

## **UNITED STATES AND CANADA TRANSBOUNDARY OIL SPILL LIABILITY AND COMPENSATION REGIMES: AN OVERVIEW**

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In 2018, the Canadian government purchased the Trans Mountain pipeline, running from Alberta to British Columbia, along with the plans for expansion. The expansion could triple the transport capacity from 300,000 to 890,000 barrels of oil per day, and would increase the tanker traffic in the inland waterways of the Salish Sea, an area known for its sensitive marine habitat, and narrow, difficult to navigate passages. The anticipated increase in tanker traffic in this busy waterway continues to raise concerns about the impact of an oil spill and the financial means to address related injuries, particularly to natural resources. The transboundary nature of any spill further complicates the situation vis-à-vis the applicable liability regimes and response resources.

Under the Canada-United States Joint Marine Contingency Plan (“JCP”), the United States Coast Guard and Canadian Coast Guard acknowledge each country’s responsibility to fund their own response actions and pursue reimbursement of those costs within their respective jurisdictions. The availability of funding for a response, and to compensate injured parties, however, including the limits of liability of the responsible party, differs under each regime, and could impact the nature and scope of a response.

For spills into or posing a substantial threat to the navigable waters of the United States, the Oil Pollution Act of 1990 governs and a national fund, the Oil Spill Liability Trust Fund (“OSLTF”), is immediately available to address an incident, including emergency restoration to natural resources. Canada’s Marine Liability Act enables the Ship-source Oil Pollution Fund (“SOPF”) to pay claimants who have incurred damages as a result of oil pollution. Both countries’

funds operate under the same principal—the polluter pays—but the compensation structure, and claims processes and procedures are entirely different.

This paper provides an overview of these funding sources and claims procedures, comparing and contrasting the different systems. The discussion is meant to provide an overall understanding of potential funding pools available for spill responses under each scheme in order to facilitate transboundary spill planning and discussion.

## **I. INTRODUCTION**

Oil pollution knows no boundaries; it observes no political or national ideologies, persuaded only by the dictates of the wind and waves upon its own chemical composition. Remediating spills within territorial boundaries are often complicated and costly; with the addition of a transboundary element to the spill, the effects may have far-reaching diplomatic and legal impacts beyond the immediate response issues.

Countries that coexist along maritime borders are naturally concerned with the impact of oil pollution from a neighbor, and Canada and the United States are no exception. The territorial boundary between the two nations is approximately 8,891 kilometers (5,525 miles), including portions of the Great Lakes, and along the Atlantic, Pacific, and Arctic coasts. Because of this, Canada and the United States have undertaken four decades of cooperative contingency planning and preparations; they are signatories to the 1990 International Convention on Oil Pollution Preparedness Response, and Co-operation; and they have developed the Canadian United States Joint Marine Pollution Contingency Plan (“JCP”), which establishes a coordinated system of operational guidelines for national and regional preparedness, planning and response, and a system for mutual aid to each country. However, the planning and preparations are predicated on the use of private-sector resources, funded by the responsible party.<sup>3</sup> It does not address liability and cost

recovery from the responsible party, or the payment of damages and compensation to injured victims, leaving those issues to national and treaty laws.

This paper discusses the two primary national funding schemes available for oil pollution response and for payment of damages in the event of catastrophic spill that is in or that threatens the waters of either country. The United States has the Oil Spill Liability Trust Fund (“OSLTF”) administered by the National Pollution Funds Center (“NPFC”); and Canada has the Ship-source Oil Pollution Fund (“SOPF”) managed by the SOPF Administrator.

The focus of the discussion is to provide an overview of both funds in the context of ship-source oil spills in contiguous waters. Understanding the legal framework and policy considerations surrounding a transboundary spill is critical to any contingency planning and preparation.

## **II. KEY SIMILARITIES AND DIFFERENCES**

The OSLTF and SOPF share the same philosophy and purpose. Their central objective is to provide national funding resources to respond to and compensate victims of oil pollution damage. Their underlying statutory regimes also provide strict liability under a polluter pays principle. The source and availability of funding, and the operations and implementation of each system are remarkably different, however. The following are some of the more salient differences in the context of a transboundary spill:

- The per incident limits—the OSLTF has a limit of \$1 billion USD<sup>4</sup>; the SOPF has no limit.
- Availability of emergency funds—in the United States, the emergency fund receives \$50 million USD annually for emergency funding, and may draw an additional \$100 million USD without Congressional approval; by contrast, in Canada, there is available up to \$10 million CAD<sup>5</sup> per year from the SOPF. The funds are made available upon the request of the Minister of Fisheries and Oceans and upon approval from the Minister of Transport and in consultation with the Administrator of the SOPF.<sup>6</sup> Up to an additional

\$50 million CAD can be released upon the authorization of the Governor in Council.<sup>7</sup>

- The SOPF is a fund of first and last resort, allowing claimants to come to the fund, or pursue the shipowner through the court system, and then making a claim to the fund for any deficiency recovered. The OSLTF requires claimants to first present the claim to the responsible party, but then will allow a claimant to submit a claim for any unpaid portions to the OSLTF.
- The OSLTF can only pay “foreign claimants” under very limited circumstances set forth by the statute. The SOPF can pay foreign claimants who have incurred oil pollution damage in Canadian waters, but so long as the claimant is not in a state other than Canada when they file the claim.
- Under the Canadian regime, liability is often premised on a party’s status as the “owner of a ship”. In the United States, liability under the Oil Pollution Act is premised on the status as a “responsible party”, which includes one “owning or operating or demise chartering” the vessel.
- Under both regimes, the limits of liability are set forth based on the size and type of vessel. However, those limits are different in each country.

