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**LAW ON POLLUTION AND DEBRIS FROM
OIL AND GAS DRILLING AND PRODUCTION OPERATIONS
OFFSHORE NOVA SCOTIA**

by

Boris B. de Jonge

Submitted in partial fulfillment of
the requirements for the degree of
Master of Laws

at

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ABSTRACT

This thesis examines international and domestic law relating to pollution from offshore oil and gas operations in the Nova Scotia offshore area. The domestic regulatory regime is not integrated, but is contained in various acts. The three main acts deal respectively with ships, including mobile offshore drilling and production units (the *Canada Shipping Act*); fisheries protection (the *Fisheries Act*); and the industrial aspects of offshore oil and gas operations (the federal *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*; there is a corresponding provincial act which is essentially identical). These acts are administered by separate regulatory agencies. This results in inefficiency and uncertainty for industry, duplication of administrative effort and the potential for inconsistencies in regulatory approach.

A comprehensive statutory regime is in place with respect to responsibility and compensation for pollution damage. This is based on strict liability to a prescribed limit of \$30-million and is backed by financial security posted by operators. Offshore oil and gas operators have established individual plans to compensate fisheries interests for damage that may arise from pollution and debris, and the Canadian Association of Petroleum Producers is in the process of establishing a compensation plan for such damage in cases where the damage cannot be attributed to a particular operator.

Although there is presently no global conventional law dealing specifically with pollution from offshore oil and gas operations, there are general obligations under international customary law and the 1982 *Law of the Sea Convention*. Canada has a legal framework in place that meets these general requirements. In cases where detailed regulations have not yet been developed, international standards are applied in practice by Canadian regulatory agencies as conditions of approval. The principle of strict liability is incorporated into Canadian law, and procedures for recourse and compensation have been established.

ABBREVIATIONS

1969 Civil Liability Convention	<i>International Convention on Civil Liability for Oil Pollution Damage</i> , November 29, 1969, U.N. Legislative Series, U.N. Doc. ST/LEG/SER.B/16 at 447; (1970), 9 I.L.M. 45; U.N. Regist. No. 14097.
1971 Fund Convention	<i>International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage</i> , December 18, 1971, 11 I.L.M. 284.
Accord Act	<i>Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act</i> , S.C. 1988, c. 28. The corresponding provincial statute is the <i>Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act</i> , S.N.S. 1987, c. 3, but for convenience references are to the federal act only. Depending on the context, "Accord Acts" may mean both the federal and Nova Scotia acts, or may also include the essentially equivalent legislation applicable to the Newfoundland offshore area: the <i>Canada-Newfoundland Atlantic Accord Implementation Act</i> , S.C. 1987, c. 3, and <i>The Canada-Newfoundland Atlantic Accord Implementation (Newfoundland) Act</i> , S.N. 1986, c. 37
AWPPA	<i>Arctic Waters Pollution Prevention Act</i> , R.S.C. 1985, c. A-12.
Board	Canada-Nova Scotia Offshore Petroleum Board
CAPP	Canadian Association of Petroleum Producers
CMI	Comité Maritime International
CNOPB	Canada-Newfoundland Offshore Petroleum Board
CNSOPB	Canada-Nova Scotia Offshore Petroleum Board
COGLA	Canada Oil and Gas Lands Administration
CPA	Canadian Petroleum Association
EEZ	Exclusive Economic Zone
EL	Exploration Licence
HMDC	Hibernia Management and Development Company Ltd.

IMO	International Maritime Organization
IOPC Fund	International Oil Pollution Compensation Fund
Lasmo	LASMO Nova Scotia Limited
Marpol	<i>International Convention for the Prevention of Pollution from Ships, 1973, IMO Publication 52077.14.E; (1979) 12 I.L.M. 1319; incorporated with modifications in the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, IMCO Documents TSPP/CONF/11, February 16, 1978 and TSPP/CONF/11/Add.1, March 7, 1978.</i>
MOU	Memorandum of Understanding
NEB	National Energy Board
NEB Act	<i>National Energy Board Act, R.S.C. 1985, c. N-7.</i>
Newfoundland Board	Canada-Newfoundland Offshore Petroleum Board
Nova Scotia Board	Canada-Nova Scotia Offshore Petroleum Board
OGPCA	<i>Oil and Gas Production and Conservation Act, R.S.C.1985, c. O-7.</i>
PanCanadian	PanCanadian Resources
PL	Production Licence
Rio Declaration	<i>Declaration of the United Nations Conference on Environment and Development, adopted at Rio de Janeiro, June 13, 1992, U.N. Doc.A/CONF.151/5/Rev.1, 31 I.L.M. 874 (1992).</i>
SDL	Significant Discovery Licence
SOEP	Sable Offshore Energy Project
Stockholm Declaration	<i>Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm June 16, 1972, U.N. Doc A/CONF.48/14 and Corr.1 (1972), Section I, 11 I.L.M. 1416.</i>
U.N.	United Nations

INTRODUCTION

Although a detailed regime of international law has developed with respect to operational and accidental pollution from ships, there is no similar regime dealing specifically with pollution arising out of offshore oil and gas drilling and production operations. Conventional and customary international law provide a only framework of general principles in this area, leaving detailed rules, standards and recommended practices and procedures to be established by coastal states and implemented as domestic law.

This thesis examines the law applicable to marine pollution from offshore drilling and production operations in the Nova Scotia offshore area of Canada's eastern continental shelf, including the issues of liability, financial responsibility and compensation for damage resulting from spills and debris from such operations. The purpose of this work is to identify and set out accepted principles that may be relevant and to consider how these apply to the specific issues. Requirements regarding environmental assessment; environmental monitoring; international notification and consultation; and contingency planning and emergency response, although related to these topics, are beyond the scope of this work.

The first commercial oil production from Canada's continental shelf commenced in June 1992 with the start-up of the Cohasset-Panuke Project. This project is located offshore Nova Scotia, about 41 kilometres southwest of Sable Island. It is expected that the three oil fields comprising this project will produce some 46.5 million barrels¹ of light oil before continued operation of the project becomes uneconomic. Production rates are now declining, but at its peak this project produced some 30,000 barrels a day. This project was developed by LASMO Nova Scotia Limited ("Lasmo"), a wholly-owned subsidiary of London-based LASMO plc, and Nova Scotia Resources (Ventures) Limited, a wholly-owned subsidiary of Nova Scotia Resources Limited, a provincial Crown corporation. The project was operated by Lasmo.² From a legal point of view this

¹ 1 barrel = 0.1589873 cubic metres.

² In 1995, Lasmo was purchased by and subsequently amalgamated with PanCanadian Petroleum Limited

project has provided an interesting “test run” of the regulatory regime established for the Nova Scotia and Newfoundland offshore areas.

Three other projects are being developed on Canada's east coast. In November 1997 production commenced from the \$5.8-billion Hibernia Project.³ This is an oil field located in the Newfoundland offshore area about 315 kilometres east of St. John's. Recoverable reserves were initially estimated at about 615-million barrels and the field was expected to produce at an average rate of 135,000 barrels a day during the peak production period. However, the operator, Hibernia Management and Development Company Ltd. (“HMDC”), has indicated that recoverable reserves could be as high as 1-billion barrels and production rates could reach 200,000 barrels a day.⁴ Production is expected to continue for 18 years. It is estimated that Hibernia will account for about 12% of Canada's production of conventional crude oil by the year 2000. The Hibernia Project was considered and approved by the Canada-Newfoundland Offshore Petroleum Board in a decision report released in 1986 (updated by a second decision report in 1990).⁵

Development of the Sable Offshore Energy Project (“SOEP”)⁶ is also under way. This \$3-billion project includes six separate natural gas fields in the vicinity of Sable

of Calgary. PanCanadian Resources, a unit of PanCanadian Petroleum Limited, continues to operate the project.

³ The Hibernia consortium is comprised of Mobil Canada Hibernia Company Ltd. (5%), Mobil Oil Canada Properties, a general partnership of Mobil Oil Canada, Ltd. and Mobil Resources Ltd. (28.125%), Chevron Hibernia Holding Company Limited (5%), Chevron Canada Resources, a general partnership of Chevron Canada Resources Limited, Crest Exploration Limited, Chevron Development Company Limited and Cornwallis Arctic Oil Limited (21.875%), Petro-Canada Hibernia Partnership, a general partnership of Petro-Canada and Petro-Canada (Hibernia) Inc. (20%), Murphy Atlantic Offshore Oil Company Ltd. (6.5%), Norsk Hydro Grand Banks Inc. (5%) and Canada Hibernia Holding Corporation, a corporation owned by the federal government (8.5%). These participants formed Hibernia Management and Development Company Ltd. to operate the project.

⁴ Comments made by Harvey Smith, President of Hibernia Management and Development Company Ltd., during an address at the Newfoundland Oceans Industries Association conference in St. John's, Newfoundland, June 23, 1998.

⁵ Canada-Newfoundland Offshore Petroleum Board Decision 86.01 (June 1986) and Decision 90.01 (August 1990). The original decision report was largely based on recommendations released in January 1986 by the Hibernia Environmental Assessment Panel, which had been established by the Governments of Canada and Newfoundland before the formation of the Canada-Newfoundland Offshore Petroleum Board

⁶ The proponents of this project are Mobil Oil Canada Properties (50.8%), Shell Canada Limited (31.3%), Imperial Oil Resources Limited (9.0%), Nova Scotia Resources (Ventures) Limited (8.4%) and Mosbacher

Island, containing recoverable reserves of about 3.1 trillion cubic feet. Gas and associated natural gas liquids will be brought to shore by a submarine pipeline to a processing plant in the vicinity of Country Harbour, N.S., and from there will be transmitted to the area of Boston, Mass., through a 1000 kilometre pipeline that will cross Nova Scotia, New Brunswick, Maine and New Hampshire. This project recently received extensive review by a panel (the Joint Review Panel) as part of a process described in Chapter 2.⁷ The applications, interventions and other exhibits filed with the Joint Review Panel, together with the transcripts of the hearing, provide a great deal of information on environmental matters related to offshore oil and gas operations.⁸ The Canada-Nova Scotia Offshore Petroleum Board⁹ released its Decision Report¹⁰ in respect of the Development Plan for this project on December 30, 1997.

The \$4.5-billion Terra Nova Project¹¹ is at the predevelopment stage. This is an oil field located in the Newfoundland offshore area about 35 kilometres southeast of the Hibernia field, with recoverable reserves of about 370 million barrels. Production is expected to commence in December 1999 at an average annual peak production rate of 115,000 barrels a day. This project was considered by a review panel formed in 1996 pursuant to a Memorandum of Understanding among the federal and provincial governments and the Canada-Newfoundland Offshore Petroleum Board.¹² This panel held public hearings and rendered a report in August 1997¹³ which was considered by the

Operating Limited (0.5%). As with the Hibernia project, the proponents have formed a separate operating company, Sable Offshore Energy Inc., to operate the project, which is staffed by personnel seconded from the participating companies.

⁷ The Joint Public Review Panel Report – Sable Gas Projects (Halifax, October 1997).

⁸ The formal hearing took 56 days and resulted in 1270 exhibits and 12,266 pages of transcripts.

⁹ *Infra*, note 116.

¹⁰ Sable Offshore Energy Project – Benefits Plan Decision Report/Development Plan Decision Report (Canada-Nova Scotia Offshore Petroleum Board, December 4, 1997).

¹¹ Proponents are Petro-Canada (the operator, with a 29% interest), Mobil Oil Canada Ltd. (22%), Husky Oil Operations Ltd. (17.5%), Murphy Oil Company Ltd. (12%), Mosbacher Operating Ltd.(3.5%), Norsk Hydro Canada Oil & Gas Inc. (15%), and Chevron Canada Resources Ltd. (1%). (The partners have announced that these interests may change slightly.)

¹² Memorandum of Understanding dated June 17, 1996 among the Government of Newfoundland and Labrador, the Government of Canada and the Canada-Newfoundland Offshore Petroleum Board.

¹³ Terra Nova Development: An Offshore Petroleum Project – Report of the Terra Nova Development

Canada-Newfoundland Offshore Petroleum Board in making decisions later that year on the proposed benefits plan and development plan.¹⁴

Other significant oil and gas discoveries have been made in both the Newfoundland and the Nova Scotia offshore areas.¹⁵

This work will focus on the specific laws applicable in the Nova Scotia offshore area, but the regime applicable in the Newfoundland offshore area is substantially identical. The only two projects to have proceeded to the development stage to date offshore Nova Scotia are the Cohasset Project and, more recently, the Sable Offshore Energy Project. Of these, only the Cohasset Project has gone into production and therefore much of the discussion in this work will relate to this project.

The law is stated as of December 1998.

Project Environmental Assessment Panel (August 1997).

¹⁴ Canada-Newfoundland Offshore Petroleum Board Decision 97.02: Application for approval of Terra Nova Canada-Newfoundland Benefits Plan and Terra Nova Development Plan (December 1997).

¹⁵ See 1997-1998 Annual Report of the Canada-Nova Scotia Offshore Petroleum Board, p. 9, and 1997-1998 Annual Report of the Canada-Newfoundland Offshore Petroleum Board, p. 8.

1. NATURE OF POLLUTION FROM OFFSHORE OIL AND GAS OPERATIONS

Although accidental spills and blowouts are probably perceived as the greatest threats of pollution from offshore oil and gas operations, the routine discharge of effluents from drilling and production units as part of normal operations is also of concern. This section will briefly describe the major sources of such operational pollution (apart from air emissions).¹⁶

Drilling Fluids

Drilling fluid, or “mud” as it is sometimes called, is used in drilling operations to carry the drill cuttings to the surface, to stabilize the borehole and to lubricate the drill bit and drill pipe. This fluid fills the borehole during drilling operations. It is pumped down the hollow drill pipe, exits through nozzles in the drill bit, and then flows back up the borehole around the outside of the drill pipe, carrying the drill cuttings with it. The drill cuttings are screened out of the mud at the surface, and the mud is then recirculated back down the drill pipe in a continuous circuit.

