Implementation of the 1996 Hazardous and Noxious Substances Convention: A Few Short Steps to Canadian Law

John MacDonald
I. INTRODUCTION

Far more destructive than oil spills are spills of other hazardous and noxious substances (collectively "hazardous substances"). This is a comment on the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.\(^1\) It is an international convention to apportion liability and facilitate compensation for victims of hazardous substances which was passed by the International Maritime Organization on May 1996. Canada became a signatory to the Convention on September 9, 1997.

Internationally, discussions on the adoption of the HNS Convention are occurring with increasing frequency, particularly among the members of the European community.\(^2\) Despite the time lag between signature and implementation of conventions in related areas this comment advocates rapid Canadian implementation of the Convention both in order to advance the degree of regulation and standardization in the area of international pollution control, and in order to ensure adequate compensation for Canadians suffering damages as the result of a hazardous substance spill or accident. Implementation should be facilitated by the fact that Canada already started taking steps towards the adoption of a comprehensive hazardous substances scheme, well before it signed the HNS Convention. Canada has enacted various dangerous goods and hazardous substances legislation and regulations. As well, the

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\(^1\) B.Sc., B.A., LL.B. anticipated 1999 (Dalhousie).

\(^2\) A. Popp, Marine and Environmental Law Program seminar, Dalhousie University, Halifax, 18 November 1997 [unpublished].
Canadian Coast Guard is currently working with the chemical industry to develop a Marine Chemical Emergency Response Regime, in recognition that chemical spills are a catastrophe entirely separate from oil spills. These focus primarily on preventing spills by ensuring a set safety standard, or in the event of a spill through adequate reporting/reaction methods. The adoption of a hazardous substances compensation and liability scheme would complete Canada’s ability to deal effectively with hazardous substances.

This comment will examine the history of the development of the *HNS Convention*, including the difficulties encountered by the IMO in attempting to adopt the *HNS Convention* at an earlier date. The key terms and articles of the *HNS Convention* will be examined and compared to earlier conventions already in force. Additionally, a hypothetical claim for damages will be projected for the *HNS Convention*—as such a claim would be approached within Canada. In this the implementing provisions of earlier IMO conventions will be drawn upon. This process will demonstrate that objections towards rapid implementation are unfounded as through the ratification and implementation of such earlier conventions the philosophical, legal and bureaucratic groundwork *HNS Convention* implementation has been laid within Canada.

II. HISTORICAL BACKGROUND

In the wake of the *Torrey Canyon* disaster in 1967, the international community realized that there was no adequate compensation scheme to ensure that those responsible for an oil spill from a tanker at sea were held liable. On the heels of the *Torrey Canyon*, two particular conventions were adopted by the IMO to address this concern: the 1969 *International Convention on Civil Liability for Oil Pollution Damage* (*CLC*) and the 1971 *International Convention on
the Establishment of an International Fund for Compensation for Oil Pollution Damage6 (FUND). As the titles of these conventions suggest, their purpose was to address liability associated solely with damage caused by oil. The fact that the international community did not adopt an hazardous substances convention at the time did not mean that they were oblivious to the benefits, or even the need, of having a similar convention governing liability for other hazardous substances. Without a disaster like that of the Torrey Canyon, a similar convention for noxious substances was not in the forefront of the international agenda.

Nonetheless, the international community was aware of a continuing increase in the amount of sea traffic in other hazardous substances, and realized that these substances have the potential to cause much greater damage to people and the environment than does oil. As W. Chao has illustrated:

> [A]lthough an oil spill causes immediate and spectacular damage, it is biodegradable, whereas half of the chemicals carried by sea—solid and liquid—are not biodegradable and cause much more harmful and alarming contamination. In addition, technical progress in the field of prevention has meant that the quantity of oil spilled at sea as a result of maritime operations has decreased by 60 per cent since 1986.7

Hence, the movement to create a separate liability scheme for these hazardous substances gained momentum.

In addition to the increased toxicity and durability of hazardous substances as compared to oil, there were other problematic factors to be considered. While oil cargoes are relatively homogeneous and transported alone in specialized ships, hazardous substances are often carried as parts of different cargoes in the same vessel. In addition, there are tens of thousands of substances that are classified as hazardous and noxious substances. As a result, the control of hazardous substances is more difficult. Also, because of the difficulties in reconciling the concerns of the hazardous substances industry with a compensation and liability

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6 11 I.L.M. 284 [hereinafter FUND].
7 Pollution from the Carriage of Oil by Sea (Boston: Kluwer Law International, 1996) at 4-5.
scheme, it was not until 1996 that the *HNS Convention* was adopted.