These differences raise perplexing substantive questions for both countries’ governments and constituents, such as who is liable, what statutory limits of liability apply, and whether foreign nationals can be a claimant of the funds. A resolution of those questions is beyond the scope of this paper, but a basic understanding of the regulatory regime will assist in planning for contingencies, as well as managing the expectations of stakeholders.

### **III. THE U.S. REGIME**

The Oil Pollution Act of 1990 (“OPA”) was passed as a result of the Exxon Valdez tanker spill in Prince William Sound. Although not the largest spill, at the time it was considered one of the most devastating from an ecological perspective.<sup>8</sup> As scenes of oiled whales and waterfowl splashed across household televisions, it became clear that the U.S. was woefully unprepared to address environmental damage of such magnitude. In its report to the President about the spill,

the National Response Center underscored the need for more comprehensive legislation, given the uncertainty of the statutory and common law framework:

Although both aspects of 311 of the [Clean Water Act] and [Trans-Alaska Pipeline Authorization Act] apply to the *Exxon Valdez* spill, it is unclear to what extent they may both be applicable or how they will interrelate. As indicated, the state and general maritime tort laws also apply, but the legal complexities of the incident ultimately may require resolution in courts. [...] The relationship between liability requirements under the Clean Water Act and other statutes is undefined and could result in costly, extensive litigation. [...] <sup>9</sup>

The passage of OPA addressed these concerns and more. It created a comprehensive prevention, response, liability and compensation scheme for oil pollution emanating from vessel and facility sources that threatened U.S. waters.<sup>10</sup> This legislation also made available the OSLTF, which had existed since 1986 but was never previously available for use.<sup>11</sup> The U.S. Coast Guard was delegated the authority to administer the OSLTF under Executive Order 12777.<sup>12</sup> Today, the NPFC, a command within the U.S. Coast Guard, handles the administration of the OSLTF.

#### **a. FUNDING OVERVIEW.**

The OSLTF is comprised of two components: the emergency fund and the principal fund. The emergency fund receives \$50 million USD annually<sup>13</sup> to be used by Federal on-scene coordinators<sup>14</sup>, Tribal, and state authorities for oil pollution response, and NRDA activity. The remaining balance is the principal fund, used to pay claims for uncompensated removal costs and for certain types of damages. In addition, Congress makes annual appropriations out of the principal fund to Federal agencies to administer other provisions of OPA, such as supporting research and development. The principal fund is financed by a combination of sources as set forth under 26 U.S.C. §9509, which includes a per-barrel excise tax on oil produced in or imported to the United States<sup>15</sup>, interest from U.S. treasury investments of the principal, cost recovery from the responsible parties, and civil penalties and fines paid by the responsible parties.<sup>16</sup> Between

FY2007 and FY2018, the fund received \$5.67 billion in excise tax receipts; \$2.3 billion USD from fines and penalties; \$1.28 billion from cost recoveries; \$362 million USD in interest on investments.<sup>17</sup> At the time of this writing, the OSLTF had a total balance of approximately \$7.3 billion USD.

**b. PER INCIDENT LIMIT.**

Expenditures from the OSLTF is limited to \$1 billion USD per incident<sup>18</sup>, or the balance of the fund, whichever is less. Within this amount, natural resource damage claims and assessments are limited to \$500 million USD.<sup>19</sup> To date, the fund's limit has never been reached, and the 2010 *Deepwater Horizon* spill has been the only spill that would have theoretically exceeded the limit if the OSLTF had been forced to pay all removal costs and damages incurred during that incident. Fortunately for the fund, the responsible parties paid in excess of \$65 billion USD in removal costs, damages, and penalties.<sup>20</sup>

**c. EMERGENCY FUNDING.**

As noted above, the OSLTF is available for immediate funding of an emergency response for actual discharges or substantial threats of discharge, as determined by the Federal-On-Scene Coordinator ("FOSC") who is delegated the authority under 33 U.S.C. §1321(c) to respond to oil pollution discharges or substantial threats of discharge. The United States Coast Guard acts as the FOSC for the coastal zone, while the Environmental Protection Agency is the authority for the inland zone.<sup>21</sup> In all situations, the NPFC works with the designated FOSC to provide funding for response. At the time of this writing, there was an approximate \$123 million USD available for emergency response funding.

