

**Recommendations on Regulations
on Compulsory Passenger Insurance
Pursuant to Marine Liability Act
(Part 4, Section 39)**

**Prepared by The Mariport Group LTD.
for**

**TRANSPORT CANADA
MARINE POLICY**

FINAL REPORT

**This report, received by Transport Canada in November 2002,
reflects the views of the authors and are not necessarily those
of Transport Canada**

THE MARIPORT GROUP LTD
Specialized advisory services for ports & the shipping industry

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to Marine Liability Act
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MARINE POLICY**

FINAL REPORT

October 2002

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GLOSSARY OF ABBREVIATIONS

AB	Able Seaman
CBMU	Canadian Board of Marine Underwriters
CCRA	Canada Customs & Revenue Agency
CD-ROM	Compact Disc - Read Only Memory
CFOA	Canadian Ferry Operators Association
CGL	Commercial General Liability
CPVA	Canadian Passenger Vessel Association
CSA	Canada Shipping Act
CVLP	Commercial Vessel Licencing Programme
DFO	Department of Fisheries and Oceans
GRP	Glass Reinforced Plastic
IBC	Insurance Bureau of Canada
IMO	International Maritime Organization
MIA	Marine Insurance Act
MLA	Marine Liability Act
OSFG	Ontario Sport Fishing Guides Association
PAI	Personal Accident Insurance
P&I	Protection and Indemnity
PFD	Personal Flotation Device
SCALA	Standard Compensation Act Liability Association
TC	Transport Canada
US	United States
VTZ	Vessel Traffic Services Zone

REGISTRATION & SAFETY REGULATIONS OF CANADIAN PASSENGER VESSELS

At various points in this report, reference is made to the Canadian Ship Register and the Commercial Vessel Licencing Programme. The following provides an explanation of these terms.

Ship Registry

All Canadian vessels of 15grt and above are required to be registered. Canadian vessels under 15 GRT may be registered voluntarily. This service is provided by Transport Canada. The Ship Registry is a system of international identification of, and title to, Canadian vessels. It is a public record of the identity of vessels and their owners and mortgage holders, as well as being a record of Authorized Representatives for commercial registered vessels. The Authorized Representative of each commercial registered vessel is responsible for regulatory compliance with the Canada Shipping Act.

Commercial Vessel Licencing Programme

Formerly all Canadian vessels with engines above 9.9 horsepower, if not registered, were required to be licenced under a Programme administered by Revenue Canada. Recent government reorganization has given regulatory responsibility for pleasure craft to the Department of Fisheries and Oceans and for commercial vessels to Transport Canada. For the time being, DFO is continuing to require that powered pleasure craft be licensed through the Canada Customs and Revenue Agency. Pleasure craft licensing will continue, but may be run differently in the future.

All commercial vessels which are not registered are required to have a commercial vessel licence. The Marine Safety Guideline 14/2000, which is also referenced in this report, is a part of the ongoing dialogue between industry and Transport Canada Ship Safety to distinguish between pleasure craft, which are regulated by DFO, and commercial craft, which are regulated by Transport Canada. Mariport has been advised that this guideline will be modified by early 2003 to clarify a number of grey areas, and will be incorporated into the regulations for CSA 2001.

Although the Commercial Vessel Licencing Programme (CVLP) is run by the same branch of Transport Canada as the ship registry, the CVLP is not a registration system in the sense that large vessel ship registries are understood internationally. Unlike a vessel registry for larger vessels, the CVLP is not evidence of title, does not permit the registration of ship mortgages and the information in the licensing program about licenced vessel owners who are individual persons is not accessible to the public. The CVLP is intended to identify the owners of all commercial vessels that are not registered, for regulatory purposes. This programme is being phased in and will not become fully operational until 5 years following the completion of the regulatory process for the entry into force of the new *Canada Shipping Act, 2001*. This time delay is in recognition of the very large number of such craft in Canada, and the need to communicate with all owners.

Safety Regulation

The TC Ship Registry and the CVLP are not concerned with safety regulation such as hull construction, equipment and passenger capacity. Passenger capacity is regulated by TC Ship Safety, who inspect and issue the appropriate annual certificates to all vessels carrying 12 or more passengers. TC Ship Safety also has established a system for initial inspection and approval of the construction and equipment of small vessels at the time they are built or converted for commercial passenger use, with requirements that the owners follow standards and regulations in the future. This safety inspection and regulatory system covers both small passenger vessels whose owners voluntarily chose to register in the ship registry, and all other Canadian small commercial passenger vessels, which are required to have a commercial vessel licence.

This report has been prepared specifically for Transport Canada in October 2002. Whilst all due care and diligence has been exercised in the collection of data for and the preparation of this report, The Mariport Group Ltd. provides an advisory service only, based on the opinion and experience of the individual consultant responsible for its compilation. The Mariport Group Ltd. issues such advice in good faith and without prejudice or guarantee. Anyone wishing to rely on such opinions should first satisfy themselves as to the feasibility of the recommendations and accuracy of the data upon which the opinions are based.

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1. SUMMARY

This report provides the findings by the consultant team relative to the introduction of compulsory passenger liability insurance pursuant to the Marine Liability Act (MLA) Part 4, section 39.

1.1 Assumptions

The consultant team was directed, in broad terms, to consider a scheme of compulsory insurance for owners and operators of commercial passenger vessels where the insurance could be obtained on usual commercial terms and practices¹. For Part 4 MLA risks, coverage on such terms would suffice for any proposed regulatory compliance

Transport Canada has proposed that the criteria in Marine Safety Bulletin 14/2000 be applied to assist in the interpretation of the application of MLA Part 4 to types of vessels and marine operations which are not considered pleasure for purposes of regulation of safety standards under the *Canada Shipping Act*².

In addition to liability for death or injury to passengers, MLA Part 4 also sets out liability rules for loss of or damage to passengers' stowed, and carry on, baggage and vehicles. As most passenger vehicles and baggage potentially subject to MLA Part 4 are carried in Canada on overnight cruises aboard commercial vessels entered in P&I clubs, or on public ferries either entered in P&I Clubs³, insured by a Province, Territory, Municipal Authority or owned by the Crown, the insurability of such property risks on such vessels is not problematic. Mariport, therefore, concentrated its resources on trades and sectors where there were perceived to be substantial insurance and regulatory issues⁴.

Discussions are based on existing enabling legislation and administrative authority. Only if it appears there are no existing practical methods of obtaining information or monitoring compliance is the possible need for amended or new legislation addressed.

¹ Usual commercial terms and practices means that contractual grounds commonly used by marine insurers for avoidance of indemnity, such as non-payment of premiums or calls, or operation outside trading or date limits, could continue to be included in policies for MLA Part 4 risks. In addition, statutory defences to indemnity such as non-disclosure of facts material to the risk, or permitting a vessel to put to sea knowing it was unseaworthy, would continue to be available to insurers. See, for example, *Marine Insurance Act* S.C. 1993 C.22, section 21 and subsection 37(4).

² For further discussion see Section 5 of this report.

³ A protection and indemnity association is an association of shipowners or operators offering mutual insurance, generally for third party liability risks and the defence of claims. Unlike marine insurance policies offered by corporate insurers with policy limits and fixed premiums, P&I Clubs' obligation to indemnify for non-pollution risks is generally unlimited. As a mutual association P&I Clubs may charge supplementary calls if the loss record is poor and may charge additional release calls if the shipowner or operator no longer wishes to be insured with a particular club.

⁴ The *Marine Liability Act* Part 4 would apply, for example, to construction vehicles and trucks if accompanied by their drivers, carried on privately owned vessels such as barges or landing craft. Compulsory insurance regulations should provide at least for coverage of the persons accompanying the vehicles.

1.2 Highlights

- i) MLA Part 4 will apply to about 1,000-1,200 vessels above 15 GRT in both domestic and international trade. The likely number of small, unlicensed⁵ craft under 15GRT could be in the 5,000-10,000 range⁶.
- ii) The ferry industry in Canada and day cruise boats are, generally, aware of the MLA Part 4 liability limits and can already demonstrate appropriate liability cover.
- iii) The situation with regard US ferries and tour boats visiting Canadian ports is less clear and we have been advised that their current arrangements for passenger liability coverage may be insufficient relative to a strict application of MLA Part 4⁷.
- iv) Some whale watch operators are covered through P&I Clubs and do not perceive a problem in meeting requirements. However, others are covered through the CGL market and may not be able to switch markets to obtain the necessary level of liability cover.
- v) The adventure tourism market (rafts, canoes, kayaks) appears to have been completely unaware of the MLA, both at the operator and insurance broker level. These operators do see great difficulty in meeting the levels of liability implied by MLA Part 4, particularly as their waivers of liability are now null and void for marine risk.
- vi) There are sectors of the marine industry where we have been unable to obtain either positive or negative feedback on the issues. These are charter fishing and the overnight cruise industry. Charter fishing, presuming four persons per boat, may be able to meet requirements with existing commercially available CGL liability limits, which are believed to be in the \$1-2m range. The overnight cruise industry is presumed to be entered with P&I Clubs and should be in the same position as the Canadian tour boat industry. That is, their insurance coverages currently meet MLA Part 4 limits.

⁵ See discussion about Ship Registry and vessel licencing on the glossary page.

⁶ At a recent CMAC Regional meeting, TC Marine Safety reported that they had found 291 unlicensed vessels under 15GRT, and 42 unregistered vessels over 15GRT in Central region. They estimate about 1,500 with all inland waters in Central region, and about 10,000 small passenger vessels across Canada.

⁷ It has been very difficult obtaining comprehensive responses from the operators believed to be involved, although some late advice was received. It is the consultants' belief that only six to eight vessels may be involved.

1.3 Recommendations

Overnight Cruise Ships – Canadian and Foreign Flag (page 7 et seq)

- Compulsory insurance for MLA Part 4 risks should be introduced promptly.

Canadian Flag Ferries and Tour Boats (page 8 et seq)

- Compulsory insurance for MLA Part 4 risks should be introduced promptly.

Other Vessels (page 19)

- Cargo vessels that carry passengers should be treated in the same manner as overnight cruise ships, with prompt implementation of compulsory insurance for MLA Part 4 risks.

US Flag Ferries and Tour Boats (page 8 et seq)

- Because these operators were unable, or unwilling, to provide Mariport with relevant information, it will be necessary for further discussions to be held between Transport Canada and the operators to determine whether the requirements of MLA Part 4 can be economically achieved and whether the requirements of effective passenger coverage can be achieved with existing liability policies. The target should be compliance with compulsory insurance for MLA Part 4 risks within 2003 unless it can be demonstrated that genuine economic hardship would result.

Adventure Tourism (page 11 et seq)

- Adventure tourism should be defined as marine activities where participants are required to wear approved flotation or exposure clothing, and where contact by the participant with water is an anticipated usual component of the trip or voyage.
- The adventure tourism industry is maintained within the scope of MLA Part 4⁸, but section 39 insurance requirements be subject to a graded approach, with a minimum of \$1m liability cover where vessel passenger capacity is less than 12. Where vessel passenger capacity is twelve or greater, then \$2m minimum liability cover be demonstrated.
- For adventure tourism fleets of canoes, kayaks, rafts, whale watch and jet boats, the above minimum requirements should apply regardless of fleet size.
- The graded requirements for compulsory insurance for adventure tourism should be phased in over a period of five years after the coming into effect of the Canada Shipping Act (CSA), 2001. As the CSA, 2001 is expected to come into effect in 2005, full compliance with compulsory insurance under section 39 of the MLA would be required by 2010.

⁸ There appears to have been a basic misconception by this industry that they were not a part of marine activities. Their operations have previously been covered under Canadian Maritime Law generally, and the Canada Shipping Act specifically in terms of Shipowner Limitation of Liability for claims arising from operation of the vessel, now part 3 of the MLA. Part 4 of the MLA complements Part 3 by balancing the interests of passengers and owners in the event of an accident.

Charter Fishing (page 16)

- Canadian charter fishing vessels which are registered should be regulated similarly to Canadian registered passenger vessels.
- Canadian charter fishing vessels which are licenced, should be required to obtain compulsory insurance⁹ for full MLA Part 4 risks, but with compliance phased in similarly to adventure tourism vessels.

Permanently Moored Craft (page 18)

- Because of the totally different risk environment under which this class of craft is used, permanently moored craft, that are not used as a conveyance, should be excluded from compulsory insurance under MLA Part 4. Examples are floating restaurants, “boatels”, casinos and houseboats. The West Coast has a large number of houseboats as well as a number of floating hotels on Vancouver Island and elsewhere. Toronto is also known to have a houseboat community.

Commercial General Liability Insurers

- Communication with this insurance sector should continue through 2003 to ensure a firm understanding of the benefits of the MLA.

Gatekeeper (page 36 et seq)

- Unlike information about individual vessel owners in CVLP, information on registered vessels is public. As well as setting out general requirements for compulsory insurance through regulations under section 39 of the MLA, it may be necessary to exclude information on commercial licensed passenger vessels from application of the Privacy Act, and to amend or develop regulations under the Canada Shipping Act, the Customs Act and the Canada Marine Act, to authorize and facilitate monitoring and enforcement.
- While Mariport has ascertained the willingness of TC Ship Registry to act as a primary gatekeeper for Canadian vessels, it will be necessary for TC to develop an administrative plan with regard to the mechanics of the process. In particular, the additional informatics needs and annual registry renewal need to be addressed.
- It will be necessary for TC to act as the Gatekeeper for foreign flag vessels and negotiate administrative arrangements with the Department of Fisheries and Oceans, the Canada Customs and Revenue Agency and port authorities established under the Canada Marine Act for use of VTZ, customs reporting and port entry, to monitor and enforce MLA Part 4 compulsory insurance requirements for foreign flag vessels embarking or disembarking passengers and other persons covered by section 37 of the MLA, in Canada.

Enforcement

- Until the informatics for receiving data on compulsory insurance by TC are implemented, enforcement will not be practicable. Because the MLA does not have specific provisions regarding offences under the act, it will be necessary for TC to

⁹ As charter fishing is a commercial purpose, all charter fishing vessels that are not registered must have commercial vessel licences.

review the juridicial bases for creating offences for contravention of regulations made under section 39 of the MLA.

Implementation

- Assuming that Transport Canada can develop a practicable and accessible e-filing system, implementation of compulsory insurance of MLA Part 4 risks for unregistered Canadian vessels would need to follow the CVLP. This would imply a phasing-in during the five-year period following the coming into force of the *Canada Shipping Act, 2001*.
- Implementation of compulsory insurance of MLA Part 4 risks for registered Canadian vessels could commence as soon as the informatics requirements of the process have been determined with TC Ship Registry, and regulations are amended to provide for annual filing of confirmation of compulsory insurance with the ship registry.
- Implementation of compulsory insurance of MLA Part 4 risks for foreign flag vessels trading into Canada could commence as soon as regulations for customs inward and outbound reporting are amended, regulations with respect to VTZ collection of information are amended and the necessary administrative arrangements are negotiated between TC and CCRA, DFO and Canadian port authorities.

New Reserve Fund

- TC should issue a Request for Proposal to develop an external funding formula for initial underwriting reserves, administer funding of initial underwriting reserves and operate an insurance facility to provide a ‘stand alone’ marine liability insurance coverage to Canadian vessel operators solely for MLA Part 4 risks, with premium set by the insurance market.
- TC should issue a separate Request for Proposal to externally fund and operate an insurance facility to provide marine liability insurance coverage for MLA Part 4 risks for Canadian vessel owners who, because of operator or vessel loss records, either cannot obtain any passenger liability cover, or who cannot obtain sufficient cover.

1.4 Impacts

- At this point in time there is no discernable negative impact of the Marine Liability Act on the marine industry.
- There is great concern in the adventure tourism industry regarding the loss of waiver protection. Given that both the industry’s insurers and the insureds were unaware of the Act until this study commenced, it is too early to tell whether the trade-off between loss of waiver protection and introduction of a statutory limit of liability will be at least neutral in effect.

- The passenger liability levels implied by the application of MLA Part 4 are commercially unobtainable in the adventure tourism industry for more than about six passengers, which would require \$2.1m insurance coverage.
- There will be some loss of business away from domestic marine liability insurers, where operators need more than \$10m liability cover – say 30 passengers. However, this is thought to represent very few vessels migrating to offshore P&I Clubs.

2. MLA VESSELS

This section of the report reviews the characteristics of different market segments that will be impacted by the MLA. Each segment analysis includes the following components:

- A description of the market segment
- Insurance needs and market capacity
- Recommendations
- Impact
- Enforcement

2.1 Overnight Cruises

These vessels may be divided into two categories – international flag and Canadian flag. US flag vessels in the Alaska Marine Highway fleet are discussed under ferries.

Calls by international flag vessels are increasing rapidly on the East Coast and Gulf of St. Lawrence. West Coast operations are more stable in terms of ship calls, although individual vessels scheduled for cruise calls are increasing in size. There are some operations on the Great Lakes that involve international, Canadian and US flag cruise ships; all of these vessels tend to be small. The situation is dynamic and changes from year to year. Several ships are represented through the North West CruiseShip Association to which most of the major North American cruise companies belong. European cruise companies and the small US companies do not belong to such a representative association. It is expected that 2002 cruise calls will involve 51 vessels; comprehensive data is not available for the 2003 season.

• *Insurance needs and market capacity*

International flag vessels are typically covered through P&I Clubs in order to meet crew and pollution liability as well as liability for passengers. There is some concern in the market at the potential exposure to a disaster involving a large cruise ship, and suggestions have been made to establish a separate facility for cruise ships. However, the market has the capacity to provide the requisite cover and it is likely that all have liability limits in excess of US\$3bn. We have only received one written submission on the subject of cover to MLA Part 4 limits, but the president of the North West CruiseShip Association has provided verbal assurances that his member companies do have insurance coverages that would meet MLA Part 4 limits.

Some Canadian flag operators are covered through domestic marine liability insurance and some through P&I Clubs. All Canadian companies are, at present, single ship operations. No concerns have been expressed to us by these companies, and vessels could, if necessary, switch markets to meet MLA Part 4 compulsory insurance requirements without adverse premium consequences.

- **Recommendations**

Compulsory insurance for MLA Part 4 risks should apply to these operators, and as many already meet the liability limits there should be no difficulty in achieving compliance within 2003.

- **Impact**

None on the ship operators, possibly minor loss of premium by domestic marine liability insurers if there should be a move by Canadian flag units into the international P&I market.

- **Enforcement**

Through VTZ Marine Traffic Regulations for foreign flag vessels; TC Ship Registry or CVLP for Canadian vessels.

2.2 Canadian and US Flag Ferries

While on a flag basis there are three categories within this section, operators are either US or Canadian based. As noted in section 2.1, the Alaska Marine Highway operation of overnight ferries is considered in this section as they are equivalent, in operational criteria, to Canadian ferries in overnight service.

The ferry market within Canada and between US ports and Canadian ports is relatively stable. The Canadian Ferry Operators Association represents most operators, although there are known to be some provincial, municipal and private operations that are not part of the CFOA. There is no formal association representing the interests of US operators that have vessels calling at Canadian ports, however the Executive Vice President of Clipper Navigation appears to act as the spokesperson for West Coast operators which includes

- Alaska Marine Highway
- Clipper Navigation
- Washington State Ferries
- Black Ball Ferries
- Victoria Rapid Transit
- Victoria San Juan Cruises

There is a US based East Coast operator with a single vessel under international flag. For US based operations not all ships call at Canadian ports, but several Alaska Marine Highway ships transit the inside passage, which is Canadian waters, but do not call at a Canadian port.

