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Chair

Mr. Merv Tweed

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● (1540)

[*English*]

The Chair (Mr. Merv Tweed (Brandon—Souris, CPC)): Order, please.

Thank you, and good afternoon, everyone. Welcome to the Standing Committee on Transport, Infrastructure and Communities. This is meeting number 16.

Orders of the day are that pursuant to the order of reference of Monday, March 30, 2009, we will consider Bill C-7, An Act to amend the Maritime Liability Act and the Federal Courts Act and to make consequential amendments to other Acts.

Joining us today from the Tourism Industry Association of Canada is Mr. Christopher Jones. He's the vice-president of public affairs. We've already had a discussion. He's going to make his presentation, and then we'll go to the committee for questioning.

Please go ahead, Mr. Jones.

Mr. Christopher Jones (Vice-President, Public Affairs, Tourism Industry Association of Canada): Thank you, Mr. Chair. I'm pleased to be here today on behalf of the Tourism Industry Association of Canada to provide our views on the amendments in Bill C-7 to the Marine Liability Act.

Let me begin by saying a little bit about the marine adventure tourism industry.

It's a little difficult to determine the number of water-based adventure tourism operators at the present time. As seasonal operators, they lack a national association, and a reliable and aggregated source of statistical data is unavailable. They have had different associations come and go in the provinces, but at the moment they lack a national outfit. However, the industry is growing and is particularly robust in British Columbia, Ontario, Quebec, and parts of the Northwest Territories.

As a niche tourism sector, marine-based adventure tourism is on the rise in North America, so let me say a few words about the Marine Liability Act of 2001 and its impact on marine tourism operators.

First, it subjected all marine operators to the same insurance regime. It set limits on liability at $350,000 per person, it promised the introduction of compulsory insurance requirements, and it subjected tourism operators to a presumption of fault in the case of the death or injury of a passenger. The onus was on the operator to prove otherwise. It also invalidated waivers of liability.

In terms of the reaction to the MLA of 2001, many marine adventure tourism companies and their insurance companies had been operating under the assumption that the MLA did not apply to them. The Marine Liability Act did not clearly define which marine tourism activities were subject to the act. As the legislation was conceived, the MLA applied wholly to vessels that are commercial in nature—largely ferries and cruise ships—and not at all to vessels used for pleasure purposes.

The confusion arose because marine adventure tourism companies were engaged in a commercial business, but the marine tourism sector offers a wide range of activities, all of which are undertaken for pleasure purposes. I might add that there are also instances in which the participant or passenger is often part of the propulsion of the vessel, or in some cases involved in the steering of the vessel or craft, which is an important distinction to make.

If the MLA's insurance regime were applied to marine adventure tourism, a number of consequences would result. The same liability regime would apply equally to marine adventure tourism operators and commercial passenger vessels such as ferries and cruise ships. Insurance would become unaffordable or unavailable to increased numbers of tourism operators.

To put the $350,000-per-person compulsory coverage into perspective, many rafting companies on the Ottawa River operate with 12-person rafts. At $350,000 per person, coverage would work out to $4.2 million just for one boat. Forcing operators to carry prescribed amounts of coverage adds to the regulatory burden on SMEs. The insurance regime envisaged in the MLA was not designed to apply to the participants in an adventure tourism excursion.

With respect to waivers and marine adventure tourism, the purpose of the waiver is to have the participants acknowledge and assume the risks that are inherent in this activity. Without waivers, adventure tourism operators cannot get insurance. Insurance companies are not willing to take on that kind of risk. Many operators would fold altogether. Passengers are still protected under tort law by being able to sue for negligence, and a court has the ability to set aside a waiver when the circumstance dictate.

I want to state on the record that TIAC supports Bill C-7 inasmuch as it seeks to amend the Marine Liability Act to specifically exclude marine adventure tourism from part 4 of the act, namely the sections dealing with the insurance regime and the restrictions on the use of waivers. TIAC supports this bill because, first, operators in the marine adventure tourism industry have experienced difficulties securing affordable liability insurance; second, because the bill reinstates and condones the practice of informed consent; and third, because safety standards for marine adventure tourism already exist and are distinct from those related to other commercial passenger vessels subject to the Marine Liability Act.

I want to just briefly go through some of the safety standards for marine adventure tourism that exist today.

The Canada Shipping Act currently regulates the marine adventure tourism industry through something known as the special-purpose vessels regulations. These set out mandatory regulations for the safe operation of commercial river rafting. They incorporate industry best practices and address such matters as vessel and safety equipment requirements, which cover helmets, life jackets, and the circumstances in which they must be worn. Second, they deal with operational requirements: guides and outfitters must possess first aid and CPR, they must give a safety briefing to participants, and guides must participate in a minimum number of runs before they are qualified to lead an excursion.

As well, the industry is now regulated under a new set of regulations called the small vessel regulations, also under the Shipping Act, which attempt to regulate the seaworthiness of a craft or vessel. These new inspection and registration rules are coming into force in 2009. In fact, they're in the *Canada Gazette* at the moment. These essentially determine what conditions of seaworthiness must apply. It is a self-regulation system. Obviously Transport Canada is not going to inspect every single pleasure vessel out there, but they have an element of self-inspection under a set of rules.

In addition, the insurance industry itself also imposes requirements on the operators. One eastern Canadian broker who is heavily involved in providing coverage to the operators on the Ottawa River tells me they have a risk management system and an on-site inspection system every second year as part of the requirements to obtain insurance.

The industry in Canada has committed to not only complying with the regulations but to exceeding many of the standards and requirements. Many require their excursion leaders to have passed courses in river rescue or to have had previous significant experience in a whitewater environment. In practice, a safety first philosophy governs the operations of the reputable rafting companies in Canada, with the result that the incidence of injuries in water-based adventure tourism operations is far lower than it is for alpine skiing.

That concludes my brief presentation. I'd be happy to attempt to take some questions on this subject.

● (1545)

The Chair: Thank you very much, Mr. Jones.

Mr. Volpe.

Hon. Joseph Volpe (Eglinton—Lawrence, Lib.): Thank you, Mr. Jones, for coming to share with us some of your views.

You've probably already heard about some of the outcomes or read about them in Hansard. Other members may want to ask other questions, but I welcome your effort to raise the issue about insurance and insurability of some of the adventure craft operators.

What this act really tries to do, unless I'm mistaken, is remove the current status quo. The situation for them is one where, as one adventure tour operator pointed out to us, they have paid in excess of $1 million in premiums and the companies have paid out about $70,000 in claims. Therefore, the operators like them don't need to be required to have insurance.

I wonder whether, in your experience, that operator is the exception that proves the rule, or whether that operator is the norm in the business.

Mr. Christopher Jones: Let me confess off the top that this is an issue I've come to grapple with over the last week or 10 days. My understanding, from speaking with people in this sector, is that the majority of reputable companies have insurance and are embodying best practices.

It's a seasonal business, and some of the smaller operators in different parts of the country—it was mentioned to me that Quebec is one—occasionally do not have insurance in place. But for most of the ones I spoke to, there was a very clear sense that in order to have their participants come back and for them to maintain and stay in business, they needed to have insurance.

I'm sorry, I couldn't hear all of the beginning of your question.

Hon. Joseph Volpe: If they're finding it difficult to get insurance and they're still operating, I guess they're engaging in.... I don't mean to attribute anything negative to them, but the old solid politic says, if you don't like the law, change the law. So they're operating outside the law, and they want to change the law so that they don't operate outside the law. Is that the norm, in your experience, or is that the exception?

● (1550)

Mr. Christopher Jones: My understanding is that the operators in this sector believe their vessels must meet certain seaworthiness requirements, and they have a vested interest in maintaining that. But they're also operators who are engaged in an inherently risky activity at one level. There is a series of classifications of the rivers that they run. But the participants in this are aware of that. They take the steps that they think are reasonable.

If we were to impose on them extremely onerous and high insurance liability requirements, essentially they wouldn't be in business. If they had followed the changes that were introduced in 2001 to the letter of the law, it would have put most of them out of business. So in practice, I think, many of them continued with the policy of having a participant sign the waiver.

This is the problem with these smaller types of operations whose revenues aren't that huge but that still want to cater to a market of people who want to have these experiences.

Hon. Joseph Volpe: Mr. Jones, I really do appreciate your work on behalf of your membership and your association.

