

# APPLYING THE NAIROBI INTERNATIONAL CONVENTION IN CANADA: THE WRECKED, ABANDONED AND HAZARDOUS VESSELS ACT (CANADA)

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On April 30, 2019, Canada acceded to the *International Convention on the Removal of Wrecks, 2007* (the “**Convention**”) which will come into force in Canada under the *Wrecked, Abandoned and Hazardous Vessels Act* (the “**Act**”) on July 30, 2019. This also corresponds with the Government of Canada’s \$1.5-billion Oceans Protection Plan, which aims to preserve and restore marine ecosystems vulnerable to increased marine shipping and development. The Convention seeks to curb the serious problems caused by hazardous wrecks for coastal states and the marine environment generally. The adoption of the Convention into Canadian law makes shipowners financially liable and requires them to take out insurance or provide other financial security to cover the costs of wreck removal.

## **Wrecked, Abandoned and Hazardous Vessels Act**

The purpose of Act is to promote the protection of the public, of the environment, including coastlines and shorelines, and of infrastructure by, among other things, regulating wrecks and vessels posing hazards, prohibiting vessel abandonment, and recognizing the responsibility and liability of owners for their vessels. The Act applies to (1) all vessels in Canadian waters or in the exclusive economic zone of Canada, (2) Canadian vessels wherever they are, and (3) wrecks within Canada, its territorial sea, and exclusive economic zone that are the result of a maritime casualty. A “wreck” is defined as “a vessel, or part of a vessel, that is sunk, partially sunk, adrift, stranded or grounded, including on the shore; or equipment, stores, cargo or any other thing that is or was on board a vessel and that is sunk, partially sunk, adrift, stranded or grounded, including on the shore”.

## **Strict Liability**

The key implications of the Act are that vessel owners will be subject to strict liability for hazardous wrecks, with certain owners being required to hold wreck insurance. In doing so, the legislation seeks to minimize the harm wrecks cause to “marine safety, navigation, property, communities, and the environment”. Hazardous wrecks are defined under the Convention as those that may result in “major harmful consequences to the marine environment, or damage to the coastline” or marine interests (such as fisheries and tourism).

The initial burden for wreck removal is on the vessel owner. Under section 21(1) of the Act, if the Minister of Fisheries and Oceans (the “Minister”) deems the wreck (i.e. the vessel that was involved in the maritime casualty that resulted in the wreck) to pose hazard, he or she may direct the owner of the vessel to remove the wreck. If an owner fails to do so within the specified time, or cannot be contacted, the Minister will be permitted to take any action he or she considers proportionate to mark or remove the wreck. Further, under sections 30, 32 and 34 of the Act, vessel owners are prohibited from stranding, abandoning, or sinking any dilapidated vessels. Doing so will again permit the Minister to take any required measures to remove the hazardous wreck.

The owner of a hazardous wreck will be strictly liable for any costs incurred in the wreck removal process by the Minister. Exceptions to strict liability include wrecks resulting from war, natural phenomenon, a damage-intending third party’s sole act or omission, or wrongful acts or omissions by the government or navigational authorities.

### **Insurance and Certification**

When the Act comes into force on July 30, 2019, owners of Canadian registered vessels that are over 300 gross tons will be required to carry insurance for wreck removal. This insurance must allow for direct action against the insurer and be up to the limits of liability that apply to the particular ship in accordance with the *Marine Liability Act* (Canada). Alternatively, a vessel owner may demonstrate that it has other financial security arrangements to cover the costs of “locating, marking and removing” the wreck.

In addition, vessel owners will also be required to hold and carry a Wreck Removal Convention Certificate (the “**Certificate**”) evidencing proof of insurance (or another form of financial security as noted above). Owners must have a Certificate for each vessel that meets the mandatory insurance criteria and must produce it upon request. In order to apply for a Certificate, the vessel owner must provide to Transport Canada (1) evidence of insurance (i.e. a blue card), and (2) a completed application form.

Foreign-registered vessels over 300 gross tons calling at Canadian ports and terminals will need to show a certificate issued by a state party to the Convention. A foreign vessel registered in a non-state party to the Convention that does not already have a Certificate may submit an application to Transport Canada.

Such vessels not carrying a Certificate will be prohibited from operating in Canada (if a Canadian vessel) or entering or leaving a port in Canada or its exclusive economic zone. Failure to obtain a Certificate may result in an enforcement action, including the detention of the vessel and fines.

Shipowners should begin the process of reviewing their insurance documents to ensure they will be compliant with the new insurance and certification requirements.

by Joanna Dawson

**A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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