

**BILL C-15: AN ACT TO AMEND THE MIGRATORY
BIRDS CONVENTION ACT, 1994 AND THE CANADIAN
ENVIRONMENTAL PROTECTION ACT, 1999**

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LEGISLATIVE HISTORY OF BILL C-15

HOUSE OF COMMONS

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SENATE

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N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print**.

Legislative history by Peter Niemczak

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BILL C-15: AN ACT TO AMEND THE MIGRATORY
BIRDS CONVENTION ACT, 1994 AND THE CANADIAN
ENVIRONMENTAL PROTECTION ACT, 1999*

BACKGROUND

Bill C-15 amends two pieces of legislation and makes minor coordinating amendments to others. Clauses 1 to 16 of the bill amend the *Migratory Birds Convention Act, 1994*, the federal statute that implements the 1916 Convention for the protection of migratory birds in Canada and the United States. Clauses 17 to 42 of the bill amend the *Canadian Environmental Protection Act, 1999*. Other sections of the bill coordinate the amendments with other legislation.

The bill was given first reading in the House of Commons on 26 October 2004. It was passed by the House on 14 December 2004, and was introduced in the Senate on the same day. A similar, but not identical, bill had been introduced and passed in the House late in the 3rd session of the 37th Parliament as Bill C-34. That bill died on the *Order Paper* with the election call in May 2004.

The amendments made by this bill are intended to clarify the prohibitions found in both statutes against the dumping of oily bilge wastes, or other pollutants, into the ocean. The inadequacies of the current legislation to deal with the problem of ocean dumping, particularly the dumping of bilge wastes by ocean-going vessels, have become apparent in recent years. Specifically, the high-profile case of the *Tecam Sea*, in which RADARSAT images showed a large oil spill, highlighted the problems. In that case, although charges were laid against the ship, they were later dropped by prosecutors who cited legislative ambiguities. Bill C-15 clarifies enforcement provisions, increases fines, and holds ships' officers accountable for their actions. Harmonization of these enforcement provisions and fines with the American approach is intended to deter ships from polluting the marine environment off Canada's coasts.

* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this legislative summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

DESCRIPTION AND ANALYSIS

A. Amendments to the *Migratory Birds Convention Act*

1. Clause 1 – Definitions

Clause 1(1) amends the definition of “conveyance” in the *Migratory Birds Convention Act, 1994* (referred to hereafter as “the Act”), to replace the term “water-borne craft” with the word “vessel” in the list of included conveyances. Clause 1(2) adds a number of new definitions to the Act, including the following: “deposit,” “environment,” “master,” “operator” and “owner.”

The new definition of “vessel” is intended to match the term used in the *Canada Shipping Act*, and it excludes a “fixed platform,” which is also defined. A “Canadian vessel” is distinguished from a “foreign vessel,” because certain enforcement actions authorized by the bill could not be taken against foreign vessels in the exclusive economic zone of Canada without the consent of the Minister of the Environment or the Attorney General of Canada. A “Canadian vessel” can include one that is registered, listed or licensed under the *Canada Shipping Act*, or another vessel that is owned by Canadian citizens, persons domiciled in Canada, a Canadian corporation, or the federal government. Any vessel that is not a Canadian vessel is a foreign vessel.

The broad definition of “deposit” is the same as the definition of “deposit” in section 34 (Fish Habitat Protection and Pollution Prevention) of the *Fisheries Act*. The definition of “environment” matches that set out in section 3 of the *Canadian Environmental Protection Act, 1999* (CEPA). Because the bill creates different obligations for various people associated with conveyances, the definitions distinguish between masters, operators and owners of vessels.

2. Clause 2 – Application

Clause 2 adds a new section 2.1 to clarify that the bill applies in Canada (including its territorial sea, the continuous zone following the coastline, or baselines between headlands, and extending 12 nautical miles out to sea) and in the exclusive economic zone of Canada. While ships passing through a country’s exclusive economic zone are normally not

affected by its domestic laws, international law permits countries to take action in their exclusive economic zones when an activity causes or threatens to cause significant damage to the marine environment.

