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Proposed Regulations Respecting Compulsory Insurance for Ships Carrying Passengers



Discussion Paper

TRANSPORT CANADA
March 1, 2012

Canada

Objective

The objective of these regulations is to ensure that marine carriers engaged in domestic carriage of passengers in Canada maintain insurance to cover their liability to those passengers. Such regulations, governing various forms of compulsory insurance, are the norm in other modes of transport (air, rail, and road) and marine passengers should expect to find the same safeguards in the marine mode.

Background

In August 2001, the *Marine Liability Act* (MLA) introduced a comprehensive liability regime for passengers carried on commercial or public purpose ships. This regime is set out in Part 4 of the Act, where section 39 provides the authority to make regulations requiring carriers to maintain insurance to cover their liability to passengers up to the maximum limit of liability of 175,000 Special Drawing Rights¹ (SDR) per passenger.

Following the “True North II” incident², the Minister of Transport made a commitment in 2001 to the House of Commons Standing Committee on Transport and Government Operations to enact regulations requiring compulsory insurance for ships carrying passengers. Transport Canada then undertook a comprehensive implementation study and extensive consultations with marine carriers and the marine insurance sector from 2001 to 2004. However, the department was unable to proceed with the regulations at that time, pending an amendment of the MLA to exclude from Part 4 adventure tourism activities. That amendment was adopted in 2009 (see section 37.1(1) of the Act), clearing the way to proceed with the regulations on compulsory insurance under Part 4.

Preliminary discussions with stakeholder in 2010-2011

Transport Canada held further discussions on the development of compulsory insurance regulations with stakeholders in the fall of 2010 at Canadian Maritime Advisory Council meetings across Canada. The department also consulted with marine and non-marine insurers on technical aspects of such regulations throughout 2011. Eight (8) main issues were raised during these consultations and possible solutions identified, which greatly assisted Transport Canada in the development of the proposed compulsory insurance regulations that are now presented in this paper. The eight issues included:

- 1) Application of the new regulations.
- 2) Who would be required to maintain the liability insurance?
- 3) Would there be any exemptions from the proposed regulations?
- 4) What amount of liability insurance would be required?
- 5) What criteria would be applied to determine the passenger capacity?
- 6) What information would be required in the proof or certificate of insurance?
- 7) Would the required insurance be available and affordable?
- 8) Would there be sufficient time allowed for stakeholders to comply with the regulations?

¹ The liability regime, contained in Part 4 of the MLA, is based on the International Maritime Organization’s 1974 *Athens Convention Relating to the Carriage of Passengers and their Luggage* as amended by the Protocol of 1990. The Convention is using a Special drawing right (SDR) as a unit of account created by the International Monetary Fund based on a basket of currencies: the Euro, Japanese Yen, Pound Sterling and the U.S. dollar. A SDR fluctuates on a daily basis and was equivalent to \$1.56 on December 29, 2011 (1.56*175,000=\$273,000 per passenger).

² On June 16, 2000, the tour boat “True North II” sank in 15 metres of water in Georgian Bay resulting in the drowning of two teenage children. The inquest found that the owner-operator was not insured and recommended compulsory insurance for commercial vessels carrying passengers.

1) Application of the new regulations

The proposed regulations will have exactly the same scope of application as the underlying liability regime itself has in Part 4, in that they will apply to all ships operated for commercial or public purpose for the domestic carriage³ of fare-paying passengers and, in some cases, also those passengers who did not have to pay for their passage.

The latter category may include:

- 1) A shuttle ferry providing service, free of charge, as an integral part of a highway, or to/from a free public concert held by a municipality on a nearby island; or
- 2) A water taxis operated by public or commercial entities, free of charge to users, as part of a municipal commuter system; or
- 3) A fishing vessel free of charge to users, carrying clients to/from fishing camps; or
- 4) A vessel normally used for private pleasure purposes free of charge to users, carrying prospective clients viewing real estate properties from the water-side; or
- 5) A vessel normally used for private pleasure purposes or a fishing vessel free of charge to users, that would carry workers to a construction site; or
- 6) A tug boat that does not usually carry passengers but once a year would have a contract to carry Transport Canada's inspectors.

