Fisherman Life – Legal Desk

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The *Mersey Seafoods* Decision: The Beginning of the End of WCB's Authority over Fishing Vessel Safety?

Many fishermen are frustrated that they are accountable to both Transport Canada (Marine Safety) and WorkSafe B.C. (WCB) when it comes to occupational health and safety onboard fishing vessels. This frustration arises for many reasons, but predominantly because each of these federal and provincial agencies applies their own set of regulations to workplace safety, and in many respects they can be unclear and contradictory. Fishermen have expressed additional frustration in that, while Transport Canada ("TC") inspectors have tended to be dedicated marine inspectors that have experience with vessels and understand the intricacies and practicalities of vessel safety, some WorkSafe inspectors can be unfamiliar with vessels and fishing activity, having to play the role of safety inspector for various industries at the same time. Whatever the reason, it seems fishermen would be happiest with only one government agency regulating safety onboard their vessels.

Fortunately for those who hold this view, a recent decision of a Nova Scotia Supreme Court, and a recently spawned legal challenge in B.C., may ultimately result in an end to WorkSafe's authority over health and safety on B.C. fishing vessels.

If Transport Canada in on Fishing Vessels, why WCB?

Traditionally, the regulation of safety on vessels, including fishing vessels, has been the responsibility of the federal government through TC, Marine Safety. This responsibility arises as a result of the federal government's exclusive jurisdiction over "navigation and shipping" under the *Constitution Act, 1867* (it is the *Constitution* that divides the powers to govern and regulate various issues between the federal and provincial levels of government). At the same time, the *Constitution* provides the provinces with the power to legislate over matters of health, as well as most working conditions (I say "most" because the province cannot legislate in respect of working conditions of a federally regulated matter). The apparent overlap between the province's jurisdiction over health and working conditions, and federal government's jurisdiction over navigation and shipping has resulted in the two governments attempting to share the responsibility of fishing vessel safety.

Why would WorkSafe be interested in regulating safety aboard fishing vessels (logically an expensive pursuit) if the responsibility and cost has traditionally fell to the federal government under their mandate over navigation and shipping? The answer lies in the fact that WorkSafe is financially responsible for injuries to workers that occur on B.C. fishing vessels. WorkSafe is in many ways like any insurance company. In exchange for

premiums WorkSafe provides benefits to workers and families in the case of injury or death, has an interest in minimizing its financial risk, that is, the amount of money it has to pay out in claims. Just as a marine insurance company would require a pre-insurance survey of a vessel and annual inspections in order to minimize the likelihood the vessel might sink, WorkSafe seeks to minimize the likelihood a worker will be injured by regulating safety requirements. WorkSafe's interest in regulating safety on fishing vessels is therefore a financial one. From WorkSafe's perspective, why should they pay the cost of workplace accidents without having the ability to minimize the likelihood of those accidents? There is a clear motive to WorkSafe wanting to regulate fishing vessel safety.

WorksSafe's interest in regulating safety on fishing vessels does not, however, allow TC to step away from its obligation to manage navigation and shipping. Managing vessel safety is an expensive proposition for any government though, and to the extent that TC can offload the duties of managing vessel safety onto an eager provincial government, cost offloading provides the motivation to do so.

Given WorkSafe's apparent incentive in managing vessel safety (and the lack of incentive on TC's part), it is no surprise that in 2000 and 2001 WorkSafe (then WCB) entered into Memorandums of Understanding ("MOU"s) with DFO and TC that set out how WorkSafe and TC and DFO would share the regulation of fishing vessel safety. The gist of the MOU between WCB and DFO is that "DFO *recognizes the jurisdiction of WCB to govern all aspects of occupational health and safety of persons working on commercial fishing vessels in British Columbia*". The MOU between TC and WCB sets out:

- the "business of fishing" (being the activities of the crew and the operation of the vessel and its gear) while fishing in B.C. waters is the jurisdiction of WCB.

- shipping and navigation operations, certification of crew members and the application of vessel construction standards, is the jurisdiction of TC.

- activities that are incidental to the business of fishing (stowing cargo and engine room procedures, emergency drills) are a joint focus.

Importantly however, simply because two levels of government agree to share the responsibility of vessel safety does not make such an arrangement lawful. Many would argue that governments and bureaucrats come and go, and it should not be left to those in charge at any one time to decide how the provincial and federal governments are going to divvy up the responsibilities of governing vessel safety. This is why we have the *Constitution*. It is a principle of constitutional law that a government in power at any one time cannot assign and re-assign responsibilities that are already assigned by the *Constitution*. This right belongs to the people of Canada *vis a vis* the *Constitution* – it does not belong to the governments in power at the time. The *Constitution* is there to ensure that government responsibilities are assigned uniformly across time, and across the country.

The Mersey Seafoods Decision: Is the Provincial Vessel Safety Regulation Unconstitutional?

Whether or not a provincial agency responsible for workplace safety has jurisdiction to regulate safety of fishing vessels (even where TC agreed to assign that role) was decided by the Supreme Court of Nova Scotia in *Regina v. Mersey Seafoods Ltd.* in May of 2007.

