"RECENT DEVELOPMENTS IN INTERNATIONAL ENVIRONMENTAL LAW: THE IMPACT ON CANADIAN POLICY AND LEGISLATION"

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by

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West Coast Oil Ports Inquiry

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ABSTRACT

From a Canadian perspective, the existing law of the sea relating to marine pollution is no longer adequate, in light of the problems created by modern technology, to ensure preservation of the marine environment. At the Law of the Sea Conference, Canada has been pressing for broader coastal state powers and has made considerable progress. The Informal Composite Negotiating Text proposed that flag states, coastal states, and port states will exercise jurisdictions in respect to vessel source pollution. Part XX of the Canada Shipping Act and the regulations are the main body of Canadian anti-pollution laws. Canada is concerned about the prospect of increased oil tanker traffic in the Strait of Juan de Fuca and is working with the United States in a number of ways to minimize the risk. One of these is the voluntary vessel traffic management system in the Strait of Juan de Fuca. Discussions relating to oil spill liability and compensation have led to special provisions in the Trans-Alaska Pipeline Authorization Act to compensate Canadian residents and are continuing. Appendices detail Canada's experience enforcing the 1954 Oil Pollution Convention against foreign flag ships.

The Maritime Pollution Claims Fund is established by the Canada Shipping Act, Part XX. The owner of a ship carrying more than 1,000 tons of oil is liable without proof of fault or negligence for the cost of authorized oil spill clean-up action and all actual loss or damage incurred in Canada. The shipowner is entitled, where the incident arises without his fault or privity, to limit his liability to the lesser of about $160.00 for each ton of the ship's tonnage or $16,800.00. That portion of a claim in excess of this amount is recoverable from the Fund, as are a fisherman's net claim for loss of income not otherwise recoverable at law and a claim based on a discharge attributed to a ship which cannot be identified after reasonable efforts to do so. Experience with the Fund has shown that it has difficulty obtaining reimbursement from ship owning companies incorporated in flag of convenience countries. An appendix lists cases where the Fund is unable to make payments and recommendations for change in the legislation that applies to the Fund.

RÉSUMÉ

Dans une optique canadienne, les dispositions de l'actuelle Loi de la mer se rapportant à la pollution marine ne sont plus adéquates. Elles ne sauraient préserver l'environnement marin des nouveaux dangers nés de certaines techniques de pointe. A la Conférence sur le droit de la mer, le Canada a fait pression pour accroître les pouvoirs des états maritimes et a fait progresser le débat de façon notable. Le document de travail non officiel proposait que les nations navales, maritimes et portuaires exercent leur compétence sur la pollution provenant des navires. La section XX de la Loi sur la marine marchande au Canada et les règlements qui en découlent constituent la base juridique de la lutte contre la pollution au Canada. Notre pays s'inquiète de voir s'accroître le trafic des pétroliers dans le détroit Juan-de-Fuca et collabore avec les États-Unis pour réduire les risques au minimum. L'un des moyens envisagés est le système de régulation volontaire du trafic maritime dans le détroit. Les entretiens sur la responsabilité des déversements éventuels et sur les indemnisations qu'ils entraîneraient se reflètent dans certaines dispositions du Trans-Alaska Pipeline Authorization Act, qui prévoit d'indemniser les citoyens canadiens. D'ailleurs, les entretiens se poursuivent. Les annexes donnent des précisions sur l'expérience du Canada à appliquer la convention sur la pollution pétrolière de 1954 aux navires étrangers.

La section XX de la Loi sur la marine marchande au Canada institue un fonds d'imdemnisation pour les dommages dus à la pollution maritime. Les armateurs de navires transportant plus de mille tonnes de pétrole sont responsables, sans qu'il soit nécessaire d'établir une preuve de faute ou de négligence, des frais de toute opération autorisée de nettoyage, ainsi que de toutes les pertes et dommages effectivement subis au Canada. Lorsqu'un accident se produit à l'insu de l'armateur ou sans qu'il en soit responsable, il peut limiter sa responsabilité au moindre de $160.00 par tonne de cargaison ou $16,800.00 au total. La portion de la réclamation qui dépasse ce montant peut être compensée par le fonds. Il en est

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ainsi de la réclamation nette d'un pêcheur pour le manque à gagner qu'il ne peut réclamer en vertu de la loi ou d'une réclamation résultant d'un déversement que des tentatives raisonnables n'arrivent pas à attribuer à un navire défini. L'expérience a démontré que le fonds a de la difficulté à se faire rembourser des dommages par les armateurs enregistrés dans les pays qui les autorisent à battre pavillon de complaisance.

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WEST COAST OIL PORTS INQUIRY

In March, 1977, Dr. Andrew R. Thompson was commissioned by the Government of Canada to inquire into the environmental, social and navigational safety aspects of a proposed oil port at Kitimat, B.C. and the broader Canadian concerns and issues related to west coast oil tanker traffic.

The Inquiry hearings were adjourned in November, 1977, because there was then no active application in Canada for a west coast oil port. The Commissioner summed up his findings to that point and presented his Statement of Proceedings to the Minister of Fisheries and the Environment and the Minister of Transport on February 23rd, 1978.

The Ministers subsequently announced that "the Federal Government sees no need for a west coast oil port now or in the foreseeable future and doubts that the benefits of establishing such a port would be sufficient to offset the danger of risking a major oil spill". Consequently the Inquiry did not continue.

This report contains material presented to the Inquiry at its hearings and subsequently by letter which is judged to be of general interest. The assistance of Mr. Rod Snow in preparing this material for publication is gratefully acknowledged.

This report was prepared under contract and does not necessarily represent the views and policies of the Department.

J.M. Millen, Editor

INTRODUCTION

The purpose of this presentation is to outline from the Canadian perspective recent developments with respect to international environmental law and their impact on Canadian policy and legislation. The matters reviewed encompass multilateral negotiations at the Third United Nations Conference on the Law of the Sea and in the Intergovernmental Maritime Consultative Organization and bilateral negotiations between Canada and the United States.

I. MARINE POLLUTION: LAW OF THE SEA TRENDS

The existing law of the sea rests on two traditional legal concepts, that of the high seas where freedom of the seas prevails, and that of the territorial sea which is under the sovereignty of the coastal state subject to the right of innocent passage by foreign vessels. On the high seas, traditionally, ships have been subject exclusively to the jurisdiction of the flag state. These basic principles have until recent years provided the basis for coastal state and flag state powers to set and enforce rules and regulations with respect to the preservation of the marine environment. It has become evident, however, that this system of law based on a firm doctrinal attachment to the principle of freedom of the high seas and restricted coastal state rights is no longer adequate, in light of the problems created by modern technology, to ensure the preservation of the marine environment.

