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Overview of Canada's Ship Source Pollution Regime and Recent Noteworthy Decisions

The Institute of Chartered Shipbrokers
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Where are we going today?

1. How did we get here?
2. The International Regime
3. The Canadian Regime
4. How it works in practice
   a. Recent Regulatory prosecutions
   b. Recent SOPF decisions
5. Questions

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How did we get here?

- The Torrey Canyon
  - Oil tanker grounded and then broke up off the southwest coast of the UK in March 1967
  - Spilled an estimated 25 – 36 million gallons of crude, killed approximately 15,000 seabirds
  - Government decided to ignite the spill and sink the wreck (and used a total of 161 bombs, 16 rockets, 1,500 tons of napalm and 44,500 litres of kerosene to do so!)
  - Still the largest spill in UK history

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How did we get here? (con't)

- Led to changes in the international regime:
  - Strict liability without the need to prove negligence (Convention on Civil Liability for Oil Pollution Damage (CLC) in 1969 (tanker liability and limitation))
  - MARPOL – ship standards (Convention for the Prevention of Pollution from Ships in 1973)
- Serge Gainsbourg recorded a song about the accident
- Sistership arrested in Singapore as crew believed arresting lawyer was a whisky salesman

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The International Regime

- There are a number of important international treaties / conventions that regulate ship source pollution
  - Convention on Civil Liability for Oil Pollution Damage (CLC) (tanker liability and limitation) as amended by the 1992 Protocol
  - Convention for the Prevention of Pollution from Ships (MARPOL)
  - Fund Convention (excess tanker liability)
  - Bunker Convention (liability for bunker discharges and limitation)
  - HNS Convention (hazardous and noxious substances)
  - Code for Ships Operating in Polar Waters (Polar Code)
- Common factors in majority of the above include strict liability, caps on liability and requirement for insurance or other security

The Canadian Regime

- International law can be incorporated into domestic law in a number of ways
- In Canada, an international convention must be incorporated by enacting domestic legislation
- Can incorporate the entire convention or only select provisions and with or without domestic changes

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The Canadian Regime (con't)

- Generally legislated by the Federal Government because it has power over navigation and shipping based on ss. 91 and 92 of the *Constitution Act, 1867*
- Provinces also have some regulatory powers re: pollution
- Two distinct regimes for Polar (i.e. north of 60°) / nonPolar

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The Canadian Regime (con't)

- Various pieces of Canadian legislation focus on:
  - Prevention
  - Regulatory / quasi-criminal penalties
  - Civil liability
  - Damages and compensation
  - Limitation of liability

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The Canadian Regime (con't)

- The Regulatory / quasi-criminal and civil penalties are contained in
  - *Canada Shipping Act, 2001*, S.C. 2001, c. 26
  - *Fisheries Act*, R.S.C., 1985, c. F-14
  - *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22
  - *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33
  - *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12
- Among other things, the above acts prohibit pollution/discharge/disposal and impose criminal and civil liability for contravention (including imprisonment and significant fines)

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The Canadian Regime (con't)

- Pollution offences and other public welfare offences are usually strict liability offences
- The Crown has to prove the illegal act (i.e. the discharge) but not intent
- Defence of due diligence: available if the accused "took all reasonable steps to avoid" the pollution.
- unlike "normal" criminal offences, the accused must prove she was duly diligent

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The Canadian Regime (con't)

- The civil liability regime is contained in the *Marine Liability Act,* S.C. 2001, c. 6
- Not criminal or regulatory fines / penalties but compensatory
- Statutory strict liability and limited defences:
  - act of war
  - civil insurrection
  - natural phenomenon of exceptional, inevitable and irresistible character
  - act of third party with intent to cause damage
  - negligence in maintenance of navigational aids
- Trade off strict liability in exchange for certainty on types of claims and limitation of liability

The Canadian Regime (con't)

- Can be dealt with by the Canada's Ship-source Oil Pollution Fund ("SOPF")
- Based on the idea of polluter pays
- Successor to a fund originally created in 1973
- Funded by a levy on oil imports and exports – fully funded by 1976
- Currently $405 million in special accounts

The Canadian Regime (con't)

- Liability for damages arising from oil in bulk, bunkers and other oil
- Liability for "reasonable" costs, expenses and damages relating to
  - Pollution damage, excluding damage to environment beyond reasonable rehabilitation
  - Prevention, repair, remedy or mitigate
  - Monitoring

- Claimants:
  - Crown, response organizations (i.e. WCMRC), persons with "costs or expenses"
  - Individuals with damages and loss of income: property interests, fishers, fish workers
  - Excludes pure economic loss (i.e. losses that are not directly tied to property damage)

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The Canadian Regime (con't)

