Chapter 17

Shifting Focus: Towards Outcome-Based Policy and Regulation Making for Maritime Safety and Vessel-Source Pollution in Canada

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17.1. Introduction

A recent publication concluded that "… Canadian water transportation policy is a history of: laissez faire; protection, financing and subsidization; government operation, ownership and privatization; expanded protection; commercialization; and a market oriented philosophy."[1] Consistent with this larger policy process, subsidiary policy and regulation making for maritime safety and vessel-source pollution in Canada have followed the roller-coaster pattern, punctuated by parallel milestones.

This contribution is a survey and analysis of current Canadian directions for domestic maritime safety and vessel-source pollution regimes. Contemporary Canadian policy and regulation making are guided by outcome-based approaches formulated on the basis of risk assessment.[2] The chapter seeks to identify and explain the reasons for contemporary Canadian policy and regulatory directions and the philosophy guiding them with reference to the broader international context. In particular, appropriate comparisons are drawn

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[1] J. Monteiro, and G. Robertson, "Milestones in Canadian Transportation Policy – Water and Highway – Part II" (Paper presented to the Canadian Transportation Research Forum, "North American Networks: Gaps and Opportunities," *Proceedings of the 42nd Annual Conference*, Winnipeg, Manitoba, 3–6 June 2007), p. 580.

[2] At the time of writing the federal Department of Transport (Transport Canada) is planning to review the 1995 National Marine Policy and to update the Marine Safety "Strategic Plan for the period 2008–2015," to be known as "The New Wave." Valerie Devlin, Senior Advisor, Transport Canada, pers. comm. (26 June 2008).

with counterpart practices of the European Union. The foci include the Canadian approach to national maritime transport policy making, the institutional framework of Canada's maritime administration, the process of reform of Canadian shipping regulation for maritime safety and marine pollution purposes culminating in a new shipping act, the strengthening of legislation and creation of penal offences to combat illegal ship discharges, places of refuge for ships in need of assistance, the use of shipping regulatory tools to address marine conservation concerns, supervision of classification societies, and the oil pollution liability and compensation regime. The study concludes with insights into the contemporary maritime policy and regulation in Canada.

17.2. Context

Bordering on three oceans (Atlantic, Arctic, and Pacific) and the Great Lakes, Canada is a major trading nation, but not necessarily a seafaring nation. The bulk of Canadian trade is with the United States, much of which is by way of surface transportation.[3] Whereas maritime cargo in 2005 accounted for 39.7 percent of the volume of Canadian international trade, it accounted for only 12.5 percent of the total value of that trade.[4] In addition, Canada has a very small flag fleet,[5] having made a deliberate policy choice not to provide incentives for shipping (other than for shipbuilding and cabotage), thus relying on international shipping (generally foreign-flagged) to carry the majority of its

[3] In 2007, approximately 59% of the value of trade with the United States was carried by trucks. Transport Canada, *Transportation in Canada: An Overview* (Ottawa: Minister of Public Works and Government Services, 2007), p. 5.

[4] Excluding trade with the United States, maritime traffic represented 45.2% of the value and 83.2% of the volume of Canadian international trade. See WTO, "Trade Policy Review: Canada," *WTO Press Release* No. PRESS/TPRB/280 (WTO, 21 March 2007), available: <http://www.wto.org/english/tratop_e/tpr_e/tp280_e.htm> (retrieved 10 November 2008), para. 159. See also Transport Canada, *Transportation in Canada 2007 Annual Report Addendum,* TP 13198E (Ottawa: Minister of Public Works and Government Services, 2007) [hereinafter *Transportation in Canada 2007*], Tables "EC6: Modal Shares in Canada-United States Trade, 1997–2007" and "EC7: Canada/Other Countries Trade, by Mode and Sector, 1997–2007." All hyperlinks last viewed 12 November 2008.

[5] *Transportation in Canada 2007*, n. 4 above at Table M15: Canadian-Registered Fleet by Type, 1987, 1997, 2007. The Canadian fleet is comprised of 182 vessels with a total registered tonnage of 2.2M tonnes. Dry bulk carriers make up over half the tonnage (1M), with tankers (515) and ferries (428) sharing the remaining majority.

trade.[6] Accordingly, Canada is a continental state in which "shipping is not something that appears to rank very high in government priorities even though it is an essential element of Canadian trade and economy."[7] That may still be true of commercial shipping. However, for risk assessment purposes, the increasing numbers and importance of fishing vessels and recreational boating registered and/or operating in Canadian waters have justified focused attention and new directions for Canadian maritime regulators. Every year there are many recreational boating accidents resulting in death, injury or property loss.[8]

Another significant contextual factor for Canadian maritime transportation law and policy is the constitutional framework. Since confederation in 1867, navigation and shipping have been federal subject-matter so that maritime legislation has essentially consisted of federal law, despite a period during which provincial law was applied in a maritime law setting.[9] Canadian maritime law draws very heavily from international maritime law and its judicial development takes into consideration this essentially international character and the need for international uniformity.[10] However, federal and provincial courts have generally common responsibilities for the administration of Canadian maritime law, irrespective of the location, types or flags of vessels involved.[11]

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[6] Transport Canada, *A Shipping Policy for Canada,* TP 1676 (Ottawa: Transport Canada, Marine, 1979), p. 1; see also Monteiro and Robertson, n. 1 above, p. 581 (Stating that "in 1949, the government concluded that Canada was not justified in maintaining a Canadian flag deep sea fleet via subsidies or preferential tax treatment for shipowners and operators, a policy which has not changed to date").

[7] E. Gold, A. Chircop, and H. Kindred, *Maritime Law* (Toronto: Irwin Law, 2003), p. 23.

[8] Every year some 150 persons die from boating accidents in Canada. See Transport Canada, *Safe Boating Guide 2006*, TP 511 (01/2008) (Ottawa: Transport Canada, Office of Boating Safety, 2008), p. 6, available: <http://www.fedpubs.com/subject/boat/safe_boating_guide.htm> (retrieved 30 March 2009). Statistics concerning accidents from other vessels are reported in: *Transportation in Canada 2007*, n. 4 above at Tables "S14: Marine Occurrences, 2002–2007" and "S17: Small Canadian Vessels Engaged in Fishing Activity Marine Occurrences, 1997–2007."

[9] *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054, *McNamara Construction (Western) Ltd. v. R.*, [1977] 2 S.C.R. 654, and *Zavarovalna Skupnost Triglav (Insurance Community Triglav Ltd.) v. Terrasses Jewellers Inc.*, [1983] 1 S.C.R. 283, followed by *ITO International Terminal Operators Ltd. v. Miida Electronics Inc. (The Buenos Aires Maru)*, [1986] 1 S.C.R. 752, and *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437.

[10] Gold et al., n. 7 above, pp. 115–117.

[11] *Federal Courts Act*, R.S., 1985, c. F-7, s. 22(1) & (3).

17.3. The Multiple Layers of Canadian Maritime Policy Making

Canadian maritime policy has a *problematique* involving multiple layers of federal policy making processes. On one level, there is departmental policy, which is developed at the highest level of the department and frequently also at the unit level within the department. There are also policies of departments that share ocean responsibilities and which may overlap with the Department of Transport's (Transport Canada) mandate, and that in turn may lead to inter-departmental policies. Overarching departmental policies are national policies concerning sustainable development, modern comptrollership and other matters imposed on all line departments by the Office of the Prime Minister and/or the Treasury Board of Canada. For example, the Treasury Board's Management Accountability Framework has had a far-reaching effect on the formulation of departmental policies, including maritime transport policy.[12]

Although ostensibly setting out a framework for integrated oceans management, the Oceans Strategy[13] and accompanying Oceans Action Plan[14] considered by other contributors in this project say very little about marine transportation generally, and maritime safety and vessel-source pollution in particular. This is partly explained by the difficulties faced by the Department of Fisheries and Oceans (DFO) in performing its "integration" mandate as lead department under the *Oceans Act*,[15] and partly due to a fundamental difference in marine culture between departments dedicated to oceans and fisheries on the one hand and maritime transport on the other.[16] Although in public the federal institutional family tends to espouse interdepartmental cooperation, in reality Transport Canada has played a marginal role in DFO's ocean policy initiatives.

As with all federal departments, Transport Canada has its own national sectoral policy process, consisting of what may be described as macro and micro policies. In 2003 Liberal Transport Minister David Collenette announced

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[12] See generally Treasury Board of Canada Secretariat, "TB Management Accountability Framework," available: <http://www.tbs-sct.gc.ca/maf-crg/index-eng.asp> (retrieved 10 November 2008).

[13] Department of Fisheries and Oceans, *Canada's Oceans Strategy: Our Oceans, Our Future* (Ottawa: Fisheries and Oceans Canada, Oceans Directorate, 2002), available: <http://www.dfo-mpo.gc.ca/oceans-habitat/oceans/ri-rs/cos-soc/index_e.asp> (retrieved 10 November 2008).

[14] Department of Fisheries and Oceans, *Canada's Oceans Action Plan: For Present and Future Generations* (Ottawa: Fisheries and Oceans Canada, 2005), available: <http://www.dfo-mpo.gc.ca/oceans-habitat/oceans/oap-pao/index_e.asp> (retrieved 10 November 2008).

[15] *Oceans Act*, S.C. 1996, c. 31.

[16] See A. Chircop, "The Regulation of Marine Transportation and Integrated Coastal Management: Two Management Approaches in Need of Integration," in J. Norton Moore, Kuen Chen Fu and M. Nordquist, eds, *Recent Developments in the Law of the Sea and China* (Leiden: Nijhoff, 2005).

"Straight Ahead - A Vision for Transportation in Canada," a major macro policy that contained little new provision for the marine sector, but confirmed existing port divestiture, review with industry of benefits of marine transportation, evaluation of the provision of marine navigational services and continued participation in international shipping policy processes, notably the Organization for Economic Cooperation and Development (OECD) and International Maritime Organization (IMO).[17] Also at a macro level, the Department has its own Sustainable Development Strategy and Action Plan[18] outlining the strategic priorities, challenges, commitments, and performance measures for measuring success. The Department's Sustainable Development Strategy (SDS) focuses on three areas (urban transportation, commercial freight transportation, and marine transportation) where the Department feels it can make a difference towards achieving sustainable development. In connection with marine transportation, the SDS states that the Department will address pollution from ship emissions (both atmospheric and marine) and from the presence of the ship itself, and identifies some of the major initiatives undertaken by the Department in that regard.[19] However, it does not provide insight into how decisions regarding those initiatives are made. In addition to the macro policies, the Department has formulated problem-specific management responses that are in effect also policy decisions. These include the strategies for invasive alien species,[20] places of refuge,[21] *Canada Shipping Act, 2001* compliance and enforcement, and safety and security culture.[22]

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[17] Transport Canada, *Straight Ahead – A Vision for Transportation in Canada*, TP 14054, online: <http://www.tc.gc.ca/publications/straightahead/vision/menu.htm> [hereinafter Transport Canada, *Straight Ahead*].

[18] Transport Canada, *Sustainable Development Strategy 2007–2009*, TP 13123 (Transport Canada, 2006), available: <http://www.tc.gc.ca/pol/en/acs/SD/sds0709/menu.htm> (retrieved 10 November 2008).

[19] Major initiatives include: Business case for environmental incentive programme in the marine sector, shortsea shipping, skills and labour, transportation data and information and marine pollution control initiatives (sulphur emission control areas, ballast water management, HNS response, ship waste management/reception and aerial surveillance).

