Legislative Summary **LS-516E**

BILL C-61: AN ACT TO AMEND THE CANADA MARINE ACT AND OTHER ACTS

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2 November 2005

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LEGISLATIVE HISTORY OF BILL C-61

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	22 June 2005	First Reading:	
Second Reading:		Second Reading:	
Committee Report:		Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

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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BACKGROUND

The *Canada Marine Act* (CMA), which received Royal Assent in 1998, governs the marine sector in Canada. The CMA implemented the 1995 National Marine Policy, which introduced commercial principles into the administration of marine infrastructure to achieve greater efficiency in marine transportation in Canada. Most notably, the CMA permitted the transfer of the management and operation of major ports and the St. Lawrence Seaway to not-for-profit corporations. The CMA also allowed for divestiture of public port facilities to local interests or other governments. In the absence of interest in taking over a public port, the CMA allowed Transport Canada to decommission or otherwise terminate its interests in the facility.

In accordance with section 144 of the CMA, the Act was subject to a review in 2002. In response to the final report of the CMA Review Panel, which was completed in 2003,(1) Bill C-61, An Act to amend the Canada Marine Act and Other Acts, was introduced in the House of Commons on 22 June 2005. The following recommendations of the CMA Review Panel find expression, at least in part, in provisions of Bill C-61:

> Recommendation 4.1
>
> Based on the overwhelming majority of stakeholder submissions, the Panel endorses the addition of a preamble to the *Canada Marine Act* that explicitly sets out the historical and present-day significance of marine transportation to our national heritage, sovereignty and economy.

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) *The Canada Marine Act – Beyond Tomorrow*, Report of the Review Panel to the Minister of Transport, TP14107B, Transport Canada, June 2003.

> Recommendation 5.3
>
> Application and approval processes to increase borrowing limits should be simplified and streamlined to ensure that CPAs [Canada Port Authorities] can undertake projects in a timely manner.
>
> Recommendation 5.7
>
> The CMA should be clarified specifically to exclude lease payments from the definition of fees.
>
> Recommendation 6.2
>
> Part 4 of the CMA should be re-examined to ensure that it contains more economically viable and efficient provisions for detention, guarantees and release of ships accused of offences under the CMA.

DESCRIPTION AND ANALYSIS

The vast majority of the provisions in this bill are technical amendments made at the request of the Department of Justice. By and large, these clauses make editorial amendments that better align the French and English versions of the CMA and the *Pilotage Act*, or better reflect the Civil Code perspective. As these clauses do not appear to change the intent of the affected provisions, these amendments are not described or analyzed here. Clauses with housekeeping provisions are also omitted.

A. Interpretation (Clause 1)

The substantive amendment in clause 1 is the replacement of the definition of the term “fees” in the CMA. In accordance with Recommendation 5.7 of the CMA Review Panel, the amended definition of “fee” clarifies that payments made under a lease or licence are not considered fees.

B. Objective (Clauses 2 and 3)

Clause 2 replaces the title “National Marine Policy” before section 4 of the CMA with “Objective.”

Clause 3 introduces an expanded objective for the Act in section 4 by recognizing “the historical, contemporary and future significance of marine transportation and its contribution to the Canadian economy.” Then, a reference to the “National Marine Policy” in

section 4(*a*) is replaced with "marine policies." Otherwise, section 4(*a*) is unchanged, continuing to state that these policies should provide marine infrastructure to meet needs and support social and economic objectives and promote national competitiveness and trade objectives. New section 4(*a.1*) refers to the objective of promoting the success of ports to contribute to Canadian economic growth, prosperity and competitiveness.

While clauses 2 and 3 remove the references to the "National Marine Policy" in the CMA, they address Recommendation 4.1 of the CMA Review Panel to a certain extent by acknowledging the role of marine transport in Canada's heritage and economic future.

C. Canada Port Authorities (Clauses 4 to 25)

Clause 4 amends the provisions respecting the contents of the letters patent of the port authorities under Part 2 of the CMA. Currently, the letters patent set out the number of directors, between seven and eleven, appointed to a port authority. The amended section lowers the minimum to five for all port authorities except at the port of Vancouver. Having fewer directors at the smaller port authorities is expected to result in quicker decision-making and to support responsive and efficient management of ports. Existing section 8(4) of the CMA requires that any provisions respecting activities described in section 28(2)(*b*) (Capacity and Powers) of the CMA need approval from the President of the Treasury Board and Minister of Finance. Clause 4(2) exempts entering into contracts, including contracts for the borrowing of money, from that approval requirement.