One key difference from the SOPF is that the OSLTF is immediately available once the FOSC makes its determination, obviating the requirement that it file a "claim" to the OSLTF for

reimbursement.<sup>22</sup> Some complications are anticipated in a transboundary spill where the OSLTF's emergency funding is used to perform services in the adjacent waters of Canada. Although under the JCP, each country funds its own response operations, it is anticipated that countries would cooperate and provide mutual assistance if requested. In such event, response activities and services provided by one country to address pollution in the other country's waters would be reimbursed by the recipient country.<sup>23</sup> By law, the OSLTF is only available to address actual discharges or "substantial threats" of discharge to United States' waters. Thus, to perform OSLTF-funded operations in Canadian waters, the FOSC would be required to articulate and establish the substantial threat to the US waters.

#### **d. COMPENSATION AND CLAIMS.**

Another central objective of the OSLTF is to pay claims for uncompensated removal costs<sup>24</sup> and damages<sup>25</sup> from an oil spill. This provides the claimant—a term broadly defined under OPA<sup>26</sup>—financial relief without enduring expensive, protracted litigation, a feature particularly critical for those who suffered losses to their livelihoods and incomes because of a spill.

##### **i. TYPES OF CLAIMS FOR COMPENSATION.**

The types of compensable claims include (1) uncompensated removal costs; (2) damages to real or personal property; (3) loss of subsistence use; (4) loss of revenues; (5) loss of profits and earning capacity; (6) net costs of providing increased or additional public services; and (7) natural resource damages.<sup>27</sup> Any claimant may recover in the categories (1)-(5). Only a State or political subdivision of a State may recover damages for public services; and only United States trustees, State trustees, an Indian tribe, or a foreign trustee<sup>28</sup> may recover claims for natural resource damages.

The OSLTF requires claimants to first present its claim to the responsible party or guarantor.<sup>29</sup> If the claim goes unpaid after 90 days, the claimant may then proceed to the fund,<sup>30</sup> or elect to pursue its remedy in court. The time limit to submit a claim for removal costs is six years from the date in which all removal activities were completed. By contrast, the time limit to submit a claim for damages is three years from the date in which the damage and its connection with the spill was reasonably discoverable with the exercise of due care. Claimants must be sure to include the 90-day presentment requirement when calculating the latest possible date to file the claim.

The NPFC endeavored to create a streamlined, efficient, and easy claims process for the public. Accordingly, the claims package requirements are relatively straightforward, and consists of an optional form (or the claimant may also create its own form), plus documentation.<sup>31</sup> The documentation requirements are not burdensome, but they must satisfy certain criteria as set forth in the regulations.<sup>32</sup> The NPFC has 180 days upon the proper presentation of a claim to make an adjudication, which could result in a payment, partial payment, or denial.<sup>33</sup> If the adjudication results in a full or partial payment, the claimant has 60 days in which to accept the payment.<sup>34</sup> If the claimant rejects the adjudication, it may then proceed to court against the NPFC.

## **ii. FOREIGN CLAIMANTS.**

In the case of a transboundary spill, the more relevant concern is the availability of the OSLTF to “foreign claimants”<sup>35</sup> who must meet additional statutory requirements before they can be compensated. The OSLTF is available to a foreign claimant only if the discharge is from (1) an Outer Continental Shelf facility or deepwater port; (2) a vessel in the navigable waters of the U.S.; (3) a vessel carrying oil as cargo between two places in the U.S.; or (4) a tanker that received the oil at the terminal of the pipeline constructed under the Trans-Alaska Pipeline Authorization Act



for transportation to a place in the United States and the discharge or threat occurs prior to delivery of the oil to that place.<sup>36</sup> The foreign claimant must also show that it has not otherwise been compensated for the claim, and that recovery is authorized by a treaty or executive agreement between the United States and the claimant's country. Alternatively, the Secretary of State, in consultation with the Attorney General has certified that the claimant's country provides a comparable remedy for United States claimants.<sup>37</sup> In the case of Canada, there is no such treaty, executive agreement, or certification. A Canadian claimant may still avail of the OSLTF, notwithstanding the lack of a treaty or certification, but only if "the discharge is from a tanker that received the oil at the terminal of the pipeline constructed under the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651) for transportation to a place in the United States, and the discharge or threat occurs prior to delivery of the oil to that place."<sup>38</sup>

**e. LIABILITY AND LIMITS.**

It is impossible to discuss compensation without a corollary discussion of liability. As noted above, the fund is the nation's compensation and liability scheme, and that liability is strict, joint and several. It is not unlimited, however. Statutory limits may apply, and in some cases, the responsible party may be entitled to a claim against the fund for removal costs and damages incurred in excess of the limits. The following chart outlines the limits of liability for the different categories of vessels.<sup>39</sup> The liability calculated is the *greater* of each category. For example, if the vessel is a single-hull tank vessel, weighing only 400 gross tons, then the limit of liability is the \$7,478,800 (because the \$3,700 calculation multiplied by 400 GT would result in less than the maximum limit).