In this case Mersey Seafoods Ltd. owned several trawlers and had been charged with eight violations of Nova Scotia's *Occupational Health and Safety Act* and *Regulations*. Mersey Seafoods maintained they had complied with the TC regulations and that the provincial regulations were not applicable. The Court was asked to answer the question "*does Nova Scotia's occupational health and safety legislation apply to fishing vessels based out of Nova Scotia*?". After reviewing constitutional and marine law the court concluded that "Nova *Scotia's occupational health and safety legislation should not apply to a fishing vessel regulated under the Canada Shipping Act.*"

In its decision the Court stated:

> "*Safety aboard ships, including fishing vessels, is, in pith and substance, an essential part of the management of ships, and of maritime law, and is therefore a matter of exclusive federal jurisdiction under section 91(10) of the Constitution Act 1867. Provincial occupational health and safety legislation is not applicable to federally regulated undertakings and activities -- and in particular to ships and safety aboard ships*"

In deciding that the Nova Scotia equivalent of WorkSafe B.C. regulation on fishing vessels was unconstitutional, the court echoed the very concern that many B.C. fishermen have about serving two masters of vessel safety, being the conflict and confusion between the regulations of two concurrent agencies. The Court said:

> *It may be that some "untidiness" or "diseconomy" of duplication is the price we pay for a federal system [a provincial and federal level of government], but more important, in my view, is the concern expressed in Bell 1988 at paragraph 260 that a two fold jurisdiction promotes the proliferation of preventative measures and controls in which the contradictions, or lack of co-ordination, may well threaten the very occupational health and safety which is sought to be protected.*

The *Mersey* decision does not mean that WorkSafe B.C.'s current regulation of vessel safety in unconstitutional. The matter will have to be decided by a B.C. Court involving a B.C. case before it can be said that WorkSafe has no jurisdiction on B.C. fishing vessels. While the *Mersey* case is supportive of those who do not want WorkSafe on B.C. fishing vessels, the *Mersey* decision does not force a B.C. court to come to a similar conclusion. It will take a B.C. Supreme Court, and likely the B.C. Court of Appeal as well as the Supreme Court of Canada, to conclude that. The *Mersey* decision is currently

being appealed by the province of Nova Scotia (to be heard by the court in February of 2008) – the likelihood that the matter will go to the highest court in the country, the Supreme Court of Canada, following that appeal is strong. Only the Supreme Court of Canada's decision would be binding on B.C. Courts and on WorkSafe B.C. If the Supreme Court does hear the case, it would likely take at least until 2009 before a decision is rendered.

It is interesting to consider that what will likely make WorkSafe's incursion onto B.C. fishing vessels more maintainable than in other coastal provinces is that B.C. is the only province whose coastline is not directly adjacent to another province's coastline. Unlike fishing in Nova Scotia or New Brunswick, you cannot sail your vessel over the B.C. border into another province. In other words, a vessel fishing in B.C. and being subject to provincial work safety law cannot suddenly find itself fishing in another province and under that provincial law. To this end, it is arguable, the concern that the worker safety laws be uniform (by applying *only* the federal work safety laws) is less of a problem in B.C. than in provinces with adjoining coastlines, such as the Maritime provinces, where vessels can be subject to more than one province's law during a single fishing trip. While I raise this issue out of interest, it is, in my view, unlikely to change a judge's analysis on whether WorkSafe has jurisdiction to regulate safety on fishing vessels in B.C.

For the time being then, fishermen are left with the existing relationship between WorkSafe B.C. and TC and DFO. It is important to note, however, that under the MOUs discussed above, while TC has assigned the jurisdiction of vessel safety to WorkSafe, it has only done so when the vessel is "*fishing in B.C. waters*". This is because provincial legislation can only apply within provincial boundaries. Oddly, the MOU appears not to contemplate that a great deal of fishing on this side of Canada occurs outside of provincial boundaries. For example, any fishing done outside of bays or headlands on the west coast of Vancouver Island or Central Coast, and any fishing in Queen Charlotte Sound and Hecate Strait is likely not within the province and therefore WorkSafe has no vessel safety jurisdiction. As a result, under the current MOUs, a vessel fishing off Bamfield would have to comply with TC safety regulations, but as soon as it passed the Juliet Buoy (into Juan de Fuca Strait) TC would say it has to comply with WorkSafe regulations. Similarly, a vessel that makes a catch in Queen Charlotte Sound must comply with TC vessel safety, but as it passes into Queen Charlotte Strait it has to switch to comply with WorkSafe regulations. Is it any wonder why fishermen are frustrated?

A final point of interest to consider, and one that I estimate few fishermen appreciate (but should know), is that WorkSafe essentially plays two roles simultaneously. The first role is "worker compensation" – that is the system discussed above of compensating workers for work place accidents and providing certainty to employers and other workers that they cannot be sued by an injured worker for a workplace accident. The second role is the management of "workplace safety". WorkSafe uses the second role, managing safety, to reduce the cost of its first role, compensating people for injuries. However, the two roles are entirely distinct. Ironically, B.C. is the only province in Canada where the workers compensation scheme and the workplace safety scheme are set out in the same legislation (the *Worker Compensation Act* and its regulations). Despite this (the two roles

being contained in the same legislation), in the event the court finds the WorkSafe regulation does not apply to fishing vessels, it would not affect WorkSafe's "worker compensation" obligation to compensate fishermen for injures (yes, you would still have to pay premiums) and there would remain a bar against suing other workers and employers for injuries that occur at work. It is possible, however, that if WorkSafe maintains it cannot manage its risk by applying it standards of work place safety and TC is not successful in minimizing fishing accidents, WorkSafe may raise their premiums. Ultimately however, such a decision will (or at least *should*) be based on accident statistics, so the responsibility to keeping WorkSafe premiums manageable falls on every fisherman to ensure that accidents at sea do not happen.

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