

Ship Source Oil Pollution Fund

**Marine Liability Act (MLA), Part 6 –
Substantive Amendments and Primer
on Claims to the SOPF**

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Introduction

Before dealing with the recent amendments to the *Marine Liability Act (MLA)*, contained in Chapter 21 of the Statutes of Canada, 2009, it might be helpful to give a brief history of the Ship Source Oil Pollution Fund (SOPF). In setting out that history, it will become evident that the claims settlement functions of the SOPF have radically changed over the years. While the recent amendments of the MLA, which entered into force on January 2, 2010, have not yet been tested, a preliminary assessment of those amendments suggests that they will not make any significant change to the actual claims handling procedures currently followed by the SOPF.

History

Already in the late 1960s and early 1970s there were concerns, world wide, about the wellbeing of the global environment. With specific reference to the marine environment, incidents such as the grounding of the Liberian tanker, the *Torrey Canyon*, in 1967, off the south coast of the United Kingdom, demonstrated the physical damage that such incidents could cause. At the same time, the growing demand for oil had led to the design and construction of ever large tankers – the so called very large crude carriers (VLCC) and the ultra crude carriers (ULCC) – with their potential to do enormous damage to coastlines and coastal interests in the event of a spill.

Closer to home, the passage of the US tanker, the *Manhattan*, in the summer of 1969 through the Canadian Arctic attracted a great deal of public attention, leading to the adoption of the *Arctic Waters Pollution Prevention Act*. The legislation provoked much international protest, since it asserted Canadian jurisdiction up to 100 nautical miles off the Canadian coast north of the 60th parallel of north latitude, at a time when many states only recognized a three-mile territorial sea. The adoption of such legislation predated by

many years the negotiation and subsequent adoption of what was to become the 1982 *Convention of the Law of the Sea* with its special provisions for ice covered waters.¹

South of the 60th parallel things also changed. In February 1970, the *Arrow*, a laden tanker, grounded off the coast of Nova Scotia, causing significant damage. After a formal inquiry into the circumstances of the incident, Parliament adopted for the first time statutory rules to deal with ship source pollution, including rules governing liability and compensation for damage caused by such incidents in a new part, Part XX, to the *Canada Shipping Act*.² The new rules included the establishment of a fund, the *Maritime Pollutions Claims Fund (MPCF)*, eventually renamed as the *Ship-source Oil Pollution Fund (SOPF)*.

As already mentioned, at the time of the *Arrow* incident, Canada had no statutory rules governing liability and compensation for oil spills caused by ships. Those that suffered damage as a consequence of such spills, including public authorities which had incurred substantial costs for preventive measures, were obliged to rely on remedies provided by the common law, with all their pitfalls, to obtain compensation from the shipowner or other party responsible for the operation and management of the ship.

The *Torrey Canyon* had demonstrated similar shortcomings. In that case, however, matters were further complicated by the fact that the grounding of the ship had occurred in international waters and had caused damage in two jurisdictions – United Kingdom and France. All sorts of questions were unclear, notably which law applied and which courts had jurisdiction, not to mention uncertainties surrounding the whole issue of the right of a coastal state to intervene in the case of a stranded vessel located technically in international waters. The incident eventually led to the adoption of the **1969 Convention on Civil Liability Convention for Oil Pollution Damage** (Civil Liability Convention)

¹ See Article 234

² *Revised Statutes of Canada* (RSC), 1970, Ch. 27 (2nd supp.)

and the **1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage** (Fund Convention)³.

The MPCF was established under the new legislation as a special account in the Accounts of Canada. Initially it was funded by a levy on each ton of oil imported into Canada or moved in Canada by ship. Between 1973 and 1976 some \$36 million were collected and credited to the fund. In 1976 the government suspended payment of the levy, but the possibility of re-imposing it remains on the statute books to this day. Since suspension of payment of the levy, the fund has continued to grow by the monthly payments of interest credited by the Minister of Finance to the fund. The Fund now stands at some \$380 million⁴.