Canada, from the outset of the Law of the Sea Conference, has taken the initiative in pressing for the incorporation in a law of the sea convention of rules, global in scope, which would lay down basic rights and duties of all states for the protection of the marine environment. Such rules would include recognition, heretofore uncodified, of the

basic obligation of all states to protect and preserve the marine environment, the zonal approach to the prevention and control of vessel-source pollution and, most importantly, a functional sharing of jurisdiction among flag, coastal and port states in place of the traditional rule of exclusive flag state sovereignty beyond the territorial sea. The major maritime powers have strongly resisted any expanded role for coastal states in the enforcement of anti-pollution regulations on the grounds that any limitation of flag state jurisdiction over vessels of their registry in areas beyond the territorial seas of other states, will lead to an erosion of high seas navigational rights. Conversely, however, coastal states, including Canada, have pointed out the inadequacy of the existing international legal rules in light of the clear evidence provided by the proliferation of oil spill incidents in recent years that flag state responsibilities have not kept pace with the doctrine of absolute flag state jurisdiction. Since coastal states invariably suffered the consequences of major oil spills and bore the main burden of clean-up operations, we considered it logical that they should have at least an equal part to play in ensuring adequate standards and a share in the enforcement of these standards. We therefore submitted comprehensive proposals providing for broad coastal state powers to enforce international environmental rules within a 200 mile economic zone and to apply national standards to foreign vessels in the territorial sea and in areas beyond where unique ecological circumstances, such as in the Canadian Arctic, so warranted.

Considerable progess has been achieved on this question at the Conference. Negotiations at the most recent session confirmed growing support among states in favour of a global approach to the protection of the marine

environment, including a general obligation to prevent, reduce and control marine pollution from any source, and an enhanced role for coastal and port states, concurrently with flag states, in enforcing anti-pollution rules and standards. These principles are clearly embodied in the Informal Composite Negotiating Text which was issued by the Conference President at the conclusion of the sixth session in July. The Composite Text, which represents a major step forward in the negotiating process at the Conference, will provide the basis for decisions leading eventually to the adoption of a draft convention, provided parallel progress is made in resolving other outstanding issues, in particular the international system of deep seabed mining, the precise definition of the outer edge of the continental margin and the rights of landlocked and geographically disadvantaged states.

The Composite Text provides that three categories of states will exercise jurisdiction in respect of vessel-source pollution: flag states, coastal states and port states. The draft text contains the following salient provisions:

A. Flag States

States are obligated to establish laws and regulations for the prevention, reduction and control of pollution of the marine environment applicable to vessels flying their flag; such laws should be at least as effective as generally accepted international rules and standards. The draft text then goes on to specify the enforcement measures which a flag state is obligated to apply to vessels of its registry; such measures to include obligations to:

(a) prevent any flag vessel not in compliance with international rules from sailing;

(b) ensure that vessels of their registry carry on board certificates of seaworthiness as required by international rules;

(c) conduct an immediate investigation of any violation of international regulations by its vessels and to bring proceedings without delay in respect of alleged violations of pollution prevention rules irrespective of where the violation by its vessel has occurred.

Flag states will have the right within a prescribed time frame to preempt proceedings to impose penalties begun in a coastal state in respect of pollution proceedings against a vessel of its registry except where the proceedings relate to a case of major damage to the coastal state or the flag state in question has repeatedly disregarded its obligations to enforce effectively applicable international rules. This right of preemption would be without prejudice to the right to institute civil proceedings in respect of any claim for loss or damage resulting from pollution of the marine environment.

B. Coastal States

Coastal states may establish and enforce national laws regulating ship traffic in the territorial sea including the right of physical inspection and, where necessary, arrest of a polluting vessel. However, with respect to design, construction, manning and equipment of foreign vessels, coastal states would be limited to enforcing

only international rules. While unhappy with this constraint on the exercise of coastal state sovereignty, Canada was at least successful in obtaining the deletion of an even more restrictively worded text. In the economic zone, a coastal state will have the power to request information from a vessel where there are clear grounds for believing that it has violated applicable international rules or national laws established in conformity with such rules. When such violation has actually resulted in substantial discharge and significant pollution, the coastal state may undertake inspection of the vessel in the 200 mile zone if that vessel has refused to give information or if the information is manifestly at variance with the factual situation. Finally, where there are clear grounds for believing that a vessel has committed a flagrant or gross violation of applicable international rules resulting in discharge causing major pollution damage or threat of such 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 cause proceedings to be taken against the vessel. Canada had sought unsuccessfully to strengthen the enforcement rules, particularly with respect to the investigatory powers of a coastal state. Corresponding efforts by flag states to weaken the text were equally unsuccessful.

The Composite Text incorporates a provision which recognizes the right of a coastal state to establish special national laws to preserve and protect the marine environment in ice-covered areas out to 200 miles. This fulfills a key Canadian objective at the Conference and it comes as considerable satisfaction that legislation adopted in 1970 to protect our Arctic environment (Arctic Waters Pollution Prevention Act, Chapter 2 (1st Suppl.) RSC 1970),

which attracted so much criticism from major maritime powers has now obtained broad international acceptance.

C. Port States

The new concept of universal port state jurisdiction is incorporated in the text. This will mean that a port state may bring proceedings against a vessel voluntarily in its port in respect of a discharge violation occurring anywhere on the high seas. The port state will also be empowered to bring proceedings against a foreign vessel in respect of discharge violations in the internal waters, territorial sea or economic zone of another state upon the request of that state or the flag state.

The marine pollution provisions in the Composite Text, which are almost certain to be among the central elements of any draft law of the sea convention, constitute a major step forward in the development of the legal order of the oceans. These provisions have not been finally agreed upon and do not have legal force. And states, for the most part, will be inhibited from extending their pollution jurisdiction until the Conference has at least taken more definitive decisions on the Composite Text. But it is difficult to conceive how the traditional rule of absolute flag state jurisdiction can prevail much longer in light of the developments at the Law of the Sea Conference, particularly the growing recognition of the right of a coastal state to play a central and expanded role in the protection of the marine environment.

In light of the objectives which Canada sought to achieve at the outset of the LOS negotiations, the Composite Text provisions on vessel-source pollution contain many positive features. However, the provisons dealing specifically

with coastal state regulatory powers in the territorial sea and with enforcement rights out to 200 miles will have to be examined carefully in the context of Canadian requirements and existing legislation.

The U.N. Conference on the Law of the Sea reconvenes for a seventh session at Geneva in March, 1978. It is hoped that on the basis of the Composite Text substantial progress will be made towards achieving a consensus for the adoption of a draft convention.

II. MARINE POLLUTION: INTERNATIONAL AND CANADIAN CONTROLS

Under existing international law, different rules apply as regards coastal state powers to regulate foreign shipping within internal waters, within the 12 mile territorial sea and within the proposed new 200 mile economic zone under discussion at the Law of the Sea Conference.

Within internal waters, such as the Douglas Channel leading into Kitimat, the Strait of Juan de Fuca and the Strait of Georgia, the coastal state is recognized as having unrestricted sovereign rights to enact and enforce controls over shipping within such waters. Within the 12 mile territorial sea, the coastal state is entitled to exercise sovereignty subject to certain rules of international law, including a right of ships of all states to innocent passage. Under the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, innocent passage is defined as "innocent so long as it is not prejudicial to the peace, good order or security of the coastal state" (Article 14(4)). Canada asserts the view, not necessarily shared by the major maritime powers, that the doctrine of innocent passage would allow the coastal state to suspend the passage of a foreign vessel which might result in pollution of its environment. Within the proposed 200 mile economic zone (beyond the 12 mile territorial sea), there is as yet no international agreement on the nature and extent of coastal state powers for purposes of pollution control. The Law of the Sea Conference has under discussion the extent to which a coastal state may apply and enforce internationally agreed anti-pollution standards in a 200 mile economic zone. The trend of the negotiations at the Conference on this matter is described in the previous section, including

the concerns of maritime powers on the one hand and coastal state, including Canada, on the other.

