BILL S-2: MARINE LIABILITY ACT

David Johansen
Law and Government Division

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LEGISLATIVE HISTORY OF BILL S-2

HOUSE OF COMMONS

Bill Stage	Date
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Second Reading:	23 February 2001
Committee Report:	2 April 2001
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SENATE

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N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL S-2: MARINE LIABILITY ACT

BACKGROUND

On 31 January 2001, Bill S-2, the Marine Liability Act, was introduced in the Senate by the Hon. Fernand Robichaud, Deputy Leader of the Government in the Senate.(1)

Current Canadian legislation relating to the marine mode of transportation includes several regimes governing the liability of domestic and foreign shipowners and shippers, and their responsibility for damage to property, environment, or loss of life or injury to others during maritime activity and therefore dealing with the economic and legal consequences of maritime accidents. They are usually based on international conventions whose aim is to harmonize international law and the practices of different nations to achieve a level playing field for the international marine industry. Over the years, Canada has adopted the provisions of these conventions in various statutes.

Bill S-2 would consolidate existing marine liability regimes (Fatal Accidents; Limitation of Liability for Maritime Claims; Liability for Carriage of Goods by Water; Liability and Compensation for Pollution Damage) into a single piece of legislation which would also include new regimes concerning shipowners' liability to passengers and apportionment of liability applicable to torts governed by Canadian maritime law. In addition, the bill would retroactively validate certain by-laws made under the *Canada Ports Corporation Act* and certain regulations made under the *Pilotage Act.* The validating provisions are of a strictly house-keeping nature and are unrelated to the marine liability regimes set out in the bill.

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(1) Bill S-2 is virtually identical to Bill S-17, which was introduced in the 2nd Session of the 36th Parliament but died on the *Order Paper* with the dissolution of Parliament. The only exception is clause 4 in Part 1, which previously contained separate definitions for a child and a dependant but which now only contains a modified definition for a dependant.

In announcing the introduction of the bill in the Senate, the Minister of Transport, the Hon. David Collenette, stated "The [bill] represents a logical step which both improves the structure and understanding of the Canadian legislation on marine liability regimes and, at the same time, advances the cause of simplification of the *Canada Shipping Act*."

DESCRIPTION AND ANALYSIS

A. Part 1 - Personal Injuries and Fatalities (clauses 4-14)

According to departmental sources, until the 1993 British Columbia Court of Appeal decision in *Shulman* v. *McCallum*, it was understood that relatives of persons who died in marine accidents could sue under either Part XIV of the *Canada Shipping Act* (concerning fatal accidents) or provincial fatal accidents legislation. In the 1998 Supreme Court of Canada decision in *Ordon* v. *Grail*, however, the Court held that the right to claim for maritime wrongful death or for personal injury from marine accidents is based only on Canadian maritime law and not on provincial law. The Supreme Court has ruled that Canadian maritime law is an independent body of law that is uniform throughout Canada and includes specialized admiralty law rules derived from international maritime law, English common law and civil law. Since it is now clear that Parliament has exclusive jurisdiction over tort claims for maritime injury or death, updating of the federal legislation has become a priority for Transport Canada.

Part 1 of the bill would generally re-enact the provisions concerning fatal accidents that currently appear in Part XIV of the *Canada Shipping Act*, revising them to give effect to the various Supreme Court of Canada decisions. More specifically, Part 1 would update Canadian maritime law to reflect developments in provincial fatal accidents legislation; to confirm that maritime wrongful death and injury claims may be made against persons as well as ships; to give effect to the rights of the relatives of deceased and injured persons to claim for loss of care, guidance and companionship; and to modernize legislative wording. The proposed amendments were previously introduced in Bill C-73, An Act to amend the Canada Shipping Act and other Acts as a consequence (2nd Session, 35th Parliament), which died on the Order Paper in April 1997 with the dissolution of Parliament.

Part 1 would apply only in respect of claims for which a remedy would be sought under Canadian maritime law (as defined in the *Federal Court Act*) or any other law of Canada in relation to any matter falling within the class of navigation and shipping (clause 5).

