THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

April 21, 2009

Mr. Merv Tweed, M.P.
Chair, Standing Committee on
Transport, Infrastructure and Communities
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Tweed:

Re: Bill C-7, *Marine Liability Act* and *Federal Court Act* Amendments

I write on behalf of the National Maritime Law Section of the Canadian Bar Association (the CBA Section). The Canadian Bar Association is a national association representing over 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. Our comments on Bill C-7 are generally favourable. That said, the CBA Section has some concerns about the Bill that we hope may be addressed.

In general, the CBA Section supports the amendments to the *Marine Liability Act* and the *Federal Court Act* in Bill C-7. The proposal to amend Part 6 of the *Marine Liability Act* to implement the 2003 Supplementary Fund Protocol to the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992* will better prepare Canada for a serious oil spill and ensure that full compensation is available for all victims. Ratification of the *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001,* while having little impact on Canadian domestic law, will harmonize international maritime law on the subject. Oil spills do not respect state borders and we applaud the adoption of an international approach to the problem.

As well, the Bill proposes to bring the English text of the *Federal Court Act* in relation to sister-ship arrest in line with the French text. The CBA Section supports this proposal, as it will quell existing doubts concerning the scope of the sister-ship arrest provision.

Our concerns can be categorized under three headings: adventure tourism; maritime liens; and limitation period**.**

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Adventure Tourism

Bill C-7 proposes to amend Parts 3 and 4 of the *Marine Liability Act* to clarify rules of the limitation of liability of ship owners for maritime claims and liability for the carriage of passengers, in particular, the treatment of participants in adventure tourism activities.

Part 4 of the Act, among other things, invalidates waivers of liability and requires compulsory insurance for carriers of passengers by water. One of the justifications for exempting vessels engaged in adventure tourism from these provisions is that the participants consent to the risks involved, and indeed seek out vessels that permit them to engage in activities carrying such risks. Clause 9 of the Bill lists five conditions that an activity must meet in order to be exempted as an "adventure tourism activity." The CBA Section is of the opinion that it is reasonable to exclude adventure tourism activities from Part 4 of the *Marine Liability Act*. However, another condition should be added to enable an operator to qualify for the exemption, namely, that it provide a seaworthy vessel, properly crewed, at the commencement of the voyage. This condition would help ensure appropriate minimum safeguards for public safety in adventure tourism operations.

Part 3 of the Act sets maximum liability for maritime claims involving certain ships, both "passenger" claims and "other" claims, with differing liability limits for each. The Bill proposes to include adventure tourism participants in these provisions. This is achieved in clause 1 of the Bill by amending the definition of "passenger" in the Act to include an adventure tourism participant. We believe this is sufficient to achieve the government's objective of limiting liability in cases of adventure tourism.

However, the Bill goes further and adds paragraph (c) to the definition of "passenger" in clause 1, namely, "a person carried on board a vessel propelled manually by paddles or oars." The CBA Section is of the opinion that this adds nothing vis-à-vis adventure tourism, and in fact creates a legal anomaly. A person injured while riding in a small boat with a motor does not meet the definition of "passenger," and therefore falls under "other" claims under section 29 of the proposed amended *Marine Liability Act.* That person is subject to a limitation fund of one million dollars. That same person, if injured while a passenger carried on board a vessel propelled by paddles or oars (such as a canoe), would fall under the new definition of "passenger." By virtue of section 28 of the proposed amended Act, this person is instead subject to a limitation fund of two million Special Drawing Rights, which converts to approximately 3.7 million Canadian dollars.

Removing paragraph (c) from clause 1 will ensure consistency in the treatment of those injured while riding in a small boat with a motor or in a canoe. This will preserve the status quo, as the current Act limits liability for personal injury to one million dollars regardless of the method or lack of propulsion.

Maritime Liens

Bill C-7 creates a maritime lien for Canadian ship suppliers against foreign vessels for unpaid accounts. The new provisions do not contain the traditional requirement of a contractual link between the supplier and the owner of the ship in order to impose a necessaries lien. The

proposed wording does not provide an owner with an opportunity to prevent a charterer, or others with no actual or apparent authority, from creating the lien. In addition, the proposed amendment is silent on extinguishment of the lien generally, or following a *bona fide* arms length transfer of ownership. In short, many of the safeguards in the U.S. *Maritime Lien Act* are missing from the proposed text.

The CBA Section offers no comment on the policy decision to have the lien apply only against foreign flagged vessels.

Limitation Period

Proposed section 140 establishes a three-year limitation period for proceedings not covered by other limitation periods. The CBA Section agrees with the need to create a general limitation period applicable to all maritime claims. Limitation periods are intended to afford certainty about whether a claim will be pursued. Current uncertainty surrounding the application of provincial limitation periods to maritime claims is incompatible with this intent. Uniformity across the country will be strengthened by the adoption of a federal limitation period of general application to maritime law.

There has been some debate within the maritime law bar regarding the correct length of this general limitation period. General limitation periods vary among provincial and territorial jurisdictions. Whichever general limitation period is chosen, it should be consistent with the other limitation provisions contained in the *Marine Liability Act.* A two-year period would be more consistent with the current Act.

The limitation period is to commence the day after the cause of action arises. In our view, the general limitation period should run from the date of discovery of the cause of action, as is already the rule in most provincial or territorial jurisdictions.

Missing from the Bill are words that would permit parties to extend the limitation period by agreement, as permitted by the Act today through the adoption of the cargo liability regime in the Hague-Visby Rules. These “tolling agreements” should continue to be recognized in the legislation.

Conclusion

I trust that these comments will be of benefit to the Committee as it considers Bill C-7. Should the Committee have any questions about our comments, or any other part of the Bill, we would be happy to assist.

Yours very truly,

(Original signed by Kerri A. Froc for Simon Barker)

Simon Barker
Chair, National Maritime Law Section