Weight of Vessel in Gross Tons ("GT")	Single-hull tank	All other tank vessels	**All other vessels, regardless of tonnage.
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3,000 GT or less	\$3,700 per GT or \$7,478,800	\$2,300 per GT or \$4,985,900	\$1,200 per GT or \$997,000
3,001 GT or more	\$3,700 per GT or \$27,422,200	\$2,300 per GT or \$19,943,400	

Notwithstanding, those limits can be broken if the incident was proximately caused by gross negligence or willful misconduct; or the violation of an applicable Federal safety, construction, or operating regulation, of the responsible party or its agents or employees.<sup>40</sup>

Lastly, the responsible party or guarantor may be entitled to a complete defense upon the showing that the incident and resulting damages were solely caused by an act of God; an act of war; or the sole fault of a third-party.<sup>41</sup> As with the SOPF, the OSLTF is available to pay a claim that exceeds the vessel's limit of liability.

#### **f. FINANCIAL RESPONSIBILITY REQUIREMENTS.**

To ensure sufficient financial means for oil pollution cleanup, certain types of vessels are required to have evidence of financial security in the amount of the maximum limit of liability set forth above. Operators of the following vessels are required to obtain and maintain evidence of financial responsibility: any vessel greater than 300 GT operating in U.S. jurisdiction; any vessel using the waters of the exclusive economic zone to transship or lighter oil destined for a place subject to U.S. jurisdiction; or any tank vessel over 100 gross tons using any place subject to U.S. jurisdiction.<sup>42</sup>

Evidence of financial responsibility can be established in several ways, including proof of insurance, a surety bond, a guarantee, or self-insurance.<sup>43</sup> The financial surety requirement creates a cause of action against the guarantor<sup>44</sup>, allowing claimants to bypass the responsible party and come to the guarantor directly. The guarantor has the same defenses that would ordinarily be available to the responsible party under the statute, as well as the additional complete defense that

the incident was caused by the willful misconduct of the responsible party.<sup>45</sup> The guarantor's liability is limited to the amount of financial responsibility that the guarantor has provided to the responsible party.<sup>46</sup>

**g. CONCLUSION.**

Established by OPA 90, the OSLTF is the national fund available to address oil pollution remediation and reimbursement of unpaid removal costs and damages. It is immediately available to federal and state authorities for emergency response, but other types of injured parties are required to present their damages to the responsible party before moving to the fund. Canadian constituents may have difficulty recovering from the OSLTF for ship-source pollution originating in U.S. waters, unless the statutory requirements are satisfied. For its part, the responsible party is strictly liable, although it is entitled to its limit of liability based on the size of the vessel so long as it, or its agents, did not engage in willful misconduct or gross negligence, or violate a federal safety, construction, or operating regulation.

**IV. THE CANADIAN REGIME.**

Although Canada is signatory to various international conventions involving oil pollution from ships, the SOPF is a primary fund available for claimants in the instance of a spill. The SOPF also covers pollution damage that is not recoverable under the international conventions. As with the United States, Canada's history with oil pollution legislation stemmed from several national catastrophes that underscored the need for a comprehensive regime to address oil pollution incidents. In the early days, Canada instituted the Maritime Pollution Claims Fund ("MPCF"), designed to be used as a last resort only after all legal remedies of the ship owner had been exhausted. The MPCF was initially financed by a levy against imports and exports of oil, but its collection was suspended a mere four years later upon a determination that the MPCF was

adequately funded to meet foreseeable claims.<sup>47</sup> In 1989, Canada established the SOPF and the funds from the MPCF were then transferred to this new fund.<sup>48</sup>

The provisions governing the SOPF are found in Part 7 of the Marine Liability Act (“MLA”). These provisions incorporate by reference several international conventions that have likewise been codified in Part 6 of the MLA:

- the *1992 International Convention on Civil Liability for Oil Pollution Damage* (“CLC”), codified in Part 6 Section 48 of the MLA;
- the *1992 International Fund Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (“Fund Convention”) codified in Part 6 Section 57 of the MLA;
- the *2003 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (“Supplementary Fund Protocol”) codified in Part 6 Section 63 of the MLA; and
- the *International Convention on Civil Liability for Oil Pollution Damage* (“Bunkers Convention”) codified in Part 6 Section 69 of the MLA.<sup>49</sup>

Although the detailed discussion of these conventions is beyond the scope of this paper, the conventions impact the SOPF where limits of liability, damages and claims are involved. Generally, the CLC provides strict, but limited liability for ship owners, and the Fund Convention provides alternative source of funding through the IOPC Fund where the compensation under CLC is limited or inadequate. In addition, Canada has the Supplementary Fund, a third tier of compensation. These international conventions are coextensive with the SOPF regime.

Some of the more salient features of the SOPF is that the fund itself is designated as “liable” for oil spill pollution vis-à-vis claimants.<sup>50</sup> This “liability” manifests in the unique feature that the SOPF serves as a claimant’s avenue of first<sup>51</sup> or last resort<sup>52</sup>—meaning that the prospective claimant may file the claim directly with the SOPF Administrator, or it may sue the shipowner, in which case the SOPF Administrator is a party to the suit. Under the latter scenario, the SOPF is

liable for the delta between the judgment and the shipowner's obligation that goes unpaid.<sup>53</sup> Practically speaking, the fund is available to a claimant without any presentment or demand requirement to the shipowner or insurer, and the claimant may recover above the ship's relevant limit of liability (established by the various conventions). Certain categories of claimants may only use the SOPF as the last resort.<sup>54</sup> The SOPF is also available to pay for damages from all classes of ships and types of ship oil. By contrast, each corresponding convention covers certain types of oil discharges.<sup>55</sup> Finally, unlike claims under the various international conventions, the claim under the SOPF is not statutorily capped. Said another way, the SOPF could be liable to a claimant up to the entire amount of the fund.