I'm still wrestling with the perplexity that position poses for me. If some people find it difficult to obey the law, they operate outside the law and then come to Parliament to change the law so that they are brought within the law. But the safety of the individuals who participate, which initially was the focus of the law, is now being put over to one side so that the business interests of those who have been operating outside the law can be satisfied.

Mr. Christopher Jones: I think you're overlooking the point I tried to make. They are subject to a number of regulations and laws under the Canada Shipping Act. Their insurance companies also impose on them a number of fairly strict safety protocols in order for their insurance to be renewed. They have a vested interest in not having accidents.

One of the operators may have mentioned to you last week during his appearance that he takes 30,000 people a year on his river operation, and on average he expects to have maybe one broken leg every two years. He also owns a ski operation, and that ski operation typically has a broken bone of some kind on almost a weekly basis.

The point we're trying to make is that there is some intrinsic risk to riding these rapids, and so on. But when you look at the number of claims and the incidence of injury, they're lower than in alpine skiing. We have to balance this between the viability of this business and the fact that it's not making the kinds of claims that would suggest it's an inordinately risky activity.

Hon. Joseph Volpe: I guess I need to have a sense of satisfaction on behalf of those who are looking to us for at least some critical inquiry into what the legislation means.

The individual to whom you made reference didn't give us an indication of the comparative premiums in insurance he had to pay for the two activities. Secondly, he didn't give us an indication of the payouts of the insurance companies in the two activities. But more importantly, from my perspective—and it's an uneducated perspective, but I hazard it's probably valid anyway—shooting down rapids or going on some very risky adventure, where it is not simply a question of physical injury but death, compared to what happens when you go down a ski slope is probably a little bit of a stretch. That's where one would say we're comparing apples and oranges in terms of the risk associated.

Mind you, there are people who have died while skiing because they've hit trees, they've died while skiing because they weren't wearing helmets—we've seen occasions of that—or they've died while skiing because they decided to go off a cliff instead of going where they should have been going.

I take all of these things into consideration. But nobody has taken me through the dollars-and-cents approach of calculating risk and assuming responsibility. How much of it is laid on the participant and how much on the operator?

Mr. Christopher Jones: When I was reading the material in this section, I noticed about 250 deaths a year in small vessels were attributed to pleasure activities or pursuits. I would imagine that the majority of those were private owners and operators of vessels, and not people running licensed river rafting, canoeing, and kayaking operations.

Yes, it is a risky activity, and as you quite correctly point out, the risk of drowning or of sustaining a head injury exists, but the insurance people I spoke with this morning said they have far fewer claims of this nature. Given that there's an informed consent verifying that people are aware of the risk and that the guides and operators are trained, are running routes that are reasonably well known to them, and are trying to avoid demonstrably unsafe conditions, that would suggest to me that this is a balance of risk.

People want to do this kind of thing in society. We can legislate them out of existence by imposing extremely high insurance rates on them if you want to, but that will also mean that we will lose an activity that many people find pleasurable.

● (1555)

The Chair: Mr. Laframboise.

[*Translation*]

Mr. Mario Laframboise (Argenteuil—Papineau—Mirabel, BQ): I think we have a good understanding of the difference between adventure tourism and tourism. Among other things, in this committee, we've talked about whale-watching excursions, but also about the industry that enables people to get closer using rafts. Some people are prepared to pay for an experience that involves a little more challenge. We in the Bloc Québécois believe that by being too demanding of the adventure tourism industry, especially in terms of insurance—and we know how that works—we risk destroying it. That industry exists, but it often involves small businesses, sometimes medium-size businesses. You're quite familiar with that field, and I would like you to explain to us the difference between tourism and adventure tourism.

[*English*]

Mr. Christopher Jones: The classical definition is probably that tourism of the kind we normally associate the word with is the non-risk type and involves a passive appreciation of some activity, site, location, or destination, whereas adventure tourism involves the participant assuming some heightened level of risk. What's becoming quite common are these ecotourism sites that involve clambering about in the tops of treetops or engaging in water-based sport tourism, mountain biking, and these kinds of things.

Perhaps it's a generational thing. There is a desire now, and we see that these niche segments of tourism are in fact the growth parts of tourism in the world. People aren't just coming to see the sites and sounds blandly; they are coming to do sport and adventure tourism, culinary and wine tourism, health and wellness tourism, and medical tourism.

What I'm saying is that these are growing and emerging facts, and it's predominantly young people. If you look at the age profiles, lots of the people wanting to do these kinds of things are in their twenties and thirties and forties, and Canada is attempting to cater to that market.

[*Translation*]

Mr. Mario Laframboise: Since 2001, because of the way things worked, the cost of insurance has been so high that some aren't even insured. That's somewhat what you were saying earlier. Is that correct?

Mr. Christopher Jones: Could you repeat your question?

Mr. Mario Laframboise: You said earlier that some operators did not have insurance coverage, probably because the costs were too high as a result of the legislation in effect since 2001.

[*English*]

Mr. Christopher Jones: In the immediate wake of September 11, 2001, insurance rates skyrocketed for lots of operators and lots of businesses, not just adventure tourism, but it was particularly acutely felt in our sector. I heard numbers suggesting that for several years afterwards the numbers went up about 27% or 28%. They have since come down, but only a limited number of underwriters and people are willing to insure this particular line of business. I've heard that fewer than 10 in this country engage in underwriting this kind of activity.

They weigh the risks. They are doing it only because it is profitable. In other words, they have made an assumption on the basis of actuarial evidence, I suppose, that the payouts they are required to pay are less than the premiums they earn from the sector. In other words, the claims, as I tried to indicate earlier, are not that high yet.

I heard a number this morning from an insurance agent. They are typically asking one operator to pay about $3,500 a year in insurance, so it has come down significantly.

● (1600)

The Chair: Thank you.

Mr. Bevington.

Mr. Dennis Bevington (Western Arctic, NDP): Thank you, Mr. Chair.

Thank you, Mr. Jones, for being here and sharing with us more information on this.

It seems that with this bill there's a fair bit of support for this section, but to some degree we seem to be running into definitional issues. What is an adventure tourism pursuit? What is risk? What is greater risk? These are things that are seemingly difficult to define in this bill because of giving exemptions.

Would it make more sense to have defined categories of activities? If you were to characterize all the water-based activities that could possibly fit under “significantly higher risk” to the passengers, over and above normal carriage, what activities would fit?

Mr. Christopher Jones: Well, clearly, canoeing, kayaking, and whitewater rafting are activities that incorporate an element of risk, but to come back to the premise of your question, the original act, as I understood it, was to deal with commercial vessels. The passenger on a ferry or a cruise ship is not assuming that he's going to get wet during his trip. He's basically assuming a pretty standard set of conditions for his trip. The people in this sector—and this is why I don't think they should be covered under this amendment, under the original act—are actively entering the activity with the assumption that they are going to participate in it, that they will run some degree of risk, and that they may be involved in the propulsion of the vessel through paddling or steering the vessel.

We just think that this was the wrong place to cover their activities.

Mr. Dennis Bevington: So you wouldn't think that there would be any harvesting activities, let's say, that people might be involved with, such as fishing or hunting on the water, that would carry significant risks and would be considered adventure tourism or that would allow someone to apply for an exemption based on the fact that there is significant risk involved in the activity they're engaged in? Or perhaps there's someone offering diving or swimming expeditions. So would that fit under adventure tourism and using a boat with significant risk?

Mr. Christopher Jones: Well, I'm not a lawyer, but I think, Mr. Bevington, that you've made a good point. There may well be a need for some kind of definitional clarity on what adventure tourism consists of. There is a distinction to be made between somebody who is using his own private vessel or craft to go fishing.... I'm not sure if the discharging of a firearm is probably what they're doing from the boat.

These are operations that are led, guided, or outfitted by people whose job it is and whose training it is to take people on these kinds of activities. I think that's an important distinction.

Mr. Dennis Bevington: Well, I—

The Chair: You're way over time. Thank you.

Mr. Jean.

Mr. Brian Jean (Fort McMurray—Athabasca, CPC): Mr. Chair, thank you very much.

I don't have any particular questions for this witness. I appreciate his coming here today.

I'm not sure if any members of the government side have questions for him at this stage. No, sir, they don't, so if there are additional questions from the opposition, we're more than happy to give them the time.

● (1605)

The Chair: Mr. Volpe.

