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B.C.'s Top Court Confirms Workers Compensation Board Can Regulate Fish Boat Safety

Mariners, particularly commercial fishermen, have for years argued that the B.C. Workers Compensation Board (the "WCB") cannot regulate vessel safety because the federal government has exclusive jurisdiction over navigation and shipping, and fisheries. However, on February 2, 2011 B.C.'s top court, the Court of Appeal, ruled that the current regulation of fish boat safety by the WCB is lawful because it does not conflict with Transport Canada's regulation in the industry.

In reaching its decision the Court of Appeal heard two separate (but similar) cases together, where vessel owners appealed a trial judge's ruling dismissing their claims that sections of the *Occupational Health & Safety Regulations* ("OHSR") under the *Workers Compensation Act* did not apply to their vessels. In one case the WCB made an inspection of an owner's vessel in April of 2006 and found the owners had failed to provide onboard stability documentation, and that the master had failed to establish emergency procedures for recovery of crewmen lost overboard, and for fires, flooding, and abandoning ship. The owners filed compliance plans and requested a review of the decision, arguing the WCB lacked the constitutional authority to regulate stability and other safety matters on board their fishing vessels. The WCB Review Board decided it could not decide the constitutional questions raised by the owners, and the owners filed a petition for judicial review in the B.C. Supreme Court. In the second case, a fatal accident occurred onboard a large BC trawler in February of 2007 when a crew member was struck and killed by a trawl door. Transport Canada did not investigate the fatality. The WCB inspected the vessel and following its investigation issued an order requiring vessel stability information to be developed and made available to the crew. The vessel owner applied to stay the order on the basis the provincial *OHSR* was not applicable to its vessels. The trial judge did not accept the owners' arguments that the WCB lacked jurisdiction, and the owners appealed, resulting in the February 2011 decision.

In lengthy reasons, the Court of Appeal referred to the importance of regulating safety on fish boats, and evolution of the constitutional law away from treating the federal and provincial powers as separate "watertight compartments" and towards cooperative regulation between the two levels of government. The trial judge noted that between 1975 and 2005, 157 fishing vessels capsized with 66 lives lost, and, between 2001 and 2005, one fisherman died for every 29 WCB claims. The trial judge also noted that one appellant had three fatalities in 55 WCB

claims, and another had one fatality in 22 WCB claims. The Court recounted the history of occupational health and safety regulations in the fishing industry, noting provincial control over the “business of fishing” was first recognized by Canadian courts in 1990. In 1995, the WCB signed memoranda of understanding with the Canadian Coast Guard and the DFO acknowledging the WCB has jurisdiction to govern all aspects of occupational health and safety of commercial fishing vessels in British Columbia. Then, in 2001, the WCB signed a further agreement with Transport Canada (Marine Safety) coordinating the oversight of the two authorities in the fishing industry. The WCB was assigned responsibility for the “business of fishing”, including the occupational safety of crews and fishing vessels while operating in B.C. waters, as well as waters adjacent to B.C. waters. Transport Canada was assigned responsibility for shipping and navigation, including crew certification and the application of vessel construction standards. The agreements also provided that “[w]here dual jurisdiction occurs, the WCB and [Transport Canada] may operate jointly and co-operatively or independently to ensure their respective program mandates are fulfilled”. It was from these agreements that the sections of the provincial *OHSR* that were challenged by the vessel owners were born.

In the end, the B.C. Court of Appeal found the two levels of government had cooperated in enacting complimentary regulatory regimes that provided enhanced protection of worker safety. The Court ruled that this exercise of “cooperative federalism” should be left alone unless there is a conflict between the two regulatory regimes. The court also ruled that the fact that the vessels worked outside the geographical and territorial boundaries of the province did not mean WCB regulation in those areas was unlawful. Assuming this case (*Jim Pattison Enterprises et al v. WCB*) is not successfully appealed to Canada’s top court in Ottawa, fishermen will have to accept the watchful eye of WCB on their vessels.

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