

CONSTITUTIONAL CHALLENGE TO BRITISH COLUMBIA WCB REGULATION OF FISHING INDUSTRY FAILS

By Brad Caldwell (to be published in *Fisherman Life Magazine* (Spring 2009))

On February 2, 2009, the Supreme Court of British Columbia released a decision upholding the validity of the provincial *Workers' Compensation Act Occupational and Health Regulations* that apply to the British Columbia fishing industry. In doing so, it exposed significant deficiencies in the current regulatory regime.

This action was brought by the owner of the "Osprey No. 1", a fishing vessel that was involved in an accident in 2007 whereby a crewmember was struck and killed by a trawl door. A related judicial review proceeding was also brought by the owners of the fishing vessels "North Isle" and "Western Investor", both of which had been issued orders that alleged contraventions of the provincial WCB regulations and required the establishment of detailed safety programs covering a wide range of matters including vessel stability. All of the vessel owners challenged the authority of the Workers' Compensation Board ("WCB") to issue these orders and regulate the fishing industry.

Lawyers for the vessel owners raised a number of constitutional challenges based upon the law as recently stated by the Supreme Court of Canada in the case of *Canadian Western Bank v. Alberta*, 2007 SCC 22. Many of these arguments are too complex to describe in an article of this nature, however one argument of particular interest was based upon what is called the "paramountcy doctrine". Under this doctrine, the vessel owners could successfully cause the WCB regulations to be declared inoperative if they could show that the federal Department of Transport regulations and the provincial *Workers' Compensation Act* regulations were operationally incompatible by establishing either:

1. Impossibility of compliance with both laws, or
2. Application of the provincial law would frustrate the purpose of the federal law.

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With respect to impossibility of compliance with both laws, the vessel owners led extensive evidence of the large number of overlapping federal and provincial regulations applicable to their vessels along with an expert opinion suggesting that the “creation of redundant documentation and instructions . . . could cause confusion and may jeopardize safety of this vessel and her crew”. Despite this evidence, the court rejected the impossibility of dual compliance argument. In doing so, it said as follows:

Clearly there is considerable overlap and potential for confusion, as stated in the expert opinion evidence filed by the plaintiff. It is possible that compliance with both regimes will be difficult and expensive. However, it has not been shown that it is impossible to comply simultaneously . . .

With respect to issue of whether or not the *Workers' Compensation Act* regulations frustrated the purpose of the Department of Transport regulations, it was argued that the Federal Government intended to provide a comprehensive safety regime from ship design and equipping of ships to the complement and training of ships' crews. However, the court rejected this argument based, in part, upon the following evidence:

1. There was a gap in the federal regulatory scheme with respect to stability tests for small vessels (only required for small fishing vessels fishing for capelin and herring);
2. WCB statistics showed that between 1975 and 2005 in British Columbia 157 fishing vessels capsized with 66 lives lost and between 2001 and 2005 one fish harvester died for every 29 WCB claims made by fish harvesters;
3. In 1995 the Canadian Coast Guard and the Workers Compensation Board signed a memorandum of understanding for allowing the WCB to regulate occupational health and safety aboard fishing vessels; and
4. Some federal regulations specifically require compliance with provincial regulations to the extent that they impose a higher standard.

Despite its rejection of the operational incompatibility arguments described above, the court did state that it would have found an operational conflict so as to find the conflicting provincial legislation inoperative if the provincial legislation had imposed stability requirements, rather than simply requiring the provision of stability documents.

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The court also left open the possibility that if the fishing vessels being regulated were fishing in waters outside the jurisdiction of the province and delivering to ports outside British Columbia, its decision might have been different.

This case highlights the difficulty and expense involved in attempting to comply with regulations passed by two different levels of government. Given the shocking statistics regarding the number of deaths and capsizings, this case also highlights what appears to be a failure of the attempt at shared regulation. Although these particular vessel owners were not successful in forcing an end to this current state of affairs through legal means, it is hoped that the publicity generated by this case might cause the Federal Government to re-evaluate the 1995 federal provincial Memorandum of Understanding and consider rising to the challenge of creating and administering a comprehensive safety regime for fishing vessels. A copy of this case is available on the Internet at Canlii.org. The citation is *Jim Pattison Enterprises v. British Columbia (Workers' Compensation Board)*, 2009 BCSC 88.

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