Canada has consistently demonstrated its commitment to the marine environment by playing instrumental roles in the creation of international marine environmental conventions and by adopting legislation which strengthens its national policies. There has in the past, however, been a lengthy period of time from Canada's signature to a convention and the time of its accession. As noted above, Canada became a signatory to the *HNS Convention* on September 9, 1997, and to date it is one of only three signatories to the convention. No country has ratified it. The development of this convention has taken over 20 years and the shipping nations of the world cannot afford to delay ratification any longer.

### III. IMPACT OF HAZARDOUS AND NOXIOUS SUBSTANCES

The drafters of the *HNS Convention* were "[c]onscious of the dangers posed by the world-wide carriage by sea of hazardous and noxious substances." Concerns about these dangers become obvious when the scope of the potential for damage is examined. One illustrative example is the "Halifax Explosion." The collision between the munitions carrying *Mont Blanc* and the *Imo*, which occurred in Halifax Harbour on December 6, 1917, resulted in 9000 people injured and 2000 killed. While oil spills cause

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8 S. Barker, "Hazardous Goods at Sea: Are Safe Ships and Clean Seas Mutually Exclusive? A Canadian Perspective" (1992) Marine Policy 306 at 325. Although the *CLC* and *FUND* conventions came into force in 1975 and 1978 respectively, they were not Canadian law until 1989.


10 The *HNS Convention* cannot come into force until at least 12 states have agreed to be bound by it and also there must be evidence that receivers of hazardous substances in those countries have received at least 40 million tonnes of cargo in the preceding year. At least 4 of the 12 states must have at least 2 million units of gross tonnage. *HNS Convention*, art. 46(1).

11 *HNS Convention*, at 1415.

12 *Supra* note 8 at 307.
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damage mainly through pollution and contamination, accidents with hazardous substances can cause more drastic harm. As the carriage of hazardous substances has increased so have the occurrences of accidents.

A more recent example is that of the Brigitta Montanari, an Italian gas tanker which sunk off the Adriatic coast in 1984. At the time it sunk it was carrying 1300 tons of vinyl chloride monomer (VCM). VCM not only forms explosive mixtures when it comes into contact with air, which is an immediate problem, but it is also carcinogetic, thereby making clean up even more important.13

One of the worst incidents of a spill of hazardous substances was that of the Danish Dana Optima which, in the rough seas of the North Sea in January 1983, lost 16 tons of “Dinoseb” a particularly toxic weed killer having the potential to kill everything over one square kilometer of seabed. Despite attempts to locate the poison, it was not until a barrel was found in a fishing net that authorities were able to pinpoint the cargo’s location and start to recapture the toxin. The location of that first barrel demonstrates how easy it is for humans to come into contact with hazardous substances spilled at sea. More than one ton of the chemical released from the Dana Optima remains unrecovered14.

Although the spilling of large amounts of oil by tankers such as the Torrey Canyon, the Amoco Cadiz, or the Exxon Valdez15 are less damaging than smaller spills of hazardous substances can be, there is less public awareness of the latter events. This is due in no small part to the immediate and visible effects of an oil spill. The media coverage of marine animals and birds coated with oil leads to public outcry, which is a strong contributing factor to a government’s implementation of environmental liability, compensation and prevention legislation.16 Because the effects of chemical pollution are

14 Supra note 8 at 307.
15 In March 1978 the Amoco Cadiz was wrecked off the coast of Brittany while carrying 223,000 tonnes of crude oil. Supra note 4 at 64. In March 1989 the Exxon Valdez ran aground in Alaska spilling almost 11 million tons of oil into the ocean contaminating beaches and breeding grounds for fish as well as marine birds and mammals, Supra note 4 at 65.
16 For example, the Exxon Valdez was the catalyst for the creation in the United States of domestic laws regarding oil pollution. Unfortunately, this step was the
often less visible than other types of pollution which cause short-term damage, such occurrences receive less public attention. Consequently, less pressure is brought to bear on governments to take action to regulate the transportation of hazardous substances.

IV. DEVELOPMENT OF THE HAZARDOUS SUBSTANCES CONVENTION

Although the *HNS Convention* was not adopted until 1996, it had been a topic of discussion among the world’s shipping nations for some time. Fortunately, in the initial debates leading up to the adoption of the *CLC* in 1969, both Kuwait and the Netherlands voiced concern that the convention should be expanded to hazardous and polluting cargoes other than oil. This option was not considered in depth by the rest of the member states at the time. There were also discussions about adopting a scheme for hazardous substances based on the earlier *CLC* and *FUND* conventions at the 1984 Diplomatic Conference of the *IMO*, which resulted in a draft *HNS Convention*. The draft convention did not receive approval, nor did a later version drafted in 1991.19

It is beyond the scope of this comment to analyze the debate and ultimate failure of either of the earlier drafts of the *HNS Convention* in great detail. It is however, important to point out that the 1984 diplomatic conference was working under a very tight schedule and had to accomplish a draft hazardous substances convention as well as 1984 protocols for the *CLC* and *FUND* conventions. Nevertheless, the failure to achieve approval was primary cause for an failure of the international community to adopt adequate safeguards, *supra* note 7 at 226-229.

