

Financial institutions
Energy
Infrastructure, mining and commodities
Transport
Technology and innovation
Life sciences and healthcare



Mandatory Marine Insurance in Canada

The Canadian Board of Marine Underwriters
Spring Conference, May 23, 2019

Kaitlin Smiley

Senior Associate, Litigation

Norton Rose Fulbright Canada LLP



Overview



- **Passenger Insurance**
 - History and Rationale
 - What is it?
 - How does it work?
- **Wreck Removal “Insurance”**
 - What is it?
 - How does it work?
 - Why should you care?

Mandatory Passenger Insurance: How did we get here?



The TRUE NORTH II

Mandatory Passenger Insurance: What is it?

- *Regulations Respecting Compulsory Insurance for Ships Carrying Passengers, SOR/2018-245*

Coverage for damages for death or personal injury

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

Minimum amount

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

Mandatory Passenger Insurance: Who does it apply to?

2 (1) These Regulations apply to

(a) the carriage by water, under a contract of carriage, of passengers from one place in Canada to the same or another place in Canada, either directly or by way of a place outside Canada; and

(b) the carriage by water, otherwise than under a contract of carriage, of persons from one place in Canada to the same or another place in Canada, either directly or by way of a place outside Canada, excluding

(i) the master of a ship, a member of a ship's crew or any other person employed or engaged in any capacity on board a ship on the business of the ship,

(ii) a person carried on board a ship other than a ship operated for a commercial or public purpose,

(iii) a person carried on board a ship in pursuance of the obligation on the master to carry shipwrecked, distressed or other persons or by reason of any circumstances that neither the master nor the owner could have prevented, and

(iv) a stowaway, a trespasser or any other person who boards a ship without the consent or knowledge of the master or the owner.

Mandatory Passenger Insurance: Who does it not apply to?

2 (2) These Regulations do not apply to

- (a) an adventure tourism activity that meets the conditions set out in subsection 37.1(1) of the Act;
- (b) the carriage of a sail trainee or a person who is a member of a class of persons prescribed under paragraph 39(d) of the Act;
- (c) search and rescue operations that are carried out by the Canadian Coast Guard Auxiliary;
- (d) a carriage performed by the Government of Canada or the government of a province, or by an entity that is entitled to indemnification by that government for liability under Part 4 of the Act; or
- (e) a carriage by a ***pleasure craft*** as defined in section 2 of the *Canada Shipping Act, 2001*.

Mandatory Passenger Insurance: Do I need it?

Does the vessel carry fare paying passengers?

This is NOT the test!

The General Test:

1. Is the vessel operated for a commercial purpose?
2. Does it operate for a public purpose? (i.e. is the general public moved on the ship without paying money)

If the answer to either 1 or 2 is YES, then go to the next question:

3. Will the ONLY people ever carried on the vessel be Crew or persons on board for the business of that vessel?

If NO, then the vessel requires specified proof of liability insurance or entry with a P&I Club unless it falls under the narrow exceptions including Adventure Tourism.

Mandatory Passenger Insurance: What is “on board for the business of the vessel”?

People on Board for the Business of that Vessel:

Examples of such persons would include repairers for that vessel during sea trials, Fishery Observers on a fish boat, Transport Canada inspectors inspecting that specific vessel.

People who would NOT qualify under the exception would include:

- Transport Canada inspector being carried on a tug or water taxi to conduct an inspection of a deep sea ship.
- Log buyer on a boom boat
- Salmon farm workers being carried on a water taxi to a work site

Mandatory Passenger Insurance: Implementation

For those with existing insurance policies:

- Carriers who hold an insurance policy for liability to passengers as of January 11, 2019, need to comply with them upon the renewal, modification or cancellation of the policy.

For those with no existing insurance policies:

- Carriers who hold no insurance policy for liability to passengers were required to have such insurance by March 12, 2019.

Mandatory Passenger Insurance: What is Required?