An important function of the drilling fluid is to maintain the hydrostatic pressure within the borehole at a level that is greater than the pressure of fluids contained within potential producing formations. This prevents any oil or gas from entering the hole and causing a “blowout;” that is, an uncontrolled flow of oil or gas from the borehole.¹⁷ The hydrostatic pressure of the drilling fluid is adjusted as required by controlling its density through the use of additives. Numerous other chemicals and additives are mixed into

¹⁶ A more comprehensive description, including technical references, may be found in S. M. Evans, “Control of Marine Pollution Generated by Offshore Oil and Gas Exploration and Exploitation” October 1986 *Marine Policy* 258. See also a report prepared for the Sable Offshore Energy Project by MacLaren Plansearch (1991) Limited, “Physical Fate of Drilling and Production Effluent Discharges and Impact on Marine Environment,” filed as part of the applicant’s evidence in the Sable Gas Projects Joint Public Review in response to the Panel’s Information Request No. 2.4; F.R. Englehardt, J.P. Ray and A.H. Gillam (editors), “Drilling Wastes” (London: Elsevier, Proceedings of the 1988 International Conference on Drilling Wastes at Calgary, Alberta); J.P. Ray and F.R. Englehardt (editors), “Produced Water—Technological/Environmental Issues and Solutions” Environmental Science Research Series v. 46, 1992.

¹⁷ In an “underground blowout,” oil or gas enters the borehole from one formation and re-enters another formation that is at a lower pressure.

drilling fluids to adjust viscosity and achieve other characteristics that may be required to seal the wall of the borehole to control fluid loss, provide lubrication, inhibit corrosion, and so on. Many of these additives and chemicals are toxic to some degree. The base fluid may be water, oil, or a synthetic formulation composed of esters, ethers or polyalphaolefins. Compared to oil-based muds, synthetic-based muds are relatively non-toxic in marine environments and relatively biodegradable; oil-based muds give rise to greater environmental concerns, but may be indicated for specific drilling conditions.

Drilling fluids can enter the marine environment as a result of the disposal of drill cuttings coated with a film of residual drilling fluid, or through direct discharge, either during operations or when operations are completed. Even if cuttings are washed to remove any adhering drilling fluid, cleaning will not be completely effective. In addition, there is then a disposal problem for the wash fluid, which is often discharged into the ocean after having been treated to remove most of the oil. Even after such treatment the wash fluid may still contain detergents, hydrocarbons and other chemicals or compounds.

Drill Cuttings

Several thousand tonnes of cuttings may result from drilling a typical well. The main concern with the disposal of cuttings into the ocean is the residual drilling fluid adhering to them, although in certain circumstances the cuttings themselves may also be of concern.

Produced Water

The production of oil or gas is usually accompanied by greater or lesser amounts of water occurring naturally in the formation with the oil or gas. In some cases, this water may have been injected into a reservoir for purposes of pressure maintenance or secondary recovery. This produced water will generally contain hydrocarbons to some degree, even after its separation from the oil, and may also contain salts, heavy metals or other substances that could be of concern if the produced water is discharged into the ocean.

Ballast and Storage Displacement Water

Ballast water is sea water used to maintain the stability of an offshore unit. Storage displacement water is sea water that is pumped into and out of oil storage chambers during oil production and shipping operations. Both ballast water and storage displacement water may be contaminated with oil.

Bilge Water and Deck Drainage

Deck drainage is water that reaches the deck of offshore installations through precipitation, seaspray or from routine operations such as washdowns or fire drills. Bilge water is sea water or deck drainage that may seep or flow into a drilling or production installation from various points and collect in the bilges. Both bilge water and deck drainage may include lubricating oil, spilled mud or mud additives, diesel fuel, detergents, solvents and other cleaning compounds.

Produced Sand

Sand from the geological formation may move into the well bore with the oil or gas being produced. This produced sand is separated during processing, but may contain residual oil concentrations.

Well Treatment Fluids

Various fluids may be used in well completion, stimulation or workover operations. These fluids have varying chemical compositions and may be toxic to marine life. Well stimulation fluids are often acidic.

Cooling Water

Cooling water will normally contain chlorine or other biocide agents.

Desalination Brine

On some units, desalination brine results from the production of potable water from sea water.

Other

Other sources of pollution are sewage, waste water from showers, laundry and kitchen (“grey water”) and solid garbage, including containers that may be contaminated with chemical residues.

Summary

Of the above, the most serious sources of oil pollution are produced water and residual oil-based drilling mud adhering to drill cuttings. As an example, PanCanadian has estimated that a total of 201,942 litres of oil were discharged into the marine environment in 1997 from the Cohasset Project. Of this, the greatest source was drilling mud adhering to cuttings (57.2%), followed by oil in produced water (40.5%). Accidental spills accounted for 2.3% while oil adhering to produced sand was negligible.¹⁸ Both cuttings and produced water can be disposed of underground through reinjection.

The Canada-Nova Scotia Offshore Petroleum Board has indicated that after 1999 it will reduce the allowable limits for Low Toxicity Oil-Based Muds to the point where cuttings contaminated with such mud will need to be reinjected or brought to shore for disposal. The Board stated as follows in its Decision Report on the SOEP Development Plan:¹⁹

The Proponents have indicated that Low Toxicity Mineral Oil (LTMO) drilling muds will be used due to the depth and angle of many of the wells. While the Board accepts that this may be a technical requirement, the discharge into the ocean of drill cuttings and solids that contain residues of LTMO is a significant environmental concern of the Board. The current *Offshore Waste Treatment Guidelines* provide that levels of LTMO discharged with cuttings should be minimized to the extent possible with current technology. This is consistent with Recommendation 4(b) of the Joint Public Review Panel, which the Board accepts. With current levels of conventional solids control technology it has been demonstrated that if all solids discharge points are accurately monitored and measured the average result will be a discharge of slightly less than 15% mineral oil by weight of drill solids. The Joint Public Review Panel Report indicated that the Proponents expect to achieve a limit of 8% LTMO on cuttings. The Board has not been presented with data from any offshore drilling operations that

¹⁸ PanCanadian Resources 1997 Discharge Summary as filed with the Canada-Nova Scotia Offshore Petroleum Board.

¹⁹ *Supra*, note 10, at 51-52.

demonstrate that discharge significantly less than 15% can be achieved through conventional solids control technology.

Research is ongoing to find other drilling fluids and to develop alternative methods to treat and dispose of contaminated drill cuttings. In some jurisdictions such as the United Kingdom, the discharge of LTMO contaminated drill solids into the ocean has been virtually eliminated by imposing an allowable discharge limit of 1% oil by weight. Oily cuttings are either transported to approved onshore disposal sites or injected in offshore disposal wells. This 1% tolerance allows for small amounts of oil taken into water base drilling fluids in exceptional circumstances, for examples, when LTMO is needed to free a stuck drill pipe.

The North Sea is a mature oil and gas area compared to Canada's east coast and their lower regulated limits have been successfully phased in over a number of years. The Board intends to take a similar approach. The Board's current *Offshore Waste Treatment Guidelines* will be strictly applied over the next two years to minimize LTMO cuttings discharge into the ocean to the greatest extent possible. This will be balanced against the technical necessity for the use of LTMO base fluid and solids treatment technology. In addition, the Proponents will be required to submit a plan showing how they will eliminate the dumping of LTMO cuttings into the ocean. This policy will give operators time to experiment with alternative fluids and alternative methods of disposal or other treatment. After December 31, 1999, a discharge limit of 1% LTMO by weight on cutting will be imposed.

The Board then imposed the following condition:

Condition 21: Low Toxicity Mineral Oil (LTMO) Based Drilling Mud

The Proponents shall minimize the discharge into the marine environment of Low Toxicity Mineral Oil on cuttings by complying with the following:

- prior to December 31, 1999 discharges of LTMO on cuttings shall be in compliance with the Board's *Offshore Waste Treatment Guidelines* and the Proponents shall only use LTMO in well sections where it is a technical requirement,
- after December 31, 1999, discharges of LTMO on cuttings shall not exceed 1% LTMO by weight on cuttings, unless specifically authorized by the Board in exceptional circumstances, and
- prior to commencing drilling, the Proponents shall submit to the Board a plan which outlines the measures they will take to minimize the discharge of LTMO on cuttings and to comply with the 1% discharge limit by December 31, 1999. Alternative means of disposal, drilling fluids and solids control equipment are to be considered.

2. INTERNATIONAL LAW

2.1 General

International law governs both a state's jurisdiction over offshore resources and its obligations with respect to environmental matters related to the exploitation of such resources. There are four traditional sources of international law: treaties; custom;²⁰ general principles of law recognized by nations; and judicial decisions and teachings of highly qualified publicists.²¹ However, international law is also influenced by "soft law" contained in non-binding resolutions, recommendations, declarations of principle and similar expressions.²² Although these are not rules, they may evolve into customary law or be incorporated into treaties as they become more broadly embraced.

The United Nations Conference on the Human Environment held in Stockholm in 1972 was a widely attended international conference which was pivotal in the development of international environmental law. This conference resulted in the *Stockholm Declaration*,²³ which consisted of a preamble and 26 principles concerning environmental matters. The declaration was not formally binding, and as such was an example of "soft law." However, it is generally considered to be an instrument of international environmental law in that it stated or generated customary law.

Principles 21 and 22 are relevant to offshore oil and gas operations:

21. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their natural resources pursuant to their own environmental policies, and the responsibility to

²⁰ Customary law consists of unwritten, uncodified custom that is established by evidence of the conduct of states (*practice*) undertaken in the belief that they were bound to do so by law (*opinio juris*). Customary law may eventually be codified in treaties (or in restatements of the law, although there may then be an issue as to whether the restatement accurately reflects customary law).

²¹ In general, see A. Kiss and D. Shelton, *International Environmental Law* (Ardsley-on-Hudson, New York: Transnational Publishers, Inc., 1991).

²² See P.M. Dupuy, "Soft Law and the International Law of the Environment" (1991) 12 Mich. J. Int'l L. 420.

²³ *Declaration of the United Nations Conference on the Human Environment*, June 16, 1972, U.N. Doc A/CONF.48/14 and Corr.1 (1972), Section I, 11 I.L.M. 1416; S. H. Lay *et al.* (eds.), *New Directions in the Law of the Sea: Documents*, Vol. II (Dobbs Ferry, N.Y.: Oceana Publications, 1973).

ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

22. States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

Principle 7 specifically addresses marine pollution:

States shall take all possible steps to prevent marine pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, damage amenities or to interfere with other legitimate uses of the sea.

The *Stockholm Declaration* was expressly reaffirmed by the *Rio Declaration* resulting from the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992,²⁴ which stated or proposed a number of principles of international environmental law.

2.2 Jurisdiction beyond the territorial sea

A state's sovereignty is limited to its own territory, its ships and aircraft. Under international law, the territory of a coastal state, in addition to its land area and internal waters,²⁵ includes its "territorial sea." Historically, this was a zone within 3 nautical miles of the coast, but a 12 mile zone is now universally recognized and is declared by Canada in the *Oceans Act*.²⁶

International law also recognizes that a coastal state has limited jurisdiction beyond its 12 mile territorial sea within the area of the continental shelf contiguous to its coasts. The development of the law of the continental shelf began with the 1945 *Truman*

²⁴ June 13, 1992, U.N. Doc.A/CONF.151/5/Rev.1, 31 I.L.M. 874 (1992).

²⁵ Internal waters are waters other than the territorial sea that are fully part of a state's territory. Canada's internal waters include those areas where Canada has a historic title of sovereignty, such as the Gulf of St. Lawrence and the Bay of Fundy.

²⁶ S.C. 1996, c. 31. The territorial sea was previously declared in the *Territorial Sea and Fishing Zones Act*, R.S.C. 1985, c. T-8, which was repealed by the *Oceans Act*.

Proclamation,²⁷ by which the United States claimed jurisdiction and control over the natural resources of the subsoil and sea-bed of the continental shelf contiguous to its coasts. It is interesting that the *Truman Proclamation*, the principal purpose of which was to facilitate the development of petroleum resources,²⁸ stated that “self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources.”²⁹

This concept was subsequently reflected in the 1958 *Geneva Convention on the Continental Shelf*,³⁰ which provided that a coastal state has sovereign rights over its continental shelf for the purpose of exploring it and exploiting its natural resources.³¹ These rights (which did not affect the legal status of the superjacent waters) were exclusive and did not depend on occupation or express proclamation.³² This principle later became part of customary international law.³³

This convention did not contain any provisions directly relevant to pollution, except that the coastal state was required to undertake all appropriate measures within safety zones around installations for the protection of the living resources of the sea from all harmful agents.³⁴ However a companion treaty, the 1958 *Geneva Convention on the High Seas*,³⁵ provided that “[e]very State shall draw up regulations to prevent pollution of

²⁷ Proclamation No. 2667, Sept. 28, 1945, 3 C.F.R. (1943-1948 Comp.) 67.

²⁸ *Supra*, note 27, at 68.

²⁹ *Ibid.* at 67.

³⁰ *Convention on the Continental Shelf*, April 29, 1958, U.N. Doc. A/CONF.13/L.55, Canada-Treaty Series 1970, No. 4, [1964] 1 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; also reprinted in I. Brownlie (ed.), *Basic Documents in International Law*, 2nd ed. (Oxford: Clarendon Press, 1981). Ratified by Canada in 1970.

³¹ Art. 2

³² Art. 3.

³³ See, for example, the judgement of the International Court of Justice in the *North Sea Continental Shelf* cases, [1969] I.C.J. Rep. 3.

³⁴ Art. 5, para. 7.

³⁵ *Convention on the High Seas*, Geneva April 29, 1958, [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil.”³⁶

In 1973, the first session of the Third United Nations Conference on the Law of the Sea was held. This was followed by ten more sessions, which in 1982 resulted in the *United Nations Convention on the Law of the Sea*.³⁷ The *Law of the Sea Convention* reaffirms the customary law related to the continental shelf and additionally provides that the coastal state has the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.³⁸ (See the Appendix for the text of relevant provisions).

The continental shelf is defined in the *Law of the Sea Convention* as comprising the sea-bed and subsoil of the submarine areas that extend beyond the territorial sea to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.³⁹ There are additional detailed rules that apply in determining the edge of the continental margin in cases where the margin extends beyond 200 nautical miles.⁴⁰

The *Law of the Sea Convention* also introduced the separate concept of an exclusive economic zone (“EEZ”) which may extend up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.⁴¹ The EEZ may therefore include all or a portion of the continental shelf. The Convention establishes a specific legal regime with respect to the EEZ, which gives the coastal state sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil; and jurisdiction with regard to the establishment and use of

³⁶ Art. 24.

³⁷ *U.N. Convention on the Law of the Sea*, October 7, 1982, U.N. Doc. A/CONF.62/122, (1982) 21 I.L.M. 1261 (hereinafter the “*Law of the Sea Convention*”). This convention came into force on November 16, 1994.

