Mariner Life – Legal

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Of Seagulls and Bilge Water: A Primer on Bill C-15

Despite its harmless sounding name, "*An Act to amend the Migratory Birds Convention Act, 1994 and the Canadian Environmental Protection Act, 1999*", the new federal law proposed under Bill C-15, targeting the effects of marine pollutants on migratory birds, has wide ranging and significant effects for mariners. Fines of up to $1,000,000 for vessels under 5000 deadweight tonnes, minimum fines of $500,000 for vessels over 5000 tonnes, jail time, and personal liability for masters, chief engineers, and directors and officers, are just a few of the hard-hitting provisions in this controversial proposed law.

Although the principal intention of Bill C-15 was to address pollution (particularly bilge water discharge from larger vessels) in Canada's exclusive economic zone (between 12 and 200 miles offshore), the Bill effects all areas frequented by migratory birds. When you consider that the common seagull is such a bird, it is unlikely any coastal area, and therefore any mariner and any vessel, will escape application of this law.

In this legal Desk I will provide readers with a brief synopsis of portions of the proposed law and describe components of it that mariners are well advised to be aware of in the likely event Bill C-15 becomes new law.

Application Out to 200 Nautical Miles:

Bill C-15 clarifies the prohibition against depositing oily bilge waste, and other pollutants, into the ocean. While Canada has for some time had laws prohibiting the discharge of pollutants into "Canadian waters" (waters inside the 12 mile limit), Bill C-15 strengthens these laws by prohibiting the "deposit" of any "substance harmful to migratory birds" in areas "frequented" by these birds. These words make for a low threshold in proving whether an offence has been committed - arguably, as little as a tablespoon of oily water is a deposit harmful to migratory birds.

Although ships passing though Canada's exclusive economic zone (those waters from 12 to 200 miles offshore) are normally not affected by Canada's domestic laws, international law permits Canada to enforce laws in the exclusive economic zone ("EEZ") where an activity causes or threatens to cause "major damage" to the marine environment. What degree of discharge constitutes "major damage" is up for debate. Bill C-15 states that the Act applies "in Canada and in the exclusive economic zone of Canada".

This being said, it is unclear whether the lower threshold offence of "depositing" a pollutant can be enforced outside Canadian waters (bounded by the 12 mile limit) but within the 200 mile limit of the EEZ. Although the wording of Bill C-15 states the lower threshold test will apply to waters inside the 200 mile limit, it is questionably whether this is within the Federal government's power. Arguably, Canada would be attempting to

enforce a lower threshold ("deposit" versus "major damage") than is contemplated by the international law that allows such jurisdiction over the EEZ.

Subjects of Protection: Migratory Birds, including Gulls

I have mentioned that seagulls are included in the definition of migratory birds, so too are other common coastal birds like petrels, gannets, shearwaters and terns. Importantly, a migratory bird does not have to be present at the time an illegal deposit occurs in order for there to be an offence. Canadian Courts have interpreted "frequented" in terms of pollution law intended to protect fish, and have held that for an area to be "frequented" by an animal, there need only be proof that such an animal has been there and may be there at the time of the deposit. In other words, there does not need to be proof that the animal was actually there at the time the deposit occurred for there to be an offence.

Prohibited Acts:

There are many prohibitions under Bill C-15, and we only have room to mention a few. It is an offence to "deposit" a substance harmful to migratory birds. The term "deposit" is broadly defined to include "discharging, spraying, releasing, spilling, leaking, seeping, poring, emitting, emptying, throwing, dumping or placing". This definition is broad enough to capture intentional and accidental, direct and indirect acts of allowing pollution into the water.

It is also an offence under Bill C-15 to destroy, alter or falsify records, or otherwise interfere with an investigation of an offence. This would include changing engine-room or wheelhouse log books, computer data or other records belonging to the ship.

Bill C-15 also contains "whistleblower protection" that prohibits employers from making reprisals against employees (including contractors) that report possible offences, provided the employee is acting in good faith.

Persons Subject to Liability:

Both persons and vessels are subject to liability under the new law. Typically the ship will be named as a defendant where it is not obvious who onboard caused the deposit – in these cases it will be left to the owner of the vessel to respond to the charge.

Aside from owners, the proposed law creates an obligation on masters, chief engineers and operators of a vessel to take reasonable steps to ensure compliance with the prohibitions. If the vessel is owned by a corporation, directors and officers who are shown to influence activities of the vessel are deemed to have this obligation of ensuring compliance.

Fines & Penalties:

Depending on the circumstances, offences will either be prosecuted by summary conviction, or by the more serious method of indictment. On the more common summary conviction proceeding, the Court may levy a fine of up to $300,000 or up 6 months in prison, or both. If prosecuted by indictment, the accused is subject to a fine of up to $1,000,000 or up to 3 years imprisonment, or both. Fines and may be doubled for second and subsequent offences.

Importantly, for offences involving vessels over 5000 tonnes deadweight, there are mandatory minimum fines. If the prosecution elects to proceed by indictment, the accused is subject to a minimum $500,000 fine, and if by summary conviction, a minimum $100,000 fine. It is important to remember that these penalties apply to masters, chief engineers, operators, and owners, including directors and officers of companies.

Defences to Conviction

Offences under the new law are termed "strict liability", or "hybrid" offences. They are so called because the burden of proving the offence was committed lies between the criminal burden of "beyond a reasonable doubt" and the civil burden of the "balance of probabilities". In a strict liability offence the Crown must prove beyond a reasonable doubt that the offence occurred. If the Crown is successful in doing so the accused may then escape conviction by showing that they were "duly diligent" is exercising reasonable care to avoid committing the offence – this is the "due diligence defence". We will discuss the due diligence defence as it relates to oil pollution in later issues of the Legal Desk.

Coming into Force

When will Bill C-15 become law? The Bill has been passed through the House of Commons and is now in Committee Stage of the Senate, with only a final Senate reading and Royal Assent to be completed before coming into force. Recently however, the *Gomery Commission* inquiry into government mis-spending has raised the possibility that a snap federal election may occur before the proposed law comes into force. At the moment it appears most likely, in my opinion, that the election will be delayed until at least November of 2005, leaving adequate time for the law to come into force. This point, along with more on the effects of Bill C-15, will be address in future issues of the Legal Desk.

Darren Williams is a marine lawyer with Williams & Co. in Victoria B.C. and can be reached for question or comment at dw@MarineLaw.ca or 250-478-9928. His 24 hour emergency line is 25-0888-0002.