- Must carry proof of liability insurance on board the vessel where feasible, or else produce it within 24 hours if it is not feasible (either because it is in electronic form or there is no protected place to keep it on the vessel).
- A certificate of entry with a P&I Club is satisfactory proof, otherwise must be in required form.
- Fleet policies are permissible.



Mandatory Passenger Insurance: Enforcement

- Transport Canada marine safety inspectors, as designated officers, can request operators of ships carrying passengers to produce a Certificate of Insurance in accordance with the Regulations.
- If the carrier does not have a Certificate of Insurance or a Certificate of Entry, then the designated officer would have the power, pursuant to the Act, to detain the ship or a court could impose a fine not exceeding \$100,000 upon summary conviction



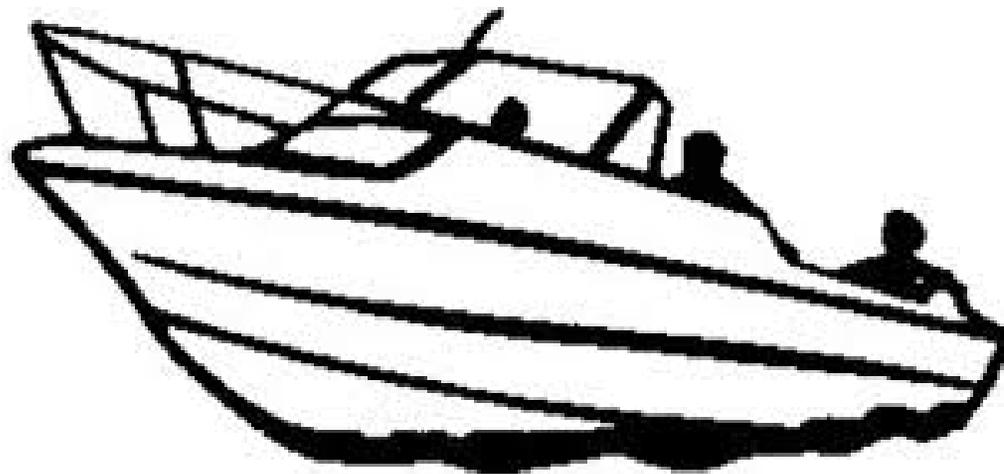
Mandatory Passenger Insurance: Passenger capacity

- “The coverage must be for an amount that is not less than \$250,000 multiplied by the passenger capacity of the ship.”
- What does this mean? Transport Canada has stated that operators are to determine the passenger capacity for the purposes of the Regulations, but the Regulation does not define how an operator must determine that capacity.
- All operators of vessels used to carry passengers, including fishing vessels, need to comply with the Canada Shipping Act, 2001 regulations on the carriage of passengers. In doing so, they need to determine the number of passengers that the vessel has been outfitted to carry (e.g. number of life jackets): according to Transport Canada, “this determination should inform their insurance policy requirements.”
- The carrier can make its own decision as to the maximum number of passengers for which it needs to insure.
- If a vessel certified by TC for 30 passengers NEVER carries more than 25 passengers, then the carrier need only carry liability insurance for 25 passengers.

The KIDS' INHERITANCE, a 8 passenger pleasure craft, is borrowed by said kids to go out on the lake with their friends.

Does it need proof of compulsory passenger insurance?

No – the vessel is not operated for a commercial or public purpose”



The MIDNIGHT MERLE, a fishing vessel, normally carries the master and 5 crew members.

Does it need proof of compulsory passenger insurance?

No – all people are on board for the business of that vessel.



The FAIRY BOAT, operated by False Creek Ferries, carries 2 crewmembers to operate, 1 ticket-taker, and up to 12 tourists.

Does the FAIRY BOAT need proof of compulsory passenger insurance?

Yes – operated for commercial purposes

For how many passengers?

12



The LOWER BACK INJURY, a raft fitting 2 crewmembers and 10 passengers, is used for white water rafting

Does it need proof of compulsory passenger insurance?