At the present time, the main body of Canadian anti-pollution laws and regulations are to be found under Part XX of the Canada Shipping Act. Under Part XX, regulations have been enacted dealing with such matters as: the discharge of pollutants and the amount of pollutants permitted on board; the use of navigational aids; the methods for loading and unloading pollutants; the methods of retention of oil and other wastes; the number of personnel and the prevailing procedures and practices to be followed by persons on board in order to ensure safe navigation. Civil liability is imposed on the owner of the vessel and the Act creates a Maritime Pollution Claims Fund to reimburse those persons suffering loss or damage as a result of pollution. In addition, a pollution prevention officer is empowered by the Canada Shipping Act to require any ship to provide information concerning the condition of the ship and may go on board such ship to determine whether it complies with Canadian pollution laws. He may also order the ship to leave or divert it to an alternative destination if he is satisfied such action is justified to prevent discharge of pollutants.

The regulations under the Canada Shipping Act pertaining to navigational standards and pollution prevention and control matters take account of internationally agreed rules and standards, including those which are in force as international conventions and to which Canada is a party. These conventions and their provisions are described in a separate presentation dealing with the Intergovernmental Maritime Consultative Organization.

To ensure that all ships entering and navigating in Canadian waters are in compliance with the Canada Shipping Act and regulations, the Canadian Coast Guard has instituted surveillance, inspection and prosecution procedures. Aerial surveillance is carried out by Department of National Defence aircraft on behalf of the Coast Guard and information regarding ships entering Canadian waters and bound for Canadian ports, as obtained by vessel traffic management systems, is utilized.

The Canada Shipping Act regulations apply in Canadian waters out to the edge of our 12 mile territorial sea, in the areas where vessel-source pollution could pose the greatest threat to our marine environment and coastline. These waters include:

- internal waters such as the Strait of Juan de Fuca;

- exclusive fishing zones in effect prior to January 1, 1977, including Queen Charlotte Sound, Hecate Strait, and Dixon Entrance;

- the 12 mile territorial sea.

These regulations also apply to the new 200 mile fishing zones which were enacted on January 1, 1977, (Zone 4 on the east coast and Zone 5 on the west coast). However, the Canadian authorities have under review the question of enforcing regulations under Part XX of the Canada Shipping Act in the new fishing zones, taking into account developments at the Law of the Sea Conference and Canada's concern for the protection of the marine environment and its resources in these areas. Amendments to the Canada Shipping Act are under preparation with a view to providing more flexibility in its application in various zones of

Canadian jurisdiction and to strengthen the powers of pollution prevention officers with respect to their ability to board and inspect vessels bound to or from Canadian ports or at places in Canada.

Internationally accepted standards, as embodied in Canadian regulations, apply within the 200 mile fishing zones. For example, in accordance with the provisions of the 1954 Convention for the Prevention of Pollution of the Sea by Oil, as amended (to which Canada is a party), regulations under the Canada Shipping Act pertaining to the discharge of oil by tankers and other ships, the maintenance of oil record books on board ship and specified cargo tank sizes continue to apply. Under the provisions of the Convention, violations by foreign ships in the extended fishing zones are reported to the flag state for appropriate enforcement action.

In addition, Canada continues to reserve its right under customary and codified international law to take action as may be necessary in the new fishing zones and beyond to prevent, mitigate or eliminate grave and imminent danger of pollution damage to our marine resources, coastline or related interests arising from vessel-source pollution or or threat of pollution. In 1969 a conference under the auspices of the IMCO adopted the Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (the same Conference adopted a Civil Liability Convention, see section on Liability and Compensation). Canada abstained on the final vote adopting the Convention on the grounds that customary law already accorded to a coastal state the right to intervene in cases of maritime casualties to protect its marine environment and the Convention failed to adequately reflect coastal state rights in this regard.

III. CANADA/U.S.A. COOPERATION ON VESSEL TRAFFIC MANAGEMENT IN THE JUAN DE FUCA AREA

Canada has expressed strong concern over the prospect of increased tanker traffic carrying Alaskan oil in the Strait of Juan de Fuca, a concern which has been conveyed to the U.S.A. authorities in a number of ways, including a resolution passed unanimously by the House of Commons on May 15, 1972.

Canada is not, however, in a position to take unilateral action to prevent such traffic since tankers could, if necessary, proceed from Alaska to U.S.A. ports through the Strait of Juan de Fuca without entering Canadian waters. The Canadian authorities accordingly initiated discussions with the U.S.A. authorities, including exchanges of information on possible alternative ports, with a view to ensuring that all possible measures are taken to enhance safety of navigation and to minimize environmental risks. The discussions have included:

- A Canada/U.S.A. agreement on an oil spill clean-up contingency plan for the Juan de Fuca area was concluded in 1975 under the umbrella agreement of June 19, 1974 (C.T.S. 1974, No. 22).
- A Canada/U.S.A. agreement on cooperative scientific research programs was concluded in 1975 with a view to better understanding of environmental conditions in the area.
- Liability and compensation arrangements.
- A vessel traffic management system in the Strait of Juan de Fuca.

A voluntary vessel traffic management system was instituted in the waters of the Strait of Juan de Fuca in August 1974 as part of a series of coordinated and parallel measures taken by the Canadian and U.S.A. Coast Guards. In March

1975, the two Coast Guards instituted a voluntary traffic separation scheme providing for incoming traffic to use the south (U.S.A.) side of the Strait and outbound traffic to exit through the north (Canadian) waters of the Strait.

The vessel traffic management system comprises, essentially, a vessel movement reporting system and a traffic separation scheme. The traffic control centres provide timely information and advice to mariners to minimize the risk of collision and grounding. Traffic controllers assess the ability of a vessel to navigate safely through the waters prior to entering the management zone, monitor and regulate vessel movements within the zone, and assist vessels in proceeding to and from their intended destinations in a safe and expeditious manner by providing information on such matters as navigation aids, traffic density, local weather conditions and the status of anchorages. Vessels participating in the scheme communicate with the centres on a common VHF radio frequency. As vessels enter the zone or depart from ports within the zone, they are requested to provide the traffic control centre with information, including the name of the vessel, location, destination, tonnage, cargo, any defects in its propulsion or steering equipment that may affect manoeuverability. Through informal inter-agency cooperation, the two Coast Guards have established three vessel traffic management sectors managed, respectively, by the Tofino Traffic Centre, the Seattle Traffic Centre and the Vancouver Traffic Centre. In support of this system, the two Coast Guards have progressively installed a network of communications and radar surveillance equipment. It is expected that Canada will have installed such equipment in the order of $18 million by early 1978. Plans for similar improvements have been announced by the U.S.A. authorities.

The traffic separation scheme consists of a network of one-way traffic lanes with separation zones in between and precautionary areas. These areas have been well publicized in notices to mariners and are depicted on all current charts of the area. In the Strait, the traffic lanes are at least 1,000 yards wide, with separation zones at least 500 yards wide.