A foreign flag passenger vessel simply transiting Canadian waters without carrying passengers between places in Canada or embarking or disembarking passengers in Canada may not be subject to the MLA Part 4 simply because of the transit. If the carriage of passengers on that vessel was otherwise governed by the Athens Convention¹⁰, the wording of

¹⁰ For example, if the vessel's state of registry was a party to the Athens Convention, if passengers had embarked on that vessel in another Athens Convention state, or if any passage contracts had been made in an Athens Convention state. The United States is not a party to the Athens Convention.

section 39 of the MLA could be interpreted as permitting the application of a compulsory insurance regime in respect of passenger claims during transit in Canadian waters. Devising an effective and efficient monitoring and compliance system for non-Canadian Athens Convention passenger vessels simply transiting Canadian waters, or for any vessel on which a passage was contracted for in Canada would be difficult, as the only existing delivery mechanism for monitoring compliance of transiting vessels would be the VTZ reporting system. There is no known existing mechanism for identifying passage contracts made in Canada¹¹.

There are 130 ferries represented by members of the CFOA. The actual number of Canadian ferries outside the CFOA is possibly in the order of 50 units. The number of candidate ferries run by US operators will depend on whether the MLA extends to transit vessels in Canadian waters as well as those calling a Canadian port.

- ***Insurance needs and market capacity***

In general, Canadian ferries have cover through the international P&I Clubs and have no difficulty meeting potential liability levels. Some are covered through municipal or provincial insurance policies and we have to presume can meet liability levels, or could have unique liability policies without significant penalty.

However, those US ferry operators who have responded to Mariport's enquiries have indicated an inability to economically meet possible requirements¹². At present these companies are covered through US domestic marine liability insurance and have claimed that moving insurance to offshore P&I Clubs is not an economic proposition due to much higher premiums demanded for US operations. This situation is a reality, partly due to the perceived litigious nature of the US passenger. However, a more significant influence is that crew liability is covered through the P&I Clubs for US and international operators. US crew claims can be significant because of the higher risk of substantial occupational death and injury claims¹³, consequently many P&I Clubs will limit their exposure to US fleets. By comparison, all crews on Canadian flag vessels are covered through provincial government workers compensation or SCALA.

¹¹ Existing and contemplated marine security measure for passenger lists are not understood to require reporting of where the passage contract was made. In any event such data would be collected for Canadian purposes only in respect of embarkation or disembarkation in Canada.

¹² Mariport very recently received communication from two of the US ferry operators noted above that they do not feel that they could economically purchase increased liability coverage for MLA Part 4 limits. Their supposition was based on the cost of scaling up their overall liability coverage.

¹³ Reportedly there is widespread fraud in the US Seaman & Longshoreman injury claims due to the lack of a cap on compensation awards. *Fairplay*, 6th June, 2002.

- ***Recommendations***

Compulsory insurance for MLA Part 4 risks should apply to all Canadian flag ferries and any ferry operator embarking or disembarking passengers in Canada. Timing should be synchronous with that for cruise ships. However, TC should be prepared to consult with US operators to assess operator ability to arrange cover to MLA Part 4 levels. Canadian public policy objectives would be met if the US operators arranged ‘stand alone’ cover for MLA Part 4 risks. There is no requirement for compulsory coverage of more problematic risks, such as US workers’ compensation exposure.

- ***Impact***

Canadian operators should not be impacted. There may be difficulties for US operators finding a P&I Club that would accept them and there may be cost penalties that could affect operational revenues. The operators have suggested a possible approach of deductibles as high as \$250,000. This raises the issue of financial responsibility on the part of the US operator to be able to pay the deductible, and thus ensure that the passenger(s) suffering death or injury would be fully compensated up to MLA Part 4 limits. In Mariport’s opinion the preferred approach would be to require these operators to purchase “stand alone” cover for MLA Part 4 risks in excess of their general liability coverage limits.

- ***Enforcement***

For Canadian Flag vessels through TC Ship Registry or CVLP. For US or Foreign Flag ferries through VTZ Marine Traffic Regulations.

2.3 Day Cruise

While there may be a few US flag, day cruise boats that enter Canadian ports, this market segment is predominantly Canadian flag. Most operations appear to be in Quebec and Ontario, but individual operators have been identified in Atlantic Canada and the West Coast. Sizes range from 50 to about 400 passengers, and many are members of the Canadian Passenger Vessel Association. In all we have identified 143 boats in this segment and 41 are represented by the CPVA.

- ***Insurance needs and market capacity***

Most members of the CPVA are covered through international P&I Clubs. Some operators have liability cover through the domestic marine market. Those operators with domestic cover with whom we have communicated have contacted offshore P&I Clubs for quotes and some have obtained premium reductions for better coverage. A typical example is an operator with two vessels about 100 passengers each. Current liability insurance has a \$10m limit with a premium in the order of \$10,000. Offshore quotes with \$500m liability limit have been about \$5,000.

Based on these experiences Mariport believes that there are viable alternative markets for operators without adverse premium changes. Further, domestic marine liability insurers have

expressed a willingness to adopt a policy wording that would accommodate vessel fleets so that each vessel in a fleet policy would be insured separately for MLA Part 4 compulsory insurance risks.

- ***Recommendations***

Compulsory insurance for MLA Part 4 risks should apply to these operators, and as many already met the liability limits there should be no difficulty in achieving compliance within 2003.

- ***Impact***

None on the ship operators. There will be some loss of premium income to domestic liability insurance carriers as operators move to off-shore insurance markets to obtain the requisite limits to meet compulsory insurance for MLA Part 4 limits.

- ***Enforcement***

For Canadian flag tour boats through TC Ship Registry or the CVLP. For US or other foreign flag ferries through VTZ Marine Traffic Regulations.

2.4 Adventure Tourism

This market sector covers a very wide range of activities that extends from heli-skiing to ocean kayaking. Reportedly a \$2bn industry across Canada, there is no data available on the marine component. Marine activities cover the following:

- Whale watching from small inflatable craft
- Jet boats
- Rafting
- Kayaking
- Canoeing.

Although technically not adventure tourism, other waterborne recreational and vacation activities have many of the same attributes. These include:

- Dragon boat racing
- Sail training
- Small boat sailing tuition.

Where small craft are operated on a not for profit basis, as is some sail training, or all occupants of the craft are actively engaged in its operation, such as Dragon boat racing, Mariport believes that these occupants could be considered as crew and therefore could be excluded from application of the MLA Part 4 by the operation of section 37.

From an insurance perspective adventure tourism operators have chosen, for almost all of their activities, although with some exceptions, to cover passenger liability risks through the Commercial General Liability market (CGL) and most have used some form of waiver as a

risk management tool. It should be noted that the whale-watching component of adventure tourism can be further subdivided between those operations that use conventional wood, steel, aluminum or glass reinforced plastic (GRP) hulled vessels, and those operating with rigid hull inflatables (zodiacs). Some companies operate both types of vessel. Conventional vessels and mixed conventional and “zodiac” whale watch fleets appear to be covered through either international P&I Clubs or domestic marine liability insurance and are generally in a position to meet compulsory passenger liability regime requirements.

For pure “zodiac” fleets, there appears to be a reluctance on the part of the CGL market to offer cover to whale watch craft without waivers of liability, and P&I Clubs have indicted an unwillingness to extend their exposure in this area. Problems cited include high risk with the greater speed of these boats, an ongoing problem with lower back injury claims (due to jolting) and a 1998 incident in Tofino where a whale watch “zodiac” capsized and two persons were drowned. This activity was covered by a waiver which was a viable defense in the incident. There is also a situation with whale watch craft, analogous to that raised regarding US flag ferries and other vessels transiting Canadian waters without a call. US flag whale watch craft will follow whales into Canadian waters, and vice versa with Canadian craft.

The P&I Clubs and domestic marine liability insurers have also cited an aversion to “white knuckle rides” as a reason for not offering facilities for rafting and other marine adventure tourism activities. This only leaves the CGL market, and Mariport was advised that, with the departure of one major underwriter in this area for the 2002 season, coupled with the loss of value of the traditional waiver, operators faced a difficult renewal position in 2002. Following extensive consultation, Mariport found no evidence that any operator in the adventure tourism industry had been refused renewal of their insurance because of the MLA. Although not directly attributable to the MLA, many are facing significant increases in premiums, which can be devastating in a sector dominated by micro businesses that are often run as a lifestyle choice generating minimal gross revenue over a very short operating season.

The use of a waiver of liability is a key issue with the adventure tourism industry, and many representatives have explained the importance as not simply being a first line of defense against nuisance claims, but being a document that the “passenger” or participant signs as an acknowledgement of involvement in an activity that involves voluntary assumption of inherent risk. In recognition of the inherent risk of the adventure tourism sector, participants are required to wear approved cruiser suits¹⁴ or Personal Floatation Devices (PFD’s) and, for some rafting activities, helmets as well. This significantly reduces the risk of loss of life or injury in any one incident. Apart from a series of rafting incidents¹⁵ in the late 1970’s and the mid-1980’s that resulted in multiple loss of life, incidents with guided operations have been

¹⁴ A cruiser suit is a full body inflatable suit that provides buoyancy. While not a survival suit per se, it does confer some exposure protection.

¹⁵ 1987 - June: Illecilewact River, east of Revelstoke. Hit log jam, three persons drowned. July: Elaho River at Devil’s Elbow. Two of three rafts capsized at log jam, five drowned. August: Chilko River at Lava Canyon, single oar raft hit rock, five drowned. August: Chilko River at Lava Canyon, private raft trip, one drowned trying to

few and far between. Of those that have occurred, several have involved contributory negligence on the part of the participant. The rafting incidents in British Columbia led to a major safety programme in their rafting industry.

In many cases, the adventure also includes various non-marine activities such as swimming, rock-climbing, hiking etc. MLA Part 4 does not preclude operators from using a waiver of liability for such non-marine activities. The enforceability of the waivers continues to be governed by general contract law requirements that intended participants have clear knowledge of waivers and exclusions before agreeing to a contract to provide adventure tourism services. The ability of tourism operator to contractually exclude liability for non-marine risks may be regulated by some provinces' consumer protection laws, e.g. Quebec.

Mariport received many representations to exclude the adventure tourism industry from the MLA, but this is a policy decision for Transport Canada and the following commentary presumes that the industry continues to be considered as coming within the requirements of the MLA. An issue that TC would need to resolve is the legality of excluding adventure tourism from the MLA Part 4 liability regime, particularly in waters that may be shared with conventional commercial vessels such as tugs, barges, fishing craft, freighters and displacement hull passenger ships.

Another major concern of the industry is the potential impact of reverse onus issues embodied in MLA Part 4 on operating conditions normal to adventure tourism. These are:

- Shipwreck
- Collision
- Stranding
- Explosion
- Fire
- Defect of the vessel.

The primary areas are the potential for misinterpretation of the terms shipwreck, collision and stranding in rafting operations, where flipping of a raft with possible damage and dunking of all participants is an integral aspect of the ride. While this is a possible interpretation, it is not one which is probable as rafts can be, and are, repaired following impact with rocks or shoal areas.

Shipwreck is a well understood term and relates to the loss of a vessel or its abandonment by the crew with no intention of re-boarding. A vessel repaired by its crew or, in the case of adventure tourism, patched so that it could continue its voyage after an incident could not be considered a shipwreck.

Collision, in a maritime sense, is a term exclusively applied to contact or damage by close quarters situations between two vessels, not between a raft, kayak or canoe and a dock, rock or riverbank.

recover a damaged raft. Previously two persons drowned on the Fraser River above Hell's Gate in 1979. On 12 June, 1978 in Lake Timiskaming, ON, four canoes overturned in heavy weather and thirteen drowned. Although not an adventure tourism incident, eight persons were drowned at a fishing camp on Grayson Lake, ON, in October 1993.

Stranding generally is regarded as a vessel being left unmanageable after a receding tide or being driven ashore or into shallower waters than will permit it to float. Thus as in the case of shipwreck, a raft, kayak or canoe that is re-floated by the crew so that it could continue its trip and could not be considered stranded.

Grounding, by comparison, is considered a normal hazard of navigation as a vessel may re-float on a tide or by the action of the crew. Sometimes an outside agency such as a tug may be involved, but salvage has not necessarily taken place. Again, in the context of adventure tourism a craft that is re-floated by the crew, so that it could continue its trip, could not be considered grounded.

The remaining reverse onus issues of explosion and fire are unlikely to have any risk analysis context within the adventure tourism industry different from conventional commercial vessels. However, to overcome the reverse onus of defect of the vessel would require the adventure tourism operator to be able to demonstrate either a latent defect not discoverable with reasonable care, or that all components of the vessel were fully functional, in proper repair, and had recently been inspected by a competent person. Thus, such quality assurance initiatives as a comprehensive daily, or voyage, checklists would be an important document in overall risk management.

This general assessment, which is not a legal analysis, shows that the above provisions, which have garnered many years precedent in marine operations, should not create any anomalies for the adventure tourism industry. Nonetheless, TC should initiate a formal legal review of these provisions with specific reference to the adventure tourism industry.

In summary, the adventure tourism industry has legitimate concerns that its unique nature does not fit well with the more formal aspects of the MLA. The fact that the industry is having both economic and practical difficulties in renewing insurance cover, and certain segments of the insurance industry will either not consider some operators, or wishes to minimize its exposure, makes the situation in 2002 exceptionally difficult. While there are recognized benefits to the statutory limit of liability, and some concerns can be demonstrated as groundless, the apparent attitude of the CGL and domestic liability markets to the loss of waiver protection appeared to have created potentially untenable short term difficulties early in the 2002 season, although Mariport received no evidence of refusal of cover due to the MLA. The difficulties experienced by operators this year were not anticipated by the Canadian marine liability market in 1999 submissions to the Parliamentary committee studying the proposed enactment of the MLA.

- ***Insurance needs and market capacity***

For those vessels considered to be subject to the MLA Part 4, the maximum risk exposure (assuming reckless vessel owner conduct does not preclude limitation of liability) could vary considerably. Examples are given below. However, it should be noted that applying the filter of Marine Safety Bulletin 14/2000 would exclude the first two examples from Part 4 of the MLA. Mariport's suggested crew filter using MLA section 37 could also exclude several of these operations.

1 person kayak	\$350,000
2 person kayak	\$700,000
2 person kayak, 1 passenger plus one guide	\$350,000
12 person voyageur canoe or raft	\$4,200,000
20 person raft	\$7,000,000

Against these potential requirements, and ignoring fleet issues, the market can only provide a \$1m liability cover at a "reasonable" premium. Premium levels jump significantly at \$2m liability cover and are effectively unobtainable at levels above this. Although we do not have firm advice, anecdotal information indicates order of magnitude \$10 per \$1,000 to go to \$3m or higher. These levels are unsupported for any operator and can be compared with gross premiums of around \$5,000 through the international P&I Clubs for a conventional tour boat with 100 passengers operating during a limited season. This premium would change very little for the operator with two boats.

However, many operators in adventure tourism are, of necessity, fleet operators in that an adequate revenue cannot be generated from one or two canoes, kayaks or rafts and cover overhead costs, guides etc. Thus an effective solution has to be demonstrated relative to risk and fleet issues.

This is particularly important where cover is through the CGL market in which limits are established for any one incident. While domestic marine liability insurers appear willing to consider wording equivalent to "each vessel separately insured", the CGL market is not. The issue does not arise with international P&I Clubs where each vessel is entered separately.

It would seem appropriate that a minimum \$1-2m limit could also be justified for fleet operators in this area. However, only a very preliminary risk analysis has been undertaken. Under these circumstances TC may wish to undertake a more detailed risk analysis for this sector before determining an appropriate level of required insurance coverage for MLA Part 4 risks, or monitor the situation with a view to later amendment.

- ***Recommendations***

It would seem, taking into account the following factors, that the goal of the MLA in securing a minimum level of insurance cover for death or injury on all marine conveyances in Canada could be met in the adventure tourism industry by a graded approach where passenger liability insurance for vessels with a passenger capacity under 12 persons is set at \$1m. This level is analogous to the general limit of liability prescribed by section 28 of the MLA for small pleasure craft. For craft with a capacity of 12 or more persons, the minimum liability should be set at \$2m. These factors are:

- Apart from the cases noted in 1978 and 1987, there have been no recorded multiple death or injury incidents, of which we are aware, in the marine adventure tourism industry for some twenty years. The 1993 incident was not a guided adventure tourism incident.
- All participants wear approved personal flotation devices and are fully aware that they are involved in a marine activity where there is voluntary assumption of risk.
- Operators have historically been adequately insured at a \$1-2m level, as required by some provinces, provincial parks and Parks Canada for operating licenses. See Annex 8.1
- Levels of liability insurance greater than \$2m are either not commercially or economically available, especially through CGL market.

- ***Impact***

Whale Watching

Most operators, in Eastern Canada and some on the West Coast and in Churchill, have cover through international P&I Clubs and are already insured up to MLA Part 4 compulsory limits. However, there are some operators with “zodiacs” on the West Coast that are having difficulty renewing CGL policies and cannot move to the P&I Clubs. The only option for these companies would be continued CGL cover within the limits suggested under the graded approach for the adventure tourism industry.

Rafting

The filter proposed by TC Marine Safety Guideline 14/2000 could assist operators whose rafts are unguided, although not guided rafts. For guided rafts, and unguided rafts section 37 of the MLA may provide a “crew” filter provided that all occupants are actively participating in the operation of the raft, and could be considered as “crew”. The proposed graded adventure tourism insurance concept does not require a filter, and would enable all operators to comply with the MLA Part 4 compulsory insurance requirements through CGL policies, unless the domestic marine liability market was willing to re-consider such operations.

Canoes

Canoes carrying one or two passengers would be covered for MLA Part 4 liability by existing CGL policies where operators carry at least \$1m liability cover. The canoe operations potentially impacted by MLA Part 4 would be those that recreate a voyageur experience and operate with a guide and up to 12 passenger/participants. At \$350,000 per passenger, liability cover would be needed to \$4.2m, which is not obtainable in the CGL market. The proposed filter of TC Marine Safety Guideline 14/2000 could assist operations where canoes are unguided. Only the MLA Section 37 crew filter could assist those operations where the participants could be considered to be “crew”. Again, the proposed graded adventure tourism concept would enable all operators to comply with MLA Part 4 compulsory insurance requirements.

Kayaks

Kayaks are typically one or two persons, and could either be removed from the requirements of Part 4 by operation of the TC Marine Safety Bulletin 14/2000 or by the MLA section 37 crew filter. Operators would also be able to maintain existing liability cover under the graded adventure tourism insurance proposal.

Enforcement

Through the CVLP.

2.5 Charter Fishing

There are, reportedly, several hundred operators offering charter fishing. There are some associations on the West Coast, and the Ontario Sport Fishing Guides Association in Ontario that represents 80 operators, estimate at least 400 non-member operators in Ontario. No estimates are available for actual numbers and many operators, even when contacted, have refused to provide information.

Reportedly there are many part-time operators and very many operate without insurance. The OSFG is understood to require members to have \$1m liability insurance, and it is suggested that many operators do not join because of the insurance provision.

- ***Insurance needs and market capacity***

Apart from some larger boats at West Coast fishing lodges, virtually all of the boats in this segment are believed to operate with a captain/owner and three or four clients. At this level of occupancy, \$1m limit covers for three passengers, but not four. It is probable that operators of larger boats (six passengers) could acquire appropriate insurance limits through the domestic marine liability market.