³⁸ *Law of the Sea Convention*, arts. 77 and 81.

³⁹ Art. 76.

⁴⁰ *Ibid.*

⁴¹ *Law of the Sea Convention*, Part V.

artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment.⁴²

The rules concerning the exploration for and the exploitation of offshore oil and gas are therefore addressed both in Part V of the *Law of the Sea Convention*, which deals with the EEZ regime, and in Part VI, which deals with the continental shelf. However, the rights of a coastal state with respect to the sea-bed and subsoil under the EEZ regime are essentially the same as the rights that it has with respect to its continental shelf.⁴³ Such rights do not amount to complete and exclusive sovereignty, however.⁴⁴

2.3 Other provisions of the Law of the Sea Convention

(a) Prevention of marine pollution⁴⁵

Part XII of the *Law of the Sea Convention* deals with the protection and preservation of the marine environment. Section 1, comprising articles 192 to 196, states certain general principles. Article 192 imposes a general obligation on states to “protect and preserve the marine environment.” Article 193 provides that, subject to this obligation, states have the sovereign right to exploit their natural resources pursuant to their environmental policies. The Convention therefore recognizes that specific environmental policies may differ from state to state, although article 194 provides that states shall “endeavour” to harmonize their policies.

Article 194 requires states to take, individually or jointly as appropriate, all measures necessary to prevent, reduce and control pollution from any source. With regard to the exploration and exploitation of the natural resources of the sea-bed and subsoil specifically, states are required to take measures for preventing accidents, dealing with emergencies, ensuring the safety of operations, and regulating the design, construction,

⁴² Art. 56.

⁴³ Art. 56, para. 3.

⁴⁴ See F. V. W. Penick, “The Legal Character of the Right to Explore and Exploit the Natural Resources of the Continental Shelf” (1985) 22 *San Diego L. Rev.* 765.

⁴⁵ See A. Berrett, “UNCLOS III: Pollution Control in the Exclusive Economic Zone” (1995) 55 *Louisiana L. Rev.* 1165.

equipment, operation and manning of installations and units used for drilling and production.

An accident may obviously be the cause of catastrophic pollution, and therefore regulations dealing with safety, design, construction, equipment, operation and manning, to the extent that they may prevent accidents, are in a sense related to the prevention of pollution. Similarly, requirements in respect of emergency response and contingency plans are indirectly related to the prevention of pollution or at least the mitigation of damages. As stated in the Introduction, a detailed discussion of these matters is beyond the scope of this work, which will instead examine the rules more directly applicable to pollution prevention and liability. It may be mentioned in passing, however, that international standards and procedures have been established in many of these areas and have generally been adopted by Canada, perhaps with some modification.⁴⁶

In adopting measures for the purpose of article 194, states are required to use “the best practical means at their disposal and in accordance with their capabilities,” suggesting that standards may vary from state to state depending on the capabilities of states and the means available to states. Certainly in the context of offshore oil and gas operations, which are conducted within the framework of an international industry and involve an international commodity, there would not seem to be any justification for having different standards. The availability of “the best practical means” in this industry would in most cases be simply a question of economics.

The remaining sections of Part XII deal with other more specific aspects of environmental protection. Articles 208 and 214 relate particularly to pollution from sea-bed activities.

Paragraph 1 of article 208 requires states to adopt laws and regulations to prevent, reduce and control pollution arising from or in connection with sea-bed activities and from artificial islands, installations and structures; and paragraph 3 states that such laws,

⁴⁶ For example, the International Maritime Organization (IMO) has developed a “Code for the Construction and Equipment of Mobile Offshore Drilling Units (1979)” which forms the basis for the Canadian Coast Guard Standards Respecting Mobile Offshore Drilling Units (TP6472 E, 1985) and the *Offshore Petroleum Installations Regulations* made separately under the *Accord Act* (*infra*, note 115) and the *Canada Oil and Gas Operations Act* (*infra*, note 122).

regulations and measures shall be no less effective than international rules, standards and recommended practices and procedures. Paragraph 4 requires states to “endeavour” to harmonize their policies in this connection at the “appropriate regional level.” (This is somewhat inconsistent with paragraph 1 of article 194, which contains a general requirement that states endeavour to harmonize their pollution policies globally. As a matter of construction, the more specific provision will prevail over the more general; the drafters must have felt that in the specific context of sea-bed activities, global uniformity was not essential but that some degree of regional uniformity would be desirable. Sea-bed activities are different in this regard from shipping, as operations are confined to particular regions and will be governed by the coastal states.) Paragraph 5, however, requires states to establish global and regional rules, standards and recommended practices and procedures through competent international organizations and diplomatic conference.

Article 214 requires states to enforce their laws and regulations adopted in accordance with article 208 and to adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference.

(b) Liability and compensation for marine pollution

The *Law of the Sea Convention* deals with responsibility and liability for marine pollution in article 235. Paragraph 1 provides that states are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment, and that they shall be liable in accordance with international law. This provision appears to be tautological, and does not assist in defining the precise nature of a state's liability.

Paragraph 2 requires states to make recourse available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

Paragraph 3 imposes certain requirements on states with the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment: states are to co-operate in the implementation of existing

international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

(c) Summary

The *Law of the Sea Convention* therefore establishes a general framework of principles rather than detailed rules and standards. These are left to be developed by each coastal state pursuant to its own environmental policies, but states are urged to harmonize their policies at least at the regional level. Furthermore, measures taken by states must as a general matter use the best practical means at their disposal and in accordance with their capabilities, but in any case, with regard to sea-bed activities specifically, measures must be no less effective than international rules, standards and recommended practices and procedures (which are not set out in the Convention but are left to future negotiation). Finally, it is not sufficient for states to adopt laws and regulations to prevent, reduce and control pollution; they must also enforce such laws.

Canada is a signatory to the *Law of the Sea Convention* but has not yet ratified this treaty. Nevertheless, the *Law of the Sea Convention* serves as evidence of pre-existing and new customary law, which will be binding on states whether or not they are parties to the convention.⁴⁷ In any case, as a signatory to the *Law of the Sea Convention*, Canada is obliged to refrain from acts which would defeat its object and purpose unless it indicates that it does not intend to proceed to ratification.⁴⁸

⁴⁷ R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 2nd. ed. (Manchester: Manchester University Press, 1988) 19. In addition, while particular provisions and concepts of the Convention may not yet clearly form part of customary international law, by giving written expression to these concepts the Convention serves to direct the development of future customary law: J. K. Gamble, Jr., and M. Frankowska, "The 1982 Convention and Customary Law of the Sea: Observations, a Framework, and a Warning" (1984) 21 San Diego L. Rev. 491.

⁴⁸ *Vienna Convention on the Law of Treaties*, 1969, art. 18.

2.4 Other Conventions

(a) 1969 Civil Liability Convention and 1971 Fund Convention

Following the shipwreck of the *Torrey Canyon* in 1967, there was a great impetus to establish a credible compensation regime for marine pollution from oil tankers. This resulted in the 1969 *Civil Liability Convention*,⁴⁹ which provided for the strict liability of shipowners for oil pollution up to a ceiling amount (subject to very limited defences) and compulsory insurance.⁵⁰ The convention entered into force in 1975 and by mid-1997 had been accepted by 97 states. The convention has been modified by 1976 and 1992 Protocols. (A 1984 Protocol never entered into force, but the basic principles of the 1984 Protocol were picked up in the 1992 Protocol, which entered into force in 1996.)

The 1969 *Civil Liability Convention* is supplemented by the 1971 *Fund Convention*⁵¹ which came into force in 1978. This provides for supplementary compensation for claimants who are unable to obtain full compensation under the *Civil Liability Convention*⁵² and also establishes the International Oil Pollution Compensation Fund (IOPC Fund), which is financed by a levy on cargoes of persistent oil. The IOPC Fund is administered by the IOPC Fund Assembly. Like the *Civil Liability Convention*, the *Fund Convention* was amended by 1976 and 1992 Protocols (a 1984 Protocol never entered into force).

Canada has incorporated these conventions into domestic law in Part XVI of the *Canada Shipping Act*, which came into force in 1989.

These conventions only apply to vessels carrying persistent oil in bulk as cargo and do not apply to oil pollution resulting from drilling or production operations (the

⁴⁹ *International Convention on Civil Liability for Oil Pollution Damage*, November 29, 1969, U.N. Legislative Series, U.N. Doc. ST/LEG/SER.B/16 at 447; (1970), 9 I.L.M. 45; U.N. Regist. No. 14097.

⁵⁰ For a general description of the 1969 *Civil Liability Convention* and the 1971 *Fund Convention*, see E. Gold, *Gard Handbook on Marine Pollution*, 2nd ed., (Arendal, Norway: Assuranceforeningen Gard, 1998).

⁵¹ *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, December 18, 1971, 11 I.L.M. 284.

⁵² The most likely reason why full compensation may not be available under the 1969 *Civil Liability Convention* is that the limit of a shipowner's liability is exceeded. However, it is also possible that a shipowner does not have sufficient insurance coverage or that there is no liability because of one of the exceptions under the convention.

1992 Protocol includes such vessels in ballast, so that dirty ballast from a previous cargo voyage is also covered).

(b) Marpol 1973/78

The *International Convention for the Prevention of Pollution from Ships, 1973*, together with the Protocol of 1978 (“*Marpol*’)⁵³ is directed at pollution from ships; however “ship” is defined to include floating craft and fixed or floating platforms.⁵⁴ Therefore although a “discharge” for the purposes of *Marpol* does not include the “release of harmful substances directly arising from the exploration, exploitation and associated offshore processing of sea-bed mineral resources,”⁵⁵ *Marpol* will apply to operational discharges from mobile offshore drilling units and other platforms. The convention has five annexes, each consisting of regulations with respect to a particular type of pollutant. Annexes I (Oil) and V (Garbage) are applicable to offshore oil and gas operations. Annex IV (Sewage) would also be applicable, but has not yet entered into force. Annexes II and III deal respectively with noxious liquid substances and harmful substances in packaged forms, and therefore have little applicability to offshore oil and gas operations.

Regulation 21 of Annex I (Oil) specifically applies to drilling rigs and other platforms. Section 10 of the Unified Interpretation of Annex I⁵⁶ recognizes four categories of discharges associated with the operation of offshore platforms when engaged in the exploration and exploitation of mineral resources: platform drainage, offshore processing drainage, production water discharge, and displacement discharge. The Unified Interpretation provides that of these, only the discharge of platform drainage should be subject to *Marpol*.

⁵³ IMO Publication 52077.14.E; (1979) 12 I.L.M. 1319; incorporated with modifications in the Protocol of 1978 relating to the *International Convention for the Prevention of Pollution from Ships, 1973*, IMCO Documents TSPP/CONF/11, February 16, 1978 and TSPP/CONF/11/Add.1, March 7, 1978. See *Marpol 73/78, Consolidated Edition, 1991* (London: IMO, Sales No. IMO-520E, 1992).

⁵⁴ Art. 2(4).

⁵⁵ Art. 2(3)(b)(ii).

⁵⁶ *Marpol 73/78 Consolidated Edition, 1991, supra*, note 53, at 139.

Regulation 4 of Annex V (Garbage) deals specifically with the disposal of garbage from fixed or floating platforms engaged in the exploration, exploitation and associated offshore processing of sea-bed mineral resources.

Of the five Annexes, only Annexes I and II are mandatory; Annexes II, IV and V are optional. Canada has acceded to *Marpol*,⁵⁷ and has implemented the requirements of Protocol I and Annexes I and II by promulgating the *Pollutant Discharge Reporting Regulations*, the *Oil Pollution Prevention Regulations* and the *Dangerous Chemicals and Noxious Liquid Substances Regulations* under the *Canada Shipping Act*. Although it has not acceded to the optional annexes, Canada also has regulations dealing with sewage and garbage from ships.

(c) CMI Draft Convention on Offshore Mobile Craft, 1994

At its 31st international conference in Rio de Janeiro in September 1977, the Comité Maritime International (CMI) developed a *Draft Convention on Offshore Mobile Craft*.⁵⁸ This draft convention was revisited during the 35th CMI Conference in Sydney, Australia in October 1994, and minor amendments were made which resulted in the 1994 Sydney Draft.⁵⁹ This draft convention was an attempt to clarify the application of certain rules of maritime law to mobile offshore drilling units and other craft involved in activities such as pipelaying, hoisting, accommodation, storage, construction and repair. The convention provided that parties which are also parties to specified international maritime conventions would apply the substantive rules of such conventions to such craft. "Craft" was defined as

any marine structure of whatever nature not permanently fixed into the seabed which

⁵⁷ An instrument of accession was deposited with the Secretary-General of the International Maritime Organization (IMO) on November 16, 1992, to take effect February 16, 1993.

⁵⁸ CMI Documentation I/1977.

⁵⁹ Draft International Convention on Offshore Mobile Craft, XXXVth International Conference of the Comité Maritime International, Sydney. CMI Yearbook 1994 – Sydney II – Documents of the Conference (Antwerp: CMI, 1994) 180.

- a) is capable of moving or being moved whilst floating in or on water, whether or not attached to the seabed during operations, and
- b) is used or intended for use in the exploration, exploitation, processing, transport or storage of the mineral resources of the seabed or its subsoil or in ancillary activities.⁶⁰

The matters addressed were collision, salvage, arrest, rights in craft such as liens and mortgages, limitation of liability of the owner or charterer for maritime claims, and liability of the owner or charterer for oil pollution damage resulting from the escape of, or discharge of oil contained in the craft.

The convention was intended to apply only to the maritime aspects of offshore craft and not the industrial aspects of the offshore activities, such as drilling or production operations. The convention therefore did not address the liabilities of the operator, concessionaire, licensee or other holder of rights with respect to mineral resources, but only those of the rig owner, demise charterer or other maritime manager responsible for the marine aspects of the craft. Also, stationary and permanent installations such as production platforms were not covered by the convention.

With regard to oil pollution, the draft convention applied only to the escape or discharge of oil contained in craft in respect of which the rules of the 1969 *International Convention on Civil Liability for Oil Pollution Damage* would apply. It was not intended to cover liability for blowouts, such liability being primarily the concern of the concessionaire or licensee. However such liability could also be incurred by a craft owner, for example due to the negligence of his employees. In order to facilitate the financing of craft by mortgage, the 1977 Rio Draft specifically provided that no maritime lien shall attach to craft in respect of pollution damage liability other than as provided in the draft convention,⁶¹ however this article was deleted from the 1994 Sydney Draft as it was held to be superfluous since the 1993 *Maritime Liens and Mortgages Convention* expressly provides that no maritime lien shall attach to craft in respect of liability for pollution damage

⁶⁰ Article 1.