**a. FUNDING OVERVIEW.**

The SOPF Administrator's 2019-2020 annual report reflected funds in excess of \$400 million CAD. This amount is based on the original balance plus interest that has accrued over the years, as well as recoveries from judgments and settlements against the shipowners. During the most recent fiscal year, the SOPF collected \$5 million CAD in interest and recovered \$1 million CAD from shipowners responsible for pollution.<sup>56</sup>

**b. PER OCCURRENCE EXPENDITURE LIMITS.**

Prior to 2018, the SOPF was limited to \$175 million CAD per occurrence, which created a situation where claimants might receive only a pro rata share after all claims had been submitted, in the event of a spill that exceeded the limit. The amendments to the MLA removed the limit, enabling the SOPF to pay claimants 100% of their "admissible assessed claims." Should the SOPF be exhausted on any given incident, then the Minister of Finance can grant the SOPF a loan from the Consolidated Revenue Fund. The loan would be recovered through the imposition of a levy or special levy on receivers and exporters of oil.

**c. EMERGENCY FUNDING AVAILABILITY.**

In the case of a “significant incident”<sup>57</sup>, the Minister of Fisheries and Oceans can seek the release of up to \$10 million CAD from SOPF for immediate emergency response.<sup>58</sup> Should this amount be insufficient, an additional \$50 million CAD is available with the approval of the Governor in Council.<sup>59</sup> This emergency money allows the Canadian Coast Guard to fund response activities, including compensating third-party responders who are acting under its direction. The Minister of Fisheries and Oceans is required to return the emergency funds to the SOPF, however.<sup>60</sup> Alternatively, it can file its total claim with the SOPF, and credit the amount of any unused funds back to the SOPF.<sup>61</sup>

**d. COMPENSATION AND CLAIMS.**

The MLA establishes the SOPF’s liability for matters under the CLC, Bunkers Convention, and from any vessel owner who spills oil. This liability is established if:

- All reasonable steps have been undertaken for recovery from the owner of the ship, the CLC, the International Fund, or the Supplementary Fund, and those steps have been unsuccessful;<sup>62</sup>
- The owner of the ship is not liable based on established defenses, such as the occurrence/damages resulted from war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; was wholly caused by an act or omission done by third parties with the intent to cause damage; or was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function;
- The claim exceeds the limit of liability;
- The shipowner is financially incapable of meeting the obligations set forth in the provisions of the MLA, the CLC, or the Bunkers Convention;
- The Administrator is unable to establish the source of pollution (mystery spill); or
- The Administrator is party to a settlement against the shipowner.<sup>63</sup>

The SOPF is broadly available for compensable damages. A “person”<sup>64</sup> may file a claim with the Administrator of the SOPF “if the person has suffered loss or damage, or incurred costs or expenses” related to oil pollution damage referred to in Sections 51, 71, or 77 of the MLA, or Article 3 of the CLC, or Article 3 of the Bunkers Convention.<sup>65</sup> The claim may cover “any kind of loss, damage, costs, or expenses arising out of actual or anticipated oil pollution damage, including economic loss suffered by a persons whose property has not been polluted.”<sup>66</sup> As with the NPFC, the SOPF Administrator has made available online a “Claimants Guide” as a resource.<sup>67</sup>

The types of damages for which the SOPF compensates includes “any kind of loss, damage, costs or expenses—including economic loss—caused by oil pollution.”<sup>68</sup> “Pollution damage” is defined under the CLC and Fund Convention as:

- (a) Loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;
- (b) The costs of preventative measures and further loss or damages caused by preventative measures.<sup>69</sup>

The Bunkers Convention defines “pollution damage” similarly but refers to the escape of discharge of “bunker oil”. In addition to the above losses, the SOPF also compensates a special type of loss to fishing income<sup>70</sup>, a loss of a source of food or animal skins. Those claimants may file a claim for that loss or future loss.<sup>71</sup>

The time in which the claim must be filed depends on the nature of the claim. For a CLC or a Bunkers claim, the time limit is two years after the day on which the oil pollution occurs, and five years after the occurrence that causes the damage<sup>72</sup>. If no oil pollution damage has occurred, then the claim must be made within five years after the occurrence in respect of which oil pollution damage is anticipated.<sup>73</sup> By contrast, for a loss of fishing claim under Section 107, the time in

which to file the claim is three years from the oil discharge happening or being noticed, or six years after the occurrence which causes the discharge.<sup>74</sup>

**e. LIABILITY AND LIMITS.**

As with the OSLTF in the United States, a private claimant entitled to SOPF compensation would not necessarily be concerned with the limits of liability. It can either come to the fund or exhaust its judicial remedies against the vessel and then come to the fund. Yet, in a transboundary spill, these limits of liability for various discharging vessels may impact any cost-recovery efforts by injured parties in the U.S. and vice versa.