Between 85 and 95 percent of the ships using the Strait comply with the reporting and advisory system and with the recommended routing scheme but there have been several instances of non-compliance by foreign ships, creating serious navigational hazards. The two Governments have accordingly agreed to develop a comprehensive mandatory vessel traffic management system. A draft agreement to this effect is currently under discussion between officials of the two Governments. A number of meetings have been held in Ottawa and Washington. Canada is represented by an interdepartmental team of officials drawn from the Department of Transport, the Canadian Coast Guard, the Department of Justice and the Department of National Defence, chaired by an official of the Department of External Affairs. The U.S.A. side has been represented by officials of counterpart agencies, chaired by the State Department. Federal officials have consulted with the B.C. authorities from time to time on these and other ongoing discussions.

The proposed agreement would require ships to comply with clearance procedures and directions from the traffic control centres which would carry out functions analogous to those of air traffic control centres. As in the case of the Canada/U.S.A. agreement with respect to aircraft control near the common boundary (C.T.S. 1963, No.20), it is considered desirable for Canadian traffic centres to

exercise authority over vessels in certain U.S.A. waters and for the U.S.A. traffic centre to exercise authority over vessels in certain Canadian waters. Each Government would accept responsibility for enforcing compliance with vessel traffic management regulations in waters under its own jurisdiction. At the same time, each Government would undertake to develop vessel traffic management regulations which will be compatible, to the extent possible, with those of the other. A number of legal and jurisdictional problems are being addressed in the current discussions. Before the proposed agreement can be brought fully into effect, the U.S.A. will require implementing legislation and appropriate amendments to the U.S.A. Ports and Waterways Act are currently before Congress. (Canadian authorities already have the necessary legislative authority under the Canada Shipping Act).

Both sides are re-examining these problems and it is hoped that early agreement can be reached.

IV. LIABILITY AND COMPENSATION

Canada/U.S.A. consultations have been held over an extended period with a view to ensuring prompt and adequate compensation for damage caused in Canada from pollution from tankers transporting oil from the Trans-Alaska pipeline to U.S.A. west coast ports. There are no bilateral or multilateral agreements in force as between Canada and the U.S.A. providing for liability and compensation to Canadian residents in the event of an oil spill. The rights and obligations of the two Governments are governed by general principles of international law, which are in a process of evolution. Specific remedies and procedures are to be found, in the first instance, under domestic laws of the two countries.

In the course of these consultations, Canada has taken the view that the transportation of Trans-Alaskan pipeline oil will create a significant risk of injury to Canada and Canadian residents with no corresponding benefits. It is, accordingly, a special situation subject to special considerations calling for the establishment by the U.S.A. of procedures to ensure prompt and adequate compensation for any damages incurred in Canada.

By passage of the Trans-Alaska Pipeline Authorization Act (TAPA Act), the U.S.A. has recognized these special considerations and has created a specific regime of liability and compensation for victims of oil pollution on a basis of strict liability without regard to fault. The Act provides for a fund of $100 million for payment of claims "for all damages, including clean-up costs, sustained by any person or entity, public or private, including residents of Canada, as the result of discharges of oil from such vessel". (Section 204(c)). (For detailed

and authoritative information on the provisions of this Act, reference should be made to the Act (Public Law 93-153 and regulations adopted by the U.S.A. authorities pursuant to the Act).

A bill is currently before the U.S.A. Congress for enactment of a "Comprehensive Oil Pollution Liability and Compensation Act" (COPLCA Act). The new act, which would supersede and in some respects consolidate the provisions of the TAPA Act within a liability regime applicable throughout U.S.A. waters, provides for the establishment of a $200 million fund. The bill has gone through several versions and changes in the course of consideration by Congress. It has also been the subject of detailed discussions between Canada and U.S.A. officials and it is noted that a number of Canadian comments and concerns have been taken into account by the U.S.A. authorities. Of major concern for Canada in the current COPLCA bill has been a provision in a recent version of the bill which, if enacted, would make substantive changes to the compensation arrangements presently available to Canadian claimants under the TAPA Act. This provision would make the assertion of a claim by a Canadian citizen under the COPLCA Act subject to a requirement of reciprocity, whereby it would have to be established that Canada provides a comparable remedy for U.S.A. claimants. Canada has expressed concern to the U.S.A. authorities about this provision and has reiterated the view that compensation for damages suffered by Canadian claimants as a result of a discharge of Trans-Alaska pipeline oil should not be made subject to reciprocity. The U.S.A. authorities have taken the position that existing Canadian access to the $100 million fund in respect of Alaskan oil should remain unimpaired and this position, along with Canadian concerns, have been conveyed to Congressional leaders.

Under Canadian law, the Canada Shipping Act (CSA) Part XX sets out provisions for liability and compensation for vessel-source pollution. The CSA applies to any discharge in Canadian waters caused by, or otherwise attributable to, a ship (regardless of nationality) that carried more than one thousand tons of oil (regardless of origin). Section 734 of the Act provides that the shipowner and the owner of the oil are jointly and severally liable for all damages and clean-up costs on a basis of strict liability. Any claimant in Canada could, therefore, have recourse to compensation under the CSA as a result of a discharge of Trans-Alaska pipeline oil in Canadian waters. The limit of liability of the shipowner in such cases would be 210 million gold francs or about $16.8 million (at eight cents to the franc), unless fault is attributable to the owner, in which case, liability is unlimited. Under Section 737 of the CSA, a Maritime Pollution Claims Fund (MPCF), which now amounts to $40 million, has been established to satisfy certain claims as specified in the Act.

Both the U.S.A. and Canada are examining possible revisons to the two international agreements which deal, although not entirely adequately, with liability and compensation for damages resulting from tanker spills: the 1969 Brussels Convention on Civil Liability for Oil Pollution Damage, and the 1971 Brussels Convention on the Establishment of an International Fund for Oil Pollution Damage. Taken together, these two conventions are designed to provide minimum international standards for compensation for vessel-source oil pollution damage. The 1969 Convention limits the liability of the shipowner to 210 million gold francs for each incident, the same limitation applicable under the Canada Shipping Act. The 1971 Convention which has not yet entered into force, establishes an International

Oil Pollution Compensation Fund to provide for compensation to a maximum of about $30 million. Considering the fact that damages and clean-up costs caused by the 120,000 ton "Torrey Canyon" disaster in 1967 were estimated to be in the order of $20 million, however, this figure may have to be revised in the near future if it is to cover damages by supertankers and the higher costs generated by inflation. (Among the most costly oil spills to date that have caused damage in Canadian waters are:

(1) The barge "Nepco 140" spill in the Thousand Islands area of the St. Lawrence in 1976 -- clean-up costs approximately $10 million;

(2) the "Arrow" spill in Chedabucto Bay in 1970 -- clean-up costs approximately $4 million; and

(3) the "Imperial Sarnia" spill in the St. Lawrence in 1974 -- clean-up costs approximately $2.4 million).

Until the inadequacies in these agreements have been removed, there is little likelihood that they will be ratified by Canada or the U.S.A.

EDITORIAL APPENDIX

CANADA'S EXPERIENCE WITH THE 1954 OIL POLLUTION CONVENTION
(Based on testimony of Erik Wang)

Perhaps I can give you statistics from a recent review we've conducted of the kind of response we've had from flag states in respect of vessels detected committing unlawful discharges off our coasts and I'll refrain from naming names to protect the innocent.

