

THE CANADIAN MARITIME LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DE DROIT MARITIME

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December 19, 2011

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Legal Services
Transportation Safety Board of Canada
Place du Centre
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Gatineau, (Québec), K1A 1K8

Attention: Allen C. Harding, Senior Legal Counsel

Dear Mr. Harding:

Re: TSB Regulations – Canada Gazette Part 1 – September 3, 2011

The following comments are submitted on behalf of the Canadian Maritime Law Association (CMLA) with respect to the proposed TSB Regulations which have been published in the *Canada Gazette* as set forth above. We refer you also to the letter of the CMLA dated December 21, 2006 to Marcel Ayeko as Acting Director of TSB concerning the TSB regulations in draft form (DORS/92-446). The concerns we expressed in that letter remain applicable.

Section 9(2)(b) – Personal Representative – Legal Counsel

It is the right of the witness to choose his representative and it should not be subject to the approval of the investigator. The choice of the representative is for the witness to make alone.

As set forth in the December 21, 2006 submissions concerning the draft TSB Regulations, it was pointed out that in marine incidents there may be a team of lawyers representing the witness and his interests in different proceedings. While, for the efficacy of the proceeding, it may be appropriate that only one member of the team be entitled to speak on behalf of the witness at the TSB investigation, to deny the right of attendance of the other representatives infringes on

the right of the witness to consult with appropriate representatives concerning different issues as they arise.

In *Re Parrish* [1993] 2 F.C. 60, Mr. Justice Rouleau stated that in the event of marine occurrences where the legal rights and potentially the employment of a witness were in jeopardy the witness had a right to have a representative present (see paragraphs 65, 66 and 67 of the reasons for judgment). Implicit in the Rouleau decision is that the witness must be the one who chooses his legal representative. Making the choice of the legal representative “subject to the approval of the investigator” is a denial of such a right and will probably result in litigation if the Regulations are promulgated and enforced by TSB. To avoid such a situation, the CMLA recommends that the words “subject to the approval of the investigator” be deleted from s. 9(2)(b) of the TSB Regs.

Section 9(3) – Participation in interview process

The CMLA is concerned that the provision that the person chosen (presumed to be legal counsel) to attend with the witness shall not intervene at any time during the interview “unless permitted by the investigator” completely negates the purpose of having a legal representative present.

It is understood that the role of counsel attending with a witness is to assist the witness in the event that questions or responses thereto are unclear or in the event that the factual basis or the assumption on which the investigator is basing his questions require clarification. In *Re Parrish* Mr. Justice Rouleau stated in paragraph 67 “...in such circumstances, 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.” Implicit in that statement is the right of the witness to have legal counsel present who can assist the witness, by intervening in the investigation if necessary, to clarify the evidence of the witness.

The presence of s. 9(3) in the TSB Regs will probably lead to a confrontation that will result in a court challenge. To prevent the legal representative from assisting the witness and the investigators in clarifying questions and responses thereto will be a disservice to all involved in the investigation process and is contrary to the fundamental right to have legal representation. The CMLA recommends that s. 9(3) of the TSB Regs be removed.

Section 11(c)(iii) – Access of observers to information relating to any person directly involved in the occurrence.

The privileges and protections granted to a witness required to attend before the TSB pursuant to the *CTAISB Act* belong to the witness and cannot be waived by the TSB (*CNR v. Canada*, 2002

BCSC 1565). The provision of s. 11(c)(iii) of the TSB Regs which allow the TSB to authorize an observer to examine information relating to any person involved in the occurrence infringe the rights of the witness to not have that information disclosed without, his consent. The CMLA recommends that s. 11(c)(iii) be modified to require that the TSB obtain the consent of the witness to the provision of information to the observer.

As a practical matter, it is of the utmost importance that the rights of the witness are protected, both at common law and pursuant to the *Canadian Charter of Rights*. The informed consent of the witness should be required prior to release of any information to the observer or prior to permitting the observer to attend at any interview. It is a concern that once information is obtained by the observer, it is not to be used or released in such a way that it circumvents the protections granted to the witness at common law, pursuant to the *CTAISB Act*, and pursuant to the *Canadian Charter of Rights*. It will be for the TSB to satisfy the witness that appropriate protections are in place such that the unauthorized use or release of information by the observer will not negatively impact the witness.

We thank you for the opportunity to provide comments on the TSB Regulations as proposed and thank you for the extension of time to permit CMLA Transportation Safety Board Committee to consider the same. If you have any questions concerning the above submissions, we will be pleased to respond to the same.

Respectfully submitted this 19th day of December, 2011.

Yours Truly,



Christopher J. Giaschi
President
The Canadian Maritime Law Association

**THE CANADIAN MARITIME LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DE DROIT MARITIME**

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December 21, 2006

Transportation Safety Board
Place du Centre
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Attention: Marcel Ayeko, Acting Director

Dear Sir:

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

The following comments are submitted on behalf of the Canadian Maritime Law Association (CMLA) with respect to the Proposed Modifications to the TSB Regulations. We apologize for the delay in getting these comments to you, however, there appears to have been some confusion in the distribution of the Proposed Modifications and the CMLA has endeavoured to provide its comments in a timely fashion.