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19 Consideration of a Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea, Submission Under the Lead Country Procedure by Canada, Denmark, Finland, France, Germany, Japan, the Netherlands, Sweden, the United Kingdom, the United States and the u.s.s.r. *IMO* Legal CoOpth, Sess., Annex, Agenda Item 4, *IMO* Doc. LEG 64/4 (25 January 1991) [hereinafter Draft 1991 *HNS Convention*].
noteworthy in that this was the first time that a proposed convention of the IMO was rejected outright by a diplomatic conference.\textsuperscript{20}

1. The Chemical Industry

A major factor that contributed to the failure of the IMO to adopt the Draft 1994 HNS Convention was the inability of all parties to define "hazardous and noxious substance."

Furthermore, the CLC and FUND conventions had already set the precedent that funds would come from both the ship owners and the industry. In addition, these conventions had already settled the issue of how to ascertain liability in the event of an incident, as well as the geographical scope for the application of the conventions. While these were contentious factors that still had to be molded to fit the proposed HNS Convention, they were sufficiently acceptable to require only minor changes.\textsuperscript{21} The process of deciding which hazardous substances would be listed in the convention, however, was an entirely new process for which the members had no precedent.

Another roadblock was that there were two competing interests in this debate. On the one hand, the chemical manufacturers wanted a minimum of restriction on their industry. The reasons for this are fairly obvious: the fewer the number of substances on the list, the less money would have to be paid by the industry's members.\textsuperscript{22} With the creation of the FUND Convention in 1971, the oil industry had been required to contribute funds to help pay for damage from oil spills. Since the HNS Convention relied in part on the FUND Convention, there was a strong possibility that the chemical industry would have to contribute funds to help pay for damage arising from hazardous substances spills. By limiting their liability to a few substances, this meant that there would be fewer

\textsuperscript{21} Ibid. at 493.
\textsuperscript{22} The 1984 Draft HNS Convention had only 45 substances listed to which the convention would apply: 1984 Draft HNS, Annex I. By comparison, the HNS Convention has over 6500 substances: M. Gauthier, "Ship owners: What Does 'Tier 1' Mean to Us?" Workshops on the Liability of Ship and Cargo under IMO's Hazardous and Noxious Substances Convention, Halifax, 12 May 1997.
certificate proving such insurance or security.\textsuperscript{43} Annex I\textsuperscript{44} contains the minimum pertinent information required with the certificate including the IMO ship identification number, the name and full address of the principal place of business of the owner, the type and duration of security and the name and address of the insurer or guarantor. The amount of insurance required varies based on the size of the ship by using a particular formula.\textsuperscript{45} This formula is a major point of contention and is often cited by opponents to the convention, since the degree of damage caused by hazardous substances is not related to the size of a spill in the same way as it would be for an oil spill. Why then should larger hazardous substances carrying ships bear a greater financial burden if a smaller ship’s cargo can be more destructive?

The absolute limit of liability at the ship owners’ level is 100 million units of account where the unit is based on the Special Drawing Right ("SDR").\textsuperscript{46} The SDR is the international monetary unit currently used by the IMO. This amount is then converted back into national currency. In 1996 one SDR was approximately equal to two Canadian dollars. The onus is on the state party to ensure that their own vessels are properly insured or covered and that they have their own certificates on board.\textsuperscript{47} In addition, each state party is responsible for ensuring that foreign ships trading in hazardous substances which make a call to any of that state’s ports have the same proper documentation, provided that the ship is from a signatory state.

The maximum level of compensation under the CLC is currently 14 million units of account.\textsuperscript{48} Under the 1992 CLC protocol, this

\textsuperscript{43} Article 12(2). Under art. 12(10) a state party is responsible to ensure ships flying its flags are not engaging in hazardous substance trade unless an appropriate certificate has been issued.

\textsuperscript{44} HNS Convention, at 1431.

\textsuperscript{45} For a ship under 2,000 units of tonnage, the ship owners’ liability would be limited to 10 million units of account. For each unit of tonnage over this and up to 50,000 units of tonnage, there would be an additional 1,500 units of account and for each unit of tonnage over 50,000 there would be a requirement for an additional 360 units of account. HNS Convention, art. 9(1).

\textsuperscript{46} Article 9(9).

\textsuperscript{47} Article 12(10).

\textsuperscript{48} CLC Convention, supra note 5, art. V(1).
could be expanded to 59.7 million units of account.\(^4^9\) As is evident, the levels of compensation available under the \textit{HNS Convention} are considerably higher than for the \textit{CLC Convention}. The fact that the international community is prepared to impose such high levels of liability on ship owners is a good indication of the costs that are associated with a hazardous substances spill, thereby reinforcing the need for an \textit{HNS Convention}. If Canada does not ratify and implement this convention now, the government risks paying these sums in the event of an incident or having victims go without adequate compensation.

