



Ship-source Oil Pollution Fund
CLAIMS MANUAL
2014 EDITION

Canada 

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Introduction

The purpose of this manual is to assist claimants in the filing of claims with the Ship-source Oil Pollution Fund (SOPF). The manual provides general information about the type of claims that may be submitted for compensation, and the particulars that supporting claim documentations should include. The manual does not attempt to set out legal details. It is intended to be only a practical guide for presenting claims to the Administrator of the Fund. When in doubt, it is recommended that legal advice be obtained.

In the event of any inconsistency between this manual and the *Marine Liability Act* (MLA), the provisions of the Act prevail. The MLA is available at:

http://laws.justice.gc.ca/eng/acts/M_0.7/page_23.html#h_41

This manual is divided into three main parts:

Section I - The Legal Framework in Canada for Liability and Compensation for Ship-source Oil Pollution;

Section II - The International Regime of Liability and Compensation for Oil Pollution caused by Tankers; and

Section III - The Canadian Liability and Compensation Regime.

Address for SOPF Claims

All claims should be addressed to the Administrator:

Administrator
Ship-source Oil Pollution Fund
180 Kent Street, Suite 830
Ottawa, Ontario K1A 0N5
CANADA

Fax: 613-990-5423

Email: info@sopf.gc.ca

Section I. Legal Framework in Canada for Liability and Compensation for Ship-source Oil Pollution

The legal framework for liability and compensation for oil pollution damage from ships can be found in Parts 6 and 7 of the *Marine Liability Act*, Statutes of Canada 2009, Chapter 21.

The legislation implements two international regimes, one for oil tankers and one governing bunker spills, and a Canadian regime for spills from other ships.

Canada has been a member of the international compensation regime for oil tankers since April 24, 1989. The present regime is based upon two international conventions adopted in 1992 under the auspices of the International Maritime Organization (IMO), a specialized agency of the United Nations. These conventions are the 1992 Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention) and the 1992 Convention on the Establishment of an International Fund Compensation for Oil Pollution Damage (Fund Convention). In 2003, the international regime was expanded to include a Supplementary Fund which provides additional compensation for tanker spills in addition to what is currently provided by the 1992 Fund Convention.

Primary liability for oil pollution damage and clean-up costs and expenses under both the international tanker regime and the Canadian regime lies with the shipowner.

The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, which is known simply as the Bunkers Convention, provides international rules governing spills of bunker oil carried on board to fuel the ship. Implementation of the international bunkers regime in Canada, on October 2, 2009, brought with it the additional advantage of the requirement that all ships greater than 1,000 tonnes must maintain insurance or other financial security, which allows claimants to go directly against the insurer or the person providing the security. Like the regime for oil tankers, the bunkers regime makes the shipowner primarily liable for spills.

Ship-source Oil Pollution Fund

The Ship-source Oil Pollution Fund was created on April 24, 1989, and succeeded the Maritime Pollution Claims Fund, which dates back to the early 1970s. The Ship-source Oil Pollution Fund is available to pay claims for oil pollution damage at any place in Canada, or in Canadian waters including the exclusive economic zone of Canada, caused by the discharge of oil from all classes of ship. The Ship-source Oil Pollution Fund provides an additional level of compensation over that of the international regimes, both the tanker regime and the bunker regime. The Ship-source Oil Pollution Fund also pays established claims that are not covered by the international conventions, such as mystery spills.

Additionally, the legislation allows a widely defined class of persons in the fishing industry to make a claim to the Ship-source Oil Pollution Fund for loss of income caused by an oil spill from a ship to the extent that such loss is not recoverable under Part 6 of the *Marine Liability Act*.

In addition to being a fund of last resort, that is, when claimants have been unable to obtain full payment of their claims from the shipowner or any other responsible party, the Ship-source Oil Pollution Fund is also a fund of first resort.