Understandably, some stakeholders were concerned about the scope of the liability regime in Part 4 given the many other variations of the use of ships for carriage of passengers for commercial or public purpose. For that very reason, however, it was not possible to provide in Part 4 a definition of a "ship operated for commercial or public purpose". The objective of such a scope in Part 4 was to ensure that the liability regime provides the same protection to all passengers, whether or not they have paid for the passage by a commercial or public purpose ship. Conversely, the objective was to avoid any application of Part 4 to private pleasure vessels that are used strictly for private purposes.

The last ten years since Part 4 came into force have not revealed any difficulties with the liability regime and its scope of application. This would suggest that shipowners who occasionally operate their vessels for commercial or public purpose and, at other times, strictly as private pleasure vessels, were able to obtain insurance to cover their liability arising under either type of operations. It is recognized that this could have been achieved only through the adaptation of insurance products designed by insurers to meet the various needs of their clients following the implementation of the liability regime in Part 4 in 2001. As the liability regime remains the same, it is anticipated that the insurers will be able to continue to meet the same needs of their clients in the future.

³ As set out in Part 4, domestic carriage includes all carriages where the initial point of departure and final point of arrival are in Canada, even if there is an in-transit call at a place outside Canada.

2) Who would be required to maintain the liability insurance?

Part 4 stipulates that both the carrier and the performing carrier are liable for death or personal injury to passengers when the carriage is entrusted to a performing carrier and it provides both parties with the right to limitation of liability. Some concerns were raised by insurers that a “carrier” who merely sells the ticket for a passenger voyage (e.g., travel agents) might be required to carry passenger insurance to cover such liability even though they may not own or operate any ship whatsoever. To resolve this issue, the proposed regulations will place the responsibility to maintain insurance solely on “**a person who performs the whole or part of a carriage by ship**”.

3) Would there be any exemptions from the proposed regulations?

In addition to the parties exempted from the liability regime in Part 4 (e.g., adventure tourism activities, sail trainees, etc.) and therefore exempted from the proposed regulations, the following are also exempted from the proposed regulations:

- carriage performed by vessels that are undertaking search and rescue operations as part of the Coast Guard Auxiliary Vessels Program; and
- carriage performed by the Government of Canada or a province, or by an entity that is entitled to indemnification by such Government for the liability under Part 4.

4) What amount of liability insurance would be required?

As noted above, Part 4, section 39, provides the authority to require liability insurance up to, but not exceeding, the maximum amount of the carrier’s liability, which is 175,000 SDRs per passenger, converted into Canadian dollars at the exchange rate in effect on the date that a judgment is rendered in respect of any claim.

Over the 10-year period from January 1, 2002 to December 31, 2011, the exchange rate for SDRs has ranged from a low of \$1.45 (i.e., \$254,000 for 175,000 SDRs) to \$2.15 (i.e., \$376,000 for 175,000 SDRs). The average rate over that period has been \$1.76 (i.e., \$308,000 for 175,000 SDRs).

Insurers in the Canadian market indicated that their practice is to issue liability insurance policies in Canadian dollars, occasionally in U.S. dollars or British pounds. Since the SDR is not a currency but only an exchange rate, it is not possible to use it as the monetary value of insurance policies issued by market insurers. Neither it is possible to project the actual value of SDR on the date of judgment that might be different from the value of the SDR at the time of the incident occurring during a given policy year.

It is therefore proposed that the amount of liability insurance for death or personal injury to passengers be fixed at an amount of **not less than \$250,000** multiplied by the passenger capacity of the ship. Using Canadian dollars, instead of the SDR, in the proposed regulations offers a more practical method for carriers and insurers to establish the required amount of insurance.