3. Clause 3 – Purpose

The amendment to section 3 expands the purpose of the Act to include conserving migratory birds, in addition to protecting them, as is already provided. The new wording specifies that the birds are to be protected and conserved as populations and as individual birds. This new language reflects the evolving science of species conservation, which now incorporates habitat and ecosystem concepts, along with concern for the protection of individuals. This approach is consistent with that taken in the *Species at Risk Act* (2002).

4. Clause 4 – Prohibitions

Section 5 of the Act already prohibits the unlawful possession of a migratory bird or nest, and the buying or selling of one. Clause 4 adds three new prohibition sections that are intended to address the problem of birds oiled at sea. The first, section 5.1, prohibits persons or vessels from depositing harmful substances in waters or areas frequented by migratory birds, unless the deposit is authorized under the *Canada Shipping Act* or another federal statute, or by the Environment Minister for scientific purposes. The main element of these offences is now found in subsection 35(1) of the *Migratory Birds Regulations*. The new wording is intended to complement that found in section 36(3) of the *Fisheries Act*.

New section 5.2 is intended to prevent offenders from escaping prosecution under the Act. It prohibits the destruction, alteration or falsification of records, or otherwise interfering with an investigation under the Act. The amended wording expands the prohibition currently set out in section 6(6) of the Act. Similar enforcement provisions can be found in CEPA (sections 228 and 273(1)).

New section 5.3 protects employees from reprisals for reporting a Canadian employer's contraventions under the Act, for refusing to contravene the Act, or for preventing a contravention of the Act. "Canadian employer" is defined in section 5.3(2) to mean an employer that is a Canadian citizen or permanent resident, or a Canadian corporation that operates in Canada. This type of "whistleblower" protection is common in recent legislation, including section 16 of CEPA.

New section 5.4 creates an obligation to take reasonable steps to ensure a vessel's compliance with the section 5.1 prohibition against deposits harmful to migratory birds. The section applies to every master, chief engineer, owner and operator of a vessel, and, if the vessel is owned by a corporation, to its directors and officers who are able to influence related activities. Section 5.5 adds the requirement that directors and officers of corporations take all reasonable care to ensure the corporation's compliance with the bill and any regulations made under it.

5. Clauses 5-7 – Inspections

Clause 5 amends section 6(3) slightly to include the words “or control.” Game officers, on entering a place, must show their certificates of designation as game officers to the occupant or person in charge of, or in control of, the place. Also, new section 6(6) allows a game officer to arrest a person without a warrant if the officer believes on reasonable grounds that the person has committed, is committing, or is about to commit an offence under the Act.

Clause 6(1) makes some minor revisions to the first part of section 7(1) of the Act. It clarifies that officers may enter a place, including a vessel, for the purpose of verifying compliance with the Act. The amended section spells out that the officer's inspection powers include records or data, which could include those in an electronic format, in addition to the documents already referred to in the Act. Clause 6(2) adds four new subsections to section 7(1) and supplements the game officer's existing enforcement powers by adding powers related to computer systems, including printing out or copying of data and records.

Clause 6(3) requires those in charge or control of places being inspected under the Act to permit the officer to exercise those powers, and permits game officers to detain vessels, or to board vessels and to travel free of charge with suitable accommodation and food. Dwelling places may be entered only pursuant to a warrant, and warrants may be obtained *ex parte* (without notice to the other side) in specified circumstances under section 7(4) (dwellings), (5) (non-dwellings) or (6) (waiving notice). Section 7(9) specifies that the powers under this section may be exercised in the exclusive economic zone of Canada. Under section 7(10), the Environment Minister's consent is required to exercise a power under this section in relation to a foreign vessel. As specified, the Attorney General's consent is not required for an inspection action under this section.

Section 8 of the Act authorizes a game officer to use the search and seizure powers set out in section 487 of the *Criminal Code* for the purposes of ensuring compliance with the Act and the regulations without a search warrant (as opposed to with a warrant, under section 7 of this Act), if the conditions for obtaining a warrant exist but it is not feasible to obtain the warrant. The addition of the word “search” before “warrant” is the only amendment to the wording of the section.