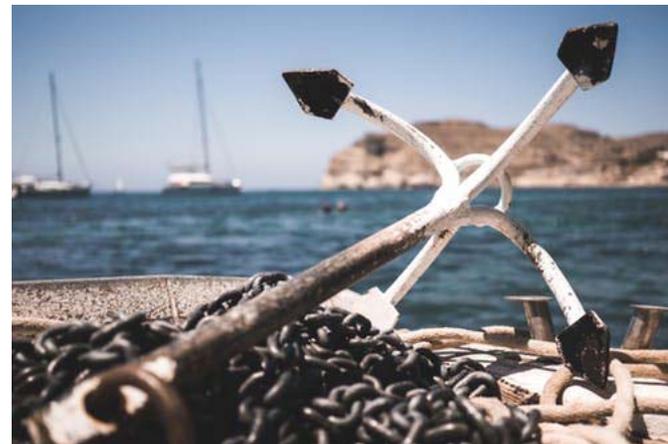
No – adventure tourism exception.



A fishing lodge operates out of a vessel, the CODFATHER, permanently anchored for the summer season. There are 10 staff on board and 20 guests.

Does it need proof of compulsory passenger insurance?

No – there is “no carriage by water... of persons from one place in Canada to the same or another place in Canada”



Reel Therapy, a fishing lodge on Quadra Island, provides two person powered boats equipped for fishing to its guests. None of the powered boats are crewed - they are run by the guests.

Do the two person boats need proof of compulsory passenger insurance?

No



Reel Therapy also has 4 person Grady White fish boats available, each one of which is operated by a fishing guide provided by the lodge.

Do the 4 person boats need proof of compulsory passenger insurance?

Yes

For how many passengers?

3 for each boat



The BOLDT BOAT, a 300 passenger ship, operates a tourist cruise from Rockport, Ontario to Boldt Castle, in New York, returning to Rockport.

Does the BOLDT BOAT need proof of compulsory passenger insurance?

Yes – carriage is from one place in Canada to the same or another place in Canada, by way of a place outside Canada.

For how many passengers?

300



The MV TOM'S CRUISE, a 1,000 passenger cruise ship, departs Vancouver for Los Angeles, stopping in Seattle and San Francisco.

Does the vessel need proof of compulsory passenger insurance?

No – carriage is not from one place in Canada to the same or another place in Canada.



The MV TERRY'S CREWS, a dinner cruise boat, takes out 25 passengers at a time. The vessel is not formally certified by Transport Canada as a passenger carrying vessel because the people on board are deemed to be guests of the charterer.

Does the vessel need proof of compulsory passenger insurance?

Yes

For how many passengers?

25



The MV A STAINER ASTERN is certified by Transport Canada for 15 passengers but Andrew never allows more than 2 to be carried.

Does the vessel need proof of compulsory passenger insurance?

Yes

For how many passengers?

2



A real estate agent uses his own personal pleasure craft, the REELTOR, which fits 6 people, to show prospective buyers water access only property.



Does the vessel require compulsory passenger insurance?

- Yes

For how many passengers?

5

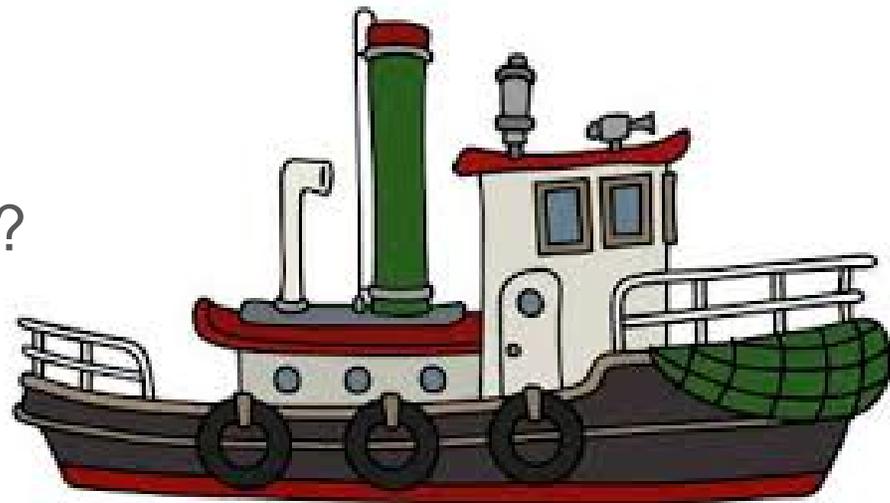
The tugboat TRUSTY carries a marine surveyor and two lawyers from the Port of Prince Rupert to that deep sea ship just off the coast.

