

Guidelines on Non-Passenger Bare-Boat Charter Parties

2000

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.