



**Financial Vulnerability Assessment:  
Who Would Pay for Oil Tanker Spills  
Associated with the Northern Gateway Pipeline?**

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## EXECUTIVE SUMMARY

Enbridge Inc.'s proposed "Northern Gateway Pipeline" would create the annual movement of approximately 225 massive crude oil supertankers through the narrow Douglas Channel, across the Inside Passage, and through Hecate Strait – which is known as the fourth most dangerous body of water in the world.<sup>1</sup> These tankers would range in size from 80,000 dead weight tons to tankers larger than the *Exxon Valdez*. Oil spills are inevitable whenever oil is transported over water and this risk is elevated given the volume of oil and number of ships Enbridge Inc. plans on having navigate the treacherous waters of the North Coast of British Columbia. The financial preparedness for a major marine oil spill in British Columbia is therefore one of the most important environmental issues facing B.C. today. The central issue is this: if there is a catastrophic oil tanker spill, who will pay: Enbridge Inc., other companies, taxpayers, or Mother Nature?

The issue has two main aspects: funding to pay for response to marine spills (clean up costs) and compensation for environmental and property damage. After researching the statutory scheme in place, it has been concluded that the funding and compensation scheme that exists under Canadian law would be remarkably inadequate in the event of a catastrophic oil spill. Compensation would be inadequate for the people living along the coast of B.C. whose livelihoods, cultures, health, property and environment would inevitably be devastated. The funding available for clean up costs and restoring the environment would also be inadequate; Mother Nature and Canadian taxpayers would pay for these shortfalls. Below is a summary of the findings, followed by a more extensive discussion.

### **I. Compensation for Oil Pollution Damage – a four-tiered approach**

In Canada, compensation for oil pollution damage is primarily governed by the *Marine Liability Act*. The current version of the *Marine Liability Act* came into force on January 2, 2010.

Through the operation of various provisions of the *Marine Liability Act* several international conventions are incorporated into Canadian domestic law. These treaties limit (cap) the liability of ship owners and set the amounts available for compensation, clean-up and natural resource damage.

The Protocol of 1992 to amend the *International Convention on Civil Liability for Oil Pollution Damage, 1992* ("Civil Liability Convention"), came into force in Canada on

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<sup>1</sup> Canada, Environment Canada. *Marine weather hazards manual: a guide to local forecasts and condition - West Coast*. (Vancouver, B.C. : Environment Canada, 1999) at p. 109.

May 29, 1999.<sup>2</sup> The *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution, 1992* (“1992 Fund”), also came into force in Canada on May 29, 1999.<sup>3</sup> The 1992 versions of these conventions increased the maximum amount of compensation available under in Canada while making it much more difficult, if not “practically impossible”, to claim compensation beyond those maximums.<sup>4</sup>

On January 2, 2010 the *International Oil Pollution Compensation Supplementary Fund, 2003* (“Supplementary Fund”) came into force in Canada.<sup>5</sup>

Additionally, Canada also has its own domestic oil pollution compensation fund, the *Ship-Source Oil Pollution Fund* (“SOP Fund”).

Essentially, the present scheme for compensation for oil pollution damage operates as follows<sup>6</sup>:

- **Tier 1:** The *Civil Liability Convention* imposes strict liability<sup>7</sup> for oil pollution damage on the ship owner up to a maximum amount. The limit on liability of ship owners of ships that are 5,000 units of tonnage or less would be 4,510,000 SDR<sup>8</sup> or approximately \$7,035,000 CAN. For ships over 5,000 units of tonnage the ship owners would be liable for an additional 631 SDR, or approximately \$984 CAN, for

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<sup>2</sup> Canada ratified the *International Convention on Civil Liability for Oil Pollution Damage, 1992*, as concluded at London on November 27, 1992, Article V of which was amended by the Resolution adopted by the Legal Committee of the International Maritime Organization on October 18, 2000. The *Civil Liability Convention* is incorporated into Canadian law through the *Marine Liability Act*.

<sup>3</sup> Canada ratified the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution, 1992*, as concluded at London on November 27, 1992, Article 4 of which was amended by the Resolution adopted by the Legal Committee of the International Maritime Organization on October 18, 2000.

<sup>4</sup> Aengus RM Fogarty, *Financial Preparedness for a Major Marine Spill in British Columbia* (Prepared for the Ministry of Environment: September 1995) at iii [*Financial Preparedness in BC*]; EnviroEmerg Consulting Services, *Major Marine Vessel Casualty Risk and Response Preparedness in British Columbia*, (Cowichan Bay: EnviroEmerg Consulting Services, July 2008) at 97, states the “new test makes it practically impossible to break the ship owner’s right to limit liability” [*Major Marine Vessel Risk in BC*].

<sup>5</sup> Canada ratified the *International Oil Pollution Compensation Supplementary Fund, 2003*, as established by Article 2 of the Protocol of 2003 to the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992*, concluded at London on May 16, 2003.

<sup>6</sup> For a succinct summary of the limits of liability under and operation of the International Oil Pollution Compensation Funds (the first three tiers) see <http://www.iopcfund.org/SDR.htm> accessed June 15, 2010.

<sup>7</sup> International Oil Pollution Compensation Funds, *Brochure: April 2009 Edition*, [IOPC: *Brochure*], accessed at <http://www.iopcfund.org/npdf/Brochure%202006.pdf>; Edgar Gold, Alder Chircop, Hugh Kindred, *Maritime Law*, (Toronto: Irwin Law, 2003) at 179 [Gold: “Maritime Law”]; Secretariat of the International Oil Pollution Compensation Funds, *The International Regime for Compensation for Oil Pollution Damage*, June 2010, at 2 [*International Regime for Compensation from Oil Pollution*], accessed at <http://www.iopcfund.org/npdf/genE.pdf>.

<sup>8</sup> Special Drawing Rights, as defined by the International Monetary Fund. See the full discussion in the main body of paper below.

every additional unit of tonnage over 5,000 units of tonnage up to a maximum amount of 89,770,000 SDR or approximately \$140,000,000 CND (i.e. 140 million CAN).<sup>9</sup>

- **Tier 2:** The 1992 Fund provides for additional compensation which is paid by the International Oil Pollution Compensation Fund up to a maximum of 203,000,000 SDR or approximately \$317,930,000 CAN.<sup>10</sup> However, this amount is inclusive of the Tier 1 compensation paid by ship owners pursuant to the *Civil Liability Convention*. So, the maximum amount available from Tier 1 and Tier 2 would be approximately \$317.93 million CAN. Compensation under the 1992 Fund only becomes available when the compensation available from ship owners under the *Civil Liability Convention* is insufficient (i.e. is exhausted) or where the ship owner is exempt from liability.<sup>11</sup>
- **Tier 3:** The Supplementary Fund provides additional compensation over and above that available under the 1992 Fund up to a maximum amount of 750,000,000 SDR or approximately \$1,177,000,000 CAN (i.e. 1.18 billion CAN).<sup>12</sup> Once again this amount is inclusive of any amount paid by the ship owner and the 1992 Fund. Thus, the total amount of compensation available under the first three tiers is approximately \$1.18 billion CAN (750 Million SDR). Note that compensation from the Supplementary Fund only becomes available once the 1992 Fund is exhausted.
- **Tier 4:** The *Ship-Source Oil Pollution Fund* is the final tier of compensation and can provide for a maximum amount of approximately \$155 million CAN. The total current balance of the fund is approximately \$380 million CAN.<sup>13</sup> Like the other funds, the SOP Fund is only available where recovery of payment of compensation from the other three tiers is not possible or where the claim exceeds the amount available under the first three tiers (i.e. where the first three tiers of funds are exhausted).<sup>14</sup> The SOP Fund is not inclusive of the amounts paid under the other three tiers. That is, compensation from the SOP Fund is on top of the maximum amount available from the first three tiers.

**In sum, the total approximate amount of compensation available from all four tiers would be approximately \$1.33 billion CAN.**<sup>15</sup>

Note that under Article V paragraph 2 of the *Civil Liability Convention* a ship owners liability will not be limited (capped) if it can be proved that the pollution damage resulted from “his personal act or omission, committed with the intent to cause such damage, or

<sup>9</sup> These figures were generated using the conversion rate as of July 23, 2010 when 1 SDR was equivalent to approximately a \$1.56 CND. Current conversion rates can be found at [http://coinmill.com/CAD\\_SDR.html](http://coinmill.com/CAD_SDR.html), and [http://www.imf.org/external/np/fin/data/rms\\_five.aspx](http://www.imf.org/external/np/fin/data/rms_five.aspx).