Dependants of a person injured or deceased as a result of a fault or neglect that would have entitled the affected person or to sue, would likewise be entitled to sue for their related losses (clauses 6(1),(2)). The damages recoverable by a dependant could include an amount to compensate for the loss of guidance, care and companionship that could reasonably have been expected from the injured or deceased person in the absence of the injury or death, as well as any amount to which a public authority could be subrogated in respect of payments made to or for the benefit of the injured or deceased person or the dependant (clause 6(3)). Damage claims would not be reduced by life insurance proceeds (clause 6(4)). The damages recoverable by a dependant would be subject to the general rule of apportionment under Part 2 of the bill (clause 6(5)).

Damages could be awarded to dependants in proportion to their loss resulting from the injury or death, and the amount so awarded would be divided in shares determined by the court (clause 7). A person against whom an action was commenced under proposed Part 1 could pay into court an amount of money as compensation for all persons entitled to damages without specifying the shares into which it was to be divided (clause 8). The court could, in its discretion, postpone the distribution of any amount to which a person under 18 or under a legal disability was entitled, could order its payment from the amount paid into court under clause 8, or could make any other order that was in the interest of the person (clause 9).

An action under Part 1 would be for the benefit of the dependants of the injured or deceased person (clause 10(1)). An action under clause 6(2) would be brought by the executor or administrator of the deceased person. If no action was brought within six months after the person's death, or if there were no executor or administrator, the action could be brought by any or all of the dependants of the deceased person and would be generally be subject to the same procedure as if it were brought by an executor or administrator (clause 10(2)).

A person who commenced an action under Part 1 would be required to take reasonable steps to identify and join as parties to it all persons who were entitled or who claimed to be entitled to damages as dependants of the injured or deceased person and to include in the statement of claim the grounds for the claim of each such person (clause 11).

Multiple actions for the benefit of the dependants of the same injured or deceased person could be consolidated in one action or tried together in the same court at the request of one party (clause 12). If actions were commenced for the benefit of two or more persons claiming to be entitled to damages under Part 1 as dependants of the injured or deceased person, the court could make any order or determination that it considered just (clause 13).

A limitation period of two years would apply with respect to actions under proposed Part 1 (clause 14).

B. Part 2 – Apportionment of Liability (clauses 15-23)

According to departmental information, historically two common law rules have caused considerable concern with respect to their application to maritime negligence claims in Canada. First, the common law defence of contributory negligence prevents a claimant from recovering anything if the defendant can prove that the claimant's own negligence, even in the slightest degree, has contributed to the damages. Second, a defendant who is found responsible for paying a claimant damages is prevented from claiming a contribution from other persons who may have contributed to the claimant's loss.

Beginning in the 1920s, the common law provinces, by virtue of their constitutional powers over property and civil rights, recognized the harsh effect of these outmoded common law rules and replaced them with legislation that allowed courts to apportion responsibility and to permit litigation parties to claim contribution and indemnity from other persons. The Quebec Civil Code had always recognized these rights. At the federal level, however, apportionment legislation such as currently exists at the provincial level has never been enacted except with respect to damage caused by collisions between ships. There are many maritime death, personal injury and property claims that do not involve collisions.

Until the 1970s the law was unclear as to whether courts could apply provincial apportionment statutes to maritime claims. In some cases, courts applied the older harsh common law rule, holding that provincial statutes could not apply to negligence claims arising from navigation and shipping activities since constitutionally these matters fall within federal legislative authority.

In its decisions in *Bow Valley Husky (Bermuda) Ltd.* v. *Saint John Shipbuilding Ltd.* (1997) and *Ordon* v. *Grail* (1998), the Supreme Court of Canada held that provincial apportionment statutes do not apply to maritime negligence claims, and that it would be unjust to continue to apply the old common law rules to such claims. In light of these decisions, the department feels that there is a need for new legislation that would establish a uniform set of rules applying to all civil wrongs governed by Canadian maritime law and thereby eliminate the current uncertainty as regards the legal basis for the apportionment of liability in maritime cases. Accordingly, for the first time in Canadian law, Part 2 of the bill would implement a new uniform regime of apportionment of liability applicable to all torts governed by Canadian maritime law.