The new liability rules included in Part XX, although very similar to the rules contained in the Civil Liability Convention, were different in a number of significant respects. The reason for this divergence from the international rules is to be found in the fact that Canada was unhappy with the outcome of the 1969 Brussels Conference that adopted the 1969 Civil Liability Convention. At the start of the conference the Canadian delegation had clearly enunciated its expectations. Specifically Canada had recommended the adoption of a comprehensive regime dealing with all forms of pollution caused by ships, not just pollution caused by tanker spills of persistent oil. Further it believed strongly in some form of shared liability that would oblige cargo owners, who share in the profits, to share also in the liabilities inherent in the bulk carriage of oil⁵.

These somewhat novel notions were subsequently included in the new legislation. Canada had thus elected to take a unilateral approach to ship source pollution.

³ The 1969 Brussels Conference also adopted the *Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*, to deal with the rights of coastal states to intervene to take protective measures against foreign flag vessels on the high seas.

⁴ See Administrator's Annual Report 2008-2009, *Summary* (iii) and *Financial Statements* (Section 6).

⁵ See the opening statement of the Hon. Donald Jamieson, Minister of Transport and Head of the Canadian delegation to the 1969 Brussels Conference, Official Records, *International Legal Conference on Marine Pollution Damage*, 1969, at 84-85.

This lack of alignment with the international regime would prevent Canadian participation in the international regime for many years to come. For over a decade Canada effectively operated a parallel regime outside the international one. Eventually, however, as will be discussed later, it came to be recognized that a purely domestic regime was not as effective as the international regime in protecting claimants from the devastating consequences of major ship-source oil pollution disasters.

Turning to the Canadian fund (MPCF), set up under the new legislation, it is noteworthy that in its initial form it was essentially a fund of last resort. Claimants were obliged to exhaust their remedies against the owner or any other party that might be responsible for the incident. The Fund was only obliged to pay compensation to the extent that compensation was unavailable or insufficient from those primarily responsible for the spill. Only very few claims were dealt with by the Canadian fund in those initial years, given the broad scope of the definition of owner, which included not only the registered owner but also charterers, thus opening up a number of parties as targets for claims.

One feature that was novel in the Canadian regime, compared with its international counterpart, is that it also provided a special remedy for fishermen in respect of loss of income caused by pollution from ships. Such claims could be brought directly to the MPCF, early recognition of the fact that fishing communities are particularly hard hit in many of these incidents and often had no or inadequate means to seek redress.

The regime contained in Part XX of the CSA entered into force on June 30, 1971, thus predating the entry into force of the 1969 Civil Liability Convention by some four years and that of the 1971 Fund Convention by some eight year. It remained operational in its original form for the next 18 years. Canadian victims of oil pollution spills caused by tankers were confined to the remedies provided by the domestic regime. Fortunately in those early years Canada had relatively few tanker incidents.

Two significant tanker spills however are worth mentioning. In 1979 the British tanker, the *Kurdistan*, broke in two off the coast of Nova Scotia, causing extensive oil pollution damage. It took five years of protracted legal proceedings to reach a settlement of all the claims produced by the incident. Some nine years later, in 1988, the US registered tank barge, the *Nestucca*, was punctured by the tug that was towing it in US waters off the coast of Oregon. Some of the oil released in the subsequent spill found its way into Canadian waters resulting in costly cleanup measures by public authorities in Canada. In this case, too, it took protracted and expensive litigation in the United States to achieve settlement of all claims.⁶

In the light of these incidents, as well as other incidents world wide, Canadian authorities were beginning to see the disadvantages of a purely domestic regime which precluded Canadian claimants from presenting their claims to the well functioning international regime in those instances where that regime would otherwise apply. It was also becoming obvious that certain features of the Canadian regime could not be made to work. Direct cargo owner liability, especially with such a comprehensive definition of pollutants contained in the legislation, proved to be unenforceable, perhaps for the same reasons that efforts in 1984 to adopt an international scheme incorporating such a feature had failed at the International Maritime Organization (IMO)⁷.

More significantly, it had proved impossible to bring into force the provisions of the Canadian regime that imposed compulsory insurance with direct access against the insurer. International insurance interests (International Group of P&I Clubs) had made it plain to Canadian authorities that they would not provide the kind of insurance cover in

⁶ See Ship-source Oil-Pollution Fund, Annual Report 1991-1992, paragraph 9.5.