<sup>10</sup> *Ibid.*

<sup>11</sup> *International Regime for Compensation from Oil Pollution*, at 3.

<sup>12</sup> Figures generated using conversion rate as of July 23, 2010. See note 7.

<sup>13</sup> Joel Fryer, Economic Officer of the International Marine Policy and Liability Organization, stated that for the fiscal year commencing April 1, 2010 the fund has a maximum liability of \$155,318,425. Information on the SOP Fund can be found at <http://www.ssopfund.gc.ca/english/index.asp>.

<sup>14</sup> *Marine Liability Act*, S.C. 2001, c. 6, s. 101(1) [*Marine Liability Act*].

<sup>15</sup> As of July 23, 2010.

recklessly and with knowledge that such damage would probably result”.<sup>16</sup> However, in his 2006-2007 annual report the Administrator of the Ship-Source Oil Pollution Fund stated:

*...this new test makes it practically impossible to break the ship owner's right to limit liability.*<sup>17</sup>

Thus, in most cases the \$1.33 billion will be a hard cap on the liability faced by a ship owner. Moreover, in the unlikely event that the ship owner's liability limit could be broken, there may be little or no additional compensation available because the success of recovering amounts in excess of the ship owner's insurance limits is dependent upon that person or corporation's assets. In some instances the only asset the ship owner will have will be the ship. These independent tank owners or “one-ship” companies are now common practice in the shipping industry. This is because oil corporations, such as Enbridge Inc., no longer own oil tankers but charter them instead.<sup>18</sup> This is common practice among oil corporations since the *Exxon Valdez* catastrophe in Alaska.<sup>19</sup>

**As noted, in the event of a major oil spill the total amount available for compensation, clean-up and natural resource damages would be approximately \$1.33 billion CAN.**

**Yet clean-up costs alone for the Exxon Valdez disaster exceeded \$2.5 billion USD, and that was in 1989.<sup>20</sup> The cost for compensation and natural resource damages for the Valdez spill was judged to be at least \$1 billion USD.<sup>21</sup> Thus, the total for clean up costs, compensation and damages for the Valdez disaster was at least \$3.5 billion USD – and likely much higher. For example, one Alaska study of just sport fishing activity and tourism losses indicated a lost passive use value at \$2.8 billion.<sup>22</sup>**

**As a further comparison, note that the U.S. government recently required British Petroleum to establish a \$20 billion compensation fund for the oil spill disaster in the Gulf of Mexico and even that may only cover a fraction of the estimated \$100 billion in potential damage.<sup>23</sup>**

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<sup>16</sup> *Marine Liability Act*, Schedule 5 Article V(2).

<sup>17</sup> Alfred Popp, *Ship-Source Oil Pollution Fund: The Administrators Annual Report 2006-2007* (Ottawa: The Administrator Ship-source Oil Pollution Fund) at 39; also see note 6.

<sup>18</sup> *Major Marine Vessel Risk in BC*, at 5; in an email, dated July 22, 2010, a representative at Enbridge Northern Gateway stated, “Ships will be owned independently of Enbridge.”

<sup>19</sup> *Major Marine Vessel Risk in BC*, at 5.

<sup>20</sup> ARLIS, *Exxon Valdez Oil Spill: FAQs, Links and Unique Resources at ARLIS*, June 2010, p. 6 [ARLIS, *Valdez FAQs*].

<sup>21</sup> Exxon had to pay \$900 million for recovery of natural resource damages, plus \$100 million for restitution of fish, wildlife and lands. See Exxon Valdez Oil Spill Trustee Council, *Oil Spill Facts: Settlement*, accessed at <http://www.evostc.state.ak.us/facts/settlement.cfm> ; Note: this figure does not include punitive damages which totaled some \$507.5 million USD. Also see: Faegre & Benson, *Exxon Valdez Oil Spill Litigation Update*, March 17, 2010, accessed at <http://www.faegre.com/showarticle.aspx?Show=2881>

<sup>22</sup> <http://www.evostc.state.ak.us/facts/economic.cfm>

<sup>23</sup> [www.telegraph.co.uk/.../energy/oilandgas/7836982/BP-oil-spill-could-cost-100bn.html](http://www.telegraph.co.uk/.../energy/oilandgas/7836982/BP-oil-spill-could-cost-100bn.html)

**In light of the massive potential clean-up costs, compensation costs and natural resource damages from a major oil spill on the B.C. coast, the \$1.33 billion CAN that is currently the total amount payable in Canada is starkly inadequate. Taxpayers and Mother Nature are likely to pick up the tab for the shortfall.**

## **II. Responsibility of Ship Owners to Carry Insurance**

In order to be covered under the *Civil Liability Convention* and operate in Canadian waters owners of ships carrying more than 2,000 tons of oil as cargo must carry insurance or other financial security that covers the limit of their liability under the Convention. The ship owners must also carry a certificate aboard the ship as proof of their insurance coverage.<sup>24</sup> In most cases, it will be the ship owner's insurer that pays claims up to the maximum limit of liability of the ship owner under the *Civil Liability Convention*.<sup>25</sup>

The certificates must be in the form prescribed in Article VII of the *Civil Liability Convention*. These certificates are commonly referred to as CLC certificates.<sup>26</sup> The certificate includes the name of the liability insurer which is usually a protection and indemnity association, known as a P&I Club.<sup>27</sup> The P&I Clubs are "mutual associations" and are established by ship owners themselves. Groups of ship owners agree to insure one another's vessels for the mutual benefit of all the owners.<sup>28</sup>

An insurer is entitled to receive the benefit of the limit of liability under the *Civil Liability Convention* even when the ship owner is not entitled to do so because of the operation of Article V paragraph 2 of the *Civil Liability Convention*. That is, if the owner is not entitled to limit their liability because it is proved that the pollution damage resulted from their personal act or omission, committed with the intent to cause pollution damage, or recklessly and with knowledge that the damage would probably result, the insurer would still be entitled to claim the benefit of the limitation on liability.<sup>29</sup> Thus, where the ship is the only asset of the ship owner, the ship owner may not have enough assets to be able to provide additional compensation above the limit, and the insurer would not be required to provide additional compensation either.

## **III. Natural Resource Damages – In Canada and the U.S.**

In the event of a spill from an oil tanker, the ship owner's insurance and the other funds would be available for natural resource damages. Nevertheless, it is questionable whether much, if any, of the funds available would actually go towards reasonable reinstatement

<sup>24</sup> *Marine Liability Act*, s.5 & Schedule 5 Article VII; Gold: "Maritime Law" at 690.

<sup>25</sup> See <http://www.iopcfund.org/compensation.htm#c11>; Gold: "Maritime Law" at 690.

<sup>26</sup> Gold: "Maritime Law", *Ibid*.

<sup>27</sup> *Marine Liability Act*, Schedule 5 Article VII; Also see <http://www.iopcfund.org/compensation.htm#c11>.

<sup>28</sup> *Major Marine Vessel Risk in BC*, at 97.

<sup>29</sup> *Marine Liability Act*, Schedule 5 Article V & VII.

measures aimed at accelerating natural recovery of the environment following damage caused by an oil spill. This is because those same funds must be used to pay for the clean up and for compensation and, as previously discussed, the clean up costs *alone* for the *Exxon Valdez* spill in 1989 exceeded the total amount currently available under the Canadian scheme by approximately \$1.23 billion CAN. Consequently, it would be Canadian taxpayers paying for the vast majority of the natural resource damages. Further discussion of the natural resource damages will be forthcoming in a subsequent paper.

## INTRODUCTION

This report reviews the current laws in Canada that dictate the amount of money available for compensation, clean up costs and natural resource damages in the event of an oil spill from a crude oil tanker. The report will highlight how the current amounts available for clean up costs and compensation under Canadian law would be inadequate in the event of a catastrophic oil spill. The report will also draw attention to the lack of adequate compensation for natural resource damages in Canada.