[20] Environment Canada, *An Invasive Alien Species Strategy for Canada* (Environment Canada, 2004), available: <www.ec.gc.ca/eee-ias> (retrieved 10 November 2008). Fisheries and Oceans Canada, *Canadian Action Plan to Address the Threat of Aquatic Invasive Species* (Canadian Council of Fisheries and Aquaculture Ministers: 2004), available: <www.dfo-mpo.gc.ca/science/environmental-environnement/invasive_e.htm> (retrieved 10 November 2008).

[21] Transport Canada, *National Places of Refuge Contingency Plan*, TP 14707 (Transport Canada, 2007), available: <http://www.tc.gc.ca/MarineSafety/tp/tp14707/menu.htm> (retrieved 10 November 2008).

[22] Transport Canada, *Moving Forward: Changing the Safety and Security Culture*, TP 14678 (Transport Canada, 2008), available: <http://www.tc.gc.ca/tcss/StrategicPlan/menu.html> (retrieved 10 November 2008).

Transport Canada's policy framework for the transportation industry in general is found in "Straight Ahead – A Vision for Transportation in Canada." The document covers all modes of transportation, offering a framework to guide future transportation policy development and initiatives. In general, it emphasises a market-based approach to policy decisions in order to achieve "a better matching of investment decisions in infrastructure to user needs and offers."[23] In the context of marine safety and the environment, the document specifically supports the implementation of strategic plans formulated by Marine Safety, an important unit within Transport Canada.

Marine Safety has produced two strategic plans (1997–2002; 2003–2010)[24] and is working on a third (2008–2015).[25] The first plan, "The Way Ahead," reflected the Department's recent reorganisation and new oversight role. It focused on strategies that impacted Marine Safety's internal environment and called for the modernisation and streamlining of the existing legislative regime (including the *Canada Shipping Act* and the *Pilotage Act*) to better reflect modern shipping practices. It also highlighted the need to maintain safety standards through more cost-effective means, i.e., the delegation of statutory inspection functions to classification societies and to formalise the consultation process and communication links within Transport Canada and between the Department and stakeholders. This entailed a renewal of the Canadian Marine Advisory Council, which is a key forum through which the various departmental units interact with stakeholders at the national level. The second plan, "The Next Wave," continues the strategic direction set out in the previous plan and follows up on the implementation of the *Canada Shipping Act, 2001*, which had been adopted recently. The plan called for the development and enhancement of a comprehensive performance-based regulatory framework to enable the bringing into force of the Act. It also emphasised the need for a risk-based inspection regime, enhanced pollution prevention, development of a quality assurance programme and safety management systems, and promotion of a stronger safety culture within the marine industry. The plan also committed to the ongoing development of information systems to ensure data collection systems provide the best possible information for safety planning and decision making. At the time of writing,

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[23] Transport Canada, *Straight Ahead*, n. 17 above, p. 84.

[24] Transport Canada, *Marine Safety Strategic Plan 1997–2002 (The Way Ahead)*, TP 13111, available: <http://www.tc.gc.ca/marinesafety/TP/TP13111/strategic-plan-1997-2002/menu.htm> (retrieved 10 November 2008); and Transport Canada, *The Next Wave: Marine Safety Strategic Plan 2003–2010*, TP13111B (2003), available: <http://www.tc.gc.ca/marinesafety/TP/TP13111/strategic-plan-2003-2010/menu.htm> (retrieved 10 November 2008).

[25] Transport Canada, *The New Wave: Marine Safety Strategic Plan 2008–2015* (draft, 2008) [hereinafter Transport Canada, *The New Wave*].

Marine Safety is developing a third strategic plan, "The New Wave," that will reflect the organisation's increasing focus on small commercial vessels and tougher global pollution prevention regulations. It also recognises the growth and importance of the maritime labour market factors. The Plan further calls for strengthened risk-based decision making and the implementation of an integrated management system within Marine Safety. It also includes improvement of the regulatory framework by strengthening the consultation process, continuing a performance-based regulatory scheme, developing and implementing safety management systems for domestic shipping, and faster ratification of international instruments.

Despite the various policy layers identified above, Canada does not have a dedicated and fully integrated marine transportation policy that includes directions for marine safety and vessel-source pollution. The National Marine Policy adopted in 1995[26] was not such a document as it focused, for the most part, on overhauling Canada's overbuilt public infrastructure and its management on the basis of the principle of commercialisation. Consequently, the latter policy focused primarily on the re-organisation of the country's port system and related legislation and led to the adoption of the *Canada Marine Act*.[27] Although given general directions from higher policies, Canadian policy for maritime safety regulation and vessel-source pollution is fundamentally set at a departmental level, and more specifically at the unit level, i.e., Marine Safety, and formulated as strategic plans. Despite the series of strategy documents, there does not appear to be a straightforward policy plan, with clear and concise goals for marine safety and environmental regulation. On the environmental side the focus is on "sustainability"; on the safety side, the main focus is on safety management systems and accident prevention. Overall, the Canadian maritime regulatory framework is now less prescriptive and more focused on performance and risk management. Transport Canada's shift toward greater focus on safety management reflects recognition that the regulatory approach does not ensure adequate risk management and adds a burden on the Department's limited resources (e.g., enforcement).[28]

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[26] Transport Canada, *National Marine Policy* (Ottawa: Transport Canada, 1995).

[27] *Canada Marine Act*, S.C. 1998, c. 10.

[28] *Moving Forward*, TC's safety management strategy, starts with the recognition that "an entity can comply with regulations without effectively managing risks to acceptable levels. A more comprehensive approach, which includes systematically understanding and managing risks and threats in the system, will enable us to make progress on our safety and security objectives." Transport Canada, *Moving Forward,* n. 22 above, p. iii.

17.4. Evolution of the Maritime Legislative Framework and Canadian Ratification Pattern of IMO Conventions

The contemporary sources of maritime law in Canada consist of federal statutes, case law and maritime law conventions to which Canada is a party. Canadian maritime law is federal law. Canada inherited the original structure of its maritime and admiralty law from English law.[29] Much of Canada's early maritime law consisted of 19th century English statutory law and case law, which was applied in the colonies, and generally received into Canadian law on confederation in 1867. Canada did not enjoy legislative powers over foreign affairs until the *Statute of Westminster* in 1931[30] and consequently the Canadian Parliament was limited in its ability to regulate shipping. With *Westminster*, Canada attained competence to deal with admiralty and shipping matters and in 1934 enacted the *Admiralty Act*, 1934[31] and the first *Canada Shipping Act*.[32] British dominance of Canadian maritime legislation would continue well after this period.[33] However, from 1931 onwards, Canada was in a position to further develop its policy and legislative framework for maritime matters generally through numerous amendments to the *Canada Shipping Act* and its eventual transformation into the *Canada Shipping Act, 2001*,[34] the *Marine Liability Act*[35] and numerous other statutes listed in Table 17.1. Empowered by the *Federal Court Act*, which was adopted in 1971,[36] Canadian courts would also embark on a case law development path that would part ways in many respects with English maritime law.

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[29] For a historical account of the historical origins of Canadian maritime law and jurisdiction, see generally Gold et al., n. 7 above at 114–110.
[30] *Statute of Westminster*, 22 Geo. V., c. 4.
[31] *Admiralty Act*, S.C. 1934, c. 31.
[32] *Canada Shipping Act*, S.C. 1934, c. 44.
[33] See T. L. McDorman, "The History of Shipping Law in Canada: The British Dominance," *Dalhousie Law Journal* 7 (1982–1983): 620.
[34] *Canada Shipping Act*, S.C. 2001, c. 26 [hereinafter CSA 2001].
[35] *Marine Liability Act*, S.C. 2001, c. 6.
[36] *Federal Court Act*, S.C. 1971, c. 1. The title of the Act would later be amended to *Federal Courts Act*. The Federal Court, as the Admiralty Court of Canada, succeeded the Exchequer Court.

Table 17.1. Statutory scheme for maritime and related statutes in Canada

Legislation	**Statutes**
Constitutional	*Constitution Act*
Judicature	*Federal Courts Act*
Maritime	*Arctic Waters Pollution Prevention Act* *Bills of Lading Act* *Canada Marine Act* *Canada Shipping Act* *Canada Transportation Act* *Coasting Trade Act* *Marine Insurance Act* *Marine Liability Act* *Marine Transportation Security Act* *Merchant Seamen Compensation Act* *Navigable Waters Protection Act* *Pilotage Act* *Safe Containers Convention Act*
Fisheries & Environmental	*Canada National Marine Conservation Areas Act* *Canada Water Act* *Canada Wildlife Act* *Canadian Environmental Assessment Act* *Canadian Environmental Protection Act* *Fisheries Act* *Migratory Birds Convention Act, 1994*
Oil & Gas	*Canada Oil and Gas Operations Act* *Canada-Newfoundland Atlantic Accord Implementation Act* *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*
Other	*Atomic Energy Control Act* *Bank Act* *Canada Labour Code* *Canadian Transportation Accident Investigation and Safety Board Act* *Nuclear Liability Act* *Oceans Act* *Transportation of Dangerous Goods Act, 1992*

The development of Canadian maritime law as it relates to safety, environmental and security considerations has in great part reflected commitments to international maritime conventions and generally the work of the IMO in developing these instruments, as well as the incremental development of technical standards and guidelines. The *Canada Shipping Act, 2001* includes as an objective to "ensure that Canada can meet its international

obligations under bilateral and multilateral agreements with respect to navigation and shipping."[37] The Act implements numerous international maritime conventions to which Canada is a party.[38] Section 32(1) of the Act provides for referential incorporation of standards produced by international bodies through regulatory action. The *Marine Liability Act* essentially consists of principles and rules set out in international conventions to which Canada is or may become a party.

Canada is not a party to all the IMO Conventions. On safety matters, Canada is a party to the International Convention for the Safety of Life at Sea, 1974 as amended (SOLAS),[39] International Convention on Load Lines,[40] Convention on the International Regulations for Preventing Collisions at Sea, 1972[41] and International Convention on Maritime Search and Rescue, 1979,[42] but not to the 1978 and 1988 protocols of SOLAS.[43] On vessel-source pollution, Canada is a party to International Convention for the Prevention of Pollution from Ships, 1973 as amended by the Protocol of 1978 (MARPOL) and Annexes I to III, but not to Annexes IV to VI.[44] It is a party to the International Convention on Salvage, 1989[45] and International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (OPRC), but not to the OPRC Protocol on Hazardous and Noxious Substances.[46] Canada is not

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[37] CSA 2001, n. 34 above, s. 6(g).

[38] Id. (Schedule 1 lists 31 conventions as the responsibility of the Minister of Transport and Schedule 2 states two others under the responsibility of the Minister of Fisheries and Oceans).

[39] *International Convention for the Safety of Life at Sea*, 1974, 1 November 1974, 1184 *U.N.T.S.* 2, Institute of Maritime Law, *The Ratification of Maritime Conventions* (London: Lloyd's Press, 1991–2003), Vol. I.3.20.

[40] *International Convention on Load Lines*, 1966, 5 April 1966, 640 *U.N.T.S.* 133, Institute of Maritime Law, *The Ratification of Maritime Conventions* (London: Lloyd's Press, 1991–2003) Vol. I.3.50; *Protocol of 1988 relating to the International Convention on Load Lines*, 1966, 11 November 1988, 2 *U.S.T.* 102, Institute of Maritime Law, n. 39 above, Vol. I.3.60.

[41] *Convention on the International Regulations for Preventing Collisions at Sea, 1972*, 20 October 1972, 1050 *U.N.T.S.* 16, Institute of Maritime Law, n. 39, Vol. I.3.250.