⁶¹ Article 10.

The draft convention has a number of deficiencies which were pointed out by the Canadian Maritime Law Association in a background paper prepared for the Sydney conference.⁶² Among other things, it attempts to apply the basic principles of maritime law, designed for ships, on structures which are not ships; it makes an unworkable distinction between the operation of mobile offshore craft while in transit and while conducting drilling or production operations, with the result that different legal regimes would apply to these two aspects of operation of the same craft; and it artificially distinguishes offshore craft that are mobile and other types of offshore units such as the Hibernia gravity-based structure and jack-up platforms.

At its October 1995 meeting the Legal Committee of the IMO encouraged the CMI to pursue the preparation of a comprehensive draft treaty. For the reasons noted above, among others, the Canadian Maritime Law Association has suggested that this can best be achieved, not by revising the Sydney Draft, but by adopting a new approach.⁶³

(d) Conventions concerning liability for offshore oil and gas operations

With the exception of certain regional conventions which contain provisions relating to liability,⁶⁴ there are presently no global conventions concerning liability for offshore oil and gas operations.⁶⁵ The *Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources*,

⁶² CMI Yearbook 1994, *supra*, note 59 at 186.

⁶³ Canadian Maritime Law Association, *Discussion Paper on the need for an International Convention on Offshore Units, Artificial Islands and Related Structures used in the Exploration for and Exploitation of Petroleum and Seabed Mineral Resources*, March 1996 Revision, CMI Yearbook 1996 (Antwerp: CMI, 1996). Also posted on internet: <http://home.istar.ca/~cmla/papers/MAR96.htm>.

⁶⁴ The *Helsinki Convention*, for example, requires the parties to jointly develop and accept rules on responsibility for damage resulting from acts or omissions in contravention of the convention, including those causing pollution from offshore operations. Among other things, such rules would cover limits of liability, criteria and procedures for determining liability and remedies. The draft *Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Offshore Activities* provides for strict and limited liability of operators and requires the states parties to cooperate in the formulation and adoption of appropriate principles and procedures for determining liability and compensation for damage resulting from offshore activities.

⁶⁵ D. VanderZwaag, *Canada and Marine Environmental Protection – Charting a Legal Course Towards Sustainable Development* (London: Kluwer Law Int'l, 1995) at 137.

1977 (CLEE, 1977)⁶⁶ was an attempt by the coastal states of northwestern Europe to establish a civil liability regime in respect of offshore drilling and production operations similar to that applicable to laden tankers under the 1969 *Civil Liability Convention*. So far no state has ratified or acceded to the convention, and it seems unlikely that it will ever enter into force.⁶⁷

Canada has not entered into any regional conventions dealing specifically with pollution from drilling and production operations, although it has made contingency plans to deal with spills of oil and other noxious substances with the United States and Denmark.⁶⁸ Canada has also entered into a treaty with Denmark concerned with operations near Greenland⁶⁹ and is a party to an agreement providing for discussion and action on environmental issues of common concern in the Gulf of Maine.⁷⁰

2.5 International responsibility

Pollution from operations in the Nova Scotia offshore area could potentially affect lands and residents of the United States and France (which has sovereignty over the islands of St. Pierre and Miquelon off the south coast of

⁶⁶ (1977) 16 I.L.M. 1451; also reproduced in *Contemporary Issues in Ocean Management and Development*, Vol. 1.B, Primary Documents (Halifax: Marine Affairs Program, Dalhousie University).

⁶⁷ The convention makes the operator of an installation strictly liable for any oil pollution damage, including the cost of preventative measures, up to a limit of liability of 40 million special drawing rights issued by the International Monetary Fund, and requires operators to carry insurance of at least 35 million special drawing rights. (A state may provide for higher or unlimited liability. Also, if the pollution damage results from a deliberate act or omission of the operator and the operator had actual knowledge that pollution damage will result, the operator's liability will be unlimited.) The only exceptions to the principle of strict liability are if the damage results from an act of war or a natural phenomenon of an exceptional, inevitable and irresistible character; from an intentional or negligent act done by the person suffering the pollution damage; or from an abandoned well more than five years after the well was properly abandoned in accordance with the applicable requirements of the coastal state. The convention provides that a person damaged by pollution may bring an action in the courts of the state where the damage was sustained, or in the courts of the state having jurisdiction over the installation causing the damage. The operator is required to constitute a fund in the amount of his limit of liability with one such court, and that court then has exclusive jurisdiction to determine all matters relating to the apportionment and distribution of the fund.

⁶⁸ *Joint Marine Pollution Contingency Plan for Spills of Oil and Other Noxious Substances*, June 19, 1974, United States-Canada, 25 U.S.T.1280, T.I.A.S No. 7861; *Interim Canada-Denmark Marine Pollution Contingency Plan*, June 22, 1977; referred to in A.L.C. de Mestral, *supra*, note 1, at 491.

⁶⁹ *Agreement for Co-operation relating to the Marine Environment*, 1983.

⁷⁰ *Agreement on Conservation of the Marine Environment of the Gulf of Maine*, December, 1989, reprinted in Gulf of Maine Council on the Marine Environment, *The Gulf of Maine Action Plan 1991 – 2000* (July 1991), Appendix.

Newfoundland, as well as related rights to a portion of the continental shelf). Principle 22 of the *Stockholm Declaration* and Principle 13 of the *Rio Declaration* emphasize the responsibility of states to develop effective international regimes to address transboundary pollution and liability and compensation for environmental damage both within and outside their territories. Principle 13 provides:

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also co-operate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

As pointed out by Melissa Cates,⁷¹ the *Law of the Sea Convention* does not impose international legal responsibility necessary to guarantee effective compensation for transnational damage. It does not have definitive procedures for determining liability, guaranteeing compensation and enforcing the adoption of international rules in this area; nor does it provide for a mandatory enforcement mechanism. However, it is a general principle of international law that states must exercise their rights in a manner which does not injure other states. In this regard, states are responsible not only for their own activities, but also those over which they exercise control, both public and private.⁷² The obligation of states to pay compensation for damage caused by transboundary pollution has been reflected in customary international law since the Trail Smelter Arbitration between the United States and Canada.⁷³

Traditionally, though, states have only been held responsible for environmental damage inflicted on other states if negligence or fault could be established. An example is the Ixtoc I blowout in the Gulf of Mexico in 1977, which caused extensive damage to the Texas coast and damaged private beaches, public parks, and the tourist and fishing

⁷¹ M. B. Cates, "Offshore Oil Platforms Which Pollute the Marine Environment: A Proposal for an International Treaty Imposing Strict Liability" (1984) 21 San Diego L. Rev. 691.

⁷² In general, see A. Nollkaemper, *The Legal Regime for Transboundary Water Pollution: Between Discretion and Constraint* (Dordrecht: Graham & Trotman/Martinus Nijhoff, 1993).

⁷³ *The Trail Smelter Arbitration*, (1945) 3 U.N. R. Int'l Arb. Awards 1905. In this case an arbitral tribunal held Canada liable to provide compensation for damage to the United States caused by fumes from a smelter at Trail, B.C.

industries. This incident resulted in a number of lawsuits, including an action by the United States government against the U.S. owner of the drilling rig, which was settled out of court. However, even though the well had been drilled under Mexican authority, Mexico denied any liability. Mexico took the position that neither it nor its agents (the operator and a Mexican drilling company) had violated any international obligation, nor had it acted negligently. Both customary law and the *Law of the Sea Convention* gave Mexico the sovereign right to exploit its natural resources in conformity with its obligation to protect and preserve the marine environment, and in attempting to contain the blowout, it thereby complied with international law. Although there were numerous treaties concerning marine pollution, none of them applied to this situation, and there was no conventional international law that obligated Mexico to pay any reparations.⁷⁴ The United States government chose not to sue Mexico, believing that it had insufficient legal support for a claim.⁷⁵

However, de Mestral argues for strict liability:

Although measures to avoid pollution of neighbours' environment from offshore mining and drilling are left to state's discretion, a failure to take appropriate measures which then give rise to transfrontier pollution damage to other states, and arguably the mere fact of damage arising from pollution, will render the state which is the source of such damage liable to provide compensation if the damage is serious and if the damage resulted from a state act. While evidence of fault or negligence clearly improves the case of a claimant state, there is a strong argument in support of a rule of strict liability. Where the damage results from the act of a private person acting under the jurisdiction of a state, that state, while itself not necessarily liable, must at least make available adequate recourse against those causing the damage, failing which it will become liable under international law for denial of justice.⁷⁶

⁷⁴ J. A. Vargas, former Mexican delegate to the *United Nations Conference on the Law of the Sea III*, quoted in M. Cates, *supra*, note 71 at 692.

⁷⁵ *Supra*, note 71, at 693.

⁷⁶ A. L. C. de Mestral, "The Prevention of Pollution of the Marine Environment Arising from Offshore Mining and Drilling" (1979) 20 Harv. Int'l L.J. 469 at 489.

Handl agrees that “while offshore oil drilling is not subject to a strict liability convention of global applicability, a non-fault standard of liability might nevertheless be argued on the basis of an emerging norm of customary international law.”⁷⁷

2.6 Conclusion

There is presently no global conventional law dealing specifically with pollution from offshore oil and gas operations. The *Law of the Sea Convention* provides only a very general framework, mostly in the nature of “soft” obligations. However, unlike tankers, which can potentially affect any number of states, offshore oil and gas operations are limited to coastal areas within the jurisdiction of the coastal state, and generally are subject to established domestic regulatory regimes, which include legal remedies for pollution damage. Parties have generally sought recovery from private parties rather than states with respect to oil spills, but in any case, a considerable body of customary international law exists with respect to transnational damage. It is therefore suggested that there is no particular need to develop global conventions in this area.

The regulatory structure applicable to oil and gas operations in the offshore area of Nova Scotia is the subject of the rest of this work.

⁷⁷ Handl, “The Case for Mexican Liability for Transnational Pollution Damage Resulting from the Ixtoc I Oilspill” (1979) 2 Hous. J. Int’l L. 227 at 235.

3. JURISDICTION OVER OFFSHORE OIL AND GAS OPERATIONS

3.1 Continental Shelf and Exclusive Economic Zone

In the *Oceans Act*, Canada declares an EEZ⁷⁸ as well as jurisdiction over offshore oil and gas resources based on its rights with respect to the continental shelf.⁷⁹ The rights of Canada in the EEZ are set out as follows in section 14:

14. Canada has

- (a) sovereign rights in the exclusive economic zone of Canada for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the exclusive economic zone of Canada, such as the production of energy from the water, currents and winds;
- (b) jurisdiction in the exclusive economic zone of Canada with regard to
 - (i) the establishment and use of artificial islands, installations and structures,
 - (ii) marine scientific research, and
 - (iii) the protection and preservation of the marine environment; and
- (c) other rights and duties in the exclusive economic zone of Canada provided for under international law.

Canada's rights with respect to the continental shelf are set out as follows in section 18 of the *Oceans Act*:

18. Canada has sovereign rights over the continental shelf of Canada for the purpose of exploring it and exploiting the mineral and other non-living natural resources of the seabed and subsoil of the continental shelf of Canada, together with living organisms belonging to sedentary species. . .

The Act provides, "for greater certainty," that any rights of Canada in the seabed and subsoil of the EEZ and their resources and any rights of Canada in the continental

⁷⁸ Section 13.

⁷⁹ Section 17.

shelf of Canada are vested in Her Majesty in right of Canada, that is, the federal government.⁸⁰ The Act also provides that in any area of the sea not within a province, the seabed and subsoil below the internal waters of Canada and the territorial sea of Canada are vested in Her Majesty in right of Canada.⁸¹

3.2 Application of Canadian Laws

(a) Extension of Canadian laws to offshore

Since the area beyond the 12 mile territorial sea does not form part of Canadian territory as such, Canadian law will not apply in that area in the absence of specific statutory provisions extending territorial application. Certain statutes apply in the offshore area by their own terms, and in some cases also provide that other named acts will apply in the offshore area.⁸² In order to extend the general body of Canadian law to oil rigs and other installations on the continental shelf, the *Canadian Laws Offshore Application Act*⁸³ was passed in 1990. The essential provisions of this Act were incorporated into Part I of the *Oceans Act* in 1996, which came into force on January 31, 1997⁸⁴ and repealed the *Canadian Laws Offshore Application Act*.

The *Oceans Act* provides that federal or provincial laws or any provisions thereof may be made applicable by regulations in the EEZ, the area of the continental shelf or, if pursuant to international agreement, an area beyond the continental shelf (or in portions of such areas).⁸⁵ No such regulations have yet been made, but in the meantime federal laws will apply pursuant to subsection 20(1) as follows:

⁸⁰ Subsections 15(1), 19(1).

⁸¹ Subsection 8(1).

⁸² For example, subsection 157(2) of the *Accord Act* (*infra*, note 115) provides that “Nova Scotia social legislation” will apply on marine installations and structures engaged in oil and gas activities in the offshore area. Nova Scotia social legislation is defined in subsection 157(1) to mean the *Labour Standards Code*, S.N.S. 1972, c. 10, the *Occupational Health and Safety Act*, S.N.S. 1985, c. 3, the *Trade Union Act*, S.N.S. 1972, c. 19 and the *Workers Compensation Act*, S.N.S. 1968, c. 65, all as amended from time to time.

⁸³ S.C. 1990, c. 44.

⁸⁴ SI/97-21.

⁸⁵ Subsection 5(3).

- (a) on or under any marine installation or structure from the time it is attached or anchored to the continental shelf of Canada in connection with the exploration of that shelf or the exploitation of its mineral or other non-living resources until the marine installation or structure is removed from the waters above the continental shelf of Canada;
- (b) on or under any artificial island constructed, erected or placed on the continental shelf of Canada; and
- (c) within such safety zone surrounding any marine installation or structure or artificial island referred to in paragraph (a) or (b) as is determined by or pursuant to the regulations.

“Marine installation or structure” is defined in section 2 to include any ship, and any anchor, anchor cable or rig pad used in connection therewith, any offshore drilling unit, production platform, subsea installation, pumping station, living accommodation, storage structure, loading or landing platform, dredge, floating crane, pipelaying or other barge or pipeline and any anchor, anchor cable or rig pad used in connection therewith, and any other work or work within a class of works as may be prescribed. (“Artificial island” is also a defined term.)