\textit{ii. Tier Two}

Given the damage caused by some of the past spills of hazardous substances, it is easily conceivable that the first tier limit would be exceeded. In anticipation of this, and in an effort to share the liability with the ship owners, the cargo recipients' contributions form the second layer of compensation. The inherent properties of hazardous substances create great risks for those working around the substances. Because the cargo owners are the ones who are causing the hazardous substances to be at sea, it was believed that they should also contribute to the availability of compensation.

The finances for this fund are drawn from cargo receivers based on the amount of hazardous substances they deal with. In the \textit{FUND Convention} the oil shippers and exporters pay into the fund. However, unlike the oil industry, where the same company controls the oil throughout its life span from pumping to shipping, there are many organizations involved in the creation of chemicals prior to shipping.\(^5^0\) Since the idea behind the adoption of a civil liability convention is to compensate the aggrieved persons as quickly as possible, the drafters decided that the importers and receivers pay into the fund. The receivers and importers are easier to identify in the hazardous substances industry, so funds will be forthcoming more quickly than if the victims had to seek compensation from more elusive shippers and exporters.


\(^{5^0}\) Supra note 20 at 500.
In Canada, this level of payment will apply only to those importers and receivers who receive more than 20,000 tons of hazardous and noxious substances in a year. This does not mean that damage caused by hazardous substances belonging to smaller shippers will not give rise to the availability of Tier Two funds, just that those small business owners will be spared the financial burden of making those contributions. The hazardous substances fund will be used when the requirements of compensation exceed the first tier’s maximum level, or when there is no liability arising under Tier One. Some examples of the latter case include where damage exceeds the owner’s liability or where the owner is financially incapable of meeting obligations under the Convention.

Despite the potentially astronomical damages a large spill of hazardous substances could create, it would be impossible to establish a fund with unlimited monetary resources. Thus the absolute maximum limit for Tier Two compensation is 250 million SDR, inclusive of any Tier One compensation. This means that if a ship owner of a large carrier were to be liable for the absolute maximum of 100 million SDR, there would only be a potential maximum of 150 million SDR forthcoming from the second tier level of compensation. Transport Canada has acknowledged that this means there could potentially be a cap of 500 million Canadian dollars available for remedies for any “damage” as defined in the convention.

The amount of compensation available under the FUND Convention does not approach those available under the HNS Convention. The highest amount currently contemplated for the FUND Convention is 135 million units of account, as indicated in the yet unadopted 1992 protocol.

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52 Article 14.
53 Article 14(5)(a).
54 Supra note 51.
VI. IMPLEMENTATION OF THE HAZARDOUS SUBSTANCES CONVENTION IN CANADA

It is possible to quickly implement the *HNS Convention* in Canada because a large part of the legal infrastructure required is already in place through the previous accession to the *CLC* and *FUND* conventions. What then would be the process for providing compensation pursuant to the *HNS Convention*? By examining the process of the *CLC* and *FUND* conventions claim process as adopted by Canada where they are similar to the hazardous substances provisions, an accurate process for an hazardous substances claim process can be projected.

1. Constitutionality

The first point to note in examining the possible application of the *HNS Convention* in Canada, is that like other matters related to shipping, the implementation and administration of the *HNS Convention* will be a federal matter. The Department of Transport has already released a press statement concerning its involvement in the convention, and Transport Minister David Collenette was the signatory to the *HNS Convention* on Canada’s behalf.\(^56\) The federal heads of jurisdiction granted under the *Constitution* include navigation and shipping.\(^57\) There does not seem to be any suggestion at this time that the provinces would be involved in the adoption of the convention. This is important because the Minister of Transport is the authority cited in the *Canadian Shipping Act*,\(^58\) which is the statute that enforces the *CLC* and *FUND* conventions.

2. Standard of Liability

The requirements for a valid cause of action have already been laid out in this comment, and what follows is based on the claimant having a legitimate grievance that meets all the requirements of the convention. The first person the claimant would proceed against under the hazardous substances convention is the ship owner. The

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\(^56\) *Supra* note 51.

\(^57\) *Constitution Act 1867* (U.K.), 30 & 31 Vict., c.3, s. 91.

standard of liability used in the convention is "strict liability." This term as it is used in the hazardous substances, CLC and FUND conventions is more akin to the Canadian legal term "absolute liability" since there is no defence of due diligence available for a ship owner whose ship causes damage by hazardous substances in connection with the carriage of that hazardous substance. The only occasions where a ship owner can exempt his liability are those stated in Articles 7(2) and 7(3).