It has been argued that crude oil tankers have been banned from traveling along British Columbia's North Coast since 1972. At that time, in response to growing concerns about oil tanker traffic associated with drilling activities in Alaska, a decision was taken by the federal government to impose a moratorium on crude oil tanker traffic on the North Coast of B.C. This was done on the recommendation of the House of Commons Special Committee on Environmental Pollution chaired by David Anderson. The decision was a valid exercise of the royal prerogative power of the Crown to administer the territorial seas of Canada, without any legal document required to establish the policy. The 1972 crude oil tanker moratorium is separate from the voluntary Tanker Exclusion Zone, adopted in 1988, which requires loaded oil tankers from Alaska headed to the continental U.S. to keep a certain distance away from Canadian shores. It is also separate from the moratorium on oil and gas exploration, which was also created in 1972, and which exists as government policy to this day. Many contend that the policy moratorium on crude oil tankers on the North Coast has been maintained by six prime ministers since it was first created, until the current government. The current government has denied the existence of the moratorium since early 2006. As a result, tankers are now periodically carrying condensate into the port of Kitimat and there are several projects proposed for the North and Central Coast that will bring more crude oil tankers into the coastal waters of B.C.

Enbridge Northern Gateway Pipelines has proposed constructing and operating two 1,170 kilometre pipelines between the Alberta tar sands and the coastal port of Kitimat. One pipeline would carry 525,000 barrels of oil per day to Kitimat, to be loaded onto oil tankers bound for Asia or the west coast of the U.S. that will thread their way down the narrow Douglas Channel across the Inside Passage and through Hecate Strait, known as the fourth most dangerous body of water in the world.<sup>30</sup> This is equivalent to approximately 225 loaded, massive oil tankers per year passing each other in the channel and other narrow, confined areas along the coast, and travelling through the extraordinarily dangerous waters of Hecate Strait. Some of these tankers would be Very Large Crude Carriers capable of carrying approximately 2 million barrels of oil which is nearly twice as much oil as the *Valdez* was carrying when it ran aground in Prince William Sound, Alaska.<sup>31</sup>

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<sup>30</sup> Canada, Environment Canada. *Marine weather hazards manual: a guide to local forecasts and condition - West Coast*. (Vancouver, B.C. : Environment Canada, 1999) at p. 109.

<sup>31</sup> Enbridge Northern Gateway Pipelines, *Project Info: Vessels*, accessed at <http://www.northerngateway.ca/project-info/marine-plan/marine-transport/vessels>; EnviroEmerg Consulting Services, *Major Marine Vessel Casualty Risk and Response Preparedness in British Columbia*, (Cowichan Bay: July 2008) p. 8; ARLIS, *Valdez FAQs*, p. 3.



The recent British Petroleum (BP) disaster in the United States has demonstrated the importance of ensuring that Canada is prepared for the financial and environmental consequences of a major marine oil spill. According to recent estimates, the clean up costs and compensation for the BP spill may be as high as \$100 billion USD (which represents roughly 20% of Canada's entire federal debt).<sup>32</sup> Once again, the total for cleanup costs, compensation and natural resource damages for the *Valdez* disaster was conservatively estimated at about \$3.5 billion USD.

However, in the case of both the BP and *Valdez* disasters the oil companies were and continue to be held liable for the clean up costs, compensation and natural resource damages associated with those disasters. In the case of the *Valdez* disaster Exxon was held liable because it was the owner of the *Valdez*. In Canada today, in the case of a catastrophic oil spill from one of the tankers Enbridge Inc. proposes to use, Enbridge Inc. and its subsidiary operating the pipeline and marine terminal – Enbridge Northern Gateway Pipelines – would not be liable for clean up costs, compensation or natural resource damages. This is because, under Canadian and International law, ship owners are seen as the party responsible for spills from tankers. Since the *Valdez* disaster, oil companies no longer own tankers. The result is that, after the limit of the ship owners' liability is met and the IOPC Funds (the 1992 and Supplementary Funds) and Ship-Source Pollution Fund are exhausted, the cost of clean up, compensation and natural resource damages would be borne by Canadian taxpayers. This is clearly unacceptable.

A 1990 federal government report on tanker safety in Canadian waters determined that if shipping of oil on the B.C. coast was allowed, then 100 small, 10 moderate and one major spill (greater than 10,000 barrels) would be expected every year. Environment Canada predicted that a catastrophic spill (greater than 100,000 barrels) would occur once every 15 years.<sup>33</sup>

The *Valdez* and BP disasters indicate that the clean up costs alone could far exceed the approximate \$1.3 billion CAN amount available for such costs under Canadian law. The clean-up costs of the *Valdez* disaster exceeded 2.5 billion USD. ***Thus, in the event of a Valdez type disaster over \$1.2 billion USD in clean-up costs could end up being paid by Canadian taxpayers. Tax payers and Mother Nature could also bear the cost of another approximate \$1 billion USD or more in unfunded compensation costs and natural resource damages.***<sup>34</sup>

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<sup>32</sup> Will Amos, *If there's an oil spill, who's at risk? Canadian Taxpayers*, The Globe and Mail, accessed at <http://www.theglobeandmail.com/news/opinions/if-theres-an-oil-spill-whos-at-risk-canadian-taxpayers/article1638799/>; Timothy Gardner, *BP stops oil spewing into the Gulf as well pressure rises*, Daily Nation: July 16, 2010; Ecojustice, *Ecojustice Memorandum: Who pays when an oil spill occurs off Canada's coast?*, (UOttawa: Ecojustice Environmental Law Clinic, July 2010) at 3 [Ecojustice: *Memorandum*].

<sup>33</sup> Living Oceans Society, *Moratorium Timeline*, accessed at <http://www.livingoceans.org/programs/energy/tankers/moratorium.aspx>.

<sup>34</sup> See footnotes 20-22 above and the associated narrative.

## OIL SPILL LIABILITY AND COMPENSATION

### 1) Who is liable for an oil spill from an oil tanker (i.e. who is the responsible party (RP))?

The *Marine Liability Act* places initial legal liability for oil pollution damage resulting from a spill from an oil tanker on the ship owner.

Through the operation of Section 48 of the *Marine Liability Act*, Articles I to XII *bis* and 15 of the *International Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention)* have the force of law in Canada. The articles of the *Civil Liability Convention* given the force of law by s. 48 of the *Marine Liability Act* are set out in schedule 5 of that Act.<sup>35</sup>

Article III paragraph 1 of the *Civil Liability Convention* establishes that ship owners are liable for pollution damage. Article III paragraph 1 states:

*[e]xcept as provided in paragraphs 2 and 3 of this Article, the owner<sup>36</sup> of a ship<sup>37</sup> at the time of an incident, or, where the incident consists of a series of occurrences, at the time of the first such occurrence, shall be liable for any pollution damage caused by the ship as a result of the incident.*

This is a strict liability regime. That is, subject to the circumstances set out in Article III paragraphs 2 and 3, liability automatically attaches to the ship owner, and the ship owner is liable even in the absence of fault on the part of the ship or its crew.<sup>38</sup>

Article III paragraphs 2 and 3 set out the circumstances where a ship owner will not be liable for pollution damage. Article III paragraph 2 states:

*[n]o liability for pollution damage shall attach to the owner of a ship if he proves that the damage: (a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or (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*

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<sup>35</sup> *Marine Liability Act*, s. 48 & Schedule 5.

<sup>36</sup> Article I (3) of the *Civil Liability Convention* defines “owner” as, “the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However in the case of a ship owned by a State and operated by a company which in that State is registered as the ship’s operator, “owner” shall mean such company.”

<sup>37</sup> Article I (1) of the *Civil Liability Convention*, “‘Ship’ means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.”

<sup>38</sup> IOPC: *Brochure*; Maritume Law at 179; *International Regime for Compensation from Oil Pollution*, at 2.

*other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.*

Article III Paragraph 3 states:

*[i]f the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person.<sup>39</sup>*

Article I paragraph 6 of the *Civil Liability Convention* defines “pollution damage”:

*“Pollution damage” means: (a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; (b) the costs of preventive measures and further loss or damage caused by preventive measures.*

Summary: Article III paragraph 1 of the *Civil Liability Convention*, which is given the force of law in Canada through the operation of s.48 of the *MLA*, establishes that the owners of ships carrying oil (i.e. any persistent hydrocarbon mineral oil) in bulk as cargo are the responsible party (i.e. are liable) in the event of an oil spill (i.e. pollution damage).