Section 20 is carefully drafted in view of Canada’s limited sovereignty under international law over areas of the continental shelf beyond the 12 mile territorial sea. This is specifically recognized in subsection 20(2), which provides that federal laws shall be applied “in a manner that is consistent with the rights and freedoms of other states under international law, and in particular, with the rights and freedoms of other states in relation to navigation and overflight.”

The act also allows for the application of provincial laws in any area of the sea that forms part of the internal waters or the territorial sea of Canada, the EEZ or the continental shelf, as may be prescribed by regulations.⁸⁶ No such regulations have yet been promulgated. (Although the provinces have no constitutional authority to legislate beyond their boundaries, such provincial laws would apply by virtue of having been incorporated into federal law by reference.) Subject to specific regulations, provincial laws that impose a tax or royalty, or relate to mineral or other non-living natural

⁸⁶ Sections 9(1) and 21.

resources will not apply. Also, the application of provincial laws will be subject to any other Act of Parliament, with the result that federal statute law will be paramount in cases of conflict.

Provincial laws will be extended fully only to internal waters and the territorial sea, being areas where Canada exercises complete sovereignty. Beyond the territorial sea, provincial laws will apply only to the same extent as federal laws apply pursuant to section 20; that is, to marine installations and structures, artificial islands and safety zones, and to the extent prescribed by future regulations.

The wording of subsection 20(1) gives rise to an issue of interpretation that might arise when the marine installation or structure is not otherwise subject to Canadian law, as would be the case, for example, with a foreign-flagged ship. This subsection provides that federal laws apply “on or under” an installation or structure from the time it is anchored, etc., and also “within” any surrounding safety zone determined by regulations (at this time no such regulations have been made); but it does not specifically provide that federal laws will apply “to” the installation or structure itself. However it is suggested that this should be the interpretation. The French version, which is given equal weight with the English for purposes of interpretation, uses the equivalent of “to and under” or “at and under,” rather than “on or under” (“aux ouvrages en mer et sous ceux-ci”). Subsection 20(1) may be interpreted as defining certain places where federal laws apply, so that the words “on or under any marine installation” would be interpreted as meaning “at the site of a marine installation.”

This is supported by the wording of subsection 20(2), which provides that for the purposes of subsection 20(1), federal laws shall be applied “as if the *places* referred to in that subsection formed part of the territory of Canada” (emphasis added). On this interpretation, federal laws would also apply to the marine installation or structure itself. In addition to being in accordance with the French version, this interpretation is also more sensible. It would be strange if federal laws applied on, under and around a structure (within the safety zone), but not to the structure itself.

The act also gives the courts of the nearest coastal province (or another province prescribed by regulation) general jurisdiction over matters that arise in whole or in part in the offshore area and to which federal or provincial law applies pursuant to the act, to the

same extent that such courts would have had jurisdiction had the matter arisen in a province.⁸⁷

(b) Applicability of Common Law

The *Oceans Act* defines “federal laws” as follows:

“federal laws” includes Acts of Parliament, regulations as defined in section 2 of the *Interpretation Act* and any other rules of law within the jurisdiction of Parliament, but does not include ordinances within the meaning of the *Northwest Territories Act* or the *Yukon Act* or, after section 3 of the *Nunavut Act* comes into force, laws made by the Legislature for Nunavut or continued by section 29 of that Act.⁸⁸

An issue that arises is whether federal law includes the rules of common law. The scope of federal law has been considered by the Supreme Court in determining the jurisdiction of the Federal Court. The Federal Court was established by the *Federal Court Act*⁸⁹ pursuant to the power given to the federal government by section 101 of the *Constitution Act, 1867* to establish “any additional Courts for the better Administration of the Laws of Canada.”⁹⁰ Because the Federal Court is a statutory court with no inherent jurisdiction (unlike the superior courts of the provinces), jurisdiction over a particular matter must be conferred by the *Federal Court Act* or some other federal statute. However, the power of Parliament to confer jurisdiction on the Federal Court is confined by the meaning of “the Laws of Canada” in section 101 of the *Constitution Act, 1867*.

Until 1977, it had been assumed that the rules of common law applicable in a field where Parliament had legislative competence would qualify as “Laws of Canada.” For

⁸⁷ Section 22.

⁸⁸ Section 2.

⁸⁹ R.S.C. 1985, c. F-7 .

⁹⁰ Section 101 reads as follows:

The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

The Supreme Court of Canada, established by the *Supreme Court Act*, R.S.C. 1985, c. S-26, is the “General Court of Appeal” referred to in section 101.

example, Laskin in an early edition of his text *Canadian Constitutional Law*⁹¹ stated as follows:

“Laws of Canada” must also include common law which relates to the matters falling within classes of subjects assigned to the Parliament of Canada.⁹²

This was the approach taken in *Robert Simpson Montreal Ltd. v. Hamburg Amerika Linie Norddeutscher*,⁹³ a 1973 decision of the Federal Court of Appeal. In that decision Chief Justice Jaccett held that section 22 of the *Federal Court Act*, which gives the Federal Court jurisdiction over maritime law, conferred jurisdiction

... in an action or suit where a claim for relief is made or a remedy is sought under or by virtue of a law relating to a matter falling within the class of subject “Navigation and Shipping” that it would be “competent for the Parliament of Canada to enact, modify or amend” or in an action or suit in relation to some subject matter legislation in regard to which is within the legislative competence of the Canadian Parliament because that subject matter falls within the class “Navigation and Shipping”.

However in two judgements rendered in 1976 and 1977, the Supreme Court of Canada interpreted “Laws of Canada” to mean “applicable and existing federal law”: *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*⁹⁴ and *McNamara Construction (Western) Ltd. v. The Queen*.⁹⁵ Referring to *North Shore Paper*, Chief Justice Laskin stated as follows in *McNamara Construction*:

... this Court held that the quoted provisions of s. 101, make it a prerequisite to the exercise of jurisdiction by the Federal Court that there be existing and applicable federal law which can be invoked to support any proceedings before it. It is not enough that the Parliament of Canada have legislative jurisdiction in respect of some matter which is the subject of litigation in the Federal Court ... judicial jurisdiction contemplated by s. 101 is not co-extensive with federal legislative jurisdiction.

⁹¹ Laskin, *Canadian Constitutional Law* (4th ed.) rev. 1975.

⁹² At 792-793.

⁹³ [1973] F.C. 1356.

⁹⁴ [1977] 2 S.C.R. 1054, (1976), 71 D.L.R. (3d) 111.

⁹⁵ [1977] 2 S.C.R. 654, (1977), 75 D.L.R. (3d) 273.

Professor Hogg⁹⁶ has criticised these decisions, commenting that it seems almost unarguable that (quoting Laskin)

. . . because the common law is potentially subject to overriding legislative power, there is federal common or decisional law and provincial common or decisional law according to the matters respectively distributed to each legislature by the B.N.A. Act.⁹⁷

However, he notes that this is not what the Supreme Court decided in *Quebec North Shore Paper* and *McNamara Construction*, and comments that it is implicit in these decisions that there is no such thing as federal common law.⁹⁸

(c) Maritime Law

Maritime law is a special body of federal law, composed of statutory and non-statutory elements, that applies to maritime causes of action.⁹⁹ The non-statutory component is not common law as such, but consists of specialized rules and principles of admiralty and rules and principles adopted from the common law and applied in admiralty cases.¹⁰⁰ Section 22 of the *Federal Court Act* gives the Trial Division of the Federal Court “concurrent original jurisdiction” over claims based on Canadian maritime law “or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specifically assigned.”¹⁰¹ Although most maritime cases come before the Federal Court,

⁹⁶ P. W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992).

⁹⁷ *Supra*, note 91.

⁹⁸ Subject to certain exceptions; Professor Hogg notes that the Supreme Court has at times referred to the existence of federal common law, and has actually held that some parts of the common law do qualify as federal law, e.g., the common law relating to the contractual liability of the federal Crown. Maritime law is also an exception; see, for example, *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752. See also J. M. Evans and B. Slattery, commenting in (1989) 68 Can. Bar Rev. 817, and W. Spicer and W. Laurence, “Not Fade Away: the Re-emergence of Common Law Defences in Canadian Maritime Law” (1992) 71 Can. Bar Rev. 700 at 702. Spicer and Laurence note that in virtually every maritime case in the Federal Court following *McNamara Construction* applications were made seeking assurance that there was in fact actual maritime law to support the Court’s jurisdiction.

⁹⁹ See W. Tetley, “A Definition of Canadian Maritime Law” (1996) 30 U.B.C. L. Rev. 137.

¹⁰⁰ See W. Spicer and W. Laurence, *supra*, note 98.

¹⁰¹ Canadian maritime law is defined in subsection 2(1) of the *Federal Court Act* as follows: “Canadian maritime law” means the law that was administered by the Exchequer Court of Canada on its Admiralty

the jurisdiction of the Federal Court is “concurrent,” not exclusive, and the courts of the provinces also have a common law jurisdiction over admiralty matters. However, such courts would apply maritime law. An advantage of suing in Federal Court is that the Federal Court Act and rules provide for proceedings against a ship *in rem*, allowing a plaintiff to arrest the ship and obtain security for the claim.

Specific types of claims are enumerated in subsection 22(2) of the *Federal Court Act*, one of which is “any claim for damage or for loss of life or personal injury caused by a ship either in collision or otherwise.”¹⁰² Accordingly, assuming that there is maritime law with respect to the cause of action,¹⁰³ the Federal Court will have jurisdiction over a claim for damage caused by a drilling or production unit if it is a “ship.” Numerous cases and articles have considered whether particular offshore installations are “ships” such that maritime law would be applicable.¹⁰⁴ However the recent decision of the Supreme Court in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*¹⁰⁵ makes it clear that maritime law may be applicable even if an installation is not a ship, if the subject matter of the claim is “integrally connected to maritime matters”:

The plaintiffs submit that maritime law should not apply because the Thermaclad had no relationship to the rig's navigational equipment and because the claims are advanced in tort and contract, rather than navigation and shipping. However, the legal nature of a claim is not the decisive factor in the determination of whether the principles of maritime law apply. What is required is “that the subject-matter under consideration in any case [be] so integrally connected to maritime matters

side by virtue of the Admiralty Act, chapter A-1 of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament.

¹⁰² Paragraph 22(2)(d).

¹⁰³ As discussed, in the past it had been assumed that if there was federal competence in respect of a matter, the Federal Court would have jurisdiction. However it now appears that it is not sufficient merely to have federal competence, but there must be federal law dealing with the subject matter for the Federal Court to have jurisdiction. See also the discussion in W.W. Spicer, *Canadian Maritime Law and the Offshore: A Primer* (Calgary: Canadian Institute of Resources Law, University of Calgary, 1984).

¹⁰⁴ See, for example, W.W. Spicer, “Applications of Maritime Law to Offshore Drilling Units – the Canadian Experience” in I.T. Gault (ed.), *Offshore Petroleum Installations Law and Financing: Canada and the United States* (London, Int'l Bar Assoc., 1986); C. G. Yoder, *The Canadian Regulation of Offshore Installations* (Calgary: Canadian Institute of Resources Law, University of Calgary, 1985) at 29; W. W. Spicer, “Some Admiralty Law Issues in Offshore Oil and Gas Development” (1982) 20 *Alta L. Rev.* 153.

¹⁰⁵ [1997] 3 S.C.R. 1210.

as to be legitimate Canadian maritime law within federal legislative competence”: *ITO--International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, at p. 774, *per* McIntyre J. It follows that “tortious liability which arises in a maritime context is governed by a body of maritime law within the exclusive legislative jurisdiction of Parliament”: *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1289, *per* La Forest J.

This case involves tortious liability arising in a maritime context. The Court of Appeal, *per* Cameron J.A., held that “[t]he activities of the Bow Drill 3 are essentially maritime in nature, albeit a modern view of maritime activity” (p. 134). The rig was not only a drifting platform, but a navigable vessel. As Cameron J.A. put it at pp. 133-34, the rig “is capable of self-propulsion; even when drilling, is vulnerable to the perils of the sea; is not attached permanently to the ocean floor and, can travel world wide to drill for oil”. Alternatively, even if the rig is not a navigable vessel, the tort claim arising from the fire would still be a maritime matter since the main purpose of the Bow Drill III was activity in navigable waters. . . .

This is not a case that “is in ‘pith and substance’ a matter of local concern involving property and civil rights or any other matter which is in essence within exclusive provincial jurisdiction under s. 92 of the *Constitution Act, 1867*”: *ITO*, *supra*, at p. 774, *per* McIntyre J. I conclude that the issues for resolution in this case are integrally connected with maritime matters, and fall to be resolved under Canadian maritime law.¹⁰⁶

It would appear that maritime law will apply even after provincial law is extended to the offshore area by regulations under the *Oceans Act* because, according to the Court, provincial law includes federal law and the principle that Canadian maritime law applies to maritime matters. The Court quoted with approval the statement of Mr. Justice McIntyre in *ITO--International Terminal Operators Ltd. v. Miida Electronics Inc.*:

Once it has been determined that a matter is governed by constitutionally valid federal law, as in this case, then the relevant legal unit is Canada and not a particular province. Federal law is not foreign law vis-à-vis the law of a province since it is an integral part of the law of each province and territory.¹⁰⁷

¹⁰⁶ *Per* McLachlin, J. at 1257 – 1258.

¹⁰⁷ *ITO--International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at 777.

The Court accordingly concluded that “[s]ince the claims advanced relate to maritime matters, the law of Newfoundland mandates the application of Canadian maritime law, not the Newfoundland *Contributory Negligence Act*.”

3.3 Federal-provincial joint management arrangements

The coastal provinces of Newfoundland and Labrador, Nova Scotia and British Columbia all claimed jurisdiction as against the federal government over the portions of the continental shelf off their coasts. The Supreme Court of Canada has decided the claims of British Columbia¹⁰⁸ and Newfoundland and Labrador¹⁰⁹ in favour of the federal government.

Nova Scotia's claim has not been adjudicated, but Nova Scotia and the federal government settled the issue politically in 1982 by agreeing to a joint management arrangement.¹¹⁰ This arrangement was implemented through the device of having both the federal and provincial governments pass essentially identical legislation,¹¹¹ so that the result would be the same regardless of which government had jurisdiction. The arrangement provided for the joint management of offshore oil and gas resources and operations through a Board called the “Canada-Nova Scotia Offshore Oil and Gas Board,” which consisted of three federal appointees and two provincial appointees. The Chair of the Board was the Administrator of the Canada Oil and Gas Lands Administration (“COGLA”), a federal agency that had been established in 1981 through a Memorandum of Understanding between the Minister of Energy, Mines and Resources and the Minister of Indian Affairs and Northern Development to administer oil and gas activities on federal lands.¹¹²

¹⁰⁸ *Reference re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792, 62 W.W.R. 21, 65 D.L.R. (2d) 553.

