Legislation Introduces Ban On Oil-Tankers On Canadian West-Coast

May 31, 2017

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On May 12, 2017, the Government of Canada introduced Bill C-48, the proposed Oil Tanker Moratorium Act (the "Act"), in Parliament. The Act's central purpose is to formalize the oil tanker moratorium on British Columbia's north coast. If brought into force, the Act will complement the existing voluntary Tanker Exclusion Zone which was created in 1985 to help avoid potential spills from oil tankers travelling between Alaska and the continental United States as well as the prohibitions on oil tanker travelling within Inside Passage.

The Act applies to oil tankers that are capable of carrying more than 12,500 metric tons of crude or persistent oil. Crude oil is defined within the Act as any liquid hydrocarbon mixture that occurs naturally in the Earth. Other oil products, such as lubricating oils, partially upgraded bitumen, synthetic crude oil, pitch, slack wax, and bunker C fuel oil, are included within the Act's definition of persistent oil. Certain oil products are not included within the definitions of crude or persistent oil, including liquefied natural gas, gasoline, naphtha, jet fuel, and propane. Accordingly, oil tankers carrying these products as cargo are not subject to the Act's prohibitions. It is important to note that liquefied natural gas is not included within the definition of crude or persistent oil and as such British Columbia's liquefied natural gas industry would not be affected by the Act's prohibitions. Currently, the British Columbia government has proposals for 19 liquefied natural gas ports along the coast, many located in the moratorium area. The Act will also not have any effect on crude or persistent oil not being transported by oil tanker. Accordingly, this Act will have no impact on the KM Trans Mountain expansion project, the terminus for which is in Vancouver.

The Act prohibits oil tankers that are carrying (or, as a result of loading, would carry) more than 12,500 metric tons of crude or persistent oil to anchor, load, or unload at any port located on the coast of British Columbia from the northern tip of Vancouver Island to the Alaska border. This area covers the Great Bear Rainforest/Great Bear Sea area and includes Haida Gwaii. The Act further prohibits any person or vessel from transporting by water any crude or persistent oil to or from an oil tanker in order to circumvent the prohibition.

These prohibitions do not apply if the oil tanker is required to anchor at the prohibited ports to ensure the safety of the vessel, to render assistance to a vessel in distress, or to obtain emergency medical service for any person on board. The prohibitions also do not apply when the Minister of Fisheries and Oceans believes that the vessel is discharging a pollutant and directs the vessel to proceed to an otherwise prohibited port.

The Act gives the Minister of Transport the authority to make orders exempting an oil tanker from the prohibitions if the Minister is of the opinion that the exemption is essential for community or industry resupply or is otherwise in the public interest. These exemption orders can be granted for any period of time that the Minister considers appropriate. It is expected that these orders will be utilized to ensure that Northern British Columbia communities who rely on marine transportation for resupply of goods, products, and essential fuels continue to receive these items. It is worthy of note that the Act stipulates that the Statutory Instruments Act does not apply to these exemption orders, which removes the requirement that the orders be published in the Canada Gazette for public inspection.

In order to ensure compliance with the new requirements, the Master of any oil tanker capable of carrying at least 12,500 tons of crude oil must provide pre-arrival information to the Minister at least 24 hours before the vessel plans to moor or anchor. It should be noted that this obligation applies independent of the actual tonnage of oil aboard the vessel; the only criterion is the carrying capacity of the vessel.

Transport Canada may inspect the vessel and may request any additional information upon the reasonable belief that the vessel plans to load or unload any oil in the prescribed territory. As usual in Canadian maritime law, the inspectors have far-reaching powers of inspection and there is a general obligation on the part of the vessel owners, operators, master and any other agent for the vessel ("vessel interests") to cooperate with the inspection.

Importantly, the inspectors have the authority to issue a detention order upon the belief on reasonable grounds that the vessel has contravened the Act. A detention order is similar to a ship arrest, in that the vessel may no longer move without the lifting of the detention order prior to the movement, or with the approval of the Minister himself. The vessel interests may put up security to obtain the release the vessel, and in any case the detention order must be lifted if no charges have been brought against the vessel within 30 days of the issuance of the detention order.

If no one appears on behalf of the vessel after 30 days, or security is not put up within 30 days of the charges, or a fine imposed upon the vessel remains unpaid for more than 30 days, the Minister may make an application to the courts to have the vessel sold via judicial sale, giving the buyer a clean title to the vessel.

The penal provisions under the new Act are severe. Contravention against any of the prohibitions in section 4 of the Act may lead through summary conviction to a fine of CA$ 1 million, or, on indictment, to a fine of CA$ 5 million. Contravening any other provision of the Act is punishable with a fine of CA$ 1 million on summary conviction and possible imprisonment of 18 months. Any person part of the vessel interests — be they owner, manager, agent, master or employee, but also directors and officers of a corporation that owns or manages the vessel — are personally guilty if they directed or

influenced the commission of the offence, or the corporation's policies or activities with respect to the offence.

The limitation period for summary convictions under the Act is two years from the day the Minister becomes aware of the offence. If the defendant is no longer in Canada by the time the Minister becomes aware of the offence, the action may be taken at any time within 60 days of the return to Canada of the offending party, and the two year limitation period does not apply in this case.

Although the Act's prohibitions may decrease the level of oil tankers that are able to utilize British Columbia's ports, it does not appear that the Act will have a large impact on oil tanker traffic in the area given that the Inside Passage prohibitions and Tanker Exclusion Zone are already in effect. Presently, oil tankers of over 40,000 tonnes deadweight are prohibited from travelling within the Inside Passage. This shipping route passes between the islands and coastline of North America's northwestern Pacific Coast extending from the Alaska panhandle to British Columbia and Washington State. In addition to the prohibition, the voluntary Tanker Exclusion Zone typically extends about 70 nautical miles off of British Columbia's coast with the exception of the southern end of Vancouver Island where it extends only 25 nautical miles. Loaded oil tankers servicing the Trans-Alaska Pipeline System between Valdez, Alaska, and Puget Sound, Washington must travel west of the zone. A noted exception to the Tanker Exclusion Zone is that it does not apply to oil tankers travelling to or from Canadian ports. The Act's major addition to this existing scheme is that it specifically target this deficit, but in doing so creates a ports-based moratorium rather than an area-based one.

As the moratorium is ports-based, it will not influence the right of innocent passage as codified by the United Nations Convention on the Law of the Sea. In addition, because the Act applies to oil tankers that intend to moor or dock at Canadian ports, this proposal, should it become law, will not have an impact on the ongoing US-Canada border dispute near Dixon Entrance, which is a dispute as to border demarcation without impacting the nationality of any ports.

The Act is part of the Government of Canada's Oceans Protection Plan (the "OPP") which was launched on November 7, 2016. The OPP is a national strategy to create a world-leading marine safety system that implements measures to improve marine safety and responsible shipping, protect Canada's marine environment, and create new partnerships with Indigenous and coastal communities. Beginning in 2017, the OPP will include over $1.5 billion in government funding over a period of five years.

As Bill C-48 is now making its way through Parliament it may still be amended before eventually coming into force. However, it seems likely that the moratorium will become reality in the foreseeable future, and the industry should prepare for the impacts of the moratorium on their current shipping routes.

By

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