Clause 7 also adds new sections 8.1 to 8.3, further elaborating the enforcement powers of game officers under the Act, including powers to detain and direct vessels, rights of passage for game officers over private property, and the requirement that assistance be offered to game officers.

New section 8.1 authorizes a game officer to direct a vessel to any place in Canadian waters or in Canada’s exclusive economic zone, or to make a detention order in relation to a vessel, if the game officer has reasonable grounds to believe that the vessel or a person on board it has committed, is committing, or is about to commit a section 5.1 offence (deposit of a harmful substance) in Canadian waters (section 8.1(1)), and the vessel was being, is being, or is about to be used in connection with the commission of the offence. Section 8.1(2) creates a similar power to detain and direct in the case of an offence in the exclusive economic zone of Canada. Under section 8.1(2), the game officer must have reasonable grounds to believe that commission of the offence will cause major damage to the environment, or cause an actual threat of major damage to the environment, in Canada or in the exclusive economic zone of Canada. In the case of a foreign vessel (section 8.1(9)), the powers to direct and detain a vessel in the exclusive economic zone of Canada may be exercised only with the consent of the Attorney General of Canada. Without charges being laid, vessels may be detained for no longer than 30 days (section 8.1(8)).

Under the *United Nations Convention on the Law of the Sea* (UNCLOS), member states have an obligation to protect the marine environment. The concept of “major damage,” referred to in sections 8.1(2) and (3) of the bill, is found in article 220.6 of the Convention:

Where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a discharge causing major damage or threat of

major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, subject to section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.⁽¹⁾

New section 8.1(5) deals with the problem of serving documents on a vessel, by providing that service of a detention order can be effected by leaving the order with a person in charge or by posting it on a conspicuous part of the vessel.

New section 8.2 authorizes a person acting under the Act to enter into private property without risk of a charge of trespassing. This type of provision is common in environmental protection legislation, and similar provisions can be found in the *Fisheries Act* (section 38(8)), the *Species at Risk Act* (section 90) and CEPA (section 226).

New section 8.3 requires that owners, operators and persons in charge or control of places entered by a game officer under the Act must give reasonable assistance and information to the officer. Similar provisions can be found in CEPA (section 227), the *Fisheries Act* (section 49(1.2)) and the *Species at Risk Act* (section 91).

6. Clause 8 – Regulations

Clause 8 of the bill amends section 12 of the Act to add several new regulation-making powers. The first, new section 12(h.1), permits the development of a regulatory system to define the conditions and circumstances under which migratory birds or their nests may be killed, taken or disturbed, or their nests may be damaged, destroyed, moved or disturbed. The regulations should ensure that any such actions would be permitted only where they are consistent with the purposes of the Act.

New sections 12(i.1), (i.2) and (j.1) allow the establishment of regulations dealing with documents and records required to be maintained under the Act, excluding military or other government vessels, and defining words not already defined in the Act.

7. Clauses 9-15 – Contraventions

Clauses 9 to 15 include a number of minor amendments to reflect the new possibility of prosecutions against either persons or vessels under the Act (clauses 10, 11 and 13).

(1) *United Nations Convention on the Law of the Sea*, in force since 16 November 1994, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm. Canada ratified the Convention on 6 November 2003.

Clause 9 amends section 13 of the Act, which creates offences and sets penalties. New section 13(1) makes it an offence to contravene the Act, regulations under the Act, or an obligation, prohibition or order made under the Act. An offence can be committed by either a person or a vessel. In practice, if a person in charge cannot be identified, the vessel will be charged and it will be left to the vessel owner and operator to decide who will defend the charge. New subsection 18.5(3) (clause 15 of the bill) states that a vessel appears by counsel or a representative, and if no one appears, the section allows the court to hold the trial in the absence of a representative for the vessel.

The offence is a hybrid offence, with a fine of up to \$1,000,000 or up to three years' imprisonment, or both, if prosecuted as an indictable offence; and a fine of up to \$300,000 or up to six months' imprisonment, or both, if prosecuted on summary conviction. Fines may be doubled in cases of second or subsequent convictions (section 13(2) of the Act). The bill removes the current distinction between corporations and individuals, consistent with the approach taken in CEPA. The proposed maximum fines are in keeping with fines in other federal environmental legislation, including the *Species at Risk Act* (section 97) and CEPA (section 272(2)).