Our study covers a ten year period between 1967 and 1977. We have reported 80 violations committed by foreign flag vessels, flag vessels of states which are parties to the 1954 Convention. In 39 of these cases, or forty-eight per cent, there has been no reply to the Canadian notification to the flag state. This is the notification that we make through the Department of External Affairs via our Canadian diplomatic mission in the capital of the flag state concerned. No reply has been forthcoming often after several reminders and proddings.

In twenty-four cases, roughly thirty per cent of the total reported infractions during that period, replies were received, often after several months indicating that the alleged infraction had been investigated, but for various reasons no enforcement action was taken or no penalty was imposed. That's eighty per cent of the total. In the remaining incidents, seventeen incidents, about twenty per cent, we have received reports that the flag state concerned has imposed penalties but in many of these cases it's been very difficult for us to judge the adequacy of the penalties imposed.

For example, in some cases, the report we've received back has been to the effect that

> "Appropriate disciplinary action has been taken against the master and the engineer".

In some cases, we've received reports that there has been "a reprimand" for the engineer, who might have left a valve on, or whatever.

In other cases, we've been informed of actual fines being imposed. In many cases, in our view, these fines have been of a token nature in terms of the costs, operating costs and revenues generated by these vessels. We have had fines reported from various flag states in the order of $1,000.00; $2,000.00; $90.00.

There is one report of a substantial fine of $34,000.00, but that kind, that level of penalty is, I regret to say, only too rare.

I must add, in fairness to some flag states, that there is a problem of evidence. Certainly, this would be a problem in Canada. If a Canadian vessel were reported elsewhere in the world as having committed an infraction, there are certain rules of evidence which are needed to sustain a conviction in the Canadian court.

We take great pains to try and collect evidence which is as solid as we can make it, but it's clear that in many foreign jurisdictions, the evidence that we do collect, the glossy eight by ten photographs that we send, showing the oil slick, cannot stand up in the foreign court.

But all in all, it's an unsatisfactory situation, and it really only reinforces our determination to work towards a more equitable balance of responsibilities for enforcement. Not to deprive a flag state of its rights and responsibilities to take action vis-a-vis ships under its jurisdiction, but to complement that right and that responsibility by entrusting the port state and the coastal state with comparable powers.

APPENDIX A

REVIEW OF RECORDED VIOLATIONS OF 1954 OIL POLLUTION CONVENTION DURING 10 YEAR PERIOD 1967-1977

SUMMARY:

A.	No reply or record of reply from the Flag State	39	48.75%
B.	Investigation only to date	24	30.00%
C.	Investigation and conviction	17	21.25%
		80	100.00%

A. VIOLATION OF 1954 CONVENTION REPORTED BY CANADA: NO REPLY OR RECORD OF REPLY FROM FLAG STATE

COUNTRY	TOTAL
1. Liberia	10
2. USSR	9
3. Greece	8
4. Great Britain	4
5. Panama	2
6. Denmark	1
7. Ghana	1
8. Italy	1
9. U.S.A.	1
10. Norway	1
11. Poland	1
	39

B. INVESTIGATION ONLY:

COUNTRY		RESULT OF INVESTIGATION
Federal Republic of Germany	1.	No oil pumped overboard.
	2.	Investigation discontinued - lack of evidence.
Great Britain	1.	Claimed navigation error made by patrol plane - ship passing through irredescent waters.
	2.	Outcome unknown.

COUNTRY		RESULT OF INVESTIGATION
Great Britain	3.	Refused to prosecute on photographic evidence only.
	4.	Refusal to prosecute - lack of evidence.
	5.	Insufficient evidence to prosecute.
	6.	Under investigation.
Greece	1.	Investigation - no official report of conviction.
Italy	1.	Denial of liability.
India	1.	Investigation - no action taken.
Japan	1.	No evidence to support allegation.
Liberia	1.	Investigation - Master denied liability - no action taken.
Netherlands	1.	Change of ownership made prosecution impossible.
Norway	1.	Dismissed by court for lack of evidence.
	2.	No prosecution - pollution caused by hosing down oil pollution equipment.
	3.	Under investigation.
Poland	1.	Fish oil discharge - biodegradable.
Spain	1.	Investigation discontinued - lack of evidence.
	2.	Found to be rupture of tank - Lloyd's report on repairs.
U.S.A.	1.	Outcome unknown.
	2.	Outcome unknown.
USSR	1.	Claimed no violation took place.
	2.	Defective Machinery (Lloyd's Report).

TOTAL: 24

C. INVESTIGATION AND CONVICTION BY FLAG STATE:

Country		PENALTY
USSR	1.	Disciplinary action taken.
	2.	"Punished according to Soviet Law".
	3.	Commander's Rank Suspended for 12 months.
	4.	Commander's Rank Suspended for 12 months.
	5.	"Punished according to Soviet legislation".
Greece	1.	Master fined 60,000 ($2,000).
	2.	Master fined ($1,000 U.S.).
	3.	Vessel fined 1,130,000 Dr. ($34,000).
	4.	Vessel fined 8,000 Dr. ($200).
	5.	Vessel fined 30,000 Dr. ($885).
Norway	1.	Captain fined 800 Norwegian Crowns.
	2.	Engineer fined 1,000 Norwegian Crowns.
Poland	1.	"Disciplinary action taken against Master and Engineer".
	2.	Chief mechanic fined 3,000 zlotys ($90.00) and liable for court costs.
U.S.A.	1.	Reprimand for engineer.
	2.	Master convicted - licence suspended 3 months.
Great Britain	1.	Master fined £ 250; ship £ 2,500.

TOTAL: 17

D. CANADIAN NOTE - NOT MEMBERS OF CONVENTION:

COUNTRY		PENALTY
Brazil	1.	No reply.
	2.	Reply - shipping company informed.
Cyprus	1.	No reply.
	2.	No reply.
India	1.	No reply.
Pakistan	1.	No reply.
	2.	No reply.
Singapore	1.	Change of ownership - now registered in Tonga.
Uruquay	1.	No reply.
USSR	1.	No reply.
	2.	No reply.
	3.	Accident - repaired in Halifax.
Yugoslavia	1.	No reply.

TOTAL: 13

OIL POLLUTION INCIDENTS OFF CANADA'S COASTS
(August 1973 - May 1977)

No.	Date	Flag	Name of Vessel	Area of Violation	Summary of Evidence	Action Taken
1	Aug 73	USSR	SEVSK	Off Halifax, N.S. 23'*	CAF aircraft sighted; 7 photos	No reply
2	Sep 73	Italian	MARE PLACIDO	Off Nova Scotia 24'	CAF aircraft sighted; captain's and co-pilot's reports; 7 photos one-mile slick.	FLO-1246 Nov. 16/73. Italian authorities denied any wrong-doing, claiming ship was not in the position reported and in all likelihood was crossing an area already polluted despite the fact that the photos show the oil slick in the ship's wake) - "no evidence proving voluntary pollution of the area".
3	Sep 73	Greece	REGAL SUN	Off Nova Scotia Canadian territorial waters; outbound so as not possible to undertake investigation that might have led to prosecution under Oil Pollution Prevention Regulations.	CAF aircraft sighted; 11 photos; captain's and co-pilot's reports.	FLO-1276 Nov.23/73. Greek authorities reported vessel was fined U.S. $1,000.
4	Jul 73	Greece	POLEMIC COLOCOTRONIS	Gulf of St. Lawrence between Gaspe Coast and Anticosti Island, outbound etc.	CAF aircraft sighted; captain and co-pilot reports; 4 photos. slick 6600^{X} X 2 ship's widths.	No reply
5	Sep 73	USSR	AZOV	Gulf of St. Lawrence (Cabot Strait) Canadian pollution control zone; outbound, etc.	CAF aircraft sighted; captain's report, 7 photos; 1/2 mile slick one mile astern and on ship's MLA, smaller slicks between.	FLO-1328 Dec.4/73. Soviet authorities reported that those guilty of the violation were punished.
6	Jan 74	Pakistani	AL KULSUM	Off Nova Scotia 82'	CAF aircraft sighted; Slick 4 n.m., approx. one ship's width.	No reply