For purposes of Part 2, "earnings" would be defined as including money paid by shippers to carry cargo (freight), fares paid by passengers (passage money) and money paid for the use of a ship (hire) (clause 15(1)). According to clause 15(2), a reference to loss caused by the fault or neglect of a ship would be construed to include any salvage or other expenses consequent on that fault or neglect, with the exception of the loss in clause 17(3), described below.

Part 2 would apply in respect of a claim made or a remedy sought under Canadian maritime law (as defined in the *Federal Court Act*), or under any other law in Canada in relation to any matter within the class of navigation and shipping (clause 16).

According to clause 17, where loss was caused by the fault or neglect of two or more persons or ships, their liability would be in proportion to their fault or negligence. If it were not possible to determine different degrees of fault or neglect, their liability would be equal (clause 17(1)). The persons or ships that were at fault or negligent would be jointly and severally liable to the persons or ships suffering the loss but, as between themselves, they would be liable to make contribution to each other or to indemnify each other in the degree to which they were respectively at fault (clause 17(2)). Liability to make good the loss would not be joint and several, however, where the fault or neglect of two or more of those ships resulted in loss to one or more of them or, to their cargo or other property on board, or to their earnings (clause 17(3)). For purposes of clause 17, a reference to liability of a ship that was at fault or negligent would include liability of any person responsible for its navigation and management or any other person responsible for its fault or neglect (clause 17(4)).

A person entitled to claim contribution or indemnity under Part 2 from another person or ship that was or might be liable in respect of a loss could do so a) by adding the other person or ship as a party to the proceeding pending before a court or administrative or arbitral tribunal of competent jurisdiction, in accordance with the applicable rules of procedure or arbitration agreement; b) by commencing a proceeding in such a court or tribunal; or c) if the other person or ship had settled with the person suffering the loss, by commencing a proceeding before such a court or tribunal (clause 18). The court or tribunal in which a proceeding was continued or commenced under clause 18(c) could deny the award of damages or adjust the amount awarded if it were not satisfied that the settlement was reasonable (clause 19). No claim for contribution or indemnity could be made under clause 18 later than one year after the date of judgment in the proceeding or the date of the settlement agreement (clause 20(1)). A claim under section 18, however, would not be defeated by any period of limitation, or by any requirement for notice, that was applicable to the original claim for contribution or indemnity (clause 20(2)).

Part 2 would apply notwithstanding that a person who had suffered a loss had had the opportunity to avoid the loss and had failed to do so (clause 21). The rights conferred by Part 2 on a person or ship that was found liable or that settled a claim would be subject to any existing contract between that person or ship and a person from whom contribution or indemnity was claimed (clause 22).

There would be a two-year limitation period for claims arising from <u>collisions</u> between ships (clause 23(1)). However, a court with jurisdiction to deal with such an action could, in accordance with the rules of the court, extend the two-year time limit to the extent and on the conditions that it thought fit (clause 23(2)(a)). As well, the court could extend the time period for arresting a ship if satisfied that the two years had not afforded a reasonable opportunity to arrest the ship within the waters of a province or of Canada or within the territorial waters of the country where the claimant lived or had its principal place of business, or within the territorial waters of the country to which the claimant's ship belonged (clause 23(2)(b)). For purposes of clause 23, an "owner" of a ship would include any person responsible for its navigation and management or any other person responsible for its fault or neglect (clause 23(2)).

C. Part 3 – Limitation of Liability for Maritime Claims (clauses 24-34)

Part 3 of the bill would generally re-enact existing provisions of Part IX of the *Canada Shipping Act* that relate to the limitation of liability for maritime claims (sections 574-584) and that are based on the 1976 Convention on Limitation of Liability for Maritime Claims as amended by its 1996 protocol. Key elements of the Convention are the right of limitation, limits of liability and a limitation fund. The relevant portions of the Convention (Articles 1 to 15 and 18) and its 1996 Protocol (Articles 8 and 9) are set out in Schedule 1 to the bill.