⁷ In 1984 a first attempt was made to adopt a convention on liability and compensation for carriage by sea of hazardous and noxious substances. The draft convention prepared by the Legal Committee of the IMO, included cargo owner liability. Efforts to adopt a convention only succeeded some 12 years later when, in 1996, a new text, minus this feature, was proposed to a diplomatic conference under the auspices of the IMO. A diplomatic conference was held, April 26 to 30, 2010, at the IMO Headquarters, which adopted a protocol to the HNS Convention, aimed at eliminating the final obstacles to implementation of the convention. For a commentary on the failure of the initial Canadian regime, see A.H.E. Popp QC, *Legal Aspects of International Oil Spills in the Canada/U.S. Context*, Canada-United States Law Journal, Case Western Reserve University School of Law, Volume Eighteen, 1992, 309, at 316-317.

Canada that included direct access against insurers so long as Canada remained outside the international regime. In Canada therefore the traditional marine insurance rules, including the “pay to be paid” rule, continued to apply.

In practical terms it had become obvious that while, on the face of it, the Canadian regime was comprehensive – it applied to all ships and was not restricted to tankers and applied to a wide definition of pollutants – effectively it only applied to oil pollution and was only enforceable against the shipowner or other party responsible for the ship⁸. It was concluded that the risks of a major tanker incident in waters under Canadian jurisdiction without the benefit of the added coverage of the international regime were too great.

The possibility of a North American regime was ruled out by the adoption in the United States of the *Oil Pollution Act* of 1990 (OPA 90) in the wake of the 1989 *Exxon Valdez* incident. That legislation does make provision for the payment of foreign claims, but only on the basis that American claimants receive reciprocal treatment under the laws of the foreign jurisdiction⁹. Another obstacle to a continental North American regime was the fact that OPA 90 did not make the remedies it provided exclusive but, instead, specifically allowed individual U.S states to add on their own statutory remedies for oil spills caused by ships. Negotiating a Canada / U.S regime under these circumstances would have proved enormously difficult and was consequently never seriously considered.

In the late 1980s, Canadian authorities concluded that the best way forward for Canada was to adopt the international regime. These conclusions were translated into amendments to Part XX of the CSA. On April 24, 1989, those amendments entered into

⁸*Id.* at 316, footnote 28.

⁹ *Id.* at 320-322.

force, allowing Canada to accede to the 1969 Civil Liability Convention and the 1971 Fund Convention¹⁰.

The 1989 amendments, besides renaming the Canadian Fund as the *Ship Source Oil Pollution Fund* (SOPF), also changed the character of the Fund. While the fund kept its “last resort” function, a new feature was introduced. Claimants, while retaining their rights against the shipowner, were given the additional option of submitting their claims to the Administrator for investigation and payment, the so-called “first resort” function. The special remedy for fishermen, previously mentioned, was retained. Broadly speaking, the new regime focused only on oil pollution damage. With Canadian accession to the international regime, it was possible at last to have viable compulsory insurance requirements in Canada with direct access against the insurer in the case of tanker spills.

Further changes to the Canadian regime were made in 2001 with the adoption of the *Marine Liability Act* (MLA).¹¹ The liability and compensation provisions, including the provisions governing the SOPF, were moved from the *Canada Shipping Act* to Part 6 of the MLA. The adoption of the new Act was preceded in 1999 by Canadian denunciation of the 1969 Civil Liability Convention and 1971 Fund Convention and Canadian accession to the 1992 Protocols to these two conventions¹².

On January 2, 2010, further amendments came into forces that essentially rewrite Part 6 of the Act. Although these amendments make some changes to the provision governing the SOPF, none of them make material changes to its claims-handling procedure. These amendments have enabled Canada to accede to the *Protocol of 2003* to the 1992 Fund Convention (Supplementary Fund) and the *2001 Convention on Civil Liability for Bunker Oil Pollution* (Bunkers Convention), both of which entered into force for Canada as of January 2, 2010.

