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December 21, 2005

Mr. Jerry Rysanek
Director, International Marine Policy
Transport Canada
Place de Ville, Tower C
Ottawa, Ontario K1A 0E6
Dear Sir:

RE: Maritime Law Reform – May 2005 Discussion Paper

In May 2005, Transport Canada circulated a Discussion Paper detailing various policy proposals to amend several important features of Canadian maritime law and requested comments from interested parties. The Maritime Law Section of the Canadian Bar Association (the CBA Section) is pleased to provide Transport Canada with the following submission in response.

Part One – Marine Liability

Chapter 1

The 1976 International Convention on the Limitation of Liability for Maritime claims (LLMC), as amended by its 1996 Protocol

The CBA Section supports Transport Canada's policy recommendations to ratify the LLMC Convention and its 1996 Protocol, with a reservation for hazardous and noxious substances (HNS) claims.

The Supplementary Fund Protocol of 2003 to the 1992 International Oil Pollution Compensation Fund

Canada is presently a full member of the 1992 *Civil Liability Convention* and the 1992 *International Oil Pollution Compensation Fund* (IOPC Fund), under which ship owners have strict liability for oil pollution, subject to limits on damages (approximately $180 million for the largest tank vessels). Canada also has its own fund, the Ship-Source Oil Pollution Fund (SOPF), from which additional amounts up to $140 million are available for any oil spill. The SOPF makes Canada's contribution to the IOPC Fund for Canadian oil receivers.

Several serious pollution incidents in Europe gave rise to the *Supplementary Fund Protocol of 2003* (the Supplementary Fund Protocol), which came into force March 2005. Transport Canada proposes that Canada join the Supplementary Fund Protocol, to bring Canada's total pollution compensation package to approximately $1.6 billion. The CBA

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Section notes that, so far, a total of seven European countries and Japan have ratified the Supplementary Fund Protocol. The Supplementary Fund Protocol was instrumental in maintaining European countries within the fund convention scheme following the two recent disasters that hit the Atlantic coasts of France and Spain.[1]

The CBA Section agrees that Canada should join the Supplementary Fund Protocol. We express some concern about the possibility this would force the SOPF to reinstate the levy on imported oil in Canada. The CBA Section would therefore suggest that this matter be carefully assessed with the possible involvement of other interested parties, such as the Canadian Coast Guard and the Administrator of the SOPF.

International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunker Convention)

We expect the ratification and implementation of the Bunker Convention to have little impact on Canadian domestic law, given the current provisions of Part 6 of the *Maritime Liability Act* (*MLA*) and the fact that virtually all commercial ships have Protection & Indemnity (P & I) association membership covering this type of oil spill. The CBA Section agrees with Transport Canada's policy recommendation that Canada ratify the Bunker Convention, if only to promote the harmonization of international maritime law.

This being said, it appears to us advisable that Canadians not lose the benefit of some important features of the current domestic law through ratification of the Bunker Convention. For instance, under the Bunker Convention, the claimant may look to the ship owner (or its insurer) for indemnity. Under the current regime, a claimant who does not want to be involved in legal proceedings may present its claim instead to the SOPF. As with the *Civil Liability Convention*, the government should implement the Bunker Convention in a manner that preserves the right of claimants to present a claim to the SOPF.

Another important feature of the current Canadian regime that appears to be missing from the Bunker Convention is the right of those who derive their revenue from marine activities to make a claim to the SOPF following an oil spill. Once again, implementation of the Bunker Convention should not deprive this category of claimants of their right to an indemnity.

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention)

The CBA Section supports Transport Canada's policy recommendation to ratify and implement the HNS Convention. We also agree that the liability of non-seagoing vessels engaged in domestic carriage of HNS cargo should continue to be governed by *MLA* Part 6 and that such HNS cargo not be considered as "contributing cargo" for the purposes of the HNS Convention.

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1 The «*Erika*» and the «*Prestige*» oil spills.

The CBA Section agrees as well with the recommendation to exclude from the regime seagoing vessels not exceeding 200 gross regulated tonnage (GRT) engaged in domestic carriage of HNS in packaged form.

The CBA Section also supports the choice of Article 1.4(a) of the HNS Convention for the definition of "receiver" and Transport Canada's proposal regarding the duty to report in the case of liquid natural gas (LNG) cargo.

With respect to the reporting requirements of receivers, the CBA Section would suggest considering the Administrator of the current SOPF as the proper authority responsible for enforcing the requirements in Canada.