- **Recommendations**

Although Mariport was unable to obtain specific information from operators in this area it would seem appropriate that, because of the limited passenger capacity of most of the vessels, the compulsory insurance provisions of MLA Part 4 should apply. For registered craft, the phase-in should be equivalent to small passenger vessels. For those craft under the CVLP, the phase-in should follow that for the adventure tourism industry.

- **Impact**

Mariport received virtually no feedback from operators in this area, even with individual operator contacts, and a presentation at an association meeting. Most of the people to whom Mariport spoke refused to provide any information about insurance or fleet operation.

Consequently Mariport cannot determine the impact, if any. However, the approach suggested should not create economic difficulties, as the vast majority of the fleet is believed to be six passengers or less. Therefore a passenger liability policy for \$2.1m would meet MLA Part 4 compulsory insurance requirements.

2.6 General Utility Craft

This class of vessel covers those craft that may have multiple roles, all of relatively short duration. A typical example would be a craft used for lobster fishing for a part of the year; whale watching or marine excursions for part of the year; possible charter for preliminary hydrographic work in an area of interest to an external company; possible use as a private ferry and charter replacement pilot boat. As the vessel is regulated for *Canada Shipping Act* marine safety purposes as a fishing vessel, it is not considered a passenger vessel within the meaning of the *Canada Shipping Act*. However its occasional use in other areas, to carry non-crew members for commercial purposes means it is subject to MLA Part 4.

There may be many such craft, including port authority work boats, private pleasure craft, marina utility craft and others where the prime purpose is not commercial passenger activity but where occasion or opportunity turns it into a passenger craft. Such opportunities may not be planned, arise at short notice and be of relatively short duration. It would thus be difficult to arrange short term liability insurance, but the revenue generated by the opportunity may be critical to the boat owner's financial status, and such a range of short term cash ventures sought to supplement other revenue sources.

The recommended use of TC Ship Registry and the CVLP, with one year renewals of passenger vessel registration or licensing to match insurance renewals, would not capture the occasional passenger operator. There is a model for economic regulation of occasional vessel use, which is the issuance of licences by the CCRA under the *Coasting Trade Act*. However, to devise a gatekeeper for compulsory insurance for occasional use vessel would require new enabling legislation and creation and funding of an administrative programme.

While it is undesirable that conscientious operators of commercial passenger vessels, who have to pay for insurance, and price passage money accordingly, face unfair competition from the occasional passenger vessel operator, there are both administrative and commercial issues

involved that preclude an immediate solution. If the insurance industry was able to electronically offer occasional use insurance for such craft at a commercially acceptable cost, then a parallel e-filing system for the operator could, perhaps, be justified and such operators could be effectively brought within the scope of MLA Part 4 compulsory insurance administration.

- ***Insurance needs and market capacity***

We have no knowledge of insurance carried, and it is likely that peripheral activities are not covered. The operation of craft as a passenger vessel while it is insured for other purposes, such as fishing, could, if an accident happens, result in cancellation of cover. This would leave the owner or operator without insurance and possibly without any other means to pay compensation to passengers.

- ***Recommendations***

TC should periodically review the “occasional use” passenger vessel sector. If it appears that this sector is unreasonably distorting the operating economics of vessel sectors that are fully compliant with MLA Part 4 compulsory insurance requirements, and transaction costs can be funded, consideration should be given to establishing an administrative system for monitoring compulsory insurance for occasional commercial uses. As noted above, this would require both prompt access to marine insurance products that would permit MLA Part 4 risks to be insured rapidly on a ‘held covered’ basis and a simplified regulatory compliance system for reporting evidence of insurance.

- ***Impact***

Mariport has no knowledge as to the number of operations, current insurance (if any) or markets. Without an enforcement policy, most of these operators will neither be aware of the MLA, nor prepared to change their modus operandi.

2.7 Permanently Moored Commercial Craft

None of these craft are included in the database and no operators have been contacted. The class would cover such craft as:

Floating restaurants
“Boatels”
Floating casinos
Houseboats.

- Mariport is aware of several such craft across the country, but overall numbers are not known.

- ***Insurance needs and market capacity***

Mariport presumes that permanently moored craft will be covered by the CGL market, but have no information as to levels. Such craft have reportedly been covered by the CGL market in the past.

- ***Recommendations***

Exclude from compulsory insurance requirements for liabilities arising from MLA Part 4.

- ***Impact***

If excluded, there would be no impact and current insurance arrangements, if any, would continue.

2.8 Other Vessels

This segment covers a wide range of other ship types such as cargo vessels, pilot boats and government vessels. An important factor in determining application of MLA Part 4 is the interpretation of the phrase “on board a ship on the business of the vessel” in reference to a class of persons exempted from the application of Part 4. The phrase “business of the vessel” has very specific meaning in a maritime sense, and within the context of the MLA, Mariport believes that this phrase applies to service personnel on board, or people associated with the operation of the vessel such as entertainers or catering staff, but not non-paying occupants not associated with internal operation. It has been suggested that the exemption could also include persons on board connected with the purpose of the vessel. Examples quoted are:

- Pilots on a pilot boat
- Scientists on a federal icebreaker operating a science platform

In Mariport’s opinion “purpose of the vessel” has an entirely different meaning from “business of the vessel”, and would caution that interpreting “business” as “purpose” could lead to arguments, for example that party boats need not have insurance cover since its passengers are there on the purpose of the vessel, which is hosting a party. Operationally, the carriage of persons other than crew has been seen as requiring additional insurance cover¹⁶.

- ***Insurance needs and market***

We have been verbally advised by the Canadian Shipowners Association that all of its members would meet requirements through P&I Club entry. Pilot boats appear to currently meet requirements through P&I Club entry, while the Canadian Coast Guard fleet are one of a very limited group of vessels that are covered under “other financial security”, e.g. Canadian government.

¹⁶ For example, a recent article on operational requirements for small inshore survey vessels recommended that each carry at least \$4 million liability insurance for risks including injury to, or death of, occupants of the vessels: Dillingham, “Inshore Survey Vessels: The Next Size Up. *Hydro International*, July/August 2002.

There are several international flag cargo vessels that carry up to twelve passengers to/from Lakes, Gulf of St. Lawrence, East Coast and West Coast ports. Principal companies are as follows:

Cargo Passenger Vessel Operators

Polish Steamship Lines	5
Intership Navigation	7 (on charter to Fednav)
Canada Maritime	4
Egon Oldendorff	9 (includes Tramps)
Costa Container Lines	2
F. Laeisz	10
N.S.B.	<u>1</u>
	38

Intership will have two more vessels starting in 2003 that will offer Great Lakes cruises out of Montreal returning to Montreal.

All of these vessels can carry up to twelve passengers and typically sail with ten. These ships and operators are not included in the database. All of these ships will be entered with international P&I Clubs and should not have difficulty meeting requirements.

There are also US lakers that traverse Canadian waters that carry family and guests in a similar manner to Canadian lakers.

- ***Recommendations***

Special purpose craft, where registered, could be brought within the scope of MLA Part 4 as soon as TC Ship Registry can establish the necessary systems and should therefore be in line with ferries and tour boats. Unregistered craft should be brought within the scope of MLA Part 4 on the time frame determined by the CVLP. Vessels such as cargo passenger vessels should be brought within the scope of MLA Part 4 compulsory insurance at the same time as ferries, tour boats and cruise vessels.

- ***Impact***

From the information available to us there should be no impact.

- ***Enforcement***

For Canadian Flag vessels through TC Ship Registry or the CVLP. For US or foreign flag vessels through VTZ Marine Traffic Regulations.

3. INSURANCE MARKET

Insurance coverage for passenger liability risks can be provided to vessel owners and operators through various sources. Mariport has identified these sources as;

a) International P&I Clubs

- contact has been made with 3 International P&I Clubs of which 2 Clubs, the Shipowners Mutual and the Standard Steamship Mutual, both responded to Mariport's questionnaire and have provided information regarding their membership.

b) Canadian Marine Liability Insurers

- identification of 18 Marine Insurers was established (see Annex 8.1).
- this group of marine insurers represent 96.45% of the total gross written marine premium in Canada.
- contact has been made with 17 Marine Insurance Companies and 3 Marine General Managing Agents.
- all markets contacted have provided responses to Mariport's questionnaire.
- contact with the Canadian Board of Marine Underwriters (CBMU), which has developed a Marine Liability Act Sub Committee, has been made.
- the CBMU has established a joint working group with the Insurance Bureau of Canada (IBC) to develop an understanding of the MLA for general liability insurers. The CBMU has also agreed to write a news article for distribution within an insurance magazine.
- The IBC has agreed to publish, and distribute, a bulletin regarding the MLA during the winter of 2002.

c) Canadian General Liability Insurers

- identification of 21 General Liability Insurers was established (see Annex 8.1).
- this group of liability insurers represent 84.91% of the total gross written liability premium in Canada.
- contact has been made with 18 General Liability Insurers and the Insurance Bureau of Canada (IBC), but only 5 markets have responded to our questionnaire.

d) Offshore Marine Liability Insurers

- no identification or contact has been officially made.

e) Offshore General Liability Insurers

- no identification or contact has been officially made.

f) Canadian Provincial Worker's Compensation Programs

- contact with two Insurance Broker Safety Management Advisors.

g) Personal Accident Insurance

- contact with three Canadian insurance companies that provide personal accident insurance

programs. In addition, Mariport contacted Mutual of Omaha regarding their air travel personal accident programme. However, a personal accident insurer could provide a limit of \$350,000 per person but subject to specific limits against certain types of accidents i.e. 'loss of one eye - \$12,000' etc. The personal accident policy is not a liability policy, but rather a direct pay for certain bodily injury accidents or death, therefore a personal accident policy may not be acceptable as an alternative to the passenger liability insurance requirements set out under section 39 of the MLA.

- Under present law, personal accident insurance is considered a collateral benefit under both MLA Part 1 and under the common law as interpreted in most provinces. An injured passenger, or the estate of a deceased passenger, after receiving PAI, would still be entitled to claim for full provable damages against the owner and performing carrier. If PAI is to be considered as an optional way of satisfying carriers' obligations under MLA Part 4, legislation amending both MLA Part 1 and non-statutory Canadian Maritime Law would be necessary.
- At present, Mariport has no grounds for concluding that a PAI product is or would be made available to meet MLA Part 4 claims. Mariport does not recommend that any legislative amendment be considered before the availability and administrative practicality of PAI is considered.

h) Self Insurance

- although this form of coverage may not be desirable, one operator did state that he conducted marine activities without an insurance policy to protect against passenger liability.
- Mariport does not have any evidence of such operators' corporate or personal ability to pay for a passenger liability claim, therefore, by default, these owners/operators are self insuring their risks.
- in many cases the only asset that the corporate owner has is the vessel itself and could sell the vessel(s) in order to collect sufficient monies to pay for the loss, or alternatively declare bankruptcy and try to walk away from the claim.
- for any operators that intend to 'self insure' the passenger liability risk, proof of a Surety Bond, Cash Bond or Letter of Credit could be presented as an alternative to commercial insurance.

i) Government Insurance

- vessels owned and/or operated by any government, whether federal, provincial, municipal or foreign, may accept the risks associated with operation of their vessels.
- should any government owned vessel be chartered to others, the government should make the charterer responsible for placement of commercial insurance.

3.1 State of the market

The P&I Clubs, which offer third party liability cover to much of the world's shipping fleet, have seen a marked fall in premium revenue over the past seven years. During this period deductibles have also been reduced, and many Clubs have consequently seen an increase in claims. Reduced premium income, coupled with increased losses, were acceptable only because investment income over this period had been able to offset losses on the premium side. In 2000/01 the investment climate deteriorated to such an extent that some Clubs experienced losses on their investment portfolio¹⁷.

At the same time, the reinsurance market has been in turmoil following events on 11th September, 2001 causing several re-insurance companies to declare bankruptcy. As a result, most insurance companies encountered difficulty in purchasing reinsurance protection for 2002 renewals, with sharply increased premiums, reduced limits and much more onerous terms. All of this has been passed along to the insured. Reinsurance concerns aside, both domestic liability and marine insurers encountered significant reduction in the value of their investment portfolios (eg collapse on Enron) due to the volatility of the stock market, as well as low investment returns on bonds and other low risk securities. As a result, all insurers are applying increases to all policy renewals, regardless of class of business or loss performance by the insured.

Also, in the marine market, P&I Clubs have increased calls significantly for 2002 renewals, and it is likely that supplementary calls may be reintroduced after being largely absent over the last decade.

3.2 Current market capacity

a) International P&I Clubs

- although P&I Clubs can offer vessel owners a fixed limit of \$500m any one vessel, any one occurrence, most Clubs have advised that their members are insured subject to Club Rules which provide each entered vessel with a limit of approximately US \$4,250 million.
- P&I Clubs accept each entered vessel, regardless of the number of vessels entered by the same ownership, on the basis of 'each vessel separately insured' Thus each vessel is covered to the Club limits, as though a separate policy had been issued against each individual vessel. This means that if two vessels owned by the same company are involved in incidents, either both in collision with each other, or in separate incidents during the policy year, each claim is considered separately up to the Club limit.

b) Canadian Marine Liability Insurers

- In reviewing the Canadian Marine Insurance marketplace it became apparent that several Marine Insurers contacted did not underwrite any commercial marine liability.

¹⁷ The Britannia P&I Club reported a loss of US\$22.4m for 2001-02, leaving it with a shortfall of US\$42.7m. The Steamship Mutual P&I Club had investment losses of US\$31.9m in 2001-02 and has been forced to make supplementary calls on members totaling US\$114m. *Lloyd's List*, 28th June & 12th August, 2002.

- several more advised that they restrict their writings to “Private Pleasure craft only” which are classified as Yacht Insurance
- the balance offered a variety of Primary and Excess limits options. The common primary limits were offered at levels of \$1m, or \$2m per occurrence with a very few able to offer a \$5m primary limit.
- excess limit capacity of \$10m was offered by many with a few able to accommodate excess limits of \$25m or \$35m.
- the majority of marine “primary” liability policies are currently written on a ‘per vessel, per occurrence’ basis. However, the excess marine liability policies state a limit which is restricted to “per occurrence”. In discussion several Insurers stated that they would offer ‘per vessel, per occurrence limit policies’ if requested. Such a policy would then operate in the same way as cover by the P&I Clubs, that is if two vessels owned by the same company are involved in an incident, either with each other or in separate incidents during the policy year, each would be considered separately insured up to the policy limit. Depending on the number of vessels insured under a single policy, underwriters may decide to increase the premium rate to accommodate this change.

c) Canadian General Liability Insurers

- of the responses received to date, the common primary limits provided are either \$1m or \$2m per occurrence.
- the excess capacities ranged from \$25m to \$50m and are generally labeled as an “Umbrella” policy.
- some policies contain an annual aggregate limit and once the loss limit is reached in that policy year, the coverage is exhausted.
- respondents were not prepared at this time to consider amending the limit from ‘per occurrence’ to ‘per vessel, per occurrence’. This means that under a CGL policy, if two vessels owned by the same company are involved in accident #1 (e.g. collision with each other) all claims of both vessels are subject to the ‘per occurrence’ limit. If one of the vessels is involved later in incident #2, all claims relating to that vessel will be subject to another ‘per occurrence’ limit. If the total of claims from both incidents exceeds the annual aggregate limit, there then is no insurance for incident #3 – coverage is exhausted for that policy year.
- in some cases, the aggregate limit under a CGL policy is the same as the per occurrence limit. This means that one serious accident could exhaust coverage for the remainder of the policy year.

d) Offshore Marine Liability Insurers

- no information.
- there is no requirement for foreign insurance companies to be licensed in order to provide

marine liability insurance to a Canadian operator.

- over the past years many U.S. and U.K. insurance companies have provided excess Protection & Indemnity coverage insurance to Canadian vessel operators due to the need for additional coverage.

e) Offshore General Liability Insurers

- no information.

f) Canadian Provincial Worker's Compensation Programmes

- For accidents involving death or bodily injury to an employee while traveling on their employer's own vessel, insurance coverage would be provided to the employee through a workers compensation programme.
- there are no set 'per accident or occurrence' limits.
- payments are provided in accordance with provincial standards and are individually calculated against the injured person's marital status, number of dependents, etc.
- in 2000 the amount that an injured employee could be awarded was a minimum of \$380.00 per week to a maximum of \$774.00 per week.
- payments would be made to the injured person until the person was returned to his/her employ or in the event of his/her death, until no dependents were entitled to receive income.
- coverage would only be valid if the injured person was 'traveling on the employer's vessel and at the request of his/her employer'.

g) Personal Accident Policies

- While the market may have the capacity to provide this insurance, as discussed in 3g) above, this would not be an acceptable form of insurance for MLA Part 4 risks.

3.3 Limitations of Canadian insurers

Through responses to the questionnaire Mariport has ascertained that the Canadian Insurers, both marine and general, could provide up to \$35m capacity to vessel owners through the design of primary and multiple excess policies. However, the CGL capacity would only relate to property risks that included some minor water craft activity.

The main concerns would be:

- interest by the Canadian insurers to provide insurance for the variety of watercraft and types of different marine operations that exist in Canada.

Mariport has not seen any desire by insurers to expand their portfolios to include non traditional passenger vessels such as ones operated by the adventure tourism industry.

- premium pricing.

As stated in the Current and Future premium costs' (see section 3.8 below), the premium

pricing from 2001 to 2002 has increased between 10% and 25%, with most insurers feeling that premium increases will continue into 2003. This could present a concern to operators who may not be able to pass through these increases in elevated ticket prices. However these increases are the result of general market conditions following Sept. 11, 2001, and are not connected with the MLA.

- expression of policy limit for operators with more than one vessel.

Marine insurers providing the primary policy can express the policy limit to reflect 'each vessel, each accident', but the excess marine policy currently states 'any accident or series of accidents'. The general liability policy normally states 'any one accident or occurrence' and further, some policies contain a maximum annual aggregate limit that, once exhausted, will not pay for any further losses.

- the realization that there are only 8-10 Canadian Marine Insurers that will underwrite Passenger Liability risks.

This is a very small market place for hundreds of potential passenger liability risks.

3.4 Current practices

International P&I Clubs

P&I Clubs have been established for many years and have differentiated themselves by specializing in “particular types of vessels” or “certain areas of operations”. Although most Clubs are recognized for having a ‘specialization’ which generally forms 75% of their portfolios, Clubs do look to expand their business with members that do not fit the Club’s specialization.

The Shipowners Club, which is recognized as the leading insurer of Canadian flagged passenger vessels, currently insures 1,842 Canadian flagged vessels of which 433 have been identified as passenger vessels. The Standard Club currently insures 345 Canadian flagged vessels of which only 40 are registered as passenger vessels¹⁸.

In discussions with the Shipowners Mutual and the Standard Steamship Mutual, while both anticipate the fact that more vessels may be entered with their Clubs due to the MLA and the future compulsory insurance component, both stated that their Clubs have no interest in risks that they term as ‘white knuckle rides’ e.g. white water rafting. Moreover, their Rules do not provide any insurance against liability to passengers connected with sporting activities outside the vessel such as diving, jet skiing and paragliding etc.

Vessel owners involved in the whale watching industry utilize different types of vessels. The steel hull vessels appear to be acceptable to the Clubs, but “zodiacs” and other inflatable type craft are now being refused entry into the Shipowners’ Club due to the number of back injury claims that have been submitted over the past several years. The Standard Club does not

¹⁸ These numbers may not be the same as those developed from owners and operators for the data base, and used elsewhere in the report.

currently insure any whale watching operators that use inflatables. They would be willing to look at this category of operators, but want to analyze the actual number of potential units, the loss records, current limit of insurance carried by the operators so that they may propose an excess programme.