¹⁰⁹ *Reference re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland* (1984), 5 D.L.R. (4th) 384 (S.C.C.).

¹¹⁰ *Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing*, March 2, 1982. See I. T. Gault, “Jurisdiction over the Petroleum Resources of the Canadian Continental Shelf: The Emerging Picture” (1985) 23 Alta. L. Rev. 75.

¹¹¹ *Canada-Nova Scotia Oil and Gas Agreement Act*, S.C. 1984, c. 29, and *Canada-Nova Scotia Oil and Gas Agreement (Nova Scotia) Act*, S.N.S. 1984, c. 2.

¹¹² COGLA was abolished as a separate agency in 1992. Its staff and functions were transferred to the

In 1985, following the 1984 Supreme Court decision that confirmed federal jurisdiction, Newfoundland negotiated a similar joint management agreement with the federal government called the “Atlantic Accord.” The same technique of parallel federal and provincial legislation was used to implement the accord.¹¹³ This likewise provided for management through a Board, in this case called the “Canada-Newfoundland Offshore Petroleum Board.” This Board was composed of three federal appointees, three provincial appointees and a jointly appointed Chair, none of whom could be public servants. Unlike the Canada-Nova Scotia Offshore Oil and Gas Board, this Board was therefore to a large degree independent from the two governments, and in particular from COGLA. Most of the routine decisions relating to oil and gas operations rested exclusively with the Board, but certain decisions, referred to in the legislation as “fundamental decisions,” could be vetoed by both governments acting together. Decisions on certain other defined matters were left exclusively to the federal or provincial governments. This arrangement currently remains in place for the Newfoundland offshore area.

The arrangement for Nova Scotia was modified one more time following the Atlantic Accord. The 1982 Canada-Nova Scotia Agreement had provided that if the federal government subsequently concluded an offshore oil and gas agreement with any other province before 1985, the Nova Scotia government could renegotiate its agreement to obtain the benefit of any more favourable features of the agreement with such other province.¹¹⁴ Although this provision had expired by the time the Atlantic Accord was concluded, the arrangement with Nova Scotia was nevertheless renegotiated and the 1982 agreement was replaced by the Canada-Nova Scotia Offshore Petroleum Resources Accord in 1986.

newly created Frontier Lands Management Branch (“FLMB”) of the Department of Energy, Mines and Resources (now the Department of Natural Resources, styled “Natural Resources Canada”), which now deals with the issuance and administration of petroleum rights for federal lands south of 60° North Latitude, the Department of Indian Affairs and Northern Development (“DIAND”), which deals with the same matters north of 60° Latitude, and the National Energy Board (“NEB”), which regulates operational activities in both areas.

¹¹³ *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3, and *The Canada-Newfoundland Atlantic Accord Implementation (Newfoundland) Act*, S.N. 1986, c. 37.

¹¹⁴ *1982 Canada-Nova Scotia Agreement*, clause 25.

As before, this accord was implemented by parallel federal and provincial legislation¹¹⁵ which superseded the previous federal and provincial acts. This legislation, which remains in effect today, is broadly similar to the Newfoundland accord implementation legislation. It established a new Board for the Nova Scotia offshore area called the “Canada-Nova Scotia Offshore Petroleum Board”¹¹⁶ (to distinguish it from the previous “Canada-Nova Scotia Oil and Gas Board”). This Board is slightly different from the Newfoundland Board. It consists of five members, not seven, two of whom are appointed by the federal government and two of whom are appointed by the province.¹¹⁷ The Chair is jointly appointed and is the fifth member of the Board.¹¹⁸ A more important difference, however, is that each government may appoint a civil servant as one of their two Board members.¹¹⁹ Until recently, the federal and provincial governments each appointed officials drawn respectively from the federal Department of Natural Resources and the provincial Department of Natural Resources. These Board members had their own staffs advising them on matters that came before the Board, and as a result the Nova Scotia Board was not, in the early years at least, as independent from the federal and provincial governments as the Newfoundland Board. However, there are no civil servants on the current Nova Scotia Board.

The substantive provisions of the Newfoundland and the Nova Scotia accord implementation legislation (the Newfoundland and Nova Scotia “*Accord Acts*”) relating to the regulation of offshore oil and gas operations and the issuance of licences for exploration, development and production, are essentially the same,¹²⁰ and consistent with the regulatory regime which applies on other federal lands not subject to a joint federal-

¹¹⁵ *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c. 28, and *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, S.N.S. 1987, c. 3.

¹¹⁶ Hereafter sometimes referred to as the “Board,” the “Nova Scotia Board” or the “CNSOPB.”

¹¹⁷ Section 10.

¹¹⁸ *Ibid.*

¹¹⁹ Subsection 11(2).

¹²⁰ References hereafter will be only to the federal *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* (the “*Accord Act*”), but the provisions of the other Accord Acts are substantially identical with respect to the matters discussed in this work.

provincial management arrangement. Such other federal lands are covered by the *Canada Petroleum Resources Act*,¹²¹ which deals with the issuance and administration of licences giving rights to petroleum resources and the *Canada Oil and Gas Operations Act*,¹²² which deals with operational matters. The substance of these is incorporated as Parts II and III respectively of the *Accord Acts*, with such changes as are necessary to reflect the joint management arrangements and the roles of the Boards.

Regulations under the Newfoundland and Nova Scotia *Accord Acts* are promulgated by each of the governments with the federal and provincial versions being parallel in each case in the same manner as the acts, and all being more or less consistent with each other, so that the regulatory regime in each of the jurisdictions is broadly uniform. The Boards do not make regulations, but as the agencies charged with the administration of the regulations, are consulted at the drafting stage.

No oil and gas operations are presently permitted off the west coast, and as a result no joint management arrangement has yet been implemented between the federal government and British Columbia.

Although the Newfoundland and Nova Scotia *Accord Acts* provide the main regulatory framework for oil and gas operations offshore Newfoundland and Nova Scotia, other federal acts are also relevant. The most important of these are the *Canada Shipping Act*¹²³ and the *Fisheries Act*,¹²⁴ which apply to offshore operations by their own terms. Other acts that do not specifically address offshore operations may also be applicable by virtue of the *Oceans Act*, as discussed above.

An important provision of the *Accord Act* is section 4, which provides that the *Accord Act* takes precedence over other acts in cases of inconsistency or conflict. The actual wording is as follows:

4. In case of any inconsistency or conflict between

(a) this Act or any regulations made thereunder, and

¹²¹ S.C. 1986, c. 45.

¹²² R.S.C. 1985, c. O-7 (formerly the *Oil and Gas Production and Conservation Act*).

¹²³ R.S.C. 1985, c. S-9.

¹²⁴ R.S.C. 1985, c. F-14.

(b) any other Act of Parliament that applies to the offshore area or any regulations made under such an Act,

this Act and the regulations made thereunder take precedence.

(The provincial version is the same, but refers to inconsistencies or conflicts with any other provincial enactment.)

3.4 Pipelines

(a) CNSOPB Jurisdiction

The CNSOPB has general jurisdiction over pipelines within the Nova Scotia offshore area: section 139 of the *Accord Act* provides that Part III applies in respect of the transportation of petroleum in those portions of the offshore area not within the Province, and subsection 153(1) allows regulations

(c) authorizing the Board, or any person, to make such orders as may be specified in the regulations, and to exercise such powers and perform such duties as may be necessary for

...
(iii) the design, construction, operation or abandonment of pipeline within the offshore area;

(“Pipeline” is defined in section 138.)

Section 140 prohibits anyone from carrying on any work or activity related to, among other things, the transportation of petroleum in the offshore area without written authorization. It is clear from subsection 40(3), which refers to an authorization under paragraph 142(1)(b) in connection with a “Nova Scotia trunkline,” that section 140 would apply to the construction of a pipeline within the Nova Scotia offshore area.

(b) NEB Jurisdiction

However, Part III of the *National Energy Board Act*¹²⁵ also gives the National Energy Board (the “NEB”) certain approval authority with respect to the construction and

¹²⁵ R.S.C. 1985, c. N-7 (hereafter sometimes called the “NEB Act”).

operation of pipelines that extend beyond the limits of the offshore area. This is a result of the definition of “pipeline” as

a line that is used or to be used for the transmission of oil or gas . . . that connects a province with any other province or provinces or extends beyond the limits of a province or the offshore area as defined in section 123 . . .¹²⁶

(The definition of “offshore area” for purposes of the *NEB Act* essentially includes the offshore area as defined in the *Accord Act*.)

Subsection 40(2) of the *Accord Act* provides greater certainty that the *NEB Act* may apply to offshore pipelines in certain cases. This provides that no certificate of public convenience and necessity shall be issued pursuant to Part III of the *NEB Act* in respect of a Nova Scotia trunkline unless the NEB is satisfied that the Government of Nova Scotia has been given a reasonable opportunity to acquire at least a 50% ownership interest in the trunkline. “Nova Scotia trunkline” is defined in subsection 40(1) of the federal *Accord Act* as

a trunkline for the transmission of petroleum in the offshore area or from the offshore area to and within the Province, and includes ... [related facilities] . . . but does not include laterals, gathering lines, flow lines, structures, or facilities for the production and processing of petroleum.

(c) Dual Jurisdiction

It thus appears that both the CNSOPB and the NEB will have jurisdiction over pipelines within the Nova Scotia offshore area that extend outside the offshore area.

Subsection 40(3) of the *Accord Act* requires the CNSOPB to satisfy itself that the Government of Nova Scotia has been given a reasonable opportunity to acquire at least a 50% ownership interest in a Nova Scotia trunkline before it issues an authorization under paragraph 142(1)(b), but only in cases where a certificate of public convenience and necessity under the *NEB Act* is not required. This would be the case, for example, for a trunkline wholly within the Nova Scotia offshore area, since that would not be a “pipeline” under the *NEB Act*.

¹²⁶ Section 2.

If it were intended that CNSOPB authorization will also be required in cases where the *NEB Act* applies, one would have expected the *Accord Act* to provide that neither the NEB nor the CNSOPB can issue a certificate or authorization unless each agency is satisfied regarding the government's opportunity to acquire an ownership interest. However if an NEB certificate is required, there is no need for the CNSOPB to satisfy itself in this regard. This gives support to the interpretation that if the NEB has jurisdiction, the CNSOPB does not, and therefore no authorization will be required from the CNSOPB. However this is not a necessary interpretation; neither Act specifically excludes the CNSOPB in cases where the NEB has jurisdiction, and the other explanation is simply that the CNSOPB does not need to concern itself with the matter of government participation if this issue has already been addressed by the NEB.

The *NEB Act* provides as follows:

12. (1) The [National Energy] Board has full and exclusive jurisdiction to inquire into, hear and determine any matter

(a) where it appears to the Board that any person has failed to do any act, matter or thing required to be done by this Act or by any regulation, certificate, licence or permit, or any order or direction made by the Board, or that any person has done or is doing any act, matter or thing contrary to or in contravention of this Act, or any such regulation, certificate, licence, permit, order or direction; or

(b) where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act or thing that by this Act or any such regulation, certificate, licence, permit, order or direction is prohibited, sanctioned or required to be done.

The jurisdiction of the NEB under this provision is exclusive, but this essentially only applies to matters arising under or authorized by the *NEB Act*, and does not exclude the CNSOPB from exercising jurisdiction independently.

Section 4 of the federal *Accord Act* provides that the *Accord Act* and regulations thereunder take precedence in case of any inconsistency or conflict; however in the absence of an actual conflict, this provision would not prevent the application of the *NEB Act* and the regulations thereunder.

The strongest support for the interpretation that both the NEB and the CNSOPB will have jurisdiction over pipelines extending outside the offshore area is found in subsection 46(1). This requires the CNSOPB to conclude memoranda of understanding with appropriate government departments and agencies to ensure effective coordination and avoid duplication of work and activities in relation to certain matters; paragraph (f) specifically refers to a Nova Scotia trunkline. The governments apparently intended that both the NEB and the CNSOPB would have jurisdiction over pipelines in certain cases, and have left it up to the agencies to sort things out.

3.5 Sable Gas Projects Joint Public Review

The Sable Gas Projects consist of two separate projects with different ownerships. The “Sable Offshore Energy Project” is the offshore project, involving the development of six offshore natural gas fields located in the area of Sable Island. This project includes the wells, production platforms and pipelines necessary to produce the gas and transport it to shore, as well as a natural gas processing plant located on shore near Goldboro, N.S., and an onshore natural gas liquids pipeline to transport natural gas liquids from the gas plant to a processing and storage facility to be located near Point Tupper, N.S.

The other project, owned by Maritimes & Northeast Pipeline Limited Partnership, is the onshore pipeline that will transport the marketable residue gas produced by the Sable Offshore Energy Project from the processing plant through Nova Scotia and New Brunswick, where some of the gas would be used, to a point on the United States border near St. Stephen, N.B., where the line will connect with facilities to be constructed in the United States.

The offshore facilities clearly fall under the jurisdiction of the Canada-Nova Scotia Offshore Petroleum Board, although, as discussed above, the National Energy Board has concurrent jurisdiction over the main trunkline to shore.¹²⁷ Jurisdiction over

¹²⁷ Subsection 130(2) of the *National Energy Board Act* provides that “The Governor in Council may by regulation exempt any oil or gas or any kind, quality or class thereof *or any area* or transaction from the operation of all or any of the provisions of this Act.” [my emphasis] The federal government could therefore resolve the problem of jurisdictional overlap by providing that the *National Energy Board Act* does not apply in the Nova Scotia “offshore area” (a term defined in the *Accord Act*), leaving jurisdiction with the CNSOPB. This would not amount to giving up federal jurisdiction, since the CNSOPB is also a federal agency governed by a federal act. However the government has chosen not to do this.

the onshore portion of the trunkline, and probably the gas plant, would appear to lie with the National Energy Board, although this was not conceded by the Nova Scotia government. In any case, the Nova Scotia government would have jurisdiction over the liquids line and liquids processing and storage facilities.