The current regime allows shipowners to limit the amount of their financial responsibility for certain types of damages occurring in connection with the operation of a ship. It applies to all maritime claims and to all ships, including pleasure craft, with the notable exception of claims for oil pollution damage (those claims are currently dealt with under provisions of Part XVI of the *Canada Shipping Act* which would be re-enacted in Part 6 of the bill).

D. Part 4 – Liability for Carriage of Passengers by Water (clauses 35-40)

According to departmental sources, there are currently no statutory provisions in Canadian law that establish the basis of liability; i.e., when and in what circumstances shipowners (carriers) are liable for loss of life or personal injury to passengers travelling by ship. Existing legislation deals only with global limitation of liability for maritime claims, including passenger claims, but does not deal with the basis on which liability may be established. Thus, claimants can establish shipowners' liability to passengers only in accordance with the ordinary rules of negligence.

With the exception of the Quebec Civil Code (which contains provisions dealing with maritime carriage that is entirely intra-provincial), no Canadian legislation specifically prevents shipowners from contracting out of liability for loss of life or personal injury caused by their fault or negligence by inserting the appropriate clause into contracts of carriage. The department notes that this practice of "contracting out" is common in Canada and that foreign carriers serving Canada also generally either exempt themselves completely from any liability, or impose very restrictive limits on it. Such exemptions are currently null and void in the United States, France and Great Britain. They are also generally absent from other transport systems in

Canada or are expressly prohibited; for example, the liability of air carriers to passengers has long been regulated by the *Carriage by Air Act*.

There is thus considerable uncertainty at present concerning the liability of shipowners for loss of life or personal injury to passengers. The department is apparently concerned that a major marine disaster in Canada would generate a strong public reaction and expectations for the government to act quickly and decisively to ensure that adequate compensation was available. Moreover, the department feels that the introduction of large vehicle ferries with large passenger capacity on both the east and west coasts, coupled with the growing popularity of cruises both inside and outside Canadian waters, lends a sense of urgency to the problem of liability for the carriage of passengers by water. As well, it notes the lack of a liability regime for passengers has become a more pressing concern since recent tragic accidents in European waters.

Accordingly, the bill proposes, in Part 4, to establish a new regime of shipowners' liability to passengers to ensure that in the event of a loss, particularly a major one, the claimants would have a guarantee of compensation, at least up to a certain level. The regime would be based on the Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea, concluded at Athens on 13 December 1974, as amended by its 1990 Protocol to update the limits of liability. According to departmental sources, this Convention is the most widely used model for national legislation in this field in many maritime countries. Part 4 of the bill was previously introduced in the form of Bill C-59, the Carriage of Passengers by Water Act (2nd Session, 35th Parliament), which died on the Order Paper in April 1997 with the dissolution of Parliament.

For purposes of Part 4, clause 35 would define the term "Convention" to mean the above 1974 Convention and the term "Protocol" to mean the 1990 Protocol to amend that Convention. Relevant Articles 1 to 22 of the Convention are set out in Part 1 of Schedule 2 to the bill and relevant Articles III and VIII of the Protocol are set out in Part 2 of Schedule 2. The Convention applies to maritime claims for loss or life or personal injury and its key elements are basis of liability, limitation of liability and shipowners' defences.

Clause 36 would extend the meaning of certain expressions in the Convention. The definition of the term "ship" would be extended so that the Convention would be made

applicable not only to seagoing vessels but also to ships operated on lakes and inland waters of Canada. The meaning of "contract of carriage" would be expanded so that the Convention would be made applicable to the contracts of carriage of passengers and their luggage in freshwater. Also, in the application of the Convention under Part 4, Article 19 of the Convention (which establishes the relationship between the Athens Convention and other international Conventions governing the limitation of liability of shipowners) would apply to owners of all ships, whether seagoing or not.

Clause 37(1) of the bill would give Articles 1 to 22 of the Convention the force of law in Canada. Article 18 of the Convention specifically prohibits the contracting out of liability. Clause 37(2) of the bill would extend the application of the Convention to the carriage by water, under a contract of carriage, of passengers and their luggage from one place in Canada to the same or another place in Canada, either directly or by way of a place outside Canada; and the carriage by water, otherwise than under a contract of carriage, of passengers and their luggage. Exceptions would be made for the master of the ship, a member of the crew of the ship, or any other person employed or engaged in any capacity on board a ship on the business of the ship, and a person carried on board a ship other than a ship operated for a commercial or public purpose.

