

ENVIRONMENTAL & ENERGY LAW

FEDERAL GOVERNMENT INCREASES COVERAGE FOR NUCLEAR LIABILITY FROM \$75 MILLION TO \$1 BILLION AND IS POISED TO RATIFY INTERNATIONAL LIABILITY TREATY

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On January 30, 2014 Canada's Minister of Natural Resources introduced the *Energy Safety and Security Act (Bill C-22)*. Part 2 of the *Bill* is the long-anticipated new *Nuclear Liability and Compensation Act* <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6395896>

The Current Law

The current *Nuclear Liability Act (Can.) R.S.C. 1985 c.N-28* provides for absolute and exclusive liability of the nuclear operator for injury or property damage occasioned as a result of the fissionable or radioactive properties of nuclear material. Liability requires insurance and is capped at **\$75 million**. Beyond that amount and for heads of liability under the Act for which insurance is unavailable (coverage B under the Nuclear Energy Liability Policy Form), the federal government assumes the risk. For heads of liability which insurance won't cover but are covered under the Act, the Federal Government currently covers that risk pursuant to s.16 of the Act and the Reinsurance Agreement between the Minister of Energy and the Nuclear Insurance Association of Canada dated October 1, 1976. For amounts exceeding \$75 million the federal government does have a discretion not to compensate victims (see s.27), however as Ontario Court Judge Blenus Wright observed in *Energy Probe v. Canada 17 O.R. (3d)717*, it "would be political suicide for the federal government not to pay reasonable amounts of compensation beyond \$75 million..."

What's Changing

The new *Bill* brings Canada's nuclear liability compensation in line with compensation under international conventions and more specifically integrates the current nuclear liability regime with the Convention on Supplementary Compensation (CSC) <http://www.iaea.org/Publications/Documents/Conventions/supcomp.html> which the United States has already ratified. Liability coverage will increase to **\$1 billion**. Nuclear operators can now cover up to 50% of their liability by satisfactory financial security other than traditional insurance. Heads of damage now covered include:

- Psychological trauma associated with bodily injury.
- Economic loss associated with bodily injury or property damage.
- Costs of the loss of use of property, including wages. Costs resulting from a failure of a nuclear installation to provide electricity if a nuclear incident occurs at that installation are not compensable.

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- Costs associated with preventative measures recommended by a competent authority acting under a nuclear emergency scheme; These costs include the costs and economic loss — including lost wages, arising from the loss of use of property; For example, if a major highway were shut down and employees could not access a job site, the economic loss to both employer and employee would be eligible for compensation. Similarly if residences or businesses were evacuated, the economic loss would be recoverable. Federal, provincial and municipal authorities and their agencies are not however, to be compensated for nuclear emergency schemes which they establish or implement. These same eligible costs are also eligible for compensation when they are incurred in response to an emergency scheme established under the laws of another country which has ratified the CSC and a competent authority acting under that scheme has recommended emergency measures because of grave and imminent danger of damage.
- Reasonable costs of environmental remediation measures ordered by a competent authority including an authority of a country which has ratified the CSC.

The limitation period on bringing claims in relation to bodily injury has now been extended from 10 years to 30 years. This primarily addresses the international recognition of a longer latency period for cancer and one which insurers have been reluctant to cover.

Cross-Border Transportation of Nuclear Material

Under the existing law there was some uncertainty as to whether loss caused by low and intermediate level radioactive waste was covered. This was of particular concern in transportation since waste shipments to off-site storage facilities in Canada are a regular occurrence and processing such waste in other countries has become more popular as it has become more economic. The Minister of Natural Resources in a letter dated December 17, 2010 to the Nuclear Insurance Association of Canada reassured the nuclear industry the Act did cover such waste in transit. The new Act removes any doubt on this point. The new Act incorporates the main principles of the CSC with respect to liability during the transport of all nuclear material including spent fuel.

Nuclear operators are solely liable for damage caused by ionizing radiation emitted from nuclear material within Canada or another CSC country, or their exclusive economic zones (EEZS), during shipments from the operator's installation to a person in non - CSC countries and also for shipments to the operator's installation when the shipment from persons in non-CSC countries is with the consent of the operator.

Nuclear operators are also solely liable for damage caused within CSC countries or within their EEZS by ionizing radiation emitted from nuclear material transported from the operator's installation until the intended recipient in that country takes charge of the material and when the material is transported to the operator, after the operator takes charge of the material. Like the CSC, the new Act does however, allow the contract between the consignor or consignee to specify a different assumption of liability.

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With respect to damage caused within Canada or Canada's EEZ, when the operator is the consignee from a CSC country, liability of the operator would only arise after the operator takes charge of the material. This is to be distinguished from the case where the operator consents to a consignment from a non-CSC country when liability within Canada or its EEZ would arise from the moment the material is loaded on the means of transport by which it is to be carried from that country to Canada.

Canada's Ratification of the CSC

Article XVIII of the CSC makes ratification dependent upon a declaration by Canada that its national law complies with the provisions of the Annex to the CSC. Ratification of the CSC is important for the nuclear industry in Canada. Canada shares a border with the United States and many of the Canadian nuclear industry suppliers and contractors are American or have assets in the United States. Currently, if there were a nuclear incident at a Canadian nuclear facility with impacts in the U.S., these suppliers or contractors would be exposed to lawsuits both in the U.S. and Canada. The absolute and exclusive liability of the operators under Canadian law would not extend to or bind an American court. The American liability law-*Price Anderson Amendments to s.170 of the 1954 Atomic Energy Act*, doesn't apply to a Canadian incident. International waste management and the export of nuclear technology also calls for greater certainty and consistency of liability between jurisdictions. The CSC squarely addresses this challenge in Article XIII which provides that with few exceptions, jurisdiction over actions concerning nuclear damage from a nuclear incident, lies only with the courts of the CSC country within which the nuclear incident occurs.