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Legal Aspects of International Oil Spills in the Canada/U.S. Context

A. H. E. Popp, Q.C.*

I. INTRODUCTION

An oil spill at sea creates a mess. It is a mess in the physical sense, because the clean-up of a spill, depending on its size and location, remains a remarkably primitive, labor intensive operation. Moreover, despite numerous technological advances, the prediction of where an oil slick will eventually strike the coast is filled with uncertainty. Consequently, anticipating where resources and equipment should be deployed remains very much a question of good judgment and lucky guess work.

The legal aspects of an oil spill also present problems. Almost invariably, international considerations are involved, either because the spill has occurred on the high seas just outside territorial waters or, having occurred in waters under one jurisdiction, the slick spreads into another jurisdiction. Similarly, if the ship causing the spill is under foreign flag, a foreign administration may become embroiled, especially if counter or clean-up measures are to be taken on the high seas.

In recognition of the fact that oil spills caused by ships are to a large extent an international problem, an impressive array of international instruments have been drawn up in recent years to address oil spill related problems. Efforts have been made to deal with both operational and accidental discharges. The 1973 Convention for the Prevention of Marine Pollution, and its 1978 protocol, represent the most comprehensive approach to control or prevent all discharges of pollutants from ships.

Since the focus of this paper is mainly on liability and compensation, the instruments of most interest are those that address this aspect. In the absence of international regulations, all sorts of problems can arise in connection with liability and compensation. For example, who is liable and what rules should apply to determine liability? Which courts have jurisdiction? To what extent can judgments in one jurisdiction be enforced in another? What limits, if any, should be allowed in respect of such liability?

In the last five years, both Canada and the United States have revised their laws respecting oil pollution caused by ships. In both instances, these revisions include important modifications to the rules.

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The opinions expressed in this paper are those of the author and do not necessarily represent those of the Department of Justice or the Government of Canada.
governing liability and compensation for clean up costs and damages arising from such spills. Unfortunately, although the trend in many parts of the world has been towards the adoption of international conventions to ensure greater uniformity in liability and compensation rules, this is not the case as between Canada and the United States.

Although a high degree of cooperation has been achieved between Canada and the U.S. in responding to oil spills caused by ships, as evidenced by the adoption of joint contingency plans, the laws governing liability and compensation for such spills remain very different in the two countries. It is safe to assume that a divided approach will eventually lead to greater transportation costs for oil and will have consequent effects on North America’s competitive trade position.

This paper examines Canada’s current regime of liability and compensation governing oil spills from ships. In contrast to the United States, Canada has taken the international scheme as its basic regime and has made additions where it has been found to be inadequate or incomplete. In reaching its present position, however, it is interesting to note that policy in Canada underwent a fundamental change in the late 1970s and early 1980s. Much like in the United States at the time of the adoption of the Oil Pollution Act of 1990 ("OPA")\textsuperscript{1}, the view in Canada in the late 1960s and early 1970s was that the international regime was inadequate, and, therefore, it was argued that Canada should create its own liability and compensation scheme.

Some eighteen years of experience with a made-in-Canada regime served to demonstrate that victims of oil pollution in Canada were perhaps less well protected than those in other jurisdictions that had adopted the international scheme. Accordingly, Canada has incorporated the international regime as the centerpiece of its domestic regime.

In considering the Canadian experience over the past twenty-five years, some pertinent conclusions and parallels emerge with what is currently being experienced in the United States in connection with the implementation of OPA. Obviously, these conclusions cannot be pressed too far. The differences in size and importance of the U.S. market give the United States an international influence that Canada does not enjoy. This may go some way to explain why Canada has chosen the international route, in contrast to the United States which has chosen to go its own way.

II. INTERNATIONAL REGIME

In Canada, as elsewhere in the world, the 1967 shipwreck of the American-built, Liberian-registered tanker Torrey Canyon, off the southwest coast of England focused public attention on oil spills as no other incident had done before it. In nightly newscasts, the public could watch

\textsuperscript{1} 33 U.S.C. § 2701.
the unfolding drama of the incident on television as British authorities struggled, somewhat helplessly, often under adverse weather conditions, to bring the oil spill under control. The devastating consequences on bird life and on the beaches were there for all to see.

Public outrage was substantial. Politicians and public officials knew that something had to be done, at least to provide effective means to deal with such large scale disasters, if not to prevent them in future. In addition to technical problems, the Torrey Canyon disaster had revealed important shortcomings in the legal regime governing such accidents, especially where the oil spill involves a ship in international waters, since, theoretically, such a ship falls under the jurisdiction of her flag administration.

The specific shortcomings in the legal regime identified by the Torrey Canyon incident fall into two categories. First, it was not clear what rights, if any, a coastal state has to intervene against a foreign flag ship, which is technically on the high seas and thus outside that state’s jurisdiction, to prevent her from causing serious pollution damage to its coastal waters, its beaches and other related interests. Even if the coastal state had some rights, the question remains to what extent must the flag state and the owners of the ship be consulted, bearing in mind that frequently action must be taken swiftly to be effective. These questions of public international law were by no means clear in 1967, although much has been done since then to clarify them.