Under Article V of the CLC, the liability limits are as follows<sup>75</sup>:

Up to 5,000GT	4.51 million SDR <sup>76</sup>
5,001GT– 140,000GT	4.51 million SDR plus 631 SDR for each additional unit of tonnage
140,000GT +	89.77 million SDR

For spills of oil used in the operations or propulsion of the ship, then the Bunkers Convention and its limits of liability applies as follows<sup>77</sup>:

Up to 2,000GT	1.51 million SDR
2,001GT-30,000GT	1.51 million SDR plus 604 SDR for each additional unit of tonnage.
30,001GT-70,000GT	1.51 million SDR plus 453 SDR for each additional unit of tonnage.
70,000 GT +	1.51 million SDR plus 302 SDR for each additional unit of tonnage.

Moreover, similar to the defenses under the Oil Pollution Act, there are also certain defenses to which shipowners are entitled to mitigate or exonerate liability. There is no liability if the owner can prove that the damage resulted from war or other hostilities, a natural phenomenon of an “exceptional, inevitable, and irresistible character”; an act of a third party whose intent was



to cause damage; or the negligence or other wrongful act of any authority responsible in maintaining navigational aids. In addition, an owner may be entitled to complete exoneration or reduction in liability if it can show that the damage was the result from an act or omission by the claimant done with an intent to cause such damage, or by the claimant's negligence.<sup>78</sup>

On the other hand, liability limits may be broken upon a showing that damage resulted from the owner's act or omission with the intent to cause the damage, or recklessly and with knowledge that such damage would result.

#### **f. FINANCIAL RESPONSIBILITY REQUIREMENTS.**

The financial responsibility requirements are incorporated into the MLA by reference to the relevant international conventions. The CLC requires owners of ships registered in a Contracting State and carrying more than 2,000 tons of oil in bulk as cargo to have insurance or other financial security to cover the liability established in Article 5 of the CLC.<sup>79</sup>

Similarly, Article 7 of the Bunkers Convention also requires compulsory insurance or other security, but only for registered owners of the Contracting State and for those ships greater than 1,000 gross tons. The financial security must be enough "to cover the liability of the registered owner for the pollution damage in an amount equal to the limits of liability under the applicable national or international limitation regime, but in all cases, not exceeding an amount calculated in accordance with the [CLC]".<sup>80</sup>

### **III. CONCLUSION.**

The OSLTF and SOPF are available to fund oil spill responses and compensate victims for damages. In turn, the administrators of these funds are empowered with the force of law to pursue cost recovery against the polluter. On its face, this is an uncomplicated proposition; the system, though not without fault, has achieved its noble mission thus far. However, the prospect of a

significant transboundary spill between Canada and the United States raises concerns about how to handle compensation and liability when the relevant laws differ in such substantive and meaningful ways. Concerns about availability of funds to responders, liability and limits, and compensation for claims are magnified in a transboundary spill. Policy makers and administrators can only go so far, however. For their part, they endeavor to understand these systems and to anticipate the issues that could arise in a major transboundary spill. Fundamental and substantive changes must be addressed at the national level of each country's respective governments.

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<sup>1</sup> The findings and conclusions of this article are those of the author, and do not represent the views or policies of the United States Coast Guard National Pollution Funds Center. This article should not be considered legal advice and no attorney-client relationship has been formed because of reading this article. This article is intended to be informative only. For specific legal questions, please consult an attorney licensed in the respective jurisdiction.

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<sup>3</sup> 2017 Canadian United States Joint Marine Contingency Plan found at:

<https://www.rtt10nwac.com/files/Canadian%20CG%20%20USCG%20Joint%20Marine%20Contingency%20Plan.pdf>

<sup>4</sup> U.S. Dollar.

<sup>5</sup> Canadian Dollar.

<sup>6</sup> See SOPF 2019-2020 Annual Report available at <http://sopf.gc.ca/wp-content/uploads/pdf/2019-2020%20SOPF%20Annual%20Report.pdf>

<sup>7</sup> *Id.*

<sup>8</sup> <https://web.archive.org/web/20070630224835/http://www.evostc.state.ak.us/History/FAQ.cfm>

<sup>9</sup> The full report can be read here:

[https://pdfs.semanticscholar.org/f528/d340cb28a161452fde2e8859f984dbbbcd83.pdf?\\_ga=2.218250649.145733527.2.1571062378-132090884.1571062378](https://pdfs.semanticscholar.org/f528/d340cb28a161452fde2e8859f984dbbbcd83.pdf?_ga=2.218250649.145733527.2.1571062378-132090884.1571062378)

<sup>10</sup> [https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/About\\_NPFC/OPA/](https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/About_NPFC/OPA/)

<sup>11</sup> [https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/About\\_NPFC/OSLTF/](https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/About_NPFC/OSLTF/)

<sup>12</sup> Executive Order 12777.