The Maritimes & Northeast pipeline, being an interprovincial and international pipeline, is clearly under the jurisdiction of the National Energy Board, although the Nova Scotia government claimed that approvals were also required under the Nova Scotia *Environment Act*.¹²⁸

The various approvals required for these projects therefore included the following:

- (a) Canada-Nova Scotia Offshore Petroleum Board: approval of Development Plan under section 143 of the *Accord Act*; approval of Canada-Nova Scotia Benefits Plan under section 45 of the *Accord Act*; and authorizations for specific works and activities under section 142 of the *Accord Act*.
- (b) National Energy Board: certificate of public convenience and necessity under section 52 of the *National Energy Board Act*; and an order under Part IV of the *National Energy Board Act* respecting pipeline tolls.
- (c) Nova Scotia Energy and Minerals Resources Conservation Board: permit under section 8 of the *Nova Scotia Pipeline Act*; and licence under section 12 of the *Pipeline Act*.
- (d) Nova Scotia Department of the Environment: approval of undertaking by the Minister of the Environment pursuant to section 40 of the *Nova Scotia Environment Act*; and any specific approvals that may be required under Part V of the *Environment Act*.

The overlapping jurisdictions and the various regulatory approvals required led to an agreement to conduct a “joint” public review.¹²⁹ A five-person review panel¹³⁰ was

¹²⁸ S.N.S. 1994-95, c. 1.

¹²⁹ Agreement for a Joint Public Review of the Proposed Sable Gas Projects, made in June 1996 among the Honourable Sergio Marchi, Minister of the Environment, Government of Canada; the Honourable A. Anne McLellan, Minister of Natural Resources, Government of Canada; Honourable F. Wayne Adams, Minister of the Environment, Province of Nova Scotia; Honourable Eleanor Norrie, Minister of Natural Resources, Province of Nova Scotia; R. Priddle, Chairman, National Energy Board; and J.E. Dickey, Acting Chief Executive Officer, Canada-Nova Scotia Offshore Petroleum Board. Filed as Exhibit A-1-1 in the record of the proceeding.

established which included three members of the National Energy Board and a Commissioner appointed by the Canada-Nova Scotia Offshore Petroleum Board.¹³¹ The idea was that there would be a single consolidated proceeding, but that the three members of the joint review panel who were also members of the National Energy Board would sit, at the same time, as a National Energy Board panel¹³² that would consider the main gas transmission pipelines and processing plant under the *National Energy Board Act*; and that the Commissioner,¹³³ in addition to being a member of the joint review panel, would prepare a separate report for the Canada-Nova Scotia Offshore Petroleum Board. In addition, it was agreed between the Nova Scotia Department of Natural Resources and the Canada-Nova Scotia Offshore Petroleum Board, that the Commissioner's report would also consider the onshore facilities forming part of the Sable Offshore Energy Project and would be forwarded to the Nova Scotia Energy and Minerals Resources Conservation Board.¹³⁴

Separate reports on the Sable Offshore Energy Project have been issued by the Joint Public Review Panel,¹³⁵ the Commissioner¹³⁶ and the Canada-Nova Scotia Offshore Petroleum Board.¹³⁷

One of the recommendations made by the Commissioner was that the CNSOPB, the NEB and the Province of Nova Scotia should enter into a memorandum of understanding ("MOU") identifying jurisdiction over the various SOEP facilities and the regulatory arrangement among the parties. In response to this recommendation, the Board stated that "[i]n fact the Board, the NEB and the Province of Nova Scotia have developed a regulatory framework for SOEP. The Board accepts the Commissioner's

¹³⁰ R. Fournier (Chairman), J. Davies, J. Sears, K. Vollman and A. Côté-Verhaaf.

¹³¹ Pursuant to section 44 of the *Accord Act*.

¹³² K. Vollman (Chairman), A. Côté-Verhaaf and R. Fournier (appointed as a temporary member of the National Energy Board for this proceeding).

¹³³ J. Sears.

¹³⁴ See Directions on Procedure issued by the Joint Public Review Panel, filed as Exhibit A-1-36 in the record of the proceeding.

¹³⁵ *Supra*, note 7.

¹³⁶ Report of the Commissioner on the Sable Energy Project, October 24, 1997.

¹³⁷ *Supra*, note 10.

recommendation and will endeavour to have a formal MOU that outlines the regulatory arrangement for SOEP in place as soon as possible.”¹³⁸

¹³⁸ Decision Report, p. 7.

4. PREVENTION OF MARINE POLLUTION FROM OFFSHORE OIL AND GAS OPERATIONS

4.1 Applicable statutes

Although the *Accord Act* might be expected to be a comprehensive code governing offshore oil and gas operations in the Nova Scotia offshore area, a number of other statutes contain provisions relating to pollution from such operations. The applicability of these other Acts, of which the most important are the *Canada Shipping Act* and the *Fisheries Act*, will be described first. The applicable provisions of the *Accord Act* will then be described, after which certain administrative problems will be discussed.

(a) Canada Shipping Act

Part XV of the *Canada Shipping Act* deals with the prevention and control of pollution from ships within defined waters, including waters in Canada's EEZ. It applies to any discharge of a pollutant except "a discharge that constitutes a spill from a ship that is on location and engaged in exploration or drilling for, or production, conservation or processing of, oil or gas . . . in so far as the discharge emanates from those activities."¹³⁹ The definition of "spill" in the *Oil and Gas Production and Conservation Act*¹⁴⁰ (now the *Canada Oil and Gas Operations Act*) is incorporated by reference, and essentially means an unauthorized discharge, emission or escape of crude oil or natural gas. "Pollutant" is defined very broadly,¹⁴¹ and "ship" is defined in a manner that includes mobile offshore craft. The result, therefore, is that while the *Canada Shipping Act* does not apply to spills of crude oil arising out of drilling or production operations, it does apply to operational pollution from mobile offshore craft, which is governed by regulations made under Part XV. The *Canada Shipping Act* is administered by the Canadian Coast Guard.

¹³⁹ Subsection 655(2).

¹⁴⁰ *Supra*, note 122.

¹⁴¹ Section 654.

The Act specifically authorizes regulations implementing *Marpol*,¹⁴² and three have so far been promulgated: the *Pollutant Discharge Reporting Regulations*,¹⁴³ giving effect to Article 8 and Protocol I; the *Oil Pollution Prevention Regulations*,¹⁴⁴ giving effect to Annex I; and the *Dangerous Chemicals and Noxious Liquid Substances Regulations*, giving effect to Annex II.

The discharge of a pollutant in contravention of the regulations is an offence for which the maximum fine is \$250,000 or, in the case of an individual, imprisonment of up to six months on summary conviction. If the Crown proceeds by way of indictment the maximum penalties are increased to \$1-million or three years imprisonment.¹⁴⁵

Charges were laid by the Coast Guard against the ship *Nordic Apollo* on February 12, 1993 in connection with oil spills that occurred on October 20, 1992 as a result of heavy rolling during storm conditions. The *Nordic Apollo* is an oil tanker that was in use as a storage facility for oil produced by Lasmo from the Cohasset Project. To fulfill this purpose the ship was moored on a semi-permanent basis in the vicinity of the Cohasset production facilities, located on an offshore platform. As crude oil was produced and processed it was continuously transferred to the *Nordic Apollo* through a hose for storage, there being no storage capacity on the platform itself. The oil would then be periodically transferred to a shuttle tanker for transportation to markets. For safety reasons, the mooring system was designed so that the *Nordic Apollo* could rapidly disconnect from the mooring buoy; this would be done in extreme sea or storm conditions to avoid excessive tension on the mooring system.

During the storm the vessel experienced severe motion as a result of a phenomenon known as synchronous rolling. As a result, six to nine barrels of crude oil escaped from the top of the ship's cargo tanks through pressure release vents. In addition, lubricating oil was spilled when 12 drums stored on the deck of the vessel came loose.

¹⁴² Section 658.

¹⁴³ SOR/92-211.

¹⁴⁴ SOR/93-3.

¹⁴⁵ Section 664(1).

Some of the drums, each of which contained 55 gallons, were lost overboard and the rest were perforated as a result of banging into deck machinery.

Coast Guard laid two separate charges relating respectively to the spill of crude oil and the spill of lubricating oil. Both charges alleged a contravention of subsection 5(b) of the *Oil Pollution Prevention Regulations*,¹⁴⁶ resulting in an offence contrary to section 664 of the *Canada Shipping Act*. Section 664¹⁴⁷ provided at that time that:

Any person or ship that discharges a pollutant in contravention of any regulation made pursuant to section 656 is guilty of an offence and liable on summary conviction to a fine not exceeding two hundred and fifty thousand dollars.

Section 5 of the *Oil Pollution Prevention Regulations* provided at that time that

Subject to section 6,

(a) no person shall discharge from any ship, and

(b) no ship shall discharge

oil or an oily mixture into any of the waters described in paragraphs 4(a) to (c).

The charges were dealt with by the Provincial Court of Nova Scotia at Halifax.

This court had jurisdiction pursuant to subsection 671(1):

Where any person or ship is charged with having committed an offence under this Part, any court in Canada that would have had cognizance of the offence if it had been committed by a person within the limits of its ordinary jurisdiction has jurisdiction to try the offence as if it had been so committed.

As noted above, Part XV of the *Canada Shipping Act* does not apply to “a discharge that constitutes a spill from a ship that is on location and engaged in exploration or drilling for, or production, conservation or processing of, oil or gas . . . in so far as the discharge emanates from those activities.”¹⁴⁸ It might have been argued that the *Nordic Apollo* was engaged in the production of oil and was an integral part of the

¹⁴⁶ SOR/71-495 (now replaced by SOR/93-3, which came into effect on February 16, 1993).

¹⁴⁷ Since amended by S.C. 1993, c. 36.

¹⁴⁸ Section 655(2).

production facilities; and that there was therefore no basis for the charge in respect of the spill of produced oil from the cargo tanks. However as part of a plea bargain arrangement, the owner of the *Nordic Apollo* pleaded guilty to the charge concerning the lubricating oil and the charge relating to the spill of crude oil was dismissed by agreement. No arguments were therefore made before the Court concerning the applicability of Part XV to the crude oil spill, and the Court did not deal with this issue. A fine of \$15,000 was assessed in connection with the spill of lubricating oil.¹⁴⁹

Following this case, amendments were made to the *Canada Shipping Act* for the purpose, among other things, of implementing the *International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990* (“OPRC 1990”). As part of these amendments, the maximum penalties for pollution were raised to the levels described at the beginning of this section. In addition, factors were listed that a court might have regard to in determining the penalty. These include:

- (a) the harm or risk of harm caused by the offence;
- (b) an estimate of the total costs of cleanup, of harm caused and of best available mitigation measures;
- (c) the remedial action taken, or proposed to be taken, by the offender to mitigate the harm;
- (d) whether the pollutant that was discharged was reported on a timely basis as required by regulations made under paragraph 657(1)(a);
- (e) whether the offence was deliberate or inadvertent;
- (f) the incompetence, negligence or lack of concern of the offender;
- (g) any precautions taken by the offender to avoid the offence;
- (h) any economic benefits accruing to the offender that, but for the offence, the offender would not have received; and

¹⁴⁹ Personal communication, James Gould, counsel for the *Nordic Apollo*. (McInnes, Cooper & Robertson, Halifax, N.S.)

- (i) any evidence from which the court may reasonably conclude that the offender has a history of non-compliance with legislation designed to prevent or to minimize pollution.

Also, a new section (s. 664.1) was added that allows a court, upon convicting an offender of pollution, to make an order having any or all of the following effects, in addition to imposing any other punishment:

- (a) prohibiting the offender from doing any act or engaging in any activity that may result in the continuation or repetition of the offence;
- (b) directing the offender to publish the facts relating to the conviction;
- (c) directing the offender to submit to the Minister [of Transport] on application by the Minister made within three years after the date of conviction, any information with respect to the offender's activities that the court considers appropriate and just in the circumstances;
- (d) directing the offender to pay an amount for the purposes of conducting research into the ecological use and disposal of the pollutant in respect of which the offence was committed; or
- (e) requiring the offender to comply with any other reasonable conditions that the court considers appropriate and just in the circumstances for securing the offender's good conduct and preventing the offender from repeating the same offences or committing other offences.

The Department of Transport has commenced extensive revisions to the *Canada Shipping Act*. The first phase of this initiative has been completed with the introduction of Bill C-15, which received first reading on October 30, 1997. Bill C-15 amends Part I of the Act, dealing with registration, listing, recording and licencing, and adds certain miscellaneous provisions. Consultations have now been completed on Phase II, which will deal with the rest of the Act, including Part XV (Pollution Prevention and Control).

(b) Fisheries Act

The *Fisheries Act*,¹⁵⁰ which dates back to 1868,¹⁵¹ has been and continues to be the principal federal water pollution control statute.¹⁵² Subsection 36(3) prohibits “the

¹⁵⁰ R.S.C. 1985, c. F-14.

deposit of a deleterious substance of any type in water frequented by fish . . .” “Water frequented by fish” is defined as Canadian fisheries waters and the terms “deposit” and “deleterious substance” are broadly defined,¹⁵³ with the result that a discharge, spill or leakage of oil or other pollutant in the Nova Scotia offshore area would fall under this provision.¹⁵⁴ Violation of this prohibition is an offence of strict liability,¹⁵⁵ punishable on summary conviction by a fine of up to \$300,000, or, for subsequent offences, imprisonment for up to six months. If the Crown proceeds by way of indictment, the maximum fine is \$1-million and subsequent offenders may be imprisoned for up to three years.¹⁵⁶

Subsection 36(4) provides an exception for authorized deposits. The deposit of deleterious substances may be authorized by regulations made under the *Fisheries Act* or another federal act. The *Fisheries Act* therefore “stands down” to regulations made under other federal acts, but only if they specifically authorize the deposit of a “waste or pollutant.” As discussed in more detail later, this exemption would not appear to apply in cases where the CNSOPB authorizes the discharge of waste in the absence of a regulation.

The *Fisheries Act* provides for a number of other specific offences in addition to subsection 36(3). Subsection 36(1) prohibits throwing overboard ballast, coal, ashes, stones or other prejudicial or deleterious substances in fishing waters, or depositing offal

¹⁵¹ *Fisheries Act*, S.C. 1868, c. 60.

¹⁵² For a general discussion, see M. Rankin and T. Leadem, “The Fisheries Act and Water Pollution” (1982) 40 *Advocate* 519.