[42] *International Convention on Maritime Search and Rescue,* 27 April 1979, 1405 U.N.T.S. 97, Institute of Maritime Law, n. 39 above, Vol. I.3.280.

[43] *Protocol relating to the International Convention for the Safety of Life at Sea, 1974*, 17 February 1978, 1276 *U.N.T.S.* 237, Institute of Maritime Law, n. 39 above, Vol. I.3.30; *Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974*, 11 November 1988, *U.S. Treaty Doc.* 102-2, Institute of Maritime Law, n. 39 above, Vol. I.3.40.

[44] *International Convention for the Prevention of Pollution from Ships*, 2 November 1973, 1340 *U.N.T.S.* 184*; Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships of 1973*, 17 February 1978, 1340 *U.N.T.S.* 61.

[45] *International Convention on Salvage,* 28 April 1989, *U.K.T.S.* 1996 No. 93.

[46] *International Convention on Oil Pollution Preparedness, Response and Co-operation*, 30 November 1990, 30 *I.L.M.* 733; OPRC/HNS Protocol, *Protocol on Preparedness, Response*

a party to the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001,[47] International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004[48] and the recently adopted International Convention on the Removal of Wrecks, 2007,[49] but has legislated rules and standards for ballast waters, anti-fouling systems and wrecks in navigable waterways.[50] On damage liability and compensation, Canada is a party to the Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, 1992 (CLC)[51] and Protocol to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, 1992 (IOPCF),[52] but not to the Protocol of 2003.[53] Recently Canada became a party to the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC), as amended by the Protocol of 1996.[54] Canada has not always become a party to international conventions that it has in fact implemented. For example, provisions of MARPOL and the LLMC were implemented in Canadian legislation long before Canada became a party to those instruments.

There have been some departures from IMO international standards at various points in time. Canada did not become a party to MARPOL when this instrument came into force partly because it believed it had higher pollution

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and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000, IMO Doc. HNSOPRC/CONF/11/Rev 1, 15 March 2000.

[47] *International Convention on the Control of Harmful Anti-Fouling Systems on Ships*, London, 5 October 2001 (London: IMO, 2005) [hereinafter AFS Convention].

[48] *International Convention for the Control and Management of Ships' Ballast Water and Sediments*, London, 16 February 2004, IMO Doc. IMO/BWM/CONF/36.

[49] *International Convention on the Removal of Wrecks*, Nairobi, 18 May 2007, IMO Doc. No. LEG/CONF.16/21.

[50] *Navigable Waters Protection Act* (R.S.C., 1985, c. N-22); *Ballast Water Control and Management Regulations* (SOR/2006-129); and *Regulations for the Prevention of Pollution from Ships and for Dangerous Chemicals* (SOR/2007-86).

[51] *International Convention on Civil Liability for Oil Pollution Damage*, 29 November 1969, 973 *U.N.T.S.* 3, as amended by *Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969*, 27 November 1992, *U.K.T.S.* 1996 No. 87 [hereinafter CLC].

[52] *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, 18 December 1971, 1110 *U.N.T.S.* 57, as amended by *Protocol to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971*, 27 November 1992, 1996 *A.T.S.* 3.

[53] *Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992*, 16 May 2003, IMO Doc. No. LEG/CONF.14/20.

[54] *Convention on Limitation of Liability for Maritime Claims, 1976*, 19 November 1976, 1456 *U.N.T.S.* 221, as amended by the *Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976*, 2 May 1996, 35 *I.L.M.* 1433.

standards in its legislation. In relation to Arctic waters, Canada made a reservation to its ratification to MARPOL to safeguard the application of the *Arctic Waters Pollution Prevention Act*[55] in the Canadian Arctic.[56] This latter statute sets higher waste management and discharge standards in Arctic waters from ships for most ship-generated waste and anticipated the special power conferred on coastal states for ice-covered areas by Article 234 of the United Nations Convention on the Law of the Sea, 1982,[57] to which Canada is a party.

17.5. Institutional Framework and New Directions for the Maritime Administration

In principle and at law, Transport Canada is the maritime administration of Canada. In practice, functions related to maritime administration are shared among a number of federal government departments, forming a complex institutional mosaic.[58]

A year after the adoption of the original *Canada Shipping Act*, Transport Canada's first iteration was established in 1935 in response to the new challenges facing the organisation of national transportation.[59] At this time, institutions responsible for Canadian railways, inland navigation and marine shipping were integrated and the *Department of Transport Act*, 1936 was adopted.[60] Until 1994 Transport Canada performed a dual role that involved the "administration" and "management" of the transport system as well as developing the policy and regulatory framework. This was perceived to result

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[55] *Arctic Waters Pollution Prevention Act,* R.S.C., 1985, c. A-12 [hereinafter AWPPA].

[56] International Maritime Organization (IMO), *Status of Multilateral Conventions and Instruments in Respect of which the International Maritime Organization or its secretary-General Performs Depositary or other Functions, as at 31 December 2005*, IMO Doc. J/9193, p. 96 [hereinafter IMO].

[57] *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982, UN Doc. A/CONF.62/122, 7 October 1982, 33 *I.L.M.* 1309.

[58] There are, in addition: (1) consultative bodies, such as the Canadian Marine Advisory Council and National Marine and Industrial Council; and (2) technical or function-specific bodies, including those established by statute, such as the Canada Transportation Agency, Marine Technical Review Board, Transportation Appeal Tribunal of Canada, Transportation Safety Board, and Ship Source Pollution Fund. Further, industry and transportation professional groups (e.g., Canadian Maritime Law Association, Shipping Federation of Canada, and Canadian Shipowners Association, among several others) are active participants in maritime policy and law-making processes.

[59] Transport Canada, *Transport Canada: Our Story* [1936–1946] (n.d.), available: <http://www.tc.gc.ca/publications/ourstory/1936-1946-menu.htm> (retrieved 10 November 2008).

[60] Today this statute is the *Department of Transport Act*, R.S.C., 1985, c. T-18.

in a conflict of interest and it was decided that Transport Canada should focus primarily on policy and regulatory responsibilities. Thus, in 1994 Transport Canada was reorganised, the St. Lawrence Seaway and numerous ports were also transferred from Transport Canada to local authorities. Transport Canada also lost the Canadian Coast Guard to DFO, ostensibly in order to rationalise government and reduce costs through the merger of the two departments' fleets.[61] As a result, and at least until 2003, Transport Canada became less of an organisation focused on "administration" and "management" of operations, and became more focused on policy and regulatory functions. In late 2003, all marine safety policy and regulatory responsibilities were consolidated under this department. As a result, the Office of Boating Safety, the *Navigable Waters Protection Act*,[62] and certain regulatory aspects of pollution prevention and emergency response, formerly responsibilities of other departments, were transferred back to Transport Canada.[63] At this time, the Canadian Coast Guard remains attached to DFO, although as a special operating agency. Today Transport Canada is responsible for developing national transportation policies and programmes. Within Transport Canada, Marine Safety is the principal policy, regulatory and enforcement agency relating to ship safety and marine pollution prevention. Transport Canada is the lead agency under the *Canada Shipping Act, 2001*, the *Arctic Waters Pollution Prevention Act*, the *Navigable Waters Protection Act*, and the *Canada Marine Act*.

DFO is tasked by legislation to lead and develop Canada's national oceans strategy and integrated management planning for the marine environment. This department focuses on Canada's economic, ecological, and scientific interests in oceans, including fisheries, hydrography, and marine services, and the coordination of federal policies and programmes respecting oceans.[64] It shares jurisdiction with Transport Canada in many areas and is responsible for the administration and implementation of the *Oceans Act* and *Fisheries Act*.[65] In particular, it is responsible under the *Canada Shipping Act, 2001* for dealing with pollution response.[66] Operating under the DFO umbrella, the Canadian Coast Guard (CCG) is the civilian federal agency responsible for patrolling Canada's coastline, providing marine search and rescue, maintenance of aids to navigation, marine pollution response, and icebreaking services. The move to DFO led to low morale and caused operational difficulties possibly

[61] Transport Canada, *Transport Canada: Our Story* [1986–1996] (n.d.), available: <http://www.tc.gc.ca/publications/ourstory/1986-1996-2.htm> (retrieved 10 November 2008).
[62] *Navigable Waters Protection Act,* n. 50 above.
[63] Transport Canada, *The New Wave*, n. 25 above, p. 4.
[64] *Department of Fisheries and Oceans Act*, R.S.C., 1985, c. F-15, s. 4.
[65] *Fisheries Act*, R.S.C., 1985, c. F-14 [hereinafter FA].
[66] CSA 2001, n. 34 above at ss. 174.1, 179 & 180.

resulting from differences between its shipping culture and the fisheries development and management culture of its new home, as well as budget cuts in the name of rationalisation.[67]

The Department of Environment (Environment Canada)[68] is responsible for the administration of several statutes for the protection and conservation of Canada's environment. Environment Canada has direct responsibility for marine pollution under the *Canadian Environmental Protection Act*, 1999,[69] *Canada Water Act*,[70] *Canada Wildlife Act*,[71] the *Migratory Birds Convention Act*, 1994[72] and the pollution prevention provisions of the *Fisheries Act.*[73] Environment Canada is the lead federal department on response and cleanup of up of hazardous wastes and oil spills. It operates in conjunction with DFO and Transport Canada in relation to several of its marine tasks.

Given the complexity and overlap of legislative and enforcement authority within the federal government, it is not surprising that a great deal of coordination is required between the various agencies involved. For example, vessel-source marine pollution is enforced by Transport Canada Inspectors (CSA 2001), Fisheries Officers (FA), Environment Canada's Enforcement Branch (CEPA), and the Canadian Wildlife Service's Enforcement Branch (MBCA). Although some interdepartmental dialogue occurs at the legislative steering committee level, there appears to have been little effective dialogue and cooperation in the development of regulatory strategies and policy. Faced with overlapping and competing mandates, Transport Canada, DFO, and Environment Canada have concluded memoranda of agreement to cooperate on enforcement issues.[74]

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[67] See the testimony of Michael Turner, former Deputy Commissioner and Acting Commissioner of the Canadian Coast Guard in Standing Senate Committee on Fisheries and Oceans, "The Coast Guard in Canada's Arctic: Interim Report," Fourth Report, June 2008, p. 36.

[68] *Department of the Environment Act*, R.S.C., 1985, c. E-10.

[69] *Canadian Environmental Protection Act,* S.C. 1999, c. 33 [hereinafter CEPA].

[70] *Canada Water Act,* R.S.C., 1985, c. C-11.

[71] *Canada Wildlife Act,* R.S.C., 1985, c. W-9.

[72] *Migratory Birds Convention Act,* S.C., 1994, c. 22 [hereinafter MBCA].

[73] Under an administrative agreement with DFO, EC has primary responsibility for the pollution prevention provisions of the *Fisheries Act*. Environment Canada, *Compliance and Enforcement Report - Volume 1*, available: <http://environnementcanada.gc.ca/alef-ewe/default.asp?lang=en&n=09ECE703> (retrieved 10 November 2008), Section 1.