It should be noted that the proposed regulations also indicate that the contract of insurance must provide that the coverage is available exclusively to indemnify damages for death or personal injury. In other words, the required amount is “reserved” for only these two kinds of claims. It follows, therefore, that carriers would be well advised to consult fully with their insurance experts to determine any additional insurance needs to cover their other exposures to various liabilities other than for death or personal injury of passengers.

5) What criteria would be applied to determine the passenger capacity?

For a ship that can carry more than 12 passengers or is over 15 gross tons, the passenger capacity would be determined by the number of passengers the ship is authorized to carry according to any Canadian maritime document required under the *Canada Shipping Act, 2001*.

For a ship that can carry up to 12 passengers or is up to 15 gross tons, the passenger capacity would be determined by the maximum number of persons that the ship may carry in accordance with a Canadian Compliance Notice (e.g., manufacturer’s capacity plate) required by the Small Vessel Regulations, (SOR/2010-91).

Where neither a Canadian maritime document nor a Canadian Compliance Notice are required, the passenger capacity would be determined by the maximum number of persons that the ship can carry as declared by the owner of the ship to the insurer.

6) What information would be required in the proof or certificate of insurance?

A proof of insurance in the form of a **Certificate of Insurance** will have to be carried on board the ship to be produced on demand by an enforcement officer. The proposed regulations include a standard form of this certificate to be issued by insurers. It should be noted that the wording of the certificate resolves the concerns raised earlier by insurers about the absence of any expression or reference that would make it clear that the certificate is “**subject to the terms and conditions of the policy**”. This provision has therefore been included in the certificate.

In addition, the certificate would also stipulate that in case of a fleet policy, each ship would be deemed separately insured.

7) Would the required insurance be available and affordable?

a) Shipowners currently insured at adequate levels

Shipowners who have sought and maintained over the last 10 years adequate insurance following the adoption in 2001 of the liability regime in Part 4, should not see any impact on their insurance costs simply because the insurance now becomes mandatory.

b) Shipowners currently not insured or underinsured

It follows from the above, that the proposed regulations will likely impact only those shipowners who, in the past, maintained insurance at levels substantially lower than their potential liability (i.e. are underinsured), or have never insured against it.

Previous consultations with insurers indicated that insurance capacity in the Canadian market is sufficient to meet any additional demand for liability insurance. Some insurers prefer or specialize in underwriting certain kinds of activities or risks and will offer excellent premiums for that preferred business.

Other insurers, although willing to quote a premium on risks that are outside of their specialty, may require premium many times higher than their competitors who specialize in such risks. As anticipated, “fleet policies” are far less expensive than when each ship is insured individually, thus shipowners would do well to seek advice from their insurers, or insurance agents or brokers and request premium quotations from several insurers before deciding on the type of insurance policy, and its terms and conditions that best meets their needs.

In assessing the potential impact of the proposed regulations, a survey done with the assistance of some insurers produced a range of annual premiums that shipowners, who never bought any liability insurance in the past, may face in the market today.

The table below illustrates the potential impact, particularly on the small operators i.e. those operating ships up to 12 passenger capacity, taking out \$3 million liability insurance (12 x \$250,000). The estimated insurance cost reflects the low and the high range of the premium that was quoted by insurers in the fall of 2011.

Annual insurance costs for ships with capacity up to 12 passengers				
Amount of passenger liability insurance \$3 million				
Annual/Seasonal revenue range	Estimated insurance cost		Insurance cost as percentage of revenue	
	Low	High	Low	High
\$30,000	\$500	\$3,700	1.67%	12.33%
\$50,000	\$500	\$3,700	1.00%	7.40%
\$100,000	\$500	\$3,700	0.50%	3.70%
\$500,000	\$500	\$3,700	0.10%	0.74%
\$1,000,000	\$500	\$3,700	0.05%	0.37%

Based on these sample premium quotes and the various ranges of annual revenue earned by shipowners involved in the carriage of passengers, the cost of insurance for those shipowners who have never purchased any liability insurance in the past may represent up to 12.33% of their annual revenue in case of relatively small operations; those involved in large operations the cost of insurance would represent about 0.05% of their annual revenue. As indicated earlier, shipowners who never insured, or underinsured their potential liability for losses or damages other than liability for death or personal injury to passengers, would be well advised to consult with insurers, or insurance agents or brokers, on how best to obtain any additional insurance to cover such exposures.