This level of liability has been adopted from the CLC Convention by the Canada Shipping Act which states, "[t]he owner's liability under subsection (1) does not depend on proof of fault or negligence." The sole difference between the exemption list in the HNS Convention and that in the CLC Convention is that the former carries the additional clause that where the shipper or any other person fails to provide accurate information about the substances shipped, the ship owner is not liable for damage. This is not a concern in the shipping of oil, where specialized ships are used and identification of the oil is easy. Hazardous substances, however, can be transported on a variety of ships in various packages. The ship owner will have to rely on the proper packaging and truthfulness of the shipper.

3. Jurisdiction

Once the claimant proves that a spill occurred, that damage was suffered in accordance with the HNS Convention and that no exemption was available for the ship owner, the claimant must ensure that the claim is brought before a court of competent jurisdiction. Article 38 of the HNS Convention states that only a court in a state party where the incident in question has caused damage has jurisdiction to hear actions against the owner of a ship. If damage occurs in more than one state there would be more than

59 Article 7(1): "Except as provided in paragraphs 2 and 3, the owner at the time of an incident shall be liable for damage caused by any hazardous and noxious substances in connection with their carriage by sea on board the ship...." The corresponding article in the CLC is art. III(1): "Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident...shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident."

60 Canada Shipping Act, R.S.C., 1985, c. S-9, s.677 as added by R.S.C. (3rd Supp.) c.6, s.84, and as am. by S.C., 1993, c.36, s.13; S.C., 1996, c.31, s.104.
one competent court to hear the matter. Despite this, only a court in a country where the ship owner's fund under the *HNS Convention* has been set up can determine matters relating to distribution and apportionment of the money from that fund, which forms the first tier compensation. A similar clause was established in the *CLC*. Subsection 750(7) of the *Canada Shipping Act* states that "all claims pursuant to this Part may be sued for and recovered in the Admiralty Court." The exception to this rule is that adapted from the *CLC Convention* clarifying that where there has been the establishment of the ship owner's fund in a country other than Canada, no Canadian court has the jurisdiction to hear that same matter.

Both the *CLC* and *HNS* conventions contain articles ensuring that a judgment of a competent court of one state party is enforceable in all other state parties unless the judgment was obtained by fraud or where the defendant was not given reasonable notice and a fair chance to present a case. A conflict may arise if there is more than one court competent to hear a case, but as only one court has the authority to disperse money from the ship owner's fund and as no such conflict has arisen under the *CLC Convention* these provisions should not be a bar to implementation.

The requirement that only the court of a state party which suffers damage is competent to hear a case under the *CLC Convention* is logical since any criterion based on the nationality, the domicile, or the residence of the parties would give rise to considerable difficulties of application. The *Torrey Canyon* disaster is a good example of the difficulty that would be encountered in determining the proper jurisdiction of such an action:

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61 Article 38(5). Under art. 9(3), in order to benefit from the ship owner's limit of liability, the shipowner must set up a fund for the total sum representing the limit of liability in a state country.
62 *CLC Convention*, art. IX(1).
63 R.S.C., 1985, c. S-9 s.677(7), as added by R.S.C. 1985 (3rd Supp.) c. 6, s.84.
64 *CLC Convention* art. IX(3).
65 *Canada Shipping Act*, R.S.C., 1985, c. S-9 s.683, as added by R.S.C. 1985 (3rd Supp.) c. 6, s.84.
66 *HNS Convention* 40(1), and *CLC Convention* art. X(1).
67 Supra note 4 at 74.
The Torrey Canyon was a relatively new 67,000 ton tanker owned by a Bermuda-registered company which in turn was a subsidiary of a US oil company. The vessel was registered in Monrovia, flew the Liberian flag and was crewed by Italians. At the time the vessel grounded upon the Seven Stones, between Cornwall and the Scilly Isles, she was on charter to a UK Company and was carrying a cargo of oil from the Persian Gulf to South Wales.

Accepting the jurisdiction of foreign courts for judgements of liability and compensation in hazardous substances matters is not novel. The similar clause in the CLC Convention on this subject has been adapted in the Canada Shipping Act by recognizing the limited circumstances in which the Admiralty Court, now part of the Federal Court of Canada, can set aside the registration of the foreign judgment. The provisions regarding jurisdiction to hear claims against a ship owner are nearly identical in both the CLC and HNS Conventions. Canada has adopted a constitutionally valid means of hearing cases arising under the adopted CLC Convention. The Admiralty Court, would certainly have the competence to hear any claims arising out of claims against a ship owner grounded in the HNS Convention in Canada. The only stipulations would be that the claims meet the convention’s rules of damage being sustained in Canada. If, however, the ship owner's fund has been set up in another country, a Canadian court will not be able to disperse those funds, but as this is the case in the CLC Convention this should not prove problematic.