Clause 5 concerns the circumstances under which supplementary letters patent may be issued, and what approval is needed to issue them. It amends the existing section 9 of the CMA by stating that, if the board of directors of a port authority wishes the Minister of Transport to issue supplementary letters patent, the board must pass a resolution to that effect, instead of making a simple request. A new section 9(2) provides that supplementary letters patent that give a port authority the power to borrow $7 million or less for port purposes do not (unless the Minister of Transport directs otherwise) require Governor in Council (Cabinet) approval, if they already have the approval of the Minister of Finance. Clauses 4 and 5 streamline the approval process for applications to borrow for port purposes, especially for amounts of $7 million or less, and therefore may be considered to address in part Recommendation 5.3 of the CMA Review Panel.

Currently, a director is appointed to the board of a port authority for a term that may be renewed only once. Clause 6 of the bill allows directors' terms to be renewed twice. The bill also specifies that terms may be renewed only just prior to expiration and that appointments begin when the port authority receives the notice of appointment. This clause allows for more long-term corporate memory in port management and governance, similar to that of Canada Airport Authorities.

Clause 7 affects section 16 of the CMA, which describes individuals who may not be officers of a port authority. New section 16(2) provides that officers of a port authority, except the chief executive officer, may be a director in spite of the provision stating that an officer or an employee of the federal public administration, including an officer or an employee of a federal Crown corporation, may not be a director.

Clause 8 concerns section 19 of the CMA, which sets out the ways in which a director may cease to hold office at a port authority. As directors currently do not have the power to appoint other directors, it removes directors' power to let a fellow director go for cause.

Clause 9 adds new section 21.1 to the CMA to allow the board of directors to delegate any of its powers to manage the activities of a port authority, except those prescribed by the regulations, to the officers of the port authority. This provision recognizes that it is difficult for directors to manage all of the business of a CPA, and therefore clarifies that the directors may delegate to facilitate port operations.

Clause 10 concerns section 25 of the CMA, which currently strictly limits port authorities' access to federal funds. Specifically, it states that no payment may be made under an appropriation by Parliament to enable a port authority or subsidiary to discharge any obligation or liability. This provision applies even if the port authority or subsidiary is an agent of the federal Crown (as defined in section 7 of the CMA). It is noteworthy that the provision applies "notwithstanding any authority given under any other Act." Thus, section 25 applies even if Parliament were to purport to give the government the authority to provide money to port authorities. There are currently four exceptions to the "no appropriation" rule, which are set out in section 25(*b*) and state that payments may be made pursuant to authority given under:

1. the *Emergencies Act*;
2. any other Act in respect of emergencies;
3. any Act of general application providing for grants; or
4. an agreement establishing funding obligations that existed before section 25(*b*) came into force.

The proposed amendment replaces section 25(*b*) and expands the exceptions to the "no appropriation" rule. The *Emergencies Act* and any other Act in respect of emergencies continue to be exceptions to the general rule, but the third exception now refers to *contributions*, rather than grants, under Acts of general application relating to infrastructure or national security. The use of the term "contribution" signifies that projects will be structured and require a valid business case to be eligible. More importantly, it indicates that costs will be shared among a number of parties, which might include the CPA, the private sector and other levels of government. The bill provides that federal contributions are to be limited to 20% of infrastructure or infrastructure-related projects that meet criteria prescribed in regulations. Thus, the amendment provides port authorities greater access to federal funds but does not truly reflect the intent of Recommendation 5.2 of the CMA Review Panel, which was to give port authorities the same access to federal funds as other companies. Appropriations can continue to be made under section 11.1(1) of the *Marine Transportation Security Act*, but this provision will cease to exist on 1 December 2007 when clause 10(2) comes into force.[(2)] Financial agreements in existence before 1 March 1999 are also exempted from the "no appropriations" rule in section 25(*c*).

Clause 11 affects section 27 of the CMA, which governs the regulations Cabinet may make respecting port authorities. Important are new regulation-making powers respecting:

- information or documents to be provided by a port authority to the Minister of Transport at his or her request;
- the powers that directors may not delegate to the port authorities;
- the criteria for contributions to infrastructure and infrastructure-related projects; and
- the accounting principles for the purposes of the public financial statements.