However, a ship owner will not be liable for pollution damage if the owner can prove that the damage resulted from an act of war or a grave natural disaster, or the damage was wholly caused by sabotage by a third party, or the damage was wholly caused by the negligence of public authorities in maintaining lights or other navigational aids.<sup>40</sup> Finally, a ship owner may be exonerated entirely or partially from their liability to a person if the owner proves that the pollution damage resulted entirely or partially from an act or omission done with intent to cause damage by the person who has suffered the damage or if the damage that person suffered was the result of their own negligence.

## **2) What is the limit of the financial vulnerability (liability) of the responsible party?**

For ships of less than 300 gross tons, liability is limited to \$500,000 under section 29(b) of the *Marine Liability Act*.<sup>41</sup>

Article V paragraph 1 of the *Civil Liability Convention* establishes the limits on ship owners’ liability for pollution damage for ships larger than 300 tons. Article V paragraph 1 states:

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<sup>39</sup> *Marine Liability Act*, Schedule 5 Article III.

<sup>40</sup> *International Regime for Compensation from Oil Pollution*, at 2.

<sup>41</sup> *Marine Liability Act*, s. 29(b); Ecojustice: *Memorandum*, at 2, 16.

*[t]he owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an aggregate amount calculated as follows: (a) 4,510,000 units of account for a ship not exceeding 5,000 units of tonnage; (b) for a ship with a tonnage in excess thereof, for each additional unit of tonnage, 631 units of account in addition to the amount mentioned in sub-paragraph (a); provided, however, that this aggregate amount shall not in any event exceed 89,770,000 units of account.*

A “unit of account” is the Special Drawing Right (SDR) as defined by the International Monetary Fund. The value of the national currency, in terms of the SDR, of a Contracting State (a country which is a party to the convention) which is a member of the International Monetary Fund is calculated in accordance with the method of valuation applied by the International Monetary Fund in effect on the date in question for its operations and transactions.

On July 23, 2010 1 SDR was the equivalent of approximately \$1.56 CAN. Therefore, the limit on liability for pollution damage for ships that are 5,000 units of tonnage or less, using the formula found in Article V paragraph 1, would be approximately \$7,035,000 CAN (i.e. approximately \$7.04 million CAN). The limit on liability for ship owners of ships over 5,000 units of tonnage, applying the July 23 conversion rate, increases by approximately \$984 for every ton over 5,000 units of tonnage up to a maximum amount of approximately \$140,000,000 CAN (i.e. approximately \$140 million CAN).<sup>42</sup>

However, under Article V paragraph 1, a ship owner will not be entitled to limit his liability under the *Civil Liability Convention* if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause the pollution damage, or recklessly and with knowledge that the pollution damage would probably result.

In his 2006-2007 annual report the Administrator of the Ship-Source Oil Pollution Fund stated, “This new test makes it practically impossible to break the ship owner’s right to limit liability.”<sup>43</sup>

### **3) What funding arrangements/response preparedness certifications are required by convention vessels (i.e. vessels carrying persistent oils as cargo) traveling in Canadian waters? Under what convention are these required?**

Certain provisions within the *Civil Liability Convention* and the *Marine Liability Act* require owners of ships carrying more than 2,000 tons of oil as cargo to carry insurance or other financial security that covers the limit of their liability under the *Civil Liability*

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<sup>42</sup> These figures were generated using the conversion rate as of July 23, 2010. Current conversion rates can be found at [http://coinmill.com/CAD\\_SDR.html](http://coinmill.com/CAD_SDR.html), and [http://www.imf.org/external/np/fin/data/rms\\_five.aspx](http://www.imf.org/external/np/fin/data/rms_five.aspx).

<sup>43</sup> Alfred Popp, *Ship-Source Oil Pollution Fund: The Administrators Annual Report 2006-2007* (Ottawa: The Administrator Ship-source Oil Pollution Fund) at 39; also see note 6 above.

*Convention* in order to operate in Canadian waters. The provisions also require ship owners to carry a certificate aboard the ship as proof of their insurance coverage.<sup>44</sup> Ships carrying less than 2,000 tons of oil as cargo are not required to maintain insurance under the *Civil Liability Convention*.

Article VII paragraph 1 of the *Civil Liability Convention* requires ship owners carrying more than 2,000 tons of oil in bulk as cargo to maintain insurance or “other financial security”, such as the guarantee of a bank or a certificate delivered by an international compensation fund, substantial enough to cover the extent of their liability as determined under Article V paragraph 1 (see above).

Article VII paragraph 2 states that a certificate providing evidence of insurance or other financial security required by the Convention shall be issued to every ship after the appropriate authority of the Contracting State (Canada) has determined that the ship does in fact have valid insurance or other financial security that covers the extent of its liability under the convention. The certificate is required to include: the name of ship and port of registration, the name and principal place of business of the owner, the type of security, the name and principal place of business of the insurer or other person giving security, and, where appropriate, the place of business where the insurance or security is established, and the period of the validity of the certificate, which can not be longer than the period of validity of the insurance or security.

According to subsection 56(2) of the *Marine Liability Act* the certificates required by the *Civil Liability Convention* shall be issued by the Minister of Transport if the ship is registered in Canada (or if the ship is registered to a country other than Canada that is not a party to the *Civil Liability Convention*) and the Minister is satisfied that the ship owner has a valid contract of insurance or other security satisfying the requirements of Article VII of the Convention (i.e. insurance that will cover the ship owners liability under the convention) for the period for which the certificate will be valid.

Subsection 56(3) governs the circumstances under which the Minister may refuse to issue a certificate. The Minister may refuse to issue where the Minister believes: the insurer or security issuer will be unable to meet their obligations under the contract of insurance or security, or that the contract of insurance or security will not cover the owner’s liability under the *Civil Liability Convention*. Subsection 56(4) allows the Minister to revoke a certificate, issued by him or her, if he or she believes either of the above situations now apply to a ship (i.e. where they believe the insurer can no longer meet their obligations under the contract of insurance, or that the insurance or security will no longer cover the owner’s liability under the Convention).

Section 55(1) of the *Marine Liability Act* requires certificates as described in Article VII of the *Civil Liability Convention* to be aboard all ships which carry more than 2,000 metric tons of bulk cargo in order to enter or leave a port in Canadian waters, or to enter or leave Canada’s exclusive economic zone or arrive or leave an offshore terminal in Canadian waters or Canada’s exclusive economic zone. Similarly, if the ship is Canadian-re-

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<sup>44</sup> *Marine Liability Act*, s.5 & Schedule 5 Article VII; Gold: “Maritime Law” at 690.

gistered and has no certificate, it is not to enter or leave the port or offshore terminal of any other state whether the state is a party to the *Civil Liability Convention* or not.

The liability insurer named on the certificate will usually be a protection and indemnity association, known as a P&I Club.<sup>45</sup> P&I Clubs are “mutual associations” and are established by ship owners themselves. Groups of ship owners agree to insure one another’s vessels for the mutual benefit of all the owners.<sup>46</sup>

Any claim against the ship owner under the *Civil Liability Convention* can be made directly against the insurer named on the certificate. Consequently, in most cases, it will be the ship owners insurer (P&I club) that will pay all claims up to the maximum limit of the ship owners liability under the *Civil Liability Convention*.<sup>47</sup>

However, an individual P&I Club would most likely not bear responsibility for the full extent of a ship owner’s liability where the claims exceed \$8 million USD. This is because approximately 90% of the world’s commercial ships are insured by the thirteen principal underwriting member clubs of the International Group of P&I Clubs and the member clubs of the International Group Clubs reinsure each other for claims in excess of \$8 million USD up to, currently, approximately \$6.9 billion USD.<sup>48</sup> The International Group also has a market reinsurance contract which reinsures the International Group for claims it pays out which exceed \$50 million USD up to a maximum of \$1 billion USD for any one oil pollution claim.<sup>49</sup>

A ship owner’s insurer, whatever form it takes, is entitled to receive the benefit of the limit of liability under the *Civil Liability Convention* even when the ship owner is not entitled to do so because of the operation of Article V paragraph 2 of the Convention. That is, if the owner is not entitled to limit their liability because it is proved that the pollution damage resulted from their personal act or omission, committed with the intent to cause pollution damage, or recklessly and with knowledge that the damage would probably result, the insurer would still be entitled to claim the benefit of the limitation on liability.<sup>50</sup> Thus, where the ship is the only asset of the ship owner the ship owner may not have the financial resources to provide additional compensation above the limit, and the insurer would not be required to provide additional compensation either.