[74] Some of the main MOUs signed to date are: TC/EC *MOU respecting Enforcement* (of the CSA 2001, AWPPA, MBCA and CEPA) (2006); TC/DFO *MOU respecting Safety at Sea of Commercial Fishers* (November 2006); TC/EC/DFO *MOU respecting Enforcement in Atlantic Canada* (2002); TC/DFO *MOU and Resource Transfer Agreement (regarding transfer of the CCG policy responsibilities to TC)* (3 March 2005); TC/DFO *MOU respecting Marine*

17.6. Selected Thematic Issues

17.6.1. Maritime Safety

Canada's principal legislation concerning maritime safety is the *Canada Shipping Act, 2001*, which came into force on 1 July 2007. As mentioned earlier, the original *Canada Shipping Act* dated back to 1934, and since then it saw numerous amendments and add-ons, making the legislation voluminous and unwieldy. As McDorman noted, the underlying policy rationale tended to reflect former British imperial interests rather than the contemporary trading interests of a modern nation such as Canada.[75] The legislation was also notoriously complex and inefficient, with over one hundred sets of regulations, making it difficult to enforce. Perhaps a major problem with the old legislation was its emphasis on regulation that required enforcement. For these and other reasons, a process of legal reform was commenced in 1997 and culminated in the adoption of the modern and streamlined *Canada Shipping Act, 2001*. The change has been described as a move from an inspection-based to a compliance-based regime, with a greater emphasis on a proactive approach to maritime safety and promotion of compliance.[76] Since the adoption of the Act in 2001, regulations under the new act took years to modernise and re-enact through an ongoing consultative process with industry and other bodies, and the process continues today. With its many changes, the Act is touted as better suited to promoting safer, more efficient, and environmentally sound shipping. In fact, it takes into consideration the broader range of vessels in Canadian navigable waters (from pleasure boating to commercial vessels) and provides for modern operational safety and environmental standards.

In the European Union (EU), a similar trend toward performance based legislation is observed, but Member States insist on following initiatives within the IMO framework. A point of divergence is in the provision of services, which in Canada is determined on a mixed risk-based decision making plus market-based approach (e.g., privatisation, user-pays). In comparison, in the EU, provision of services is generally governed by the EU rule on free provision of services (also market-based approach), but with certain exclusions for public utility services. In addition, there are differences between Member

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Transportation Safety & Environmental Protection (April 1996); DFO/EC *MOU respecting administration of the Fisheries Act* (1985).

[75] McDorman, n. 33 above, p. 651.

[76] Transport Canada, "Canada Shipping Act, 2001 ushers in new era of safety and protection of the marine environment," *News Release*, No. H 133/07 (3 July 2007).

States as this issue belongs to the area of shared (EU-Member State) competences.

17.6.1.1. Delegation of Functions to Classification Societies and Their Supervision

A major change introduced by the *Canada Shipping Act, 2001* is the delegation of certain functions previously considered the exclusive reserve of the maritime administration. The EU also delegates certain tasks to classification societies. In Canada, the *Canada Shipping Act, 2001* empowers the Minister of Transport with discretionary authority to delegate classification societies to issue Canadian maritime documents, carry out compliance inspections, and undertake audit inspections.[77] To date, five classification societies have been authorised to do so.[78] The move toward delegated statutory inspection was a specific commitment made in Marine Safety's in "The Way Ahead" and was first implemented in 1998.[79] In July 1999, prior to proceeding with the comprehensive "master" delegation agreements, Transport Canada signed agreements concerning certification for the International Safety Management (ISM) Code.[80] Ships may enrol in the Delegated Statutory Inspection

[77] CSA 2001, n. 34 above, ss. 12 & 13.

[78] Lloyd's Register of Shipping (4 December 2000), American Bureau of Shipping (23 March 2001), Germanischer Lloyd (10 September 2001), Det Norske Veritas (22 April 2002), and Bureau Veritas (31 March 2003). Transport Canada, "Delegation of Statutory Inspection and Certification" website, available: <http://www.tc.gc.ca/marinesafety/NPD/Intro-Text/menu.htm> (retrieved 10 November 2008) [hereinafter Transport Canada, "DSI&C"].

[79] *Bill C-15, an Act to amend the Canada Shipping Act and to make consequential amendments to other Acts* (1st Sess., 36th Parl., 46 Eliz. II., 1997), 1998, c. 16, s. 6, adding s. 317.1 to the *Canada Shipping Act, 1985*. At the time of passing only one political party, the New Democratic Party, opposed this move on the grounds that: a) "[p]rivatization of inspection will … increase bottom line pressures to cut corners to do things the cheap way rather than the safe way," b) that the job of safety inspector will become a patronage appointment, c) that classification societies are often lax, and d) that a large amount of revenue generated through inspections will be lost to international players. *House of Commons Debates, Second Reading of Bill C-15* (Edited Hansard, Debates No. 77: 19 March, 1998), p. 1105 (Bev Desjarlais), available: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2332782&Language=E&Mode=1&Parl=36&Ses=1> (retrieved 10 November 2008) and *House of Commons Debates, Third Reading of Bill C-15* (Edited Hansard, Debates No. 96: 30 April, 1998), p. 1105 (Bev Desjarlais), available: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2332801&Language=E&Mode=1&Parl=36&Ses=1> (retrieved 10 November 2008).

[80] This was done under the Safety Management Regulations with the five delegated classification societies. Those agreements are now considered complementary to the "master" agreements. Transport Canada, "DSI&C," n. 78 above.

Programme (DSIP)[81] and thereafter its classification society becomes the sole issuing authority for the vessel's certificates. The DSIP encompasses most of the surveys and certification required under the Act and regulations, including documentary requirements of international conventions to which Canada is a party.[82] Although these moves suggest a comprehensive delegation of authority, in practice Marine Safety has retained sole issuing authority for several important documents.[83] Further, Marine Safety retains authority to ensure that Canadian vessels comply with all applicable international and domestic requirements, and may monitor compliance through various administrative and executive measures.[84]

17.6.1.2. Phasing-Out of Single-Hull Tankers

The phasing-out of single-hull tankers from trading in Canadian waters has had to tie in to the requirements of the United States *Oil Pollution Act of 1990*[85] and subsequently the initiative to amend Regulation 13 of Annex I to MARPOL concerning existing and new tankers. The purpose was to improve the standards of existing and new tankers as a preventative measure to accidental oil pollution resulting from an incident, such as collision or grounding, or in a worse case scenario, a casualty at sea. As noted earlier, the bulk of Canadian trade is with its southern neighbour and therefore any major change to the conditions or transportation of that trade can be expected to affect Canada. Accordingly, Canada proceeded to implement the single-hull standard under the influence of the United States' legislation as early as 1993 and further developed in 1995 to

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[81] Transport Canada, *Delegated Statutory Inspection Programme,* TP 13585E (Ottawa: Transport Canada, 17 December 2001), available: <http://www.tc.gc.ca/marinesafety/NPD/Delegated-Statutory-Inspection/Revision-1-signed.PDF> (retrieved 10 November 2008) [hereinafter Transport Canada, *DSIP*].

[82] Id., para. 3.2.4.

[83] E.g., Marine Occupational Safety and Heath requirements; Safety Convention certificates on passenger vessels; extending inspection intervals or certificates more than two months beyond the due date; exemption of certificates; revoking a certificate; any statutory function or inspection not explicitly transferred. Transport Canada, *DISP*, n. 79 above, paras. 3–4.

[84] E.g., administrative reviews of the delegated organisation's reports and records; announced and unannounced verification inspections (of a scope comparable to a port state control inspection); dry-dock examinations; marine casualties and damage surveys; liaison with the delegated organisation; and audit of delegated organisation's shore operations. Id.

[85] *Oil Pollution Act of 1990*, 33 *U.S.C.* 2701, et seq. See the US Coast Guard Interim Final Rule on Double Hull Standards for Vessels Carrying Oil in Bulk, issued 12 August 1992 for smaller existing tankers.

apply to both Canadian ships and non-Canadian ships trading in Canadian waters, including the exclusive economic zone (EEZ).[86] Following the loss of the *Erika* and subsequently the *Prestige* off the coasts of France and Spain respectively, the IMO was urged to accelerate the phasing out of single-hulls and to bring international standards more in line with the *Oil Pollution Act of 1990* through further amendments to MARPOL.[87] In addition to an accelerated phase-out for single-hulls, heavy grade oils (HGOs) were banned from carriage by single-hulls being phased out and the Condition Assessment Scheme for these ships was extended.[88]

Despite what appeared to be a convergence of international standards for single-hull tankers and the oil trade, which had suffered a seismic split with the *Oil Pollution Act of 1990*, there continued to be differences between the regulations under the Act and the revised MARPOL Annex I regulations. This was a divergence that Canada obviously could not ignore. Hence, Canadian regulations on single-hull phase-outs have had to apply two parallel regimes. The *Oil Pollution Act of 1990* requirements continue to be applied to certain existing tankers, notably those trading with the United States,[89] whereas others are to be governed by the amended MARPOL Annex I standards.[90] In contrast, the EU has a single regime governed by the amended MARPOL to accelerate the phase-out, which was largely at the behest of the EU.

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[86] *Oil Pollution Prevention Regulations*, SOR/03-3, at s. 14.2: "Any oil tanker that is engaged in voyages that take place in waters under Canadian jurisdiction shall comply with Standards for the Double Hull Construction of Oil Tankers, TP 11710, published by the Canadian Coast Guard on July 6, 1993, as amended from time to time, other than sections 3 and 5 and subparagraphs 24(a)(i), (b)(i) and (c)(i) of those Standards." Superseded by *Regulations for the Prevention of Pollution from Ships and for Dangerous Chemicals,* SOR/2007-86, s. 54 *et. seq.*

[87] Specifically Regulations 13F, 13G and 13H to Annex I for new tankers and existing large tankers. Following *Erika*, amendments to Regulation 13G resolution MEPC.95(46) included smaller tankers and brought MARPOL closer in line with the US OPA 1990 in order to bring the international requirements more in line with OPA 90 requirements by 2015. However, with *Prestige* in 2002, Regulation 13G was amended further and a new Regulation 13H was introduced accelerating the phase-out, among other.

[88] IMO, Resolutions MEPC.111(50) and MEPC.112(50).

[89] In particular the following: "Canadian tankers on domestic trade or only trading to the U.S.; U.S. tankers trading only to Canada or in transit through waters under Canadian jurisdiction; Canadian tankers that are less than 5000 DWT, except tankers over 600 DWT on international trade carrying heavy grade oil as cargo; non-Canadian tankers on the coasting trade; non-Canadian tankers on international trade calling at Canadian ports that are less than 5000 DWT, except tankers over 600 DWT carrying heavy grade oil as cargo." Transport Canada, *Standards for the Double Hull Construction of Oil Tankers,* TP 11710 (Ottawa: Transport Canada, 6 July 1993, rev. 5 April 2005).

[90] Id., namely: "Canadian tankers over 5000 DWT requiring international certification; non-Canadian tankers over 5000 DWT on international trade in waters under Canadian jurisdiction; tankers over 600 DWT on international trade carrying heavy grade oil as cargo."

17.6.1.3. Use of Safety Regulatory Tools for Marine Environmental Protection and Conservation Purposes

Canada has used regulatory tools normally reserved for the regulation and management of navigation safety for the purpose of achieving marine environmental protection and conservation objectives. This type of regulation relates to restrictions and controls on the movement of vessels, or the conditions of that movement, and may be of a mandatory or recommendatory nature. This is a function that rests in DFO and is carried out by the Canadian Coast Guard.[91] The utilisation of these tools for protection and conservation purposes has provided Canada with the management and enforcement tools needed without necessarily resorting to the designation of a particularly sensitive sea area (PSSA) through the IMO, as has been the case in several other regions, including the marine areas of EU Member States in the Baltic Sea, Canary Islands region, North Sea (Wadden Sea), and Western European Waters. To date, there has been only one instance of a PSSA being mooted within the Canadian federal government, specifically in connection with oil pollution incidents and consequent bird mortality in the northwest Atlantic off Newfoundland.[92] As it turned out, rather than proceeding the PSSA path, the federal government passed amendments to the *Migratory Birds Convention Act* and *Canada Shipping Act, 2001*, which toughened the sanctions for oil pollution offences. In general, there are a number of instances where safety regulation has been employed for marine environmental protection and conservation purposes, and in particular in two types of situations.

