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VIOLATION TICKETS FOR MARINERS AND VESSEL OWNERS?

The New System of Administrative Monetary Penalties Under the *Canada Shipping Act, 2001*

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The *Canada Shipping Act, 2001* ("CSA 2001"), which came into force on July 1, 2007, replaced the former *Canada Shipping Act* and brought with it many important changes to the law.

As Part Two in a series of Legal Desk articles highlighting changes in Canada's shipping legislation, this month's Legal Desk will focus on the implementation of AMPs (Administrative Monetary Penalties), a system of ticketing and fines akin to motor vehicle traffic tickets that legislators hope will make enforcement of the CSA 2001 and regulations more effective by encouraging mariners and owners to modify behaviour without the threat of the time and expense of prosecuting offenders in court. Under the new system individual mariners will face fines of up to \$5,000 (and \$25,000 for companies) as a result of tickets issued on the spot for infractions under the CSA 2001, including failing to have or maintain safety equipment, inadequate documentation, improperly trained crew or inadequate watches, oil pollution, and marine traffic violations.

What is an AMP?

An AMP is a fine that results from the issuance of a ticket (formally known as a "Notice of Violation") that can be given by a designated authority for breaches of various sections of the CSA 2001,

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and its regulations, as well as Directions given under the legislation (such as the Direction of a Marine Safety Inspector to comply with a safety or equipment or manning requirement). Notice of Violation will typically arise where failures to meet equipment, safety, documentation, or manning requirements are discovered during spot checks or scheduled inspections of vessels and their crew.

The amount of the fine under the AMP will vary with the type of offence, the severity of the circumstances, and the mariner's or owner's history of compliance. Fines for individual mariners will be a maximum of \$5,000 and up to \$25,000 for companies, per contravention. Interestingly, because the CSA 2001 provides that in some circumstances a representative of the vessel can enter into an agreement with Transport Canada to self-inspect and ensure compliance (rather than being inspected by an independent third party), failure to comply results in a doubling of the fine – therefore the maximum fine for a company can be \$50,000.

Why AMPs?

Under the former *Canada Shipping Act*, a mariner or vessel owner who contravened the Act or regulations had to be prosecuted in criminal court in order to hold them accountable. This represented a potentially significant drain on court resources. Prosecution was a lengthy and costly process for both Transport Canada and the alleged offender. Consequently, prosecutions were few and far between, and many contraventions went unpunished. Regulators such as Transport Canada – Marine Safety expect the AMP system will be more cost and time effective in influencing and correcting behaviour because the AMP

system makes it easier to visit the consequences of non-compliance on the mariner or vessel owner.

Is an AMP Automatic?

The issuance of an AMP is not automatic. If an inspector finds a contravention he may first give the alleged offender a warning. Alternatively, the inspector may ask that the offender enter into an "Assurance of Compliance". An Assurance of Compliance is essentially a written promise to do something, such as correct a behavior or situation that is an offence under the Act. The Assurance of Compliance gives the offender an opportunity to correct the problem without an AMP being issued. However, if the Assurance of Compliance is breached (such as the requirement is not met within the time required by the agreement), the AMP is issued automatically and the fine under the AMP is doubled.

It is important to note that the CSA 2001 states that where a mariner or owner agrees to enter into an Assurance of Compliance rather than accept a violation ticket, the party is deemed to have committed the violation – this is important because a record of such violations is kept for five years and perhaps longer. As such, while agreeing to enter into an Assurance of Compliance may avoid having to pay a fine, it does not avoid a record of a violation being kept.

Importantly, just because the AMP regulation provides that a particular contravention can result in an Assurance of Compliance or an AMP, it does not mean that the responsible authority cannot decide to prosecute the offender in court instead. The option is the Crown's. Transport Canada has stated that the decision to assess an AMP or to refer the case to prosecution in criminal court will be determined by a number of factors, including:

- whether the contravention was committed willfully;
- how serious the contravention was;
- what its consequences were;
- whether it was a repeat offence; and
- how best to deter future contraventions and ensure compliance.

Who Can Issue an AMP?

The primary responsible authority for issuing AMPs will be Transport Canada. However, contraventions of different parts of the legislation are expected to be the joint responsibility of other authorities, including Fisheries and Oceans and Environment Canada (particularly for offences related

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to the possibility or presence of oil pollution), and the RCMP and local police (particularly for recreational boating offences). Which authorities will be able to issue AMPs under which part of the legislation is being finalized by Transport Canada (see “When does the AMP System Commence” below).