#### **4) What Additional Funds, Beyond the Amount the Ship Owner is Liable for, are Available for an Oil Spill?**

In addition to the amount the ship owner will be liable for, there are two International Oil Pollution Compensation funds (“IOPC funds”) and a domestic oil pollution fund which may provide additional compensation in the event of an oil spill from a oil tanker.

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<sup>45</sup> *Marine Liability Act*, Schedule 5 Article VII; Also see <http://www.iopcfund.org/compensation.htm#c11>.

<sup>46</sup> *Major Marine Vessel Risk in BC*, at 97.

<sup>47</sup> See <http://www.iopcfund.org/compensation.htm#c11>; Gold: “Maritime Law” at 690.

<sup>48</sup> See <http://www.igpandi.org/Home>; <http://www.igpandi.org/About>;  
<http://www.igpandi.org/Group+Agreement+s/The+Pooling+Agreement>.

<sup>49</sup> See <http://www.igpandi.org/Group+Agreements/Pool+reinsurance+programme>.

<sup>50</sup> *Marine Liability Act*, Schedule 5 Article V & VII.

The IOPC funds are the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution, 1992* (“1992 Fund”) and the *International Oil Pollution Compensation Supplementary Fund, 2003* (“Supplementary Fund”).

The Canadian domestic fund is known as the *Ship-Source Oil Pollution Fund* (“SOP Fund”).

**a) The *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution, 1992* – The 1992 Fund**

Certain provisions of the 1992 Fund were brought into force in Canada on May 29, 1999.

Through the operation of section 57 of the *Marine Liability Act*, Articles 1 to 4, 6 to 10, 12 to 15, 36 *ter*, 29, 33 and 37 of the 1992 Fund have the force of law in Canada. The Articles of the 1992 Fund which are given the force of law by s. 57 of the *Marine Liability Act* are set out in schedule 6 of that Act.<sup>51</sup>

The primary goal of the 1992 Fund is to provide compensation for pollution damage to the extent that the compensation available under the *Civil Liability Convention* (i.e. from the ship owner’s insurance) is inadequate.<sup>52</sup>

According to Article 4 paragraph 4, the amount of compensation payable by the 1992 Fund in respect of any one incident is limited so that the total sum of the amount from the 1992 Fund and the amount of compensation actually paid under the *Civil Liability Convention* by the ship owner for pollution damage does not exceed 203,000,000 SDR.<sup>53</sup>

Thus, as of July 23, 2010, a maximum of approximately \$317,930,000 CAN (\$317.93 million CAN) would be available for compensation from the 1992 Fund for oil pollution from an oil tanker in Canada. This maximum payable through the 1992 Fund is inclusive of any amount paid by the ship owner pursuant to their liability under the *Civil Liability Convention*. Where the ship owner was liable for the maximum amount provided for under the *Civil Liability Convention*, approximately \$140 million CAN, the 1992 Fund would provide approximately an additional \$177.93 million CAN in compensation.

In the event that a ship owner was not liable for any amount of compensation under the *Civil Liability Convention*, for example because the pollution damage resulted from “a natural phenomenon of an exceptional, inevitable and irresistible character,” the maximum amount of compensation available from only the 1992 Fund would be \$317.93 million CAN.

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<sup>51</sup> *Marine Liability Act*, s. 57.

<sup>52</sup> *Marine Liability Act*, Schedule 6 Article 2.

<sup>53</sup> *Ibid*, Schedule 6 Article 4.

However, the 1992 Fund incurs no obligation to provide compensation if: it proves that the pollution damage resulted from an act of war, hostilities, civil war or insurrection or was caused by oil which escaped or was discharged from a warship or other ship owned or operated by a state and was being used, at the time of the incident, only for government non-commercial services, or the claimant cannot prove that the damage resulted from an incident involving one or more ships<sup>54</sup>.

Also, if the 1992 Fund proves that a person who suffered pollution damage caused the pollution damage wholly or partially from either an act or omission done with the intent to cause the damage or caused it by their negligence, the 1992 Fund may be exonerated wholly or partially from its obligation to pay compensation to such a person. In any event the 1992 Fund will be exonerated from paying compensation to the extent that the ship owner was not liable because the pollution damage resulted from the claimant's act or omission or negligence.<sup>55</sup>

According to Article 6, rights to compensation will be extinguished if the action or notification of the action is not made within three years of the date the damage occurred.

#### **b) The *International Oil Pollution Compensation Supplementary Fund, 2003* – The Supplementary Fund**

Certain provisions of the Supplementary Fund were brought into force in Canada on January 2, 2010 through the coming into force of amendments to the *Marine Liability Act*.

Through the operation of Section 63 of the *Marine Liability Act*, Articles 1 to 15, 18, 20, 24, 25 and 29 of the Supplementary Fund have the force of law in Canada. The Articles of the Supplementary Fund which are given the force of law by s. 63 of the *Marine Liability Act* are set out in schedule 7 of that Act.<sup>56</sup>

The Supplementary Fund is required to pay compensation to any person suffering pollution damage that has a valid claim under the 1992 Fund, but is unable to obtain full and adequate compensation under the 1992 Fund Convention because the total damage exceeds, or risks exceeding, the limit of compensation available under the 1992 Fund.<sup>57</sup>

Article 4 paragraph 2 of the Supplementary Fund sets the limit on the compensation available under the fund. The total amount of compensation available under the Supplementary Fund, in respect to any one incident, is limited so that the total sum available under the Supplementary Fund, 1992 Fund and the *Civil Liability Convention* (ship owner's liability) does not exceed 750 million SDR.

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<sup>54</sup> "Ships" for the purposes of the 1992 Fund and the Supplementary Fund has the same definition as that under the *Civil Liability Convention*. See note 32.

<sup>55</sup> See the discussion of Article III paragraph 3 of the *Civil Liability Convention* above.

<sup>56</sup> *Marine Liability Act*, s. 63 & Schedule 7.

<sup>57</sup> *Ibid.*, Schedule 7 Article 4.



Thus, as of July 23, 2010 the total amount available from the *Civil Liability Convention*, the 1992 Fund and the Supplementary Fund would be limited to approximately \$1,177,000,000 CAN (i.e. approximately \$1.18 billion CAN). The Supplementary Fund would provide approximately \$85,907,000 CAN in compensation above the maximum amount available under the *Civil Liability Convention* and the 1992 Fund.

Compensation under the Supplementary Fund is available to anyone who has an “established claim”.<sup>58</sup> An established claim is one which has been recognized by the 1992 Fund or which has been accepted as admissible by the Federal Court or “Admiralty Court” (the Canadian court that has the ability to bind the 1992 Fund), and which would have been fully compensated if the limit under the 1992 Fund had not been reached. Thus, anyone entitled for compensation under the 1992 Fund will be entitled to compensation under the Supplementary Fund in the event the 1992 Fund is exhausted.

### **c) The Ship-Source Oil Pollution Fund – The “SOP Fund”**

The liability of the SOP Fund is governed by Part 7 of the *Marine Liability Act*. The SOP Fund came into force on April 24, 1989 and is continued by section 92(1) of the *Marine Liability Act*.

The SOP Fund is a special account of Canada. The SOP Fund succeeded the Maritime Pollution Claims Fund (MPCF), which had existed since 1973. In 1989 the accumulated amount of \$149,618,850.24 in the MPCF was transferred to the SOPF. The current balance of the fund is approximately \$380 million CAN. There have been very few payouts.

Under section 114 of the *MLA*, the Minister of Transport has the ability to re-impose a levy per metric ton of “contributing oil” imported into or shipped from Canada in bulk as cargo on a ship. The levy is indexed annually to the consumer price index. However, no levy has been imposed since 1976.<sup>59</sup> A levy of 15 cents per metric ton of oil shipped existed from February 15, 1972, until September 1, 1976. During that period a total of \$34,866,459.88 was collected and credited to the MPCF from 65 contributors. Payers into the MPCF included oil companies, power generating authorities, pulp and paper manufacturers, chemical plants and other heavy industries.<sup>60</sup>

The purpose of the SOP Fund is to ensure the payment of claims for marine oil pollution that originates from ships. The system is designed to cover the risk of non-payment by the ship owner who is responsible for pollution. In addition, it covers claims for damage and clean-up costs where the identity of the ship that caused the discharge of oil cannot be established (i.e. mystery spills).<sup>61</sup>

The limit of the SOP Funds liability is governed by section 110 of the *MLA*. The maximum liability of the fund is calculated annually using the Consumer Price Index. The cur-

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<sup>58</sup> *Ibid.*, Schedule 7 Article 4.