Does the vessel need proof of compulsory passenger insurance?

Yes

For how many passengers?

3



The tug RUSTY, the TRUSTY's sistership, is occasionally used as a water taxi taking 1-3 Transport Canada inspectors from shore to deep sea ships.

1. Does the vessel need proof of compulsory passenger insurance?

Yes – only marine personnel employed or engaged in any capacity on board that ship are exempt.

For how many passengers?

3



A dozer boat, the BULLHOUSSE, which is used to move logs around to form log booms occasionally takes out one or two log buyers to see logs.



Does the vessel need proof of compulsory passenger insurance?

Yes

For how many passengers?

2

The MV USAIN BOAT, a 10 passenger supply vessel, quickly carries workers from St. John's harbour to another vessel within Canadian waters.

Does the vessel need proof of compulsory passenger insurance?

Yes

For how many passengers?

10

The CHAPELSKI I fishing vessel is sinking, and the fishing vessel BROMLEY I is nearby, picks up the distress messages, and picks up the CHAPELSKI I crewmembers and carries them back to shore.

Does the BROMLEY 1 need proof of compulsory passenger insurance?

No – exception for persons carried on board a ship “in pursuance of the obligation on the master to carry shipwrecked, distressed or other persons...”

The CHAPELSKI II fishing vessel is returning to port early and gives a ride to a crewmember from the BROMLEY I.

Does the CHAPELSKI II need proof of compulsory passenger insurance?

Yes – the BROMLEY I's crewmember is not on board the CHAPELSKI II for the business of that vessel.

For how many passengers?

1

The fishing vessel GET HOOKED has a fishery observer onboard to ensure compliance with fisheries regulations.

Does the vessel need proof of compulsory passenger insurance?

No – the fisheries observer is on board for the business of the boat



The FISHIZZLE, a fishing lodge, is being towed from Vancouver to Knight Inlet by the PUGBOAT, a tug. While the FISHIZZLE is being towed, ten plumbers and painters are working on board the FISHIZZLE.

Does the FISHIZZLE need proof of compulsory passenger insurance?

No - the ten people are on board for the business of the boat, to repair or maintain it for the purpose of its business.

The OCEAN XING, a cargo ship, will be starring in an upcoming documentary, and 4 members of the documentary film crew are along for the trip from Tianjin, China to Vancouver.

Does the vessel need proof of compulsory passenger insurance?

No – carriage is not from one place in Canada to the same or another place in Canada



They looked into the winter weather patterns in the North Pacific Ocean and the 4 member documentary crew decided to change topics. They are now going to track a shipment by tug/barge (the TUGLIFE and the YEAH BUOY) from Hay River to Tuktoyaktuk as part of a documentary on life in Northern Canada.

Does the tug need proof of compulsory passenger insurance?