Hon. Joseph Volpe: I have just a brief observation, Mr. Jones. It comes back to the issue of liability claims, etc. Again, I don't mean any malice by the question, but I'm wondering whether the waiver clauses are the cause of fewer claims being brought forward or whether in fact these activities are as dangerous as we say or could imagine them to be.

What if there's a legal chill brought on by that waiver? What if someone goes before his or her own lawyer and asks what the chances are of pursuing a claim against the operator, and the lawyer says he or she doesn't know, but because the waiver is there, it's going to cost them a little bit more? The client weighs how much it's going to cost to get compensation and is unsure about going that route, because it's a minimal amount if he or she is successful, whereas the operator has probably built it into his insurance indemnification as well as representation in court, so it doesn't cost him anything.

I'm wondering whether the numbers being presented to us as a basis for taking one position or another are really valid in the absence of this kind of analysis.

Mr. Christopher Jones: It's a good question.

My examination of the waivers issue led me to understand that it is true that with a waiver system in place fewer legal actions are brought against insurance companies for any kind of injuries sustained. But a waiver can be set aside, as I said earlier, by a judge. It still gives the participant the right to pursue an action if he feels that some kind of conduct, or malice, or neglect, or omission by the operator resulted in his injury, or his death in the case of the next of kin.

When you ski, on the back of your lift pass is an implicit waiver. Also, there are other activities where you sign a waiver. I think this is the trade-off, where people are cognizant when they embark on these activities that there is an element of risk and that they are absolving the owner or the operator from some of that. But as you point out, it still does give the participant some recourse through tort law to bring an action if he feels he sustained an injury that's attributable to some kind of negligence.

The Chair: I think it's also important to note that part 3 of this basically invalidates the signed waiver if a person wants to pursue it at the legal level. Is that not correct?

Mr. Christopher Jones: Yes, that's right, in part 3, I believe, and the amounts go up to significantly more than $350,000. It's $4 million or something of that order.

The Chair: Mr. Kania.

Mr. Andrew Kania (Brampton West, Lib.): I'd like to comment on that part.

I am a trial lawyer. While it's true that anybody can sue at any time, if you have a waiver that's upheld, that's the end; you lose. So I believe what Mr. Volpe was saying is 100% accurate, because there is a chill; when you go to a lawyer, they'll say, “Is this enforceable?” Most lawyers, if they're being responsible, will say, “I don't know; it's going to cost you to find out, but most likely based on the wording...”. All these waivers, obviously—there's not one standard form waiver; it depends on who has written it. Oftentimes—because I've written them myself—you just look at the most recent case and see when something has been permitted, and then you write it up again to make sure that's now taken into account.

I can tell you from experience that there's a serious chill with these waivers.

Mr. Christopher Jones: It does put a chill.

It comes back to the problem, though, that if in the interests of removing that chill you remove the waiver, then you're exposing the operator, in what is essentially a fairly risky activity, to a law suit that can put him out of business. The question is whether we want to have these businesses operating when the participants are knowingly and voluntarily engaging in it, knowing that there is an element of risk—now, with the caveat, of course, that the operator must ensure seaworthiness, he must have trained guides and outfitters, so certain basic minimum conditions are being met. You point to the dilemma, and it's hard to answer it.

● (1610)

Mr. Andrew Kania: But it's not accurate to state that they'll be put out of business, because they'll have insurance, and the insurance company will have the duty to indemnify and defend, pursuant to all liability policies of insurance. So it's just a question of whether they have sufficient limits—

Mr. Christopher Jones: But if you take the waiver away, then the policy premiums the insurance company will then charge the operator will be prohibitive, and that will effectively.... These are mom-and-pop operations that can't afford $60,000 or $80,000. Some of the larger ones might be able to, like some of the fellows you heard from last week, but many of the smaller ones couldn't afford $60,000 to $80,000 in premiums a year, so the operation would cease to exist.

The Chair: Thank you.

Are there any other questions? Mr. Jean.

Mr. Brian Jean: I'd like to speak to that point.

Volenti non fit injuria, which shows my expression of Latin, means voluntarily assuming the risk, which is the case law in Canada. I'm someone who practised personal injury law and has his teeth marks in more ambulances across Alberta than probably any other lawyer.

That was a joke, by the way. I'm glad you see that.

So nobody can voluntarily assume gross negligence; that's what it comes down to. No one can waiver gross negligence. They can waiver negligence, but if it's found that the operator of the vessel is grossly negligent, the judge will throw out the waiver and say that no one will voluntarily assume that. Is that correct?

Mr. Christopher Jones: Yes, that's my understanding. I think that's how the operators would see it as well.

The Chair: Mr. Dhaliwal.

Mr. Sukh Dhaliwal (Newton—North Delta, Lib.): Thank you, Mr. Chair.

Thank you, Mr. Jones.

I would like to raise this question to you. How will the adventure tourism industry change because of the modifications to this liability law and Bill C-7?

Mr. Christopher Jones: I think, if the amendments pass, there will be a sigh of relief from the water-based marine tourism operators because they will revert to the status quo that existed prior to 2001. They were able to use waivers, obtain affordable insurance, and conduct their businesses. So I think they would be generally quite pleased with the outcome. It would be a good outcome for them.

Mr. Sukh Dhaliwal: Bill C-7 would remove adventure tourism from part 4 of the act and it would still remain in part 3 of the act. Do you have any particular comments with reference to that?

Mr. Christopher Jones: My understanding is that these are pleasure-seeking activities, which comes back to my original point. They're also involving the participants in the particular activity. As I understand it, part 3 was dealing more with the commercial operations of the large ferries and crew ships.

My understanding is that there would be still be some ability to sue under part 3, but I'm afraid I'm not.... My understanding is that the industry would be pleased if they're removed from part 4. I'm sorry, I'm not a marine lawyer, and my understanding of the minutia of the rest of the bill is not that good.

The Chair: Thank you.

I'll go now to Mr. Bevington to wrap up.

Mr. Dennis Bevington: It's becoming clearer to me as we go along that really proposed section 37.1 is not well-defined. I actually don't see that the amendments to proposed section 37.1 that have been put forward are really going to solve this issue. It doesn't clearly identify what activities we're talking about.

Adventure tourism “exposes participants to an aquatic environment”. How many different categories fit under that?

Normally it would require “safety equipment and procedures beyond those normally used in the carriage of passengers”. You're at the level of a life jacket.

Then it says that “participants are exposed to greater risks than passengers are normally exposed to in the carriage of passengers.” How do you quantify that in real terms? There are so many things that add to the danger that passengers have on a boat. The temperature of the water that you're going through would, I think, be of serious consideration when you add to risk.

You really haven't defined risk. You haven't defined any of the things that are in there that give us a clear picture of who's going to get the exemption. I'm having trouble with this section completely. Certainly I'd like to see companies have the opportunity to have waivers, but I think we need to understand where those waivers fit into the system.

● (1615)

Mr. Christopher Jones: I take your point. I can't comment on the lack of definitional clarity in the amendment. It is just our view, as I've stated already, that this is an activity that is commonly accepted. It's practised in the United States and many other jurisdictions where the participants knowingly enter it, knowing that there is a level of risk. They do sign waivers. But the operators themselves are mindful as well that they have certain minimum obligations to meet in terms of the seaworthiness of the vessels, the training of their staff, and the conditions in which they operate. My concern is that if we became too prescriptive here it may render it difficult for these operators to operate. They would be operating in such a narrow set of conditions, or perhaps with extremely high premiums, that they would be out of business.

The Chair: Very good. Thank you.

Does anyone else want to speak? One round around the table?

I thank you, Mr. Jones, for your attendance and the advice and the information you provided us with.

We will move to clause-by-clause. Maybe we'll take two minutes to stretch and allow our guests to leave, and then we can get at the clause-by-clause of the bill.

● _____ (Pause) _____ ●

● (1620)

The Chair: Thank you, and welcome back.

Joining us now for clause-by-clause, in person, from the Department of Transport, is Donald Roussel, director general, marine safety; and Mark Gauthier, general counsel, legal services. Joining us by teleconference from the beautiful city of Vancouver is Jerry Rysanek.

Are you there, Jerry?

Mr. Jerry Rysanek (Executive Director, International Marine Policy and Liability, Department of Transport): Yes, I am. Thank you very much, Mr. Chairman, for allowing me to participate in this manner.

The Chair: I hope the rain isn't bothering you too much out there.

We'll proceed with clause-by-clause.

(On clause 1)

The Chair: We have a Liberal amendment, L-1.

