

# **SAFE BUT NOT SOUND: THE EFFECT OF FEDERAL SMALL VESSEL REGULATIONS ON CERTAIN SMALL BUSINESSES IN CANADA**

*Robin Squires and Jonathan Chen\**

## **INTRODUCTION**

Over the last number of years, Transport Canada has begun enforcing existing small vessel regulations that impose onerous obligations on many small businesses that depend heavily on the operation of commercial vessels including summer camps, rental cottages, resorts and cottage country businesses. More recently, Transport Canada has proposed further regulations that would require operators of commercial vessels that carry passengers to have in place dedicated third party liability insurance of \$250,000 multiplied by the total passenger capacity of each vessel irrespective of pre-existing insurance arrangements. It currently appears that Transport Canada is aiming to bring the compulsory insurance regulation into force within the next year.

As described in Transport Canada's Discussion Paper released in March of 2012, the purpose of the mandatory insurance regulation appears to be:

“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.”<sup>1</sup>

There is no doubt that the mandatory insurance regulation and the already enacted small vessel regulations have safety as their sole purpose. Transport Canada should be applauded for enforcing these safety measures. However, for some small businesses, this "one size fits all"

---

\* Robin Squires is a Partner in the Maritime and Insurance and Tort Liability practice groups at Borden Ladner Gervais LLP. Jonathan Chen is a Student-at-Law at Borden Ladner Gervais LLP.

<sup>1</sup> Transport Canada, Discussion Paper, “Proposed Regulations Respecting Compulsory Insurance for Ships Carrying Passengers” (1 March 2012) at 1 [*Discussion Paper*].

style of regulation may be completely impractical, decrease safety, and have significant negative impacts both financially and administratively.

In this paper, the authors will explore some of the impacts of the regulations in the hope of showing that a more flexible and contextual approach to regulation may be more successful in improving the safety and protection of passengers. The authors begin by providing a brief background of their understanding for the recent enforcement efforts and the proposed insurance regulation. The authors then review the more impractical of the regulations and discuss the difficulties they impose on many small businesses. The conclusion offers some possible constructive solutions.

#### **IMPETUS FOR RECENT ENFORCEMENT OF SMALL VESSEL REGULATIONS: THE “TRUE NORTH II” OCCURRENCE**

On June 16, 2000, the small passenger vessel, True North II, was scheduled to return to Tobermory, Ontario, from Flowerpot Island, Georgian Bay, Ontario. Despite concern with respect to the prevailing weather and sea conditions, the master proceeded to load the vessel. True North II had been used by the Bruce Township Central Public School on four previous occasions to ferry grade-seven classes to Flowerpot Island. On this occasion, a group of 13 school children, two supervisory teachers, two chaperones, two adult tourists and the master were on board. Shortly after departure, True North II suddenly encountered a series of waves causing water to ship over deck which then downflooded through various openings in the main deck. True North II sank rapidly, leaving no opportunity for the master to provide lifejackets. As it sank, eighteen of the twenty persons on board were able to cling to a floating apparatus. Only when they reached the shore did they realize two schoolchildren were missing. On the morning of June 17, the bodies of the two missing schoolchildren were found.

The Transportation Safety Board of Canada (the “TSB”) investigated the occurrence and produced a Marine Investigation Report (the “Report”).<sup>2</sup> The Report made numerous findings as to the causes and contributing factors of the occurrence, the primary one of which was the Master's decision to sail. Some of the other factors included:

- The vessel had ineffective scuppers;
- The vessel had modifications that compromised its watertight integrity;
- The vessel had no emergency equipment plan;
- The master was the only crew on the vessel;
- The inflatable life raft and life jackets were not readily accessible;
- The vessel had unsafe structural features that were improperly assessed and approved by Transport Canada;
- The vessel was inadequately inspected; and
- Transport Canada failed to enforce the requirement that the vessel was to be crewed by two persons.