As amended by the House of Commons Standing Committee on Environment and Sustainable Development, clause 9 adds a new section 13(1.11), providing for a minimum fine for offences under section 5.1 (the prohibition against deposits harmful to migratory birds) committed by vessels of at least 5,000 tonnes deadweight: the minimum is \$500,000 in cases of indictable offences, and \$100,000 for summary conviction offences.

A number of aspects of prosecutions under the new offence provisions are spelled out in the other subsections of section 13 amended by clause 9. If a corporation is convicted under section 13, individuals responsible for the commission of the offence are parties to the offence and can be convicted under the section, even if the corporation is not prosecuted (new section 13(1.2)). In a prosecution against a corporation, it is sufficient proof of the offence to establish that it was committed by an employee, agent or mandatary (someone under a mandate) of the accused, whether or not that person is identified or prosecuted for the offence (new section 13(1.3)).

The defence of due diligence, standard in legislation that creates strict liability offences, is set out in new section 13(1.8). Relying on due diligence, an accused person or vessel could escape conviction by proving that he or she took reasonable steps to fulfil the statutory obligation to take all reasonable care, even if the illegal act or omission has taken place. In these cases, once the Crown has proved the prohibited conduct has occurred, the evidentiary burden

shifts to the accused to prove that he or she acted with due diligence before the offence took place. The Crown is not required to prove the accused's intent to commit the offence (*mens rea*). The due diligence defence does not apply to an offence in paragraphs 5.2(a), (c), (d) or section 5.3, because for these *mens rea* offences, the Crown must prove the accused person's intention to commit the offence.

New section 13(4.1) requires a sentencing court to take into account a series of sentencing principles, such as the harm caused by the offence, whether the offence was committed inadvertently, negligently, recklessly or intentionally, and any history of previous non-compliance.

Clause 12 amends section 16, which deals with the other punishments that can be imposed by a court on convicting someone of an offence under the Act. New section 16(1)(b.1) allows the court to direct the offender (person or vessel) to have an environmental audit conducted and to remedy any deficiencies thus revealed. New sections 16(1)(d.1) and (d.2) allow the court to direct the offender to pay for research or to pay for scholarships for environmental studies students. New section 16(2) allows the court to order a convicted offender to pay compensation to anyone who incurred a monetary loss as a result of the commission of an offence.

Under new section 16(3), a compensation order can be enforced as if it were a civil judgment. New section 16(4) allows a court to vary an order made on conviction of an offender, to change its terms or conditions or to extend or decrease its duration, in response to a change in the offender's circumstances.

Clause 14 adds new section 17.1, providing that civil remedies available under other laws are unaffected by the fact that the conduct is an offence under the Act. Also, courts are precluded from ordering compensation if there exists a compensation claim for the damage under the *Marine Liability Act* or the *Arctic Waters Pollution Prevention Act*. Those Acts are given priority under the section, as both employ clean-up and remediation as corrective tools in circumstances in which a compensation order might be made under section 16(1)(d) or (2) of the Act.

Clause 15 deals with some technical and evidentiary issues related to prosecutions under the Act. It adds section 18.1, to make documents required to be kept under this Act or the *Canada Shipping Act* admissible in evidence. New section 18.2 makes analysts' certificates admissible in evidence, subject to certain procedural requirements.

New section 18.3 deals with offences that occur outside Canadian waters, by deeming them to have taken place in Canada, in order to extend *Criminal Code* protection to Canadian enforcement officers and facilitate prosecutions. New section 18.3(1) provides that an offence under this Act, or a *Criminal Code* offence committed against someone enforcing this Act, that is committed in the exclusive economic zone of Canada is deemed to have been committed in Canada. Section 18.3(2) extends the Act's application to an offence committed anywhere on the seas, except in another state's territorial sea or inland waters, if it occurs during hot pursuit of a vessel that commenced in Canadian waters or Canada's exclusive economic zone. Section 18.3(3) empowers enforcement officers to utilize the powers they would have under this Act or the *Criminal Code* in the exclusive economic zone and on the high seas, but only with the Attorney General's consent in relation to a foreign vessel. According to section 18.3(6), if the accused is a foreign vessel or a foreign national, the Attorney General must consent to the continuation of proceedings within 8 days, or else the prosecution cannot continue and the charges against the accused must be withdrawn or stayed.