For the information of the committee, the Liberal amendment moves to remove lines 13 and 14. The government amendment, G-1, would move to amend line 14.

So if L-1 is passed, G-1 is no longer on the table.

Mr. Volpe.

Hon. Joseph Volpe: Mr. Chairman, this is pursuant to the discussions we've been having about how to address the issues of people who are participating in an activity from proposed section 37.1. From that activity, we need the definitions in order to have consistency. The first of those is to define who a person may be.

Proposed paragraph 24(c)—lines 13 and 14 in the English, and lines 14, 15, and 16 in the French—says that a passenger is

(c) a person carried on board a vessel propelled manually by paddles or oars; and

If we eliminate that, then they are no longer passengers, for the purposes of this act, for the activity outlined in proposed section 37.1.

● (1625)

The Chair: Any comments?

Mr. Jean.

Mr. Brian Jean: I would like to hear from the Department of Justice in relation to this particular issue. If that is adopted, what would be the consequences? They seem quite severe. I'm wondering if the department could comment on that.

Obviously, from our perspective, G-1 would be a better proposal.

The Chair: Mr. Gauthier.

Mr. Mark Gauthier (General Counsel, Legal Services, Department of Transport): Thank you, Mr. Chairman.

Yes, I believe there is a legal consequence in accepting this particular motion and consequently rejecting G-1. I may have touched upon this in my previous testimony.

The reason we are compelled to make, or at least should make, a motion to amend this particular provision is as a result of proposed section 34.1 from part 4 of the act, which, to put it crudely, expels, if you wish, from part 4 the persons carried on board propelled manually or by paddles or oars, in order to take them out of that provision.

Then, if we do not consequentially amend also proposed section 24 in the manner that is proposed in G-1—that is to say, simply deleting the entire paragraph—it leaves doubt as to exactly which provision of part 3 of the MLA would apply to those individuals.

The reason G-1 is framed in this manner is in order to address that—that is to say, to carry the concept of persons on board vessels propelled manually by paddles or oars as passengers if they are carried on a commercial vessel. Of course, if they're not carried on a commercial vessel, then it is a pleasure craft, and it becomes clear which section of part 3 applies.

The wording of G-1 clarifies that if you're a person carried on board one of those vessels, if you're on a commercial vessel, you're a passenger and the liability regime is X—proposed subsection 28(1), to be more precise—whereas if you're on a pleasure craft, or you're not on a commercial vessel and therefore on a pleasure craft, then you're directed to proposed section 29 in part 3.

That's the manner in which G-1 clarifies that. In my view, L-1 would create an uncertainty there.

Thank you.

Mr. Brian Jean: In fact, if I may, Mr. Gauthier, this is actually consistent with the proposed amendment by the Canadian Maritime Law Association, is that not correct?

Mr. Mark Gauthier: I believe that is so, sir.

The Chair: Mr. Volpe.

Hon. Joseph Volpe: Well, since we want to refer to others who support our position, I think the lawyers who came from the Canadian law association said that with the way the bill is currently written, what happens is that you create an anomaly, as a person injured while riding in a small boat with a motor does not meet the definition of passenger and falls under other claims, under proposed section 29 of the amended act. So I think they disagreed with your initial presentation, Mr. Gauthier. It would be important to eliminate this particular definition in order to arrive at some consistency.

Now, you will probably have already read some of the other amendments that we have proposed. Those amendments go to providing some consistency in the interpretation presented for legal dispute. They don't necessarily invalidate G-1, but it certainly does not make them necessary—and, of course, all the other ones that are consequent to G-1.

● (1630)

Mr. Mark Gauthier: Mr. Chairman, I certainly don't wish to engage in a fencing match. The CMLA said what they said, but if they were suggesting that anyone on board that type of craft, whether it's a commercial craft or a pleasure craft, should have the same liability regime, that's a matter of policy.

When the proponents, the Ministry of Transport, wrote this up, the policy—which was then adopted and then tabled in Parliament—was that there ought to be a distinction between the liability regime for those on board pleasure craft and those on board commercial craft. It's purely a matter of policy. Perhaps the CMLA favours the same. What I'm seeing here, though, and I will repeat it, is that amendment L-1, as drafted, doesn't really clarify which of the two regimes would actually apply. It just takes that category of person out—a passenger. It doesn't have, at least in my view, the specificity that is provided for in G-1.

The Chair: Mr. Laframboise.

[*Translation*]

Mr. Mario Laframboise: Mr. Gauthier, two public systems are provided for under this bill. The addition that you're making, that is the government's amendment, will clarify the situation, I believe. I agree with you.

[*English*]

The Chair: Mr. Volpe.

[*Translation*]

Hon. Joseph Volpe: I have an observation to make.

[*English*]

Mr. Gauthier, I'm glad you said what you did in response to my observation about this possibly being a policy issue rather than a fencing issue. Of course, what we're here to do is talk about legislation that represents government policy. The reason we referred to what other lawyers have said, lawyers who are apparently commissioned by the Bar Association to look at this particular act—and they provided you as well as us with their thinking on it—and those from the marine liability component of the practice of law, is that they said to us—and I hope I'm not misinterpreting or misstating their position—that what the act is trying to do is put some people into part 4 of the act, and we, on this side, may not be convinced that they ought to removed.

So you're right, it's question of policy. So we need not fence.

In terms of policy, this would be as valid a position as someone else's. It's a question of whether this is the one the group will accept. I think you're right on that score as well. Let me compliment you on two very good observations, and I leave your credentials in law untested by one who does not have them.

The Chair: Are there any other comments?

(Amendment negatived)

We're moving to amendment G-1. Mr. Jean, please.

Mr. Brian Jean: Thank you, Mr. Chair.

This particular amendment is required to clarify that vessels propelled manually by paddles or oars, etc., that are used for private or pleasure purposes will continue to be subject to the $1 million limit per incident, while the same types of vessels used for commercial and public purposes will be subject to a minimum limit of $3.5 million to reflect the policy of greater coverage for the commercial public purpose.

The Chair: Are there any comments?

(Amendment agreed to [See *Minutes of Proceedings*])

(Clause 1 as amended agreed to on division)

(Clause 2 agreed to)

(On clause 3)

● (1635)

The Chair: We have government amendment G-2.

Mr. Jean.

Mr. Brian Jean: Thank you, Mr. Chair.

The addition of a new subparagraph would actually ensure clarity in the act and avoid any misinterpretation. The amendment would actually add a new subparagraph (c)(i) to proposed subsection 28(3) to clarify the treatment of others who should not be considered passengers under the act. These would be people carried on board involuntarily, such as shipwrecked and distressed persons.

That is my understanding of that particular amendment. And I would like to hear from Mr. Gauthier if that is indeed his understanding of the amendment as well.

The Chair: Mr. Gauthier.

Mr. Mark Gauthier: Mr. Chairman, it is my understanding that but for this amendment, there may be some inference or it might somehow at some point be concluded that these persons—trespassers, stowaways, and so on—by virtue of the existence of proposed subsection (3) as drafted, might somehow benefit from passenger status, which is what this amendment seeks to prevent, as I understand it.

Thank you.

The Chair: Mr. Volpe.

Hon. Joseph Volpe: The difficulty I have with this—and I'm going to defer to all the esteemed legal experts around the table—is that if someone comes onto my property and is injured in so doing, whether he's invited or not to come onto my property, I'm still liable for any injuries to him. What this particular clause suggests is that if you're going to make an exception for someone who comes aboard a vessel, which is the private property of person X, then you need to have consistency with the legal principles applied to someone who has private property that's not floating.

I'm not sure this would stand up anywhere. Why present it?

The Chair: Are there any comments?

Mr. Jean.

Mr. Brian Jean: I'm not certain if he's looking for my legal expertise on the particular issue, but if someone is a trespasser on your property, it doesn't necessarily mean that you're assuming responsibility for that person while they're there. In some jurisdictions, such as the United States, depending on the state, that does indeed happen, and that is my understanding. But certainly you would not suggest that someone who owns a ship is going to be responsible for stowaways and for somebody carrying on an illegal activity. I suggest that would be beyond public policy, and it would certainly be beyond this government's purview.

Hon. Joseph Volpe: So a police officer who boards ship without having been noticed, or a customs official or any port official who doesn't have the consent or knowledge of the master or the owner are all individuals captured by this. They're not covered because this particular clause exempts the owner from any liability for any of those officials who can board without notice.