<sup>59</sup> See <http://www.ssopfund.gc.ca/english/background.asp>, and <http://www.ssopfund.gc.ca/english/faq.asp>.

<sup>60</sup> See <http://www.ssopfund.gc.ca/english/gfinformation.asp>.

<sup>61</sup> See <http://www.ssopfund.gc.ca/english/faq.asp>.

rent maximum liability of the fund is \$155,318,425 (i.e. approximately \$155 million CAN). This amount is in addition to any amount paid by the ship owner in accordance with the *Civil Liability Convention* as well as any amount paid by the 1992 and Supplementary Funds.

***Thus, the total approximate amount of compensation available from all four tiers as of July 23, 2010 would be \$1.33 billion CAN.***

### **5) What Types of Incidents are Covered by the *Civil Liability Convention*, the 1992 Fund the Supplementary Fund and the SOP Fund?**

The *Civil Liability Convention*, 1992 Fund and Supplementary Fund cover incidents in which persistent mineral oil is spilled from a sea-going vessel and seaborne craft of any type constructed or adapted to carry oil in bulk as cargo (normally a tanker). The *Civil Liability Convention* and the 1992 and Supplementary Funds cover not only spills of cargo and bunker oil (the vessel's own fuel) from laden tankers (when the ship is "actually carrying oil in bulk as cargo") but also spills of bunker oil from unladen tankers, so long as the spill occurred after a voyage where the ship was carrying oil in bulk as cargo and it has not been proven that there were no residues from the carrying of the oil in bulk.<sup>62</sup>

Examples of persistent mineral oil are crude oil, fuel oil, heavy diesel oil, and lubricating oil. Such oils are usually slow to dissipate naturally when spilled into the sea and are therefore likely to spread and require cleaning up. Damage caused by spills of non-persistent mineral oil, such as gasoline, light diesel oil, condensate, and kerosene, is not compensated under the convention and funds, as such oils tend to evaporate quickly when spilled and do not normally require cleaning up.

The SOP Fund is also available for spills of persistent oil from sea-going tankers for the same types of spills that the *Civil Liability Convention*, the 1992 Fund and the Supplementary Fund are available for. However, the SOP Fund is unique in that it not only covers sea-going tankers, but rather is intended to pay claims regarding oil spills from all classes of ship such as general cargo vessels, cruise ships, ferries, and other non-tankers. The SOP Fund covers both persistent and non-persistent oil spills. In addition, the SOP Fund also applies to so-called mystery spills, where the identity of the ship that caused the discharge cannot be established.<sup>63</sup> For the purposes of this report it is the availability of the SOP Funds for spills of persistent oil from tankers that is most important.

### **6) At What Point do the 1992 and Supplementary Funds Become Available for Compensation and Clean up Costs?**

#### **a) The 1992 Fund:**

The 1992 Fund becomes available for compensation when:

<sup>62</sup> *Ibid.*, Schedule 5 Article 1; International Oil Pollution Compensation Fund, *Claims Manual*, (IOPC: December 2008 Edition), at 12, accessed at [http://www.iopcfund.org/npdf/2008%20claims%20manual\\_e.pdf](http://www.iopcfund.org/npdf/2008%20claims%20manual_e.pdf) [*Claims Manual*]

<sup>63</sup> See <http://www.ssopfund.gc.ca/english/faq.asp>.

- The damage exceeds the limit of the ship owner's liability under the *Civil Liability Convention*.
- The ship owner is not liable under the *Civil Liability Convention* because the ship owner is able to invoke one of the following exemptions to liability: where the damage was caused either by a grave natural disaster, or wholly caused intentionally by a third party (not the person who suffered the damage), or wholly caused as a result of the negligence of public authorities in maintaining lights or other navigational aids.
- The ship owner is financially incapable of meeting his obligations under the *Civil Liability Convention* in full, and/or the insurance is insufficient to pay all valid compensation claims.<sup>64</sup>

Also, it is significant to note that the 1992 Fund is available to compensate ship owners for voluntary expenses reasonably incurred or sacrifices reasonably made to prevent or minimize pollution damage.<sup>65</sup>

Compensation from the 1992 Fund will not be available where:

- The ship owner was exempted from liability because the oil pollution damage resulted from an act of war, hostilities, civil war, or insurrection, or was caused by a spill from a warship or other ship owned or operated by a state and was being used, at the time of the incident, only for government non-commercial services.
- The claimant cannot prove that the damage resulted from an incident involving one or more ships as defined in the *Civil Liability Convention* (that is, any sea-going vessel or seaborne craft of any type constructed or adapted to carry oil in bulk as cargo – see note 32).<sup>66</sup>

The 1992 Fund may be wholly or partially exonerated from paying compensation to a *person* where:

- The Fund proves that that the pollution damage resulted wholly or partially either from an act or omission done with the intent to cause damage by *the person* who suffered the damage or from the negligence of *that person*.
  - In any case the Fund is exonerated to the extent the ship owner is exonerated.<sup>67</sup>

#### **b) The Supplementary Fund:**

As previously discussed, the criteria under which compensation claims qualify for compensation from the Supplementary Fund are identical to those of the 1992 Fund. Thus, anyone entitled for compensation under the 1992 Fund will be entitled to compensation under the Supplementary Fund in the event the 1992 Fund is exhausted.

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<sup>64</sup> International Oil Pollution Compensation Fund, *Claims Manual*, (IOPC: December 2008 Edition), at 9, accessed at [http://www.iopcfund.org/npdf/2008%20claims%20manual\\_e.pdf](http://www.iopcfund.org/npdf/2008%20claims%20manual_e.pdf) [*Claims Manual*]; *Marine Liability Act*, Schedule 6 Article 4.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Marine Liability Act*, Schedule 6 Article 4 paragraph 3.

Conversely, if compensation is not available under the 1992 Fund, for any of the reasons mentioned above, it will not be available under the Supplementary Fund.

## 7) At What Point does the Ship-Source Oil Pollution Fund Become Available?

The SOP Fund can be described as a fund of last and first resort.<sup>68</sup>

### a) Fund of Last Resort

As previously stated, the *Marine Liability Act* and the *Civil Liability Convention* provides for the strict liability of ship owners for pollution damage caused by the ship, and for costs and expenses incurred by the Minister of Fisheries and Oceans and any other person in Canada for clean-up and preventative measures.<sup>69</sup> When the limit of the ship owner's liability is reached, the 1992 Fund becomes available and when that limit is reached, the Supplementary Fund becomes available.

Section 101 of the *MLA* states that the SOP Fund will become available for pollution damage:

- when all reasonable steps have been taken to recover compensation from the ship owner (their insurer) and from the 1992 Fund and the Supplementary Fund and those steps have been unsuccessful<sup>70</sup>;
- where the owner of the ship is not liable because they are able to claim one of the defences<sup>71</sup> available to them under the *Civil Liability Convention* and neither the International Fund nor the Supplementary Fund are liable;
- if the claim exceeds the maximum amount available from the ship owner and from the IOPC Funds<sup>72</sup>;
- where the ship owner is financially incapable of meeting their obligations under section 51 of the *MLA* and the *Civil Liability Convention* (i.e. their insurance is non-existent or inadequate) and where the obligation is not recoverable from the IOPC Funds;<sup>73</sup>
- where the cause of the oil pollution damage is unknown and the Administrator has been unable to establish that the occurrence that gave rise to the damage was not caused by a ship.<sup>74</sup>

In these situations the SOP Fund can be described as a fund of last resort, or the “fourth tier” of compensation available for oil spills from oil tankers in Canada. A claim is made to the SOP Fund as a fund of last resort after attempts to secure compensation from the ship owner and IOPC funds have failed or the compensation available from those sources is inadequate or is otherwise unavailable.

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<sup>68</sup> Alfred Popp, *Ship-Source Oil Pollution Fund: The Administrators Annual Report 2008-2009* (Ottawa: The Administrator Ship-source Oil Pollution Fund) at 2.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Marine Liability Act*, s. 101(1)(a).

<sup>71</sup> See note 34.

<sup>72</sup> *Marine Liability Act*, s. 101(1)(c)(i).

<sup>73</sup> *Ibid.*, s. 101(1)(d).