In the second category, there were the difficult questions relating to who was liable for the costs of any response actions mounted by coastal state authorities to prevent or minimize the consequences of massive discharges of oil. For example, which courts have jurisdiction to resolve any related disputes? What is the basis of liability, and how do other rules, such as limitation of liability allowed in the maritime laws of many countries, apply in cases of ship accidents in international waters? In addition to the question of government costs, there is the difficult problem of compensations payable to individuals — fishermen, hotel owners, tour operators and others — who suffer oil spill related damages.

The Torrey Canyon incident clearly demonstrated that these problems could not be tackled satisfactorily on a purely national basis. The oil spill had done substantial damage to both British and French...
beaches. In response to pressure from governments, the International Maritime Organization ("IMO"), or the Inter-governmental Maritime Consultative Organization ("IMCO") as it was known at the time, convened meetings of experts to supervise the drawing up of international legal instruments intended to address these specific problems.\(^3\) This preparatory activity culminated in the 1969 diplomatic conference in Brussels, which adopted two conventions.

Since this paper focuses mainly on questions of liability and compensation, it is sufficient to say that the first convention, the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties,\(^4\) addressed the public international law questions that had been raised by the Torrey Canyon incident. Specifically, the Convention sets out the circumstances under which coastal states may intervene against foreign flag vessels on the high seas that threaten their coastal waters and related interests. It is interesting to note that the United States, ironically, is a party to that Convention, whereas Canada has not yet seen fit to join it.

The second convention adopted at the 1969 Brussels conference was the International Convention on Civil Liability for Oil Pollution Damage (the "Civil Liability Convention").\(^5\) It is not necessary to give a detailed analysis of this Convention here, because its terms have been adopted by many states and are well known.\(^6\) A brief outline of its principal features will suffice for present purposes.

As its name suggests, the Civil Liability Convention is designed to address questions of compensation. Essentially, it addresses the liability and compensation problems which arose from the Torrey Canyon incident. The first thing to note, therefore, is that the Convention is confined in its application to tankers carrying a cargo of persistent oil.\(^7\) Further, the Convention establishes a strict liability regime. Consequently, claimants do not have to prove fault or negligence on the part of the ship-owner, who can only rely on a very restricted number of defenses to

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\(^3\) In a statement of IMO on World Maritime Day, 1989, Doc. No. J/3980, entitled "IMO — The First Thirty Years" (on file with author), it is noted that the Legal Committee of IMO was established in June 1967, "first as an ad hoc body and later as a permanent subsidiary organ of the Council." The establishment of the Committee was thus a direct consequence of the Torrey Canyon incident. The first task of the Committee was to develop, in consultation with the Comité Maritime Internationale ("CMI"), the necessary legal instruments to address the problems arising out of the incident.

\(^4\) Nov. 29, 1969, 970 U.N.T.S. 211.


\(^6\) As of April 20, 1992, seventy states are party to the Civil Liability Convention.

\(^7\) Under the Convention, "ship" is defined to mean "any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo." Id. at Art. I. In the same article, "oil" is defined to be "any persistent oil such as crude oil, fuel oil, heavy diesel oil, lubricating oil and whale oil, whether carried on board a ship as cargo or in the bunkers of such a ship." Id.
escape liability.\textsuperscript{8}

The Civil Liability Convention sets the limits of liability at roughly double the amount established under the 1957 International Convention relating to the Limitation of Liability of Owners of Sea-going Ships.\textsuperscript{9} Although not universally accepted, the 1957 Convention was nevertheless the most widely adopted convention on general limitation. According to Article V of the Civil Liability Convention, a shipowner may limit his liability to the lesser of 133 special drawing rights ("SDRs") for each ton of the ship's tonnage or 14,000,000 SDRs, which translates into some CAN $22.8 million.\textsuperscript{10} The Civil Liability Convention also deals with important questions, such as proof of insurance with direct access against the insurer.\textsuperscript{11} The question of which courts have jurisdiction to resolve such disputes is also addressed.\textsuperscript{12} Since the ownership and management of the \textit{Torrey Canyon} had been a contentious point in determining who was responsible for the ship, the Convention has simplified matters by channelling liability to the registered owner.\textsuperscript{13}

Two years later, IMCO convened a further diplomatic conference in Brussels, to adopt the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the "Fund Convention").\textsuperscript{14} This Convention established the International Oil Pollution Claims Fund ("IOPC Fund") to supplement the compensation payable under the Civil Liability Convention.\textsuperscript{15} The IOPC Fund is financed out of contributions from oil received in ports and terminal installations in member states.\textsuperscript{16} These contributions vary according to the claims that have to be settled in each year. Membership in the Fund Convention is restricted to states that are party to the Civil Liability Convention.\textsuperscript{17} Compensation payable under the Fund Convention for any one incident, including the amount payable by the shipowner under the Civil Liability Convention, was initially fixed in gold francs, but is