Unlike the CLC Convention, the HNS Convention would apply wherever preventative measures are taken, including the high seas. The CLC did not choose this approach due in large part to a report that found “the Working Party considered that damage caused on the high seas was unlikely to be comparable in gravity with damage caused near the coast, and that it should be possible to settle resulting claims for compensation satisfactorily under the existing

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69 Supra, note 8 at 308.
70 Canada Shipping Act, R.S.C., 1985, c. S-9, s.694 as added by R.S.C. 1985 (3rd Supp.) c.6, s.84.
71 HNS Convention, art. 3(d).
rules." The fact that the *HNS Convention* states in its scope of application that preventive measures "wherever taken" are claimable under the convention is evidence as to how much more destructive hazardous substances spills can be compared to oil spills, thus underscoring the need for this *Convention*. The geographical limits for damage by contamination of the environment under the *HNS Convention* have been set out already, but the important point to note is that the limit of the *HNS Convention'*s scope for environmental damage is the exclusive economic zone ("EEZ"), not the territorial sea. This is roughly an increase from 12 to 200 nautical miles. This expanded scope would increase Canada's ability to apply its jurisdiction to addressing matters of liability and compensation for hazardous substance damage to the environment over a broader geographical area. This too is a realization of the more destructive potential of hazardous substances spills. This affords state parties a larger geographical buffer zone in which to act to stop or limit environmental damage and still be able to seek compensation. Article 38(2) of the *HNS Convention* provides a method of determining which court to use in the event of exclusive damage outside the territory of a state party.

4. *Comparison with the FUND Convention*

Thus far only half of the *HNS Convention* has been examined in light of how it could apply in a Canadian context. The second half of the *HNS Convention* is the equivalent of the *FUND Convention*; it provides the Tier Two compensation mentioned earlier. This tier has been outlined above, but in order to examine how it would apply in Canada, it is useful to examine how its sister convention has been implemented.

The *FUND Convention* was adopted in the *Canada Shipping Act* in the same part of the act that adopted the *CLC Convention*. The

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72 *Supra* note 68 at 563.
73 1992 *CLC* Protocol, *supra* note 49. It is suggested in this protocol that the *CLC* be changed and adopt an identical clause as the one found in article 3(d) of the *HNS Convention*.
74 *HNS Convention*, art. 3(b).
75 *Ibid*.
76 *Oceans Act*, S.C., 1996, c.31, ss. 4(a), 13(1)(a) for the territorial sea and EEZ respectively.
*FUND Convention* comes into play only where no liability arises under the *CLC Convention*, where the damage exceeds the owners liability under the *CLC Convention*, or where the owner is financially incapable of meeting the obligations in full.\(^77\) The corresponding article in the *HNS Convention* is nearly identical, and can expect to be applied in the same manner.

When Canada implemented the *FUND Convention*, it saw the requirement to create the Ship-source Oil Pollution Fund (SOPF). Because of the similarities between the *FUND Convention* and the *HNS Convention*, there would be a requirement to create a similar fund. The SOPF is responsible for paying Canada’s share of the contributions required by the Assembly of the *FUND*.\(^78\) The SOPF is liable where the recovery of payment from the *FUND* has been unsuccessful or for a variety of reasons where the *FUND* is not liable.\(^79\) It also pays out the compensation to a valid claimant in order to ensure the compensation is paid as quickly as possible, and then seeks reimbursement from the *FUND*. The Administrator of the SOPF is appointed by the Governor-in-Council for a period of not more than five years.\(^80\) During that period, the Administrator can obtain whatever technical, professional or other advice required.\(^81\) An organization similar to the SOPF would be necessary to oversee the administration of the Second Tier of the *HNS Convention*. It would most likely have its own appointed Administrator given that the overseeing of both the *FUND Convention* and part of the *HNS Convention* would be an enormous undertaking. In addition, the funds for each are paid to different organizations and they deal with different industries.

This fund, for the purposes of this comment, will be referred to as the Ship-source Hazardous and Noxious Substance Fund (SHNSF). The Administrator for this fund should, and most likely would, be granted similar jurisdiction as the SOPF counterpart. The ability to seek whatever technical or professional advice deemed necessary would be an essential asset given the evolving nature of

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\(^77\) *FUND Convention* art. 4(1).

\(^78\) *Canada Shipping Act*, R.S.C., 1985, c.S-9, s.702 as added by R.S.C. 1985 (3rd Supp.) c.6, s. 84.

\(^79\) Section 709.

\(^80\) Section 704(1).

\(^81\) Section 706.
the chemical industry. It would fill the same administrative duties in relation to the *HNS Convention* that the *sopf* does in relation to the *FUND Convention*.