For purposes of the application of the Convention, Canada would be a State Party to the Convention (clause 38).

The Governor in Council would be permitted to make regulations requiring insurance or other financial security to be maintained to cover liability to passengers under Part 4 (clause 39). The Governor in Council could, by order, declare that an amendment made in accordance with Article VIII of the Protocol to any of the limits of liability specified in Article 7(1) or 8 of the Convention would have the force of law in Canada (clause 40).

E. Part 5 – Liability for Carriage of Goods by Water (clauses 41-46)

The *Carriage of Goods by Water Act* applies to all international carriage of goods between Canada and other countries which give the force of law to the Hague-Visby Rules embodied in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, concluded at Brussels on 25 August 1924 and its Protocols of 1968 and 1979.

The Act also applies to the domestic carriage of goods by water, but with some modifications. The Act provides for the eventual replacement of the Hague-Visby Rules with the Hamburg Rules, which are embodied in the United Nations Convention of the Carriage of Goods by Sea, 1978, concluded at Hamburg on 31 March 1978. Both of the Conventions apply to maritime claims for loss or damage to cargo and their key elements are basis of liability; limitation of liability; and shipowners' defences. According to departmental sources, the fact that the Hague-Visby Rules, unlike the Hamburg Rules, contain no jurisdiction clause has given rise to some problems where the inclusion of foreign jurisdiction clauses in bills of lading has prevented adjudication or arbitration of any dispute in Canada. Accordingly, an amendment is needed to confirm Canadian jurisdiction in situations where a bill of lading stipulates that disputes must be submitted to foreign courts.

Part 5 of Bill S-2 would re-enact existing provisions of the *Carriage of Goods by Water Act* respecting the application of the Hague-Visby Rules in Canada (reproduced in Schedule 3 to the bill) and the eventual implementation of the Hamburg Rules (reproduced in Schedule 4 to the bill). The Hamburg Rules would come into force only by an Order of the Governor in Council to bring clause 45 of the bill into effect (clause 131(2)), after which, according to clause 43(4) of the bill, the Hague-Visby rules would no longer apply. However, a new provision, not contained in the Hague-Visby Rules, would be introduced to confirm Canadian jurisdiction in situations where a bill of lading stipulates that disputes must be submitted to foreign courts. According to clause 46(1), if a contract for the carriage of goods by water to which the Hamburg Rules did not apply were to provide for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant could nevertheless institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada; such court or tribunal would have to be competent to determine the claim if the contract had referred the claim to Canada. This would apply where the actual or intended port of loading or discharge under the contract was in Canada; where the person against whom the claim was made resided or had a place of business, branch or agency in Canada; or where the contract was made in Canada. Clause 46(2) stipulates that, notwithstanding clause 46(1), the parties to a contract referred to in the latter sub-clause could, after a claim arose under the contract, designate by agreement the place where judicial or arbitral proceedings could be instituted.

F. Part 6 – Liability and Compensation for Pollution (clauses 47-105)

Part 6 would continue the existing regime governing liability and compensation for maritime oil pollution. Part 6 would re-enact existing provisions of Part XVI of the *Canada Shipping Act* (sections 673-727) based on two international Conventions, the 1969 Convention on Civil Liability for Oil Pollution Damage and the 1971 Convention on the Establishment of an International Fund for Compensation for Oil pollution Damage, both of which were amended by Protocols in 1976 and 1992. The current provisions governing liability and compensation for maritime oil pollution were amended in 1998. No changes to the present regime would be proposed in Bill S-2 with the exception of a new provision aimed at keeping pace with modern technology in offshore oil exploration. The provision would stipulate that Part 6 of the bill would not apply to a floating storage unit or floating production, storage and offloading unit unless it was carrying oil as a cargo on a voyage to or from a port or terminal outside an offshore oil field (clause 49(2)).