- Claimants can seek recovery from the offending shipowner or from the SOPF
- SOPF at reviews the claim and makes an offer based on what the Administrator of the SOPF determines to be recoverable at law
- Claimants can challenge that offer in Federal Court if they are unsatisfied
- If the offer is accepted, the SOPF will then pursue the shipowner for the same amount
- Why make a direct claim to the SOPF?
  - Convenience – do not have to identify the source of the spill or track down and properly serve the ship or shipowner

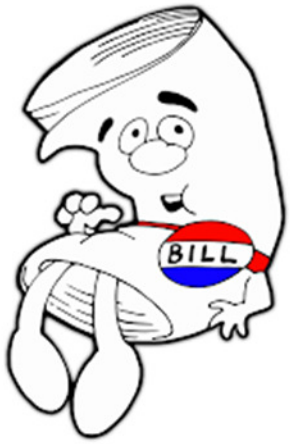
The Canadian Regime (con't)

In 2017 – 2018 fiscal year, the SOPF fund

- Paid out or offered to pay out approximately $2.7 million in claims
- Recovered $258,691 from polluters for claims it had paid out previously
- Had 32 claimants: CG was the claimant in 23 cases, five port claimants and four municipality claimants

The Canadian Regime (con't)

- Recent statutory changes to the SOPF by, among other things, allowing for
  - Reimbursement of expenses if a "grave and imminent threat" of pollution damage
  - Liability for economic loss and preventive measures before a "grave and imminent threat"
  - creating an expedited, simplified process for small claims ($35,000 CAD and less) to the Fund



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Recent Regulatory Prosecutions

- Focus here on two issues:
  - Difference between inspections and investigations
  - A successful due diligence defence

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Recent Regulatory Prosecutions (con't)

- Both decisions arise from *R. v. MV Marathassa*
- Prosecution in BC Provincial Court following a:
  - Small oil spill in English Bay in April 2015
  - Charged with 8 counts following the spill relating to alleged
    - discharge of oil
    - disposal of oil
    - deposit of oil in waters frequented by migratory birds
    - failure to implement the ship's oil pollution emergency plan
    - failure to report a discharge and record the circumstances of the same in the ship's oil record book

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Recent Regulatory Prosecutions (con't)

- Why is the inspection / investigation distinction important?
- There are two main sets of powers under the *CSA, 2001*:
  - those given to "marine safety inspectors" ("MSI"), i.e. Transport Canada designated employees who address regulatory issues; and
  - those given to "pollution response officers", i.e. CCG designated employees who do not generally address regulatory issues
- The above powers must be read with s. 116 of the *CSA, 2001*: no one can board a ship without lawful authority or the master's consent.
- Lawful authority under s. 116 is limited to certain provisions under the *CSA, 2001* or "any other Act of Parliament."

Recent Regulatory Prosecutions (con't)

- Same individual can and often does wear both inspector and investigator hats BUT
  - *CSA, 2001*, s. 211 does not require consent for an "inspection"
  - *CSA, 2001*, s. 219 requires consent or a warrant for an "investigation"
- It is essential to know whether the MSI is conducting an inspection or an investigation
- Fact based determination based on the nature of the work or conduct of the MSI
- The distinction is not easy to determine and it is not dictated by the MSI (as they can say one thing and found to be doing another)

Recent Regulatory Prosecutions (con't)

- This distinction was recently highlighted in a ruling following a lengthy *voir dire* to exclude evidence obtained in the *R. v. Marathassa* case (2018 BCPC 125)
- Vessel targeted by TC management for a PSC inspection **and** a pollution investigation. Two MSIs boarded: one conducted a PSC inspection and the other said he was conducting an inspection, not an investigation
- Court noted no other ships targeted and the non-PSC inspector performed investigative type work: took pictures, copied and seized documents, took samples, requested tank soundings, sought a statement from and ultimately Charter warned the Master, … also lots of e-mails, etc. with use of the word "investigation"

Recent Regulatory Prosecutions (con't)

- Crown argued it initially was an inspection that continued and as such even if a subsequent investigation arises there was no obligation to obtain warrant or consent: *R. v. Nolet*, 2010 SCC 24
- Defence argued it was always an investigation from initial boarding, so either consent or a warrant was required: *R. v. Jarvis*, 2002 SCC 73 and the evidence gathered should be excluded
- Ultimately, the Judge agreed with the defence and made the following findings

Recent Regulatory Prosecutions (con't)

- The Charter violation began when the TC inspector "used the **ruse** of conducting a compliance inspection to actually conduct an enforcement investigation."
- The **ruse continued** to be advanced by both the TC inspector and his manager "in court through their testimony."
- "The **deliberate and repeated breaches** of the s. 8 Charter rights [unreasonable search and seizure] of the Marathassa by both [the manager] and [the inspector] amounted to bad faith."
- Significant amount of evidence was excluded

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Recent Regulatory Prosecutions (con't)