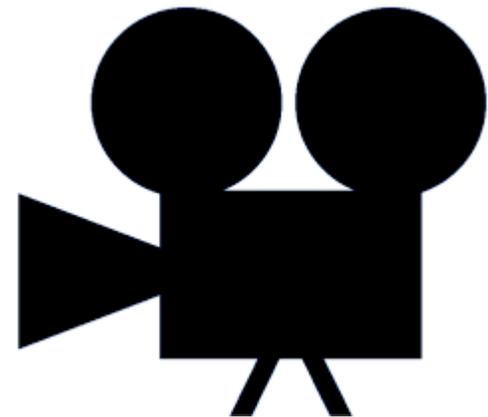
Yes – the film crew is not onboard for the business of the ship (which is transportation) but rather for the purpose of filming a documentary.

For how many passengers?

The Flash is filming a water battle, and hires the AQUACAM, a specially outfitted film vessel carrying 4 camera operators with custom mounted film equipment, to film scenes from the water.

Does the vessel need proof of compulsory passenger insurance?

No – the camera operators are on board for the business of the ship (which is to operate film equipment)



Regulations Amending the Navigation Safety Regulations (Automatic Identification Systems)

- Transport Canada is expanding AIS carriage requirements

- The expanded requirements will apply to every vessel on a voyage other than a sheltered waters voyage, if she is

- certified to carry more than 12 passengers; or
- eight metres or more in length and is carrying passengers.



- Why should you care?

- One more potential source of information following an incident or claim which you should take steps to make sure is preserved.

Wrecked, Abandoned or Hazardous Vessels Act
SC 2019 (Bill C- 64)



Wreck Removal: Current law

Navigation Protection Act R.S.C. 1985 c.N-22, s.15 and 16.

Section 15 requires the owner of an vessel which obstructs or impedes navigation or makes it more difficult to advise the Minister of Transport and remove it unless the Minister orders otherwise.

Section 16 allows the Minister to order the person in charge of an obstruction to remove it.

Canada Shipping Act, 2001 S.C. 2001, c. 26, s. 180

Section 180 allows the Minister of Fisheries and Oceans to order mitigation measures to minimize or prevent pollution including the removal of a wreck.

THE NEW -Wrecked, Abandoned or Hazardous Vessels Act: What does it do?

- implements the *Nairobi International Convention on the Removal of Wrecks, 2007*;
- requires owners of vessels of 300 gross tonnage and above, and unregistered vessels being towed, to maintain wreck-removal insurance or other financial security;
- prohibits vessel abandonment unless it is authorized by law or it is due to a maritime emergency;
- prohibits the leaving of a dilapidated vessel in the same place for more than 60 days without authorization;
- authorizes the Minister of Transport or the Minister of Fisheries and Oceans to order the removal of a dilapidated vessel left on any federal property;

Wrecked, Abandoned or Hazardous Vessels Act: **What else does it do?**

- authorizes the Minister of Fisheries and Oceans to take measures to prevent, mitigate or eliminate hazards posed by vessels or wrecks and to hold the owner liable;
- authorizes the Minister of Transport to take measures with respect to abandoned or dilapidated vessels and to hold the owner liable;
- establishes an administration and enforcement scheme, including administrative monetary penalties; and
- authorizes the Governor in Council to make regulations respecting such matters as excluding certain vessels from the application of the *Act*, setting fees and establishing requirements for salvage operations, the towing of vessels and the dismantlement or destruction of vessels.

Wrecked, Abandoned or Hazardous Vessels Act: Shipowners' Responsibilities

- Shipowners have an obligation to report any casualty that results in a wreck, and are responsible for the cost of locating, marking and removing the wreck, including the assessment of hazards, communicating notice to other mariners, and monitoring the effectiveness of remediation.
- If the shipowner fails to do so, the Government or its delegate will step in and recover its costs from the shipowner and/or its financial guarantee.
- The only defences available to a shipowner are where a wreck:
 - (a) resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character;
 - (b) was wholly caused by an act or omission done with intent to cause damage by a third party; or
 - (c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

Wrecked, Abandoned or Hazardous Vessels Act: Proof of Financial Responsibility, or Wreck Removal “Insurance”

- Vessels are required to have dedicated insurance available to respond to wreck removal, similar to blue card or the bunker certificate.
- Vessels must carry proof in the form of a specified certificate issued by Transport Canada (or other Government), and it must be renewed annually.
- The amount of the insurance must be dedicated to wreck removal and no other claims.



