THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Via email: doug.okeefe@tc.gc.ca

Doug O'Keefe
Chief, International Marine Policy
Marine Policy Directorate
Transport Canada
Place de Ville, Tower C, 26th Floor
330 Sparks Street
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Dear Mr. O'Keefe:

Re: Regulations Respecting Compulsory Insurance for Ships Carrying Passengers Canada Gazette Part I, Vol. 150, No. 52 — December 24, 2016

The Maritime Law Section of the Canadian Bar Association (the CBA Section) appreciates the opportunity to comment on the proposed Regulations Respecting Compulsory Insurance for Ships Carrying Passengers under the *Marine Liability Act*.

The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. The CBA Section comprises lawyers with an in-depth knowledge of domestic and international law and practice affecting shipping and navigation.

The proposed regulations are an important step towards better protecting the Canadian public through access to financial compensation for individuals (or their families) who are injured or killed as a result of a maritime passenger accident. However, aspects of the proposed regulations are inadequate to fully achieve this objective.

The CBA Section has three major areas of concern, where the regulations should be improved before final adoption:

1. Inadequate minimum limits.
2. Absolute liability and the right of direct action to protect victims.
3. Application to non-commercial vessels.

1. Inadequate minimum limits

The proposed regulations call for mandatory insurance with a minimum limit of CDN$250,000 multiplied by the passenger capacity of the ship. While this is a good start, the CBA Section recommends that the limit be higher, to reflect the potential liability of a carrier under Part 4 of *the Marine Liability Act*. Part 4 of the Act incorporates the *Athens Convention on Passenger Carriage,* with a limitation of liability for each passenger in the amount of 175,000 Special Drawing Rights at the International Monetary Fund (SDRs). At current exchange rates between the Canadian dollar and the SDR of $1.77 SDR, this equates to a limitation amount of approximately CDN$310,000. The proposed limit of $250,000 is roughly 80% of the carrier's limit, producing a potential shortfall of nearly $60,000 to an injured victim.

While section 39 of the Act only permits regulations to cover the maximum liability and not more, and the insurance industry has taken the position that it must denominate policies in a specific amount of Canadian dollars, we believe that this issue needs to be addressed so there is no shortfall for innocent victims of maritime passenger accidents. For example, the regulation could require carriers to procure insurance at an amount in Canadian currency, equivalent to $175,000 SDRs on the day of issuance of the policy or its renewal. Another possible solution is seek a minor modification to section 39 to allow for insurance to cover the minimum liability of the carrier – which we believe was the original intent of section 39 (1)(a).

2. Absolute liability and the right of direct action to protect victims

The lack of absolute liability and direct action provisions to assist in protecting accident victims is another concern for the CBA Section. While the regulations may mandate carriers to procure insurance to cover potential passenger liability, there remains a significant risk that the insurance will be unavailable to the victims of a marine accident due to breaches of the policy or the insurer's reliance on the "pay to be paid" rule.

Under the current law of marine insurance in Canada, a breach of warranty in the marine insurance policy could lead to the insurer voiding the policy, even if the breach did not cause the loss. Similarly, a breach of an exclusion clause could lead to a denial of coverage by the insurer. In these situations where the policy may have been breached, the innocent injured victims could not recover financial recompense from the insurer. This defeats the purpose of mandatory insurance.

The purpose of these regulations is to provide a safety net for passengers who may be injured in a maritime accident. By comparison, in some jurisdictions (Ontario for example), the motor vehicle liability automobile insurance statutes make a vehicle's liability insurance available to an injured victim even if the policy holder was operating the vehicle in violation of the terms of the policy. This is known as an "absolute liability" provision.

It is designed to protect the public and have insurance compensation available to injured victims, even though the policy holder may have been in violation of the terms of their policy. If the purpose of the proposed regulations is to protect the public, then absolute liability should be included. Otherwise, we can easily foresee a situation where individuals are injured when the operator may have done something to violate the policy, leaving the victims without compensation.

Similarly, insurance compensation may be unavailable to innocent victims due to the application of the "pay to be paid" principle. This is a common feature of marine protection and indemnity insurance, in which the insured policy holder/vessel owner must make a payment under a settlement or judgment before being entitled to indemnity from its insurer. However, if the insured fails to make a payment due to financial insolvency or bankruptcy, there is no obligation on the

insurer to pay innocent accident victims. For example, an accident victim may obtain a judgment of $250,000 in court proceedings, only to have that judgment not paid due to the carrier's bankruptcy. The insurer would not be obligated to honour that judgment if the policy contained a "pay to be paid" clause. The insurer would have received payment of a premium for the risk, but does not make a payment due to the financial position of its insured.

The CBA Section suggests that the proposed regulations be amended to prohibit the operative effect of "pay to be paid" clauses in cases of personal injury or death, or otherwise provide a right of direct action against the insurer in these situations.

3. Application to non-commercial vessels

Finally, while the requirement for passenger vessels to carry a minimum level of insurance is a good step in the right direction, the CBA Section is concerned that recreational or pleasure craft vessels are not included in mandatory insurance requirements.

Numerous small pleasure craft operate on the lakes and rivers of Canada, and many of these vessels are uninsured. At the same time, many also carry family and friends of the vessel owner/operator who may not technically be "passengers" under maritime law definitions. If one of these vessels is involved in an accident, an innocent passenger carried onboard may not have any financial recourse due to lack of insurance by the at-fault operator.

Many Canadians would be surprised to learn that there is no requirement for these vessels to have insurance, leaving potential accident victims without financial recourse. As the government is in the process of addressing financial compensation for potential accident victims, and a large sector of marine accident victims comes from the recreational setting, this is an opportune time to deal with this concern in the proposed regulations.

While the government has made good and substantial efforts towards regulations that will assist in protecting the public, our concern is that the proposed regulations do not go far enough, and do not provide wide enough protection and availability for those who may need it most.

We appreciate the opportunity to comment, and would be pleased to discuss them with you in more detail.

Yours truly,

(original letter signed by Kate Terroux for M. Robert Jette)

M. Robert Jette, Q.C.
Chair, CBA Maritime Law Section