

IOI Training Module:
Law of the Sea and Principled Ocean Governance
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Polluter Pays Principle

Liability and compensation for vessel-source pollution damage

Canada - Liability and Compensation for Ship-source Oil Pollution

(1) Marine Liability Act

Canadian domestic law on liability and compensation for ship-source oil spills has traditionally gone further than the international regime. Some legislative history is illuminating: Even before the 1969 *CLC* and 1971 *Fund Convention* came into force internationally Canada had enacted new domestic oil spill legislation in *Part XX* of the *Canada Shipping Act (CSA)*. The new *Part XX* was one of the first national comprehensive regimes for oil spill response, liability and compensation in the western world. The principal elements of *Part XX* were:

- Establishing the strict liability of owners to be responsible for costs and damages for a discharge of oil from all classes of ships – not just oil tankers.
- Allowing the shipowner, in certain circumstances, to limit his liability.
- Creating a new national fund, the *Maritime Pollution Claims Fund (MPCF)*, to be available for claims in excess of the shipowner's limit of liability.
- Giving the Minister of Transport the power to move or dispose of any ship and cargo discharging or likely to discharge oil.

This national regime existed in Canada between 1971 and 1989. During this period Canada was not part of the international 1969 *CLC* and 1971 *Fund Convention*. In 1989 (after the *Exxon Valdez* incident) Canada decided to increase its cover for spills from seagoing oil tankers by accepting the international regime, while modifying and continuing its domestic regime. Thus the *Ship-source Oil Pollution Fund (SOPF)* came into force on April 24, 1989, by amendments to the *CSA* and succeeded the *MPCF*.

The *Marine Liability Act*, S.C. 2001, c.6 came into force August 8, 2001. It applied, with some modifications, the 1992 *CLC* and the 1992 *Fund Convention* as part of Canadian law, and continued Canada's particular domestic regime previously found in the *CSA*.

Bill C-7, legislation to amend the Marine Liability Act, received Royal Assent on June 23, 2009. Currently in Canada statutory civil liability and compensation for ship-source oil pollution is provided for in *Part 6* of the *Marine Liability Act* (MLA). See: www.tc.gc.ca (click on: (1) “Modes of Transportation”, (2) “Marine Transportation”, (3) “Acts and Regulations” and (4) scroll down, click on “Marine Liability Act” and continue).

Whilst Canada is currently a State Party to the 1992 *CLC*, the 1992 *Fund Convention*, the *Bunkers Convention* and the *Supplementary Fund Convention*, it is Division 1 (“International Conventions”) of Part 6 of the MLA that gives these international conventions the force of law in Canada respecting the liability and compensation for ship-source oil pollution. Division 2 of Part 6 of the MLA provides for “Liability Not Covered By Division 1” and contains, for example, definitions of “oil”, “owner” and “ship” that differ from the (Convention) definitions applicable in Division 1 of Part 6.

In the MLA Part 7 continues Canada’s national fund, the *SOPF*. See: www.ssopfund.gc.ca.

The balance in the *SOPF* (an account in the accounts of Canada) as at March 31, 2009, was some \$ 380 million.)

The maximum aggregate liability of the *SOPF* for all claims from one oil spill for the fiscal year commencing April 1, 2010, is \$ 155 Million.

The liability of the *SOPF*, as a **fund of last resort**, is stipulated in section 101 of the MLA. Notable exceptions include drilling activities and floating storage units.

The *SOPF* can also be a **fund of first resort** for claimants, including the Crown. Under section 103 of the MLA any person (other than a response organization) may file a claim directly with the Administrator without going first to the shipowner or his insurer. The Administrator must investigate and assess the claim. To the extent he pays the claim the Administrator is then subrogated to the claimant’s rights and is required to take reasonable measures to recover the amount of compensation paid from the shipowner, his insurer, the international funds, or any other person.

Unlike the situation in other States Parties to the *1992 Fund Convention* (where individual corporations, etc., who have received in one calendar year more than 150 000 tonnes of persistent oil, must pay contributions directly to the International Fund) all Canadian contributions are paid out of the *SOPF*.

Finally, under section 107 of the MLA the *SOPF* may also be liable to a widely defined class of persons in the Canadian fishing industry for **claims for loss of income**, or loss of a source of food or animal skins, resulting from an oil spill from a ship and not recoverable under *Part 6*. Consequential economic loss would be recoverable under *Part 6*. This particular statutory provision would appear to provide sensitive relief for persons of this class who have suffered pure economic loss that may not be recoverable as ‘oil

pollution damage' under *Part 6*, given the existing non-statutory law of damages in Canada. However as noted elsewhere, the 1992 international regime has adopted a policy of accepting in principle claims for pure economic loss.