The CBA Section also supports Transport Canada's proposals to adopt the definition of "associated persons" set out in *MLA* subsection 76(7) and to set fines for not carrying appropriate certificates of insurance at a level consistent with *MLA* Part 6.

The CBA Section has no particular views on the other proposals of Transport Canada with respect to the HNS Convention. However, we would recommend that the ratification and implementation of the HNS Convention be done in conjunction with a review of current Canadian environmental legislation, such as the *Canadian Environmental Protection Act, 1999*. This legislation could also apply to HNS and create inconsistencies upon the implementation of the HNS Convention. This would be contrary to Transport Canada's goal, which we fully support, of harmonizing Canada's legal regime with international maritime law.

Chapter 2

Liability and Insurance for Carriage of Passengers by Water

1. Amending the definition of ship.

The CBA Section is of the opinion that it is reasonable to exclude "adventure tourism" (such as kayaking or white water rafting) from *MLA* Part 4. It does not favour, however, Transport Canada's proposal to attempt exclusion of such enterprises by exempting types of vessels. The proposed exemption is too broad. Despite the legislative drafting challenges it may present, the CBA Section is of the opinion that if "adventure tourism" is to be excluded from the application of the *MLA*, the exclusion must be based on the activity itself and not on the nature of the vessel.

For example, exempting motorized vessels such as inflatable hull vessels and rigid inflatable boats is, in our opinion, inappropriate. The purported justification for exempting vessels engaged in adventure tourism from the application of Part 4 is that the operators and passengers of these vessels consent to the risk involved and indeed seek out such vessels because of the risk. However, motorized inflatable hull vessels and rigid inflatable boats are used for activities such as guided fishing excursions and whale watching trips. We cannot presume that these operators and passengers have consented to any greater risk than passengers of a traditional rigid hull boat of similar size and power.

If “adventure tourism” enterprises are to be excluded from the application of Part 4 and therefore not required to have compulsory insurance, Transport Canada may wish to consider whether such enterprises should also enjoy the benefit of Part 3 of the *MLA* and the right to limit their liability.

Alternatively, should the exclusion remain on the basis of the type of craft used, the CBA Section would recommend that the exclusion be worded as “any vessel, boat or craft, of any length, propelled manually by oars or paddles.”

Finally, the CBA Section submits that the one million dollars insurance coverage for vessels less than 15 GRT carrying twelve passengers or less, is not sufficient and that a figure of two million is a more reasonable minimum. The CBA Section is also of the view that the shift in the requirements at the 15 tonne mark is too abrupt and might unfairly discriminate against those vessels engaged in activities similar to those vessels less than 15 GRT. The CBA Section believes that the requirements should have more gradations.

2. Notification

The CBA Section is of the view that the requirement to provide notification of insurance is a reasonable one. However, vessel owners, and not insurers, should be the ones obliged to provide proof of insurance upon demand to authorized inspectors.

The proposal requiring insurers to provide notification of any alteration of the compulsory insurance coverage, especially when the modification is minor, is overly bureaucratic and potentially sets up unreasonable liabilities against insurance brokers and insurers. If the government proceeds with its proposal to require notification by insurers, rather than by vessel owners, it should be made clear that there will be no liability upon insurers for a failure to notify and a failure to do so will not in any way affect the rights of the insurer and the assured under the insurance policy. As an example, time should continue to run from the receipt of the cancellation notice by the assured and not by the authority.

3. Detention of vessels

The CBA Section supports Transport Canada’s policy recommendation to enable detention of vessels for non-compliance with the compulsory insurance regulations and permit the delegation of enforcement powers and administration, so long as the person receiving the delegated power is authorized to handle marine transportation matters.

4. Amendment of section 37 MLA

The CBA Section does not object to Transport Canada’s proposal to clarify that people carried without contracts of carriage are “passengers,” so long as the present exemptions set forth in section 37 are not modified by the amendment.

Part Two – Miscellaneous Amendments to Canadian Maritime Law

General Limitation for Maritime Claims

The CBA Section agrees with the creation of a general limitation period applicable to maritime claims. Limitation periods are intended to afford certainty as to whether a claim will be pursued, and the current uncertainty concerning the application of provincial and territorial limitation periods to maritime claims should be rectified. The adoption of a federal limitation period of general application to maritime law will also further the objective of achieving uniformity in Canadian maritime law across the country.