Clause 14 deals with the provisions respecting the annual financial statements of port authorities set out in section 37 of the CMA. Clause 14(1) amends section 37(2), which currently states that annual financial statements shall be prepared in accordance with generally accepted accounting principles. The amendment provides that Cabinet may prescribe the

(2) This provision states that the Minister may, with the approval of Cabinet, enter into agreements respecting marine transportation security or make contributions or grants to assist in enhancing security on vessels or marine facilities. It was enacted as part of the *Public Safety Act, 2002*.

principles by regulation. Clause 14(2) describes in more detail what should be reported in the port authority financial statements with respect to remuneration. Section 37(3) currently requires that the total remuneration of the chief executive officer, directors and employees earning over a certain threshold be reported. The proposed replacement for this section would require reporting of total remuneration, as set out in the new regulations, as well as breakdowns of the salaries and other benefits of the chief executive officer and directors.

Clauses 16, 17 and 18 of the bill affect sections of the CMA that address aspects of the federal property and federal immovables associated with a port authority. Clause 16 amends section 44(2) and allows the Minister of Transport to give the management of federal real property and federal immovables to port authorities through supplementary letters patent, whereas the existing section allows only the transfer of property through letters patent. It also amends section 44(3) by specifying some additional sections of the *Federal Real Property and Federal Immovables Act* (FRPFIA) that will continue to apply to the property after management has been transferred to the port authority, to the extent that those sections are not inconsistent with the CMA. These include:

- the authorization of the Minister to delegate his or her powers under the FRPFIA to officials in the department (section 3 of the FRPFIA);
- the mechanisms by which federal property may be granted and federal immovables may be conceded (section 5 of the FRPFIA); and
- provisions relating to the authority to dispose of, acquire or transfer federal real property and federal immovables (section 16 of the FRPFIA).

Clause 17 amends the existing section 45(1)(*c*), which currently requires that a port authority that has been given the management of any federal real property or federal immovable must undertake and defend any legal proceedings with respect to that property. This clause adds the requirement that the port authority do so subject to any instructions that may be provided by the Minister of Transport.

Clause 18 clarifies section 46 of the CMA, which deals with the restrictions on the disposal of both federal and non-federal real property and immovables on the part of the port authorities. Clause 18(3) specifies that one federal real property may be exchanged for another of equal or greater value if supplementary letters patent *have already been* issued describing the other property to that effect. Clause 18(5) allows a port authority to dispose of non-federal real

property and immovables if supplementary letters patent *have already been* issued. (Currently, such exchange or disposal is subject to the issuance of supplementary letters patent at some unspecified time.)

Clause 23 makes one substantive amendment to existing section 58 of the CMA, which deals with marine traffic control. It provides that persons designated, by virtue of the existing provision, to exercise powers with respect to ships about to enter or within the port or an area of the port must have a certificate of designation.

Clause 25 amends section 62 of the CMA, which deals with the regulation-making powers of Cabinet. It adds a new section 62(1)(*d.1*) authorizing Cabinet to make regulations respecting information or documents that must be provided by the owner or the person in charge of the ship to the port authority.

D. Public Ports (Clauses 26 to 32)

Clause 26 expands the geographic scope of what the Minister of Transport may designate as a public port in section 65(1)(*a*) of the CMA. To the existing scope, which includes any navigable waters within the jurisdiction of Parliament, and their foreshores, the amended section adds any land under the administration of the Minister of Transport which is covered by the navigable waters, and any related foreshore.

Clause 28 amends section 69(1) of the CMA, which currently allows the Minister to appoint and assign responsibilities to a harbour master or wharfinger at public ports. The amendment specifies that collecting fees and interest on fees is included in these responsibilities.

Clause 32 concerns section 74(1) of the CMA, which states that Cabinet can make regulations respecting public ports and port facilities. It adds “information or documents that must be provided by the owner or the person in charge of a ship to the Minister” to the list of things in respect of which Cabinet may make regulations.

E. The Seaway (Clauses 33 to 37)

Clause 33 affects section 84 of the CMA, which describes how the corporation that manages and operates the Seaway is to report its financial statements to the public. Section 84(2) currently states that the financial statements shall be prepared in accordance with generally accepted accounting principles. The proposed amendment in clause 33 provides that the accounting principles may be prescribed in regulations, and adds that power to the list of things in respect of which Cabinet may make regulations.

Clause 36 concerns the regulations Cabinet can make respecting the Seaway. It adds new section 98(1)(*d.1*) stating that Cabinet may make regulations prescribing information or documents that must be provided by the owner or the person in charge of a ship to the Minister or the manager of the Seaway.