Mr. Brian Jean: If I may, Mr. Chair, I would suggest not. if you look at proposed subparagraph 28(3)(c)(i), it specifically deals with stowaways and trespassers. That's my understanding of it, and indeed, people with lawful—

Hon. Joseph Volpe: But it says “or any other person”.

Mr. Brian Jean: Could Mr. Gauthier comment on that? That's not my understanding of what it would be.

Mr. Mark Gauthier: Well, sir, my understanding would be that if you're not exempted by this provision, then at least the passenger type of liability would apply. And again, I stress that the government policy appears to be that there ought to be a distinction between certain classes of those who might suffer injury on board vessels. But for this exemption, the regime that would apply would be that afforded to passengers, in other words, the higher regime. I think that is the reason for the distinction.

Proposed subsection 28(2) says, "The maximum liability... to persons...otherwise than under a contract of passenger carriage...", and clearly these people would be otherwise than under a contract of carriage if they've sort of sneaked on board or have been found in a container or whatever. It is to ensure that this particular provision just doesn't apply to them.

That is the chief reason to make this amendment. It mirrors another amendment in part 4, which has the same sense or goes in the same direction. Again, it's an exemplification of the government's approach to different liability regimes, depending on what type of person is on board and what type of vessel it is.

● (1640)

The Chair: Mr. Volpe.

Hon. Joseph Volpe: It's simply that when you start to enumerate who your passengers are, such as stowaways, trespassers, or any other person who doesn't have permission or who is not coming on board with the knowledge of the shipowner or operator, you're including even officials of the local port, customs and excise, and so on. So in the interests of clarity, you either leave it out or you start to enumerate them all.

Mr. Brian Jean: If I may, Mr. Chair, unless there are other comments, I would say that my understanding is that those particular officials have lawful authority to enter a ship and to do what is necessary or else they wouldn't be doing it in the first place. They would be considered trespassers and would thus be illegal.

Nor do I understand, Mr. Gauthier—and I'd like you to confirm this—if this would exclude any other tort liability that may rest with the shipowner as a result of negligence, which obviously would be the case if the ship sank. This is simply to set in stone the liability. Is that not the case?

Mr. Mark Gauthier: Yes, that is quite correct, Mr. Jean. This is by no means attempting to somehow preclude the application of general law. The principles are still there.

As to your point about persons being lawfully on board, I suppose that's probably indeed the case. For ship inspectors and folks like that who might have business on board, for example, it is at least implied that they are allowed to be on board. Arguably, it's a bit different from someone who sneaks on board to get passage, which is the stowaway type of problem.

The Chair: Are there any further comments?

Hon. Joseph Volpe: Yes. I have just one last one.

Given what's happening with this legislation, which is that you're trying to take some people from the status quo and bring them into a situation where they are not going to have to suffer the possibility of having to get insurance, and you're listing them through the definitions, why not simply leave the status quo? If you haven't gone that far, then why not, Mr. Jean, eliminate the words "or any other person"?

The Chair: Mr. Jean.

Hon. Joseph Volpe: Excuse me a second. We've heard more often than not from Mr. Gauthier, once from Mr. Roussel, and from their other colleague, whose name I forget, that anything not captured in this particular legislation comes under tort law, under other civil law provisions, or under other maritime law provisions. Well, if we're going to hand off all of these things, why don't we withdraw all the amendments and say yes?

The Chair: Mr. Jean.

Mr. Brian Jean: I would like to say that I think when someone enters into a contractual arrangement with a carrier, they have a different obligation to that person who has entered into the contract. Depending on what Mr. Gauthier would say in the Department of Justice, I would certainly be open to the thought of adding "without lawful authority" after "any other person" if that would satisfy Mr. Volpe and indeed satisfy the Department of Justice. I would suggest that this might indeed deal with the matter. "Any other person without lawful authority" is found in many other acts that I have seen.

Hon. Joseph Volpe: It's for the sake of consistency, because we've already turned down my amendment and got the government's amendment. It doesn't make sense not to have consistency in that point. If you are proposing to amend your own amendment by adding after "any other person" the three words "without lawful authority"—

The Chair: Actually, we need someone else to make that amendment if—

Mr. Brian Jean: Before I actually consent to that amendment, I'd like to hear from the Department of Justice representative, who is currently scribbling madly.

Mr. Mark Gauthier: Well, certainly from my perch, sir, such a subamendment could be made. If made, though, I think we should also bear in mind that it should be made later, when we're dealing with a similar provision for part 4. Looking at it rather hastily, of course, it does not appear to have a potential for an unintended result, at least not at first glance.

● (1645)

The Chair: Mr. Laframboise.

[*Translation*]

Mr. Mario Laframboise: I think the amendment introduced is quite complete. Where you state "any other person who boards a ship without the consent [...]", that doesn't make me think of the officers who are the representatives of the port or government because, in any case, the captain gives the individual his consent to board the ship.

The definition of "stowaways" can be very restrictive. The same is true of the definition of trespasser. That could be a friend of a passenger or someone who says he isn't a stowaway, that he isn't a trespasser, even though he hasn't paid and someone didn't know he was there.

That's why I think that "any other person who boards a ship without the consent or knowledge [...]" is a more comprehensive definition. I therefore hope that the government won't amend it. I would support it as it stands right now, in view of the objective you are pursuing. If there is another one, perhaps we should review the subsection in full.

Let's see whether I understand the objective when you talk about stowaways and trespassers. Sometimes there are people who might be friends of the crew and who would say they aren't stowaways, that they aren't himtrespassers, whereas the captain or the authorities didn't know they were there.

I think your definition is more comprehensive; I like it as it is.

[*English*]

The Chair: Mr. Jean.

Mr. Brian Jean: I just noticed that Mr. Kennedy has arrived, and I was wondering if he had any comments on this particular clause.

Mr. Gerard Kennedy (Parkdale—High Park, Lib.): [*Inaudible—Editor]...the committee, so I know they're doing a great job and I'm going to catch up at another clause. But thank you.*

The Chair: Mr. Volpe.

Hon. Joseph Volpe: I wonder whether this would be a good time to talk about the doctrine of allurement. Mr. Jean would know what that means.

Mr. Gauthier, in order for the doctrine of allurement to be upheld, you have to make the definitions appropriate. So while we're wrestling with the appropriate definition, a stowaway or a trespasser would probably have to be defined in the definition section of the act, would they not?

Mr. Mark Gauthier: They're not sought to be defined. They would be left with the courts to define, obviously, and if so, the courts would rely on the body of law such as it is, no doubt, that touches on these concepts. It's certainly not sought to be defined here, as many words aren't sought to be defined. I felt no need for it.

Hon. Joseph Volpe: There's no need for it because the legislation as presented in the House and before this committee didn't have this amendment and didn't have the words defined initially, so there was no need then. But there might be a need now, because you will complicate the legislation even further unless you are as precise as the legislation intends to be.

Mr. Mark Gauthier: I have no further comment on that, Mr. Volpe. It would be up to others to decide whether or not some further amendments are needed to the act to create these definitions. All we know is that when this difficulty was initially identified and was sought to be corrected, when the policy people and our people got together, this was the amendment they came up with and that was thought to be satisfactory. For a stowaway or trespasser, undoubtedly there are definitions here and there that could be relied upon to backfill, as it were, the lack of a specific definition here.

The Chair: Have you any further comment?

Hon. Joseph Volpe: I have no further comment on this amendment.

The Chair: Seeing no more comment, I'll go to the question.

(Amendment agreed to [See *Minutes of Proceedings*])

(Clause 3 as amended agreed to)

(Clauses 4 to 6 inclusive agreed to)

(On clause 7)

The Chair: We have a Liberal amendment, Liberal 1.2.

Mr. Volpe.

● (1650)

Hon. Joseph Volpe: This particular amendment is proposed, in part, because in clause 9 we're going to have a definition of ship or vessel that's going to be, I think, pretty comprehensive for the way this legislation will be interpreted.

So this proposes to insert in line 26, after the word "vehicle" and before the word "or", the following:

> air cushion vehicle or, except when used for an activity referred to in subsection 37.1(1), a vessel propelled

So it seeks to narrow down a definition of the activity under section 37.1.

The Chair: Mr. Jean.

Mr. Brian Jean: With respect, Mr. Chair, I would suggest that this amendment would actually have the effect of bringing marine adventure tourism activities back into part 4, and this would actually defeat the purpose of section 37.1. It would have a huge detrimental effect on marine adventure tourism activities involving paddling and oars, since they now fall under part 4 and no longer would be able to use the waivers.