The only controversy, from the perspective of the CBA Section, is whether the proposed two-year limitation period is the correct length. No uniform limitation period exists under provincial and territorial law. For instance, British Columbia law gives a claimant six years after a cause of action has arisen to sue on a debt (e.g. an unpaid repair bill) or a contract claim without direct property damage (e.g. loss of profits from a ship wrongfully detained). The British Columbia limitation period for direct damage claims is two years after the plaintiff has discovered that there is a cause of action. Alberta and Saskatchewan have recently moved to a two-year limitation period for all such claims, following Ontario. The time limitation in Quebec is three years for contractual and extra-contractual claims. On the other hand, Nova Scotia has a six-year limitation period applicable to all such claims (other than specific circumstances, such as motor vehicle accidents).

The CBA Section has considered the following arguments in favour of the proposed two-year limit:

- the two year limit would speed up the beginning of litigation, resulting in better witness recollection;
- after two years (or until any filed writ expires unserved), potential defendants will know whether a claim is being pursued;
- two years is consistent with recent trends in Ontario, Alberta and Saskatchewan, which together have a large population and a considerable commercial base;
- even in jurisdictions with longer limitation periods, the two-year period may actually be longer than existing limitation periods for some claims (such as the one-year limitation period applicable to an action on an insurance policy in British Columbia); and
- time extensions can be granted if agreed by the parties.

Arguments that have been considered against the two-year limitation period are as follows:

- a contractual debt is an important right that should not be quickly extinguished;

- there may be commercial reasons for a party not to sue within two years of a debt arising, particularly when business relations between the parties are continuing; and

- marine businesses drive the economies of British Columbia and the Atlantic Provinces more than Ontario, Alberta and Saskatchewan. A six-year limitation period would be consistent with the laws of the provinces in which most maritime claims arise.

Whether a two-year or six-year period should be selected has been a matter of debate within the CBA Section, however, it is prepared support a two-year limitation period. This period should run from the time of discovery that there is a claim, as is the rule in most provinces and territories.

Finally, Transport Canada may wish to consider whether or not parties to a maritime contract should be free to contract out of this statutory time limitation.

Claims of Canadian Ship Suppliers for Unpaid Invoices

The members of the Section have discussed, and continue to discuss, whether or not a new lien should be created in favour of this category of marine creditors *at all.* It is premature for the CBA Section to advance a position on this policy consideration.

However, recognizing that the government may decide to proceed with creating such a lien, the CBA Section believes that the three questions asked by Transport Canada should be answered as follows.

1. What would be the scope of a maritime lien for ship suppliers?

A wholesale adoption of the U.S. rule creating a maritime lien for necessaries would introduce uncertainty into Canadian law. Canadian ship suppliers will be reasonably well protected if the proposed maritime lien is restricted to the core, traditional areas of their work for which rights *in rem* are already granted under section 22(2)(m) of the *Federal Courts Act.*

2. Who would have the authority to bind the vessel for ship supplies?

The CBA Section is of the view that the current Canadian law should not be changed and that the U.S. law permitting broader categories of persons who can bind a ship should not be adopted.

3. What would be the ranking of a new maritime lien for ship suppliers?

The CBA Section recommends that a maritime lien for necessaries be given priority over all mortgages, except previously registered mortgages to a lender registered in the country where the maritime lien arose. This is a simplified version of the intricate U.S. priority scheme for ship suppliers' maritime liens.

Sistership Arrest and Amendment to the English Version of subsection 43(8) of the *Federal Courts Act*

The Discussion Paper recognizes the questions in the maritime law community about the scope of the sistership arrest remedy in subsection 43(8) of the *Federal Courts Act*.

As set out in the Discussion Paper, sistership arrest relates to a situation where a plaintiff can take legal action against a vessel owned by the same owner as the defendant vessel in the plaintiff's initial action. As stated by Prothonotary Hargrave in *Royal Bank of Scotland v. "Golden Trinity" (The)*[2] the purpose of the provision is to prevent a vessel owner from improperly insulating assets by putting each ship in its fleet into separate companies.

The CBA Section is of the view that the availability of the remedy in subsection 43(8) is ambiguous, for two reasons:

- There is conflicting case law interpreting subsection 43(8). The court in *Hollansche Aannaming Maatschappi v. The Ryan Leet*[3] based its interpretation on the terminology used in the English language version of the subsection. Later decisions have adopted a different interpretation based on the terminology in the French version; and

- Subsection 43(8) does not provide sufficient guidance on the factors to be considered in determining when a vessel is the "sistership" of another, or in the words of the subsection, when the target vessel is owned "by the beneficial owner of the ship that is the subject of the action."