Another factor in establishing a separate domestic fund for hazardous substances is that the *HNS Convention* requirements for tier two contributions are even more complex and detailed than the *FUND* contributions. There is not one, but four separate funds into which receivers of hazardous substances pay under the convention.82 This is evidence of the more complex chemical industry and the number of different substances which are regulated. Contributions are determined and set out by the Assembly for one of the four funds. The administrative realities of administering Canadian contributions to four separate funds will require a separate fund not only so that the *sopf* does not become ineffective through administrative overload, but also to ensure that Canadians in the industry do not bear the brunt of the paper work. In the creation of the *sopf*, it was determined that “[t]here will be a minor impact in the way of paper-burdens, but less than would be the case if industry was required to report oil movements directly to the International Fund.”83 This would be even more important given the more complex scheme involved with the *HNS Convention*. The *sopf* exceeds the *FUND* in its scope by compensating for damage from an unknown source, which is not compensable under the *FUND*. The *shnsf* could also do the same for other hazardous substances spills. This would increase the availability for compensation to Canadian citizens, but this is purely an internal matter unrelated to the adoption of the *HNS Convention*.

Another administrative concern for the implementation of the *HNS Convention* to Canada is the issuing of the certificates required for all ships carrying hazardous substances in Canadian waters. The issuing of the certificates required by the *CLC Convention* is done under the authority of the Minister of Transport.84 Having the hazardous substances certificates issued under the same authority is the most administratively convenient method. The *CLC Convention* has a similar requirement and Canada has adopted this stipulation

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82 *HNS Convention*, art. 16.
83 *Ship-source Oil Pollution Fund Regulations*, SOR/90-82.
84 *Canada Shipping Act*, R.S.C., 1985, c. S-9, s.685 as added by R.S.C. 1985 (3rd Supp.), c.6, s84.
under the *Canada Shipping Act*. This section states that no convention ship can "enter or leave a port in Canadian waters or arrive at or leave an offshore terminal in Canadian waters."\(^8^5\)

Furthermore, the same restrictions are applied on Canadian ships entering or leaving ports of other states, regardless if that state is a party state to the *CLC Convention*. These certificates must be carried on board the ship at all times and must be presented "at the request of any duly authorized officer of the Government of Canada."\(^8^6\) A similar program would be easily adopted for the HNS certificates, given that this type of legislation is already in place for the inspection and enforcement of CLC certificates.

In the current *Canada Shipping Act* there are provisions made for the designation of pollution prevention officers. These officers have a broad range of powers that enable them to ensure the safety of Canadian waters by early detection of potentially dangerous ships and that allow them to take a variety of actions. The power exercised by these officials is not limited to oil carrying ships,\(^8^7\) and the definition of "pollutant" in the *Canada Shipping Act* is broad enough to interpret the hazardous substances listed in the convention.\(^8^8\)

In summary, the adoption of a legislative scheme which implements the *CLC* and *FUND* conventions has provided Canada with the framework to adopt the *HNS Convention*. Because of the similarities between the conventions, the infrastructure required to

\(^8^5\) Section 684(1).
\(^8^6\) Section 684(3).
\(^8^7\) Section 662(1) lists the powers of pollution prevention officers, and these powers refer to any Canadian or foreign ship, not just any oil carrying ship.
\(^8^8\) Section 654:

"pollutant" means any substance that, if added to any waters, would degrade or alter or form part of a process of degradation or alteration to the quality of those waters to an extent that is detrimental to their use by man or by any animal, fish or plant that is useful to man, and any water that contains a substance in such a quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any waters, degrade or alter or form part of a process of degradation or alteration of the quality of those waters to an extent that is detrimental to their use by man or by any animal, fish or plant that is useful to man.
administer the *HNS Convention* is already in place or can be easily adapted from the existing *CLC* and *FUND* infrastructure.

VII. WHAT CANADA HAS ACCOMPLISHED ALREADY: LAYING THE FOUNDATION

1. Statutory Recognition of Hazardous Substances

One argument against the implementation of the *HNS Convention* is that the convention’s list of hazardous substances will be difficult to integrate into Canadian legislation and will create undue hardship on the chemical industry. However, for some time now Canada has pursued the prevention aspect of substances falling under the hazardous substances banner. In 1993 the government passed the *Dangerous Chemicals and Noxious Liquid Substances Regulations*. This replaced the older *Chemical Carrier (Steamship) Regulations*, and provided for the “safe carriage of dangerous chemicals and...provide protection for Canada’s marine environment from pollution caused by operational and accidental discharges of noxious liquid substances.” These regulations were adopted to permit Canada to accede to *MARPOL 73/78*, and in particular to Annex II of that convention. By acceding to *MARPOL 73/78*, Canada has incidentally agreed to hold that two of the seven listed definitions of hazardous substances as stated in the *HNS Convention* are hazardous substances. It would be inconsistent for the chemical industry or any other party opposed to the adoption of the *HNS Convention* to state that the adoption of the hazardous substances list found in the convention is an arbitrary decision when parts of it have already been acceded to through current legislation.