That's my understanding of it. Mr. Gauthier, is that indeed the case?

Mr. Mark Gauthier: Well, yes, sir, I believe that is. The effect of it is that, fundamentally, section 37.1 would be, in a way, an exception from the exception. So from a legal point of view, it would put that operation, basically, back into part 4 and not retain it in part 3. That is the legal effect.

Now, on the policy effect of it, and so on, I think you've expressed that, and I would not wish to comment further on that.

Mr. Brian Jean: With respect, we've actually heard testimony that indeed, if they are put back into that part, it will close down, in effect, the whole adventure tourism industry. That's the evidence we've heard, so that's the effect of the amendment, if passed as proposed by the Liberal member.

The Chair: Can I ask you this, Mr. Gauthier? Part 4 invalidates the use of waivers. Now, are they valid in part 3?

Mr. Mark Gauthier: Yes, in a sense, sir, they are not invalid. We've heard already much testimony on how they would hold up in a court of law and so on, on a case-by-case basis, but they're not outlawed outright, whereas in part 4 they're outlawed outright.

The Chair: I think that's the clarification. It does help me, believe it or not.

Mr. Mark Gauthier: I believe that's the connection with the point Mr. Jean made.

The Chair: Okay. Are there any other comments?

(Amendment negatived)

(Clause 7 agreed to)

(On clause 8)

The Chair: We have a government amendment, G-3.

Mr. Jean.

Mr. Brian Jean: The proposed amendment was actually recommended by the Canadian Maritime Law Association. It's the same amendment that has been proposed for proposed subsection 28 (3). It would actually add to that paragraph we talked about and clarify the treatment of others who are not intended to be covered by the act.

Is that, indeed, the case, Mr. Gauthier, from your understanding of this?

Mr. Mark Gauthier: Yes, Mr. Jean, this is what I would describe as a companion motion to the one that was previously passed, this one having effect in part 4.

● (1655)

Mr. Brian Jean: And create consistency throughout the act.

Mr. Mark Gauthier: Yes, that's correct.

Mr. Brian Jean: Thank you.

(Amendment agreed to on division [See *Minutes of Proceedings*])

(Clause 8 as amended agreed to)

(On clause 9)

The Chair: We have two amendments.

On the Liberal L-2 amendment, Mr. Volpe.

Hon. Joseph Volpe: Mr. Chairman, we had some ongoing discussion with the legal experts who we brought before the committee about what needed to be done with respect to this component of the legislation. They suggested that we needed to make sure that we put down the word "significantly" in order to ensure that participants would not be exposed to the kinds of risks that they might not normally expect, notwithstanding the fact that they are in a risk-taking adventure exercise. In other words, if you put the word "significantly" in, then there is an incumbent responsibility imposed on the operator to ensure that there is a well-defined process and series of protocols for due diligence that can give the participant an indication that there are normal risks. Something that goes beyond those normal risks would have to trigger their access to the courts for indemnification.

So we're following that advice, and we thought we would make the amendment reflect that particular thinking.

Ms. Lois Brown (Newmarket—Aurora, CPC): Mr. Chair, I would like to propose that adding the word "significantly" makes it very subjective. I would question who is going to define that. What I consider a significantly increased risk may not be what you consider a significantly increased risk. I would be nervous about giving that to the courts to define.

The Chair: Mr. Volpe.

Hon. Joseph Volpe: I think that's the whole issue, isn't it, to make sure that the courts are given the appropriate sway? So the definitional word "significantly"—in a legal fashion, in a legal matter—is going to be decided by the courts, not necessarily by the operators unilaterally.

The Chair: Mr. Bevington.

Mr. Dennis Bevington: As I said earlier, I don't think this section has been well outlined. The particular amendment simply replaces one subjective word with another. We're really still at a subjective stage with what we're proposing would define adventure tourism.

I look at what it says under "passenger": "a participant in an adventure tourism activity". Yet in the adventure tourism activity section it says it "exposes participants to an aquatic environment". What does that mean? Does that mean that scuba expedition fits under this? A passenger is a participant in adventure tourism activity. So we have clearly established that somebody is not simply a passenger, that they can just be somebody doing adventure tourism activity in an aquatic environment.

I think there are some really difficult issues here. My point would be, how far do we want to go in allowing these waivers? For what activities are these waivers suitable, and at what point are they not suitable? I don't see anything here that really lays it out very clearly. I thought the government was going to come back with amendments to this particular section that would give us some clarity. I don't see it in their amendment.

So as of now, I can't support this section.

The Chair: Mr. Laframboise.

[*Translation*]

Mr. Mario Laframboise: On the contrary, I get the impression that one of highlights of this bill—but I could be mistaken, Mr. Gauthier—is precisely the section on adventure tourism. You informed us at the outset, at the department, that there were different views between the legal aspect and the industry, that the industry supported these provisions. We've been discussing this matter with the industry people for some years now. I believe you've weighed each of the words appearing in this bill. You've weighed the pros and cons. You've convinced me.

I don't know whether you can add something, Mr. Roussel. I'd like you to reassure me.

● (1700)

[*English*]

Mr. Donald Roussel (Director General, Marine Safety, Department of Transport): Maybe Mr. Rysanek in sunny Vancouver can explain a little more.

Jerry, are you still there?

Mr. Jerry Rysanek: Yes. Thank you very much, Mr. Chairman, for your invitation.

The Chair: I'm sorry, we forgot about you.

Mr. Jerry Rysanek: The definition of adventure tourism was not an easy task. It took a while. It took a number of experts that we invited from adventure tourism, both the legal and insurance side, to help us design what you see in clause 9. I think it is true to say every word was carefully measured and weighted. On balance, we think this is the best we can present.

There have been options, as you can imagine. For example, we were trying to do it on the type of vessel, size of vessel, and using all kinds of other techniques. This definition of adventure tourism, which has a cumulative effect between paragraph (a) and paragraph (c), is the best and has wide-ranging support among those who will be affected by it.

Thank you.

The Chair: Are there any other comments?

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: On Liberal amendment 2.1, Mr. Volpe.

Hon. Joseph Volpe: Again, for the sake of greater clarity, I feel I must have my dictionary with me, but it has to be a law dictionary, I suppose.

You'll note that in clause 9, proposed subsection 37.1(1), we are adding an additional item so that it would be consistent with the concept of an operator doing appropriate due diligence in establishing a procedure that would give the user/client a comfort level that the operator is providing a vessel that is safe. There must be certain protocols in place, and by adding this paragraph, that the ship is seaworthy and suitable for the activity for which it is to be used and is properly crewed, equipped and supplied, and that we have competent people operating with them.... I know some people think the only adventure tourism is that which takes place on a fast-flowing river in the interior of Canada, but this takes into consideration as well those others who are engaged offshore.

The Chair: Mr. Watson.

Mr. Jeff Watson (Essex, CPC): Thank you, Mr. Chair.

If I'm not mistaken, the witness who appeared before us today commented that seaworthiness of vessels, as well as the equipment required in training of crews, is already accounted for under special purpose vessels regulations—I think that is the term he used—so I think that's already captured sufficiently.

Perhaps Mr. Gauthier might want to comment. If this measure were added in there, does this create additional problems with respect to liability or not? Is it necessary?

Mr. Mark Gauthier: Thank you, Mr. Watson.

I'll probably have to engage in a sort of tag team with my colleague Monsieur Roussel, who is the director general of marine safety in the Department of Transport, as he is more conversant than I am with what's contained inside those special purpose regulations and so on. With your permission, sir, I'll ask my colleague to answer.

● (1705)

Mr. Jeff Watson: Fair enough. Anyone on the panel is fine.

Mr. Donald Roussel: Thank you, Mr. Chairman.

It depends on the type of vessel we're dealing with. We have mentioned in this committee the special purpose vessels regulations that deal specifically with the river rafting adventure type of operation. If you were operating another type of vessel, you may get your hands on our *Small Commercial Vessel Safety Guide*. It will give you all sorts of additional detail and will navigate you through the different regulations that apply for specific activities.

We have an array of different rules and regulations plus, of course, our main law, the Canada Shipping Act. Also, our inspectors are doing the work out there to verify that those vessels operating commercially are in conformity with the act.

The Chair: Mr. Volpe.