More Than One AMP Issued for One Event?

Because a single event at sea can represent a breach of more than one condition under the CSA 2001 and regulations, it is likely that more than one AMP can be issued for a single event. Just as a police officer can issue you one ticket for speeding and another for driving without due care and attention (having only stopped you once), a marine inspector, upon visiting the vessel on one occasion, could issue AMPs for each of a minor oil spill and failing to keep an adequate engine room oil log.

Are AMPs Recorded?

The CSA 2001 contemplates that there will be a publicly accessible record of all violations and penalties as they relate to individuals and vessels. As such, mariners and owners should have some concern as to what effect this new record of violations may have on their employment or contract opportunities. Employers may search this record in deciding whether to hire a mariner, or a charterer may search the record before agreeing to hire a vessel. Keeping a clean record is obviously important.

The CSA provides that notations of a violation will be removed from the Government record after five years, unless the Minister of Transport deems it to be in the public interest that it not be removed; however, such a decision of the Minister can be disputed.

Disputing an AMP

You can dispute an AMP but you must do so within 30 days of receiving the ticket. You can also dispute the facts of which an Assurance of Compliance is based, but this must be done within 48 hours of signing the Assurance (disputing the facts may be important because once an Assurance is signed the party has essentially admitted to alleged facts and these go on their record).

AMPs are disputed by filing a notice of dispute with the Transportation Appeal Tribunal of Canada (“TATC”). The TATC is independent of Transport Canada, and reports to Parliament through the Minister of Transport.

A single TATC Review Officer will hold a hearing (like a disputed traffic ticket results in the court holding a trial) where the enforcement officer will have to prove that the

violation or default of an Assurance has occurred. The alleged offender will be given the opportunity to defend himself by showing the alleged offence did not occur. The TATC has the authority to reduce the amount of the fine provided the revised amount does not fall below a minimum set by the regulations.

If the mariner is not successful in having the notice of violation set aside by the Review Officer and an AMP is issued, the mariner can appeal to the second level within the TATC. This appeal hearing is before a panel of three adjudicators. If that appeal is not successful, the mariner can ask the Federal Court to review the decision of the TATC appeal panel.

When Does the AMP System Commence?

Although the CSA 2001 currently has written into it the necessary language to give effect to the AMP system, the regulations that will detail the use of AMPs is yet to be finalized. In September of 2007 Transport Canada, the authority responsible for the AMP regulations, reported that the necessary regulation will be in force in November of 2007. However, there is expected to be a six-month moratorium on the issuance of any AMP – this will allow for public education of the system and to allow enforcement officers to be trained in the system. While in this author’s mind the November 2007 implementation of the Regulation is a possibility, it is more likely that the AMP regulation will not be implemented until the Spring or Summer of 2008 and possibly later.

Legal Concerns About the AMP System: the Sinking Burden of Proof and the Grumpy Cop Factor

There is significant legal concern relating to the significant change in the *burden of proof* that inspectors now have to meet to have a mariner convicted of an offence. The “burden of proof” refers to the extent that the party issuing the notice of violation has to convince the TATC adjudicator that the offence actually occurred. In claims between citizens, such as breach of contract or negligence, the burden on the party asserting wrong-doing was done is the “balance of probabilities”, which means the court must be satisfied it is more likely than not (51% likely) that the event occurred. In criminal matters, the burden on the Crown is much higher, being “beyond a reasonable doubt” – this means the court has to be satisfied that there is no reasonable doubt that the offence did not occur. In most regulatory offences, such as shipping offences before CSA 2001, the Crown had to prove beyond a reasonable doubt that the offence occurred, then the accused could still escape conviction by showing, on the balance of probabilities, that they exercised reasonable care to avoid

the offence. This hybrid burden of proof was highly desirable for mariners because it put the toughest burden on the Crown and provided a relatively easy defence to the mariner.

Strikingly, under the new AMP regime, the burden of proof had been changed significantly. Firstly, once a notice of violation has been issued and disputed and the TATC is asked to rule on whether the accused is guilty of an offence, the inspector need only show on the *balance of probabilities* (remember this the lesser burden of proof) that the offence occurred (a violation was committed or an Assurance of Compliance was breached). This lowering of the burden of proof significantly increases the risk of conviction to the mariner.