The TSB made three overarching recommendations. First, safety inspectors should focus on addressing all unsafe practices and conditions, not mere compliance with explicitly laid out rules. Second, small vessels must provide pre-departure briefings, be equipped with a readily deployable life raft and readily accessible life-saving equipment, and have in place the means to immediately alert others of an emergency situation. Third, although the Board was unable to identify specific shortcomings in the certification process for vessel operators, it underscored the importance of knowledge, skill and competency of masters and officers in addressing emergency situations.

The TSB did not address the lack of third party liability insurance for the passengers aboard True North II. That finding was made at the Coroner’s Inquest, where one of the

---

<sup>2</sup> Transportation Safety Board of Canada, Investigation Report, “Marine Investigation Report M00C0033” (26 April 2001).

recommendations was compulsory insurance for commercial vessels carrying passengers.<sup>3</sup> The Minister of Transport then made a commitment in 2011 to the House of Commons Standing Committee on Transport and Government Operations to enact regulations requiring compulsory insurance for ships carrying passengers. In the fall of 2010 to 2011, Transport Canada held preliminary discussions with stakeholders, and, following these discussions, it released its discussion paper in March of 2012 which included a draft of the regulation.<sup>4</sup>

## **REVIEW AND DISCUSSION OF RECENT AND PROPOSED REGULATIONS**

Two regulations under the *Canada Shipping Act, 2001*, S.C. 2001, c. 26—the *Small Vessel Regulations*, SOR/2010-91 and the *Marine Personnel Regulations*, SOR/2007-115—have created legal obligations on the operation of small commercial vessels that both financially and administratively impact small businesses.

One of the most onerous sections of the *Marine Personnel Regulations* is that it requires vessel operators to obtain the Small Vessel Operator Proficiency (“SVOP”) as well as the Marine Emergency Duties A3 (“MED A-3”) certificate if they wish to carry more than 6 passengers. Specifically, the regulations require the following:

Operators of passenger-carrying motorized vessels that are no more than 8 meters in length and carrying no more than 6 passengers (not counting the driver) may operate these vessels with a standard Pleasure Craft Operator's Card (PCOC) license if operating in sheltered waters. Operators of these vessels not in sheltered waters, but in near coastal waters must obtain the SVOP and MED A3. Operators of these vessels with 7-12 passengers must obtain both the SVOP and MED A3.

Operators of passenger-carrying motorized vessels that are more than 8 meters in length and carrying 1-12 passengers must have the SVOP and MED A3 certifications.

---

<sup>3</sup> See *Discussion Paper*, *supra* note 1 at fn 2.

<sup>4</sup> See Schedule A for the Draft Regulation

Operators of workboats that are no more than 8 meters in length are required to have their PCOC, assuming they are in sheltered waters or within 2 nautical miles from shore. Otherwise, the SVOP and MED A3 are required.

Operators of workboats that are more than 8 meters in length are required to have their SVOP and MED A3 certifications.

For the authors, the problem is not that certification is required. By all means, it should be, so that operators have a minimum level of skill and knowledge to ensure the safety of passengers.

The issue is the practicality of the content of the required courses.

In order to obtain the SVOP, an operator is required to take a four day training course on various topics, including nautical charting, pilotage, meteorology, hull construction, use of radar, electronic navigation and compass work. While the course may have some practical value for a voyage like the one taken in True North II, it has little to no practical application to small vessel operators that work, for example, in the cottage, river or small lake environment. Resorts and children's camps often use vessels for short distances on the same route in a small lake. For example, at Camp Tamakwa in Algonquin Park, which is accessible by water only, the boat ride from the highway access point to camp is slightly more than one kilometre, and vessels are always yards from the shoreline on Tea Lake, a small lake without any of the hazards of locations like Georgian Bay or other large bodies of water. Camp Tamakwa's vessels travel the same route on every voyage, and there is no other means of access to the camp site. Since Tea Lake is in Algonquin Park, there are rarely any other vessels on the water save canoes and other camp vessels. Charting, pilotage and other similar topics taught as part of the SVOP course are completely irrelevant to operators in the camp, resort or cottage industries. Furthermore, forcing boat drivers to learn about those topics does nothing to improve the safety of passengers in those operations. Similar concerns exist for the MED A3 course, which includes topics such as marine

firefighting, immersion and work suits, life rafts, survival techniques and helicopter rescue. These topics are beyond the scope of many inland small business environments.