<sup>74</sup> *Ibid.*, s. 101(1)(g).

The final situation described above, where the cause of the oil pollution damage is unknown and the Administrator has been unable to establish that the occurrence that gave rise to the damage was not caused by a ship, would cover the situation sometimes referred to as a “mystery spill” where it is likely a ship caused the oil pollution damage but the identity of the ship is unknown. In such a situation, claimants, including the Crown, would be able to file a claim with the SOP Fund Administrator for any loss, damage, costs, and expenses (including clean-up costs) resulting from ship-source pollution.<sup>75</sup> In such a situation the party which takes responsibility for the clean-up (which would most likely be the Canadian Coast Guard) would be able to make a claim against the SOP Fund for actual costs and expenses incurred during the clean-up.<sup>76</sup> Mystery spills may occur when the master and owner of a ship fail to report the pollution as is required by the *Pollutant Discharge Reporting Regulations*<sup>77</sup> and the master and owner of the ship subsequently denies that the ship was the source of the pollution.<sup>78</sup>

No matter the circumstances under which a claim is paid out of the SOP Fund, even if paid out in respect of pollution from a ‘mystery ship’, the SOP Fund Administrator is obligated to take all reasonable measures to recover the amount of compensation paid to claimants from the ship owner, the 1992 Fund, the Supplementary Fund or any other person liable.<sup>79</sup>

#### **b) Fund of First Resort**

Under section 103 of the *MLA* a person can also file a claim against the SOP Fund before attempting to file a claim against the ship owner or either the 1992 or Supplementary Fund. The person may file a claim for losses or damage or costs or expenses incurred as a result of actual or anticipated oil pollution damage. In this way the SOP Fund can also be described as a fund of first resort.<sup>80</sup>

The SOP Fund Administrator, as an independent authority, has a duty to investigate and assess claims filed with the SOP Fund. The Administrator may either make an offer of compensation or decline the claim to the extent that it has not been established.

A claimant is not required to prove that the occurrence was caused by a ship, however the Administrator must dismiss a claim if he or she believes, based on the evidence, that the occurrence was not caused by a ship. Also, the Administrator is required to reduce or nullify any amount they would have offered if they are satisfied on the evidence that the

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<sup>75</sup> <http://www.ssopfund.gc.ca/english/faq.asp>.

<sup>76</sup> Alfred Popp, *Ship-Source Oil Pollution Fund: The Administrators Annual Report 2008-2009* (Ottawa: The Administrator Ship-source Oil Pollution Fund) at 1, 7.

<sup>77</sup> *Pollutant Discharge Regulations, 1995*, S.O.R./ 95-351, s. 5.

<sup>78</sup> Alfred Popp, *Ship-Source Oil Pollution Fund: The Administrators Annual Report 2008-2009* (Ottawa: The Administrator Ship-source Oil Pollution Fund) at 7.

<sup>79</sup> *Ibid.*, at 2, 7.

<sup>80</sup> *Ibid.*, at 2.

pollution damage resulted from an act or omission by the claimant with the intent to cause damage or from the claimant's own negligence.<sup>81</sup>

A claimant may, within 60 days after receiving an offer of compensation or notification that the Administrator has rejected the claim, appeal the adequacy of the offer or the rejection of the claim to the Federal Court of Canada (Canada's court of Admiralty).

If the claimant accepts the offer, the Administrator is required to make direct payment, without delay, to the claimant for the amount offered out of the SOP Fund.

Upon accepting an offer of compensation from the SOP Fund the claimant is precluded from pursuing any claim or rights they may have had against the ship owner under the *Civil Liability Convention* as the Administrator of the SOP Fund becomes the sole agency entitled to pursue those claims and rights.<sup>82</sup> Similarly, claimants who accept an offer would also be precluded from making a claim under the 1992 or Supplementary Fund.<sup>83</sup> If the offer is rejected by the claimant or no offer of compensation is made, the claimant would not be precluded from pursuing a claim against the ship owner or the IOPC Funds.

As mentioned, when the Administrator pays a claim out of the SOP Fund he or she is subrogated to the rights of the claimant and is obligated to take all reasonable measures to recover the amount of compensation paid to claimants from the ship owner, the 1992 Fund, the Supplementary Fund or any other person liable.<sup>84</sup>

#### **8) What Types of Damage, Losses and Costs are the Ship Owner (under the *Civil Liability Convention*), the 1992 Fund and the Supplementary Fund Liable for?**

The Convention and Funds cover "pollution damage" which is defined in Article I of the *Civil Liability Convention* as:

*loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.*<sup>85</sup>

Pollution damage includes preventive measures, which are defined in the *Civil Liability Convention* as:

*any reasonable measures taken by any person after an incident has occurred to*

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<sup>81</sup> *Marine Liability Act*, ss. 105(4); 105(5).

<sup>82</sup> *Ibid.*, s. 106(3)(c).

<sup>83</sup> *Ibid.*, s. 106(3)(b).

<sup>84</sup> Alfred Popp, *Ship-Source Oil Pollution Fund: The Administrators Annual Report 2008-2009* (Ottawa: The Administrator Ship-source Oil Pollution Fund) at 2.

<sup>85</sup> *Marine Liability Act*, Schedule 5 Article I.

*prevent or minimize pollution damage.*<sup>86</sup>

Under this definition of “pollution damage” an oil spill from a tanker will generally give rise to claims for five types of damage:

- Property damage
- Costs of clean up operations at sea and on shore
- Direct economic losses by fishermen or those engaged in mariculture
- Direct economic losses in the tourism sector
- Costs of reasonable measures for reinstatement of the environment<sup>87</sup>

**Property Damage:** Compensation is payable for reasonable costs of cleaning, repairing or replacing property that has been contaminated by oil.

**Clean up and preventive measures:** Compensation is payable for the cost of reasonable clean up measures and other measures taken to prevent or minimize pollution damage in a State Party (a country that is a party to the convention), wherever these measures are taken. For example, if response is undertaken on the high seas or within the territorial waters of a state that is not party to the conventions in order to prevent or reduce pollution damage within the territorial sea or exclusive economic zone (“EEZ”) of a State Party, the cost of the response would in principle qualify for compensation. Expenses for preventive measures are recoverable even if no spill of oil occurs, provided that there was a grave and imminent threat of pollution damage.

Compensation is also payable for reasonable costs associated with the capture, cleaning and rehabilitation of wildlife, in particular birds, mammals and reptiles.

**Consequential loss:** Compensation is payable for loss of earnings suffered by the owners of property contaminated by oil as a result of a spill (consequential loss). One example of consequential loss is loss of income by fishermen as a result of their nets becoming oiled, which prevents them from fishing until their nets are either cleaned or replaced.

**Pure economic loss:** 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. It should be noted that only actual losses will be compensated for and proof of such loss is required for the claim. It is likely that many small business operators or small scale fishermen would not be able to prove their losses. Furthermore, payments for pure economic losses are subject to set-offs; for instance, where clean up crews stay at a hotel that has experienced loss, the hotel owners compensation will be reduced to reflect the income earned from the cleanup crews.

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<sup>86</sup> *Ibid.*

<sup>87</sup> IOPC: *Brochure*, at 3.

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.

**Environmental damage:** Compensation is payable for the costs of reasonable reinstatement measures aimed at accelerating natural recovery of environmental damage. Contributions may be made to the costs of post-spill studies provided that they relate to damage which falls within the definition of pollution damage under the conventions, including studies to establish the nature and extent of environmental damage caused by an oil spill and to determine whether or not reinstatement measures are necessary and feasible.

### 9) What Types of Damage, Loss and Costs is the SOP Fund Liable for?

The SOP Fund is essentially liable for the same sorts of damage, loss and costs as the ship owner and the IOPC Funds.

Thus, the SOP Fund may be liable for:

- Claims for oil pollution damage (for actual damages suffered as a result of the oil pollution);
- Claims for the costs of reasonable measures of reinstatement of the environment;
- Claims for costs and expenses of oil spill clean up including the cost of preventative measures; and
- Claims for oil pollution damage and clean up costs where the identity of the ship that caused the discharge cannot be established (mystery spills).

Section 107 of the *MLA* also explicitly states that the SOP Fund is liable for claims of loss of income or for claims of future loss of income for claimants involved in the fishing industry.