Secondly, in some offences, the defence of reasonable diligence that was open to mariners under strict liability offences is removed by the CSA 2001. For example, where an Assurance of Compliance is given by a mariner or an owner and an inspector alleges the Assurance was not complied with (and therefore double the AMP is payable), if the inspector satisfies the TATC adjudicator that the offence occurred, the mariner cannot escape liability by showing he was diligent in avoiding the breach of the Assurance. This is key for owners and employers who are liable for the acts of their employees because, while the owner may have done nothing wrong and a careless employee might have, it is not open to the owner to say “but I took reasonable efforts to ensure the employee did not do that”. The owner will be convicted regardless. These changes in the burden of proof increase dramatically the mariner’s and owner’s chances of being convicted of an offence under the AMP system.

Another concern I have about the AMP system relates to the relative ease of issuing an AMP versus the difficulty in disputing the AMP. Like vehicle traffic tickets, AMPs are issued on the spot and may be subject to abuses of discretion by the issuing officer (what I call the Grumpy Cop Factor). Once the AMP is issued it is a relatively onerous procedure to dispute the AMP – if it is not disputed the mariner is deemed to have committed the offence. The result is that some mariners may be subject to an unwarranted AMP but be unable or unwilling to dispute the AMP because of the time and costs involved. The likelihood that the AMP would not be disputed (particularly an AMP with a small fine, such as \$500) provides further incentive to officers who may issue inappropriate AMPs because they know it is unlikely the AMP will be challenged. Mariners should be vigilant about accepting an AMP where the alleged offence is less than absolutely clear.

Obviously the new AMP system under the CSA 2001 is a detailed and important new area of law for mariners and vessel owners. The next several years will be interesting times for the development of the marine AMP system.

Mariners and owners who are AMPed will dispute the fines and cases will develop that will be helpful to show how other mariners and owners deal with alleged contraventions of the new CSA 2001. Readers should expect the Legal Desk to report on these cases and the law as it develops in the coming years.

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FEDERAL DEVELOPMENTS

Regulatory Amendments Strengthen Airport Emergency Response

On November 29, 2007, Lawrence Cannon, Minister of Transport, Infrastructure and Communities, announced regulatory amendments that require all certified Canadian airports to follow clear and consistent criteria when developing and evaluating emergency response plans.

The amendments will ensure a more formal approach to airport emergency planning and for plan testing. Emergency response plans must now include outlines of potential emergency scenarios and how each type of emergency will be handled, and identify airport and community organizations that are able to provide assistance during an emergency. As well, aircraft crash charts for each type of aircraft that uses the airport must be available in the plans.

The proposed regulatory changes were first published in the *Canada Gazette*, Part I, on October 7, 2007. The finalized regulations were published in the *Canada Gazette*, Part II, on November 28, 2007.

Transport Minister Introduces Amendments to the *Canada Marine Act*

On November 16, 2007, Lawrence Cannon, Minister of Transport, Infrastructure and Communities, introduced proposed amendments to the *Canada Marine Act*.

The amendments will strengthen the operating framework for the Canada Port Authorities (CPAs) by modifying the current borrowing regime, providing access to contribution funding, and clarifying some aspects of governance. The amendments will also include provisions regarding amalgamation of the CPAs and will introduce new provi-

sions to make the enforcement of minor violations easier to manage.

The *Canada Marine Act* governs the marine sector in Canada. It has improved the effectiveness of major ports by creating a National Ports System composed of independently managed port authorities for ports that are vital to Canada's international and domestic trade. It also provides Canada's major ports with the necessary tools to operate commercially and efficiently.

Canada's Government Urges the United States To Consider Exemption for All Canadian Overflights

On November 22, 2007, Lawrence Cannon, Minister of Transport, Infrastructure and Communities, announced that the Government of Canada has submitted its official comments on the United States Notice of Proposed Rulemaking (NPRM) by the Department of Homeland Security on the Secure Flight Program, urging the United States to exempt all Canadian overflights.

The official comments are aimed at the proposed U.S. Secure Flight Program. The government asserts that, in light of existing strong security protocols and security initiatives and ongoing and growing cooperative capacity to address security challenges, all flights between Canada and third countries that overfly the United States should be exempt from the Secure Flight program. Currently, all domestic Canadian flights, representing over 75 per cent of overflights, will be exempt under the proposed Secure Flight Program.