Canadian Marine Liability Insurers

Mariport interviewed a number of marine insurers who did not have the ability to advise of the actual number of watercraft they insure, nor were some able to separate “Passenger Liability Premium” from their “Marine Liability Premium including Yacht Premium”.

Most Insurers advised that their Protection & Indemnity book of business did not include many Passenger Vessels. This fact is borne out by responses from 4 marine markets (representing 39.95% of market) that advised; of 815 vessels insured against Protection & Indemnity risks, only 250 were identified as Passenger carrying vessels. Of the 250 Passenger carrying vessels, only 53 were identified as vessels able to carry more than 20 passengers.

The type of watercraft which carried passengers were small passenger ferries, tour boats, sport fishing crafts, etc. None identified white water rafting in their portfolios of accounts.

Most Canadian Marine Insurers recognized that the majority of large vessel owners and ships capable of carrying large numbers of passengers were insured through an International Protection & Indemnity Club for reasons of capacity, service and pricing.

The Canadian Marine Insurers, either individually or through the voice of the Canadian Board of Marine Underwriters did not feel that Canadian Insurers would unite to form any type of Mutual Club for Passenger Liability risks.

Mariport discussed the possibility of developing a new policy form, which only insured ‘Excess Passenger Liability’ risks. This product would anticipate that the operator would maintain a primary Protection & Indemnity limit of \$1m or \$2m. The operator could then purchase the excess passenger liability risk limits needed for his operation. Marine Insurers felt that this would not be a feasible plan as they would still have to attract re-insurance to balance the difference between their net loss retentions (generally marine insurers retain between \$500,000 and \$1m) and the required limits. Their feeling was that there was an insufficient number of potential clients to develop enough premium to attract Canadian insurers to provide such a product.

Mariport’s enquiries lead to the belief that the currently unregistered and unidentified Canadian passenger vessel fleet subject to MLA Part 4 is so numerous that a ‘stand alone’ policy form covering only MLA Part 4 risks, or an excess endorsement for MLA Part 4 risks, could probably generate sufficient premium to sustain marine insurance market support. Mariport is conscious of the challenge of funding initial reserves for such a product, and Mariport therefore recommends that Transport Canada prepare Requests for Proposals for the funding and administration of a new “Reserve Fund” to offer such a product.

Canadian General Liability Insurers

Mariport was advised that the CGL market was being informed by the IBC regarding the MLA. However, those general liability insurers contacted were not aware of the MLA Part 4 liability limits. They advised that they would need time to review their current book of business to ascertain the number of actual accounts they presently insure that have any waterborne exposures. In many cases they are unaware of the watercraft exposure as their policy wording covers the 'general liability exposure related to the business of the insured'. As each insurance company has developed their own comprehensive general liability policy wording, each company's policy may provide different limitations on watercraft risks.

Some examples are:

- a. includes liability for watercraft not greater than 26 feet in length
- b. includes liability for watercraft not in excess of 5 gross registered tons
- c. includes liability for watercraft not in excess of 50 tons

These insurers are not looking to insure 'solely marine operations' but if the Insured has an operation where the marine exposure is small and very limited, then their liability underwriters do have the ability to provide coverage.

Mariport has been informed by several operators, and some insurance brokers, that are involved in the white water rafting, canoe and outfitters groups, that their passenger liability exposures are insured by their comprehensive general liability policy.

Mariport has not spoken to any liability insurer that has acknowledged insuring this class of risk.

3.5 Impact of regulation on marine passenger insurance

From the insurer's underwriting policy perspective, the regulations on compulsory insurance should have no impact on their relationship with the insured operators. They both will retain the rights and obligations set out in an insurance contract that will continue to be subject of the Marine Insurance Act (MIA). This means that, for example, a breach of specific conditions stipulated in the insurance contract could absolve the insurer from any obligation to pay for a loss, damage or liability caused by such a breach. In some cases, the insurer could void the insurance contract from inception in the breach by the insured operator is fundamental in nature. These and other provisions of the MIA will not, and should not, be affected by the proposed compulsory insurance regime under MLA Part 4.

From the insurer's business perspective, compulsory insurance could be considered as a potential for greater premium income as many operators will have to increase their current policy limits in order to better protect their potential exposure to limits embodied in the act.

In responses received from the Canadian marine liability insurers, the vast majority felt that if the limit required by the operator exceeded \$5m, the operator may well decide to move his account to an International P&I Club. The insurers belief is that his/her company cannot offer a pricing level more advantageous than the Club's pricing due to the need for the normal Canadian marine insurer to purchase reinsurance to accommodate the increased limit amount.

Prior to Sept. 11th, 2001 one could purchase excess liability coverage on most marine exposures (over the \$5 million primary limit) for a cost of \$650-\$850 per \$1 million of limit. The current pricing is now gauged at roughly \$1,000 per \$1 million of limit.

On the other hand, the International P&I Clubs have stated that they feel that they will benefit as more Canadian operations will approach the Club due to the fact that the Club can provide the greater limits required without adding additional premium.

Mariport has not received any particular feedback from the Canadian general liability insurers as to their feelings for increased business or any loss thereof. This may be due to the fact that any policy issued in this market provides cover for more than the marine component. Where a CGL policy is provided to a marine operator, in most cases the policy covers the complete business operation of the insured, which would include premises and land based risks in addition to insuring some marine risks by deleting the standard policy watercraft exclusion.

Aside from increased premium concerns due to increased policy limit requirements, Mariport has addressed the issue of the MLA not permitting the operator to contract out of his/her waterborne passenger liability whereas many operators have been obtaining signed releases or waivers of liability from their passengers.

The perception of both the marine liability insurer and the P&I Clubs is that this change will not affect the way that they underwrite an account nor will it necessarily change their premium calculations. The marine liability insurer and the P&I Clubs restrict their liability to 'risks arising out of the use and operation of the vessel' and are currently not actively involved in insuring vessels which are termed as adventure tourism type operations. This group of insurers sees the removal of the waivers as a potential loss in their ability to use the waiver as a first line of defense in denying small nuisance claims for the average trip and fall type passenger claim. Should these insurers see a significant increase in the number of small claims being presented to them, they may then consider increasing the policy deductible in respect of passenger liability claims from the current range of \$1,000 to \$2,500 to a higher amount.

Mariport's main concern was with the attitude of the Canadian general liability insurers and their acceptance of the change in application of the passenger waiver of liability. As noted above, Mariport has been advised that many of the outfitters' associations have their members insured in this market and the waiver is a requirement of the insurers.

The waiver currently approved for use by the general liability insurer applies to all activities provided by the insured, which include but are not limited to: jet boating; river rafting; fishing; hiking; backpacking; back country travel; orientation; travel to and from the river; loading and unloading of vehicles and rafts; any or all of the foregoing. MLA Part 4 only restricts the use of the waiver in respect of waterborne activities and it is understood that the adventure tourism operators are looking to their legal advisors to redraft their release form to exclude waterborne activities. Prior to August 2001, a vessel passenger could sue an operator for an unlimited amount for any death or bodily injuries suffered, subject only to the per accident liability limit under MLA Part 3. The MLA, while removing the ability of the vessel owner to escape liability through the use of a waiver, has brought in a liability ceiling of roughly C\$350,000 per

passenger¹⁹, which should give insurers some reassurance in the knowledge that their loss amount can be restricted, unlike losses occurring prior to August 2001.

While Mariport has not seen the outcome of the general liability insurer's attitude in continuing to provide coverage based upon a new waiver wording, that only applies to non-marine activities, it is felt that there should be a recognition of the value of the new limitation of passenger liability as a positive counterbalance to the loss of the waiver on marine aspects of the activity.

3.6 Insurance trade and competition

The Canadian insurance marketplace is small in comparison to the United States, European and United Kingdom markets. Not only is the Canadian base of business small, but most insurers are restricted (as a matter of corporate policy) to insure 'Canadian only business' whereas the U.S. and U.K. insurance markets tend to expand beyond their borders and provide insurance to all markets. On the re-insurance side, there are few 'Canadian Re-insurance Companies', the vast majority of re-insurance capacity provided to the Canadian market is purchased from foreign re-insurance companies.

The 2000 published direct written premium by all Canadian marine insurers was \$165,791,000. This total includes premiums for ocean cargo risks (both imported and exported cargoes), yacht insurance, hull & machinery policies, charterer's liability, stevedores liability, protection & indemnity risks and premiums collected for re-insurance.

The written premium for Protection & Indemnity risks should probably be estimated in the area of 5% or \$8m. This figure would include premium charges for yacht business which in Canada is a substantial portion of the \$8m estimate. To arrive at the commercial operators' Protection & Indemnity premiums we should look at the premium estimates given by four large Canadian marine insurers who stated that their gross commercial P&I premium is roughly \$1,825,000. The group of 4 companies represents 39.95%. If we take a straight comparison and gross this \$1,825,000 to reflect a 100% factor, the total gross P&I premium becomes \$4,500,000. We would then have to separate the various P&I risks to determine what portion would be attributed to 'passenger liability risks' – 20%, or \$900,000 of the \$4,500,000 may be a generous assumption.

To that should be added premiums charged by the general liability insurers, but unfortunately no figures or estimated have been made available.

In short, Canadian marine insurers who are generally limited to insuring Canadian risks have to compete with foreign markets because marine insurance is one of the few types of insurance that can be conducted without taxation and without the need to have a Canadian licensed insurer.

Canadian general liability insurers again tend to restrict their exposures to Canadian operations, but do have the ability to insure the foreign operations of their Canadian clients.

¹⁹ The value of the limit is 175,000 Special Drawing Rights Units of account. The current exchange rate is approximately C\$2.00/SDR.

Due to regulations imposed by licensing and taxation surcharges, foreign Insurers do not pose a threat in the CGL market.

Although foreign competition is not appreciated by the Canadian industry, it is recognized that there is an absolute need for shipowners to have the ability to source their P&I insurance from foreign insurers as there is insufficient capacity in the Canadian marketplace to satisfy the needs and limits of many Canadian Vessel operators.

3.7 Premium outflow to foreign markets

Mariport has collected some data from 2 International P&I Clubs in respect to their premium income from Canadian shipowners:

2001 – US \$8,682,000

2002 – US \$10,000,000 estimated

3.8 Current and future premium costs

During 2000 there was a surplus of capacity, both in the direct and re-insurance market, which in turn provided for competitive pricing. Accidents were occurring but as there is a ‘tail’ on most liability based claims, a true loss picture was not evident and premium costs remained somewhat constant.

After Sept. 11th, 2001, there was an immediate reduction in re-insurance capacity, which was passed along to all general and marine insurers. With a reduction in capacity came the ability of the re-insurer to charge a higher cost for his/her product, and these additional costs were then passed along to the Insured.

Coupled with greater re-insurance costs, many direct underwriters and International P&I Clubs had also incurred a loss on their investment income, higher operational costs and claim settlements were not receding. The general rate increases that have been advised were;

- Canadian Marine Insurers 10 to 23.5%
- Shipowners Club 20% plus re-insurance costs
- Standard Club 25% plus re-insurance costs

(No major evidence of changes in insuring conditions, limits or deductibles)

Within the general liability market, a very broad-brush approach was taken in respect of premium increases. In the last quarter of 2001, most underwriters were looking at a minimum 15-20% increase. In the beginning of 2002 the general stance seems to be a starting point of a 20% increase with reduction in limits and increases in deductible levels. Some adventure tourism operators have reported premium increases in excess of 100%, and one has, reportedly, had to accept a 1000% jump in premium. Mariport has not had access to actual premium figures to evaluate the relative scale of these reports, but sees no reason to doubt the sources. Although these increases appear to be severe, it must be recognized that every class of insurance has seen

increases, worldwide. For example, in Australia²⁰ the situation is so severe that some operations, such as shopping malls, have had to close because they could not obtain any cover. The market will likely take years to recover, and until the situation on payout for the World Trade Center is resolved, insurers will try and build reserves against the possibility of a double, rather than single payout²¹. In summary, Mariport found no evidence that any premium increases experienced by owners or operators were the result of the MLA.

3.9 Quality of insurance carriers

(i) Approved insurers

As advised within this report, vessel owners/operators are able to purchase their insurance protection from a range of insurers, being domestic general liability insurers, domestic and foreign marine liability insurers and international P&I Clubs and in respect of foreign flag vessels, their insurance carrier may also be a foreign general liability insurer.

Within Canada, there is no requirement for a provider of marine liability insurance to be licensed. However, there is a license requirement if the insurance is supplied by a general liability insurer.

With this distinction being stated, it would follow that if any general insurance company which has received a license to operate as an insurance company by either the federal government or any of the provincial governments, should be considered as an acceptable insurer.

For foreign insurers and marine liability insurers, who do not require a government license, it would be a considerable task for Transport Canada to maintain and monitor a listing of acceptable insurance companies. Most major insurance brokers maintain a standard of insurer financial acceptability through the use of financial statistics provided by A.M. Best & Company and/or Standard & Poors Rating. Both A.M. Best and Standard & Poors publish reports on insurance companies operating throughout the world.

If the government decided to develop a listing of acceptable insurers, the government would have to decide upon the level of financial rating that would be acceptable. Ratings are posted from 'AAA' downwards. Most major brokerage firms try to utilize insurers

²⁰ In Wollongong, a shopping centre had to close due to its inability to renew public liability insurance. Some hospitals in South Australia and Victoria were forced to close obstetrics units because of an inability to renew liability cover. Also in Victoria, the state government was forced to create an A\$250m package for adventure tourism when liability insurance for operators was refused. *The Australian*, 5th July, 2002. In the United Kingdom, rail work was threatened by "rocketing costs of professional indemnity insurance for railway workers". *The Times*, 10th August, 2002.

²¹ In a ruling by a US Federal Court judge in New York, three insurers involved in covering the World Trade Center (WTC) will only be required to pay for a single incident. However, other insurers, representing the bulk of the cover on the WTC, still have to go to trial. *Lloyd's List*, 27th Sept, 2002.

with a rating of no less than “A” or “A-“, however, for more difficult risk placements, insurers with lesser ratings have been used providing that the client is aware of the insurer’s financial status.

Any listing of acceptable insurers would have to be continually monitored as the financial rating of all insurers can change quickly and without much advance warning.

Recommendation

Mariport believes that there is adequate monitoring of the Canadian insurance market at present, and a separate list of “approved” insurers for MLA Part 4 risks is not needed.

(ii) Canadian leads on subscription policies

An insurance policy can be underwritten 100% by a single insurer, or it can be underwritten on a subscription basis with numerous insurers participating for a share of the 100%. A subscription policy normally has a ‘lead insurer’ whose company name appears as the first insurer on the subscription policy.

Traditionally the lead insurer participates on the risk for a larger share than any of the subscribing insurers. The lead insurer normally sets the insuring conditions, deductible levels and premiums for 100% of the policy, but the policy is always issued on the basis of ‘each severally and not jointly, and not on the part of one for the other or any of the others’.

In the event of a claim, the lead would pay his/her percentage of the loss, but would never become responsible for the payment of any of the other subscribing insurers. So if any of the participating insurers declared bankruptcy, the claim would not be settled in full by the remaining insurers, the claimant would only receive a partial settlement.

Thus any Gatekeeper who is presented with evidence of insurance which states that the insurance is a ‘subscription policy’ would, to be absolutely certain of the quality of the policy, have to specifically request that all participating insurers be named.

Recommendation

For subscription policies at least the name of the lead is needed, but preferably all names participating in the policy.

3.10 Uninsured and uninsurable operators

(i) Uninsurable vessels

Vessels that are rendered as ‘uninsurable’ may result for several reasons:

- age of vessel
- construction material of vessel
- area of operation
- number of prior accidents involving the vessel, its operator or crew
- state of repair of the vessel
- type of operation that the vessel is engaged in

- refusal of owner to comply with a Marine Surveyor recommendations
- lack of a Transport Canada, or recognized international safety convention certificate.

A vessel or its operation is normally considered ‘uninsurable’ when the owner/operator cannot locate an insurance company to provide the necessary vessel insurance due to one of the foregoing reasons.

There is currently no ‘facility’ or government-sponsored vehicle to underwrite the uninsurable vessel. Any passenger injuries or passenger deaths that occur on an uninsurable vessel will have to rely on the owner having sufficient funds to pay for injuries or deaths.

Within the automobile insurance sector, if a driver was considered an uninsurable due to his/her driver record, he/she could approach a ‘facility’ for coverage. This ‘facility’ is made up of numerous automobile insurers that each underwrite a small portion of the risk so that no single insurer bears the whole risk. However, the premium pool available in the auto market is many times that of the marine market which makes such an approach feasible.

(ii) Uninsured vessels

Uninsured vessels may present acceptable risks for commercial insurers, but may be uninsured due to:

- the owner/operator electing to operate without the benefit of insurance
- cancellation due to failure to pay for the insurance policy or cancellation mid-term by the Insurer or the Insured for various reasons
- insurance may have been in force at the time of the incident, however the owner/operator breached a condition/warranty of the policy thereby rendering the policy null and void at the time of the loss.

There is no provincial or federal fund in place to pay the innocent public for any injuries or deaths that might occur on an uninsured vessel. Any passenger injuries or passenger deaths that occur on an uninsured vessel will have to rely on the owner having sufficient funds to pay.

If an automobile was involved in an accident for which the automobile did not have any insurance, the Uninsured Motorist coverage would be activated and pay for the damages/injuries. The Uninsured Motorist coverage is basically a fund set up by a the Canadian automobile insurance industry. All Canadian automobile insurers pay a portion of their annual premiums into this fund so that all uninsured automobile claims can be paid, thereby giving a guarantee to all injured parties that monies will be available for legitimate claims. As noted elsewhere, the marine market does not generate an adequate premium pool to permit this type of facility.

(iii) Self insured vessels

There is no legislation preventing an owner/operator from self-insuring the passenger liability risks associated with a commercially operated vessel. For the purposes of acceptance under any compulsory insurance regime, Mariport believes that it should be a requirement that the ‘self-insured owner/operator’ prove their ability to satisfy any Part 4 requirements by providing the gatekeeper with evidence of a surety bond, cash bond or standby letter of credit to be in effect for an annual period.

(iv) New Reserve Fund

At the present time, there is no guarantee that an injury or death claim suffered by a passenger would be paid. There is no legal requirement for a passenger carrying vessel to maintain an insurance policy or prove to an authority that he/she has the ability to pay a claimant.

In order for the government to guarantee that any passenger receive compensation for an injury or death that may occur on a commercially or publicly operated vessel, a special fund would have to be created.

The Canadian automobile insurance industry have successfully provided a guarantee to all auto claimants by virtue of their sharing in a ‘facility’ for severe exposure risks and by maintaining a shared fund to pay for losses caused by uninsured motorists.

The question becomes, if the Canadian automobile insurance industry can maintain both a facility for adverse risks and a fund to pay uninsured losses, can the Canadian marine insurance industry operate in a similar manner.

The premium derived by the automobile insurance industry in Canada is in the hundreds of millions of dollars whereas the total marine liability premium underwritten in Canada is estimated at only \$8m of which the majority of premium is derived from ‘private pleasure yacht insurance’ and also includes charterer’s legal liability premiums and marine liability premiums not attributable to passenger liability risks. Our estimate of annual Canadian premium for passenger liability risks underwritten by Canadian marine insurers is only \$900,000 – not a sufficient pool of premium to draw a small percentage from in order to set aside a fund for the uninsured vessel.

Marine insurers have collectively voiced the opinion that should the government make the Marine insurers responsible for setting up a fund to pay for non-insured losses, their corporate management would review the possibility of ceasing to insure marine liability risks due to the uncertainty of future claim settlements combined with the low volume of premiums from which the uninsured claim monies is drawn from.