¹⁰ RSC, 1985, 3rd Supplement, Ch.6.

¹¹ Statutes of Canada, 2001, Ch. 6.

¹² Canada became a party to the Protocols on May 29, 1999.

Substantive Amendments

As already mentioned, the recently adopted amendments to the MLA contain a complete rewrite of Part 6 of the Act. In effect, claims for oil pollution damage caused by ships can now be divided up according to whether they are governed by the **Convention on Civil Liability for Oil Pollution Damage, 1992**, (1992 Civil Liability Convention), the **Convention on Civil Liability for Bunker Oil Pollution Damage** (Bunker Convention) or neither of these international instruments, in which case they will be governed by the liability rules set out in Division 2 of Part 6. The texts of the conventions have been conveniently appended to the Act¹³. The effect of this is that, in contrast to treatment of claims under Part 6 before the recent amendments, disputes regarding claims will now be resolved by reference to the actual text treaties, where they apply. Only claims not governed by either of these conventions will be subject to rules made in Canada. An examination of the “made in Canada” rules will show that they closely resemble the provisions set out in the old Act before amendment¹⁴.

By appending these conventions to the legislation, the recent amendments continue a trend started some years ago, to schedule the conventions to the implementing legislation rather than relying on Canadian paraphrases of those instruments¹⁵. This will hopefully contribute to greater uniformity in the application of international conventions.

While a regime of compulsory insurance has been in place in Canada since the Civil Liability Convention entered into force for Canada, that regime was confined to ships governed by that convention, namely, seagoing vessels constructed or adapted for the carriage of oil in bulk as cargo where they are carrying more than 2,000 tons of oil. The

¹³ See Schedule 5 for the Civil Liability Convention and Schedule 8 for the Bunkers Convention.

¹⁴ Compare the scheme set out in s. 51, Chapter 6, Statutes of Canada, 2001, and s. 77, Chapter 21, Statutes of Canada, 2009.

¹⁵ Schedules 1, 2, 3 and 4 of the Act contain, respectively, the **Convention on Limitation of Liability for Maritime Claims, 1996**, the **Athens Convention relating to the Carriage of Passengers and their Luggage**, the **Hague-Visby Rules** and the **Hamburg Rules**.

advantage of Canadian accession to the Bunkers Convention is that a regime of compulsory insurance will now also be in force for spills governed by that convention¹⁶. In both instances the insurance must be of a kind that allows any claim for pollution damage to be made directly against the insurer¹⁷.

It might be appropriate to mention another feature of the Canadian regime, which is somewhat unique but has proved to be very effective, namely the power of the Administrator to apply for the arrest of a ship suspected of having caused a spill. This power of arrest may be triggered even before a claim has been filed and guarantees that funds will be available to pay established claims in those instances where the ship plans to leave the jurisdiction. In the rewrite of Part 6, this feature has been retained.

The amendments have made one other important change to the regime of liability and compensation for oil pollution damage caused by ships, they implement the **International Oil Pollution Compensation Supplementary Fund, 2003** (Supplementary Fund), established under the Supplementary Fund Protocol. This means that for tanker spills that affect Canada, approximately 750,000,000 SDR (\$1,148,362,500.00) is available to compensate established claims. That amount would include any amount of compensation paid by the shipowner or its insurer. Where compensation from these two sources is insufficient to pay established claims, the SOPF would be available for a further \$155,318.00 per incident.

Claims Handling

It is not intended to give a detailed account of the claims handling practices of the SOPF, but merely to point to some basic, self evident facts. Claims for oil pollution damage or costs and expenses for clean up or other response measures may reach the SOPF in one of two ways.

¹⁶ In the case of the Civil Liability Convention, see Article VII, in the case of the Bunkers Convention see Article 7.

¹⁷ See Article VII, paragraph 8, of the Civil Liability Convention, Article 7, paragraph 10.