The Government of Canada and the Railway Association of Canada Sign New Agreement on Railway Security

On November 15, 2007, the Honourable Lawrence Cannon, Minister of Transport, Infrastructure and Communities, and Mr. Cliff Mackay, President and Chief Executive Officer of the Railway Association of Canada (RAC), signed a Memorandum of Understanding (MOU) to strengthen railway security.

This MOU replaces the one signed by the RAC and Transport Canada in July 1997. It is one of a series of security measures implemented in the last few years to enhance the security of rail and transit operations. The updated MOU primarily addresses security of freight rail and complements the security measures being implemented for passenger operations through the Transit-Secure program.

The new MOU requires that each railway operator who is a member of the RAC will prepare a security plan based on risk assessment. These plans will be provided to the Minister of Transport, Infrastructure and Communities and each will be reviewed no less frequently than once a year. The MOU also includes important elements such as maintaining records, performing exercises and drills, appropriate training and awareness for new employees, and reporting incidents to the Minister as soon as possible.

If you would like more information about the RAC and the list of participating companies, please visit www.railcan.ca.

New Government Strategy To Improve the Health of the Oceans

On October 5, 2007, Lawrence Cannon, Minister of Transport, Infrastructure and Communities, announced a five-year commitment to the Health of the Oceans Initiative. Transport Canada will invest \$23.85 million, while Canada's New Government is adding \$42.5 million to the \$19 million announced in the 2007 Budget. The Government intends to use this money to protect Canada's waterways from ship pollution by:

- enforcing ballast water regulations to prevent the introduction of invasive aquatic species;
- increasing detection of oil spills, prosecuting polluters, and deterring potential polluters;
- outfitting surveillance aircraft to better track and identify polluters;
- co-leading an international assessment to review and predict marine shipping uses and activities and the impacts of marine traffic; and
- researching the implementation of a strategy to reduce ship waste.

PROVINCIAL DEVELOPMENTS

Alberta

Province Invests in 1,100 Kilometres of Highway

On November 29, 2007, the Alberta government announced that it has paved 1,100 kilometers of highway

this year, which allows Albertans to travel from Calgary in the south, to High Level in the north.

Highlights of the road construction include:

- 246 kilometres of new paved highway at a cost of \$310 million;
- 861 kilometres of repaved highway at a cost of \$260 million;
- construction on the northeast leg of the Calgary ring road and continued on the northwest leg; and
- the southeast leg of Edmonton's ring road opened to traffic.

Manitoba

Proposed Legislation Would Bolster Street Racing Sanctions

On November 23, 2007, the Manitoba government proposed amendments to the *Highway Traffic Act* that would subject drivers convicted of new *Criminal Code* street racing offences to long-term driver's licence suspensions and vehicle forfeiture sanctions.

Street racing offences were recently added to the federal *Criminal Code*. The amendments would extend Manitoba's vehicle forfeiture provisions to include vehicles driven by people who commit the new federal *Criminal Code* offences.

The proposed legislation would also extend Manitoba's automatic driver's licence suspension sanctions to ensure that people convicted of criminal street racing offences will face suspensions ranging from one year to a possible lifetime suspension.

Nova Scotia

Province Targets Impaired Drivers

In December, the province launched a one-year integrated impaired driving enforcement pilot project in southwest Nova Scotia. It will involve the establishment of a dedicated, joint RCMP–municipal police mobile unit that will target impaired drivers and other offenders.

In addition to the integrated impaired driving enforcement pilot project, the province will also:

- develop an impaired driving countermeasures course;
- provide resources to train an additional 48 Datamaster technicians to operate Breathalyzer equipment throughout the province; and
- purchase 20 additional screening devices to help front-line officers detect and process impaired drivers, as well as 10 in-vehicle video cameras, which allow officers to capture and retain relevant evidence when interacting with impaired drivers.

Ontario

Government Seeks Partnership with Private Sector in Building a New Windsor Border Crossing

On November 27, 2007, Lawrence Cannon, Minister of Transport, Infrastructure and Communities, announced that it is the government's intention to seek a partnership with the private sector in the building of a new Windsor border crossing as part of the government's \$33 billion Building Canada infrastructure plan.

Minister Cannon said that it was the Government of Canada's intention to seek private sector participation to design, build, finance, and operate the Canadian inspection plaza and portion of the new bridge between Windsor and Detroit, while at the same time ensuring effective public oversight.