Claimants may file their claims directly with the Ship-source Oil Pollution Fund, which takes over the task of recovering compensation from the shipowner or other responsible party to the extent that the Administrator finds the claim to be established.

Where compensation is paid to a claimant out of the SOPF, the Administrator steps into the shoes of the claimant and is obliged to take all reasonable measures to recover the amount paid out from the shipowner or any other responsible party.

Section II. The International Regime of Liability and Compensation for Oil Pollution caused by Tankers

As mentioned in describing the framework of the Canadian Regime (Section I), Canada is party to the Civil Liability Convention, the Fund Convention and the Supplementary Fund Protocol, 2003. A Secretariat located in London, United Kingdom, administers these Funds.

For information respecting the claims covered by the three international instruments, as well as the claims procedure for those claims, please refer to the IOPC Fund Claims Manual which can be accessed at the IOPC Fund website: www.iopcfunds.org.

Where claims are covered by the International Funds and the SOPF, the Administrator and the Secretariat will coordinate their claims procedures to avoid duplication of claims submission and substantiation.

Section III. The Canadian Liability and Compensation Regime

1. Background

This section addresses claims for oil pollution from ships not covered by the international regime referred to in Section II. The first thing to note, however, is that the MLA specifically excludes drilling ships engaged in exploration or exploitation activities or to floating storage units or to floating production, storage and offloading units. For the precise scope of those exclusions, please refer to subsections 101(2) and (3) of the Act.

The MLA provides two methods for obtaining compensation in respect of oil pollution caused by ships. First, a claimant may submit the claim to the owner of the ship who, under the legislation, remains the primary party responsible for the payment of compensation. In such cases, the SOPF only becomes liable to pay compensation to the extent that full and adequate compensation is not available from the owner; for example, the amount of compensation exceeds the owner's limit of liability under the MLA or the owner is incapable of meeting its obligations to pay compensation. The SOPF is also liable in those instances where the cause of the oil pollution is unknown but the Administrator is unable to show that it has not been caused by a ship (mystery spills). These two methods constitute the "last resort" function of the SOPF.

A claimant may also submit a claim directly to the Administrator for assessment and payment of the claim. Where the Administrator finds the claim to be established in whole or in part, and makes an offer of compensation which is accepted by the claimant, the Administrator is subrogated to (acquires) the rights of the claimant to the extent that payment of the claim has been made out of the SOPF. This subrogation constitutes the "first resort" function of the SOPF.

2. Duties of the Administrator

2.1 Investigation and Assessment

The Administrator has a duty to investigate and assess all claims filed with the Ship-source Oil Pollution Fund. The Administrator examines each claim on its merits, in light of the particular circumstances. For the purpose of investigating and assessing a claim, the Administrator has the power of a Commissioner under the *Inquiries Act*, and may summon witnesses, or examine them under oath and compel the production of documents. Upon completion of investigation and assessment of a claim, the Administrator shall make an offer of compensation to the claimant for whatever portion of it the Administrator finds to be established. When a claimant accepts an offer of compensation, the Administrator directs payment out of the Ship-source Oil Pollution Fund. An unsatisfied claimant may, within 60 days after notification of an offer or disallowance of a claim, appeal the adequacy of the offer or the disallowance of a claim to the Admiralty Court (Federal Court of Canada).

2.2 Test of Reasonableness

In assessing a claim, the Administrator applies the test of reasonableness mandated by the MLA. Reasonableness is understood to mean that measures taken or equipment used in response to an incident were, on the basis of expert technical appraisal at the time the decision was taken, likely to have been successful in minimizing or preventing pollution damage. The fact that the response measure turned out to be ineffective or the decision was shown to be incorrect with the benefit of hindsight is not a reason on its own to disallow a claim for the costs involved. The cost of a measure may be rejected if it was unreasonable in the circumstances, or it ought to have been known that the measure would be ineffective. Measures taken for purely public relations reasons would not be considered reasonable.