8. Clause 16 – Disclosure of Information

Section 19.1, which is added to the Act by clause 16, sets out rules for disclosure of information obtained in the administration or enforcement of the Act. Such information is subject to the *Privacy Act*, meaning that it can be disclosed only for one of the reasons listed, such as to notify the public or another Party to the *Migratory Birds Convention* of an environmental emergency, or for the purposes of enforcing the Act.

B. Amendments to the *Canadian Environmental Protection Act, 1999*

1. Clause 17 – Change to French Heading

Clause 17 changes the heading of Division 3 of Part 7 of the French version of CEPA from “Immersion” to “Immersion en mer.” The English heading (Disposal at Sea) is not affected.

2. Clause 18 – Definitions

Clause 18 amends several definitions which apply in Division 3 (Disposal at Sea) of Part 7, Controlling Pollution and Managing Wastes, and in Part 10, Enforcement, of CEPA.

The definition of “disposal” will include acts or omissions defined as disposals under new section 135(3)(c). The definition of “incineration” will be expanded by the deletion of the word “deliberate” from the current wording (“the deliberate combustion of a substance on board a ship, a platform or another structure at sea for the purpose of its thermal destruction”), so that any such combustion will be included. For the purposes of the definition of “master,” the meaning of the term “pilot” will be limited to a licensed pilot within the meaning of section 2 of the *Pilotage Act*.

3. Clause 19 – Purpose of Division 3

Clause 19 adds a new Purpose provision, section 122.1, establishing the purpose of the Division as the protection of the marine environment, particularly by implementing the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, signed by Canada on 29 December 1972, and the 1996 Protocol to it.

4. Clauses 20-27 – Disposal at Sea

Clause 20 expands the prohibitions found in section 123 of CEPA against importing and exporting substances for disposal at sea, to apply to ships as well as persons. Clause 21 adds a new prohibition, section 124(1.1), against the unauthorized loading of any substance onto a ship for the purpose of disposal at sea in a location under Canadian jurisdiction or on the high seas (specifically listed in section 122(2)(a)-(e) and (g)). Clause 22(1) expands the prohibitions found in section 125 of CEPA, against disposals in waters under Canadian jurisdiction and on the high seas, to apply to ships as well as persons. In waters under foreign jurisdiction, new section 125(3.1) prohibits disposal at sea unless the substance was loaded in the foreign state, and the disposal is authorized by that state. Section 125, pursuant to new section 125(6), does not apply to disposals authorized under the *Canada Shipping Act*.

New sections 126(1.1) and (3) (clause 23) prohibit a ship from incinerating a substance on board, in waters under Canadian jurisdiction, in foreign waters or elsewhere, without a permit issued under section 128(2). Disposals at sea and on-board incineration may be permitted under new section 128 (clause 24).

Clause 26 of the bill amends section 135(3) of the Act, to add to the types of regulations that the Governor in Council, on the recommendation of the Environment Minister, may make under the section. These include defining acts or omissions that would constitute disposals, and specifying the normal operations of a ship or other conveyance or structure, for the purpose of various provisions and regulations.

5. Clauses 28-42 – Enforcement

These clauses make a number of amendments to Part 10 of CEPA, which deals with enforcement.

Clause 28 adds a definition of “foreign national,” giving it the same meaning as in the *Immigration and Refugee Protection Act*.⁽²⁾ Clause 29 provides that, for the purpose of certain sections in this Part, “a ship that is not a Canadian ship” does not include a ship that is unregistered but owned by Canadian citizens, residents or a corporation that is incorporated and operating in Canada, or an unregistered ship operated or owned by the federal government. In other words, those types of vessels would be considered Canadian ships. A clarification of the phrase “committed in the course of enforcement of this Act” is set out in new section 216.1(2).