<sup>13</sup> 33 U.S.C. §2752(b). The annual \$50 million USD can be carried over from year to year.

<sup>14</sup> The U.S. Coast Guard or the EPA (for inland spills) serve as the delegated federal on-scene coordinators.

<sup>15</sup> As of the current Fiscal Year 2020, the nine cent per barrel tax has been reinstated, but will expire on December 31, 2020. See P.L. 116-94, Division Q, Section 134.

<sup>16</sup> [https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/About\\_NPFC/OSLTF/](https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/About_NPFC/OSLTF/)

<sup>17</sup> <https://fas.org/sgp/crs/misc/IF11160.pdf>

<sup>18</sup> 26 U.S.C. §9509(c)(2). Under 33 U.S.C. §2701(14), an “incident” is defined as “any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil.”

<sup>19</sup> 26 U.S.C. §9509(c)(2).

<sup>20</sup> <https://fas.org/sgp/crs/misc/IF11160.pdf>. Of this amount, \$8.1 billion and \$5.5 billion comprised natural resource damages and civil penalties respectively. [http://www.gulfspillrestoration.noaa.gov/sites/default/files/wp-content/uploads/Overview\\_04-07-16\\_final-508.pdf](http://www.gulfspillrestoration.noaa.gov/sites/default/files/wp-content/uploads/Overview_04-07-16_final-508.pdf)

<sup>21</sup> 40 C.F.R. §300.5.

<sup>22</sup> 33 U.S.C. §2712(a).

<sup>23</sup> JCP Section 800.

<sup>24</sup> Defined as “the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident.” 33 U.S.C. §2701(31).

<sup>25</sup> Defined as the “damages specified in section 2702(b) [...], and includes the cost of assessing these damages.” 33 U.S.C. §2701(5).

<sup>26</sup> A “claimant” means “any person or government who presents a claim for compensation under” OPA.

<sup>27</sup> 33 U.S.C. §2702(b).

<sup>28</sup> Although a foreign trustee is recognized under the statute, because no comparable remedy exists in Canada, Section 2707(a)(1)(B) precludes payment from the OSLTF to Canadian trustees for natural resource damages.

<sup>29</sup> 33 U.S.C. §2713(a).

<sup>30</sup> 33 U.S.C. §2713(c). There are certain, limited exceptions to the presentment requirement: (a) if the NPFC notifies claimants to submit the claim directly to NPFC; (b) if the claimant is the responsible party asserting a defense or limitation of liability; (c) if the claimant is a State; or (d) if the claimant is a United States claimant suffering damages from a foreign offshore unit. 33 U.S.C. §2713(b)(1).

<sup>31</sup> The NPFC has created a “Claimants Guide” and can be downloaded at <https://www.uscg.mil/Portals/0/NPFC/docs/PDFs/Claimant%20Guide.pdf>

<sup>32</sup> 33 CFR Part 136.

<sup>33</sup> 33 C.F.R. Part 136.

<sup>34</sup> 33 C.F.R. Part 136.

<sup>35</sup> Defined as a resident of a foreign country; the government of a foreign country; and an agency or political subdivision of a foreign country. 33 U.S.C. §2707(c).

<sup>36</sup> 33 U.S.C. §2707(b).

<sup>37</sup> 33 U.S.C. §2707(a).

<sup>38</sup> 33 U.S.C. §2707(a)(2), (b)(4).

<sup>39</sup> 33 C.F.R. 138.230.

<sup>40</sup> 33 U.S.C. §2704.

<sup>41</sup> 33 U.S.C. §2703.

<sup>42</sup> 33 U.S.C. §2716(a). Under OPA, the financial responsibility requirements apply only to tank vessels over 100 GT; the regulations (33 C.F.R. §138.15(a)(1)) provide, however, that all operators of tank vessels must provide evidence of financial responsibility.

<sup>43</sup> 33 U.S.C. §2716(e). In addition 33 C.F.R. §138.80 sets specifies the requirements for each category of evidence.

<sup>44</sup> A “guarantor” is defined as any person, other than the responsible party, who provides evidence of financial responsibility for a responsible party under the Act. 33 U.S.C. §2701(13). Although a guarantor can be an insurer, the key difference is that the insurer acting as the guarantor has no contractual or common law defenses that are ordinarily available and often identified in underlying insurance policies. 33 U.S.C. §2716(f).

<sup>45</sup> 33 U.S.C. §2716(f).

<sup>46</sup> 33 U.S.C. §2716(g).