* denotes miles

OIL POLLUTION INCIDENTS OFF CANADA'S COASTS
(August 1973 - May 1977)

No.	Date	Flag	Name of Vessel	Area of Violation	Summary of Evidence	Action Taken
7	Jan 74	Cypriot	REIFENS	Off Yarmouth, N.S. 42'	CAF aircraft sighted; captain's and intelligence officer's reports; 10 photo prints. Slick 2 n.m. long, 2 ships' widths.	No reply
8	Mar 74	USSR	VERYLL	Off Nova Scotia 22'*	CAF aircraft sighted; to photos of effluence from port side discharges.	Incident occurred because of fault in equipment. Commander's rank suspended for 12 months. (10/75).
9	Jun 74	Greece	FILIA	Off Nova Scotia	CAF aircraft sighted; captain and 2 observers reported; photos not suitable for evidence (fog).	Fine US $3,000.
10	Jun 74	USSR	ANDROMEDA (Hydrographic)	Off Sable Island 15'	CAF aircraft sighted; captain and co-pilot reported; 3 photos. Circular slick 2 ships' widths in diameter.	Incident investigated; Soviet authorities repoted cause was defective machinery.
11	Jul 74	Polish	KASZALOT	Off Yarmouth, N.S. 49'	CAF aircraft sighted; captain and co-pilot reported; 3 photos. Slick 10 miles by 2 ships' widths.	Note from Polish Emb (30/4/75). Captain and chief mechanic penalized by disciplinary penalties.
12	Jul 74	FRG	ALSTER EXPRESS	Off Sable Island 23'	CAF aircraft sighted; captain and observer reported. Slick 3 miles by one ship's width.	FRG investigation determined that no oil-containing water had been pumped into the restricted zone.
13	Jul 74	Greece	NEIL ARMSTRONG	Off Sable Island 59'	CAF aircraft sighted; captain reported, 5 photo prints. Slick 3 miles by 3-1/2 ships' widths.	No reply
14	Jul 74	Norwegian	BINSHIP	Off Halifax, N.S. 33'	CAF aircraft sighted; reports. 4 photo prints.	Chief Engineer fined 800 Norwegian Kroners.

* denotes miles

No.	Date	Flag	Name of Vessel	Area of Violation	Summary of Evidence	Action Taken
15	Jul 74	USSR	ANTCHAR	Off Nova Scotia 67'	CAF aircraft sighted; captain, co-pilot and observer reported; 8 photos. Slick 4 miles by 60 yards.	Russian reply 10/3/75. Incident occurred because of faulty equipment. Commander's rank suspended for 12 months.
16	Sep 74	USSR	DEBREGEN	Off Newfoundland 58'*	CAF aircraft sighted; reports and photos.	No reply
17	Jul 73	Norway	STOVE TRADITION	Off Nova Scotia	CAF aircraft sighted; reports and photos.	Chief Engineer had ordered the cleaning of mud-tank. Captain not informed. Chief Engineer fined 1,000 Norwegian Kroners.
18	Dec 74	Britain	CARIBBEAN	Off Cape Breton, N.S. 23'	CAF aircraft sighted; thin slick 7 n.m. length, 1/4 to 2 ships' widths.	Vessel re-christened IRANIAN PROGRESS. Insufficient evidence to prosecute successfully (under exposed photos).
19	Mar 75	Greece	NEIL ARMSTRONG	Off Nova Scotia 74'	CAF aircraft sighted; reports and photos. Sample of oil determined that oil had come from NEIL ARMSTRONG.	Vessel fined 1,130,000 drachmas by Greek authorities ($34,000).
20	Apr 75	Greece	PITRIA SEA	In territorial waters off B.C.	CAF aircraft sighted; reports and photos.	Vessel fined 8,000 drachmas by Greek authorities.
21	Aug 75	Italy	MARE FELICE	Off Nova Scotia in internal waters 5'	CAF aircraft sighted; oil slick 2 miles long and approx. one ship's width.	No reply
22	Jul 75	Greece	LARRY L.	Off Nova Scotia 25' in internal waters.	CAF aircraft sighted; oil slick 10 miles long by 1/3 ship's width.	Vessel fined 30,000 drachmas ($885) by Greek authorities.

* denotes miles

OIL POLLUTION INCIDENTS OFF CANADA'S COASTS
(August 1973 - May 1977)

No.	Date	Flag	Name of Vessel	Area of Violation	Summary of Evidence	Action Taken
23	Aug 75	USSR	NIKOLAY PAPIVAN	Off Nova Scotia 26'	CAF aircraft sighted. Oil slick 2 n.m. long and 1/2 ship's width.	Russian investigation determined that there had been no violation of the Convention.
24	Sep	USSR	VALKA	Off Nova Scotia 23'	CAF aircraft sighted; reports and photos.	Captain punished "in accordance with Soviet legislation".
25	Oct 75	Britain	ANGELINA	Off Nova Scotia 16'*	CAF aircraft sighted; reports and photos.	No reply
26	Dec 75	India	JALAKANTA	Off Nova Scotia 22' in internal waters.	CAF aircraft sighted; reports and photos.	Indian investigation determined that the vessel was not involved in the spillage of any oil. No action.
27	Oct 75	Britain	FRANK D. MOORES	Off Nova Scotia 24'	CAF aircraft sighted; reports and photos.	No reply
28	Nov 75	Norway	FINNANGER	Off Nova Scotia 31'	CAF aircraft sighted; reports and photos.	No action. Oil film on water caused by cleaning oil-polluted equipment on deck.
29	Nov 75	U.S.A.	GOLDEN ENDEAVOUR	Off Nova Scotia 64'	CAF aircraft sighted; reports and photos.	No reply
30	Apr 76	Panama	HARVESTER	Off British Columbia 60'	CAF aircraft sighted; reports and photos.	No reply
31	Jul 76	Greece	PTOLEMAIS	Off British Columbia 19'	CAF aircraft sighted; a slick approx. 1-1/2 miles by 1/4 mile.	No reply
32	Jun 76	USSR	GRIGORIY SHELIKOU TOLBACHIK BOTNICHESKIY ZALIV	Off Newfoundland 52'	CAF aircraft sighted; slick 1-1/2 miles behind center vessel. 2 ships' widths. Vessels were tied up to one another and dead in water.	No reply

* denotes miles

OIL POLLUTION INCIDENTS OFF CANADA'S COASTS
(August 1973 - May 1977)