8) Would there be sufficient time allowed for stakeholders to comply with the regulations?

Some concerns were expressed by stakeholders that the insurance sector may be overwhelmed if they were to issue new policies for those who have yet to obtain the required insurance or amend existing policies to reflect the new requirement, all at the same time.

To facilitate their entry into force, the proposed regulations provide for a two-stage approach:

a) **Existing insurance policies**

Shipowners who hold an insurance policy for liability to passengers at the time that the new regulations come into force would need to comply with the regulations on the date of the **next renewal** of the policy, unless they modify or cancel their policy in the meantime.

Thus, if the regulations are published in Part II of the *Canada Gazette* on September 1, 2012 and come into force in 30 days, i.e. on October 1, 2012, and the shipowner already holds an annual liability insurance policy that was issued or last renewed on April 1, 2012, that shipowner would be expected to comply with the regulations at the next renewal of the policy on April 1, 2013.

b) **New insurance policies**

Shipowners who do not have any insurance policy for liability to passengers would be expected to comply with the regulations sixty (60) days after they came into force.

Thus, if the regulations are published in Part II of the *Canada Gazette* on September 1, 2012 and come into force in 30 days, i.e. on October 1, 2012, the shipowners would have to obtain the required insurance to comply with the regulations by November 30, 2012.

Effectively, the shipowners would have 90 days to comply with the new regulations.

This two-stage approach is designed to respond to the concerns stakeholders raised and it should allow sufficient time for both shipowners and insurers to become informed and to comply with the new regulations without undue administrative burden.

Communications

In addition to the staged implementation, Transport Canada will publicize the proposed regulations in venues and events involving members of the marine sector, including meetings of various associations whose members may be affected. The department will also ensure that insurers, or insurance agents, or brokers are well aware of the regulations and can inform their clients accordingly. Close cooperation between the department and the insurance sector should ensure that clients are well aware of these proposed regulations.

Transport Canada will further inform the public of the proposed regulations through the use of public notices in local newspapers during the period of ninety (90) days from the day that the proposed regulations are published in Part II of the *Canada Gazette* until the first stage of the implementation.

Next steps - Canada Gazette

The outcome of these consultations will be taken into account in the development of the final draft of these regulations that will be subsequently published in the *Canada Gazette*, Part I, along with a Regulatory Impact Analysis Statement. All stakeholders will then have a period of 60 days to submit comments on that first publication and the outcome will again be considered before the final regulations are published in *Canada Gazette*, Part II, which will determine the date when the regulations will enter into force.

REGULATIONS RESPECTING COMPULSORY INSURANCE FOR SHIPS CARRYING
PASSENGERS

INTERPRETATION

Definition of “Act”

1. In these Regulations, “Act” means the *Marine Liability Act*.

APPLICATION

Application

2. (1) These Regulations apply to
 - (a) the carriage by water, under a contract of carriage, of persons from one place in Canada to the same or another place in Canada, either directly or by way of a place outside Canada; and
 - (b) the carriage by water, otherwise than under a contract of carriage, of persons from one place in Canada to the same or another place in Canada, either directly or by way of a place outside Canada, excluding
 - (i) the master of a ship, a member of a ship’s crew or any other person employed or engaged in any capacity on board a ship on the business of the ship,
 - (ii) a person carried on board a ship other than a ship operated for a commercial or public purpose,
 - (iii) a person carried on board a ship in pursuance of the obligation on the master to carry shipwrecked, distressed or other persons or by reason of any circumstances that neither the master nor the owner could have prevented, and
 - (iv) a stowaway, a trespasser or any other person who boards a ship without the consent or knowledge of the master or the owner.