F. Regulations and Enforcement

Clause 39 amends section 115(1) of the CMA, which lists the grounds on which an enforcement officer may make a detention order respecting a ship or goods carried on a ship. The section currently allows an enforcement officer to make a detention order if the owner or person in charge of the ship has contravened a provision of the CMA. The amended provision would include the ship itself as an entity capable of contravening a provision of the CMA. It also adds the contravention of the regulations as further grounds for a detention order.

Clause 40 provides the person to whom a detention order is addressed with another situation under which he or she may give clearance in respect of the ship to which the order relates. These conditions are currently provided in section 116(4)(*a*) through (*e*). Clause 40 allows the person to give clearance if a security in the amount of $100,000 has been provided and is found to be satisfactory.

Clause 41 places an additional restriction on the power of the Minister of Transport, a port authority or the manager of the Seaway to authorize the sale of a ship if the CMA or the regulations have been contravened. This is done through an amendment to section 117 which makes reference to the new $100,000 security provided for in clause 40. The provision of that security prevents the Seaway manager from being authorized to sell the ship to which a detention order relates. Together, clauses 40 and 41 address Recommendation 6.2 of the CMA Review Panel by making the enforcement regime less cumbersome and expensive, in terms of lost time, for vessel owners when security is given. They also serve to better harmonize the ship detention regime under the CMA with that of the United States and other ship detention regimes in Canada (i.e., under the *Canada Shipping Act*).

As noted above, a ship itself is now an entity that may contravene the CMA or the regulations. Clause 44 creates new section 127(1.1), which provides that it may be established that a ship has contravened the CMA whether or not the person on board who committed the offence has been identified. New section 127(1.2) clarifies that a contravention of a port

authority by-law established under section 30 of the CMA is not an offence under the CMA. Proposed changes to section 127(2) state that a ship (as well as a person) is an entity that may not be found guilty of contravening the CMA if it is established that the ship exercised due diligence to prevent a contravention of the Act. (No corresponding revision is made to the French text.)

Clauses 45 and 46 are consequential on adding a ship as an entity that can contravene the Act or regulations. (Again, no corresponding revision is made to the French text.)

G. Coming Into Force

Clause 53 states that the provisions of this Act come into force on a day or days to be fixed by Cabinet, with the exception of section 52 in clause 10(2). Section 52 will come into force on 1 December 2007, when the provision relating to agreements, grants or appropriations for security purposes that was introduced by the *Public Safety Act, 2002* expires.

COMMENTARY

There appears to have been no media coverage of Bill C-61 to date. One key stakeholder that has taken a position on this proposed legislation is the Association of Canadian Port Authorities (ACPA).

In a letter to the Minister of Transport, ACPA expressed disappointment that Bill C-61 addresses so few of the CMA Review Panel's recommendations in its 2003 report. ACPA has suggested that additional amendments need to be made to the CMA to enhance the competitiveness of Canadian ports in the global market. It would support additional amendments having the following effects:

- *The federal government, instead of the CPAs, becomes responsible for payments in lieu of taxes (PILTs) to municipalities*. ACPA notes that the Minister of Transport currently pays the PILTs on federal properties managed by the St. Lawrence Seaway Management Corporation.

- *CPAs gain direct access to federal funding on the same basis as the private sector and/or other eligible organizations*. ACPA would like to see the 20% cap removed from federal contributions in the proposed amendments to section 25 of the CMA. ACPA would also like the Minister of Transport and the Minister of Finance to be able to recommend loans or grants to port authorities for any project, subject to approval from Cabinet.

- *CPAs may borrow funds based on commercial banking tests, not bureaucratic regulation*. ACPA recommends that the CMA and letters patent be amended to remove borrowing restrictions and to give CPAs the ability to obtain government guarantees, pledge real property, provide other related collateral as security and access a variety of other funding sources, such as those available to U.S. ports.

- *The federal charge on CPAs' gross revenue is eliminated.* ACPA thinks CPAs should be allowed to keep what they would pay on their gross revenue in order to improve their competitive position.

- *CPAs may retain the proceeds from the sale of surplus port property and direct them to port infrastructure*. ACPA recommends repealing and replacing section 46 of the CMA with a provision that permits a CPA to acquire, manage, occupy, hold, possess, sell or dispose of real and personal property and to retain the proceeds for future port infrastructure investment.

Also, ACPA has concerns about Bill C-61's proposed amendments respecting the composition of the board of directors of CPAs. It believes that user representation is at risk of being diluted by the provision allowing for a smaller number of directors, and that appointing CPA employees as directors is contrary to governance principles.