Hon. Joseph Volpe: We've wrestled with this one before, and I continue to express frustration as to why people in the industry would not want legislation saying, look, if you want to be in this business, then operate a seaworthy vessel, put people on board who are appropriately trained, and have a place that is appropriately equipped so you don't put anybody to any undue or significant risks. And I say “significant” just for those who think I'm bitter because we didn't get the word “significant” in.

But why create an environment where the operator is left off the hook, so to speak, in terms of performance to his clientele, just because you can say to him, go to a lawyer and take somebody to court? Please, why would you do that? You're the guys who suggested the government do this. It's not just a policy issue; we're providing the legal wiggle room for people to divest themselves of their responsibility.

I know that my friends over here to my left are going to agree with me.

Mr. Donald Roussel: Mr. Chairman, I think we're mixing two things here. The first thing is the requirement under the statute of this country when we deal with the safety of vessels, and it's under the Canada Shipping Act and the suite of regulations present under that act.

What we have in front of us is a liability regime, which is different. So please bear with us, that the safety of Canadians is certainly not in peril. The number of those who have lost their lives in commercial operations in this country is about 15; in the pleasure craft industry, it's about 150. So it's fairly safe out there when it comes to commercial operations.

What we're discussing here is liability; the safety portion of the matter is taken care of.

The Chair: Mr. Jean, then Mr. Volpe.

Mr. Brian Jean: In fact, Mr. Roussel, would this amendment not result in the adoption of a dual standard of liability for the same industry? We'd have two different acts dealing with safety, when indeed the liability act is supposed to deal with liability, and the Canada Shipping Act, especially given that it deals with special purpose vessel regulations.... Wouldn't it actually create a situation where you could actually suggest there would be a dual standard?

Mr. Donald Roussel: I think Mr. Gauthier can answer that; he's our legal specialist.

Mr. Mark Gauthier: Well, yes, Mr. Jean, in a way that's the result. For better or for worse, in Canada there are these two major statutes, one dealing with safety and all of the operational components, and another one dealing with liability. It's a good division, I think, in the sense that the regulated public can go to one statute or the other, and they can see what the standards are. Seaworthiness is certainly, from my own point of view, very much a technical safety concept, and it's addressed in the Canada Shipping Act, and not only in the act itself but also in the various regulations that are relevant here.

There are two sets of regulations. One we've heard already is the special purpose ships regulations, which is an odd name. But just in order to assist the committee, that term was chosen as a bit of a throwback to the old Canada Shipping Act, which had everything categorized: you were either this kind of a ship or that kind of a ship, or some other kind; and if you were none of the above, you were a cargo ship. That didn't work too well. In the new Canada Shipping Act, 2001, these categories were basically set aside, with the exception of pleasure craft. As a result, the government has the ability to propose to the Governor in Council regulations for any kind of vessel. You could presumably have a regulation for a rowboat that's 10 foot long—or choose something else.

Here, under special purpose, was a set of regulations adopted specifically for the marine adventure tourism industry. From my point of view, that is the place where it belongs. There were also the small vessels regulations, which I'll again ask Monsieur Roussel to confirm, but I believe the major amendment to them is not yet law. I believe they're in the *Gazette*. When they do become law, they'll have all the construction standards and all of that business relative to small craft, which would include these vessels involved in this industry.

So from my point of view, and it's only my own personal point of view, it seems to make sense to have a separation of liability on one side and safety on the other.

● (1710)

Mr. Brian Jean: If I may, in fact, Mr. Gauthier, based on conflict of laws—and any second year law student will tell you this—if the regulation was changed and it didn't reflect the same in this statute, we would have to bring forward both at the same time and change them both as a matter of course, and in fact possibly the Canada Shipping Act at the same time, and keep track of all that or else we'd have a conflict of laws and judges would be open to interpret them differently or, indeed, apply a different standard to both.

So that's why there's the separation, I would suggest, with respect. You have one deal with one part of the law and another deal with another. Is that not indeed the case?

Mr. Mark Gauthier: Yes, I would agree with you.

The Chair: Is there any further comment?

Mr. Volpe.

Hon. Joseph Volpe: But you would agree as well that the Canadian Maritime Law Association and the Canadian Bar Association both recommended in their briefs that adventure tourism operators be required to exercise that due diligence and to ensure the seaworthiness of their vessels and the competency of their masters and crews at the beginning of the voyage, and that they be prohibited from contracting out these requirements?

I say this because as some of these discussions will move from the form of making law to interpreting law and end up in the courts, I'm sure that smart lawyers will take a look at what the intent of the legislators would be, and they would probably refer to the Hansard of this meeting to say what is it that was on the minds of those legislators. The legislators also consulted with experts in that particular field, and those experts continued by saying participants in any of these activities might be aware of and accept the risks inherent in such activities, but they should not have to accept the risk imposed by an operator who uses substandard equipment or an inadequately trained crew. Those aren't my words; that is the advice of those experts in law and in courts that have had to deal with these kinds of differences that Mr. Jean talks about.

So I refer again to the reason, the rationale, why we put this addition into that legislation, and with all due respect to the lawyers who were consulted by the Department of Transport on this matter, I think it's a pretty good principle to underscore, and it is that you try to put in the safety of the participants as best you can.

The Chair: I have Mr. Bevington and then Mr. Kennedy.

Mr. Dennis Bevington: Yes, I have some questions.

When it comes to proposed section 37.1, would you explain to me how proposed paragraph 39(c) would impact, or does that have an impact on the definitions within proposed section 37.1? Can you provide regulation to clarify the definitions?

Mr. Mark Gauthier: Yes, Mr. Bevington, that is indeed the case. It's sort of an escape hatch, if you wish, that the Governor in Council could make regulations dealing with any of the items that precede in paragraphs (a) to (d), and the specific power to make those regulations is found in paragraph 39(c).

● (1715)

Mr. Dennis Bevington: So you could classify activities that would be adventure tourism activities under regulation?

Mr. Mark Gauthier: I can only stress the words that are there, obviously. When regulatory projects are put together, of course, the policy is written up by the department, and it's run by a special branch in the Department of Justice that advises on whether it's properly authorized under the act. They have to be intra vires within the authority of act—all the tests that are met in the Statutory Instruments Act.

So of course, in principle you're absolutely right, the reason it's put in is that a regulation could qualify these previous subjects. But no regulation, to the best of my knowledge, has been proposed, and I can't comment on any specifics. But in principle, that's the reason it's there, yes.

Mr. Dennis Bevington: Okay, so we have some coverage here in terms of proposed section 37.1, and I think that helps me more with what my concern is, because I see that then we can narrow this down through regulation if we see that too many are picking up the waivers. I think this was the concern many people had that was brought to us, that this would open it up for many people to use waivers rather than have proper insurance that would cover the activity that might not....

So you're saying that would be quite possible and likely possible.

The Chair: Mr. Kennedy.

Mr. Gerard Kennedy: Along the lines of what Mr. Bevington is saying, what Mr. Volpe's motion talks about is ships that are seaworthy and suitable for the activity. The activity is not a normative activity, almost by definition. In other words, these activities were unanticipated when the Shipping Act came in, are specialized, and have some risk attached.

In other words, there may be ability to make regulation, but some of those activities may not even be of the use of the vessel. They may be the things that take place on the vessel. They may be things that just use the vessel as a platform or to get people to and from. This is adding that extra dimension. This relies on the activity as a generality, and I think that's the extra protection that witnesses at this committee were looking for around the specialized activities, not just the safe vessel. This is about the adventure activities themselves. This is how I read it.

I wonder, then, where else that protection will come from, because I think that's the advice we're getting, and I think Mr. Bevington saw it and got some assurance that there could be some regulation on that front. Where else will we register an intent, if not here, to recognize that this is different from simply the operation of any kind of boat or vessel? It's actually doing these other activities, using the vessel as a base.

The Chair: Mr. Volpe. please.

Hon. Joseph Volpe: Mr. Chairman, I realize that members around the table all want to be helpful and trusting. I take Mr. Bevington's reflections on the confidence that we might derive from regulations to be a very positive effort in that regard. However, regulations are only authorized and devolved from legislation that expresses a particular intent. So a regulation can't emerge—poof—out of the air to address a particular issue, even if it was raised in committee, unless the legislation allows for the development of such regulation.

While I welcome Mr. Bevington's reflection that maybe some of this might be captured—or his request to see whether this might be captured—by regulation, I don't think that we, as members of a committee, need to vest our trust in potential regulation if the legislation doesn't directly lead us in that vein.