Claimants should keep comprehensive records of their decisions, operations and expenditures in connection with an oil spill in order to be able to demonstrate that expenses were reasonable.

2.3 Recourse and Recovery Action

Upon payment of compensation out of the SOPF, the Administrator is obliged to take all reasonable measures to recover the amount from the owner of the ship or, where applicable, from the IOPC Funds or any other person liable. Where an action is commenced by the claimant, for example, against the

owner of the ship, the document commencing the proceedings must be served on the Administrator who automatically becomes a party to the litigation.

3. Presentation of Claims

3.1 General Principles

Any person in Canada, including corporations and the Crown, who has sustained loss or damage, or incurred costs and expenses in respect of oil pollution damage may file a claim directly with the Administrator of the SOPF. This entitlement of filing a claim directly with the Administrator does not apply to a Canadian Response Organization, as defined in the *Canada Shipping Act*, or to a person in a State other than Canada. A Response Organization may, nevertheless, assert a claim for unsatisfied costs and expenses after exhausting its right of recovery against the shipowner.

The statutory claims regime of the *Marine Liability Act* is based on the application of the principle that the “polluter pays”.

3.2 Scope of Compensation

Compensation is payable for the costs of reasonable operational measures taken during oil spill recovery at sea and from all inland waters under Canadian jurisdiction. In addition, compensation is payable for the costs to clean shorelines and dispose of collected oil and oily wastes. Furthermore, payment will be made for the costs of mobilizing the clean up equipment and other essential response resources for the purpose of prevention measures, even if no pollution occurred. However, for preventive measures to be compensated, it must be shown that at the time they were taken there were reasonable grounds to believe that the vessel had discharged, was discharging or was likely to discharge oil or another hydrocarbon.

3.3 Claimants Entitled to Interest

Interest accrues on a claim filed with the SOPF from the day on which the oil pollution damage occurs, or from the day on which the loss or damage occurs. In the case of costs and expenses, interest accrues from the day on which they are incurred. The interest is calculated at the rate prescribed under the *Income Tax Act* for amounts payable as refunds of overpayment of tax.

3.4 Claims arising from Mystery Spills

An oil spill is referred to as a ‘mystery spill’ when the identity of the ship which caused the pollution is unknown or cannot be established. In such cases, a claimant is not required to satisfy the Administrator that the occurrence was caused by a ship. The Administrator shall, however, dismiss a claim if he or she is satisfied on the evidence that the occurrence was not caused by a ship, for instance, if the oil pollution originated on land.

3.5 Limitation Periods for Filing a Claim

Where a claimant intends to file a claim directly with the Administrator (first resort), the claim must be filed within two years after the date on which the oil pollution damage occurs and within five years after the occurrence that causes the damage.

If no pollution damage occurs, the claim must be filed within five years after the occurrence in respect of which oil pollution is anticipated.

To be noted: where the claimant intends to make a claim against the owner of the ship, longer limitation periods apply (three and six years) and claimants should refer to the relevant provisions ss. 77(6) of the MLA.

3.6 Salvage Operations

In some spill situations where ship salvage operations take place, these operations may include an element of pollution prevention measures. Such operations can be considered as preventive measures only if the primary purpose is to prevent pollution damage. If the operations have another purpose, such as salvage of the hull and cargo, or wreck removal, the costs incurred are not allowable.

4. Claim Documentation Required

The key to the successful recovery of costs and expenses from the SOPF is good record keeping. The claim documentation should clearly set out what was done and why, where and when it was done, by whom, with what resources and for how much. In general, invoices, receipts and worksheets provide useful evidence of expenditure, but sometimes they are insufficient by themselves. It is always beneficial to have a comprehensive narrative describing the response activities. Linking these with expenses will greatly facilitate the assessment of claims. Each on scene co ordinator and technical services contractor should

maintain a daily log of activities, including details of the activities, the number of personnel engaged, the type and quantity of equipment and materials used, and the type of shoreline cleaned. When a claim is not supported with all appropriate documentation, an investigation and assessment is usually delayed. As a consequence, the Administrator will have to request that the claimant provide further documentation. Like insurance claims, adequate documentation is essential for cost recovery from the shipowner for the oil spill response.

