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Via email: [Daniel.Hache@tc.gc.ca](mailto:Daniel.Hache@tc.gc.ca)

Mr. Daniel Haché  
Director, International Marine Policy  
Transport Canada  
330 Sparks Street  
Ottawa, ON K1A 0N5

Dear Mr. Haché:

**Re: Hazards Related to Shipwrecks**

I am writing on behalf of the Canadian Bar Association's Maritime Law Section (CBA Section) in response to Transport Canada's discussion paper on the proposed Canadian legislative regime for the remediation of hazards related to shipwrecks published in June 2015.

The CBA is a national association of 36,000 lawyers, Québec notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. The CBA Section members have expertise in provincial, national and international issues in all aspects of maritime law, including shipping, registration, navigation and maritime related transactions.

Our comments focus on four areas of the discussion paper: limitation of liability, exemption of small vessels, towing requirements, and compulsory insurance and wreck removal orders.

**Limitation of Liability**

The discussion paper included no limitation of liability for shipowners for wreck removal expenses. The discussion paper notes that wreck removal is currently exempted under the *Marine Liability Act* (MLA) and Canada's reservations to the *Convention on Limitation of Liability for Maritime Claims* (LLMC). If Canada is to adopt a strict liability regime for wreck removal accompanied by compulsory insurance, as contemplated by the *International Convention on the Removal of Wrecks, 2007* (IWRC), the regime should provide for the limitation of liability consistent with similar regimes. This is the structure of the IWRC, which at Article 10(2) provides:

Nothing in this Convention shall affect the right of the registered owner to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.

Other similar regimes, notably liability for pollution damage, impose strict liability on the carrier or shipowner if a pollutant is released (i.e. persistent hydrocarbons or hazardous and noxious substances), but preserves a shipowner's right to limit liability under the LLMC. In the context of a pollution event, the shipowner will be liable for the cost of cleanup and damages flowing from the release of the pollutant with limited exceptions, similar to those found in the IWRC. The shipowner must have sufficient insurance and proof of insurance to cover that potential liability. Along with the strict liability and the insurance requirement, there is also a corresponding right of the shipowner to limit its liability.

Limitation of liability recognizes shipping as a risky business requiring intensive capital outlay and operating costs while balancing the need to promote and maintain a shipping industry that is vital to a nation's economy. The traditional quid-pro-quo for a strict liability regime (i.e. the right to limit liability) is reflected in the IWRC and should be similarly reflected in Canada's legislative regime. Canada has historically attempted to harmonize international shipping laws. If Canada is to implement the IWRC, our legislative regime should not deviate substantially from the IWRC. Lack of global harmonization creates confusion and would make wreck removal very difficult.

If Canada adopts the IWRC, we recommend that the right to limit liability, as reflected in the IWRC, be preserved.

### **Exemption of Small Vessels**

The discussion paper calls for shipowners to maintain insurance or financial security for wreck removal or remediation in accordance with Article 12 of the IWRC. This requirement would only apply to ships over 300 gross tons (GT). While we agree in principle with the requirement, we believe that the compulsory insurance requirement should be extended to commercial vessels under 300GT with the possibility of expanding the requirement to all vessels in due course.

Often, the most difficult or complicated wreck removals are those for smaller vessels, including derelict and abandoned vessels. In many respects, smaller vessels demand more insurance protection than the larger vessels contemplated by the proposal.

We acknowledge the practical difficulties of applying the insurance requirement more widely and understand that most general property insurance policies that cover small vessels do not cover any kind of wreck removal. If this requirement were to be expanded to all small vessels, full consultations should be undertaken with the insurance industry.

### **Towing Requirements**

Paragraph 34 of the discussion paper states that the owner of a towing vessel would not be liable for the wreck of the towed vessel under the IWRC. Paragraph 35 states that this could pose difficulties in holding the owner of the towed vessel liable if that vessel is not registered. Paragraph 37 proposes that the Canadian regime address this difficulty by including a requirement that the owner of the towing vessel "ensure" that the owner of the towed vessel has adequate insurance for wreck removal. Failure of the owner of the towing vessel to "ensure" could result in monetary penalties or liability for the removal of the wrecked towed vessel. An exception to this requirement would be when a vessel is in distress.

The requirement that the owner of the towing vessel "ensure" the towed vessel has adequate insurance is neither fair to the owner of the towing vessel nor viable in practice and is

inconsistent with the IWRC. The word “ensure” implies a certainty that is unrealistic. The owner of the towing vessel will rarely have the ability to confirm and guarantee that the towed vessel has adequate insurance. The requirement could seriously dissuade towing companies from towing many vessels.

Under the IWRC, the owner of the vessel is responsible to have the required insurance. We see no policy or legal rationale to treat towage contracts differently from other types of contracts relating to ships, such as charter parties, shipping contracts or moorage/terminal contracts. A towing company is in the same position as charterers, shippers and terminal operators vis-à-vis the owner of the vessel. A towing company has no greater ability than those other entities to ensure the vessel has adequate insurance and we see no policy reason to treat it differently.

The owner of the towing vessel should not be held strictly liable for damages and wreck removal costs associated with the towed vessel. Strict liability on towing companies for the failure of the owner of the towed vessel to comply with the insurance requirement is overly burdensome and unjust.

### **Compulsory Insurance and Wreck Removal Orders**

The discussion paper states that the proposed regime would provide for direct action against insurers and prohibit or render ineffective “pay to be paid” type clauses under the compulsory insurance requirement. Reforms in this area should remove the requirement of a government wreck removal order for insurance policies covering wreck removal risk. Many liability or protection and indemnity policies (P&I Club) provide coverage for wreck removal, but only “when removal is compulsory by law”. This type of language can be found in commonly used liability policies, particularly for vessels not entered with P&I Clubs such as the SP 23 form and the Canadian Pacific P&I clauses used in the domestic insurance market. While a shipowner may be willing to remove the wreck of its vessel, it may not be able to do so due to the lack of available funds to underwrite the wreck removal expenses. Unless the government issues an order that the wreck is to be removed, insurers can take the position that removal is not compulsory by law therefore and deny insurance coverage. We recommend that legislative reforms deem these clauses to be of no effect, or alternatively that shipowners be deemed to have a compulsory obligation to remove the wreck without further order of the government.

We appreciate the opportunity to comment on Transport Canada’s discussion paper and would be pleased to further assist in the development of the legislative regime dealing with hazards related to shipwrecks.

Yours truly,

*(original letter signed by Noah Arshinoff for Marc D. Isaacs)*

Marc D. Isaacs  
Chair, CBA Maritime Law Section