The CMLA is concerned that the provisions of s. 39 and s. 40 of the Proposed Modifications seriously undermine the rights of the persons required to attend before a TSB Investigator to have a legal representative of their choosing to assist them at the interview.

Section 39(d) of the Proposed Modifications provides for only one representative to attend with a witness and that representative can only be someone who represents "exclusively" the interest of that person. This is problematic, particularly where there are many people and interests to be represented as a result of a marine incident. If there are several crew members required to attend as witnesses, it is possible that one lawyer may represent more than one of them. It is respectfully submitted that the word "exclusively" should be deleted from s. 39(d).

It is the right of the witness to choose his representative and not for the Transportation Safety Board to regulate that selection. The choice of a representative is for the witness to make alone.

The specification in s. 39(d) that there be only one representative for a witness is also problematic. Members of a firm or a team of lawyers may represent a witness with respect to different interests, such as civil and criminal litigation. While it may be appropriate for the Transportation Safety Board Investigator to require that only one representative speak for the person being interviewed, to deny other representatives the right to be present and consult with the one representative for the person interviewed infringes on the right of the witness to determine his own representation. It is respectfully submitted that the Regulations can be drafted in such a manner that the legal team representing the witness would be entitled to attend, with a proviso that for the efficacy of the proceeding, the witness indicate which representative will speak on his behalf in the event that should be necessary.

The CMLA has grave concerns with the restrictions placed on representatives in s. 40 of the Proposed Modifications. The provision in s. 40 that "the representative referred to in paragraph 39(d) shall not intervene during the interview" is tantamount to a denial of legal representation. The implication of s. 40 is that the representative is to have no participation in the interview process. That is not in the interest of the TSB in obtaining with clarity the facts concerning an incident. It is not in the interest of the person being interviewed if counsel is not able to intervene to clarify a question or a response to a question.

Simply put, it is the position of the CMLA that witnesses compelled by law to attend before a TSB investigator are entitled to have representatives of the witnesses' choosing. In order to be effective, a representative cannot be fettered to the extent set forth in the Proposed Modifications that the representative "shall not intervene during the interview". This effectively negates the assistance that a witness can properly expect from a legal representative.

Mr. Justice Rouleau in *Re Parrish*, [1993] 2 F.C. 60 (see paragraphs 65, 66 and 67 of the reasons for judgment) confirmed the right of a witness to have legal counsel present at a TSB interview. While recognizing that the Board is the master of its procedure, Rouleau J. clearly contemplated counsel would be permitted to participate in the interview process. Rouleau J. stated in paragraph 67 of *Re Parrish* "...In such circumstances, 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.” Sections 39(d) and 40 of the Proposed Modifications unjustly restrict the right of the witness to legal representation and would be open to a court challenge.

Sections 41 to 44 of the Proposed Modifications dealing with Observers are of concern due to the fact that the Board determines who can attend as an Observer and the Board can expressly authorize the use of information without the consent of the witness. There is no provision for the attendance of an Observer to be contingent on the consent of a witness. This could affect the comfort level of and the frankness with which a witness will participate in the interview.

As was pointed out by the courts in *CNR v. Canada*, 2002 BCSC 1562, the privilege which attaches to statements made by a person being interviewed is the privilege of that person and the Board cannot waive that privilege. Section 41(c) of the Proposed Modifications provides that the Observer, unless otherwise prohibited by law, may, with the Board’s approval, have access to relevant information or material relating to the crew members involved in the transportation occurrence. This infringes the rights of the witness without his consent.

The duty on the Board to act fairly implies that the consent of a witness is necessary and should be required with respect to ss. 41 to 44 of the Proposed Modifications.

Section 45 of the Proposed Modifications makes provision for owners to attend at tests of objects (see s.19(5)(b)(i) of *TSAIB Act*), but no provision is made for other parties interested in the investigation to attend, such as persons who are being interviewed and whose evidence relates to the thing or object that is being tested. Provisions should be made in s.45 so that persons who are required to attend to provide an investigator with evidence concerning a thing or an object have the opportunity to be present with a representative with technical knowledge and expertise in the subject matter of the tests when that thing or object is tested.

Section 68 of the Proposed Modifications concerning the issuance of a subpoena and the requirement that it be served only three days prior to the date set for the attendance of the witness may be problematic for both the witness and any representative the witness wishes to attend with him or her. Three days may not provide sufficient time for the witness or the representative to make arrangements to organize their affairs and travel.


With respect to the information to be included in reports of marine accidents or incidents required by s. 10 of the Proposed Modifications, (in particular ss. 10(j), (l) and (m)), concerns have been raised that the list of information required to be produced by the person reporting is too extensive and can more properly be obtained through the investigation process itself.

It is noted that the English and French versions of the Proposed Modifications do not accord in certain aspects with each other. An example is s. 38 of the Proposed

Modifications, where the French and English versions have significantly different meanings.

We wish to thank you for the opportunity to provide comments on the Proposed Modifications to the TSB Regulations and regret the delay in the same being made available to you. We would be pleased to respond to any questions you may have concerning the above submissions.

Yours truly,


A. William Moreira
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/jn

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