If a policy decision is made to exempt significant sectors of the Canadian passenger vessel fleet to which MLA Part 4 applies from compulsory insurance, or if this fleet, while numerous, does not generate sufficient premium due to the small carrying capacity of individual vessels to permit cross subsidization of a facility for non-insured losses from premium income, other choices are possible.

An alternative that may be considered is a surcharge on every passenger that is on board a vessel that is operated within or enters Canadian waters. The rough quoted number of passengers carried annually within Canadian waters is 44m with possibly 1m passengers on vessels that sail in international waters but make a stop at a Canadian port.

If each passenger ticket on all domestic voyages were surcharged 10 cents, the collective amount would be in the region of \$4,400,000. On single voyages, a 10 cent charge should not be considered as a hardship, but if a passenger used a ferry to go to work and return each day, the surcharge would become 40 trips monthly time 10 cents = \$4.00. Possibly if a ticket were sold as a 'monthly pass' similar to the land mass transit systems, the surcharge could be reduced to a smaller amount. As Goods and Service tax is collected on the payment of all tickets sold in Canada, possibly the surcharge monies could flow through the same processing system. This may not be practical for adventure tourism operators earning less than \$30,000 per annum.

Assessing foreign vessels passing through Canadian waters would be difficult, and for the purposes of the Marine Navigation Services Fee such ships were ignored. However, for passenger vessels and ferries that call in Canada, then a charge could be collected with the MNSF and be transferred into the reserve fund.

The surcharge fund would be a government controlled fund, but would have to have some limits placed on it such that when an appropriate reserve level was reached, then collection ceased. Investment income would help maintain the fund. Based on the above revenue concepts, a reserve target in the \$20-30m, or five years collection may be appropriate.

Another approach, if the Registrar of Ships is deemed to be an appropriate Gatekeeper, would be to charge a fee with vessel registration and annual renewals. A portion would go to fulfill the information requirements of the MLA versus the register. The balance could go into a reserve fund.

3.11 Tracking of insurance requirements

(i) Evidence of Insurance

Mariport believes that as evidence of insurance to meet MLA Part 4 requirements, or any amount deemed appropriate by regulations, the gatekeeper would need to have sight of any of the following:

- A policy or bond issued & signed by the insurance company
- A cover note or binder issued & signed by the insurance broker
- A certificate of insurance issued & signed by either the insurance company or insurance broker
- A certificate of entry issued by an International P & I Club
- A bank letter of credit

- Verification that the vessel is insured by a government, either domestic or foreign
- If all passengers on board are employees of the vessel owner and all employees are covered by a Provincial Worker Compensation program, then a copy of the Certificate of Compliance issued by any provincial government.

In addition, the documentation presented should contain the following information, as appropriate:

- A policy or reference number
- The corporate name of the insurance company, bond issuer, bank or compensation board
- The corporate name of the registered vessel owner or operator or charterer (including corporate address and name/phone number of contact)
- The name of the vessel or vessels, except no vessel name would be necessary in respect of documentation issued for company owned vessels used exclusively to carry company employees for employment purposes for which coverage has been issued by a workers compensation program
- The maximum passenger capacity or the certificated passenger capacity of each vessel (except exclusive WCB vessels)
- The length and or gross registered tonnage of each vessel (except exclusive WCB vessels)
- The policy period or the date of commencement and termination
- The amount of the policy limit, except no limit would be necessary in respect of documentation issued for evidence of a workers compensation program

(ii) Notice of Cancellation

The insurance community considered that notice of cancellation should be provided by the insurance company, not the insured. However, as Mariport discusses below, at present there is no regulatory framework to monitor, or ensure compliance, by marine insurers with a potential obligation to provide notice of cancellation. Thus because this insurance sector is not required to be licensed, the primary legal obligation to report cancellation must rest with the shipowner or authorized representative. Insurance provision such as the CLC, although requiring evidence of insurance, puts the onus on the Master to provide the relevant documents. The associated statutory instrument has specific penalties for non-compliance, but does not mention the insurer. The MLA does not contain equivalent provisions. TC may consider offering a direct voluntary reporting mechanism by insurers, subject to a review of *Privacy Act* issues.

For government vessels that are chartered to non-governmental bodies, then notice would also be needed, as the charterer would need to then show evidence of insurance. There would also need to be notice provided by the operator of a vessel, where passengers were covered by the Workers Compensation Board, if the vessel was no longer in this type of

operation.

3.12 Scope of application

Assuming Mariport's recommendations are adopted and some classes of vessels (e.g. occasional use) are wholly or partially exempted from compulsory insurance for MLA Part 4 risks, either because a monitoring and compliance system may not be cost effective or coverage is simply unobtainable, those vessel owners and operators involved must understand that any possible exemption from compulsory insurance, or graded insurance, (e.g. adventure tourism) under section 39, does not relieve them from their obligations to passengers under the remainder of MLA, Part 4.

4. MONITORING

4.1 The designated authority – the gatekeeper

Mariport has analyzed potential entities or governmental authorities who may be available to act as ‘gatekeepers’ in

- i) acquiring and communicating information with respect to vessels subject to the compulsory insurance regime
- ii) acquiring and communicating information confirming compliance and non-compliance; and
- iii) initiating or assisting in enforcement

Private sector

Consultations to date have not revealed any receptivity from any private sector trade association to assume any responsibility for monitoring MLA compliance. The Shipping Federation of Canada has declined to consider such a role in respect of foreign vessels operating to and from Canada, out of concern for potential liability exposure. Even if MOUs could be negotiated with vessel owners’ associations, the scope of coverage necessarily would be incomplete as long as membership in the association is voluntary.

Because co-operation between vessel owners may facilitate the purchase of insurance on more favourable terms, any MLA compliance mechanism should allow any person or entity to act as an agent for multiple vessel owners in providing evidence of compliance.

Responsible department

MLA Part 4 does not designate a responsible department or Minister. As other parts of this Act confer responsibilities on the Minister of Transport, and both the existing Canada Shipping Act and Canada Shipping Act, 2001²² confer responsibility for commercial shipping on the Minister of Transport, it appears appropriate that TC have primary responsibility for administering any monitoring and compliance system for compulsory passenger liability insurance.

Classes of Part 4 MLA Vessels

i) Foreign flag passenger vessels

The Commissioner of the Coast Guard may designate Marine Traffic Regulators to require pertinent information from vessels about to enter Vessel Traffic Zones. Because section 562.18 of the *Canada Shipping Act* does not refer to the Marine Liability Act, the wording of section 562.18 may not be sufficiently broad to authorize the Commissioner to require ships reporting inward to include MLA Part 4 compliance data. The appropriate approach may be to enact a regulation under *Canada Shipping Act section 562.15 or 16*.

²² Canada Shipping Act refers to the existing act as amended by s.c. 1998 c16. Canada Shipping Act 2001 refers to the newly enacted statute which will come into force only when the regulations have been revised.

The *Canada Marine Act, section 62* authorizes the Governor in Council to make regulations respecting ports governed by that Act. This mechanism could be used to enable port authorities to require information on and monitor MLA Part 4 compliance. While most large foreign flag passenger vessels would first dock in Canada within the geographic jurisdiction of a *Canada Marine Act* port, foreign flag 'adventure' passenger cruise ships do enter Canada on international voyages into the Arctic and other water areas not organized for port purposes. However, the NORDREG reporting system could acquire telefax copies of the appropriate documentation from such vessels operating in the Canadian Arctic.

The VTZ system would appear the most practical vehicle for 'distant early warning' of MLA section 39 compliance issues. Control by port authorities may be regarded as a supportive, rather than primary, compliance mechanism.

ii) *Canadian Flag Vessels over 15 GRT*

The *Canada Shipping Act section 21* confers on the Chief Registrar of Ships authority to require information and documents for the registration of ships. The TC Ship Registry therefore is an appropriate mechanism for monitoring MLA Part 4 compliance for ships required to be registered. Consultation with the Chief Registrar shows that the following administrative issues need to be addressed, if the ship registry system is to be chosen as a gatekeeper

- i) Full consultation will be required between the Ship Registry, Legal, Policy, and insurance experts
- ii) TC Ship Registry would prefer to maintain the database and monitor existence of evidence of insurance only. It would not be involved in auditing sufficiency of coverage as the registry staff do not have expertise in reviewing insurance policy terms
- iii) Estimation and budgeting would be required for additional staff and resources.
- iv) It is necessary to determine if the system would be administered by headquarters or the regional offices
- v) New registry forms would need to be developed for evidence of insurance
- vi) Present registry information requirements do not include passenger capacity. Because the number of passengers is a relevant criteria for amount of coverage, this would require additional informatics resources, such as a datalink to a MLA Part 4 vessel database
- vii) The present registry classification system for passenger vessels is organized differently from the scope of vessels covered by MLA Part 4, with Ship Registry classifications such as Passenger/Vehicle, Passenger/Train and Barge/Passenger/Vehicle. Data handling for MLA compliance would have to be reconciled with the scope of fleet sectors subject to compulsory insurance for MLA Part 4 risks.

Presently, registrations of Canadian vessels are for a three year term. This would have to be

modified to a one year term requirement for vessels covered by MLA Part 4, in view of the annual renewal of insurance coverages. If the period for renewal of ship registrations is to coincide with the general February 20th renewal date for marine policies, a surge processing capacity for renewal of ship registrations for the period November - February would be desirable

The registry system already provides for submission of copies of supporting documents, such as ship financing agreements and evidence of transmission of interest by death. As the number of Canadian registered vessels subject to MLA Part 4 is in the order of 1,000, this appears to be a practicable paper load for annual renewal at least on a provisional basis. For the longer term future, electronic filing of insurance information could be made part of a general electronic registry system.

iii) Canadian Small Craft under 15 GRT

This is the most problematic sector for practical monitoring of MLA Part 4 compliance. Section 108 of the *Canada Shipping Act* permits a requirement of evidence of MLA Part 4 compliance as part of the information for compulsory licensing of small Canadian commercial vessels. The present plan is for a transition period of five years from the time of implementation of the *Canada Shipping Act, 2001* to allow all commercial small craft now bearing Department of Fisheries and Oceans small craft licences to be licensed in the new commercial vessel licensing programme administered by Transport Canada. While the general commercial small craft licenses are intended to be issued for a five year term, annual renewals would be necessary for MLA Part 4 vessels to which compulsory insurance applies.

Given the very great numbers of non-registered small commercial vessels potentially subject to the MLA Part 4, a paper based registration system would be costly and inefficient. The most cost effective monitoring and compliance system would be an electronic database with fields for entry of necessary insurance data.

Electronic land titles systems administered by the provinces permit financial institutions to file in a central registry commonly used transfer and mortgage clauses, which are assigned an identification number. Rather than have to deposit paper copies or scan individual documents for each registered transaction, electronic land titles systems permit reference to standard form clauses identification numbers for document terms used in individual registrations.

This system's architecture could be adopted for marine policy terms, types of entry or coverage certificates, and the identity of insurers. This would have the additional advantage of permitting review and approval of standard certificate and policy terms and of underlying insurers as a condition of their being granted forms and insurer identification numbers.

To avoid abuse of e-filing systems, regulations could be developed under s.108 of the *Canada Shipping Act* to require small commercial passenger vessel license holders to keep paper, or machine readable, copies of evidence of insurance for a prescribed period of time, and to be subject to spot audit.

Care must be taken that operators based in geographically isolated areas, particularly in the adventure tourism industry, have practical access to e-filing systems. At present, information on individuals who are owners of Canadian licensed small craft is protected under the *Privacy Act*. This is unworkable for small commercial craft which are subject to MLA Part 4 compulsory insurance requirements. Therefore we recommend that when the system is implemented, appropriate revisions be made to the Schedules under the *Privacy Act*²³ to exempt information on owners of small commercial vessels which are subject to MLA Part 4 compulsory insurance requirements from the application of the *Privacy Act*. It can be argued that if people wish to make money carrying the public, they may expect oversight on behalf of the public.

At present, factors such as diverse regional licence office records retention policies would make any attempt to identify and monitor unregistered Canadian passenger vessels through the previous small vessel licensing system, impractical. As the *Canada Shipping Act, 2001* will not be proclaimed into force until the regulations are updated, which project is anticipated to be completed in 2005, the small commercial vessel licensing system probably will not be fully implemented until 2010.

A phase in period for compulsory MLA Part 4 insurance for unregistered Canadian passenger vessels to 2010 would give reasonable opportunity for Transport Canada to perform risk analysis for adventure tourism sector coverage limits, the CGL insurance and the marine insurance industry to adapt to underwriting and administering liability policies for MLA Part 4 risks, and the recommended studies on behalf of Transport Canada for the implementation of MLA Part 4 insurance facilities, and the informatics system for e-filing to have been developed and completed.

iv) Passenger Vessels owned by the Crown in Right of Canada or a Province

The *Canada Shipping Act* is now binding on the Crown and requires non-military Crown vessels to be registered. The *Marine Liability Act* is also binding on the Crown in Right of Canada or a province. Where a passenger vessel is owned directly by the Crown in Right of Canada or a Province (as distinct from a separate legal entity owned by the Crown), it does not appear administratively necessary to require that a government demonstrate financial capacity. If a public vessel in passenger service is owned by an entity with a distinct legal personality from the Crown, it would be appropriate to require either evidence of insurance or an acknowledgement that the Crown would pay that entity's obligations under MLA Part 4.

²³ This is justifiable on public policy grounds because Canadian courts have ruled repeatedly in *Charter* cases that operators of commercial premises have less expectation of privacy from regulatory oversight than individuals have in their residential premises.

v) *Provincial Regulatory Authorities*

Certain sectors of the passenger vessel industry, such as white water rafting in British Columbia and business licences for passenger vessel operators in Quebec, are administered by provincial authorities. It is now questionable whether these regulatory initiatives are constitutional. While the 1998 decision of the Supreme Court of Canada in *Ordon v. Grail* did not entirely preclude the possibility of provincial law applying to marine activities under the aspect doctrine, the court commented that the potential scope of application of provincial substantive law to navigation and shipping would be narrow. The January 2002 decision of the British Columbia Court of Appeal in *R. v. Kupchanko* emphasized that provinces are constitutionally incapable of enacting legislation authorizing an interference with navigation. It is a matter of public policy whether the Government of Canada wishes to clothe any existing provincial regulatory programme affecting the operation of passenger vessels with constitutional legitimacy by delegating to those particular programmes administrative responsibility for monitoring MLA Part 4 compliance.

Of course, provinces under their constitutional responsibility for administration of justice can and do enforce federal law. It is clearly recognized that the Government of Canada may delegate the administration of a federal law to a province. There is some general authority that such delegation need not be uniform across all provinces. However, the Supreme Court of Canada has emphasized that Canadian Maritime Law is and should for operational necessity, be uniform. Therefore, even if different authorities or entities are selected as gatekeepers, it is not recommended that any MLA Part 4 compliance programme differ in its effect or application from province to province.

4.2 Party to provide evidence of insurance

In section 3.11 reference was made to the documentation needed for the owner or operator to show evidence of insurance to the designated authority. This section defines who should provide the evidence of insurance.

During consultations, there was general agreement that while they were willing to provide certificates of entry or of insurance, insurers and brokers did not wish to assume regulatory responsibility for notifying the designated authority of cancellation of coverage. To meet MLA Part 4 policy objectives, it is important that persons subject to compulsory insurance are obliged to give immediate notice of cancellation of coverage.

For example, if a passenger vessel operator were to make a proposal to its creditors under the *Bankruptcy and Insolvency Act* that it continue to operate while its debts are restructured, it is significant for regulatory purposes to know if its passenger liability insurance coverage is suspended or cancelled by the filing of the proposal. The rules of protection and indemnity clubs generally include a 'pay to be paid' term that permits the club to require the insured to pay a claim before the owner is indemnified. Therefore the regulations under MLA section 39 should require immediate reporting by a vessel owner of

any event of insolvency.

Given the identified disinclination of any trade association to agree to act as a gatekeeper, the only practicable alternative is to place responsibility on the owner and operator, and in the case of Canadian registered vessels, the authorized representative, to provide evidence of insurance.

While certain non-marine insurance companies are regulated under federal legislation, the majority of general casualty insurance corporations who provide CGL cover are regulated by the provinces. The marine insurance industry as such is not regulated in Canada. Therefore there is no effective existing regulatory regime to receive notice of cancellation of policies for MLA Part 4 risks from insurers themselves and to police compliance. Therefore the primary regulatory responsibility for advising the designated authority of cancellation of cover must be imposed on the owner or authorized representative of the vessel.

4.3 Compliance enforcement

The MLA does not enact specific offences for contravention of regulations made under Part 4, section 39. Therefore it is necessary to consider whether other statutory regulatory mechanisms, including offences enacted under those statutes, may be used to enforce compliance.

Practical enforcement mechanisms will differ according to the vessel's flag. For Canadian vessels, there is a possible public law anomaly that while other statutes may be called in aid of enforcement against owners or operators refusing to provide evidence of insurance, it is unclear if other statutes may be used as a method of enforcing compliance with insurance requirements in the sense of coverage limits or the scope of risks covered.

Foreign Vessels

Foreign vessel operators, if subject to VTZ associated insurance reporting requirements, could be refused entry into VTZ for neglect or failure to report. To the extent smaller commercial craft, such as water taxis or whale watchers, may be presently exempt from compulsory VTZ reporting, consideration should be given to amending reporting requirements to extend compulsory reporting to any foreign passenger vessel about to enter a VTZ. If our recommendation is adopted, this extension would apply only to foreign passenger vessels entering Canada to embark or disembark passengers.

As discussed above there are enforcement challenges for vessels simply transiting Canadian waters and not calling at a port in Canada, in verifying if information reported by VTZ is complete and accurate. These would not have to be addressed if foreign vessels simply transiting Canadian waters were exempted from the application of compulsory insurance. As Mariport recommended earlier:

Foreign flag vessels entering or leaving Canada are subject to inbound and outbound reporting requirements under the *Customs Act* and regulations. The *Customs Act* appears to be worded broadly enough to permit amendment of the reporting regulations to include

evidence of insurance for passenger vessels.

This in turn would trigger offence provisions under that Act if the vessel owner or operator simply refused to provide prescribed insurance information as part of inward or outbound reporting.

However, in enforcing compliance with required passenger insurance coverages it is necessary to consider whether the significant restrictions on disclosure of customs information under section 107 of the *Customs Act* would permit use of information gathered under customs reporting requirements for enforcing substantive compliance with MLA section 39 insurance requirements. As a general policy, the need for practical voluntary reporting and payment of taxes and duties discourages use of revenue statutes as a vehicle for detection of evidence of non-compliance with other laws.

It is obviously inconvenient for foreign passenger vessels to have to provide evidence of insurance at every voyage reporting inward if they are engaged in regular commerce into Canada. Amendment of the reporting regulations could include provision for deposit of evidence of insurance with the ship's agent or customs broker during the term of the insurance. This in turn would permit audit of insurance information.

Registered Canadian Vessels

While section 21(a) of the *Canada Shipping Act* gives the Chief Registrar wide discretion to require information, and this power can be supplemented under a regulation made under section 48 it is unclear if sections 16, 21 and 51, read together, may create an offence of refusal to provide or providing false or misleading insurance information. This is because insurance information does not relate directly to the qualifications for ownership of a Canadian vessel or the purposes of Part 1 of the *Canada Shipping Act*.