The first way might be characterized as the “classical” way as a consequence of making a claim against the party primarily liable for ship source oil pollution damage, namely the owner of the ship. This is the “last resort” function of the SOPF, mentioned earlier. If the amount of compensation available from the shipowner or other applicable source of compensation is for any reason inadequate, the SOPF will cover the balance¹⁸. Accordingly, in any litigation arising out of such a claim, the SOPF will generally be joined¹⁹.

In fact this method of asserting claims against the SOPF is infrequently used²⁰. An obvious reason for this is that where claims arising out of an oil pollution incident involve a responsible shipowner, backed by good insurance, and the amount claimed is within the limit of liability of the shipowner, those claims will generally be settled and aside from some initial notification of the incident, there may be no further involvement of the SOPF.

The bulk of the SOPF’s claims work however arises out of the second way of making claims, the “first resort” function, discussed earlier. Section 103 of the Act (section 85 of the Act before the entry into force of the recent amendments), allows a claimant to file a claim with the Administrator of the SOPF. This method of proceeding is without prejudice to rights that the claimant may have against the owner of the ship. The Administrator under the terms of the legislation is then bound to investigate the claim and for the purposes of doing so has the powers of a commissioner under Part 1 of the *Inquiries Act*²¹. The claimant does not have to prove that the incident giving rise to his claim was caused by a ship, but the Administrator is obliged to dismiss the claim if he is

¹⁸ Section 101 of the *Marine Liability Act*, as amended, sets out the circumstances in which the SOPF is made liable for oil pollution damage and costs and expenses for response measures.

¹⁹ See section 109, which specifies that where a claimant commences proceedings against the owner of a ship, the document commencing the proceedings must be served on the Administrator who becomes a party by statute and may take appropriate action, including participation in the any settlement of the claim.

²⁰ As of the date of this paper, the SOPF is not involved in any active litigation arising out of a claim brought against the shipowner.

²¹ Ss. 104(2)

satisfied on the evidence that the incident was not caused by a ship²². The SOPF is thus made liable for so-called mystery spills²³.

The actual submission of a claim is a relatively straightforward procedure. The Administrator will require the same level of documentary proof as the shipowner or its insurer would require. It is also important to note the time limits prescribed in the legislation for the presentation of claims. Where a claimant takes advantage of the “first resort” functions, the time limits prescribed are shorter than the generally applicable prescription periods set out in the conventions and in the Act²⁴.

After investigating a claim, the Administrator will make an offer of compensation to the extent that he finds the claim to have been established²⁵. Most of the claims dealt with by the Administrator under this procedure relate to costs and expenses incurred by public authorities – Canadian Coast Guard, harbor and port authorities – for clean up costs and other response measures. Most of these cases revolve around the issue whether the measures taken and the costs and expenses incurred were reasonable, since that is the guiding principle of both the international conventions implemented by Part 6 of the Act and the domestic rules put in place for those incidents not governed by the international conventions²⁶.

²² Ss 105(4)

²³ The International Oil Pollution Compensation Fund (IOPC Fund) is also liable for mystery spills but the onus is on the claimant to show that the incident giving rise to the claim involved one or more ships, see Article 4.2.(b), Fund Convention.

²⁴ See Article VII of the 1992 Civil Liability Convention and Article 8 of the Bunkers Convention, which impose a time limit of three years from the date when the damage occurred or six years from the date of the incident. This contrasts with the two years and five years specified in ss. 103(2) of the Act for claims submitted directly to the SOPF.

²⁵ Ss 105 (3) set out the factors that the Administrator may consider, most notably, whether the claimant was wholly or partially at fault in causing the damage.

²⁶ See, for example, the definition of preventive measures in Article I, paragraph 7 of the 1992 Civil Liability Act and Article 1, paragraph 7, of the Bunkers Convention. Likewise, paragraph 77(1)(b) stipulates that the measures taken and the costs and expenses incurred must be reasonable.

A final offer of compensation can only be set aside on appeal to the Federal Court within 60 days of notification of an offer of compensation or disallowance of the claim²⁷. Where an offer of compensation has been accepted, the Administrator is under a duty to take “all reasonable measures” to recover the amount from the shipowner or any other source of compensation, such as the international funds, where available²⁸.