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[91] Under the former *Canada Shipping Act*, s. 125. In 1996 pursuant to the *Public Service Rearrangement and Transfer of Duties Act*, R.S.C. 1985, c. P-34, responsibility for vessel traffic and marine navigation services under s. 562.15-562.20 and 517-525 of the CSA 1985 was transferred to DFO. TC/DFO, *MOU respecting Marine Safety & Environmental Protection* (April 1996), n. 74 above, s. 2, available: <http://www.tc.gc.ca/MarineSafety/TP/mou/menu.htm> (retrieved 10 November 2008).

[92] Although not PSSAs, it should be noted that DFO has designated seven "Marine Protected Areas" (MPAs) under the *Oceans Act*, five in Eastern Canada: The Musquash Estuary (7 March 2007), Basin Head (PEI) (11 October 2005), Gilbert Bay (11 October 2005), Eastport (11 October 2005), The Gully (14 May 2004); and two off the Pacific coast: Bowie Seamount (21 April 2008), Endeavour Hydrothermal Vents (7 March 2003). Fisheries and Oceans Canada, "Marine Protected Areas," available: <http://www.dfo-mpo.gc.ca/oceans/marineareas-zonesmarines/mpa-zpm/index-eng.htm> (retrieved 10 November 2008). The system of MPAs is also complemented by "Marine Wildlife Areas" established by Environment Canada and "National Marine Conservation Areas" established by Parks Canada. Again, there are no PSSAs established with regard to any of these. The departments and agencies are coordinated by the *Federal Marine Protected Areas Strategy* (Ottawa: DFO, 2005), available: <http://www.dfo-mpo.gc.ca/oceans-habitat/oceans/mpa-zpm/fedmpa-zpmfed/index_e.asp> (retrieved 10 November 2008).

The first concerns the requirement of use of automatic identification system (AIS), now an IMO international standard and which, while enabling the identification of the location of a vessel for the purposes of traffic regulation and search and rescue, also assists aerial surveillance of potential polluters and evidence for prosecutions.[93] Information concerning the identity and course of the ship is relayed to coastal authorities on a real-time basis and has enabled more efficient use of limited surveillance resources. The reporting of a slick may thus be traced to a vessel that may have been navigating the area. In another application, a fishing vessel that appears to be undertaking irregular movement at a slow speed in a marine protected area may also suggest that illegal fishing may be taking place.

The second situation concerns the conservation needs of a particular species and protection of its habitat, possibly on a seasonal basis. In the Atlantic region this has occurred in the form of change to the shipping lanes in the Canadian sector of the Bay of Fundy to protect the North Atlantic Right Whale population from ship strikes, a major cause of premature mortality for this endangered species. Studies of sightings between 1987–2000 suggested that the shipping lanes in the Bay of Fundy were in direct conflict with areas where major aggregations of this species occurred, and that a slight adjustment to the location of the lanes in the traffic separation scheme in the area could significantly reduce the ship strikes.[94] A proposal was made to the IMO and after consideration by the Sub-Committee on Safety of Navigation (NAV), the proposed changes were adopted. The changes were made as part of the North Atlantic Right Whale Recovery Plan led by DFO[95] after a joint government-industry working group concluded that the most cost effective way of reducing strikes (by as much as 80 percent) while maintaining safe commercial navigation was to shift ship traffic flow in areas of highest whale density.[96] The success of this initiative led to a similar proposal for the

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[93] Pursuant to the *Navigation Safety Regulations*, all vessels over 300 tons on international voyages and domestic trade ships of 500 GT or more except fishing vessels must carry AIS. *Navigations Safety Regulations*, SOR/2005-134, s. 65 (entered into force 10 May 2005). In the EU, reporting is regulated by Directive 2002/59/EC on Community Vessel Traffic Monitoring and Information System.

[94] IMO, Doc. NAV 48/3/5 (5 April 2002).

[95] Transport Canada, "Bay of Fundy Shipping Lanes Moved to Protect Right Whale," *News Release*, No. A017/02 (19 December 2002), available: <http://www.tc.gc.ca/mediaroom/releases/atl/2002/02_A017e.htm> (retrieved 10 November 2008). The new lanes were approved by IMO in December 2002 and became effective 1 July 2003.

[96] Transport Canada, "New Bay of Fundy Shipping Lanes to Protect Right Whale come into effect," *News Release*, No. A007/03 (26 June 2003), available: <http://www.tc.gc.ca/mediaroom/releases/atl/2003/03-A007e.htm> (retrieved 10 November 2008). See also *Guidelines for Vessel Traffic Services,* IMO Assembly Res. A.857(20) (27 November 1997);

Roseway Basin. Again with the conservation needs of the North Atlantic Right Whale in mind, in 2007 Canada proposed to the IMO that the Roseway Basin, located off southeastern Nova Scotia, be designated as a seasonal area to be avoided (ATBA).[97] The proposal was adopted by the IMO's MSC in October 2007 for ships 300 GT or more and takes effect from June 1st to December 31st each year.[98]

On a related point, Canada has often used the powers under the *Navigable Waters Protection Act* to have sunken vessels and wrecks removed where they pose hazards to navigation or even constitute a threat to the marine environment. Although Canada is not yet a party to the recently adopted Nairobi International Convention on the Removal of Wrecks, 2007, it has been urged to do so to enable Transport Canada to undertake the removal of derelict vessels.[99] Transport Canada proposes to amend the Act to implement the operational elements of the Convention.

17.6.2. Vessel-Source Pollution

17.6.2.1. Regime for Pollution Offences

Canada's approach to the regulation of marine pollution has been aptly summarised as follows: "Canada has created its marine environmental legislation through a series of uncoordinated statutes, each attempting to put an end to intentional marine pollution. Overlapping offences is unnecessary and useless."[100] This is indeed the situation in Canada—an extensive system of

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and generally, *Ships' Routeing*, 9th ed. (London: IMO, 2008), IX/2. On the US side, see the Reporting Systems for Protection of Endangered North Atlantic Right Whales in Sea Areas off the North-Eastern and South-Eastern Coasts of the United States. Id., G/I/18-1-3.

[97] Transport Canada, "Canada's New Government is Vigilant in the Protection of Endangered North Atlantic Right Whales," *News Release*, No. A 008/07 (10 October 2007), available: <http://www.tc.gc.ca/mediaroom/releases/atl/2007/07-a008e.htm> (retrieved 10 November 2008). *IMO Ships' Routeing*, n. 96 above, II/1.

[98] Id. See also IMO, *Guidelines for Vessel Traffic Services,* n. 96 above.

[99] House of Commons, *Consideration of Proposed Amendments to the Navigable Waters Protection Act*, Report of the Standing Committee on Transport, Infrastructure and Communities (June 2008), available: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3566517&Language=E&Mode=1&Parl=39&Ses=2> (retrieved 10 November 2008).

[100] J. O'Connor, "The Enforcement of Marine Pollution Legislation in Canada" (Paper presented to the New Direction in Maritime Law 2006 Conference, 16 June 2006) (unpublished).

statutes that establish overlapping sanctions legitimated by several statutes and for what amounts to the same offence (see Annex below). Moreover, there has been a consequent and not unexpected overlap, if not duplication, of institutional responsibilities among the various federal departments concerned. The EU, unlike Canada, has a single Ship Source Pollution Directive (2005/35/EC) to be implemented by all Member States. Nevertheless, there are similar underlying concerns in both systems regarding the criminalisation of seafarers and corporate and vicarious liability.

Canada has been regulating vessel-source pollution utilising criminal and civil law tools ever since its implementation of OILPOL.[101] In 1971 and 1984, comprehensive marine pollution provisions, including higher penalties, were added to the *Canada Shipping Act*.[102] The *Canada Shipping Act, 2001* is the principal statute now implementing international conventions addressing vessel-source pollution to which Canada is a party, such as MARPOL 73/78,[103] whereas civil liability and compensation are addressed by the *Marine Liability Act*, which is discussed below. The *Canada Shipping Act, 2001* provides for summary conviction procedures with substantial penalties for the most serious contraventions, such as illegal discharge of pollutant, failure to have or to implement oil pollution prevention or emergency plans, or failure to obey instructions resulting from a discharge. Less serious offences, such as failure to have response, emergency or prevention plans on site or failure to provide

[101] The *Canada Shipping Act* was amended in 1956 to give effect to the OILPOL Convention. 4 & 5 Eliz. II, c. 34 (Can). The Minister of Transport was authorised to draft regulations giving effect to the Convention and to "prevent pollution by oil from ships of any mainland, minor or other waters of Canada." Such regulations were adopted in 1960: *Oil Pollution Prevention Regulations*, SOR 60-70, adopted 24 February 1960. Offenders were punished with a fine of up to CAD500 or imprisonment up to 6 months, or both. CSA 1956, s. 495A.

[102] *House of Commons Debates 1970*, Vol. I, at 519 (Donald Jamieson (Minister of Transport)). Among the various amendments, the fines for illegal discharge and failure to report a discharge were increased to CAD100,000 to make crews and masters "more conscious of their responsibilities" to the environment. Prior to that, the maximum fines that could be imposed on the master, owner or person responsible for the unlawful spillage of oil from a vessel was CAD5,000 (Source: *Oil Pollution Prevention Regulations*, s. 5; *Garbage Pollution Prevention Regulations*, s. 4; *Pollutant Substances Regulations*, s.4). Imprisonment penalties were removed from the section without any apparent explanation. The fines were increased again in 1984 to CAD200,000 and to CAD250,000. Bill C-75, an *Act to Amend the Canada Shipping Act and the Arctic Waters Pollution Prevention Act. House of Commons Debates 1983–84*, pp. 14263-5.

[103] *Regulations for the Prevention of Pollution from Ships and for Dangerous Chemicals* (SOR/2007-86), implementing MARPOL Annex I, II, IV, V and VI, the *Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk*, 1971 (BCH Code), the *International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk* (IBC Code), and the AFS Convention, n. 47 above, in all Canadian waters although stricter requirements are often required for inland waters.

information when requested, may result in lower fines.[104] These provisions were greatly influenced by consultations with the shipping industry, so that all but one of the stated offences were made subject to summary conviction.[105] Since 2004, Transport Canada has overall responsibility for enforcement of the pollution prevention provisions, while DFO is responsible for pollution response provisions.

Despite the apparent stringent pollution provisions, ongoing illegal discharges of oily ballast and waste engine room oil in Canada's EEZ in the Atlantic resulted in significant seabird mortality. The federal response to this problem was Bill C-15 amending the *Migratory Birds Convention Act* and the *Environmental Protection Act*. Bill C-15 was enacted to protect migratory birds and prevent oil pollution discharges from vessels by "expanding the zone where [Canada] can operate, bringing in tougher penalties and ensuring better protection for [Canadian] officers in the field."[106] The legislation was triggered by the perceived failure of the enforcement regime following the *Tecum Sea* incident. The *Tecum Sea* was observed trailing an oil slick, but charges against the vessel and master were dropped after several legal gaps were identified and a turf war between the various federal departments with related mandates could not be resolved.[107] During parliamentary deliberations, it was further noted that it was essential to extend Canadian law to its EEZ and to bring its sanctions in line with those imposed by courts in the United States because the vast majority of vessels were simply transiting the Canadian EEZ while trading to or from that country.[108] Because this trade did not include port entry in Canada, there

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[104] Penalties for serious offences are up to CAD1million in fines or 18 months imprisonment, or both, other offences are subject to fines of up to CAD100,000 or 1 year imprisonment, or both. CSA 2001, n. 34 above, ss.183–184, 187–188.