Claimants for the purposes of section 107 means:

- an individual who derives income from fishing, from the production, breeding, holding or rearing of fish, or from the culture or harvesting of marine plants;
- the owner of a fishing vessel who derives income from the rental of fishing vessels to holders of commercial fishing licences issued in Canada;
- an individual who derives income from the handling of fish on shore in Canada directly after they are landed from fishing vessels;
- an individual who fishes or hunts for food or animal skins for their own consumption or use;
- a person who rents or charters boats in Canada for sport fishing; or
- a worker in a fish plant in Canada, excluding a person engaged exclusively in supervisory or managerial functions, except in the case of a family-type co-operative operation that has a total annual throughput of less than 1,400 metric tons or an annual average number of employees of fewer than 50.



## 10) Who Can Make Claims Under the *Civil Liability Convention* and the IOPC Funds?<sup>88</sup>

Anyone who has suffered pollution damage in Canada may make a claim for compensation. Claims for damage in Canada, which is a party to both the *Civil Liability Convention* and both IOPC funds, may be made against the ship owner and his insurer, the 1992 Fund and the Supplementary Fund.<sup>89</sup>

Claimants may be private individuals, partnerships, companies, corporations, private organizations or public bodies, including states (i.e. the federal or provincial government) or municipal governments.<sup>90</sup>

## 11) How are Claims Handled?

When an incident occurs the 1992 Fund co-operates closely with the ship owner's insurer, which will normally be one of the Protection and Indemnity Associations (P&I Clubs) that insure the third-party liabilities of ship owners, including liability for oil pollution damage. The P&I Club concerned and the 1992 Fund usually co-operate in the handling of claims, particularly when it is clear from the outset that compensation will be paid under both Conventions. Since in most cases the 1992 Fund only pays compensation once the ship owner/insurer has paid up to the limit applicable to the ship involved, claims are first submitted to the ship owner or his P&I Club. In practice, claims are often channeled through the office of the P&I Club's correspondent closest to the incident location. Because of the close co-operation between the 1992 Fund and the insurer, claims, including supporting documentation, need only be sent to either the P&I Club/correspondent or the Fund.<sup>91</sup>

Occasionally, when an incident gives rise to a large number of claims, the 1992 Fund and the P&I Club jointly set up a local claims office so that claims may be processed more easily. Claimants would then submit their claims to that local claims office. Details of claims offices are given in the local press.

Claims will automatically be considered for compensation from the Supplementary Fund, if the amount available from the ship owner/insurer and the 1992 Fund is insufficient to pay full compensation for proven losses.<sup>92</sup>

The following general criteria apply to all claims:

- Any expense, loss or damage must actually have been incurred.
- Any expense must relate to measures that are considered reasonable and justifiable.
- Any expense, loss or damage is compensated only if and to the extent that it can be considered as caused by contamination resulting from the spill.

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<sup>88</sup> The following paragraphs are taken from the IOPC Claims Manual.

<sup>89</sup> *Claims Manual*, at 17.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*, 17.

- There must be a reasonably close link of causation between the expense, loss or damage covered by the claim and the contamination caused by the spill.
- A claimant is entitled to compensation only if he or she has suffered a quantifiable economic loss.
- A claimant has to prove the amount of his or her expense, loss or damage by producing appropriate documents or other evidence.

Therefore, according to the IOPC Claims Manual, a claim qualifies for compensation only to the extent that the amount of the loss or damage is actually demonstrated. All elements of proof are considered, but sufficient evidence must be provided to give the ship owner, his insurer and the 1992 Fund the possibility of making their own judgment as to the amount of the expense, loss or damage actually suffered. The extent to which claimants are able to reduce their losses is taken into account.<sup>93</sup>

## 12) Why is Enbridge Inc. *Not* Liable for an Oil Spill?

As previously discussed, in Canada the ship owner is responsible for incident management and impact mitigation from an oil spill or other environmental consequences up to the limit of their liability under the *Civil Liability Convention*, not the cargo owner or vessel charterer. Enbridge Inc. has made clear that it will not own or operate the oil tankers that operate to and from its terminal in Kitimat.<sup>94</sup> This has become common practice among oil corporations since the *Exxon Valdez* catastrophe in Alaska.<sup>95</sup>

Claims for pollution damage under the *Civil Liability Convention* can only be made against the registered owner of the tanker in question. This does not preclude victims from claiming compensation outside the convention from persons other than the owner. However, the convention prohibits claims against the servants or agents of the owner, members of the crew, the pilot, the charterer (including bareboat charterer), manager or operator of the ship, or any person carrying out salvage operations or preventive measures. Further, the owner is entitled to take recourse action against third parties in accordance with national law.<sup>96</sup>

Thus, for example, even if Enbridge Inc. were to be the charterer of the boats, which is not likely as the company has stated that its responsibility ends at the marine terminal, they would still be protected from claims for compensation by the *Civil Liability Convention*.

## NATURAL RESOURCE DAMAGES

Despite the fact that a ship owner's insurance and the other funds would be available for natural resource damages, it is questionable whether much of the funds available would

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<sup>93</sup> *Ibid.*, 13-14.

<sup>94</sup> *Major Marine Vessel Risk in BC*, at 5; in an email, dated July 22, 2010, a representative at Enbridge Northern Gateway stated, "Ships will be owned independently of Enbridge."

<sup>95</sup> *Major Marine Vessel Risk in BC*, at 5.

<sup>96</sup> *International Regime for Compensation from Oil Pollution*, at 7.

actually go towards reasonable reinstatement measures aimed at accelerating natural recovery of the environment following a major oil spill. This is because those same funds must be used to pay for the clean up and for compensation. **As noted above, the clean up costs alone for the Valdez spill exceeded the total amount currently available under the Canadian scheme by approximately \$1.23 billion CAN. Consequently, citizens and taxpayers would bear the burden for the vast majority of the natural resource damages and much of the clean up costs and compensation costs as well.**

Further discussion of the natural resource damages will be forthcoming in a subsequent paper.

### **AN ADDITIONAL ISSUE -- OIL SPILL RESPONSE REGIME**

Oil spill response in Canada is governed by the *Canada Shipping Act, 2001 (CSA)*. The current version has been in force since May 28, 2009. The *CSA* requires ships of more than 400 gross tons (gt) that carry oil as cargo or fuel, tankers of 150 gt or more, and groups of vessels that are towed or pushed, are of 150 gt or more combined and carry oil as cargo, to enter into an arrangement with a response organization (RO).<sup>97</sup>

Ships are required to have arrangements with ROs that are able to prove they are capable of providing oil response for an amount of oil “that is at least equal to the total amount of oil that the vessel carries,”<sup>98</sup> both as cargo and fuel, to the prescribed maximum quantity of 10,000 tonnes of oil.<sup>99</sup> ROs must also demonstrate capability to provide response within a specified period of time that varies with the area of response.

The *Exxon Valdez* was carrying approximately 53 million gallons or 1.2 million barrels of oil when it ran aground in Prince William Sound, Alaska and spilled approximately 44,000 tonnes or 257,000 barrels of oil.<sup>100</sup> Tanker traffic resulting from the Enbridge Northern Gateway Pipeline would include Very Large Crude Carriers which would have the capacity to carry between 200 to 285 thousand tonnes or approximately 2 million barrels of oil.<sup>101</sup>

Thus, the maximum amount of oil a RO is required to be capable of responding to in Canada (10,000 tonnes) is roughly one quarter the amount the *Exxon Valdez* spilled off the coast of Alaska. Enbridge Inc. proposes using tankers capable of carrying nearly twice as much oil as the *Valdez* was carrying in its operations. Therefore, the legally required clean up capability is remarkably inadequate to manage the size of an oil spill that the Enbridge Inc. oil tankers risk for the coast of B.C.

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<sup>97</sup> s. 2(1) *Environmental Response Arrangements Regulations*; s. 167(1) *Canada Shipping Act*.

<sup>98</sup> s. 167(1)(a) *Canada Shipping Act*.

<sup>99</sup> s. 4 *Environmental Response Arrangements Regulations*.

<sup>100</sup> *Major Marine Vessel Casualty Risk and Response Preparedness in British Columbia*, at 42.; ARLIS, *Exxon Valdez Oil Spill: FAQs, Links and Unique Resources at ARLIS*, June 2010, at 3.

<sup>101</sup> *Ibid.*, p. 8; West Coast Environmental Law, *Keeping Tankers Out of BC's North Coast: Preventing The Next Exxon Valdez* (2009), at 2.