Transport Canada's proposed amendments to subsection 43(8) of the *Federal Courts Act* address only the first issue. The amendments would reconcile the English and French versions of subsection 43(8) by bringing the English version into line with the French version. The Discussion Paper expressly states that the amendments are "not intended to suggest a broadening of the scope of the term 'beneficial owner'" outside the parameters as set out in *Royal Bank of Scotland v. "Golden Trinity" (The).*

The CBA Section supports the proposed amendment insofar as it will harmonize the French and English texts of subsection 43(8). While there is no consensus among our members on broadening or narrowing the scope of the remedy in subsection 43(8), we

2 (2004), 254 F.T.R. 1 (F.C.).

3 (1997), 135 F.T.R. 67 (F.C.T.D.).

agree that any conflict between the French and English texts of the legislation is obviously untenable.

As stated by Prothonotary Hargrave in *Norcan Electrical Systems Inc. v. "FB XIX" and "FB XX"*, the term "beneficial" modifying the term "owner" is reversed in the respective French and English sistership arrest provisions. The conflict could be resolved either by putting the focus of "beneficial" ownership on the "wrongdoing" defendant vessel or the putative sistership vessel. In any event, the amendment should be consistent with the essence of the sistership arrest concept, that is, the corporate veil may be pierced to prevent a vessel owner from improperly insulating assets by putting each ship in its fleet into separate companies. This appears to be supported by the *International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships* and the manner in which this Convention has been implemented in other countries.

With regard to the second issue identified above, we understand that the Canadian Maritime Law Association (CMLA) is proposing an amendment that jettisons the concept of "beneficial ownership" in favour of "ownership," to clarify the ambiguity in subsection 43(8). The CBA Section submits that the CMLA's proposal would be a significant change to the law. Should Transport Canada consider that additional submissions on the sistership arrest provisions are necessary to address this issue, the CBA Section would be pleased to comment further.

Reform of Outdated Common Law Rules on Maritime Property and Obligations

The Discussion Paper notes that the decision of the Supreme Court of Canada in *Ordon v. Grail*,[4] substantially limits application of provincial and territorial legislation to matters of navigation and shipping. As a result, there are many areas of tort, contract and property arising in a maritime context, which, in the absence of federal statutory intervention, would be governed by outdated common law principles. The Discussion Paper accordingly proposes federal legislation in a number of specific areas to bring the law applicable to maritime matters in line with modern provincial and territorial law.

The CBA Section agrees with Transport Canada's proposal to enact legislation in the various categories canvassed by the Discussion Paper, with the following caveats.

With respect to item (ix), "Mortgage and Security Interests in Maritime Property," the CBA Section agrees with the proposal to create a regime similar to provincial and territorial Personal Property Security Acts for the granting of security interests in maritime property. The CBA Section recommends that this new regime include a publicly searchable title registry for vessels, comparable to the registry that currently exists under the *Canada Shipping Act*.

With respect to item (xi), "Enforcement of Rights: Cross and Third Party Claims," the CBA Section does not favour Transport Canada's proposal to introduce legislation that would render inoperative "no action" clauses, which preclude an action on a contract of indemnity until after the underlying liability claim has been determined. To the extent

4 [1998] 3 S.C.R. 437.

that fairness requires interference with no action clauses, so that insureds are not in the position of having to defend a claim without knowing whether they are covered by liability insurance, this should be accomplished through the common law. This is, for the most part, how this issue has been addressed in provincial and territorial law. In *Svetlichny v. Orerend*,[5] the British Columbia Court of Appeal held that a judge has the discretion to overturn a "no action" clause without recourse to legislation. The CBA Section advocates relying upon developing jurisprudence to address this issue, as this is more flexible than legislative intervention.

Part Three – Housekeeping Amendments

Salvage Provisions to be moved to the *Marine Liability Act*

The CBA Section agrees with the proposal to move existing provisions on salvage from the *Canada Shipping Act* to the *Marine Liability Act*.

Title of the *Marine Liability Act*

The CBA Section submits that there is no need to amend the title of the *Marine Liability Act*.

Conclusion

The CBA Section thanks Transport Canada for the opportunity to consult on these matters. With our suggestions, we believe that most of the policy recommendations will bring clarity to Canadian maritime law, will facilitate the operation of the Canadian shipping industry at home and internationally, will enhance safety, and will facilitate recovery by those who have suffered damage as a result of marine business activities. We have pointed out a few areas that may require further consideration and consultation, in which we would be pleased to participate.

Sincerely,

(*Original signed by Kerri Froc on behalf of Richard Desgagnés*)

Richard Desgagnés
Chair, National Maritime Law Section

5 (1982), 33 B.C.L.R. 214.