[105] The only exception is found in s. 253(1), intentionally or recklessly causing a disaster that results in the loss of life or serious damage to the environment, for which the guilty person may be liable on conviction on indictment to a fine (without maximum limits) or to imprisonment up to five years, or both. CSA 2001, n. 34 above, s. 253(1).

[106] *Bill C-15 an Act to amend the Migratory Birds Convention Act, 1994, and the Canadian Environmental Protection Act Discussion* (Standing Committee on Environment and Sustainable Development (ENVI) Evidence, 4 November 2004), available: <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=125178#T1020> (retrieved 10 November 2008), per Hon. Stephan Dion (Minister of Environment), p. 1035.

[107] Id., p. 1040 per Mr. Bryon Wilfert (M.P.) The members also highlighted the need for an adequate enforcement budget, in particular Mr. Nathan Cullen (M.P.) stated that: "I want to put the fear of God into some of these captains so that they know there's a good chance they're going to be inspected," because these enforcement difficulties apparently resulted in a culture within the shipping community that "if you're going to spill, you spill in Canada, because (a) they won't find you, and (b) if they do find you, they won't fine you." Id., p. 1055.

[108] Id., p. 1055, per Trevor Swerdfager (Director General, Canadian Wildlife Service, Environmental Conservation Service, Department of the Environment).

was a perceived gap in the exercise of port state and coastal state enforcement. The federal government justified the tougher sanctions in the interest of conformity with the contemporary shipping business, change of the risk-benefit assessment of polluting, and harmonisation of sanctions with those imposed in the United States to ensure that polluters no longer enjoy safe haven.[109]

Political will ensured that the proposed legislation passed, but concerns were expressed. The role of Environment Canada as the lead agency was clarified. The power of arrest, entry, search and seizure, detention, and direction of movement to vessels in the Canadian EEZ was extended.[110] Tougher sanctions were introduced and new penalties for tampering with or destruction of records were added to penalties for discharges, all to deter shipowners and operators from discharging pollutants in Canadian waters.[111] There were issues of consistency with MARPOL commitments. At the same time, Courts were provided with sentencing guidelines.[112] The bill contained hasty and vague drafting and could have given better consideration to the problem of legislative and institutional overlaps in Canada's vessel-source pollution regime.

Most significantly, strict and vicarious liability provisions applicable to masters and chief engineers, owners, operators, or directors of the corporate owner, with imprisonment as penalty, was legislated.[113] The hope was that these measures would encourage whistle-blowing and strengthen the evidentiary base for the prosecution of offences. The new criminal offences

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[109] In a subsequent declaration, the Minister of Environment added: "The European Union is preparing legislation that will have about the same effect as Bill C-15. We are going in the same direction according to international law and international morality." Hon. Stephan Dion, "Announcing the proclamation of the *Migratory Birds Convention Act* and the *Canadian Environmental Protection Act* as Amended by Bill C-15" (St. John's Newfoundland, 25 June 2005), available: <http://www.ec.gc.ca/media_archive/minister/speeches/2005/050625_s_e.htm> (retrieved 10 November 2008).

[110] MBCA, n. 72 above, s. 2.1 and 18.3.

[111] The MBCA now provides for convictions on indictment a maximum fine of CAD1 million and, if the vessel is over 5000 DWT a minimum of CAD500,000, and imprisonment for up to three years, or both, for vessels caught depositing o permitting harmful substances to be deposited, whether accidental or intentionally, regardless of amount, in areas frequented by migratory birds. The same punishment is applicable for the destruction or alteration of the vessel's records. The only defence available is that of due diligence. MBCA, n. 72 above, s. 13(1.1), 13(1.11), 13(1.8).

[112] Id., s. 13(4.1).

[113] Id., s. 5.4-5.5 and 13(1.6)–13(1.7). Under the MBCA, the accused must establish that he took all reasonable care to avoid the commission of the offence by others on board the vessel; such vicarious strict liability is unprecedented in Canadian law. S. Kirby, "The Criminalization of Seafarers Involved in Marine Pollution Incidents" (2008) (unpublished), p. 24. Corporate liability is found in the proposed amendments of the EU Ship Source Pollution Directive (2005/35/EC).

could potentially infringe on the human rights of seafarers, who are invariably more visible than the shipowners. However, no such convictions have as yet occurred.[114] While much has been said about the rising trend of criminalisation of seafarers in Canada, it would appear that seafarers have been faced with the prospect of criminal liability for such offences since the inception of marine pollution regulation. Although there was a brief period during the 1970s in which shipping interests succeeded in removing the possibility of imprisonment for pollution offences, the victory was only brief, and perhaps the only remaining example of such legislation is found in the Arctic Waters Pollution Prevention Act (AWPPA).

Vessel-source pollution offences are also established and enforced under other statutes. Contemporaneous and parallel amendments to the *Canadian Environmental Protection Act*, 1999 establish similar sanctions for the disposal or incineration of polluting substances at sea, import or export of pollutants for disposal at sea, and the loading of a substance onto a ship for disposal at sea, unless done with a permit.[115] As mentioned earlier, vessel-source pollution prosecutions may also be pursued under the *Fisheries Act*, implementation responsibility for which rests with DFO, and enforcement with Environment Canada. The Act prohibits "throwing prejudicial or deleterious substances overboard" or depositing such substances in fish habitats.[116] It also establishes a duty to report an incident of pollution and to take measures to minimise the effects.[117] Tough sanctions similar to those under the AWPPA and CEPA are imposed, possibly because of the socio-economic significance of fisheries for the Canadian economy. The *Canada National Marine Conservation Areas Act*,[118] provides similar offences and sanctions for discharges in conservation

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[114] Kirby, id., p. 25, citing pers. comm. with James Martin, Federal Department of Justice (20 May 2008).

[115] CEPA, n. 69 above, Part VIII, Div. 3 – Disposal at Sea and s. 272. In addition, CEPA contains a broad prohibition against intentional or reckless damage to the environment (causing a disaster) and risk of death or harm to person, contravention of which may be punished on indictment by a fine without maximum limits and/or up to five years imprisonment or on summary conviction with a fine up to CAD300,000 or imprisonment up to six months, or both. CEPA, s. 274(1).

[116] A contravention may be punished on indictment by a fine up to CAD1 million, in the case of a first offence and in the case of subsequent offences to the same fine plus imprisonment for up to three years. If the offence is prosecuted on summary conviction, first time offenders may be punished by a fine up to CAD300,000 and subsequently by fine or imprisonment up to six months or both.

[117] Failure to do so may be punished on summary conviction by a fine up to CAD200,000 for a first offence and fine plus imprisonment up to six months for subsequent offences.

[118] *Canada National Marine Conservation Areas Act*, S.C. 2002, c. 18 [hereinafter NMCA].

areas.[119] Discharges in Arctic waters are enforced by Transport Canada by virtue of the *Arctic Waters Pollution Prevention Act* and the *Arctic Shipping Pollution Prevention Regulations*.[120] *Inter alia*, the AWPPA prohibits all waste disposal into Arctic waters and permits the removal or destruction of any vessel, cargo, or bunkers when a serious pollution discharge occurs.[121] Curiously, and inconsistently, the AWPPA marine pollution sanctions appear to be less severe than those under the *Canada Shipping Act, 2001*, the *Migratory Birds Convention Act*, and *Canadian Environment Protection Act*.[122] This situation is inconsistent with the particular needs and difficulties of protecting the sensitive Arctic marine environment. Consistent, if not tougher sanctions, are likely justifiable to enhance deterrence and heighten vessel operational standards in a remote region where pollution response and monitoring are extremely difficult, at best.

It is appropriate to enquire to what extent this legislative activity has managed to harmonise overlapping statutes addressing vessel-source pollution and equally overlapping mandates of multiple federal departments. Although the *Canada Shipping Act, 2001* streamlined the prosecution of offences by providing only for summary conviction offences, that new and innovative effort was not carried through to the *Fisheries Act*, Bill C-15, and the *National Marine Conservation Areas Act*. The latter two continue to provide for prosecution by indictment or summary conviction. Despite serious concerns in the shipping and legal community about Bill C-15's vicarious strict liability offences and stiff sanctions, in practice most oil pollution offences have been prosecuted by Transport Canada under the *Canada Shipping Act, 2001* or the *Fisheries Act*, rather than under the *Migratory Birds Convention Act* or the *Canadian Environmental Protection Act*.[123] Since 1996, Environment Canada

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[119] This Act punishes anyone who disposes of pollutant substances in a marine conservation area; offenders may be punished by indictment to a fine up to CAD500,000 and on summary conviction to a fine of up to CAD100,000. NMCA, id., s. 24(1).

[120] *Arctic Shipping Pollution Prevention Regulations*, C.R.C., c. 354.

[121] It also permits seizure and forfeiture of ship and equipment in cases of pollution offences. AWPPA, n. 55 above, s. 23 et seq.

[122] The AWWPA provides for summary conviction offences punishable by a fine of up to CAD500,000 if the offender is an individual and CAD100,000 if the offender is a ship. Id., s. 18.

[123] Marine Pollution Prevention, "Successful Prosecutions - Marine Pollution Prevention (2000–2007)" (June 2007), available: <http://www.marinepollution-pollutionmaritime.gc.ca/eng/succes_pros/prosecutions/menu.htm> (retrieved 10 November 2008) [hereinafter *Successful Prosecutions*]. See also statistics published by Environment Canada, Enforcement Branch, "National Statistics, Legal Activities Report, and Annual Reports for CEPA and FA," available: <http://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=5C63F879-1> (retrieved 10 November 2008) [hereinafter Environment Canada, "Statistics"].

has charged only five vessels under the *Migratory Birds Convention Act.*[124] Of these, only one was convicted under that Act.[125] In the other cases, federal prosecutors preferred to proceed under the *Canada Shipping Act, 2001* for various reasons.[126] Further, to date only one master has been charged and fined for an oil pollution offence under the *Canada Shipping Act, 2001.*[127] Imprisonment has not been applied. Considering the political fanfare accompanying Bill C-15, in hindsight it appears that the principal effect has been to "send a message" to the shipping community and to assuage public concern. Government wanted to be seen to be "getting tough on polluters." However, the significance of the Bill C-15 amendments should not be underestimated. The enhanced sanctions therein accompany the practice of Canadian courts to progressively increase the fines assessed for pollution incidents and orders to pay contributions into the Environmental Damages Fund.[128]

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[124] These were: *Elm*, *Brandenburg*, *Atlantic Cartier*, *Donau Ore*, and *Sandviken*. F. Wiese, *Seabirds and Atlantic Canada's Ship-Source Oil Pollution: Impacts, Trends, and Solutions* (World Wildlife Fund, 2002), p. 23.