In response to industry concerns about the impracticality of the program, Transport Canada has suggested that the SVOP and MED A3 certifications are marketable for those employees who obtain them such that the certifications will assist in obtaining employment in other parts of the maritime industry where the impractical topics may be useful. However, this ignores the reality that most employees in resort, camp and cottage businesses are seasonal, and sourced from the local community or from secondary or post-secondary institutions. They are not mariners, and the vast majority have no intention or desire to become mariners. The employees are also transient, meaning that these small businesses must annually certify a new batch of employees who might need to drive vessels. These arrangements can therefore be taxing on already limited budgets.

Most troubling for some businesses, particularly those who rely on vessels for access to their sites, is that obtaining the SVOP and MED A3 still only allows each vessel to hold a maximum of 12 passengers. This limit can in many circumstances defeat the purpose of the regulations in practice. At some remote resorts, fly-in fishing operations and summer camps, water transportation is essential for both staff and participants to arrive and depart. In addition, participants often must be transported to nearby camp sites to enjoy certain activities. At larger operations, there can be hundreds of passengers leaving and arriving on site on holiday weekends and changeover days. With limited passenger capacity, the number of extra voyages necessarily multiplies thereby adding additional opportunity for risk, which runs counter to the safety objective of the regulations. This is particularly the case on small, shallow lakes where vessels are mere metres from shore. Admittedly, limited passenger loads may increase safety for those

vessels like the True North II which travel in larger open bodies of water. However, this one size fits all approach can in fact be detrimental in some situations.

Vessel certification and inspection requirements of the *Small Vessel Regulations* have also caused difficulty for many small businesses. Many of the boats currently used by storied resorts and summer camps in particular are built according to custom, with cost and convenience as guides rather than modern nautical engineering standards appropriate for ocean-going vessels. These vessels fail the stipulated construction requirements and cannot be altered or modified to comply, forcing business owners to purchase new engineered boats at significant cost. The stated reason is safety, but these vessels in fact have impeccable safety records. Slow-moving, heavy barges constructed of wood and flotation, essentially floating docks with motors, are arguably safer than canoes, sailboats and the vast majority of high-powered pleasure craft, even when carrying large numbers of passengers. These barges are essentially unsinkable and have superb stability characteristics. However, they were never designed for speed, manoeuvrability, or travel over great distances in a multitude of conditions. They therefore have none of the construction or architecture of modern vessels, and do not easily fit within the rubric of the regulations or the requirements of nautical engineering. These vessels are single-purpose, akin to an elevator or a bridge, for getting from point A to point B but with nowhere to fall. There is no evidence that vessels like this are any more unsafe, but because they do not comply with the strict standards of the vessel construction regulations, they are no longer permitted.

Finally, there is the issue of Transport Canada's proposed mandatory insurance regulation, which it appears will soon require that any commercial enterprise carrying passengers by boat has no less than \$250,000 of dedicated liability coverage multiplied by the total passenger capacity of its fleet. The contract of insurance must provide that the coverage is

available exclusively to indemnify damages for death or personal injury. A Certificate of Insurance will have to be carried on board and produced upon the request of an enforcement officer.<sup>5</sup>