On an important point: In Canadian waters north of 60 degrees N shipowners are not required to have an arrangement with a certified response organization for oil spill response and clean-up. The *Canadian Coast Guard* has been given this responsibility and has been working on an Arctic Response Strategy. It ought to be clearly recognized that in the event of a significant oil spill in the Arctic, it would be challenging to deliver trained personnel and appropriate equipment on a timely basis from storage sites in southern Canada. In the meantime it has been reported that the USCG was expected to establish its first operating base inside the Arctic Circle near Barrow, Alaska, in 2008. Although initially seasonal and small, officials say it would be expanded later to help speed response to oil spills from tankers and to deal with cruise ships. It would be encouraging to have this well trained, properly resourced US Agency on scene in the American Arctic. Given the history of co-operation between the two coast guards there may now be a new opportunity in the Canadian Arctic.

(2) Arctic Waters Pollution Prevention Act

With current prospect of increased shipping in Arctic waters, it is useful to recall that in the 1970s, notwithstanding negative pressure from the shipping industry and shipping states, Canada was a serious leader in the movement to protect the marine environment. At the time Canada was virtually alone in its concern. After the Arctic transit of the US tanker *Manhattan* in 1969 that concern resulted in the enactment of the *Canadian Arctic Waters Pollution Prevention Act* (AWPPA) in 1970 (proclaimed in 1972). The AWPPA provided for a pollution prevention area in Canadian Arctic waters north of 60 degrees N. At the time it was debated whether Canadian legislation constituted a violation of or a development to traditional law. We now know in truth that this unilateral act by Canada had major law making effects at the international level. Canada's initiatives showed the world how strong environmental concern could be, and the need for fundamental changes to traditional law in order to effectively deal with environmental problems.

The Arctic Waters Pollution Prevention Act (AWPPA) and the Arctic Waters Pollution Prevention Regulations (AWPPR) made pursuant to the Act, include particular civil liability provisions for ship-source oil pollution in "arctic waters."

The AWPPA provides that in the event of an inconsistency between the AWPPA or AWPPR and the provisions of Part 6 of the MLA, the provisions of that Part prevail to the extent of the inconsistency.

Generally:

- Application of the civil liability provisions is up to 200 miles ('arctic waters') from the coast.

- Liability for depositing “waste” in arctic waters applies to both owner of the ship and owner of the cargo.
- Other persons are given priority over the Crown in the recovery of claims for damages and repair costs and expenses.
- The joint liability of the ship and cargo owners is ‘absolute’. It does not depend on proof of fault or negligence. Particularly, no statutory defences are available to them.
- Limitation periods for commencing proceedings to recover compensation are two years from the time the deposit of waste occurred or first occurred or ‘could reasonably be expected to have become known to those affected thereby’.
- The shipowner can be required to provide proof of financial responsibility in a form allowing direct recovery action against his insurer.
- Both shipowner and cargo owner may limit their liability.

Please note:

For information on the structure and workings of the International Oil Pollution Compensation Funds (1992 IOPC Funds) and the Civil Liability Convention (1992 CLC) see: www.iopcfund.org/ Just click on “About the IOPC Funds.” There will be found a wealth of very helpful information supporting my lecture. The Funds’ Annual Reports are available on this website. The website and information are available in Spanish, French and English. The IOPC Funds’ e-mail is info@iopcfund.org

Further information on civil liability and compensation for marine pollution (oil, HNS, etc.) is available from the International Maritime Organization (IMO). The IMO website is: www.imo.org/ (1) Click on “Legal”. (2) Click on “Liability and Compensation.” Information is available here about the 1992 IOPC Fund, the 1992 CLC, and the HNS Convention (including an update).

For information on the particular Canadian regime for civil liability and compensation for ship-source oil pollution, including the workings of Parts 6 and 7 of the Marine Liability Act, and the Ship-source Oil Pollution Fund (Canada’s national fund), see: www.ssopfund.gc.ca This website contains the SSOP Fund’s recent annual reports, and normally a good summary of how the international regime works. Participants are reminded that the Marine Liability Act has recently been amended by the Canadian Parliament. Consequently this website appears to be in the process of being updated.

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