\begin{itemize}
\item \textsuperscript{8} \textit{Id.} at Art. III.
\item \textsuperscript{10} The Convention originally used the Poincare gold franc. \textit{See} Civil Liability Convention, \textit{supra} note 5, at Art. V, para. 9. By a protocol adopted in 1976, the Special Drawing right ("SDR") of the International Monetary Fund ("IMF") was substituted as the unit of account in the Convention. As of March 30, 1992, 1 SDR equals CAN $1.63.
\item \textsuperscript{11} \textit{Id.} at Art. VII.
\item \textsuperscript{12} \textit{Id.} at Art. IX.
\item \textsuperscript{13} Under the Convention, "owner" is defined to mean "... the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship." \textit{Id.} at Art. I.
\item \textsuperscript{15} Under the Fund Convention, compensation is payable from the IOPC Fund in three cases: (1) if no liability arises under the Civil Liability; (2) if the owner is incapable of paying compensation; or (3) if the damage exceeds the owner's limit of liability. \textit{Id.} at Art. 4.
\item \textsuperscript{16} \textit{Id.} at Art. 10.
\item \textsuperscript{17} \textit{Id.} at Art. 37.
\end{itemize}
currently limited to 60,000,000 SDRs (CAN $97.8 million).18

The Civil Liability Convention came into force in 1975. Four years later, in the wake of the Amoco Cadiz incident, the Fund Convention came into force.

In 1984, after a series of informal meetings and some discussion in the Legal Committee of IMO, a further diplomatic conference was held in London at the headquarters of IMO, to adopt two protocols extensively amending the Civil Liability Convention and the Fund Convention.19

The most notable amendments in these two protocols, which have come to be known as the 1984 protocols, relate to the substantially increased compensation that would apply on their entry into force. The maximum compensation under the 1984 Protocol to the Civil Liability Convention is approximately CAN $98 million.20 The 1984 Protocol to the Fund Convention increases compensation in two stages: $220 million, at the first level, then rising to $326 million when the amount of contributing oil received in contracting states in the preceding year has reached 600 million tons or more.21

It is unlikely that these protocols will come into force, since they have been drafted in such a way so as to make United States participation necessary for their entry into force. Efforts are currently underway to remedy this situation.22

18 The Fund Convention, like the Civil Liability Convention, as originally adopted, uses the Poincaré gold franc as the unit of account. Id. at Art. 1. By a protocol adopted in 1976, the SDR was substituted for the gold franc. Unfortunately, this protocol, in contrast to the 1976 protocol to the Civil Liability Convention, for lack of the required ratifications and accessions, has not entered into force. The IOPC Fund Assembly has adopted a resolution in fact substituting the SDR for the gold franc. In the recent Haven incident, off the coast of Italy, the use of the SDR has been questioned by some of the claimants because of the fact that the 1976 protocol has not entered into force. For an account, see IOPC, IOPC FUND ANNUAL REPORT 64 (1991).


20 A shipowner may limit his liability in respect of any one incident to (a) 3 million units of account (SDR) for a ship not exceeding 5,000 tons and (b) for a ship with a tonnage in excess thereof, for each additional ton, 420 units of account in addition to the amount mentioned in subparagraph (a) but in no event shall the amount exceed 59.7 million units of account. 1984 Protocol to Civil Liability Convention, supra note 19, at Art. 6.

21 1984 Protocol to the Fund Convention, supra note 19, at Art. 6.3.

22 In 1991 a working group met under the auspices of the IOPC Fund Assembly and drew up two new draft protocols which reproduce the substance of the 1984 protocols, but with different entry into force provisions. These draft protocols are to be considered at a diplomatic conference scheduled to be held November 22-27, 1992. For a more ample account of this development, see IOPC, supra note 16, 17-20.
III. THE EVOLUTION OF CANADIAN POLICY

In order to understand the current Canadian liability and compensation regime for oil pollution caused by ships, it is necessary to describe briefly the evolution of policy in Canada on this subject over the past twenty-five years. In the late 1960s and early 1970s, there was growing awareness in Canada, as elsewhere, that the earth’s environment, including the marine environment, was in danger and was consequently in need of protection to avoid irreparable damage.

At about the time of the Torrey Canyon disaster, the widely held view in Canada was that the international regime governing pollution caused by ships was inadequate and, indeed as far as liability and compensation were concerned, was virtually nonexistent. This view was reinforced in early 1970, when Canada experienced its own major oil pollution incident. On February 4, 1970, the Liberian tanker Arrow, carrying 16,000 tons of bunker C fuel, went aground in Chedobucto Bay in Nova Scotia. Some 82,500 barrels of bunker C oil were released into the surrounding waters.

The Canadian Government conducted a formal inquiry into the circumstances of the Arrow accident. The inquiry report identified a number of shortcomings in the Canadian legal regime, much as the Torrey Canyon incident had done with respect to the British regime. Something clearly had to be done to overcome these shortcomings. The question was whether Canada should follow the Brussels conventions adopted just a few months prior to these incidents or should establish its own regime.

The 1969 Brussels conference had been a disappointment to Canada for several reasons. In the first place, Canada did not accept what it considered to be the restrictions of the Intervention Convention, and, as a result, has not become a party to this Convention.