[125] The M/V *Donau Ore*. A fine of CAD30,500 was paid after the owners pleaded guilty. Environment Canada, "Government of Canada announces successful prosecution of marine oil polluter," *News Release* (21 March 2001), available: <http://www.ns.ec.gc.ca/press/01-03-21.html> (retrieved 10 November 2008). It will be noted that this conviction precedes the enactment of Bill C-15. Similarly, there appear to be no prosecutions for disposal at sea or ocean dumping offences under CEPA, and only one Environmental Protection Compliance Order (EPCO) issued. Environment Canada, "Statistics," n. 123 above at CEPA 1999 for Fiscal Year 2004–2005. See also letter from Chuck Brumwell (Environment Canada, MGP Review Manager) to Paula Pacholek (7 November 2006) regarding Environment Canada's Response to the Joint Review Panel's Information Request JRP_R5_10, available: <http://www.ngps.nt.ca/Upload/Interveners/Environment%20Canada/061107_EC%20IR%20Response%205%2010.pdf> (retrieved 10 November 2008).

[126] Wiese, n. 124 above.

[127] *Successful Prosecutions*, n. 123 above. Prosecution of F/V *Hime Maru* and its Master for Oil Record Book violations. See also Transport Canada, "Precedent Set as Marine Polluter Ordered to Pay Substantial Penalty," *News Release* No. A001/05 (14 February 2005), available: <http://www.tc.gc.ca/mediaroom/releases/atl/2005/05-a001e.htm> (retrieved 10 November 2008).

[128] *Successful Prosecutions*, id. See, e.g., most recent incidents with respect to the jack-up oil rig *Rowan Gorilla VI* (prosecuted March 2007, CAD70,000 fine imposed, CAD35,000 going to EDF), the M/V *Point Valiant* (prosecuted November 8, 2007, CAD18,000 fine imposed, CAD10,000 going to the EDF) and the M/V *Cicero* (prosecuted April 17, 2008, CAD15,000 fine imposed, CAD10,000 were paid in the EDF). The EDF adds a restorative component to vessel-source pollution sanctions.

17.6.2.2. Places of Refuge for Ships in Need of Assistance

The international custom of granting refuge to ships in distress has been recognised in Canada at least since the 18th century.[129] Canadian courts have enforced the international custom in a domestic context at least from the last quarter of the 19th century.[130] In more recent times, ships in distress have been permitted to enter a Canadian port as a place of refuge only after their threatening condition was stabilised.[131] This practice is consistent with that of other maritime states. While on the one hand recognising the humanitarian right of a ship in need of assistance to enter a place of refuge, Canada also takes the steps necessary to protect its interests, which may also include directing the ship to a particular location or possibly, in rare situations, to refuse admission. Canada supported efforts in the IMO to develop and adopt the 2003 Guidelines on Places of Refuge for Ships in Need of Assistance as an attempt to standardise international practice and the use of a risk assessment framework.[132] Following the adoption of the IMO Guidelines, Canada embarked on a lengthy process to develop the National Places of Refuge Contingency Plan (PORCP), which was finalised in 2007.[133] Overall, the adoption of the PORCP in Canada was a relatively straightforward, non-contentious task, unlike the EU where public concern has delayed the adoption of a further directive in the Erika III package addressing this issue. The purpose of the PORCP is "to establish a national framework and approach which, with associated regional measures, will provide for an effective and efficient response to requests from ships in need of assistance seeking a place of refuge." Based on the IMO Guidelines,

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[129] *Treaty of Amity, Commerce and Navigation between His Britannick Majesty and the United States of America*, London, 19 November 1794, *Parry*, Vol. 52 (1969), Article 23, p. 243. For a historical assessment of the custom, see: A. Chircop, "Ships in Distress, Environmental Threats to Coastal States, and Places of Refuge: New Directions for an *Ancien Regime*?" *Ocean Development and International Law* 33, no. 2 (2002): 207–226, p. 208; and by the same author, "The Customary Law of Refuge for Ships in Distress," in A. Chircop and O. Linden, eds, *Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom* (Leiden: Nijhoff, 2005), pp. 161–229.

[130] *Canada (Attorney-General) v. MacDonell*, (1883), 1 Ex. C. R. 99; *Canada v. Valiant (The)* (1914), 15 Ex. C. R. 392; *May (The) v. Canada*, [1931] S. C. R. 374; *Queen City (The) v. Canada*, [1931] S.C. R. 387; *Canada (Attorney-General) v. Natalie S. (The)*, [1932] Ex. C. R. 155; *Rex v. Flahaut*, [1935] 2 D.L.R. 685.

[131] The *Eastern Power* (leaking oil, 2000) and the M/V *Kitano* (fire onboard, 2001) entered ports of refuge in Atlantic Canada in such circumstances. "Canada to let leaking oil tanker in Newfoundland," CBC News Update, 9 December 2000; "Ship 'safe' to enter harbour," *Halifax Chronicle Herald*, 24 March 2001.

[132] *Guidelines on Places of Refuge for Ships in Need of Assistance*, IMO Assembly Resolution A.949(23), adopted on 5 December 2003, IMO Doc. A 23/RES.949, 5 March 2004.

[133] Transport Canada, *National Places of Refuge Contingency Plan (PORCP)* (3 July 2007).

but contextualised for Canada, the PORCP aims at promoting a consistent approach to a national response plan for Canada's oceans. By identifying the responsible authority for providing assistance, Canada also appears to have implemented an IMO resolution accompanying the Guidelines concerning maritime assistance services.[134] PORCP has been prepared by Transport Canada and within it the regional Marine Safety directors are expected to engage in a thorough and balanced risk assessment exercise as a basis for a timely decision on providing safe assistance to such ships, refuge as may be appropriate, and any related conditions.

17.6.2.3. Pollution Liability and Compensation Regime

Canada has long been a party to the CLC and IOPCF conventions, and has recently become a party to the LLMC. Canada is not yet a party to HNS and Bunkers, but neither convention is yet in force. Under Canadian law, a shipowner who is not covered by the CLC Convention (e.g., he is flying the flag of a non-party) is entitled to claim limitation of liability under the LLMC. This is similar to other jurisdictions. However, the two most significant aspects of Canada's pollution liability and compensation regime, and a significant departure from the practice of EU Member States, are (1) standing arrangements with response organisations and (2) Canada's long-standing Ship-Source Oil Pollution Fund (SOPF).

In its attempt to implement the polluter pays principle in relation to accidental oil pollution, Canada introduced a system of private responders across the country who would be equipped and certified as institutions with whom persons trading in oil in Canadian waters would be required to enter into a standing arrangement.[135] The idea is that private response organisations would take on much of the response work of the Canadian Coast Guard, for a fee, and be available to respond promptly. They would operate under the authority of the master of the vessel that needs such assistance. Response organisations are entitled to claim their intervention costs as described further below.

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[134] *Maritime Assistance Services*, IMO Assembly Resolution A.950, adopted on 5 December 2003, IMO Doc. A 23/Res.950, 26 February 2004.

[135] CSA 2001, n. 34 above, ss. 167–171. See further *Response Organizations and Oil Handling Facilities Regulations*, SOR/95-405; Transport Canada, *Response Organizations Standards*, TP 12401 (Transport Canada, 1995), available: <http://www.tc.gc.ca/marinesafety/tp/TP12401/menu.htm> (retrieved 10 November 2008). See generally, Transport Canada, *Environmental Response Systems: Managing Canada's Marine Oil Spill Preparedness and Response Regime*, TP 14471 (Transport Canada, 2006), available: <http://www.tc.gc.ca/marinesafety/TP/TP14471/menu.htm> (retrieved 10 November 2008).

Originally established in 1973 as the Marine Pollution Claims Fund in response to the *Arrow* casualty, the SOPF was launched in 1989 and is probably the first compensation fund for marine oil pollution damage that is separate from, but complements, the international liability and compensation regime.[136] The SOPF interweaves with the CLC and IOPCF regimes, and to a lesser extent with the LLMC, which are implemented through the *Marine Liability Act* and regulations.[137] The shipowner remains the first line of liability within the strict liability limits based on tonnage of the ship set out in the CLC, with the second line of liability consisting of the cargo-owners share in the form of the IOPCF, liability under which is also governed by the principle of strict liability.[138] In a suit for compensation, the directors of the IOPCF and SOPF are joined to the suit by law.

The SOPF interacts with this combined regime in a number of ways. First, the SOPF is responsible for the imported oil contribution calls which are at the basis of the IOPCF. This is in contrast to the other IOPCF state parties, who have legislated direct contributions from qualifying major oil importers in their jurisdictions.[139] Second, the SOPF covers a wider range of spills than the international regime. Any ship qualifies (not just tankers), the oil covered is not restricted to persistent oils, and the polluting oil does not need to be carried as cargo. CLC is limited to cargo, bunker oil, and slops. Third, the claims covered are similar to the CLC and IOPCF, such as oil pollution damage, and cleanup costs (including reasonable preventive measures, actually incurred). Pollution damage and cleanup where the ship's identity is not established, such as mystery spills are covered, unlike the CLC and IOPCF. Anticipatory and remedial expenses are covered.[140] Economic loss claims are also covered, but

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[136] K. A. MacInnis, "The Canadian SSOPF Fund and Environmental Damage Assessment (EDA) in Canada," in F. Maes, ed., *Marine Resource Damage Assessment: Liability and Compensation for Environmental Damage* (Dordrecht: Springer, 2005), pp. 67–84.

[137] *Marine Liability Regulations*, SOR/2002-307 (8 August 2002).

[138] The only conduct that bars limitation is a "Personal act or omission of the owner, committed with the intent to cause the oil pollution damage or recklessly and with knowledge that the oil pollution damage would probably result." CLC, n. 51 above, and *Marine Liability Act*, n. 35 above. The "owner" includes shipowner, ship operator, and person who has possession or control of ship.

[139] Since 1989, the SOPF has contributed over CAD42 million in calls to the IOPCF. Ship-Source Oil Pollution Fund (SOPF), *The Administrator's Annual Report 2006–2007* (Ottawa: SOPF, 2007), p. i.

[140] Costs and expenses incurred by the Minister of Fisheries and Oceans, response organisation, any other person in Canada "in respect of measures to prevent, repair, remedy or minimise oil pollution damage from the ship, including measures taken in anticipation of a discharge of oil from that ship, to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by such measures," and costs and expenses of the Minister or any person directed to take action or otherwise. *Marine Liability Act,* n. 35 above, s. 51.

they are limited to those connected with loss of income from fisheries (including sport fishing, and workers involved in handling and processing), aquaculture, and subsistence hunting in Canada. This is significantly narrower than the CLC and IOPCF parameters. In any case, claimants must show that they have no other right of recovery under any other law, and relational economic loss is not covered.[141] Fourth, the SOPF is a fund of both first and last resort for Canadian claimants. Canadian claimants, except response organisations, may file a claim against the SOPF in an administrative procedure, so that they avoid the cumbersome judicial procedure of a suit against the shipowner and the IOPCF. The SOPF would then be subrogated into their claim against the shipowner and the IOPCF. Empowered as a commissioner under the *Inquiries Act*,[142] the SOPF Administrator will investigate and assess all claims, and in practice rarely grants the entire amount claimed. The Administrator will make an offer to the claimant. If the claimant is dissatisfied, s/he will still have the right to appeal the Administrator's decision to the Federal Court.