So I hold to this particular amendment.

(Amendment negatived [See *Minutes of Proceedings*])

(Clause 9 agreed to)

The Chair: Mr. Jean.

Mr. Brian Jean: I have a point of order, Mr. Chair.

I know Mr. Kennedy did come approximately 30 minutes ago, but I saw him voting and I saw Mr. Valeriote voting before. We have three Liberal members, and one appeared and started voting when we had another Liberal member voting.

I just want to clarify if Mr. Kennedy has provided the proper forms to the clerk so he can vote appropriately, and if not, if Mr. Valeriote is gone now.

I just want to keep track of all the Liberal members—who's coming and going.

● (1720)

The Chair: My advice is that when Mr. Kennedy is at the table, Mr. Kania's vote does not count. He's a substitute member and has been voting, but the rules would state that he's ineligible to vote.

Hon. Joseph Volpe: We're going to have better luck on this one, because Mr. Kania's amendments are coming forward.

The Chair: I know there is some other discussion to take place. I'm going to ask Mr. Volpe to take the chair. I have another commitment that I have to be at, but I'm hoping that on Thursday we can come back and resume on clause 10, and I know Mr. Kennedy has something he wants to discuss.

Mr. Volpe, will you take the chair as the deputy?

Hon. Joseph Volpe: I don't mind doing that. Can I still vote?

[*Translation*]

Mr. Roger Gaudet (Montcalm, BQ): I'd like to make a suggestion to you. It might be better to stop the committee proceedings today and to resume on Thursday afternoon. We have exactly eight minutes left. We won't be able to do much by the end of the meeting. We may not even be able to cover one point.

[*English*]

The Vice-Chair (Hon. Joseph Volpe): Mr. Jean.

Mr. Brian Jean: *Merci.*

In relation to the bill itself, I think that is a very good suggestion, but I believe Mr. Kennedy has a motion that he wants to bring forward to the committee. We can certainly deal with that now and deal with the remainder of the legislation on Thursday.

The Vice-Chair (Hon. Joseph Volpe): Monsieur Laframboise.

[*Translation*]

Mr. Mario Laframboise: Mr. Chairman, you say that Mr. Kennedy wants to introduce a motion, but have we been informed through the agenda? If it's not on the agenda, it would be better to continue the clause-by-clause consideration until 5:30. This isn't the first time Mr. Kennedy has introduced motions. He can introduce one a day, if he wants; that's not a problem for me, except that this one is not on the agenda.

The Vice-Chair (Hon. Joseph Volpe): Mr. Laframboise, the clerk is of the view that, if a motion was introduced 48 hours ago, the member may promote it whenever he wishes. So if we are ready, the motion may be introduced. However, it must have been tabled at least 48 hours before the meeting. Since Mr. Kennedy did that, everything is in order.

[*English*]

Mr. Kania is here today and he has three amendments. I would like to deal with them, and I would also like to deal with Mr. Kennedy's motion.

I have a particular question for the clerk. What do I do as chair when it comes to a vote? It doesn't matter what the vote is.

[*Translation*]

Clerk, could you give me an answer?

The Clerk of the Committee (Mr. Maxime Ricard): The Chair or Acting Chair does not vote and does not move any motions.

The Vice-Chair (Hon. Joseph Volpe): Mr. Gaudet.

Mr. Roger Gaudet: Your suggestion may be the right one, Mr. Chairman. Let's come back Thursday afternoon.

● (1725)

[*English*]

The Vice-Chair (Hon. Joseph Volpe): Mr. Kennedy.

[*Translation*]

Mr. Gerard Kennedy: I asked the Chairman when the appropriate time to introduce it would be. That's his decision. I believe Mr. Kania will be here at the next meeting.

[*English*]

The Vice-Chair (Hon. Joseph Volpe): Is it your wish to withdraw your motion now until a further date?

Mr. Gerard Kennedy: I would be happy to facilitate business. I was advised by the clerk that this had to be brought forward today. I asked him to bring it up at the appropriate time in the proceedings, and this is the time he chose.

The Vice-Chair (Hon. Joseph Volpe): Mr. Jean.

Mr. Brian Jean: The government and I are quite content to deal with this motion now, and I think it's appropriate to deal with it now.

The Vice-Chair (Hon. Joseph Volpe): I'm advised that it hasn't been moved yet. Notice has been given and it's appropriate, so it's all up to the member.

Mr. Gerard Kennedy: I'd like to bring the motion forward. It's time sensitive, and I'd like to seek the committee's view on this matter. We're probably up against time in any event for any considerations we have, so I'm willing to bring this forward now, if it's the chair's disposition.

I so move.

The Vice-Chair (Hon. Joseph Volpe): I'm advised that it has to be moved word for word so it cannot be changed when it is so moved.

Mr. Gerard Kennedy: I move, given the urgency of ensuring that $12 billion in new infrastructure funding is being distributed quickly, fairly, and effectively and the limited window that exists to influence those measures given government targets, that the Standing Committee on Transport, Infrastructure, and Communities call as a witness the Parliamentary Budget Officer during the week of May 4 to May 8 to answer questions on the tracking of budget 2009 infrastructure and other stimulus spending, including but not limited to the number of jobs being created and the regional distribution of the stimulus spending.

Je peux répéter en français, si vous voulez.

The Vice-Chair (Hon. Joseph Volpe): Debate?

Monsieur Laframboise.

[*Translation*]

Mr. Mario Laframboise: Mr. Kennedy, this isn't the first time you've moved to debate the infrastructure issue here. However, the program was negotiated with the Quebec government barely a month ago. The conditions are not yet known. It isn't just the federal government's responsibility, but also that of the Quebec government. In my opinion, debating this matter in this committee while excluding Quebec is out of the question. I couldn't talk about any issue in view of the fact that they're not yet ready in Quebec.

As for the other Canadian provinces, I can understand why you wanted to discuss the infrastructure question immediately. That might be possible in a month and a half, once all the conditions are known, but they aren't all known in Quebec. Furthermore, the Quebec government has a share of the responsibility. I can't support your motion, not because I don't want to, but because I am unable to discuss it for Quebec at this time. However, I understand why you are impatient. You should check with your Quebec members and the Quebec government. The Quebec municipalities don't even know the program or barely know it. So I am simply forced to vote against this motion. It's too soon for us.

[*English*]

The Vice-Chair (Hon. Joseph Volpe): Mr. Bevington.

Mr. Dennis Bevington: I think it's an excellent motion, and I would agree that this process should begin as soon as possible. It is our responsibility to ensure that the infrastructure programs are being handled in a judicious fashion, and I think this is an excellent opportunity to set the ground rules. I have asked for the past two months for representations from the department to give us, first, the outline of the infrastructure programs in detail, and second, an opportunity to question the department about how these funds are going to be allocated. This hasn't happened, so I'm with Mr. Kennedy, and I hope the rest of the committee recognizes how important it is for us to understand these programs.

● (1730)

The Vice-Chair (Hon. Joseph Volpe): Mr. Jean.

Mr. Brian Jean: First of all, my understanding is that it's actually outside of the Parliamentary Budget Officer's mandate. He's mandated to appear in front of three committees, and this is not one of them.

The other problem I have is that this is dated for this week. I believe Mr. Kennedy is a full member. This is the second time he has appeared for a motion at the end of the committee. My difficulty with this is that it's not just the steering committee that recently set the agenda for the committee; rather, it was the entire committee itself. I'm not certain if Mr. Kennedy was actually at that meeting. Alberta is not ready for the question about infrastructure, and many other parts of Canada aren't either.

So it is beyond the mandate of the Parliamentary Budget Officer to be at this committee—I don't think he's even allowed to be here. In addition, it's a premature application that goes against the spirit of cooperation of the committee, which set its agenda just three or four meetings ago.

I don't understand why Mr. Kennedy shows up at the beginning of the parade to set the agenda for a motion. I find it difficult to move forward with the agenda of the committee if you're going to appear just to move a motion rather than to deal with the substantive part of the agenda of the committee itself, which is legislation.

The Vice-Chair (Hon. Joseph Volpe): Excuse me, Mr. Kennedy. I have to abide by the Standing Orders, and they say that once the bells call us to the House we must immediately suspend the sitting, unless I have the unanimous consent of members.

Do I have unanimous consent to continue with the meeting?

Some hon. members: No.

The Vice-Chair (Hon. Joseph Volpe): The meeting is adjourned.

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