With respect to liability and compensation, Canada made several points at the Brussels conference. First, Canada had recommended a more comprehensive convention dealing with all forms of pollution. Second, Canada strongly advocated shared liability for oil pollution damage; that is to say, the oil companies, which shared in the profits from the maritime carriage of oil, should also share in the liabilities inherent in this form of transport. Finally, Canada expressed concern with the proposed jurisdiction provisions.23

In the light of what was finally adopted, it was argued in Canada that the two conventions were rather modest in their approach and effect, further proof of the fact that the international regime was indeed inadequate to deal with the problem and that, therefore, Canada was fully

23 All these points were made by the Hon. Donald Jamieson, the then Minister of Transport, who headed the Canadian delegation to the 1969 Brussels Conference, in his opening statement to the conference. See INTERNATIONAL LEGAL CONFERENCE ON MARINE POLLUTION DAMAGE, OFFICIAL RECORDS 84 (1969) (on file with author).
justified in its resolve to adopt a more progressive, all-encompassing regime. The Canadian attitude to the international regime was well expressed in the statement of the Minister of Transport made to the House of Commons in 1970. In introducing amendments to the Canada Shipping Act, embodying the new Canadian scheme, the Minister noted:

... that the instant the world community comes around to agreeing on the magnitude of this problem and on the potential threat it poses to us all, Canada will not wish to act unilaterally but will be quite prepared to fall in with whatever is achieved through international agreements. 25

The Bill was passed by Parliament the following year and proclaimed into force on June 30, 1971. In effect, the amendments added Part XX to the Canada Shipping Act, which dealt with both public and private law aspects of pollution caused by ships.

The public law-related amendments authorized the appointment of pollution prevention officers with extensive powers to board and inspect ships, as well as to direct them in the event of an actual or threatened pollution incident. Moreover, the Minister of Transport was given far-reaching powers to take preventive measures to deal with ship source pollution incidents. The legislation created a number of offenses relating to pollution from ships. Finally, the new Part XX applied in Canadian territorial waters and fishing zones south of the sixtieth parallel only, because a special regime applicable north of that latitude had been adopted by the Canadian Parliament just shortly before the adoption of Part XX. 26

The liability provisions of the new legislation, in some respects, closely resembled the Civil Liability Convention. For example, the Canadian scheme established the same limits of liability and a very similar liability regime, 27 but it also had significant differences. Unlike its international counterpart, it was not restricted to laden tankers carrying persistent oil as cargo. In principle, the scheme applied to all ships carrying pollutants over a certain minimum quantity. A closer study of the legislation and its supporting regulations, however, demonstrated that Part XX was largely confined in its application to oil. 28 In this respect, there-

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24 R.S.C., ch. 27 (2d Supp. 1970) (Can.).
26 Arctic Waters Pollution Prevention Act, R.S.C., ch. A-12 (1985) (Can.).
27 Canada Shipping Act, R.S.C., ch. 27, § 735(4) (2d Supp. 1970) (Can.).
28 Subsection 734(1) of the Canada Shipping Act, id., which creates the liability, in identifying the party liable, speaks of "the owner of a ship that carries a pollutant in bulk". The term "in bulk" is defined, in subsection 727(1), to be "a quantity that exceeds a quantity prescribed by the Governor in Council." In fact such a prescription was only made with respect to oil.

Subsection 2(2) of the Maritime Pollution Claims Fund Regulations, C.R.C., ch. 1444 (1978) (Can.), reads as follows: "For the purposes of Part XX of the Act... 'in bulk' in relation to oil carried on board a ship, whether as cargo or otherwise, means a quantity that exceeds 1,000 tons."
fore, the legislation was somewhat misleading.

In keeping with Canada's position at the 1969 Brussels conference, the legislation attempted to make cargo interests directly liable for pollution damage on the same basis as the shipowner. Cargo interests were further engaged in the scheme of compensation set up under the new legislation, by the establishment of a fund, the Maritime Pollution Claims Fund ("MPCF"), financed initially out of a levy per ton of oil imported by ship into Canada. 29

In contrast to the IOPC Fund, however, the MPCF, under Part XX, played a relatively unimportant role in the Canadian scheme of liability and compensation, because the Fund was essentially a fund of last resort. With one exception, it was only available after efforts to obtain compensation from the shipowner had been exhausted. The one exception related to loss of income that may be suffered by fishermen, which under certain conditions was directly payable out of the Fund. 30

Over the next seventeen years, Canada luckily had only one major oil pollution incident. In 1979, the British oil tanker Kurdistan broke in two off the coast of Nova Scotia and extensively polluted both the Nova Scotian and Newfoundland coasts. The resulting clean-up costs and damages were eventually settled in accordance with Part XX. 31 In contrast to the relatively quick settlement record of the international scheme, it took some five years to settle claims arising from the Kurdistan incident.