Originally, the SOPF consisted of the receipts from a legally imposed levy of CAD 45.61 cents per metric ton of imported or exported oil in Canada. However, this levy was discontinued in 1976 as it was thought sufficient funds had accumulated to cover the claims that could arise. Although the idea of re-introducing the levy has surfaced from time to time, it has not been re-established. The SOPF has remained self-sufficient and has thus been able to pay off claims from its own growth. At the end of March 2008, the SOPF accumulated surplus stood at CAD376,425,567, with CAD152,110,416 being available for all claims from one major spill. This amount is significant when it is considered that it complements the CLC and IOPCF amounts. Thus a major spill that would necessitate combined compensation efforts would have CAD495,257,000 for claims. However, it is possible these funds might not be sufficient for a *Prestige* type scenario, and consequently it has been proposed that Canada should join the 2003 IOPC Protocol.[143] Cleanup costs in the cases of *Prestige* and the earlier *Exxon Valdez* exceeded USD2 billion each; a *Prestige* scenario in Canada has been estimated at USD1.5 billion. Under the 2003 protocol, combined CLC and IOPCF compensation amounts would be in

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[141] This is similar in all three funds, based on the pragmatic rule and principle of remoteness. See *Landcatch v. IOPC Fund*, 1999 SLT 1208 (Court of Session: Inner House (Second Division).

[142] *Inquiries Act*, R.S.C. 1985, c. I-11.

[143] Transport Canada, *Maritime Law Reform Discussion Paper*, TP 14370E (May 2005), available: <http://www.tc.gc.ca/pol/en/Report/tp14370/menu.htm> (retrieved 10 November 2008), p. 14.

the region of CAD1.3 billion, thus bringing compensation levels closer to those of the United States' *Oil Pollution Act of 1990.*

In comparison, the EU does not have an EU-wide compensation fund, although it did obtain a higher level of compensation by successfully lobbying for the 2003 IOPCF Protocol. Nevertheless, some Member States, such as Finland, do have a separate national fund similar to the SOPF.

17.7. Conclusion

In general, and like EU Member States, Canada has pursued its shipping and marine environment protection interests within the global international maritime law regime serviced by IMO. Canada has been an active participant, frequently taking initiatives that have produced change in international regulations and standards. Canada has been able to do so even though it has not always embraced international conventions in a timely manner, if at all. However, its approach to the implementation of international standards has generally been solid: Canada has tended to legislate the amendments prior to or at the same time as it became a party to an international convention.

In a contemporary setting, Canadian policy and regulation making for maritime safety and marine pollution, frequently under pressure from stakeholders and lack of resources, strives to produce results in an efficient (cost-effective) manner. Current policies are ostensibly geared towards the achievement of outcomes. It may be too soon to determine the extent to which intended results are being achieved, as the expected outcomes speak to medium- to long-term change. For successful results-based management, it should be expected that institutional efforts should be proactive. The Canadian experience appears to be more a mixture of proactive and reactive policy, institutional, and regulatory responses. The *Canada Shipping Act, 2001* reform process can be seen as a proactive approach to legislative modernisation. Similarly, the PORCP constitutes proactive planning for the likelihood that ships in need of assistance that may pose environmental and other threats might require and be given refuge in Canadian waters. Differently, the complicated legislative response to oil pollution as a result of illegal discharges from ships is indicative of a reactive approach. It is arguable that reactive approaches are less efficient than well-thought-out proactive approaches which are spared development under the heat of the moment. In this example, the response to oil pollution has produced a fragmented, laborious, and inefficient approach to dealing with the problem.

A handicap Canadian maritime administration has laboured under since the 1990s is the split of maritime responsibilities between two departments, and

especially the migration of the Canadian Coast Guard from the core of the maritime administration. The issue of conflicting institutional cultures has not been resolved, and will likely not be resolved. The approach to maritime administration remains unnecessarily fragmented.

Annex. Ship Pollution Offences in Canada (all figures in CAD)

Statute & Regulations	Offences	Sanctions	Enforcement Responsibility
Oceans Act	Carry out any activity — including depositing, discharging or dumping any substance, or causing any substance to be deposited, discharged or dumped — that is likely to result in the disturbance, damage, destruction or removal of a living marine organism or any part of its habitat. (various Marine Protected Areas Regulations, made pursuant to s. 35(3) *Oceans Act*)	Summary conviction: Fine max. $100,000 Indictment: Fine max. $500,000 (s. 37)	DFO names "enforcement officers" (s. 39)
CSA 2001	Failure to: (s. 183(1)) • Have arrangement with RO • Have procedures, equipment and resources for immediate use • Implement oil pollution *prevention* plan • Implement oil pollution *emergency* plan • Have equipment and resources at the site • Implement response plan • Obey direction resulting from a discharge or possible discharge of a pollutant	Summary conviction: Fine max. $1 million and/or imprisonment maximum 18 months (s. 183(2))	TC names "Pollution Prevention Officers" (s. 174) DFO names "Pollution Response Officers" (s. 174.1)
	Failure to: (s. 184(1)) • Have a declaration on board • Have a declaration on site • Have oil pollution prevention plan on site • Have oil pollution emergency plan on site • Have a response plan • Provide or arrange for training • Undertake and participate in activities to evaluate response plan • Provide information • Provide information officer considers appropriate • Obey directions given under s.	Summary conviction: Fine maximum $100,000 and/or imprisonment maximum 1 year (s. 184(2))	TC & DFO s. 175.1(2) Powers of PRO re discharges

	175(1)(b)(c)(d) or (e) and 176(1)(b)(c) or (d)		
	• **Illegal discharge of pollutant** (s. 187) • Failure to implement shipboard oil pollution emergency plan (s. 188) • Failure to proceed to a place and unload a pollutant (s. 189) • Contravention of the regulations made under this Part (s. 190) **Regulations include:** • Carrying of pollutants on board a vessel, whether as cargo or fuel • Control and prevention of pollution of the air by vessels • Reception facilities • Ballast water management • Design, construction, manufacture and maintenance of vessels or classes of vessels • Inspecting and testing • Obtaining certificates	Summary conviction: • Fine maximum $1 million and/or imprisonment maximum 18 months (s. 191)	TC (s. 185)
	Failure to obey directions: (s. 189) • To provide information • To proceed by a specified route • To proceed to a place and remain there	Summary conviction: • Fine maximum $100,000 (s. 192)	
	• Intentionally or recklessly causing a disaster that results in the loss of life or serious damage to the environment (s. 253(1)(a))	Indictment: • Fine (no limits) and/or imprisonment maximum 5 years (s. 53)	
MBCA	• Depositing or permitting harmful substances to be deposited in waters or an area frequented by migratory birds or in a place from which the substance may enter such waters or such an area (s. 5.1)	Indictment: • Fine maximum $1 million and/or imprisonment maximum 3 years • If vessel over 5000 DWT minimum fine $500,000 Summary conviction:	EC: • Game Officers • RMCP (s. 6(1))

		• Fine max. $300,000 and/or imprisonment maximum 6 months • If vessel over 5000 DWT minimum fine $100,000 (ss. 13(1.1), (1.11))	
	• Destruction or alteration of records • Omissions or false entries in records. • Obstruction of Game Officers • Providing false or misleading information (s. 5.2)	Ibid.	
FA	• Throwing prejudicial or deleterious substances (incl. ballast, coal ashes, stones) overboard in any river, harbour or roadstead, or in any water where fishing is carried on (s. 36(1))	Indictment: • First offence: fine maximum $1 million • Subsequent offence: fine maximum $1 million and/or imprisonment maximum 3 years Summary conviction: • First offence: fine maximum $300,000 • Subsequent offence: fine maximum $300,000 and/or imprisonment maximum 6 months (s. 40(2))	EC per MOU with DFO
	• Depositing or permitting deposit of deleterious substances of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water (s. 36(3))	Ibid.	
	• Failure to report deposits of deleterious substances that occur "out of normal course of events" (s. 38(4))	Summary conviction: • First offence: fine max. $200,000 • Subsequent offence, fine max. $200,000 and/or imprisonment maximum 6 months (s. 40(3))	

	• Failure to take reasonable measures to mitigate or remedy adverse effects of deposits regarding s. 38(4) (s. 38(5))	Ibid.	
	• Failure to comply with direction of inspectors re deposit per s. 38(4) (s. 8(6))	Ibid.	
CEPA	• Disposal or incineration of substances at sea • Importation or exportation of a substance for disposal at sea • Loading of a substance onto a ship for disposal at sea unless done with a permit (Part VIII Div. 3 – Disposal at Sea)	Indictment: • Fine maximum $1 million and/or imprisonment maximum 3 years Summary conviction: • Fine maximum $300,000 and/or imprisonment maximum 6 months (s. 272)	EC
	• Failure to prepare and implement environmental emergency plans in respect of listed substances (s. 199) • Failure to report and minimise environmental emergency in respect of listed substances (s. 201)	Ibid.	
	• Intentional or reckless damage to environment (causing disaster) (s. 274(1)(a))	Indictment: • Fine (no limit) and/or imprisonment maximum 5 years	
NMCA	• Disposal of any substance (s. 14) within a marine conservation area except as authorised under CEPA	Indictment: • Fine maximum $500,000 Summary conviction: • Fine maximum $100,000 (s. 24(1))	Parks Canada Agency
	• Failure to mitigate degradation or injury caused by discharge or deposit of a substance capable of degrading the environment or injuring any animal, fish or plant within a marine conservation area (s. 29(1)) • Failure to comply with Minister's irections (s. 29(2))	Ibid. (s. 24(1))	
AWPPA	• Deposit of waste of any type (s. 4(1)) in the Arctic waters or in any place on	Summary conviction: • Individual: fine maximum $5,000	TC named Pollution Prevention

	the mainland or islands of the Canadian Arctic under any conditions where the waste or any other waste that results from the deposit of the waste may enter the Arctic waters	• Ship: fine maximum $100,000 (s. 18)	Officers per *Governor in Council Authority Delegation Order* (C.R.C., c. 355)
	• Failure to report deposit of waste or accident or other occurrence (s. 5(1)) • Failure to provide evidence of financial responsibility when required (s. 8(1))	Summary conviction: • Fine maximum $25,000 (s. 19(1))	
	• Navigating in shipping safety control zone without meeting standards • Navigating in shipping safety control zone contrary to regulations • Failure to comply with reasonable directions given by pilot • Failure to comply with orders given by pollution prevention officer in response to deposits or threat of deposit • Failure to report deposit (master of ship) • Obstructing PPO or making false statements (master of ship)	Summary conviction: • Fine maximum $25,000 (s. 19(2))	
	• Obstructing or hindering a pollution prevention officer (other than master) • Making false or misleading statements to a pollution prevention officer (other than master) (s. 17)	Summary conviction (no minimum/ maximum)	

Key: CEPA, *Canadian Environmental Protection Act*; CSA, *Canada Shipping Act, 2001*; DFO, Department of Fisheries and Oceans; EC, Environment Canada; FA, *Fisheries Act*; MBCA, *Migratory Birds Convention Act*; MOU, memorandum of understanding; NMCA, *Canada National Marine Conservation Areas Act*; PRO, pollution response officer; PPO, pollution prevention officer; RO, response organisation; TC, Transport Canada.

Workshop Discussion Summary

Management of Maritime Safety and Vessel-Source Pollution

Susan Rolston

Moira McConnell, Marine & Environment Law Institute, Dalhousie University (making a joint presentation on behalf of Lotta Viikari, Faculty of Law, University of Lapland); Malgorzata Nesterowicz, European Maritime Safety Agency; and Aldo Chircop and Eric Machum, Marine & Environment Law Institute, Dalhousie University, presented their papers focussing on invasive species and ships' ballast water, and maritime safety and vessel-source pollution control from both Canadian and EU perspectives.

Discussion centered on the issue of transport of alien species, including the unaddressed issue of transport of introduction of alien species to land as a result of maritime transport (e.g., introduced beetles from wooden shipping platforms). It was agreed that we must also consider the issue from the perspective of what we are exporting, and identify means of reducing the transport of invasive species from this perspective.