Clause 30 adds several new subsections to section 217 of CEPA, to deal with enforcement powers in the exclusive economic zone, and on the high seas in cases of hot pursuit. These sections mirror the amendments to the *Migratory Birds Convention Act* by clause 15, including the requirement in section 217(6) that the powers cannot be exercised in relation to a foreign ship (“a ship that is not a Canadian ship”) or a foreign national without the consent of the Attorney General.

The application of the inspection powers under CEPA in the exclusive economic zone of Canada is clarified by clause 31(3), which adds new subsections to section 218, including the requirement that the consent of the Environment Minister be obtained in relation to inspections of foreign ships. The authority to search without a warrant set out in section 220(3) of CEPA also applies to foreign ships if the Attorney General of Canada has consented to the exercise of those powers without a warrant (new section 220(5.1)). Enforcement officers have the same entitlement under section 220(8) to be carried free of charge, and provided with food and lodging, as is set out in clause 6 for the *Migratory Birds Convention Act*.

Clause 33 creates a new power under section 222.1 to arrest without warrant any person or ship that the enforcement officer reasonably believes has committed, is committing or is about to commit an offence under CEPA.

As was the case with the amendments to the *Migratory Birds Convention Act*, amendments to CEPA deal with the problem of serving documents on a ship. Clause 34(1) amends section 225(3) to provide that service of a detention order can be effected by leaving the order with a person in charge or by posting it on a conspicuous part of the ship.

(2) A person who is not a Canadian citizen or a permanent resident, and includes a stateless person.

New section 225(6)(b) of CEPA permits clearance to be given a ship where security has been paid to the federal government in an amount equal to the maximum fine that could be levied against the ship on conviction, or a lesser amount if approved. The bill amends the subsection to distinguish between offences under Division 3 of Part 7 (Disposal at Sea) and other contraventions of the Act or its regulations. In the former case, security must be the maximum amount or a lesser amount that is approved by the Attorney General of Canada. In the latter case, the security must be the maximum amount or a lesser amount approved by the Environment Minister or a person designated by the Minister.

Clause 35 adds new section 225.1 dealing with enforcement officers' powers to direct ships. An enforcement officer can direct a ship in an area within Canadian jurisdiction (including the exclusive economic zone) or on the high seas to proceed to a specified place if the officer reasonably believes that the ship or a person on board has committed, is committing or is about to commit on an offence under the Disposal at Sea provisions of CEPA (Division 3 of Part 7). If a ship is in waters under foreign jurisdiction, an enforcement officer may proceed in the same fashion with the consent of the foreign state.

Clause 36 creates a deeming provision similar to that created for the *Migratory Birds Convention Act* in clause 15. Under new section 271.1(1), acts or omissions amounting to an offence under Division 3 of Part 7 are deemed to have been committed in Canada if committed in the exclusive economic zone of Canada, or on the high seas in a case of hot pursuit. Similarly, new section 271.1(2) deems *Criminal Code* offences occurring in the course of enforcement of CEPA to have occurred in Canada if they are committed in the exclusive economic zone of Canada, or on the high seas in hot pursuit cases.

To further clarify the application of CEPA to ships, clause 37 adds section 272(3), which provides that a ship is deemed to be a person in respect of all provisions except those that expressly refer to ships.

Clause 38 adds section 275.1, which restricts prosecutions of foreign ships and foreign nationals to those in which, no later than eight days after the proceeding is commenced, the Attorney General consents to their continuation.

Clauses 39 and 40, which amend sections 278.1 and 279, deal with the power of judges and justices to authorize arrest, entry, search or seizure, and the jurisdiction of the courts, in relation to offences committed at sea.

Clause 41 adds a new subsection to section 280, which deals with offences committed by corporations. New section 280(2) provides that if a ship commits an offence under the Act or its regulations, and a master or chief engineer directed, authorized, or was party to the commission of the offence, that person may be held liable whether or not the ship has been prosecuted or convicted. This provision holds the two key people in charge of a ship to the same standard applied to directors and officers of a corporation. The defence of due diligence applies to section 280.1, 280.2 and 280.3 offences.