4.1 Submission of Claims

All claims should be made in writing and signed by the claimant or a legal representative. A claim must be presented clearly and with sufficient information and supporting documentation to enable the amount of expenditure to be investigated and assessed. It is the responsibility of claimants to submit sufficient documentary evidence to support their claims. Substantiating documentation and a comprehensive chronology of events will add credence to the claim and help to reduce the volume of further questions. In the event of prosecutions or court proceedings, which seldom occur, it will speed up the resolution of discussions, since many obvious questions will already have been answered in the documentation package. The quality of the detailed information is extremely important. All costs must be fully substantiated. Therefore, it is essential at the commencement of an incident that the responder establish procedures to safeguard the documentation to help ensure the integrity of the costing process.

Depending upon the complexity of the clean up response to an oil spill occurrence, the Administrator may appoint marine surveyors and technical advisors to investigate the technical merits of the claims. This sort of claims can be settled promptly only if the claimants and service contractors provide all information relevant to the assessment of the claims.

Although the MLA prescribes specific time limits for the submission of claims, in particular see ss. 103(2) of the Act, they should be submitted as soon as possible, given that the Administrator cannot commence investigation and assessment of a claim until it has been submitted. Timely submission of claims may speed up investigation and assessment and result in quicker payment of established claims. Speedy submission of claims may also be beneficial for any subsequent recourse action to recover the amount paid out of the SOPF from owners of ships or other responsible parties.

4.2 Contents of Each Claim

It is important that the original claim documentation be complete and accurate. Each claim filed with the SOPF should contain the following information:

- a) The name, postal address, telephone number and e-mail address of the claimant and any appointed representative;
- b) The identity of the ship involved in the incident and the type of ship – that is, oil tanker, general cargo vessel, fishing vessel or pleasure craft. In addition, if known, the types of vessels transiting in the vicinity before and at the time of the oil spill;
- c) The time, date, location and specific details of the occurrence including the type of oil released, if known;
- d) Description of the area affected, indicating the extent of the pollution and the area most heavily contaminated (use maps or nautical charts supported by photographs or video recordings);
- e) Analytical and other documentary evidence linking the oil pollution with the suspect ship involved, such as the collection and chemical analysis of oil samples. With respect to collecting oil samples, it is important to document various aspects of the sampling process, such as container type, container cleanliness, handling procedures, preservation and chain of custody;
- f) The sea state conditions, relevant weather, tide and current data, observation and direction of the floating oil, including the length and breadth of the oil sheen;
- g) Results of the claimant's investigation into the possible source of the oil spill – for example, was spill source from a ship, land based or a mystery spill;
- h) When known, the name, address and telephone number of the shipowner;
- i) Comprehensive written records of decisions and statements of what work that was actually performed by the lead government agency and by commercial contractors. These records should include detailed logs and notes recorded by the on-scene commander, and all field notes and observations taken by response personnel;

- j) Records of decision by expert technical marine surveyors and other advisors – for example, Regional Environmental Emergency Team (REET) personnel and copies of the minutes of REET operational meetings, and technical survey reports;
- k) Copies of standing offer agreements, written contracts, and tendering documents with commercial contractors;
- l) The total monetary amount of the claim filed for compensation.

5. Costs and Expenses Incurred

5.1 Materials

The costs of all materials and supplies that were purchased for use during the oil spill clean-up operation must be supported with copies of the acquisition invoices. The invoices should indicate details of the materials, such as: types of materials used, rate of hire or cost of purchase, quantity used, unit price and total cost, including GST/HST/PST if paid for materials and supplies used on the incident. Costs for materials that were not fully used and can be used at another time should be excluded from charges or pro-rated.