In the *Pollution Discharge Reporting Regulations*, it is stated that “any harmful substance in packaged form that is identified as a marine pollutant in the general index to the *International Maritime Dangerous Goods Code*, published by the International Maritime Organization, as amended from time to time, is a prescribed

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89 SOR/93-4.
90 SOR/93-4, s.54.
91 SOR/93-4.
92 *HNS Convention*, art. 6(a)(i) and (ii).
pollutant.” This means that Canada has already recognized the originating document for yet another classification of hazardous substances. A fourth designated category is simply a family of substances having a physical category and does not rely on any previous conventions or legislation, and therefore should not pose any great difficulties in its adoption. Yet another category relies on the Code of Safe Practice for Solid Bulk Cargoes. This was the main basis for the adoption of the Dangerous Bulk Materials Regulations, which refer to the IMO code. Because the drafting committee of the HNS Convention wanted to create a list of hazardous substances that would be as appealing as possible to the chemical industry, they relied heavily on the work already done for previous conventions. As a result of Canada having already implemented these conventions, there is a precedent already in place that allows the government to refer to IMO conventions and use them to create legislation when it is convenient. The majority of the conventions that the government would be required to use have already been adopted through referring to them in the appropriate regulations.

Under section 450 of the Canada Shipping Act, “[t]he Governor in Council may, by regulation, declare that any goods, articles or materials to be carried in a ship are dangerous goods.” Therefore, it is possible to adopt, in full, the list of hazardous substances as defined in the HNS Convention. An even broader power is found in the same section of the act, where the Board of Steamship Inspectors are granted the authority to react to and deal with new substances which the legislature has not yet had an opportunity to regulate themselves. This is an important aspect in the control of

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93 SOR/95-351, s. 3.
94 HNS Convention, art. 5 (a)(iv).
95 HNS Convention, art. 5 (a)(vi).
96 HNS Convention, art. 5 (a)(vii).
97 SOR/87-24.
98 Canada Shipping Act, R.S.C., 1985, c. S-9, s. 450(1).
99 Canada Shipping Act, R.S.C. 1985, c. S-9, s. 450 (2.2): Where the Board [of Steamship Inspection] considers it to be necessary for the protection of public safety, property or the environment in any case not provided for by regulations made under subsection (1) (2.1), it may, subject to any regulations made pursuant to subsection (2.3), direct any person engaged in sending or carrying, in any Canadian ship, goods that the Board
dangerous goods as they relate to hazardous substances because of the speed with which new chemicals are created. 100

2. Non-Statutory Recognition of Hazardous Substances
As has already been mentioned, Canada has not been idle in developing policies and plans for the immediate physical clean-up requirements for chemical spills. The Rescue, Safety and Environment Response Directorate of the Canadian Coast Guard, in conjunction with industry, are in the process of developing a Marine Emergency Chemical Response Regime. Being aware that chemical spills differ significantly from oil spills, they are designing a solution that will be “unique to the marine transportation of hazardous and noxious substances.” 101

Canada has already demonstrated an understanding of the dangers of hazardous substances. It has created regulations dealing with hazardous substances matters of a preventive nature, and is developing clean-up procedures. The adoption of a compensation and liability scheme for hazardous substances damage is the next logical step in producing a comprehensive government plan.

VIII. CONCLUSION
By implementing the CLC and FUND conventions and creating the sopf Canada laid the legal framework for the HNS Convention. There are no new legal ideas in the HNS Convention that are inconsistent with Canadian law since the Canada Shipping Act has already adopted the CLC and FUND conventions, both of which formed the basis for the HNS Convention. The majority of the list of hazardous substances has already been recognized through Canada’s adoption of the other imo conventions upon which the list was based. Canada has already recognized the importance of preventive measures in relation to hazardous substances and in reactive measures by establishing clean up and reaction policies.

100 Some estimates indicate that 80,000 chemicals are in common every day usage, and thousands more are created each year: supra note 4 at 61.

101 Supra note 3.
The suggestion that the implementation of the convention will cause the chemical industry undue hardship is inaccurate. It was in large part due to the participation of the international chemical industry that the convention was finally adopted. As well, the Canadian Chemical Producer's Association, through its Responsible Care program has taken an active role in the adoption of some of the chemical programs in the country.\textsuperscript{102}

By ratifying and implementing the \textit{HNS Convention}, Canada would reap domestic and international benefits. Domestically, Canadian citizens would have greater protection by ensuring compensation in the event of a spill. Internationally, Canada's actions would increase the Convention's credibility in the international community. The implementation of the \textit{CLC} and \textit{FUND} conventions took many years, but with the groundwork for the \textit{HNS Convention} already laid in Canada, there is no reason why new legislation can not be implemented in a much shorter time frame.

\textsuperscript{102} Supra note 8.