Clause 41 also adds new section 280.1, making it the duty of directors and officers of corporations to take all reasonable care to ensure that their corporation adheres to CEPA and its regulations, except for the Disposal at Sea provisions in Division 3 of Part 7 of the Act, as well as orders made by the Minister or enforcement officers. Where a corporation commits an offence, section 280.1(3) makes directors and officers liable to the punishment provided, whether or not the corporation is prosecuted or convicted. The duty of care created by this section exists in the current CEPA, section 280(2). The duty of care is being retained in the bill, with the amendments distinguishing between the duty of care with respect to the disposal at sea provisions, which is dealt with by section 280.2, and the duty of care with respect to the rest of CEPA, which is covered by section 280.1.

The liability provisions differ in their application to directors and officers, as opposed to masters and chief engineers. Only directors and officers “in a position to direct or influence the corporation’s policies or activities” regarding its obligations under the Act will be held liable under section 280.1. This reflects the nature of corporate structures in the shipping industry. It will not always be appropriate to require every director and officer of every corporation that has an ownership link to a ship to meet the “all reasonable care” standard and to hold them accountable.

New section 280.2 creates a similar duty of care for masters and chief engineers to ensure ships’ compliance with Division 3 of Part 7 of CEPA (Disposal at Sea), and holds them accountable for offences under section 280.2(2). This is consistent with the duties of masters and chief engineers to take all reasonable care under clause 4 of the bill, which adds section 5.4 to the *Migratory Birds Convention Act, 1994* (“the Act”).

New section 280.3 creates a duty of care for owners of ships, requiring them to ensure that the ship complies with the Disposal at Sea provisions (Division 3 of Part 7) and regulations, as well as orders and prohibitions by the Minister or enforcement officers. Directors

and officers of corporate ship owners, those that are “in a position to direct or influence the corporation’s policies or activities” related to the offence, can be held liable to punishment under section 280.3(2).

For greater certainty, new section 280.4 clarifies that section 283 – the defence of due diligence – applies to offences under section 280.1(3) (liability of directors and officers of a corporation); section 280.2(2) (liability of master and chief engineer); or section 280.3(2) (liability of directors and officers of owners).

Also for clarification, new section 280.5 will deem orders made under section 225.1 (directing a ship) or 235 (environmental protection compliance orders), that are given to the master or a crew member of a ship, to have been given to the ship.

Clause 42 adds new section 281.1 which provides that CEPA and the *Criminal Code* apply to ships as they do to persons, with any necessary modifications, and a summons may be served by delivery to owners, masters or officers of ships, or by conspicuous posting on the ship.

C. Coordinating Amendments

1. Clauses 43-46 – Coordination With *Canada Shipping Act* and *Public Service Modernization Act* Amendments

Amendments to the *Canada Shipping Act* received Royal Assent on 1 November 2001, but have not yet been proclaimed in force. On the later of the proclaiming of that legislation and that of clause 1(2) of this bill, clause 43 will replace the definition of “Canadian vessel” in the *Migratory Birds Convention Act, 1994* (“the Act”) with a new definition which refers to the *Canada Shipping Act, 2001*. Similarly, clauses 44 and 49 will replace the definition of “master” in the Act and CEPA with one that refers to section 1.1 of the *Pilotage Act*, which is also amended by the *Canada Shipping Act, 2001*. Three other references to the *Canada Shipping Act* in the Act (in sections 5.1, 5.2 and 18.1 of the Act), and two in CEPA (sections 125(6) and 216.1), will be updated by clauses 45, 46, 48, 50 and 51.

Clause 47 will provide, on the later of the dates on which the bill and the *Public Service Modernization Act* come into force, that section 5.3(1)(a) of the English version of the *Migratory Birds Convention Act, 1994* be amended, for consistency, by a terminological change that affects only that version of the statute. The words “any employee of the public service of Canada” will be replaced by the words “any employee of the federal public administration.”

D. Coming Into Force

Clause 52 provides that, other than clauses 43 to 51, the bill comes into force on a day or days fixed by order of the Governor in Council. Clauses 43 to 51 are the coordinating amendments, and they set out their own timing for coming into force.