Unregistered Canadian Vessels

The wording of section 108 of the *Canada Shipping Act* is so broad in comparison to section 51 that it appears section 108 permits not only the making of regulations requiring giving of evidence of insurance by owners of unregistered Canadian passenger vessels, but also explicitly enacts an offence for non-compliance with any regulation to that effect.

We recommend to TC that it review the juridical bases for creating offences for contravention of regulations made under section 39 of the MLA.

This review is potentially of importance as many operators at the cross-country workshops were prepared to accept the MLA provided those operators that flouted the regulations were subject to heavy fine. In the absence of an enforcement regime the only approach is through market forces. We have discussed an approach whereby advertising for compliant operators carried a specific symbol in Provincial or Territorial advertising, and there was general support for such a concept. However, it would require TC to develop a concept that could be accepted by the operators and by tourism agencies that produce promotional literature. A specific TC "seal of approval" for compliant operators to use in their own advertising may also be a viable approach.

A further possibility, not discussed at length but supported by the few operators with which it was discussed, was to tie the MLA compliance in with a Safety Management programme. TC Marine Safety are considering the possibility of a simple safety management regime for Canadian domestic vessels. A code of practice is also being drafted for the rafting industry. The insurance community could also be interested in such a programme, provided it was independently audited. Again, Mariport has encountered limited support for the concept, but no opposition. Thus an operator that met certain key safety criteria and demonstrated that it had passenger insurance to MLA Part 4 requirements might be awarded a 5-star certificate that could be used in promotion and marketing, and may help with obtaining and renewing insurance.

5. FILTERS

A number of potential filters have been suggested that may permit certain operators and operations to be considered as non-commercial and therefore exempt from MLA Part 4. However, if the recommended graded system of passenger liability insurance for the adventure tourism industry is adopted in the regulations, then it does not matter whether activities are commercial or recreational. The minimum levels of liability insurance that would be required are commercially obtainable at reasonable cost. The level required for craft of less than 12 passenger capability is also compatible with the provisions of section 28 of the MLA which requires a minimum of \$1m liability cover for passenger risk.

TC has recommended use of Marine Safety Guideline 14/2000, which contains certain definitions regarding commercial and recreational operation (see Annex 8.2). As well as passengers carried under contracts of carriage, MLA Part 4 applies also to occupants other than crew or persons on the business of the ship carried for a commercial or public purpose. Mariport has suggested the use of the crew filter of MLA section 37, which could well have application in situations where the passenger is also an essential part of the operation of the vessel. Some examples are given in the discussions below:

- **Dragon Boats.** This type of entertainment is growing in popularity, but every person on the Dragon Boat is crewing, as in the case of the paddlers, and the steers person. There are no passengers as such. Under the 14/2000 guidelines these vessels would be considered commercial, however they would be excluded using the crew filter of MLA section 37.
- **Sail Training Ships.** Persons on sail training vessels are effectively the crew. The AB's may pay a tuition fee, but the ones that stay with the ship over a number of seasons and are promoted, are paid (at least on some of the boats) a small honorarium. None of the normal crew can be considered to be passengers, although passengers are sometimes carried as a fund-raising effort on sunset or lunchtime sails. The level of insurance needed should therefore probably be limited to the maximum declared passenger capacity for the season, not the complement of persons who crew the boat.
- **Charter Yachts.** TC Marine Safety has gone to great lengths to define a bareboat operation (see Annex 8.2). In essence, if the ship is chartered and the ultimate use is pleasure (as in a marina chartering a yacht or power boat to a family for a vacation) then the charterers constitute the crew and therefore MLA Part 4 would not apply. However, if the same boat was chartered with a captain, then the same family would be passengers. The final variant might be where a captain charters the boat, then hires himself out with the boat for vacation. In these circumstances the captain charterer would need to have the relevant insurance. In those cases where the hypothetical family becomes passengers rather than being crew, compulsory insurance for MLA Part 4 risks would apply.

While this may be a somewhat complex definition, it is consistent with the TC Ship Safety Bulletin TP 13699E "Guidelines on non-passenger bare-boat charter parties" and does avoid the need for marinas to become involved in extensive insurance placement for

pure bare boat charter boats. See Annex 8.2.

- **Small Boat Rental Operators and Outfitters.** Where a commercial operator does not provide crew or guides, regulations respecting compulsory insurance could exempt any operator who is required to provide a rental boat safety checklist under the *Competency of Operators of Pleasure Craft Regulations*²⁴. Mariport considers that setting a filter for compulsory insurance requirements with reference to another regulation would be easier for the industry and for TC to administer than use of an administrative guideline such as 14/2000. The safety policy objective is met by use of the checklist, and unlike passengers under the direction of crew or guides, there is not the same reliance by users of rented vessels on the provider of rented craft to also operate the vessel.

Because the *Competency of Operators of Pleasure Craft Regulations* checklist requirement applies only to powered craft and not to purely sail or hand propelled craft, it may be appropriate to extend the exemption from compulsory insurance requirements in regulations made under MLA Part 4 to bareboat operations for all types of small craft, such as canoe outfitters, provided the person renting the vessel is required to set up and operate a rental boat safety checklist system appropriate to the type of craft being rented. In such cases it would be desirable for the regulations to require the operator submit to TC annually a copy of the rental boat safety checklist as evidence of compliance with the exemption from compulsory insurance.

To avoid abuse of rental arrangements to evade compulsory insurance requirements, any exemption from compulsory insurance should not extend to any vessel for which a passenger vessel safety certificate is required under the *Canada Shipping Act* or any vessel to which section 406 of the *Canada Shipping Act* applies.

- **Canoes and Kayaks.** These craft are typically one or two person capable, but canoes may take a third person, and voyageur-type canoes up to twelve passengers plus two guides. The occupant(s) is/are definitely crew, and again we would suggest that they could be excluded from consideration under the MLA Part 4. Marine Safety Guideline 14/2000 would exclude kayak and canoe operators where the guide was in a separate craft. Where the guide shared a craft, then this would be commercial. The voyageur style canoe would be considered commercial.

The use of any filter, whether crew or Marine Safety Bulletin 14/2000, may assist in interpretation, but it would be for the courts to decide whether the interpretation was appropriate.

Another aspect is the employment of small craft by members of Inuit and aboriginal communities for subsistence hunting or fishing activities, or transport on a co-operative basis of members of those communities from place to place. These activities should not be regarded as commercial or public use. However, if such craft are used in commercial fisheries or for carriage of tourists or persons for payment, any occupants of the craft who are not

²⁴ SOR/99-53 s.8. For what is required in such a checklist and how it is to be used, see the Department of Fisheries and Oceans *Rental Boat Safety Checklist Standard*.

engaged in the operation of the vessel would be passengers within the meaning of the MLA Part 4.

For example, freighter canoes which are used to ferry tourists across rivers, where tourists do not operate the craft, or are used in fishing charters for non-aboriginals, would be regarded as commercial or public operations. It may be appropriate to require the owners or operators of such craft to carry insurance for MLA Part 4 risks.

6. DATABASE

A database has been created specifically for the Marine Liability Act and contains representative vessels in Canadian, US and Foreign Flags that may be covered by MLA Part 4. The information has been drawn from a wide range of public and private sources.

6.1 Estimated Coverage by Sector

(i) *Overnight cruise ships – foreign flag*

The ships included in the database are those that are known, from port schedules, to be calling Canadian ports in 2002 (51 ships). The ships will change year by year. Mariport believes all ships are in the list, except those that may call Arctic ports only. In 2000, five specialist ships made voyages into the Arctic from Greenland.

(ii) *Overnight cruise ships – Canadian flag*

Mariport has listed the four (4) known vessels. As noted elsewhere, some charter fishing vessels on the West Coast may offer overnight accommodation. The number is not known, but is possibly in the 10-12 range.

(iii) *Canadian flag ferries*

As noted, all CFOA ferries are included. In all, the database contains 155 ferries. Mariport has made enquiries, but has been unable to obtain details on the two Halifax/Dartmouth ferries and those serving the Toronto Islands. Mariport has identified, but not been able to obtain information on a water taxi operation in Winnipeg and two ferry operators in False Creek in Vancouver. There will be other ferries that have not been captured, operating either privately, municipally or within provinces and territories. There may well be ferries serving Indian bands. Mariport has, for example, contacted the bands on Christian Island and Georgina Island who are known to have ferries, but has had no response.

It is estimated that this section may be missing 20-30 ferries, but it is believed that only about ten of these would have a passenger capacity in excess of twelve persons.

(iv) *Day cruise*

There are, potentially, a large number of day cruise operators of which Mariport is unaware. Many of the vessels in the database for which there is no indication of passenger numbers, or operating company, could be in the day cruise business. Some may be private operators ferrying workers to remote logging or mining sites. We have identified details for 143 vessels in this category, but there could be in excess of 100 vessels for which data is not available, and contacts have not been made.

(v) *Other vessels*

See comments under 2.6. Mariport has not included cargo vessels in the database as these do not regularly carry “passengers” which might be interpreted as family of crew members or guests of the owner. These vessels would include Canadian lakers and possibly other Canadian flag cargo vessels. Also indicated under 2.6 are cargo/passenger vessels under international flag, pilot boats and work boats. There are, in the database,

over 800 passenger vessels from Ship Registry sources for which there is no operational data. These include work boats as well as unidentified ferries and day cruise boats.

(vi) *US flag ferries*

Although Mariport has had responses from some of the companies that have been negative about the MLA it has not been possible to obtain any fleet information. For fleets such as the Alaska Marine Highway System, it is not known whether it is always the same vessel (or vessels) that call Canadian ports, or whether different vessels from the fleet will call, having different capacities. There is also the issue, from the perspective of the AMHS, whether transit through Canadian waters requires cover to be demonstrated.

Mariport believes some 15 ferries of various sizes (which are not in the data base) may need to demonstrate cover under the MLA.

(vii) *Adventure tourism*

The database entries for rafting, kayaking, canoeing and whale watching can only be considered a representative sample. Total operations across Canada could well be triple the number in the communications database which contains in excess of 800 entities. The database contains 14 rafting, 40 canoe/kayaking and 9 whale watch operators with 546 vessels. As with the ferry issue of US flag vessels transiting Canadian waters, there could be similar concerns regarding US whale watching boats transiting Canadian waters while following or searching for whales. Mariport has no information on the number of companies and/or boats involved in these activities.

(viii) *Charter fishing*

There are only four charter fishing operations in the database. Operators that have been responded have generally declined to provide other than very basic information. It is probable that there are in excess of 1,000 operators across Canada, potentially with around 3,000 boats. There are understood to be in the order of 300-400 operators in Ontario and possibly a similar number on the West Coast. This number would not include the many small boats associated with fly-in lodges in remote areas of Quebec, Ontario and Manitoba. It is likely that there will be operators in other provinces and territories, but the three mentioned seem to have a large number of operations.

6.2 Original data and resources

The primary data source was the 1999 edition of the Canadian Ship Register which was made available at that time on CD-ROM²⁵. The selection from the database was all vessels that had an indication of passenger carriage in their type description, plus original vessels that were not on register in 1999.

²⁵ Provided to the team courtesy of Michael J. Bird, of Owen, Bird, Vancouver. The consultancy team also wishes to thank Brad Caldwell, Barrister & Solicitor, Vancouver, and A. William Moreira, Q.C., Patterson, Palmer, Halifax, for their assistance in providing information. The conclusions and recommendations are the teams' alone.

Some work was needed to accommodate changes over the past three years. The following summary indicates the numbers operators and vessels in the database.

OPERATION TYPE SUMMARY REPORT

Vessel Type	Number of Operators	Number of Vessels	Vessel GRT	
			15>	<15
No Data	869	1036	726	310
Charter Fishing	4	9	1	8
Cruise Day	58	143	101	42
Cruise Overnight – Can Flag	4	4	4	0
Cruise Overnight – Fo. Flag	25	51	51	0
Ferry –Can Flag	25	155	140	15
Ferry –USA Flag	2	2	2	0
Government Service	6	63	47	16
Outfitter – Canoe / Kayak ²⁶	40	419	6	413
Pilotage	2	5	4	1
Sail Training	2	2	0	2
Whale Watch	9	23	12	11
White Water Rafting	14	104	5	99
Total	1060	2016	1099	917

Mariport has added vessels such as overnight cruise ships and other non-Canadian vessels that are believed call in Canadian ports. There are a significant number of entries where there is no confirmatory data. These vessels remain in the database, but some may have changed hands or been scrapped.

Other Resources drawn on were the CPVA members directory for 2000, and some guidance from the CPVA as to membership. The CVLP was not available to us due to Privacy Act concerns relative to individual owners.

6.3 Communications with operators

Mariport provided handouts regarding the MLA, together with a questionnaire, at the small craft regulatory meetings that took place in Vancouver, Edmonton, Hamilton, Quebec City, Halifax and St. John’s. Team members also attended those in Vancouver and Hamilton.

²⁶ These numbers are at the low end of information provided. Some operators indicated only that they had canoes and / or kayaks without giving actual numbers. Others gave a range eg 100 – 125; we took the lower number.

Material was sent by regular mail and email to the executive director or equivalent person of the following associations:

Canadian Ferry Operators Association*
Canadian Passenger Vessel Association*
North West Cruise Ship Association*
International Council of Cruise Lines*
Ontario Sport Fishing Guides Association**
North West Whale Watchers Association**
Canadian Shipowners Association*

* Signifies personal meeting/communication with the relevant officer.

** Signifies presentation to the association.

Material was also sent to identified cruise lines that called Canadian ports in 2001 and were not on the North West CruiseShip Association membership list. In addition Mariport separately contacted US operators who had vessels calling in Canadian ports. These included Washington State Ferries, Clipper Navigation, Alaska Marine Highway etc.

Known passenger vessel operators in Mariport's data base were contacted and all CFOA and CPVA members were individually contacted to clarify database information.

Mariport undertook extensive web searches and contacted individual operators and provincial and territorial tourism departments for companies involved in marine activities where passengers may be involved.

A copy of the communication document, which was also posted on Mariport's website, is provided in Annex 8.1.

Workshop meetings were initially planned for Vancouver, Winnipeg, Toronto, Quebec City, Halifax. Subsequent to this intended sampling of possible issues associated with the MLA, it was agreed with Transport Canada to extend workshops to St. John's, Saint John, Edmonton, Yellowknife and Victoria. Transport Canada will separately undertake a post report consultative meeting in Whitehorse.

Where additional contact names were acquired at these meetings they have been added to the primary contact database. The workshop presentation is provided in Annex 8.1.

In addition to direct contact with operators and associations, Mariport posted extensive reference material on its website. Since posting of the information in January 2002, and later upgraded in April, nearly 2,000 copies of the MLA have been downloaded as well as substantial numbers of the background paper and TC's presentation at the Rivers Council meeting on April 24th 2002. See Annex 8.1 for details.

7. OTHER MARITIME ENVIRONMENTS WITH COMPULSORY PASSENGER INSURANCE

Mariport undertook extensive web searches for evidence of cover requirements in other regulatory environments and the following summarizes the result of this search. In general the requirements are for third party liability insurance by pleasure craft rather than passenger insurance per se.

7.1 *Australia*

In 1995 the Queensland Government looked into the desirability of compulsory third party insurance for boats and trailers. There is no evidence requirements were introduced.

7.2 *China*

In July 2001 it was reported that the Peoples Republic of China was proposing to adopt compulsory liability insurance “*to alleviate environmental damage and human loss*”. It was proposed that passengers should be required to buy life insurance when boarding a vessel, while the owner/operator should be required to buy third party liability insurance.

The genesis of the proposal was the capsizing of a passenger ship in 1999, when the government was forced to compensate families of the deceased “*to prevent social unrest*”.

In China during the last decade there had been 14,900 marine incidents, with 3,107 vessel and 6,084 lives lost.

7.3 *Croatia*

Croatia requires compulsory liability insurance for boat owners/operators for bodily injury, health impairment or death of third parties. However, those persons travelling in the boat are specifically excluded and are not considered third parties. No liability limit is mentioned.

7.4 *Hong Kong*

Hong Kong introduced an ordinance in 2000 that came into force at the end of the year requiring minimum insurance liability cover of HK\$10m for vessels permitted to carry more than 12 persons and HK\$5m for those carrying less. Although the ordinance was handled as an extension of compulsory third party risk insurance requirements it was intended to provide better protection for passengers of local vessels.

7.5 *Philippines*

The Philippines has required passenger insurance since 1991. Motor bancas with a capacity of 11 passengers or less are not required to carry passenger insurance. Over 12 passengers cover at a level of P50,000 per passenger capacity is mandated. The ordinance defines a motor banca as not more than 50grt or 100 passengers.

For inter-island ferries minimum insurance requirements of P20,000 per passenger (not stated whether boarded or capacity) have been in place since 1987.

The issuing company or pool/group of insurance companies must be authorized to do business by the Insurance Commission and accredited by MARINA²⁷. The insurance regulation also contains a schedule for full or partial compensation for bodily injury.

7.6 Sweden

In 2001 a recommendation was made for compulsory liability insurance and a compulsory leisure craft registry.

7.7 United Kingdom

British Waterways and most other waterway authorities in Britain require all craft to have a minimum of third party insurance. Craft also have to be licensed and the license dictates the waters in which the craft may operate.

Chester City Council also requires powered craft to be licensed for operation on parts of the River Dee. The license application must be accompanied by an insurance certificate indemnifying persons using the boat against claims in respect of death or bodily injury to any other persons caused by or arising out of the use of the boat.

7.8 USA

A variety of State related insurance requirements for small boats was uncovered in the search. Specifically, references were found in Arkansas, Kansas, Oregon, Utah and Washington. In general proof of insurance was needed in order to obtain a license.

In Oregon the insurance requirements specify “*bodily injury liability insurance, described as protection and indemnity insurance in the Standard American Institute Hull Form, issued by an insurer authorized by ORS chapter 731 to transit such insurance in the State*”. An alternative to use bonding or evidence of insurance issued on behalf of Lloyd’s of London or by “*any other evidence of liability protection approved by the State Marine Board*” is permitted. There is also specific language regarding cancellation or refusal to renew insurance.

Utah State Parks requires personal watercraft liability insurance minimum U\$25,000/50,000 bodily injury/death U\$15,000 proper, U\$65,000 combined minimum per incident. Proof of insurance must be carried at all times.

The State of Washington has insurance requirements in place for white water rafting with a minimum of U\$300,000 per occurrence by the applicant and employees that result in bodily injury or property damage. All guides must also be covered by the insurance.

7.9 IMO Activities

The Legal Committee of the IMO has considered a draft Protocol to revise the Athens Convention and has requested that the IMO Council and Assembly convene a diplomatic conference in October 2002 to adopt the draft Protocol.

²⁷ Maritime Industry Authority.

The draft Protocol introduces, among other matters, the requirement for compulsory insurance for passenger claims, and proposes changes to the fault-based liability process. It would introduce concepts of strict liability and reverse burden of proof in certain circumstances. The revised Protocol would also distinguish between shipping and non-shipping incidents. It should be noted, however, that any new Protocol to the Athens Convention will not be binding for Canada, and the MLA would have to be amended before such Protocol could come into force.

7.10 European Union

The Commission of European Communities has outlined arguments for the introduction of compulsory insurance for passenger vessels. The proposal suggests that the limits in the 1990 Protocol to the 1974 Athens Convention are the minimum acceptable. However, the EU is awaiting the outcome of the upcoming diplomatic conference on the Athens Convention before determining whether they should take unilateral action on passenger liability insurance.

