



April 12, 2007

Mr. Jerry Rysanek
Director, International Marine Policy
Transport Canada
Place de Ville, Tower C
Ottawa ON K1A 0N5

Dear Sir:

Re: Comments on Supplementary Discussion Papers on Maritime Law Reform

In May 2005, Transport Canada circulated a Discussion Paper detailing 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") commented in a letter dated December 21, 2005.

We are writing now in response to the recently released supplementary Discussion Papers on the topics of sister ship arrest, Canadian ship suppliers' liens, and marine adventure tourism.

Liens for Canadian Ship Suppliers

The CBA Section offers no comment on the policy recommendation that the new maritime lien available to Canadian necessities suppliers would apply only against foreign flagged vessels.

The CBA Section supports the proposal that the new maritime lien would apply to both goods and services supplied to the ship and that the scope of the lien be consistent with the claims for which *in rem* rights have traditionally been available under section 22 (2) (m) of the *Federal Court Act*.

The CBA Section supports the proposal that, if a new maritime lien is to be created, it should rank before a ship's mortgage.

The CBA Section also supports the proposal that the authority to bind the ship so as to create the lien rest with the ship owner or someone acting on the ship owner's authority.

With respect to the proposal that the lien be extinguished 60 days after the bona fide sale of the vessel, the CBA Section raises the following issues for Transport Canada's consideration:

- (a) It will be necessary to clarify the steps that must be taken within the 60 day period following sale in order to preserve the lien, such as commencement of a Federal Court action;
- (b) Clarity will also be necessary around the issue of what constitutes a bona fide sale of the vessel and whether this must be a sale to an arm's length purchaser.

The CBA Section also raises for Transport Canada's consideration whether the creation of the new Canadian maritime lien on the terms proposed by Transport Canada would still leave discrepancies between the liens available to Canadian necessities suppliers and US necessities suppliers in pursuing their claims in Canadian Courts. Unless the proposed legislation would be intended to apply to US suppliers as well as Canadian suppliers, the following potential discrepancies would be created:

- (a) US suppliers would have maritime liens against Canadian flagged vessels while Canadian suppliers would not;
- (b) US suppliers' liens would not be extinguished 60 days after sale of the vessel; and
- (c) US suppliers would continue to benefit from what the CBA Section understands to be somewhat broader categories of persons who can bind a ship.

Sister Ship Arrest

The CBA Section remains committed to the need to amend section 43(8) of the *Federal Court Act* to harmonize the English and French versions of the text. However, the CBA Section does not support an expansion of sister ship arrest as proposed in either option 1 or 2 of the Supplementary Discussion Paper dated February 10, 2007.

This issue has been discussed a number of times at both the provincial and national level of the CBA. With one minor exception¹, there has never been a consensus within the maritime bar on this issue. There is, without question, a philosophical divide between those members of the bar that regularly represent vessel owners, charterers and their underwriters, and those members that regularly represent cargo interests and their underwriters. While it is recognized this issue is by no means limited to claims involving damage or loss to cargo, the philosophical divide has not yet been bridged. The CBA Section notes that support for expansion is limited and arises because "...some respondents proposed alternatives that would extend the scope of application for sister ship arrest."

¹ There is a general consensus on the need to harmonize the English and French version of section 43(8).

The CBA Section does not accept the fourfold rationale as proper justification for an expanded sister ship arrest regime. While the first rationale supports a clarification and harmonization of section 43(8), it does not support an expansion of sister ship arrest. The other three reasons advanced in support of expanding sister ship arrest do not identify any specific mischief requiring or supporting changes to our existing law. Instead, they simply refer to a common form of chartering arrangement, and different corporate structures generally used by all manner of industry, not just shipping. More importantly, it has long been accepted under Anglo-Canadian law that individuals are at liberty to structure their affairs in order to minimize liability. In a corporate context this was firmly established by the House of Lords in *Salomon v Salomon & Co Ltd*. [1897] AC 22. To do so is not illegal, nor is it necessarily immoral. That said, questions certainly can arise where affairs are structured to commit a fraud or otherwise improperly evade a legal obligation. The use of a bareboat charter, or the structuring of business affairs through the use of subsidiary companies or joint ventures, is not legally improper, nor is it immoral. The existence of such arrangements does not justify an expansion of sister ship arrest.

There is nothing to suggest that otherwise meritorious claims are being defeated or avoided by ship-owners given the current state of Canadian law.

Marine Adventure Tourism

The CBA Section participated in the Focus Group session in November 2006, which was tasked with developing a definition of “marine adventure tourism” suitable for use in Part 4 of the *Marine Liability Act* (MLA).

The CBA Section supports three proposals:

- to amend the definition of the term “ship” to exclude a vessel of any length propelled manually by oars;
- the proposed definition of a “marine adventure tourism activity”; and
- to treat “trainees” on board sail training vessels as, in effect, members of the crew and not passengers.

The CBA Section recognizes that the Focus Group had no mandate to discuss policy related issues, and remains concerned that if the proposal is left without any requirement for compulsory insurance, it might leave passengers involved in a marine adventure tourism activity potentially exposed to negligent behaviour without any legal recourse whatsoever. The CBA Section remains of the view that, if a marine adventure tourism activity is to be excluded from the application of Part 4 and not required to have compulsory insurance, Transport Canada may wish to consider whether such activities should also enjoy the benefit of Part 3 of the MLA and the right to limit liability.

Conclusion

The CBA Section thanks Transport Canada for the opportunity to comment on these matters. The CBA Section looks forward to continuing to work with Transport Canada as the proposals progress further.

Yours truly,

(original signed for Richard F. Southcott by Kerri A. Froc)

Richard F. Southcott
Chair
National Maritime Law Section