Non-application

- (2) These Regulations do not apply to
 - (a) an adventure tourism activity that meets the conditions set out in subsection 37.1(1) of the Act;
 - (b) the carriage of a sail trainee or a person who is a member of a class of persons prescribed under paragraph 39 (d) of the Act;
 - (c) vessels that are undertaking search and rescue operations as part of the Coast Guard Auxiliary Vessels Program; or
 - (d) a carriage performed by the Government of Canada or of a province, or by an entity that is entitled to indemnification by such a Government for liability under Part 4 of the Act.

LIABILITY INSURANCE

Coverage for damages for death or personal injury

3. (1) A person who performs the whole or part of a carriage by ship must maintain liability insurance coverage for damages for death or personal injury that are caused by an incident that occurred in the course of the carriage and was due to the fault or neglect of the person or of the person's servants or agents acting within the scope of their employment.

Minimum amount

(2) The coverage must be not less than \$250,000 multiplied by the passenger capacity of the ship.

Available exclusively for damages

(3) The contract of insurance must provide that the coverage is available exclusively to indemnify for damages referred to in subsection (1).

CERTIFICATE OF INSURANCE

Requirement to carry

4. (1) The person referred to in section 3 must ensure that

- (a) a certificate of insurance in the form set out in the schedule is carried on board the ship; or
- (b) if the liability insurance policy provides coverage in respect of a fleet of ships, a certificate of insurance in the form set out in the schedule is carried on board one ship in the fleet and a copy of it is carried on board every other ship in the fleet.

Signed by insurer

(2) The certificate of insurance must be signed by the insurer or its authorized representative as proof that it has issued a liability insurance policy to the person referred to in section 3 for the liability insurance coverage required by that section.

Fleets

(3) If the liability insurance policy provides coverage in respect of a fleet of ships, the certificate of insurance must state that

- (a) the amount of insurance is the amount required by section 3 for the ship in the fleet with the highest passenger capacity; and
- (b) the fleet policy provides the same coverage as if a separate policy had been issued in respect of each ship listed in the certificate.

Application

5. Sections 3 and 4 do not apply until

(a) if, on the expiry of the day before the day on which these Regulations come into force, the person referred to in section 3 holds a policy of liability insurance coverage for death or personal injury, the first day on which any of the following events occurs:

- (i) the policy expires,
 - (ii) the policy is cancelled,
 - (iii) the policy is modified; and
- (b) in any other case, 60 days after the day on which these Regulations come into force.

COMING INTO FORCE

30 days after publication

6. These Regulations come into force 30 days after the day on which they are published in the *Canada Gazette*, Part II.

COMPANY LETTERHEAD/LOGO

SCHEDULE
(Subsection 4 (1))
CERTIFICATE OF INSURANCE

Number of the insurance policy
Name of the Insured
Address
City, Province
Postal Code

Name of Ship(s)*	Official Number	Passenger Capacity	Amount of Insurance (not less than \$250,000 × passenger capacity)

* Paragraph 36 (1) (a) of the *Marine Liability Act* provides that “the definition ‘ship’ in Article 1 of the Convention shall be read as including any vessel or craft designed, used or capable of being used solely or partly for navigation, whether seagoing or not, but not including an air cushion vehicle or a vessel propelled manually by paddles or oar.”

Pursuant to the *Regulations Respecting Compulsory Insurance for Ships Carrying Passengers* made under Part 4 of the *Marine Liability Act*, and subject to the terms and conditions of the above-mentioned insurance policy, this is to certify that there is in force, in respect of the above-named Insured, an insurance policy for the carriage of passengers on board the ships listed in this Certificate.

If the insurance policy covers a fleet of ships, the policy provides the same coverage as if a separate policy had been issued in respect of each ship listed in this Certificate. The top ship** must be listed first in the column “Name of Ship(s)”. If the fleet has more than three ships, the other ships must be listed overleaf.

INSURER
Name
Address
City, Province
Postal Code
Policy effective date:
Policy expiry date:

Insurer or Authorized Representative of the Insurer

Date

** The top ship is the ship with the highest passenger capacity of the fleet.