While mandatory insurance certainly seems to bring added comfort in the context of uninsured disasters like the True North II, it is another one size fits all solution to the problem that misses the mark for many small businesses. First, many small businesses, such as accredited Canadian summer camps, already abide by extensive and comprehensive safety standards appropriate for their industry. Nearly all Canadian summer camp vessels are already insured under commercial general liability policies with minimum limits of \$5,000,000 set in accordance with the industry standard, with global third party coverage totalling \$982,000,000 in the industry's main insurance program. At the same time, the claims experience is exceptionally low. In fact, in the past 15 years at the 273 accredited summer camps, there have only been three insured losses for passengers in boats. All of the losses involved minor injuries, and none of them resulted in any claims for compensation. As such, mandatory insurance will have little utility for accredited summer camps or other small businesses in similar circumstances, such as established wilderness lodges and resorts. Second, many businesses already have sufficient insurance coverage in the event of a significant loss. Requiring them to purchase more dedicated insurance coverage based on their passenger capacity is an impractical solution that will only result in over-insurance in many cases. The likelihood of a single occurrence involving 20 or more passengers entitled to claim the maximum under the *Marine Liability Act* is remote, and so requiring additional dedicated coverage where coverage is already in place serves no useful

---

<sup>5</sup> See Schedule "B" for an example of a Certificate of Insurance.

purpose. Instead, limited funds will be taken away from important Canadian small businesses and put into the pockets of insurance companies.

## **CONCLUDING THOUGHTS AND A SUGGESTION**

There is no denying that Transport Canada has taken positive steps to improve safety for marine passengers with its additional enforcement efforts. In addition, it is clear that mandatory insurance should be imposed on certain businesses. However, as the foregoing discussion hopefully illustrates, a broad strokes approach to regulation of vessels used in commercial enterprises may not only fail at achieving its purpose but also hurt an industry. Treating vessels used at resorts, lodges and summer camps on relatively tiny bodies of water the same way as a vessel like the True North II overlooks the uniqueness of some these businesses and their distinct challenges (and safety record) related to the logistics of people-moving.

What the authors propose instead is a more nuanced approach to the application of the regulations, beginning with alterations to the definition of commercial or non-pleasure vessels to which the regulations apply. The regulations currently apply to any vessel used for a non-pleasure purpose, as is also proposed for the mandatory insurance regulation. It seems more appropriate to treat different classes of marine enterprises differently, with ferry services and tour boats like the True North II at one end and businesses without transportation as their primary purpose at the other.

Further subcategorizing vessels/voyages to which certain regulations apply may also be of assistance. The least amount of regulation required for small businesses with a marine aspect applies to businesses whose marine travel qualifies as a “Sheltered Waters” voyage as defined by section 1 of the *Vessel Certificates Regulations*, SOR/2007-31. This definition applies to vessels that are on inland waterways and never more than one nautical mile from shore. However,

having more categories of waterways, voyages and environments that consider distances from the shore, depth of the water, boat traffic, and typical weather/wind patterns would allow for a more practical approach. Vessels/voyages on lakes no more than a square kilometre in area and where the vessel is never more than 50 metres from shore ought to be treated differently from vessels operating in situations that more closely mirror ocean travel. Furthermore, inspectors<sup>6</sup> should both have and be instructed to use their discretion in enforcing the regulations in unique situations or where industry already effectively self-regulates behaviour to exempt boats like barges (which have unparalleled safety records) as well as operators who clearly do not need the required qualifications from compliance with the regulations.

Each business with a marine aspect is unique. Only through understanding a particular business and the way it uses vessels can one fully comprehend the impracticality and problems imposed by the regulations. It is hoped that this paper will at least provide a starting point for that understanding. There is much to be lost and little to be gained.

TOR01: 5155319: v1

---

<sup>6</sup> Transport Canada soon expects to pass regulations to empower local police to enforce the regulations as well.

## Schedule “A”

DRAFT – FOR PUBLIC CONSULTATION PURPOSES

### 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.

**Schedule “B”**

DRAFT – FOR PUBLIC CONSULTATION PURPOSES

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.