5.2 Contract Services

All contracted commercial services acquired for the response operations are to be documented by the contractors' original invoices, and proof of payment. Contractors' invoices must clearly indicate that the work performed or services rendered were to support the response operations. Furthermore, the claim should contain copies of all contractual agreements clearly indicating the type of service being purchased and, where appropriate, the cost effectiveness and other reasons for engaging a particular contractor. For example, was the contractor selected as the lowest bidder or because the contractor was near the location of the spill occurrence and in a position to avoid unnecessary response delay?

In addition, the invoice should clearly show the unit cost of special equipment deployed and, also, the hourly rate and time period of operation. The costs and expenses for mobilization and demobilization should be set out clearly separate from the actual costs of equipment used on the site of the oil pollution incident. All contract services, including sub-contractors, are to be substantiated with the contractor's personnel time sheet indicating details of work assignments.

5.3 Travel Costs

The travel claims for all personnel assigned for response operations should clearly identify the name of the individual travelling as well as the period covered by the travel claim. Additional details indicating the mode of transportation, location and other related expenses, such as airfares, ferry charges and vehicle mileage should be included with the claim documentation. The travel records should include expenses, meal cost allowances, and hotel accommodations with all appropriate receipts. For Government claims, properly authorized travel authority and travel expense claims must be completed to support meals and travel expenditures.

5.4 Salaries and Overtime

Response supervisors should complete daily field reports indicating the name of each worker engaged and their role in the response operations. The dates on which work was carried out and the hourly rates for salaries and overtime must be noted. The regular hours and overtime hours worked should be recorded for each day engaged. The employee's role in the response operation should be stated. Copies of company records as evidence of proof of payment of wages and overtime must be provided with the claim documentation.

5.5 Vehicle and Boat Costs

Logs should be maintained to support the use of all vehicles and support vessels. The logs should describe the type of vehicle used, distance travelled, the purpose for its use and the duration of deployment during the response to the incident. The hourly and daily charge-out rates for vehicles and boats should be clearly noted in the claim documentation.

5.6 Pollution Counter Measures and Other Equipment

The claim documentation should identify all the equipment deployed during the response to an oil pollution occurrence and brief notes on what the equipment was used for. The information provided should include the dates of assignment, the equipment category and type, rate of hire, standby rates and periods of usage. All mobilization and demobilization costs and expenses should be noted.

5.7 Claims for Loss of Income

The *Marine Liability Act* prescribes that compensation is payable to claimants in the fisheries, marine culture and fish processing sector who suffer loss of fishing income resulting from a discharge of oil from a ship. A claim for loss of income is only allowable if such loss is not recoverable under the general provisions of Part 6.

The completeness of the documentary evidence, including all receipts, photographs of damage and so forth, will assist in expediting the investigation and assessment of the claim. Depending on the circumstances surrounding the claim, the following information, among other questions that may arise, are essential when filing a claim for loss of income with the Administrator:

- a) The identity of the ship involved in the incident;
- b) The kind of, or description of, pollution damage to the fishing vessel, fishing gear and other property belonging to the claimant, as well as the location where the damage was sustained;
- c) Particulars of the commercial fishing license held, including the name and address of the registered license owner;
- d) The fishing area named in the fishing license, so that it may be identified on a nautical chart or geographical map;
- e) Records of catches, kinds of fish normally caught and marketed and the sale price of the various species of fish marketed, and the buyer's name and address;
- f) Particulars of the repairs and cleaning of contaminated fishing gear and work required to clean the fishing vessel as a result of the oil pollution;
- g) The costs and age of property damaged or replaced with copies of invoices or vouchers for all items purchased.

5.8 Appointment of Assessors

If the Administrator and a fisheries claimant cannot agree on the amount of compensation of the claim, the matter will be referred to the Minister of Transport. Consequently, an assessor will be appointed to report on the amount at which the claim is assessed and must be paid by the Administrator to the fishery claimant.