With the entry into force of the Fund Convention, it became increasingly clear that Canadian victims of oil pollution were not as well protected as victims in other parts of the world covered by the international regime. In the first place, it had proved impossible to bring into force the compulsory insurance provision of Part XX. Like the Civil Liability Convention, Part XX stipulated that certain ships must have on board certificates showing that they have insurance with direct access against the insurers. 32 International insurance interests were unwilling to submit to direct access under provisions of national legislation that did not implement the international convention.

Moreover, in the event of a spill that did damage in excess of what the shipowner was liable to pay under limitation of liability, Canadian victims of oil pollution had no access to the IOPC Fund. In this regard, it should be noted that, due to the progressive policies of the IOPC Fund which encouraged the settlement of claims, the Fund administration had made cooperative arrangements with insurance interests (Protection and Indemnity Clubs or "P&I Clubs") aimed at settling claims with a mini-

29 Canada Shipping Act, R.S.C., ch. 27, § 748(1) (2d Supp. 1970) (Can.).
30 Id. at § 746.
31 For a brief account of this incident, see Troop & Greenham, supra note 25.
32 Canada Shipping Act, R.S.C., ch. 27, § 736 (2d Supp. 1970) (Can.).
mum of cost. As a result, claims were quickly investigated and, if established, swiftly paid.\textsuperscript{33}

It had also proved impossible to implement cargo owner liability stipulated in Part XX, because, as it turned out, no insurance was available for this kind of risk. In this respect, therefore, the legislation appeared to impose a liability which, it turned out, was impossible to enforce. Part XX contained other irritants. Many small spills were not covered at all because of the minimum quantities specified by the “in bulk” definition which triggered the liability provisions.\textsuperscript{34}

At the same time, while there were strong misgivings in Canada about Part XX, discussions were initiated in the early 1980s to revise the international regime. One of the principal objectives for revision was to increase substantially the available compensation to attract important outsiders, such as the United States and Canada.

The time seemed ripe for Canada to reexamine its own regime. Hailed as a progressive piece of legislation, well in advance of its time when it was first adopted, it was clear that Part XX had in fact fallen behind what was available internationally to protect victims of oil pollution. As a result, extensive amendments to the Canada Shipping Act, including a fundamental rewrite of the liability regime, were introduced and adopted by Parliament in 1987. On April 24, 1989, coinciding with the entry into force of the two international conventions for Canada, the amendments were proclaimed into force.\textsuperscript{35}

\section*{IV. Current Canadian Regime}

The new amendments repealed Part XX of the Canada Shipping Act and added two new parts, Parts XV and XVI, to the Act.\textsuperscript{36} The new Part XV deals with pollution prevention and control, implementing, \emph{inter alia}, the 1973 Convention for the Prevention of Pollution from Ships\textsuperscript{37} and its 1978 protocol.\textsuperscript{38} Additionally, in the light of experience, it enhanced the powers of pollution prevention officers and the power of the Minister of Transport to intervene in incidents. Finally, reflecting the seriousness with which pollution is viewed, fines for pollution offenses were substantially increased.

The new Part XVI is entirely devoted to liability and compensation

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{33}] A concise account of the IOPC Fund’s claims settlement procedure is set out in IOPC, IOPC FUND ANNUAL REPORT 56-62 (1988).
\item[\textsuperscript{34}] See supra note 28.
\item[\textsuperscript{35}] R.S.C., ch. 6 (3d Supp. 1985) (Can.).
\item[\textsuperscript{36}] It should be noted that between the adoption of the amendments and their entry into force, the new Revised Statutes of Canada had come into force. In the case of the Canada Shipping Act, the revision had deleted several parts, so that the new parts, although appearing at the end of the Act, like the repealed Part XX, were numbered as Parts XV and XVI.
\item[\textsuperscript{37}] Nov. 2, 1973, 12 I.L.M. 1319.
\end{enumerate}
\end{footnotesize}
for oil pollution caused by ships. In essence, the new Part incorporates the international regime as the basic scheme and adds to it where it is incomplete or inadequate. To begin with, the strict liability regime of the Civil Liability Convention has been applied to all ships which cause oil pollution, not just to oil tankers.39

There is no change in the limits of liability, since the same limits are imposed as are prescribed by the Civil Liability Convention, already a feature of the repealed Part XX, subject to the same rules about breaking limitation of liability. However, special rules in addition to those applying to all ships have been adopted for “convention ships”, described as tankers carrying “persistent oil” as cargo.40

One of the most important features of the special rules relates to proof of financial responsibility. In line with the Convention, every tanker carrying 2000 tons of persistent oil must have on board a certificate “showing that there is in force in respect of that ship a contract of insurance or other security that satisfies the requirements of that Article [VII] . . .”41

The insurance must allow claimants direct access against the insurers. The important feature here, of course, is that insurance interests now submit to direct access, something that they were not prepared to do under Part XX. An important shortcoming of the previous legislation has thus been overcome.