COMMENTARY

Bill C-15 has drawn a good deal of support from Members of Parliament from all parties, and from others outside Parliament. Many have expressed the hope that the legislation can be put in place and enforced quickly and effectively. There has been widespread concern about birds oiled at sea for several years. Even a small amount of oil can destroy the insulation and buoyancy of a seabird's feathers, usually causing the death of the bird. Ever since Canada's legislative inadequacies with respect to prosecuting polluting ships were highlighted by the dropping of charges in the *Tecam Sea* case in April 2003, there has been agreement about the need to address the problem.

Even with general support for the aims of the bill, however, there may be some controversy about its details. One contentious issue is that, like many environmental protection statutes, Bill C-15 creates or amends a number of strict liability offences. In the prosecution of a strict liability offence, once the Crown has proved the prohibited conduct has occurred, the evidentiary burden shifts to the accused to prove that he or she acted with due diligence (took reasonable precautions) before the offence took place. The Crown is not required to prove the accused's intent to commit the offence (*mens rea*). Strict liability offences are found on a continuum of types of criminal offences extending from absolute liability offences at one end to full *mens rea* offences at the other. In the case of a strict liability offence, no mental element is required to be proven, nor is a defence provided to an accused based on any pre-offence conduct or intention. (In the case of a full *mens rea* offence, the Crown is put to the proof of a mental element, such as premeditation or deliberation.)

The use of this type of offence, while standard in environmental regulation across Canada, is often controversial, and some question about its application in the case of matters addressed by this bill was raised by Members of Parliament in Second Reading Debate in the House of Commons.⁽³⁾

(3) *House of Commons Debates*, 26 October 2004.

Another issue was raised by the Shipping Federation of Canada in reference to Bill C-34, the predecessor to Bill C-15. In May 2004, the Federation wrote to the House of Commons Standing Committee on Environment and Sustainable Development to express concerns about inter-agency cooperation within the federal government, and compliance with international shipping treaties. The Federation's letter also suggested that Bill C-34's provisions on imprisonment for members of ships' crews raise major human rights questions.⁽⁴⁾

A further key concern about Bill C-15 relates to the availability of resources to enforce the legislation once it is passed.

Finally, some argue that increasing fines in environmental protection statutes such as Bill C-15 will be less effective in deterring corporations from polluting if they are able to write off any fines levied against them for income tax purposes. Currently, the leading case on the deductibility of fines and penalties in Canada is *65302 British Columbia Ltd. v. The Queen*,⁽⁵⁾ where the deduction of an over-quota levy for egg-producing hens was allowed as an income tax deduction. The Supreme Court of Canada suggested in that case that "a breach could be so egregious or repulsive that the fine subsequently imposed could not be justified as being incurred for the purpose of producing income," and therefore should not be deductible for income tax purposes; but no guidance was given to indicate when that might occur.⁽⁶⁾

In September 2004, the Minister of Finance released draft amendments to the *Income Tax Act* to implement measures announced in the 2004 Budget, including the elimination of the deductibility of fines and penalties.⁽⁷⁾ The proposed changes include an amendment to section 67.5 of the *Income Tax Act* to preclude the deduction from income of any amount "that is a fine or penalty (other than a prescribed fine or penalty) imposed under a law of a country or of a political subdivision of a country (including a state, province or territory) by any person or public body that has authority to impose the fine or penalty."⁽⁸⁾

(4) Letter from Anne Legars, Director – Policy and Government Affairs, Shipping Federation of Canada, to the Clerk of the Committee, 7 May 2004.

(5) *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804 (25 November 1999), available at <http://www.canlii.org/ca/cas/scc/1999/1999scc75.html>.

(6) Canada Revenue Agency, Interpretation Bulletin IT-104R3, "Deductibility of Fines or Penalties," 9 August 2002, available at <http://www.cra-arc.gc.ca/E/pub/tp/it104r3/it104r3-e.html>.

(7) News release, "Minister of Finance Releases Draft Income Tax Amendments Implementing 2004 Measures," 16 September 2004, available at <http://www.fin.gc.ca/news04/04-051e.html>.

(8) Department of Finance Canada, "Legislative Proposals, Draft Regulations and Explanatory Notes Relating to Income Tax," September 2004.