No.	Date	Flag	Name of Vessel	Area of Violation	Summary of Evidence	Action Taken
33	May 76	Liberia	NEPCO COURAGEOUS	Off Nova Scotia 50'	CAF aircraft sighted. Slick 2-3 miles long by 25-50 yards wide. Sample of slick taken.	No reply
34	Jun 76	Spain	PONTE ZALAMA	Off Nova Scotia 26'*	CAF aircraft sighted; slick 10 n.m. in length and 3 ships' widths.	Spanish investigation found vessel not guilty of polluting water. (Note of March 15, 1977).
35	Jul 76	Poland	GOPLO	Off Nova Scotia 7'	CAF aircraft sighted; slick 3 n.m. long and 1 ship's length wide. The discharge stopped on sighting during contact.	Polish evistigation determined chief mechanic at fault. He was fined and had to pay court costs.
36	Aug 76	Panama	MARGARET SIMONE	Off Nova Scotia 9' within territorial sea.	CAF aircraft sighted. Brown effluent being discharged from both sides amid-ship producing a slick.	No reply
37	Jun 76	Brazil	PROTALESTE	Off Nova Scotia 62'	CAF aircraft sighted; oil slick 8 miles long and 2-3 ship's widths, also foam.	Brazil not signatory to Convention, but shipping company has issued instructions to its vessels to comply with regulations of Convention. (Note April 19/77).
38	May 76	Latvia	LEON PAEGLE	Off Nova Scotia 59'	CAF aircraft sighted; slick 1 n.m. long, 3 ships' lengths at its maximum. Slick production ceased while under observation.	No reply
39	Aug 76	USSR	NARVSKAYA ZASTAVA	Off Newfoundland 111'	CAF aircraft sighted; slick 3 n.m. long and 2 ships' widths.	No reply to date.

* denotes miles

OIL POLLUTION INCIDENTS OFF CANADA'S COASTS
(August 1973 - May 1977)

No.	Date	Flag	Name of Vessel	Area of Violation	Summary of Evidence	Action Taken
40	Jan 77	Norway	JARMINA	Off Nova Scotia 39'	CAF aircraft sighted; an oil slick 12 miles long and 4 ships' widths.	No reply to date.
41	Mar 77	U.K.	BARON BELHAVEN	Off Nova Scotia 51'	CAF aircraft sighted, a thick oil film 10 miles long and 2 widths.	Under investigation.
42	Feb 77	Singapore Registry changed from Singapore to Tonga	HOLSTENDEICH	Off Nova Scotia 69'*	CAF aircraft sighted; oil slick 12 n.m. in length and 3 ships' widths.	No reply to date.
43	Apr 77	Greece	DRYS	Off Newfoundland 53'	CAF aircraft sighted; reports and photos.	No reply to date.
44	May 77	Greece	AGAMEMNON	Off Nova Scotia 99'	CAF aircraft sighted; oil slick 4 miles long and one ship's width.	No reply to date.
45	May 77	Bermuda	IRVING STREAM	Off Nova Scotia 9'	CAF aircraft sighted; 22 n.m. oil slick 3 to 4 ships' widths.	No reply to date.
46	May 77	Greece	CAPTAIN LYGNOS	Off Nova Scotia 13'	CAF aircraft sighted; photos and reports. Oil slick 4 n.m. in wake, one ship's width.	No reply to date.

* denotes miles

A similar catalogue of Pollution Incidents during the period from September 1973 to August 1973 is found in the IMCO publication "Reports on Prosecutions for Contraventions of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954 (as amended 1962)," MEPC/Circ. 17, 30 May 1975.

THE MARITIME POLLUTION CLAIMS FUND*

Louis C. Audette
Administrator
Maritime Pollution Claims Fund

* This article is based on a Statement of Evidence prepared for the West Coast Oil Ports Inquiry, August 1977, and testimony at the Inquiry hearings.

I. THE MARITIME POLLUTION CLAIMS FUND

The new legislation establishing the Maritime Pollution Claims Fund and a strict liability on shipowners discharging oil in Canadian waters without proof of fault or negligence is contained in Part XX of the Canada Shipping Act enacted by Parliament in 1972. It is set out in the Second Supplement to the Revised Statutes of Canada, 1970. The section numbers in parentheses which follow refer to the section numbers of the Canada Shipping Act.

The owner of a ship carrying more than 1,000 tons of oil is liable for the cost of any remedial action - providing it has been authorized by the Governor in Council - resulting from a discharge of oil caused by or otherwise attributable to the ship and is liable for all actual loss or damage incurred by Her Majesty in right of Canada or a province or any other person (734(1)).

The owner of a ship carrying oil in any quantity is liable for the cost incurred by the Minister of Transport or by any person authorized by him to destroy or remove the ship or her cargo where the Minister believes that the ship is in distress, stranded, wrecked, sunk or abandoned and is discharging or likely to discharge a pollutant into our waters (729 and 734(2)).

There is a limitation period of two years for the commencement of proceedings for such claims (734(4)).

Though the shipowner's liability does not depend upon proof of fault or negligence (735(1)), his liability ceases if the discharge of oil was caused by the claimant, by an act of war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistable character,

by an act of omission intended to cause damage done by someone for whose act or omission he is not legally responsible or by negligence in the installation or maintenance of lights or aids to navigation (735(1)).

Should the incident giving rise to the discharge of oil occur with fault or privity of the shipowner, his liability is unlimited in amount. However, should the incident arise without his fault or privity, his liability is limited to the lesser of about $160.00 for each ton of the ship's tonnage or $16,800,000.00 (735(4)). Nevertheless, the claimant remains protected for the excess of his claim over the quantitative limitation of the shipowner's liability because such excess is recoverable from the Fund (735(4)).

The Maritime Pollution Claims Fund (737(1)) now amounts to close to $45,000,000.00 as a result of a levy, collected from early 1972 until September 1st, 1976, of fifteen cents per ton of oil imported by ship into Canada "in bulk" (meaning in excess of 1,000 tons) as cargo and per ton of oil shipped from any place in Canada "in bulk" (again meaning in excess of 1,000 tons) as a cargo of a ship (748(1)). The monies of the Fund are held in the Consolidated Revenue Fund of Canada (737(1)) and interest is credited to the Fund at a rate fixed from time to time by the Governor in Council; this rate has been close to 3 per cent (737(2)).

The Governor in Council has appointed an Administrator of the Fund (738 to 740). Any proceedings against a shipowner as a result of a discharge of oil must be served on the Administrator and he, thereby, becomes a party by statute to the proceedings (743). His duties are to deal

with claims, to take such action as he considers appropriate in any litigation, to deal with the special claim of the fisherman under section 746 which is considered later in this paper, to direct payment of amounts properly chargeable to the Fund and to take such action as he considers appropriate for the recovery of any claims assigned to him or for which he holds subrogation (741).

The basic role of the Administrator in relation to claimants or plaintiffs in litigation is set out in section 744. He stands behind the defendant shipowner as a subsidiary defendant, a guarantor or an unsatisfied judgment fund. In the event of settlement of judgment in favour of the claimant, the Administrator must direct payment out of the Fund to the claimant of any amount remaining unpaid or of any amount in excess of the quantitative limitation of the shipowner's liability as established by subsection (735(4)). However, before making payment, the Administrator must await the expiration of any delays for appeal and must further be satisfied that the claimant has taken all reasonable steps to recover any amount remaining unpaid and has been unsuccessful in such attempts at recovery. The Administrator has the further obligation in making any payment of obtaining a valid assignment from the claimant of his judgment or claim in order to be able to replenish the Fund to whatever extent should become possible if circumstances should change later.