8. ANNEXES

8.1 COMMUNICATIONS

- 8.1.1 - Web material and downloads
- 8.1.2 - Workshop text
- 8.1.3 - Insurance industry contacts
- 8.1.4 - Insurance requirements for marine adventure tourism operators

8.2 MARINE SAFETY BULLETINS

MARINE LIABILITY ACT

Chapter 6 of the Statutes of Canada, 2001

BACKGROUND PAPER

The *Marine Liability Act (MLA)*, which came into force on August 8, 2001, combines existing and new marine liability regimes into a single framework for claims related to personal injuries, fatalities, pollution and property damage.

Prior to this legislation, there had been no provisions in Canadian statutes on shipowners' liability to passengers' injury and death claims. Legislation in Part IX of the *Canada Shipping Act (CSA)* dealt only with the global limitation of liability for maritime claims, including passenger claims, but it did not deal with the basis on which to establish liability. It was possible for a shipowner to limit or even exempt its liability to passengers through the insertion of exemption clauses in the contract of carriage. The result was that a shipowners' liability to passengers was established by the claimants only in accordance with the ordinary rules of negligence.

The *MLA* introduces major changes, in particular for smaller domestic passenger vessels, by implementing a comprehensive system of liability of shipowners to passengers, and provisions which will prohibit any contracting out of liability.

The *Act* provides a uniform method for establishing liability that balances the interests of shipowners and passengers. Of benefit to shipowners and their insurers is that they now have a clearer indication of what they may be liable for, and to what degree. The *MLA* provides passengers in Canadian waters with the ability to make claims, and facilitate their prompt settlement.

Part 4 of the *MLA* concerns liability for carriage of passengers by water and includes the following provisions.

- The liability regime based on the 1974 Athens Convention on Carriage of Passengers and their Luggage as amended by its 1990 Protocol.
- The basis and limits of shipowners liability to passengers. The principal amount of liability (about \$350,000 per passenger, for loss of life or personal injury) will be comparable to similar levels of liability in the air mode.

- The inability to exempt liability through contracts.
- The balancing of the interests of shipowners and passengers and facilitating prompt settlement of claims.

Relevant portions of the Marine Liability Act, and the Athens Convention, can be downloaded from Mariport's website, www.mariport.com. An email communication link is also provided. The following commentary provides an overview of the Act and Convention relative to passenger liability issues.

For purposes of Part 4, clause 35 defines the term "Convention" to mean the above 1974 Convention and the term "Protocol" to mean the 1990 Protocol to amend that Convention. Relevant Articles 1 to 22 of the Convention and relevant Articles III and VIII of the Protocol are set out in Schedule 2 of the *MLA*. The Convention applies to maritime claims for loss of life or personal injury and its key elements are basis of liability, limitation of liability and shipowners' defences.

Section 36(1) of the *MLA* extends the meaning of certain expressions in the Convention. The definition of the term "ship" has been extended so that the Convention would be made applicable not only to seagoing vessels but also to ships operated on lakes and inland waters of Canada. The meaning of "contract of carriage" has also been expanded so that the Convention is applicable to the contracts of carriage of passengers and their luggage in freshwater.

Section 36(2) confirms that the Limitation of Liability, pursuant to Article 19 of the Convention, applies to all ships, seagoing or not. The current Limitation of Liability in respect of "passenger claims" is set out in Part 3 of the *MLA*. An illustration how the Limitation of Liability is calculated is provided in the Annex.

Under Section 37(1) of the *MLA*, Articles 1 to 22 of the Convention have the force of law in Canada. Article 18 of the Convention specifically prohibits the contracting out of liability. Section 37(2) extends the application of the Convention to the carriage by water, under a contract of carriage, of passengers and their luggage from one place in Canada to the same or another place in Canada, either directly or by way of a place outside Canada; and the carriage by water, otherwise than under a contract of carriage, of passengers and their luggage. The Convention does not apply to the master of the ship, a member of the crew of the ship, or any other person employed or engaged in any capacity on board a ship on the business of the ship, or a person carried on board a ship other than a ship operated for a commercial or public purpose.

For purposes of the application of the Convention, Canada will be a State Party to the Convention (Section 38).

The Governor in Council may make regulations requiring insurance or other financial security to be maintained to cover liability to passengers under Part 4 (Section 39). Until such time as these regulations are in place, operators may carry any level of insurance that they believe meets their

risk profile. However, in the event of an incident, they may be liable up to the limits established in the MLA. The Governor in Council may, by order, declare that an amendment made in accordance with Article VIII of the Protocol to any of the limits of liability specified in Article 7(1) or 8 of the Convention would have the force of law in Canada (Section 40).

The Mariport Group Ltd has been awarded a contract by Transport Canada to undertake research and analysis into possible compulsory insurance regimes for vessels covered by Part 4 of the *MLA*. This work, leading to a new regulatory regime under Section 39 of the *MLA*, will involve consultation with stakeholders; determine the impact of the new regulatory regime pursuant to Section 39 of the *MLA*; profile vessels based on the present regulatory framework; look into all aspects of insurance arrangements; look at means of verifying compliance and advise on regulatory issues.

The compulsory insurance regime will apply to all boats that carry passengers for “commercial or public purpose”. Thus, not only will large cruise ships need to demonstrate appropriate insurance, but also operators of canoes (e.g. outfitters), white water rafting operators, and many others, where the boat is used for commercial purposes. However, the compulsory insurance regime will not apply to boats used for pleasure purposes only.

Apart from their liability to passengers, shipowners should be aware that under the *MLA* other types of maritime claims may arise (e.g. claims to persons outside the ship, to property and environment, etc.) and the applicable limits of liability for these claims are set out in the *MLA*, Part 3, section 28, and Schedule 1, Article 6. It should be noted, however, that these claims are not part of Mariport’s mandate and shipowners and operators should consult with their insurance advisors on these additional exposures.

The Mariport Team consists of:

Christopher Wright	Project Manager
Alice Dunning	Insurance Matters
William Sharpe	Legal & Regulatory
Jonathan Seymour	Small Boat Issues
Tony Brain	Adjuster Perspectives.

Christopher Wright is the president of The Mariport Group Ltd, a marine and port consultancy based in Cambridge, Ontario. Contact may be made with the study team, who are all experienced professionals in their field, through The Mariport Group at 1-800-319-9997, or via email at info@mariport.com.

Consultations will be held with stakeholders and will be arranged for Halifax, Quebec City, Toronto, Winnipeg and Vancouver.

**LIMITATION OF LIABILITY FOR PASSENGER CLAIMS
PER VESSEL / PER INCIDENT**

What law applies	Part 3 section 29(1)	Part 3 section 29(2)	Part 3 Schedule 1 Article 7
Persons with claim	passengers on a ship not certified	passengers without contract of carriage on ship, certified or not certified	passengers with contract of carriage on a certified ship
	Ship A 7 passengers Limit of Liability = \$ 4 million	Ship C certified for 7 passengers Limit of Liability = \$ 4 million	Ship E certified to carry 300 passengers Limit of Liability = \$ 105 million
	Ship B 13 passengers Limit of Liability = \$ 4.55 million	Ship D not certified 15 passengers on board Limit of liability = \$ 5.25 million	Ship F certified to carry 1,500 passengers Limit of Liability = \$ 525 million
Amount of Insurance Required to cover Part 4 claims	Ship A 7 x 350,000 = \$ 2.45 million	Ship C 7 x 350,000 = \$ 2.45 million	Ship E 300 x 350,000 = \$ 105 million
	Ship B 13 x 350,000 = \$ 4.55 million	Ship D 15 x 350,000 = \$ 5.25 million	Ship F 1,500 x 350,000 = \$ 525 million

Notes:

1. Certified means a ship that requires a certificate under Part V of the Canada Shipping Act. This includes both international certificates for ship covered by SOLAS and certificates required for domestic passenger ships under the Canada Shipping Act
2. All limits are shown in Canadian dollars, based on approximate conversion of 1 SDR = \$ 2.00
3. For Part 4 claims by any one passenger; the limit of liability for death or personal injury and the additional limits of liability for loss of cabin or other baggage or vehicles may be aggregated.

MARINE LIABILITY ACT

Please help us with information about you and your fleet using the form below. We are also creating a database and would appreciate information about your boats, please fill in the details and mail or fax the completed form.

NAME: _____

REPRESENTING: _____

OWNER: _____

ADDRESS: _____

TELEPHONE: () _____ FAX: () _____

EMAIL: _____ WEBSITE: _____

TYPE OF BOAT(S): _____

Name	GRT	Length	Passenger	Vehicle	Material	Built

WHO INSPECTS YOUR BOATS?: _____ HOW OFTEN?: _____

ARE YOU INSURED FOR PASSENGER LIABILITY AT PRESENT?: _____

IS THIS THROUGH: - MARINE MARKET?: _____

- COMMERCIAL GENERAL LIABILITY?: _____

- PERSONAL ACCIDENT INSURANCE?: _____

- OTHER?: _____

HOW DID YOU HEAR ABOUT THE NEW PASSENGER INSURANCE REGIME?:

CAN YOU MEET THE REQUIREMENTS?: _____

DO YOU SEE DIFFICULTIES IN PROVIDING EVIDENCE OF INSURANCE BY 2003?: _____

DO YOU WANT A CALL BACK FROM A TEAM MEMBER?: _____

COMMENTS: _____

All information will be treated in confidence and will only be used internally by the Study Team and provided to Transport Canada as part of a database.

MARIPORT WEBSITE STATISTICS FOR MARINE LIABILITY ACT							
	VIEWS	DOWNLOADED FILES					
Month		MLA English	MLA French	Background Paper	Athens Conv. English	Athens Conv. French	River Council Meeting
February		38		43	29	2	
March	111	248	17	50	30	6	
April	431	851	21	389	199	27	149
May	319	353	66	310	100	31	457
June	432	470	56	205	76	27	448
July	99	180	20	74	21	7	154
August	107	138	35	83	17	25	98
September	156	150	58	154	70	30	154
Total:	1655	2428	273	1308	542	155	1460

**MARINE
LIABILITY
ACT
WORKSHOPS**



<p>SLIDE 1</p> <p style="text-align: center;">MARINE LIABILITY ACT WORKSHOPS</p>	<p>SLIDE 2</p> <p style="text-align: center;">Marine Liability Act</p> <p>Marine Liability Act (MLA) came into force in August 2001, regulations for compulsory insurance for passenger claims are planned for 2003. The Act provides a common approach to passenger liability.</p>								
<p>SLIDE 3</p> <p style="text-align: center;">Passenger Liability Regime</p> <ul style="list-style-type: none"> ▪ Part 4 of the MLA introduces a requirement for carrier's passenger liability. also excluded the carrier from contracting out liability and thus any waivers used are now null & void. 	<p>SLIDE 4</p> <p style="text-align: center;">Passenger Liability Insurance</p> <ul style="list-style-type: none"> ▪ Until the regulations are approved, operator free to set any level of insurance they feel meets their risk profile ▪ However, in the event of an incident may be liable to the limits established in the MLA. ▪ Insurance may be on usual commercial terms 								
<p>SLIDE 5</p> <p style="text-align: center;">Mariport</p> <p>Mariport Group awarded a contract in January to look into issues associated with introduction of Compulsory Insurance for Passenger Liability under Part 4 of the MLA.</p>	<p>SLIDE 6</p> <p style="text-align: center;">Team</p> <p>Team consists of:</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%;">Christopher Wright</td> <td style="width: 50%;">- Project Manager</td> </tr> <tr> <td>William Sharpe</td> <td>- Legal & Regulatory</td> </tr> <tr> <td>Alice Dunning</td> <td>- Insurance Market</td> </tr> <tr> <td>Jonathan Seymour</td> <td>- Small Boat Issues</td> </tr> </table> <p>Also being assisted by Tony Brain of Braden Marine</p>	Christopher Wright	- Project Manager	William Sharpe	- Legal & Regulatory	Alice Dunning	- Insurance Market	Jonathan Seymour	- Small Boat Issues
Christopher Wright	- Project Manager								
William Sharpe	- Legal & Regulatory								
Alice Dunning	- Insurance Market								
Jonathan Seymour	- Small Boat Issues								
<p>SLIDE 7</p> <p style="text-align: center;">Information</p> <p>Available from Mariport's website at www.mariport.com:</p> <ul style="list-style-type: none"> ▪ Background document ▪ MLA Section 4 ▪ Part Section 3 ▪ Athens Convention ▪ Article 7 of CLC ▪ Transport Canada's presentation from Canadian River Council meeting on April 24th ▪ Email questionnaire regarding fleet and coverage <p>Or call: 1-800-319-9997</p>	<p>SLIDE 8</p> <p style="text-align: center;">Passenger Liability Insurance</p> <p>MLA Part 4 liability rules apply to:</p> <ul style="list-style-type: none"> ▪ Carriage of all persons who are not crew or persons on the business of the vessel ▪ Whether or not under a contract ▪ On a vessel operated for commercial or public purpose 								
<p>SLIDE 9</p> <p style="text-align: center;">Liability Rules</p> <ul style="list-style-type: none"> • Passenger must prove death or injury is caused by fault of carrier • Carrier must prove it was not at fault if death or injury caused by shipwreck, collision, stranding, fire, explosion or defect of the vessel • Carrier is not liable, or liability is reduced if death or injury caused by, or contributed to, by fault of passenger 	<p>SLIDE 10</p> <p style="text-align: center;">Limits of Liability - Passengers</p> <p>Limit of liability required is 175,000 SDR units of account per the Athens Convention for registered passenger capacity or, for small boats, the number of persons on board. At current exchange rates this is approximately C \$350,000 per person.</p>								

<p>SLIDE 11</p> <p style="text-align: center;">Limits of Liability – Global – 1</p> <p>There are global limits of liability embodied in other sections of the MLA.</p>	<p>SLIDE 12</p> <p style="text-align: center;">Limits of Liability – Global - 2</p> <p>However, no statutory requirements to carry insurance to global limit.</p> <ul style="list-style-type: none"> ▪ This will continue to be a business decision for the operator and their insurance broker ▪ Proposed compulsory insurance is only for passenger liability under Part 4, not global limits under Part 3
<p>SLIDE 13</p> <p style="text-align: center;"><u>Examples</u></p> <p>Some examples of who may need to have insurance:</p> <p style="text-align: center;">Obvious</p> <ul style="list-style-type: none"> •Ferries •Cruise ships •Day passenger vessels •Charter fishing boats, whitewater rafts <p style="text-align: center;">Not So Obvious</p> <ul style="list-style-type: none"> •Lakers that carry family of crew, or guests of the owner •Pilot boats, ice-breakers on scientific missions 	<p>SLIDE 14</p> <p style="text-align: center;">Who on Board May Need to be Covered</p> <ul style="list-style-type: none"> •Who has the right to claim under Part 4, and for whom compulsory insurance may be required are separate issues •Right to claim will be decided by courts •Who operators will need to insure for will be set out in regulations
<p>SLIDE 15</p> <p style="text-align: center;">What are we looking at?</p> <p>Availability of coverage and practicality of running a compliance system.</p> <ul style="list-style-type: none"> • Form of insurance. • Fleet issues. • How to check that the insurance is in place? • Filters to establish who may need to be covered. 	<p>SLIDE 16</p> <p style="text-align: center;">Form of Insurance</p> <ul style="list-style-type: none"> ▪ Marine market ▪ Commercial general liability ▪ Personal accident insurance ▪ Other security
<p>SLIDE 17</p> <p style="text-align: center;">How Do We Check that the Insurance is in Place?</p> <ul style="list-style-type: none"> • Gatekeepers • Market information • Possible secure web-based system 	<p>SLIDE 18</p> <p style="text-align: center;">Conceptual Filters to Establish Who May Need to be Covered - 1</p> <ul style="list-style-type: none"> • People who are not crew or on the business of the vessel • Everyone actively involved in operating the vessel could be considered as crew • e.g. dragon boats, kayaks, some rafts
<p>SLIDE 19</p> <p style="text-align: center;">Conceptual Filters to Establish Who May Need to be Covered - 2</p> <ul style="list-style-type: none"> • First nation subsistence hunters, fishing and transportation • Activities of not-for-profit associations, training, racing • Privately owned recreational craft 	<p>SLIDE 20</p> <p style="text-align: center;">Filters and Grey Areas</p> <ul style="list-style-type: none"> • Vessels owned by businesses for a profit, but used for recreation, • e.g. rental water craft, boats owned by a fishing lodge

<p>SLIDE 21</p> <p>Guidelines to Differentiate Between Commercial or Public Purpose & Pleasure Craft</p> <p>Transport Canada has recommended Ship Safety Bulletin 14/2000. However, the MLA is new and the courts have not yet considered these guidelines as means of defining “commercial vessel” under Section 37.</p>	<p>SLIDE 22</p> <p>14/2000 Examples of Pleasure Vessels</p> <p>Rented vessels used for recreational purposes:</p> <ul style="list-style-type: none"> • Yacht • Sailboards • Personal watercraft • Fishing boat • House boat • Kayak / canoe / personal water craft tour • Kayak / canoe / personal water craft lesson 						
<p>SLIDE 23</p> <p>14/2000 Examples of Pleasure Vessels</p> <p>Boating education / training schools:</p> <ul style="list-style-type: none"> • Sail boat instruction • Power or sail boating school • Water craft training vessels 	<p>SLIDE 24</p> <p>14/2000 Examples of Pleasure Vessels</p> <p>Situational examples:</p> <ul style="list-style-type: none"> • Boat used to transport person or goods as a favour • Boat used as an essential means of transportation • Boats provided with a rented cottage • Boat used for subsistence activities 						
<p>SLIDE 25</p> <p>Where are we with the study?</p> <ul style="list-style-type: none"> • Preparing database of vessels • Researched other jurisdiction and modes • Communicating with insurance industry • Analysing fleet issues • Communicating with vessel owners and operators • Identifying gatekeepers • Assessing filters 	<p>SLIDE 26</p> <p>Findings so far – 1</p> <ul style="list-style-type: none"> • If covered by offshore P & I clubs unlikely to be any problems. There may be limit problems for domestic P & I. • Where coverage is through CGL market there appears to be current and continuing problems. 						
<p>SLIDE 27</p> <p>Findings so far - 2</p> <ul style="list-style-type: none"> • Some craft-like whale watchers may be able to switch markets. • Wilderness industry, rafts, etc. may need special attention because of limits, insurance markets. 	<p>SLIDE 28</p> <p>Progress</p> <table border="0"> <tr> <td>Preliminary report delivered</td> <td>March 29th, 2002</td> </tr> <tr> <td>Interim report</td> <td>May 3rd, 2002</td> </tr> <tr> <td>Draft final report</td> <td>June 28th, 2002</td> </tr> </table>	Preliminary report delivered	March 29 th , 2002	Interim report	May 3 rd , 2002	Draft final report	June 28 th , 2002
Preliminary report delivered	March 29 th , 2002						
Interim report	May 3 rd , 2002						
Draft final report	June 28 th , 2002						
<p>SLIDE 29</p> <p>Regulations</p> <p>We will be making recommendations to Transport Canada for their consideration. If there are specific issues we will need to provide well documented and researched arguments.</p>	<p>SLIDE 30</p> <p>What do we need? FEEDBACK</p> <p>Had very little so far, still time, but do need to hear from those who will be affected relative to:</p> <ul style="list-style-type: none"> • Insurance carried • Market • Any current, or possible future, difficulties • 14/2000 Guidelines • Other filters • Gatekeepers 						

ANNEX 8.1.3

MARINE & GENERAL LIABILITY INSURANCE COMPANIES CONTACTED IN CANADA					
Market Percentages as per Canadian Underwriter Magazine - May 2001					
	MARINE INSURERS	Market %		GENERAL LIABILITY INSURERS	MARKET %
	(citing 18 of 35 Marine Insurers)			(citing 21 of 81 CGL Insurers)	
	(represents 96.45% of written premiums)			(represents 84.91% of written premiums)	
1	C.N.A. Canada Group	14.75	1	CGU Group	8.13
2	Royal Insurance Group	13.98	2	ING Canada	7.82
3	Allianz Canada	10.07	3	Lloyd's Underwriters	6.94
4	AXA Canada	9.2	4	Chubb In. Co.	6.82
5	ING Canada	9.12	5	American Home Assur.	5.69
6	St. Paul Canada	8.51	6	Zurich Canada	5.34
7	Lloyds Underwriters	5.62	7	Royal Insurance	5.19
8	Gerling Canada	5.21	8	Motors Ins. Corp.	4.29
9	ACE INA Insurance	3.78	9	Lombard Canada	4.14
10	Chubb Insurance	3.51	10	Co-operators Group	4
11	CGU Group	3.07	11	AXA Canada	3.92
12	Co-operators Group	2.27	12	Economical Ins. Group	3.18
13	Liberty Mutual	2.02	13	Commerce & Industry	2.92
14	Ecclesiastical Ins.	1.36	14	Liberty Mutual	2.85
15	American Home Assur.	1.33	15	St. Paul Canada	2.45
16	Economical Ins. Group	0.92	16	C.N.A. Canada	2.34
17	Zurich Canada	0.92	17	Gerling Canada	2.18
18	Providence Washington	<u>0.81</u>	18	Allianz Canada	2.13
	TOTAL	<u>96.45</u>			
	MARINE GENERAL AGENTS:				
			19	Dominion of Canada	1.68
			20	ACE INA Insurance	1.62
1	Oceanic Underwriters Ltd				
2	Coast Underwriters Ltd.		21	State Farm Insurance	<u>1.28</u>
3	Harlock Williams Lemon Ltd.			TOTAL	<u>84.91</u>

**PROVINCIAL & TERRITORIAL REQUIREMENTS
FOR
MARINE ADVENTURE TOURISM OPERATORS**

YUKON

\$1,000,000 public liability coverage is required. It is also recommended that the operators have injury to participant coverage, but it is not mandatory.