- The matter proceeded to trial and after a long trial, the Judge concluded that the ship successfully established the due diligence defence and acquitted the ship on all charges (2019 BCPC 13)
- Like the inspection / investigation issue, the defence of due diligence is a fact specific determination
- Although the ship did discharge a pollutant, the defects that caused the discharge were not foreseeable and the ship proved the defence of due diligence

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Recent Regulatory Prosecutions (con't)

- Key facts in this case:
  - Japanese built ship on its first voyage
  - High level alarms in fuel oil tanks not properly installed by shipyard
  - Valve did not close as it was partially blocked by debris
- Court found that the ship took all reasonable steps to avoid the spill, including:
  - Selecting a quality shipbuilder, flag state and classification society
  - Meeting all statutory requirements
  - Hiring a crewing agent that met all regulatory requirements and was accredited by Lloyd's Register
  - Requiring master and crew familiarization at the shipyard
  - External audit of the ship's equipment and implementation of ISM

Recent Civil Liability Decisions

Administrator of SOPF v. Dr. Jim Halvorson Medical Services Ltd., 2019 FC 35

- Background:
  - September 2014 accommodation barge sunk near Zeballos, BC
  - Leaked fuel and other contaminants into the water

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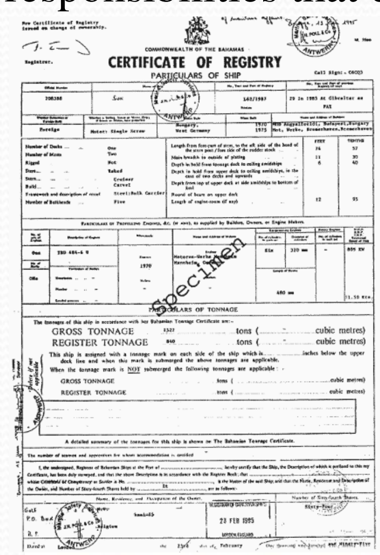
Recent Civil Liability Decisions (con't)

- Background (con't):
  - Barge was nicknamed the "Tiltin' Hilton" as it would sometimes take on water and develop a list
  - Defendant company purchased the barge in early 2012 and was listed as the registered owner in the Canadian Register of Vessels
  - Sold the barge to Fred Adams in September 2012 for $1
  - Mr. Adams subsequently confirmed that he "accepted the responsibilities that come with the barge" in an email
  - No steps taken to change the name of the registered owner in the Register



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Recent Civil Liability Decisions (con't)

- Background (con't):
  - Vessel sunk and the Coast Guard stepped in to take steps to deal with issues arising from the same
  - Ultimately, the Coast Guard incurred expenses of $67,348.81 to deal with the pollution
  - The Administrator of the SOPF paid that amount to the CG plus interest and then took steps to try to recover the same from the defendant company

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Recent Civil Liability Decisions (con't)

- Background (con't):
  - Mr. Adams was joined as a third party but did not participate in the action and was apparently deceased
- Main question to be decided by the court: who was the owner of the barge?
- *MLA*, s. 75 defines "owner": "means the person who has for the time being, either by law or by contract, the rights of the owner of the ship with respect to its possession and use."

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Recent Civil Liability Decisions (con't)

- The Administrator argued that title to the barge did not fully pass based on the failure to change the Registry information
- As a result, the defendant company was still the legal owner of the barge and is liable for the clean up costs
- Although the Court had some concerns with the "intent to purchase" document used to sell the barge in September 2012, it concluded it was enough to form a binding contract and to transfer ownership (and responsibility!) to Mr. Adams

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Recent Civil Liability Decisions (con't)

- The Court made that conclusion based on the intention of the buyer and seller here, including:
  - The wording of the intent to purchase
  - The email from Mr. Adams
  - The individual defendant subsequently telling others, including the BC Ministry of Environment, that Mr. Adams had purchased the vessel
  - The individual defendant seeking (and getting) Mr. Adams' consent to remove a ramp and float attached to the barge as per the intent to purchase

Recent Civil Liability Decisions (con't)

The Administrator of SOPF v. Beasse, 2018 FC 39:

- Administrator sought damages for $82,512.70 following **two** sinkings of the 1902 tug the "Elf"
- Interestingly, the tug was never registered in Canada
- Defendant took no steps to deal with the first sinking on January 14, 2014
- Tug raised by the CG, who also took steps to deal with pollution

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Recent Civil Liability Decisions (con't)

- Tug was raised and was to be towed to a different location
- Sunk in deep water during that tow
- Defendant argued that the first sinking was caused by sabotage (i.e. the deliberate act of an unknown third party as there was some evidence that a small aft door was torn off its hinges)
- But there was evidence that the door frame was rotten, that the latch on the door was not closed at the time and that the pressure from the sinking could have blown the door off
- The Court ultimately concluded that the defendant did not prove that the sinking was cause by the unknown saboteur

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Questions?


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