As already mentioned, most of the claims that are submitted directly to the Administrator under the above procedure relate to costs and expenses incurred by public or quasi public authorities for clean up or other preventive measures in relation to wrecked or abandoned vessels. The rate of recovery of compensation paid out in such instances is poor, since in most cases the owners have disappeared or have no assets. Another issue that is frequently examined in these cases is whether the measures taken are truly pollution prevention measures or in fact wreck removal measures. The regime set up under Part 6 of the Act does not apply to wreck removal and such costs are only recoverable to the extent that they can truly be characterized as pollution prevention measures.

Because the Canadian regime set out in Part 6 of the Act is closely aligned with the international regime, exemplified by the international conventions implemented by that part, the claims policy of the SOPF closely follows that of the IOPC Fund, where applicable. Many of those policies would also be pertinent in non-tanker spills. For example, the issue of whether a measure is a pollution prevention measure or in fact wreck removal is often determined on the basis of the primary purpose test set out in the IOPC Fund Manual in relation to salvage operations.

So far Part 6 has come under very little judicial scrutiny so it is a matter of some speculation to what extent Canadian courts would endorse the claims policy of the IOPC Fund. While it is safe to assume that Canadian courts would probably go along with

²⁷ S. 106. The appeal procedure has only been invoked once and that one turned on a technicality, resulting in the claim being sent back to the Administrator for a reassessment, so there is no jurisprudence so far as to the distinction between these two grounds of appeal.

²⁸ Paragraph 106(3)(d).

much of that policy, as did, for example, the Scottish court in the *Braer* incident and the French courts in the *Erika* incident²⁹, there is room to question whether they would follow the international fund in some of its policies. For example, it is a matter of some conjecture whether Canadian courts would go as far as the IOPC Fund, in its treatment of pure economic loss³⁰.

Another area of speculation relates to the notion of environmental damage. In relation to claims governed by the 1992 Civil Liability Convention and the 2001 Bunkers Convention specific language has been included to address this matter in the definition of pollution damage by restricting compensation for impairment of the environment to “costs of reasonable measures of reinstatement actually undertaken or to be undertaken”³¹. The same language has been included in section 75 the Act governing claims that do not fall under the conventions. The issue is whether these restrictions are still in step with the evolving notion of environmental damage in many jurisdictions.

The SOPF has not yet had to grapple with any of these issues. Most of the claims submitted to it, as already mentioned, relate to costs and expenses incurred in respect of clean up and other preventive measures, where the main issue has been whether they

²⁹ In many of the decisions handed down by the French courts, the judges were keen to point out that they were not bound by the claims policies of the IOPC Fund, but then proceeded to endorse the assessments made by the Fund. In those few cases where they did disagree with the IOPC Fund, it was more on the basis of the facts than on the application of its policies.

³⁰ The IOPC Fund Claims Manual, December 2008 Edition says in paragraph 1.4.9 and 10 the following about pure economic loss:

« 1.4.9 Under certain circumstances compensation is also payable for loss of earnings caused by oil pollution suffered by persons whose property has not been polluted (pure economic loss). For example, fishermen whose nets have not been contaminated may nevertheless be prevented from fishing because the area of the sea where they normally fish is polluted and they cannot fish elsewhere. Similarly, an owner of a hotel or a restaurant located close to a contaminated public beach may suffer losses because the number of guests falls during the period of the pollution.

1.4.10 Compensation may also be payable for the costs of reasonable measures, such as marketing campaigns, which are intended to prevent or reduce economic losses by countering the negative effects which can result from a major pollution incident. »

³¹ See the Civil Liability Convention and the Bunkers Convention, respectively, Article I, paragraph 6 and Article 1, paragraph 9

were reasonable or whether the measure was in fact something else dressed up as a preventive measure.

Conclusions

The recent amendments to the MLA have resulted in the implementation in Canada of a number of important international instruments governing liability and compensation for ship-source oil pollution. The amount of compensation available for tanker spills has been substantially increased. Compulsory insurance has been expanded to include bunker spills. The scheduling of actual treaties will contribute to the uniform application of those treaties. It is not anticipated that claims handling of the SOPF will be significantly changed by the amendments.