Further, the new scheme in Part XVI, in line with the Convention, provides for the registration and enforcement of judgments issued in another state that is party to the Convention.42 Last, but not least, the new legislation makes provision for Canadian participation in the IOPC Fund. To the extent that pollution damage caused by a laden tanker is not recoverable from the shipowner, Canadian victims now have access to the IOPC Fund.43

The new Part XVI also establishes the Ship-source Oil Pollution Fund (“SOPF”), which, in effect, is the old MPCF with new functions and liabilities. In contrast to the old MPCF, the new SOPF is designed to play a much more active role in the payment of compensation. Specifically, the SOPF is available to compensate for damages that remain after steps have been taken to obtain payment from the shipowner and, if applicable, from the IOPC Fund. In all instances, the SOPF has a liability limit per incident currently fixed at approximately CAN $116 million.44

A “fast track” procedure is included in the new legislation. Claimants who do not qualify as public authorities have the additional option

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39 Canada Shipping Act, ch. 27, § 677 (2d Supp. 1970) (Can.).
40 Id. at § 673.
41 See id. at § 684 et seq.
42 Id. at §§ 687-695.
43 Id. at §§ 696-701 (in particular § 699).
44 Sections 710-714 of the Canada Shipping Act, id., deal with the SOPF. Section 714 contains the limit of the Fund, which is adjusted annually to take account of inflation.
of submitting their claims directly to the Administrator of the SOPF. The Administrator is obliged to investigate every claim and make an offer of compensation, if it is established. Upon acceptance of the offer, the Fund pays the claim, and the Administrator is thereupon subrogated to the rights of the claimant to enable the Administrator to take recovery action.\(^{45}\)

Moreover, the special rights of compensation in favor of fishermen for loss of income that is not otherwise recoverable has been expanded.\(^{46}\) Furthermore, the "mystery" spill provisions, already a feature of the repealed Part XX, have been revised to place the onus on the SOPF to provide compensation for oil pollution damage caused by an unidentified source, unless the Fund can demonstrate that it is not a spill from a ship.\(^{47}\)

In closing, it should be mentioned that the SOPF is the Canadian link, so to speak, to the IOPC Fund. Canadian contributions to the IOPC Fund, pursuant to the terms of the Fund Convention are paid out of the SOPF.\(^{48}\)

V. TRANSFRONTIER POLLUTION

To appreciate the implications of the divided liability and compensation regime in North America on a transfrontier spill, it is necessary to take a brief look at some of the important provisions of the new legislation in the United States. It would go beyond the scope of this paper to try to embark on a detailed analysis of the new legislation.

Having a different regime in force on both sides of the Canada/United States border is, of course, not new. The adoption of OPA merely perpetuates the existence of a divided regime. From a Canadian perspective, it represents a missed opportunity for the United States to join the international scheme, which, with the amendments in the 1984 protocols, had been fashioned largely to meet U.S. needs. It would have provided common rules of liability and compensation in North America, at least for an important source of accidental marine spills.

Besides the actual compensation payable under the two schemes,\(^{49}\) there are several other significant differences. One of the most important differences is that the international scheme is founded on the basic assumption that, in most cases, shipowners will be able to limit their liability.\(^{50}\) While OPA also embraces the notion of shipowners' limitation of

\(^{45}\) Id. at §§ 710-711.

\(^{46}\) Id. at § 712.

\(^{47}\) Id. at para. 709 (f).

\(^{48}\) Id. at § 701.

\(^{49}\) Under OPA, the limit of liability for tank vessels is the greater of (1) $1,200 per gross ton, or (2) $10 million if the vessel exceeds 3000 tons, or (3) $2 million in the case of a vessel less than 3,000 tons. OPA § 1004, 33 U.S.C. § 2704.

\(^{50}\) It remains to be seen how far this assumption holds true for Canada. Section 679 of the Canada Shipping Act, R.S.C., ch. 27 (2d Supp. 1970) (Can.), appears to place the onus on the
liability, the conditions under which it can be broken are very different. Indeed there is room to argue that under OPA, the limitation of liability, for practical purposes, has been abolished.\footnote{In support of this opinion it should be noted that limitation may be lost, in addition to gross negligence and willful misconduct, for violation of an applicable federal safety, construction or operating regulation. It is submitted that it will be difficult for any shipowner or operator to show that at the time of an incident the ship was in compliance with all “safety, construction and operating regulations”. Other grounds are provided for losing the right to limit liability, for example, failure to report an incident, failure to provide cooperation and assistance. See OPA § 1004, 33 U.S.C. § 2704.}

The notion of limitation of liability is further undermined in OPA by the specific protection of the right of states to impose “any additional liability or requirement with respect to ... the discharge of oil or pollution by oil within such State ...”.\footnote{Id. at § 1018, 33 U.S.C. at § 2718.} A conscious decision was made not to preempt state laws in this area. Another significant difference relates to what the two regimes will compensate. The extensive provisions set out in OPA with respect to natural resource damage, particularly the definition and method of measuring such damage, would seem to go well beyond what the present IOPC Fund practice allows or what has been agreed to in the 1984 protocols.\footnote{See id. at § 1006, 33 U.S.C. at § 2706 (as read with the definition of “natural resource damage” in § 1001, 33 U.S.C. § 2701, and the measure of damages set out in § 1004(d), 33 U.S.C. § 2704(d)). These provisions must be compared with the definition of “pollution damage” in Article 2.3 of the 1984 Protocol to the Civil Liability Convention. For an instructive account of the new definition in the 1984 Protocol, see Mans Jacobsson & Norbert Trotz, The Definition of Pollution Damage in the 1984 Protocols to the 1969 Civil Liability Convention, 17 J. MAR. L. & COM. 467 (1986).}

Important differences also exist between the two regimes in the manner in which they deal with foreign claims. Both pieces of legislation specifically address this point.