Where a discharge of oil is attributable to a ship which cannot be identified, the claimant may institute proceedings against the Fund, represented by the Administrator, as defendant, and the Fund is liable as if it were the responsible shipowner (745(1)). For judgment to be rendered against the Fund in such cases, the Admiralty

Court must be satisfied that all reasonable efforts have been made unsuccessfully to establish the identity of the ship (745(2)).

Subsection (746(1)) of the Act allows a claim by a fisherman who has suffered a loss of income from his activities as a fisherman resulting from an oil discharge attributable to a ship and that is not recoverable otherwise under Part XX of the Canada Shipping Act or any other law. This claim is made directly to the Administrator who adjudicates upon it (746(1)). There are appeal procedures if the fisherman is dissatisfied with the award made by the Administrator (746(2)) to (746(6)).

Subsection (751(1)) establishes the order to priorities for the various payments which the Admnistrator may direct. The first is the remuneration and expenses of assessors appointed to hear an appeal by a fisherman against a decision of the Administrator and the costs, expenses and fees of the Administrator. The second priority is that existing among the claims by various claimants. In this category, the first is the fisherman's special claims, the second is the claims for actual loss or damage and the third is the claims for remedial or preventive action. Among the claims other than the fisherman's, priority is established by the date of the discharge.

This paper refers only to the discharge of "oil" by a ship notwithstanding the fact that the legislation refers to "pollutants" and that the Governor in Council has prescribed certain other substances to be "pollutants". The reason is that the civil liability of section 734 is imposed on the owner of a ship that carries a pollutant "in bulk" and section (727(1)) defines "in bulk" to mean

in a quantity that exceeds a quantity prescribed by the Governor in Council. So far, the Governor in Council has prescribed such a quantity only for oil: a quantity in excess of 1,000 tons. Thus, for other pollutants, it would not appear that the Administrator may direct payments from the Fund as it is not possible to determine whether or not such other pollutants are carried "in bulk" in order to engage the shipowner's responsibility or his.

Nor has any mention been made of the joint and several responsibility of the shipowner and the cargo owner in paragraph (734)(1)(b)) and in subsection 734(2) "if the ship is of a class prescribed by the Governor in Council as a class to which this paragraph applies". The reason for this omission is that the Governor in Council has not prescribed any such class of ships.

The reason for omitting the provisions of section 736 concerning the provision of evidence of financial responsibility in the form of insurance or an indemnity bond covering the shipowner or the cargo owner is that this section is not yet in force.

The preceding part of this paper constitutes a synopsis of Part XX of the Canada Shipping Act as viewed by me. I deem my role under the legislation to be essentially a quasi-judicial one limiting my powers and duties to dealing with claims. "The Minister" in Part XX of the Act is the Minister of Transport and it is to him that I must, in each year, submit a report on my operations as Administrator to be laid before Parliament. Nevertheless, I think it quite clear that the legislation makes the Ministry of Transport -- and not me -- responsible for the policy advice and recommendations to the Minister relating to claims and for payments into the Fund as

opposed to payments out of the Fund which are exclusively within my jurisdiction. This observation is not made ungraciously or resentfully -- it is a mere opinion as to the clearly stated intent of Parliament.

Having made this observation, I now feel free to add that my experience with the new legislation has made it clear that some legislative changes should be made. It is no secret that the appropriate officials of Government are working on such changes. Perhaps I should add that these officials have sought my views in the course of their work. Not being a part of the Department of Transport but having direct access to the Minister, I would, of course, advise him should I disagree with any recommendations made to him. As matters now stand, I have no reason to believe that it will or will not be necessary for me to adopt such a course.

Beyond the Canadian legislation on compensation for oil discharges, there are other matters which may interest the Commission.

The first is the existence of TOVALOP. These seven letters stand for the descriptive phrase: Tanker Owners' Voluntary Assumption of Liability for Oil Pollution. TOVALOP is a voluntary association of tanker owners which has established a fund for the compensation of victims of oil pollution. CRISTAL is an ancillary development of TOVALOP which increases the amount available for compensation.

Beyond TOVALOP, there exists an IMCO convention -- not yet in force -- for the creation of an international fund for compensation. IMCO is the Intergovernmental Maritime Consultative Organization, the United Nations' specialized

agency for shipping. Should the IMCO convention come into force establishing an international fund, I assume that TOVALOP would go out of existence. Should Canada adhere to the IMCO fund convention, it will be necessary to consider the mutual relationship of the IMCO fund and my own Fund.

My experience of over four years as Administrator of the Canadian Fund has given me some anxieties. However, these anxieties do not relate to the compensation of the victims of oil discharges by ships in Canada but, rather, to my own ability to obtain reimbursement for the Fund after paying the victims in Canada and being subrogated in their rights or to prevent payments from the Fund in circumstances not intended by Parliament. Shipowning companies are often corporate bodies of places like Bermuda, the Cayman Islands or other flags of convenience with mere Post Office Box addresses and so set up that it is difficult to ascertain what assets they have or to realize upon such assets.

As a final observation, I add that I am aware that the United States Congress is considering a Bill to establish legislation somewhat similar to that existing in Canada. This proposed legislation may make it possible to have reciprocal agreements of advantage to pollution victims on each side of the border and to both governments. Any final conclusions on this score would be premature at this time.

EDITORIAL APPENDIX

In response to questions at the Inquiry hearings Mr. Audette indicated a number of types of cases where he is unable to make payments from the Fund.

(1) Where a food fisherman, as opposed to a licensed commercial fisherman, suffers when a fishery resource is depleted by oil.

(2) Where damage results from the discharge from a ship carrying less than 1,000 tons of oil, as cargo or otherwise.

(3) Where remedial (clean-up) action is not authorized by the Governor in Council.

(4) Where claims are made more than two years after the oil spill incident.

(5) Where the discharge comes from a shore installation.

(6) Where oil is discharged outside of Canadian waters and, subsequently, drifts into Canadian waters.

In addition, he made the following recommendations for change in the legislation that applies to the Fund.

(1) Section 736 of the Canada Shipping Act, requiring owners of ships carrying over 1,000 tons of oil to show financial responsibility through insurance or indemnity bond, should be brought into force.

(2) The Fund should be authorized to borrow money from the Minister of Finance in situations where its obligations to make payments exceed its accumulated reserves.

(3) It should be clarified that a sunken ship from which oil is being discharged, is a ship carrying oil for the purposes of the Canada Shipping Act.

(4) The Minister of Transport, not the Governor in Council, should be the person whose authorization is required before remedial action is compensable by the Fund.

(5) The Fund should be liable to pay claims where oil is discharged outside of Canadian waters and drifts into Canadian waters.

(6) The Fund should be liable to pay claims to which the shipowner has a defence under the Act, namely those arising from a discharge caused by an act of war, a natural phenomenon of irresistible strength or exceptional, inevitable and irresistible character, or negligence in the placing of aids to navigation.