd Conference of the Comite Maritime International Report. HNS - Montreal - 8

10. Reports of Sub-Committee on Liaison with IMO to CMLA Executive Committee June 1, 1995 and August 21, 1995 and Report of Sub-Committee on HNS to CMLA Executive Committee, June 1, 1995 and August 21, 1995

11. Reports of Sub-Committee on Limitation of Liability to CMLA Executive Committee January 20, 1995 and August 18, 1995; Report of Sub-Committee on Limitation of Liability the CMLA Annual General Meeting June 1, 1995; Report of Sub-Committee on Liaison with IMO to CMLA Executive Committee, August 21, 1995

12. CMI **Yearbook 1994 Annuaire**, pp. 168-177 and pp. 188-197.

13. Report of Sub-Committee on Offshore Craft to CMLA Annual General meeting, June 1, 1995.

14. Report of Sub-Committee on Liaison with IMO to CMLA Annual General Meeting, June 1, 1995.

15. Report on Comite Maritime International (CMI) Matters to CMLA Annual General Meeting, June 1, 1995.