Section 1007(a)(1) of OPA lays down the general proposition that foreign claimants may make a claim if:

recovery is authorized by a treaty or executive agreement between the United States and the claimant’s country, or the Secretary of State, in consultation with the Attorney General and other appropriate officials, has certified that the claimant’s country provides a comparable remedy for United States claimants.\footnote{OPA § 1007(a)(1), 33 U.S.C. § 2701(a)(1)(B).}

The foreign claimant would of course have to comply with other requirements of the Act, notably demonstrate that the damage suffered
comes within the definition of the Act. The legislation contains one noteworthy exception that existed under the Trans-Alaska Pipeline Authorization Act and that has simply been perpetuated under OPA; this exception involves the case of residents of Canada with respect to an oil pollution incident involving a:

    tanker that received the oil at the terminal of the pipeline constructed under the Trans-Alaska Pipeline Authorization Act... for transportation to a place in the United States, and the discharge or threat occurs prior to delivery of the oil to that place. 55

As a general proposition, then, foreign claimants are excluded from claiming under OPA unless, on a reciprocal basis, American claimants have comparable remedies in the foreign jurisdiction.

Part XVI of the Canada Shipping Act tackles the matter in a different way. In keeping with the principle already contained in the repealed Part XX, Part XVI basically applies to claims arising "(a) in any place in Canada, (b) in Canadian waters, and (c) in any fishing zones of Canada..." 56

There are three modifications to the above rules. First, "convention ships" claims, in line with the Civil Liability Convention, are restricted to pollution damage in the "territory including the territorial sea" of Canada. 57 Second, the remedies in Part XVI do not apply to pollution damage in the Arctic involving ships other than convention ships. These continue to be covered by the special regime in the Arctic Waters Pollution Prevention Act. 58 For present purposes, the most important exception relates to oil pollution damage that occurs "on the territory or in the territorial sea of a state other than Canada that is a party to the Civil Liability Convention." 59 This would automatically exclude American claimants since the United States is not party to that Convention.

It remains to speculate what effect the tightly divided regimes might have on a transfrontier spill. In recognition of the need to respond to pollution incidents in commonly administered waters, such as the Great Lakes, in a coordinated and integrated way, Canada and the United States have concluded contingency plans. The current plan, the Canada-United States Joint Marine Pollution Contingency Plan, was signed in 1983. 60

Originally conceived to protect the waters of the Great Lakes, the current Plan has been extended to apply to waters on the east and west coasts and in the Arctic. 61 The Plan has two basic purposes: that inci-

55 Id. at § 2707(b)(4).
56 Canada Shipping Act, ch. 27, § 675(1) (2d Supp. 1970) (Can.).
57 Id. at § 675(2).
58 Id. at § 675(1).
59 Id. at § 675(2).
60 The current Plan is contained in TRANSPORT CANADA, PUB. NO. TP 5341 CANADA-UNITED STATES JOINT MARINE POLLUTION CONTINGENCY PLAN (1983).
61 The Plan applies to the areas specified in the annexes. Id. at § 103. There is an annex for
dents in waters of one party that present a potential threat to the other party are promptly reported, and that resources from both parties are made available to deal with any incident in waters falling under the Plan.

The Plan is not intended to deal with questions of liability and compensation. It only contains one brief provision on this point. Except in the Great Lakes, the Plan endorses the general proposition that each party shall bear the costs of the response operation in its waters, including the costs of "response operations, the loan of resources, or other assistance provided by the other Party . . . ."62 In the Great Lakes, the costs of both parties are borne by the party in whose waters the pollution incident occurred.

It is noteworthy that the funding arrangements in force for public authorities in both countries is somewhat different. In Canada, the Coast Guard operates under the authority of the Minister of Transport. The Minister, acting through the Coast Guard, would be the primary response authority for oil spills caused by ships. In doing so, he is entitled to recover his costs and expenses for any measures taken subject to the proviso that they are reasonable.63

According to Section 1012(a) of OPA, on the other hand, the Oil Spill Liability Trust Fund is available to the President for the payment of removal costs "determined by the President to be consistent with the National Contingency Plan."64 The Fund would eventually seek to recover those costs from the responsible party.65 The Canada Shipping Act, at least as presently drafted, does not provide any such direct access to the SOPF for costs and expenses incurred by public authorities such as the Coast Guard.

It remains to be seen whether the arrangements under the Joint Contingency Plan will prove adequate when the rules under which funding for public authorities, such as the Coast Guard, are so different in the two countries. In the past, the costs and expenses incurred by one party in another party's jurisdiction have been included in the costs and expenses of the latter party, and have been claimed as a portion of that party's costs and expenses.