<sup>47</sup> [http://sopf.gc.ca/wp-content/uploads/pdf/39-202\\_GeneralClaims\\_Manuel-EN-Web.pdf](http://sopf.gc.ca/wp-content/uploads/pdf/39-202_GeneralClaims_Manuel-EN-Web.pdf)

<sup>48</sup> [http://sopf.gc.ca/wp-content/uploads/pdf/39-202\\_GeneralClaims\\_Manuel-EN-Web.pdf](http://sopf.gc.ca/wp-content/uploads/pdf/39-202_GeneralClaims_Manuel-EN-Web.pdf)

<sup>49</sup> These various conventions enable claimants in signatory countries to avail of additional financial sources. The Fund Convention establishes the International Oil Pollution Compensation Fund (“International Fund”) against which injured parties of signatory countries may claim compensation for damages. Also known as a “second tier” compensation, the purpose is to compensate victims who did not obtain full compensation under the CLC. Finally, the Supplementary Fund Protocol established a “third tier” of compensation from the “Supplementary Fund”, an additional fund for tanker spills above and beyond what is provided by the International Fund. The United States is not a signatory and therefore not entitled to avail of these resources.

<sup>50</sup> Section 101, 103, MLA.

<sup>51</sup> Section 103, MLA.

<sup>52</sup> Section 101, MLA.

<sup>53</sup> For example, the SOPF would be liable to the claimant if and to the extent that: (1) the shipowner successfully raises one of the statutory defenses; (2) the claim or claims against a shipowner exceed its maximum liability; (3) the shipowner is financially incapable of meeting the obligation; the Administrator decides to settle with the claimant. *See generally*, [http://sopf.gc.ca/wp-content/uploads/pdf/39-202\\_GeneralClaims\\_Manuel-EN-Web.pdf](http://sopf.gc.ca/wp-content/uploads/pdf/39-202_GeneralClaims_Manuel-EN-Web.pdf)

<sup>54</sup> Section 103(3), MLA.

<sup>55</sup> For example, the Bunkers Convention only applies to spills involving oil used in propulsion or other ship operations, while the CLC, Funds Convention and Supplementary Fund apply to spills from oil tankers.

<sup>56</sup> SOPF 2019-2020 Annual Report available at <http://sopf.gc.ca/wp-content/uploads/pdf/2019-2020%20SOPF%20Annual%20Report.pdf>

<sup>57</sup> Defined as “a discharge of oil that, due to its severity, size, or location and its impact—actual or potential—on the environment, requires extraordinary resources to respond to it.” Section 91, MLA.

<sup>58</sup> Section 110(1), MLA.

<sup>59</sup> Section 110(2), MLA.

<sup>60</sup> Section 111(1), MLA. The amount taken from the SOPF is to be credited back out of appropriations for the Department of Fisheries and Oceans under the Appropriations Act.

<sup>61</sup> Section 111.1(1), MLA.

<sup>62</sup> Section 101, MLA. Also known as the case of “last resort”.

<sup>63</sup> Section 101(1) MLA.

<sup>64</sup> Although this term is not defined in the MLA, the MLA incorporates the CLC and Bunkers Convention, including the definitions found under Art. 1(2) of the CLC; and Art. 1(2) of the Bunkers Convention. Under these respective conventions, a “person” is “any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.” The SOPF General Claims Manual also indicates that a “person” includes the “Canadian Coast Guard; ports, harbours, and marinas; those involved in the fishing and tourism industries; all levels of government; corporations; indigenous communities; individuals; coastal landowners; and owners of impacted ships and boats.” [http://sopf.gc.ca/wp-content/uploads/pdf/39-202\\_GeneralClaims\\_Manuel-EN-Web.pdf](http://sopf.gc.ca/wp-content/uploads/pdf/39-202_GeneralClaims_Manuel-EN-Web.pdf). However, the MLA excludes certain “response organizations”—i.e. those entities certified by Transport Canada, of which there are currently four—from utilizing the SOPF as a first resort. *See* Section 103(6)(excluded response organizations are those that are referred to in Paragraph 51(1)(a), 71(1)(a), or 77(1)(b) of the MLA).

<sup>65</sup> Section 103(1) MLA.

<sup>66</sup> Section 103(1) MLA.

<sup>67</sup> [http://sopf.gc.ca/wp-content/uploads/pdf/39-202\\_GeneralClaims\\_Manuel-EN-Web.pdf](http://sopf.gc.ca/wp-content/uploads/pdf/39-202_GeneralClaims_Manuel-EN-Web.pdf)

<sup>68</sup> Section 101(1), MLA.

<sup>69</sup> Article I (6) CLC.

<sup>70</sup> Section 107, MLA.

<sup>71</sup> Section 107 (3), MLA.

<sup>72</sup> Section 103(2), MLA.

<sup>73</sup> Section 103(2), MLA.

<sup>74</sup> Section 107, MLA.

<sup>75</sup> <https://iopcfunds.org/about-us/legal-framework/1992-civil-liability-convention/>

<sup>76</sup> The term “SDR” means special drawing rights, and is artificial valuation created by the International Monetary Fund for accounting purposes and is used as a neutral account measure. The value of the SDR is determined on the value of a basket of currencies, each weighted based on their importance in the world market. The use of the SDR in various international conventions is to value penalties, charges, or in this case the limits of liability and would be converted to the relevant member currency.

<sup>77</sup> <https://www.westpandi.com/publications/news/new-limits-under-llmc/>

<sup>78</sup> Article 5, CLC.

<sup>79</sup> Article 7, CLC.

<sup>80</sup> Bunkers Convention Article 7(1).