

June 2011

### **Carbon Tax on Diesel Fuel: Refunds for Vessels Making Trips Outside of B.C.**

Between January of 2010 and July of 2012, carbon tax on diesel fuel will double, from ¢3.3/litre to ¢6.7/litre. Implemented in 2008, the carbon tax is, in part, designed to create downward pressure on the use of fossil fuels by taxing carbon emitting fuels used in B.C. While the tax has honorable objectives, the conspicuous absence of solar-powered towboats, electric fishboats, and sail-powered freighters leaves most of the marine industry to cope with the carbon tax, rather than shift its fuel source. Coping with this tax means reducing it wherever possible, which in turn means obtaining whatever refunds might be available for carbon tax that has been paid at the pump.

In a recent (March 2011) decision by B.C.'s Supreme Court, a local towboat company challenged the provincial government's refusal to grant a carbon tax refund on those legs of its international voyages that occurred between B.C. ports (*Island Tug & Barge v. British Columbia*). The Court's decision is worth summarizing, as it provides a useful introduction, and insight into, when a vessel owner might consider pursuing a carbon tax refund. The decision also raises interesting questions of whether such a refund should apply to voyages across the B.C. border that are commonly seen in other parts of the marine industry, such as commercial fishing.

#### **The ITB Case:**

In *Island Tug & Barge v. British Columbia* (the "ITB case") the court was asked to decide whether the B.C. Minister of Finance had incorrectly denied the refund of carbon tax paid for fuel used on legs between B.C. ports which were part of a larger voyage between the U.S. and Canadian ports. The important background facts are these: ITB towed barges laden with calcium carbonate from Tacoma, Washington, to pulp mills in Campbell River and Powell River. After discharging the carbonate at these B.C. ports, the empty barges travelled to either Texada Island (to be loaded with rock) or Roberts Bank (to be loaded with coal), for transport back to Tacoma. The barges never discharged cargo at a B.C. port that had been loaded at a port in B.C.

ITB applied to the Minister of Finance for, and was granted, a refund of the tax paid on fuel used on those legs of the voyage directly between Tacoma and the first stop in B.C., and the leg between the last stop in B.C. and Tacoma, but were denied a refund for the leg that occurred between the B.C. ports. The Minister maintained that the distance travelled between B.C. ports was not an interjurisdictional trip for the purposes of the Act, and the exemption did not apply. The court disagreed, essentially finding that because no cargo was loaded and then unloaded at B.C. ports, the trip between them was part of fulfilling the larger voyage between B.C. and the U.S., and hence part of the interjurisdictional trip. The court found ITB was entitled to a refund for all of the fuel used in B.C. on the voyage.

### **Refund Provisions in the *Carbon Tax Regulation*:**

There are two provisions in the *Carbon Tax Regulation* that may entitle vessels to a refund for fuel used during “interjurisdictional” trips.

Section 28, entitled “*Refund – Interjurisdictional Marine Travel or Transportation*”, focuses on the movement of passengers and goods, for a fee. The section provides that a refund must be paid “*for fuel that was used by a ship that (1) transported passengers, goods or both on the ship; (2) was provided to members of the public for a fee; and (3) did not include an intraprovincial leg*”. Section 28 also provides that where the trip does include an intraprovincial leg (a leg between two ports in B.C.), the refund does not apply to fuel used on that intraprovincial leg.

Section 29, entitled “*Refund – Commercial Marine Services*” is arguably broader than section 28, as it targets “*commercial marine services*” and does not focus merely on the movement of passengers or goods for a fee. Section 29 provides a refund must be paid “*for fuel that was used by a ship for a trip that (1) was made in the course of providing marine services using the ship other than passengers or goods for a fee for members of the public; and (2) included an interjurisdictional leg that was integral to providing the marine service*”. It was this section that ITB applied under for a refund.

### **Refunds for B.C. Fishing Vessels?**

There are several commercial fisheries in B.C. that regularly make trips from B.C. to fish and deliver their catch to points outside of B.C. For example, the tuna fleet often delivers its catch to buyers in U.S. ports; similarly some groundfish vessels do as well. The joint-venture hake fishery involves catcher boats leaving B.C. ports to fish and deliver their catch to factory vessels sitting outside the B.C. border. Unfortunately, large amounts of fuel are burned in the process.

Many such vessels purchase their fuel in the U.S., but often they do not, and hence pay the B.C. carbon tax on fuel used on these trips.

There is nothing on the face of the *Carbon Tax Act* or the *Regulation* that expressly precludes it from applying to commercial fishing vessels. So, while not providing legal advice, I suggest the following issues are likely relevant to whether such an application would succeed. Firstly, the legislation defines "*interjurisdictional leg*" as a trip that begins or ends "*at a port or other similar place that is in a foreign state*". Unfortunately, this definition precludes any application for refund where the vessel does not land at a foreign port before returning to B.C., such as a joint-venture hake catcher delivering to a factory vessel.

Secondly, if the application for refund were to be made under s.28, the applicant would have to show the trip outside of B.C. "*transported goods*", for "*members of the public for a fee*". For starters, "*goods*" are not defined by the *Act* or *Regulation*. Goods are typically defined as personal belongings or merchandise (items for sale). A logical interpretation of "*goods*" in the *Regulation* would include merchandise, which is fish for sale. The requirement that the trip be made for "*members of the public for a fee*" is more problematic. In most cases, the fish being transported is owned or leased by the vessel owner, thus the Minister would likely deny the refund because the goods are being transported on the vessel owner's behalf, and not for a "member of the public". However, this apparent problem might be resolved with a contract that separates the party who operates the vessel from that who owns the cargo of fish, but whether this legal separation is sufficient to satisfy the Minister of Finance the owner of the fish is a "member of the public" is up for debate.

On the other hand, if the application for refund were to be made under s.29, the applicant would have to show the fuel was used in the course of "*providing marine services using the ship*", and that an interjurisdictional leg was integral to providing the marine services. Like "*goods*", "*marine service*" is not defined in the legislation. However, a vessel that catches and delivers its own fish is likely not providing a "marine service" because service implies an act done for another person. However, with some creativity a refund might be triggered. For example, the vessel might be contracted by the owner of the fish to catch and deliver the fish to a port outside of B.C. as part of a "marine service" agreement. Alternatively, a vessel owner who also owns the fish might contract with the foreign buyer to make the delivery of the fish part of the vessel's "*marine service*" to the buyer. While delivery of the catch is traditionally implied in the contract with the fish buyer, a contract defining the obligation may be helpful to a refund application.

In closing, vessel owners should bear in mind that they have already paid their carbon tax at the pump. Governments rarely give up their tax money without being asked. What refund you might receive from the Minister of Finance will only be known if you ask.

*The above article is for discussion purposes and is not legal advice on Carbon Tax refunds. If you seek legal advice, retain a qualified lawyer, such as Darren Williams, who leads the interprovincial Merchant Law Group office in Victoria B.C. and can be reached for question or comment at [dw@MarineLaw.ca](mailto:dw@MarineLaw.ca), toll-free at 1-866-765-7777 or by emergency phone at 250-888-0002.*