It is noteworthy that OPA requires the Secretary of State to review relevant international agreements and treaties with the Government of Canada, including the Great Lakes Water Quality Agreement, to identify what needs to be done by way of amendments or additional agreements to:

(1) prevent discharges of oil on the Great Lakes;

62 Id. at § 202.1(c).
63 Canada Shipping Act, R.S.C., ch. 27, § 677(1)(c) (2d Supp. 1970) (Can.).
64 OPA § 1012(a), 33 U.S.C. § 2712(a)(2).
65 Id. at § 1015, 33 U.S.C. at § 2715.
(2) ensure an immediate and effective removal of oil on the Great Lakes; and
(3) fully compensate those who are injured by a discharge of oil on the Great Lakes.\textsuperscript{66}

It may well be that a more wide ranging review, including the Joint Contingency Plan, would be most useful in view of the very different funding arrangements in place in the two countries.

Perhaps even more troubling is the lack of any common remedy for individual claimants who might have suffered costs, expenses and damages arising out of one and the same incident. The consolidation of claims in one jurisdiction, before one court, would not seem to be possible under present conditions. It is likely that the shipowner would have to respond in both jurisdictions. One of the objectives of limitation of liability could thus not be met.

Finally, there are the divergent notions of damage in the two regimes. This has already been dealt with above. There may consequently be a significant difference between what is available under this heading north and south of the border.

VI. FUTURE PROSPECTS

What has been said so far about transfrontier spills is of course largely speculation. Happily, there have been few spills, and none of any significance, since the two countries have adopted their new regimes. Nevertheless, it may be anticipated, with relative certainty, that sooner or later there will be a major spill which will do damage on both sides of the border.

Having recently rethought its policy with respect to the international scheme and having rewritten its domestic scheme to comply with it, Canada is likely to remain committed to that scheme. Indeed, the Public Review Panel on Tanker Safety and Marine Spills Response Capability, established in the wake of the 1988 Nestucca and the 1989 Exxon Valdez incidents, recommended in its report that Canada ratify the 1984 protocols — a recommendation that has been endorsed by the Canadian Government.\textsuperscript{67} It is equally clear that early endorsement of the international scheme by the United States is not a likely prospect.

A few differences between the American and international schemes have already been dealt with earlier in this paper. It is sufficient to note

\textsuperscript{66} See id. at § 3002, 33 U.S.C. at § 2761.

\textsuperscript{67} The Panel released its report in September 1990, and it, therefore, does not take account of the fact that OPA had shortly before come into force, thus making it impossible for the protocols to come into force. See \textit{Public Review Panel on Tanker Safety and Marine Spills Response Capability, Final Report} 20 (September 1990) (on file with author). Recommendation 5-2 of the Panel Report reads: "To increase funding available for compensation of damages caused by spills, Canada ratify the 1984 Protocols to the '69 CLC and the '71 Fund Convention as soon as the second stage of compensation is reached."
here that a substantial rewrite of the present international regime would be needed to fulfill American expectations as expressed in Section 3001 of OPA. That is not likely to happen in the light of what followed the 1984 conference. It is more likely that the international scheme will now continue without American participation.

The international scheme faces some important challenges if it is to survive as a viable scheme in the years to come. The recent Haven incident has brought to light some potentially serious problems for the international scheme. Reference has already been made about the dispute concerning the unit of account in the Fund Convention. Then, there is the question of the definition of pollution damage.

This definition had already proved a difficult subject at the 1984 conference. The difficulties relate to the knotty problem of damage to the environment, to what extent such damage should be covered and, where what is to be compensated goes beyond actual costs of restoration, how it should be measured. If the international scheme, especially its IOPC Fund component, is to maintain its successful record in settling claims, it is essential that some consensus is achieved on this point. This will become more difficult as more states join the scheme.

VII. SUMMARY

The trend in the rest of the world is toward greater uniformity in the rules governing liability and compensation for ship source pollution. Canada and the United States, however, have not followed this trend.

Whereas Canada, after a long period of going it alone, has chosen to join the international fold, the United States has preferred to stay outside. Canada has taken the international regime as its own basic scheme, adding to it where it considered the international scheme to be incomplete or inadequate. The United States, on the other hand, has rejected the international scheme in its entirety and has constructed its own scheme from the ground up.

The existence of two different regimes in North America is nothing new. Nevertheless, a golden opportunity has been missed to harmonize the two regimes, and this is bound to drive up the costs of dealing with the consequences of oil spills caused by ships. The decision of the P&I Clubs to impose a surcharge on oil transported by sea into the United States is a first indication of things to come. In a world where regional competition has become much more intense, this gives cause for concern. As between Canada and the United States, the existence of two different regimes will give rise to pressures and tensions in any marine spill that does damage on both sides of the border. Given the course that has been

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68 See Jacobsson & Trotz, supra note 53.
set in both countries by the adoption of new legislation, the prospects of achieving common rules of liability and compensation between Canada and the United States seem remote.