G. Part 7 – Validation of Certain By-laws and Regulations (clauses 106-107)

Part 7 concerns a couple of strictly housekeeping measures that are not related to the marine liability regimes, the principal subject of the bill.

Technical errors would be corrected by retroactively validating certain by-laws made under the *Canada Ports Corporation Act* between 1983 and 1985 for increased harbour dues (clause 106) and a 1994 regulation made under the *Pilotage Act* to increase fees collected by the Laurentian Pilotage Authority for a three-month period (clause 107). These provisions would remove any ambiguity about the validity of the increased harbour dues and Laurentian Pilotage Authority fees collected by the respective authorities.

H. Part 8 – Transitional, Consequential Amendments, Conditional Amendment, Repeal and Coming into Force (clauses 108-131)

Part 8 contains certain transitional, conditional and consequential amendments, and repeal and coming into force provisions.

A number of amendments to other Acts would be required as a result of the enactment of this bill, and certain provisions in other Acts would need to be repealed. For

example, clause 125 would repeal Part XIV (sections 645-653) of the *Canada Shipping Act* dealing with fatal accidents since those provisions would now be revised and re-enacted in Part 1 of the bill. Clauses 126 to 128 of the bill would repeal sections 677 and 677.1, sections 679-723 and sections 724-727 respectively in Part XVI of the *Canada Shipping Act* (concerning liability for oil pollution damage) since those provisions would be re-enacted in Part 6 of the bill. Certain other provisions of the *Canada Shipping Act* that would be re-enacted in various parts of the bill would be repealed. Similarly, the *Carriage of Goods by Water Act* would be repealed (clause 130) since its provisions would be re-enacted in Part 5 of the bill as part of the consolidation of marine liability regimes in a single statute.

The provisions of Parts 2 to 5 of the bill (except for clause 45 concerning the Hamburg Rules) and the provisions of Parts 6 to 8 (except for clause 125 (repeal of Part XIV of the *Canada Shipping Act*) and clause 129) would come into force 90 days after the day on which the bill received Royal Assent or on any later day or days previously fixed by order of the Governor in Council (clause 131(1)). Part 1 of the bill and clauses 45 and 125 would come into force of a day or days to be fixed by Order of the Governor in Council (clause 131(2)).

COMMENTARY

The proposal for a new regime respecting liability for carriage of passengers by water, set out in Part 4 of Bill S-2 (and previously introduced in the form of Bill C-59, the Carriage of Passengers by Water Act – 2nd Session, 35th Parliament – which died on the Order Paper in April 1997 with the dissolution of Parliament), was the subject of discussion papers providing the basis for consultations with the industry and the provinces. According to departmental sources, no negative reaction or problems were raised before or after the introduction of Bill C-59. The principal groups concerned are shipowners, passengers, marine insurers and the marine legal community.

The proposed revisions to the current provisions of Part XIV of the *Canada Shipping Act* regarding fatal accidents, which would be re-enacted in Part 1 of the bill, were previously introduced in Bill C-73 – 2nd Session, 35th Parliament. That bill died on the Order Paper with the dissolution of Parliament in April 1997, having received the general support of stakeholders.

The department has pointed out that all provinces except Quebec have indicated their support for the proposed new regime on apportionment of liability set out in Part 2 of the bill. Quebec expressed its preference for an alternative approach whereby provincial law on apportionment of liability would be incorporated by reference into the federal statute. The department has noted, however, that this approach is counter to the 1997 Supreme Court of Canada decision in *Bow Valley Husky (Bermuda) Ltd.* v. *Saint John Shipbuilding Ltd.* and is not supported by the maritime law community since it would not contribute to the uniformity of Canadian maritime law.

Finally, departmental sources have stated that the proposal to consolidate maritime liability regimes into one piece of legislation has been the subject of consultations within the Canada Shipping Act Reform Project and has received support from the majority of stakeholders. It is the department's view that the establishment of a single Act dedicated solely to maritime liability regimes would avoid the proliferation of separate statutes on marine liability and improve the structure of the legislation and users' understanding of it.