

# The Application of International Pollution Conventions in Canadian Waters

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Challenges for International Shipping in the Year of the Seafarer  
Vancouver, BC - November 18, 2010

Canada

This presentation will be confined to discussing the application of **international conventions** applicable in Canadian waters that relate to **liability and compensation** for ship-source pollution.

First, it is intended to provide a **brief history** on the implementation of those conventions in Canadian law.

Then, certain features of those conventions will be highlighted, specifically those provisions that relate to spill response and pure economic loss.

Canada

Until the early 1970s, there was little statutory law in Canada, relating to liability and compensation for ship-source oil pollution in waters under Canadian jurisdiction.

The *Torry Canyon* incident off the south west coast of the United Kingdom in 1967 and the *Arrow* incident off the coast of Nova Scotia in 1970 gave impetus for the development of some statutory rules governing liability and compensation for pollution caused by ships.

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Internationally the *Convention on Civil Liability for Oil Pollution Damage* was adopted in 1969 (CLC), to be followed two years later by the *Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* ( 1971 Fund Convention).

These conventions were limited in their scope, being confined to compensation for pollution damage caused by tankers carrying persistent oil in bulk as cargo.

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Canada's response to the *Arrow* incident was the adoption in 1971 of more comprehensive legislation, at least on the face of it, embodied in a new part to the prevailing maritime legislation, namely the *Canada Shipping Act (CSA)* which came to be known as *Part XX*.

This legislation was inspired by the CLC, but was not restricted to oil pollution damage. The legislation included the *establishment of a fund* to provide compensation, where full compensation could not be obtained from those primarily responsible (*Maritime Pollution Claims Fund*).

Canada

Because of the *lack of alignment* between the Canadian regime and the international regime, Canada was initially not a participant in the international regime set up under the 1969 CLC and 1971 Fund Convention.

*Canada joined the international regime in 1989*. The amendments to the CSA in 1989, enabling Canada to join the international regime, renamed the Canadian fund the *Ship Source Oil Pollution Fund (SOPF)*.

Canada

In 1992 the international regime was amended to increase substantially the amount of compensation available for tanker spills, extending the regime also to empty tankers in certain circumstances.

These amendments were incorporated into Canadian legislation in 2001 in *Part 6 of the Marine Liability Act (MLA)*.

In 2009 the MLA was further amended to give effect in Canada to the 2003 Protocol to 1992 CLC and *Fund Convention* and to the *2001 Bunkers Convention*.

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One of the most important features of the *2001 Bunkers Convention* relates to the requirement of registered owners of ships with a gross tonnage greater than 1000 to have *evidence of insurance with direct access by claimants against the insurer (Article 7)*.

Canada

Canada is also a state party to the *1996 Convention on Limitation of Liability for Maritime Claims (LLMC)*. That convention provides for limitation of liability for maritime claims, including claims for bunker spills regulated by the *Bunkers Convention*.

Canada

Transport Canada has recently published a discussion paper recommending the implementation of the *1996 HNS Convention*, as amended by a protocol adopted in April 2010

Canada

Compensation for damage caused by oil pollution from ships under the Canadian regime, as set out in the MLA, may come from several sources:

- **Shipowners** who remain the primary responsible party for oil pollution caused by their ships
- The **IOPC Funds**, to the extent that compensation from the shipowner is inadequate in the case of spills involving tankers
- **SOPF**, where the compensation from the IOPC Funds is inadequate or in the case of spills not involving tankers carrying persistent oil

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The total amount of compensation for a spill would be:

- In the case of a tanker spill covered by the IOPC Funds: **\$1,303,680,924**.
- In the case of all other spills: **\$155,318,424**

Canada

Claimants in Canada may also bring their claims for compensation for ship-source oil pollution **directly to the SOPF** for assessment and payment, subject to the right of the SOPF to seek recovery of what it has paid out in claims from others primarily liable (shipowner, IOPC Funds, where applicable).

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The **SOPF** is the primary liable party in those instances where the evidence points to a ship source for the oil pollution, but the SOPF cannot identify the specific ship (**"mystery spills"**).

Canada

The Canadian regime, based largely on the international regime, includes the following essential elements:

- The **owner** of the ship remains primarily **liable** for oil pollution caused by its ship
- Liability is not subject to **proof of fault or negligence** and can only be avoided on the basis of few, limited defenses (strict liability)

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- The owner must have **insurance** (or other guarantee) that gives claimants direct access to insurer (or guarantor) in those instances covered by the international conventions (*CLC, Bunkers Convention*)
- In the event that the owner is **incapable of providing adequate compensation**, claimants have access to the IOPC Funds, where a tanker is involved carrying persistent oil; the SOPF in all other cases.

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The notion of pollution damage consists of two elements (see [Article 1.6](#), CLC):

- Loss or damage outside the ship by [contamination resulting from the escape or discharge of oil](#)
- Cost of preventive measures

Canada

Preventive measures are defined in [Article 1.7](#) as any [reasonable measure](#) taken by any person after an incident has occurred to prevent or minimize pollution damage.

Canada

The notion of preventive measures, as set out in the [IOPC Fund Manual](#), would include:

- Clean up measures
- Measures to prevent or minimize pollution damage
- Costs associated with capture, cleaning and rehabilitation of wildlife

The test of [reasonableness](#) applies in all instances, both the measure and the cost must be reasonable.

Canada

The IOPC Funds also recognizes claims for [pure economic loss](#) under certain circumstances, notably:

- Loss of profit in the [tourism sector](#) caused by contamination of beaches
- Losses of earnings in the [fisheries, mariculture and fish processing sectors](#)
- Costs of measures to prevent [pure economic loss](#)

Canada

In the absence of case law interpreting the scope of the international conventions and Canadian legislation based on them (MLA), there is room for speculation to what extent claims for pure economic loss would be recognized in Canada.

Ever since the adoption of a statutory regime in Canada in the 1970s for ship-source pollution, specific provision has been included for claims for loss of income in the fisheries sector in recognition that those claims may not be covered under common law principles.

Canada

Canada has moved from a unilateral scheme, adopted in the wake of the *Arrow* incident, to a scheme fully integrated with the international regime, as reflected in the *1992 CLC, Fund Convention and Bunkers Convention*.

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