Wreck Removal “Insurance”: But is it “insurance”?

- Wreck removal “insurance” is a serious misnomer – it is really a financial guarantee.
- Only defences available to insurers are the same that a shipowner has (which are very limited) and, in addition, where the wreck was caused by the wilful misconduct of the registered owner – ie. scuttling.
- Any other policy breach (including unlawful operations, going outside the trading limit, etc.) cannot form the basis for a denial of coverage.
- Insolvency or bankruptcy of insured is not a defence nor is breach of policy terms.

Wrecked, Abandoned or Hazardous Vessels Act: Limitations

- In Canada, Owners cannot limit liability for wreck removal under the Limitation of Liability Convention.
- However, the insurer's liability for a wreck removal claim by a third party, and the amount of the financial guarantee required, can be limited to the vessel's limitation under the Limitation Convention.
- Although insurers can provide a financial guarantee for only the limitation amount, the shipowner cannot claim this limitation and remains personally liable for the full amount of the wreck removal costs.
- The property damage limitation for vessels 300 to 2000 GT's:
1,510,000 SDR = CA\$2,794,070.61 (as of 05/21/19)

Wrecked, Abandoned or Hazardous Vessels Act: Who enforces it?

6(1). The Minister may . . . enter into agreements or arrangements for carrying out the purposes of this Act and authorize any person, including a provincial government, a local authority and a government, council or other entity authorized to act on behalf of an Aboriginal group, with whom an agreement or arrangement is entered into to exercise the powers . . . or perform the duties or functions under this Act that are specified in the agreement or arrangement.

The Minister's authority could be outsourced to a third party, including for:

- determination of whether a wreck poses a hazard (which is the trigger for any wreck removal operation that ensues), and
- prescription of the wreck removal measures that the shipowner must undertake (which includes ensuring that those measures are proportionate to the hazard posed by the wreck).

Wrecked, Abandoned or Hazardous Vessels Act: Enforcement headaches

- There is potential for a multiplicity of third parties to have a role in the management of a wreck removal operation – ranging from provincial authorities to local governments to others – each with their own concerns with respect to the protection of the affected coastlines and waters. This could lead to uncoordinated and undisciplined decision-making with respect to how a wreck is to be removed.



- This exposes the shipowner and its insurer to huge financial liability because the owner is responsible not only for the costs of locating, marking and removing a wreck (as mandated under the Nairobi Convention), but also for the costs of determining whether a wreck poses a hazard (23(a)) and for any loss or damage caused by the resulting measures (23(b)).



