



December 22, 2006

Transportation Safety Board  
Place du Centre  
4<sup>th</sup> Floor  
200 Promenade du Portage  
Gatineau, Quebec  
K1A 1K8

Attention: Marcel Ayeko, Acting Director

Dear Sir:

**Proposed Modifications to Transportation Safety Board Regulations DORS/92-446**

The following comments are submitted on behalf of the Canadian Bar Association National Maritime Law Section (CBA Section) regarding the proposed modifications to the *Transportation Safety Board Regulations*, SOR/92-446.

We apologize for the delay in providing these comments to the Board but would appreciate your indulgence in receiving and considering the comments contained herein.

The Canadian Bar Association is a national association representing 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

**Legal Representation**

The CBA Section is of the view that witnesses compelled to answer questions before a TSB investigator are entitled to have a representative of the witnesses' choosing, without restriction, and further that there should be no restriction on that representative's ability to intervene during the interview by TSB.

The Federal Court of Canada decision in *Re Parrish* [1993] 2 F.C. 60 held that persons compelled to attend a TSB interview have a right to legal counsel during the interview process. It is clear from Rouleau J.'s reasons that the purpose of a presence of legal counsel was for the protection of the witness. At paragraph 67 of the decision, Mr. Justice Rouleau stated:

“... I cannot accept the board’s argument that the need for administrative expediency in the proceedings outweighs the necessity for the protection of a witness through the presence of counsel.”

Section 40 of the Proposed Modifications states that “the representative ... shall not intervene during the interview.” That wording is completely contrary to the intent of the ruling of Mr. Justice Rouleau in *Re Parrish*. The fettering of a legal representative’s ability to speak or intervene during an interview renders the purpose of having counsel present illusory.

The CBA Section is also concerned with the wording of Section 39(d) of the Proposed Modifications that purports to require that a witness’ representative must be someone who represents “exclusively” the interest of the witness. This amounts to an unwarranted restriction on the witness’ choice of legal representation. In many instances, non-union employees will prefer to have the company’s legal representative attend the TSB interview. The witness understands that the company’s legal representative has knowledge of the incident and is familiar with the company’s procedures and policies that may be the subject of the inquiry. The witness is always free to request separate legal representation if they so wish. Some investigations may require the attendance of many employees of an involved company which, given the current wording of the proposal, would require the involvement of numerous legal representatives. It is difficult to imagine what meaningful legal protections could be offered to a witness in those circumstances. The CBA Section recommends that reference to the representative being required to represent “exclusively” the interest of the witness be deleted from Section 39(d).

The CBA Section is also of the view that the witness should not be restricted to having only one representative in attendance during a TSB interview as set out in Section 39(d) of the Proposed Modifications. Often, there are several investigations ongoing including criminal and civil each with its own particular issues of concern to a witness. It is quite likely that a witness undergoing a TSB interview may require advice from legal representation with expertise in criminal law or other areas in order that the witness is able to obtain proper advice. The TSB may properly require that only one representative intervene or speak for the witness but it ought not to restrict the witness’ right to determine the scope of his or her own legal representation.

### Observers

Section 43 of the Proposed Modifications provides that the rights granted to an observer shall not, unless otherwise authorized by the Board, include attendance at or access to a transcript of, an interview of a person. The CBA Section is of the view that this wording contravenes the principle that privilege which attaches to statements made by a witness is the privilege of

that witness alone. The Board ought not to be able to waive that privilege by permitting an observer to access a transcript of evidence or, attend an interview, without the witness' consent. The words "and consented to by the witness" should be included in Sections 43 and 44 of the Proposed Modifications.

#### Subpoenas

The timeframe of service of a subpoena three days prior to the date set for attendance of a witness for a TSB interview under Section 68 of the Proposed Modifications is too short a timeframe. The CBA Section proposes that a period of seven days is more reasonable.

#### Testing of Objects

Section 45 of the Proposed Modifications provides that owners may attend at tests of objects but there is no provision for other interested parties or witnesses to attend. Although it may not be a right often exercised, the CBA Section is of the view that a witness who may be interviewed with respect to particular objects, ought to have the right to attend a test of the object by the TSB.

We appreciate this opportunity to provide comments regarding the Proposed Modifications. Please do not hesitate to contact us should you have any questions with respect to any of the above comments.

Yours very truly,

*(Original signed by John Hoyles for Richard Southcott)*

Richard F. Southcott  
Chair, National Maritime Law Section