PARKS CANADA

\$1,000,000 coverage, plus \$1,000,000 per incident coverage is required, regardless if considered low-risk or high-risk business. Additionally leaseholders are asked to carry insurance with a regular insurance broker for such things as fire, water damage, etc.

MANITOBA

Proof of insurance is not required for licensing an operator. It is left up to the operator to acquire insurance.

NWT

\$1,000,000 minimum liability is required, however, many carry up to \$3,000,000. Insurance is required to obtain a license.

ONTARIO TOURISM MARKETING PARTNERSHIP

Have been advised that some organizations require proof of insurance. Most operators have \$2,000,000.

BC PARKS

Contacted, but no response. However, the Council of Tourism Association of BC has indicated that all operators are required to have a minimum of \$1m liability insurance in place, and that a certificate of insurance is delivered prior to a licence being issued.

SASKATCHEWAN

Kayaking industry is not licensed and considered a “free for all”.

NOVA SCOTIA

There are not regulations required, however when becoming a member of the Adventure Tourism Association insurance is recommended.

TOURISM PARKS NEW BRUNSWICK

If marine tourism operators wish to advertise boat tour packages with Department of Tourism they must meet several conditions, including \$1,000,000 liability insurance in place, a written risk management plan and liability waiver forms.

PRINCE EDWARD ISLAND

Contacted, they undertook to provide information.

NEWFOUNDLAND / LABRADOR

No license is required for any adventure operator, nor is insurance mandatory.

QUEBEC

Some confusion as to what is required. However, we have been advised, through insurance contacts, that the Province requires evidence of \$1,000,000 below 12 passengers and \$5,000,000 above 12 passengers, in order to be granted a business license. However, we do not know how comprehensive this requirement is.

ALBERTA

Contacted, but advised that it is difficult to get information. Believed that there are requirements for Provincial Parks, but no confirmation of details.

8.2 MARINE SAFETY BULLETINS

SHIP SAFETY BULLETIN

Bulletin No.: 14/2000

Date: 2000-11-20

Subject: DIFFERENTIATION BETWEEN "PLEASURE VESSEL" AND OTHER VESSELS

Fisheries and Oceans Canada (DFO) and Transport Canada (TC) are jointly responsible for ensuring that all vessels are subject to a regulatory framework. To this end, they work together to make certain that all vessels fall under the purview of one or other of the departments. Fisheries and Oceans Canada is mandated with the responsibility for pleasure vessels and Transport Canada is mandated with all other vessels.

The purpose of this bulletin is to assist in clarifying which vessels are in pleasure use by giving some examples and expanding on the information provided in Ship Safety Bulletin 11/99.

A "Pleasure Vessel" is a vessel used by individuals for their pleasure, recreational or sporting use and not for any commercial purpose by them such as carrying passenger(s).

A "Passenger" is any person other than:

(a) the master, a member of the crew or a person employed or engaged in any capacity on board the ship on the business of that ship;

(b) a person under one year of age carried on a Safety Convention (foreign going) vessel;

(c) a guest on board the ship, if the ship is used exclusively for pleasure, and the guest is carried without remuneration;

(d) a person carried

on a ship by reason of circumstances that neither the master nor the owner could have prevented, such as obligation to carry shipwrecked; or

(e) persons designated as special purpose personnel.

A fare does not have to be paid for a person to be a passenger.

The formal definitions of "pleasure craft" and "passenger" may be found in Section 2 of the *Canada Shipping Act*.

In order to more clearly illustrate the differentiation between a pleasure vessel and a non-pleasure vessel an annex providing examples of pleasure vessels is attached. This Annex is not exhaustive and should be used for guidance only.

Vessels that are rented with a Skipper/Guide without a bona fide charter party in place may well be considered to be a passenger operations.

In summary, any vessel which is not a pleasure vessel is by definition a non-pleasure vessel and comes under Transport Canada and no vessel carrying a passenger is a pleasure vessel.

-

ANNEX

EXAMPLES OF PLEASURE VESSELS

(Not permitted to carry passengers)

1. Rented vessels used for recreational purposes:

- a) Yacht;
- b) Sailboards;
- c) Personal Watercraft (PWCs);
- d) Fishing boat (fishing camp);
- e) House boat - friends invited, they

don't contribute money;

f) House boat - friends invited, they contribute money;

g) Kayak/canoe/personal water craft tour;

h) Kayak/canoe/personal water craft tour as part of summer camp activity;

i) Kayak/canoe/personal water craft lesson; or

j) Kayak/canoe/personal water craft lesson as part of summer camp activity.

2. Boating education/training schools:

a) Sail Boat Instruction, 10 persons or less on board (day sailing only) - contract in place for provision of sail training and affiliated with yacht clubs;

b) Power or sail boating school – contract in place for instruction only; or

c) Watercraft training vessels – contract in place for instruction only.

3. Situational examples:

a) Boat used to transport person or goods as a favour

(no remuneration and no commercial purpose whatsoever).

b) Boat used as an essential means of transportation for one person/persons (no remuneration).

c) Boats provided with a rented cottage.

d) Boat used for subsistence activities, e.g. fishing and hunting.

e) Safety craft operated by yacht club with skipper and "spotter", e.g. club launch and standby vessels for races.

f) Privately-owned and used recreational craft.

g) Privately-owned yacht used to entertain owner's guests.

h) Outboard motorboat used exclusively for pleasure at a cottage.

i) Cabin cruiser, occasionally rented out by owner to third parties for them to use for weekend or weeks to cruise on their own.

j) Pontoon houseboat rented out by owner for "U-Drive"

cruising/camping
vacations.

k) Sailboat,
bareboat (no crew)
chartered/rented for
a period of time.

l) Any vessel
converted to
private/personal use
without commercial
component.

m) "U-drive" rentals
that are
operated/navigated
by individuals
renting the vessels.

An explanatory bulletin as to what constitutes a charter is available on the Marine Safety Web site (http://www.tc.gc.ca/canadashippingact/english/intro_e.htm or http://www.tc.gc.ca/canadashippingact/french/intro_f.htm) or from any Marine Safety office.

Keywords:

1. Differentiation
2. Pleasure Vessel
3. Commercial Vessels

Questions concerning this bulletin should be addressed to:

AMSED Transport Canada
James Brock Marine Safety
998-0624 Tower C, Place de Ville
 11th Floor, 330 Sparks Street
 Ottawa, Ontario K1A 0N8



Guidelines on Non-Passenger Bare-Boat Charter Parties

This document is for guidance only. Determination of a non-passenger bare-boat charter party can only be done by examining the particulars of each individual case.

If you have any questions or would like further information, please contact your local Marine Safety office.

Introduction

When the Canadian Coast Guard was transferred from Transport Canada (TC) to the Department of Fisheries and Oceans (DFO), so too was the responsibility for pleasure craft. Where a vessel is used for pleasure the operator and other people on board should be aware that they assume responsibility for their own safety and cannot rely on a trained crew to assist them in an emergency.

Where passengers pay an operator for carriage, there may well be an expectation that the operator has taken steps to ensure that the vessel is safe and that the crew is trained to deal with emergencies. Operators who carry passengers have a higher duty of care.

Both departments (TC and DFO) accept this, but there may still be some ambiguity when determining the actual (end) use of the vessel. Where a vessel is chartered, the owner is clearly using the vessel for a commercial purpose, as the charter will be for an object of profit, however, the charterer may well be using the vessel solely for pleasure, depending on the circumstances.

One should look at the "end user." If the vessel is being used as a pleasure craft then it must satisfy the requirements of DFO. On the other hand, if the vessel is being used as a commercial vessel, then it must satisfy the requirements of Transport Canada. In the situation of a bare-boat charter, the charterer effectively takes over responsibility for the operation and safety of the vessel from the owner; when the vessel is used for pleasure the requirements to be met would be those of DFO.

Pleasure versus Non-pleasure

Since there is a different safety regime for pleasure craft than for other types of vessels, it is essential to be able to identify and categorize all vessels. The general test used (i.e. whether the vessel is used for commercial purposes or not) is often cited as being the "rule of thumb". While this may be helpful as a first step, this test can result in errors if applied incorrectly, especially in cases that are not clear. Where there is a charter in place, the relationships between the different parties must be examined closely. A quick review of key definitions will aid in this endeavor.

Pleasure Craft

The Bill C-15 definition, which came into force October 31, 1998, defines a pleasure craft as:

"Pleasure craft" means a vessel used by an individual for pleasure and not for a commercial purpose.

Notice that the direct reference to "passengers" has been removed from the new definition. However, whether passengers are carried on board will still have to be considered when determining the legal status of a vessel as a vessel that carries passengers is incompatible with a vessel being used for pleasure.

Bare-boat Charter

The Bill C-15 definition, which came into force October 31, 1998, defines a bare-boat charter as:

"Bare-boat charter" means a ship charter agreement under which the charterer has complete possession and control of the ship, including the right to appoint its master and crew.

Passenger

"Passenger" means a person carried on a ship by the owner or operator, other than

- a. a person carried on a Safety Convention ship who is
 - i. the master, a member of the crew or a person employed or engaged in any capacity on board the ship on the business of that ship, or

- ii. under one year of age,
- b. a person carried on a ship that is not a Safety Convention ship who is
 - i. the master, a member of the crew or a person employed or engaged in any capacity on board the ship on the business of that ship, or
 - ii. a guest on board the ship, if the ship is used exclusively for pleasure and the guest is carried on it without remuneration or any object of profit.

Thus, a person is not a passenger when the person is either a member of the crew or is on board the vessel for the exclusive purpose of pleasure.

The definition of "passenger" refers to the person being carried "by the owner or operator." It is easy to derive what is meant by the term "owner" as it is defined in the Act, however the same cannot be said for "operator" which is not defined in the CSA.

Owner

"Owner" is defined in the CSA and means;

- i. "as applied to unregistered ships, the actual owner and as applied to registered ships, the registered owner only"

Operator

As the term "operator" is not defined in the CSA, one must look at other elements to determine its meaning. The first question to be answered is who is the operator of the vessel? This may be the owner who retains the attributes of the operator or it may be another party who has chartered the vessel. If a charter party exists it should be examined to establish its characteristics and whether it satisfies the requirements set out below to establish that the charterer is the operator. The final element to consider is the relationship amongst the owner, operator and the other persons on the vessel to ascertain whether there is a commercial aspect and whether those persons are guests or passengers.

Deciding whether a person is the owner or not of a vessel is comparatively simple. The question as to whether a person is the operator will depend upon the facts of each case. However, there

are three elements that must be present:

- A. Control - The operator must have exclusive and effective control of the vessel. This will include complete discretion with respect to navigation, employment and the day-to-day running of the vessel.
- B. Possession - The vessel must be in the exclusive possession of the operator. Any agreement that does not permit a person to have exclusive possession will mean that that person is not the operator; if the agreement provides for shared possession with other persons this will mean that these people are not the operator. Meaning that if multiple charters are in existence, in respect of the same vessel or parts of the same vessel, the charterer will not be the operator, unless appointed as such.
- C. Crew - Any crew members must be servants or agents of the operator. This means that the operator must: appoint the crew, be responsible for crew remuneration, if any, and is the person to whom the crew is answerable. The charterer will be responsible for the navigation and operation of the vessel as well as for any action taken by crew members, in this respect, during the charter. If the owner retains overall control of the crew then the owner will be the operator.

Required Elements of a Non-Passenger Bare-Boat Charter Party

A bare-boat charter varies from any other type of charter in that it is a lease of the vessel rather than a contract of carriage. The distinction can be likened to a contract for the hire of a self-drive car as opposed to paying for the services of a taxi.

Commercial bare-boat charters usually place the responsibility for a large number of items upon the charterer. The owner provides the vessel but all other expenses from the commencement of the charter to its end, in respect of the vessel, will be for the charterer's account.

For the purpose of establishing who is the operator of a pleasure craft, for present purposes, not all these elements will have to be the responsibility of the charterer. The type of charter that is envisaged will often be for a relatively short period of time

(weeks rather than months) and certain elements such as insurance will nearly always remain with the owner. It is not intended that such a situation should prevent a charterer being considered as an operator.

To determine the status of the charter, one must first ask whether the charterer is the operator. If it can be established that the charterer is the operator the second test is to establish "whether the persons carried are guests or passengers?" The next sections deal with this question.

The elements that must be present in the charter party agreement, in order to establish that the charterer is the operator, are:

(the first three are essential)

- 1. Control**

The charterer must have complete control of all operational decisions affecting the vessel during the length of the charter. Of course, control can be delegated to a Master or Guide (see number 3 for more on crewing), however aside from the safe navigation of the vessel, final authority with respect to the vessel rests with the charterer.

- 2. Exclusive Use of Vessel**

The contract must be for the exclusive use of the entire vessel. The charterer must have complete possession and be able to exercise power of control over the whole vessel. Multiple charters of the same vessel or charters of separate parts of the vessel will not satisfy this requirement.

The charterer shall use the vessel only for the purpose of pleasure. The charterer may carry guests on board the vessel provided that such carriage is not part of a commercial activity or is done with the objective of making a profit and that any guests are on board solely for the purpose of pleasure.

The charterer shall not use the vessel in any commercial trade and shall not carry passengers for payment. The charterer shall not use the vessel for any purpose that violates the laws of Canada or any other applicable laws.

3. Crew

The charterer will be solely responsible for choosing and appointing crew. The only limit on this discretion is that the owner may reject a crew member if the owner has reasonable grounds to believe that the crew member in question will not be competent to operate the vessel. The owner, then, has a right to reject, however, the owner cannot order the charterer to appoint a particular person nor does the owner have control in the selection process. This right is only intended to give the owner a right of veto where the charterer's appointment may lead to the vessel and any persons on board being placed in danger. Therefore, all crew members operating the vessel during the charter will be under the orders of the charterer, not the owner. If the owner provides the crew and pays their wages, whether as part of the charter or not, it will not constitute a bare-boat charter and the "charterer" and any other persons on board will be passengers. The charterer must ensure that any crew or other persons operating the vessel are sufficient and competent and have received the necessary training or certification that is required for the safe operation and navigation of the vessel.

The charterer will provide full details and supporting documentation in respect of any crew or other persons who will operate the vessel during the charter upon request to do so by the owner. The owner may request that such information be provided prior to the delivery of the vessel. If the owner has reasonable grounds to believe that a person does not satisfy the requirements of this clause, the owner may refuse to allow such person to operate the vessel. In the event that the charterer breaches the terms of this clause the owner may terminate the charter forthwith.

4. Supplies and Expenses

The cost of operating the vessel during the charter will be at the sole expense of the charterer. This will include fuel and supplies. This will not include the equipment on board the vessel that is necessary for the safe and efficient operation of the vessel; this will be considered part of the vessel for the purposes of the charter. The owner may provide the vessel with oil and supplies on

board at the beginning of the charter but they must be paid for by the charterer.

The charterer shall provide any food necessary for the duration of the charter and will be responsible for any other consumable stores that are used. The charterer shall be responsible for any expenses incurred during the charter, including port costs and mooring fees, which are incidental to the use of the vessel.

Upon delivery, the owner shall provide the charterer with an inventory of the quantity of fuel on board. The charterer will be responsible for the costs of any fuel consumed during the charter, up to the time of redelivery.

5. Insurance

In the type of situation that is envisaged it is unlikely that the responsibility for insurance will pass to the charterer. One should check with the owner to find out if insurance coverage is provided for the vessel and guests. No coverage could pose serious problems for an unwary charterer.

6. Sub-charter

The charterer shall not assign this charter nor sub demise the vessel without the prior consent of the owner. In no circumstance shall the charterer sub-charter or sub demise the vessel as an object of profit or for a commercial use.

7. Repairs

The charterer will be responsible for any damages occurring during the charter and ultimately the cost of repairs. The obligation is not necessarily on the charterer to carry out repairs, the owner will normally complete them and charge the charterer.

8. Obligations of Charterer

The charterer shall be responsible for all matters relating to the navigation, operation and maintenance of the vessel during the charter. The charterer shall ensure that any persons on board the vessel comply with any applicable laws relating to safety, or the operation of the

vessel. The charterer shall maintain the vessel and its equipment in a good state of repair and in efficient operating condition. The charterer shall indemnify the owner for any costs or expenses resulting from breach of these obligations by the charterer.

9. Obligations of Owner

The owner shall provide the vessel at the time and place agreed upon for delivery. The owner shall provide the vessel in a seaworthy condition and shall provide any equipment necessary for the safe and efficient operation of the vessel or that is required by any applicable laws.

Passenger or Guest?

The essential issue to consider when deciding which regime a vessel should fit within is whether the persons carried on board are passengers or not.

The situation is clearer where the person owning the vessel also operates it and there is no form of charter party in existence. In this situation, one has to examine the relationship between the owner and the people on board. If any of them are paying money for their carriage on the vessel, then they will be deemed to be passengers and the vessel will come within Transport Canada's regime. If the owner is receiving any form of remuneration for the use of the vessel, even if not directly from the persons carried, then they will be passengers. If the persons are guests, there is no form of remuneration and the vessel is being used exclusively for pleasure they will not be passengers and the craft will be under the pleasure craft regime. This would include the situation where an owner invites some friends for a trip on his pleasure craft. If the sole purpose of the trip is pleasure and there is no commercial element or intent then they will not be passengers.

The dictionary definition of "commercial" is "made, done or operating primarily for profit". Therefore, a simple sharing of or participation towards expenses will be acceptable. However, if there is an ultimate commercial purpose, even if disguised in another form, they will be passengers.