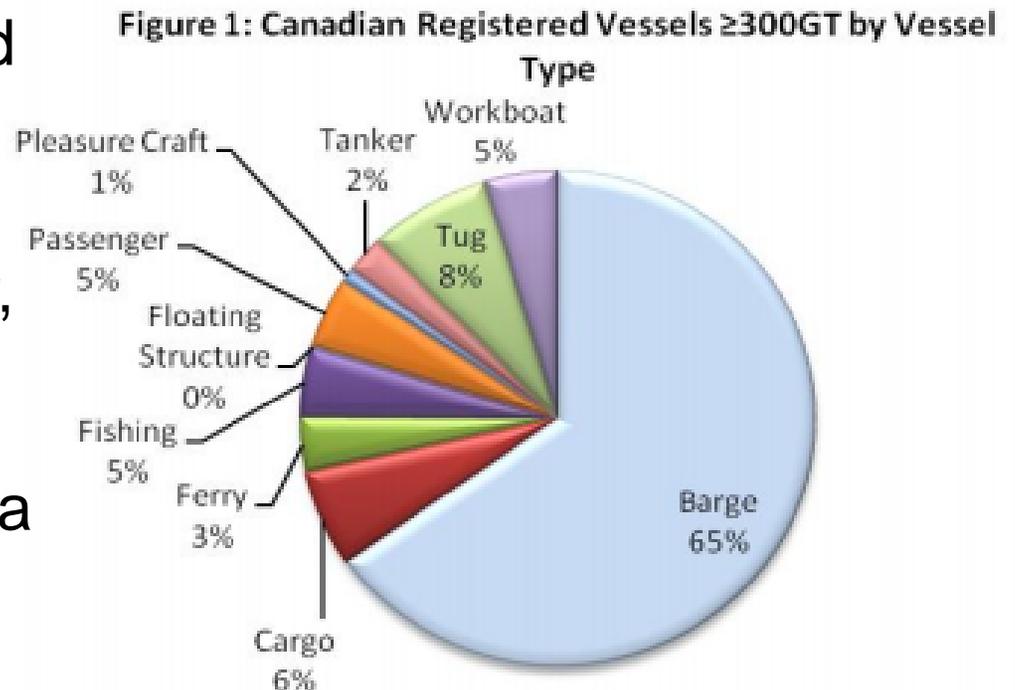
Wrecked, Abandoned or Hazardous Vessels Act: Tug and Tow

- Vessels over 300GT are required to be compliance with the Act and carry the certificate unless specifically exempted
- The master of a tug towing such a vessel is responsible for carrying the certificate or proof of an exemption on behalf of the tow.
- If the tow is a registered vessel, it will likely be aware of its responsibilities to have a wreck removal financial guarantee. However, many towed vessels are not registered vessels and may not be compliant with the Act.
- While the owner of the tow remains liable for wreck removal costs, failure on the part of the master of the tug to produce a certificate or proof that the tow has an exemption from the requirements is an offence, punishable by a fine of up to \$100,000.

Wrecked, Abandoned or Hazardous Vessels Act: What's the market?

In a recent publication, Transport Canada estimated that it would issue 2,788 certificates per year.

In its 2015 discussion paper, Transport Canada identified that approximately 1,500 registered vessels in Canada are 300 GT and above (approximately 3% of the registered fleet).



Source: Transport Canada

Wrecked, Abandoned or Hazardous Vessels Act: But what's the market, really?

- Given the restrictions on the defences available to the insurer, are many of these vessels going to be able to secure the financial guarantee at an affordable cost?
- What enforcement will Transport Canada really put into place? Will requests be made other than where there has been an incident?
- If the domestic insurer refuses to provide wreck removal “insurance” at a price that the owner can afford, he may simply go without.
- As a result, this regime is likely to create more scofflaws who either hide (possibly diverted) vessels along the coast line or simply go without.



Questions?

Thank you!

kaitlin.smiley@nortonrosefulbright.com

shelley.chapelski@nortonrosefulbright.com

The logo consists of a stylized, upward-pointing chevron shape in a gold color, positioned above the first letter of the text.

NORTON ROSE FULBRIGHT

Disclaimer

Norton Rose Fulbright US LLP, Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright Canada LLP and Norton Rose Fulbright South Africa Inc are separate legal entities and all of them are members of Norton Rose Fulbright Verein, a Swiss verein. Norton Rose Fulbright Verein helps coordinate the activities of the members but does not itself provide legal services to clients.

References to 'Norton Rose Fulbright', 'the law firm' and 'legal practice' are to one or more of the Norton Rose Fulbright members or to one of their respective affiliates (together 'Norton Rose Fulbright entity/entities'). No individual who is a member, partner, shareholder, director, employee or consultant of, in or to any Norton Rose Fulbright entity (whether or not such individual is described as a 'partner') accepts or assumes responsibility, or has any liability, to any person in respect of this communication. Any reference to a partner or director is to a member, employee or consultant with equivalent standing and qualifications of the relevant Norton Rose Fulbright entity.

The purpose of this communication is to provide general information of a legal nature. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.