¹⁵³ Section 34. It is the deleterious character of the substance that is relevant, not the water with the substance added; it is not necessary for the Crown to establish actual deleterious effects on fish or to even to prove the presence of fish: *R. v. MacMillan Bloedel (Alberni) Ltd.* (1979), 47 C.C.C. (2d) 118, [1979] 4 W.W.R. 654 (B.C.C.A.); leave to appeal to S.C.C. refused C.C.C. *loc. cit.*

¹⁵⁴ In *R. v. MacMillan Bloedel (Alberni) Ltd.*, [1979] 4 W.W.R. 654, 47 C.C.C. (2d) 118 (B.C.C.A.) the British Columbia Court of Appeal upheld the conviction of a company for allowing 170 gallons of bunker C oil to be spilled at its dock even though the Crown did not show any negative effects on fish. The Court indicated that even a teaspoon of oil placed in the ocean would constitute an offence.

¹⁵⁵ *R. v. Churchill Copper Corp. Ltd.* (1971), 5 C.C.C. (2d) 319, [1971] 4 W.W.R. 481 (B.C. Prov. Ct.), *aff'd* 8 C.C.C. (2d) 36 (C.A.). For a recent case under this section involving the oil industry, see *R. v. Amoco Canada Petroleum Co.*, (1993), 13 C.E.L.R. (N.S.) 317, in which Amoco was convicted following the escape of oil into a watercourse as a result of an accidental pipeline break.

¹⁵⁶ Subsection 40(2).

or fish or animal remains on beaches or shores. Since these offences are included in the more general offence under subsection 36(3), this provision is rarely used. Subsection 35(1) provides that no person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat. The maximum penalties for this offence are the same as for a contravention of subsection 36(3).¹⁵⁷ As in the case of subsection 36(3), there is an exemption if fish habitat is altered under conditions authorized by the Minister or regulations.¹⁵⁸

Section 37 allows the Minister to require a person proposing to carry out a work or undertaking that may result in the deposit of a deleterious substance to provide plans, specifications, studies, analyses or other information. After reviewing such information, and after giving the proponent a reasonable opportunity to make representations, the Minister may require modifications to the work or undertaking or may restrict the work or undertaking, and with the approval of the Governor in Council, may direct the closing of the work or undertaking. Before exercising this power, the Minister must offer to consult with any provincial governments having an interest, and other federal departments or agencies that he considers appropriate.

The constitutionality of subsection 36(3) was confirmed by the Supreme Court in *R. v. Northwest Falling Contractors Ltd.*¹⁵⁹ It had been argued in that case that this provision¹⁶⁰ was legislation in relation to the pollution of water generally and was therefore *ultra vires* the Parliament of Canada as it went beyond the federal government's power to legislate in relation to "Sea Coast and Inland Fisheries" set out in subsection 91.12 of the *British North America Act*. The court found that this provision was valid because "[t]he definition of 'deleterious substance' ensures that the scope of subsection 33(2) [now subsection 36(3)] is restricted to a prohibition of deposits that threaten fish, fish habitat or the use of fish by man."¹⁶¹

¹⁵⁷ Subsection 40(1).

¹⁵⁸ Subsection 35(2).

¹⁵⁹ (1980), 32 N.R. 541 (S.C.C.)

¹⁶⁰ At that time, subsection 33(2) of the *Fisheries Act*, R.S.C. 1970, c. F-14.

¹⁶¹ *Supra*, note 159 at 550. The court distinguished *R. v. Fowler* (1980), 32 N.R. 230 (S.C.C.), in which the Supreme Court held that subsection 33(3) of the *Fisheries Act* (now repealed) was *ultra vires*. This

Responsibility for the administration of section 36 has been delegated by the Department of Fisheries and Oceans to Environment Canada under a memorandum of understanding,¹⁶² and certain Environment Canada personnel have been appointed as inspectors for purposes of the *Fisheries Act*. The CNSOPB is presently discussing the possibility of having Board personnel designated as inspectors under the *Fisheries Act* and the *Canadian Environmental Protection Act*, to carry out the compliance and enforcement responsibilities of Environment Canada under those Acts for the purpose of reducing duplication of effort. Such Board inspectors would be trained by Environment Canada to qualify for certification as inspectors and will comply with any enforcement and compliance policies that may be adopted by Environment Canada or the Department of Fisheries and Oceans.¹⁶³ Such an arrangement, if agreed to, would be set out in an MOU currently being finalized by the Board, Environment Canada and the Department of Fisheries and Oceans.¹⁶⁴

(c) Canadian Environmental Protection Act

The *Canadian Environmental Protection Act*¹⁶⁵ is the main federal environmental statute, but it has only limited applicability to offshore oil and gas operations. The Act is divided into nine parts:

- I Environmental Quality Objectives, Guidelines and Codes of Practice
- II Toxic Substances
- III Nutrients

provision prohibited logging operators and others from putting logging debris and similar materials into water frequented by fish. In holding that this provision was *ultra vires*, the court stated that it “makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries.” (at 243).

¹⁶² MOU dated May 6, 1985, signed at the Deputy Minister level (currently under revision). There is also a regional working agreement between Environment Canada and the Department of Fisheries and Oceans regarding the administration of section 36 in New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland, dated January 1988.

¹⁶³ Environment Canada has issued an Enforcement and Compliance Policy with respect to the *Canadian Environmental Protection Act* dated May 1988. At this time there is no similar policy relating to the *Fisheries Act*.

¹⁶⁴ Section 1.06 of the CNSOPB SOEP Decision Report lists the various MOUs in place or being developed with other agencies.

¹⁶⁵ S.C. 1988, c. 22.

- IV Federal Departments, Agencies, Crown Corporations, Works, Undertakings and Lands
- V International Air Pollution
- VI Ocean Dumping
- VII General
- VIII Consequential Amendments and Repeal
- IX Coming into Force

Part I – Environmental Quality Objectives, Guidelines and Codes of Practice

Part I requires the Minister of the Environment to formulate:

- (a) environmental quality objectives specifying goals or purposes toward which an environmental control effort is directed, including goals or purposes stated in quantitative or qualitative terms;
- (b) environmental quality guidelines specifying recommendations in quantitative or qualitative terms to support and maintain particular uses of the environment;
- (c) release guidelines recommending limits, including limits expressed as concentrations or quantities, for the release of substances into the environment from works, undertakings or activities; and
- (d) environmental codes of practice specifying procedures, practices or release limits for environmental control relating to works, undertakings and activities during any phase of their development and operation, including the location, design, construction, start-up, closure, dismantling and clean-up phases and any subsequent monitoring activities.¹⁶⁶

No objectives, guidelines or codes of practice have yet been formulated under the *Canadian Environmental Protection Act* with respect to offshore oil and gas operations. Any such objectives, guidelines and codes of practice under the *Canadian Environmental Protection Act* must be published in the *Canada Gazette*.¹⁶⁷ Such guidelines and codes of practice would presumably be made applicable by requiring compliance as a condition of an authorization or licence that might be given or issued by the appropriate regulatory agency.

¹⁶⁶ Subsection 8(1).

¹⁶⁷ Section 10.

Part II – Toxic Substances

Part II deals with the control of certain substances. Section 25 provides for the *Domestic Substances List*,¹⁶⁸ essentially a list of substances in commercial use in Canada during the period 1984 - 1986, as well as the *Non-Domestic Substances List*,¹⁶⁹ which lists other substances. A substance not on the *Domestic Substances List* cannot be manufactured or imported into Canada without going through a notification and assessment process,¹⁷⁰ as a result of which restrictions, controls or prohibitions may be imposed (inclusion on the *Domestic Substances List* does not necessarily mean a substance is approved for offshore applications). Substances found to be toxic may be added to the List of Toxic Substances attached to the Act as Schedule I, after which the use of such substances may be controlled by regulation. The Act imposes duties to report the release of a toxic substance into the environment in contravention of a regulation or interim order and allows officials to take remedial action and recover costs from the responsible persons.¹⁷¹ Sections 41 to 43 deal with the export and import of toxic substances and waste materials.

The use of particular chemicals in offshore operations may therefore be affected by this Part. At this time there are no regulations in respect of any substances that are specific to or commonly used in offshore oil and gas operations, but the lists mentioned above will be considered as part of the procedure for selecting chemicals, as set out in the draft *Offshore Chemical Selection Guidelines*, discussed below.

A large variety of chemicals is used in offshore oil and gas operations and many of these, particularly those used as components of drilling fluids, can end up in the marine environment. The CNSOPB requires operators to provide it with product information on such chemicals for purposes of approval. This information is provided to Environment Canada for comment, but to date direct regulatory control has been through the Board, exercising its general authority to approve operations.

¹⁶⁸ Established as a regulation: SOR/94-311.

¹⁶⁹ SI/91-149.

¹⁷⁰ See *New Substances Notification Regulations*, SOR/94-260.

¹⁷¹ Section 36.

Part III - Nutrients

Part III deals with nutrients that may find their way into water, such as phosphates contained in detergents. This Part is largely irrelevant to offshore oil and gas operations.

Part IV - Federal Departments, Agencies, Crown Corporations, Works, Undertakings and Lands

In Part IV, section 53 provides that the Minister may “establish guidelines for use by departments, boards and agencies of the Government of Canada, and where appropriate, by corporations named in Schedule C to the *Financial Administration Act* and federal regulatory bodies in the exercise of their powers and the carrying out of their duties and functions.” It would seem that these guidelines are intended to apply to the agencies themselves, rather than the persons regulated by such agencies.

In addition, section 54(1) gives the federal Cabinet residual authority to make regulations for the protection of the environment “where no other Act of Parliament expressly provides for the making of regulations that result in the protection of the environment and apply to federal works or undertakings or federal lands.” “Federal lands” is defined to mean the submarine areas of the continental shelf out to two hundred miles, and therefore this section would authorize environmental regulations if no other Act were applicable. This section would not be applicable to offshore oil and gas operations since the *Accord Act* already provides for such regulations.

Part V - International Air Pollution

This part is largely irrelevant to offshore oil and gas operations.

Part VI - Ocean Dumping

Part VI replaced the *Ocean Dumping Control Act*,¹⁷² originally enacted in 1975 to implement the 1972 *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* (London Dumping Convention).¹⁷³ This part is generally inapplicable to routine oil and gas operations because “dumping” is defined as excluding

¹⁷² R.S.C. 1985, c. O-2.

¹⁷³ 26 U.T.S 2403; T.I.A.S. 8165, in force August 1975.

“any discharge that is incidental to or derived from the exploration for, exploitation of and associated off-shore processing of sea bed mineral resources.”¹⁷⁴ However, this part could potentially apply to the deliberate dumping of materials outside of the normal conduct of operations. This part prohibits the deliberate disposal of substances at sea without a permit.¹⁷⁵ The disposal at sea of ships, aircraft, platforms or other structures without a permit is also prohibited,¹⁷⁶ and this part may therefore apply to the abandonment of oil and gas installations if these are not removed when they are decommissioned. “Sea” is broadly defined to include, among other areas, the territorial sea of Canada and any exclusive economic zone that may be created by Canada,¹⁷⁷ and this part will accordingly apply in the Nova Scotia offshore area.¹⁷⁸ This part provides for a List of Prohibited Substances and a List of Restricted Substances which are set out in Schedule III of the Act. Even though this part does not apply to routine discharges from oil and gas operations, these lists are considered as part of the procedure for selecting chemicals, as set out in the draft *Offshore Chemical Selection Guidelines*, discussed below.

¹⁷⁴ Subsection 66(1). Ocean dumping was previously addressed by the *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55, the constitutional validity of which was considered and upheld in *R. v. Crown Zellerbach Canada Ltd.* (1988), 49 D.L.R. (4th) 161 (S.C.C.).

¹⁷⁵ Section 67.

¹⁷⁶ Subsection 70(1).

¹⁷⁷ Subsection 66(2).

¹⁷⁸ Two cases involving the prosecution of oil companies for dumping in violation of the predecessor *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55, are *R. v. PanArctic Oils Ltd.* (1982), 12 C.E.L.R. 78, [1983] N.W.T.R. 143 and *R. v. Gulf Canada Corp.* (1987), 2 C.E.L.R. (N.S.) 261, [1987] N.W.T.R. 277 (both cases before the N.W.T. Terr. Ct.). The PanArctic case involved deliberate dumping in connection with rigging down at the end of an Arctic drilling season, in circumstances where time was short and the airstrip was deteriorating. The company was fined \$150,000 and placed on probation. The Gulf case involved the intermittent discharge of excess barite and cement into the Beaufort Sea in 1986. After two days the company applied for a permit, but this was refused. The company nevertheless continued to dump. The company later advised the government and was then charged with eight counts of dumping without a permit. No harm had been caused to the environment, but the court commented that harm had been inflicted on the process of environmental protection and that legislative goals and objectives had been undermined. The court felt that the only sentencing tool available to it was the imposition of a fine in view of reservations that had been expressed by the Court of Appeal with respect to the probation of corporate offenders, and imposed a fine of \$180,000.

Amendment of Act

The *Canadian Environmental Protection Act* has not been significantly amended since its enactment in 1988, but it is expected that it will be replaced in the near future by the *Canadian Environmental Protection Act, 1998*, currently in committee as Bill C-32, having passed second reading in the House of Commons on April 28, 1998.

(d) Pest Control Products Act

The *Pest Control Products Act*,¹⁷⁹ administered by Agriculture Canada, regulates the use of pesticide products. This Act was somewhat unexpectedly found to be applicable to the use of biocides in marine applications, when Lasmo reported to the CNSOPB in 1992 that it was using a product called "Amersperse 280" as a slimicide to control marine growth in the drilling fluid cooling system and fire water mains on its drilling and production unit. This product had apparently been in common use for at least several years in marine applications generally, but had never been registered as required under the *Pest Control Products Act*, although it had been registered with the Environmental Protection Agency in the United States. The use of this product was discontinued by Lasmo due to the lack of Canadian registration. Although Agriculture Canada was notified at the time, that agency has not become involved in the regulation of chemicals used in offshore operations, and as a practical matter this has been left to the Board.

(e) Migratory Birds Convention Act

Regulations under the *Migratory Birds Convention Act*¹⁸⁰ make it an offence to deposit or permit the deposit of oil or any other substances in or near waters frequented by migratory birds, or on the ice of such waters.¹⁸¹ This statute has to date been of little practical consequence in the context of offshore oil and gas operations, but could potentially be used, particularly if a spill results in the fouling of sea birds with oil.

¹⁷⁹ R.S.C. 1985, c. P-9.

¹⁸⁰ R.S.C. 1985, c. M-7.

¹⁸¹ *Migratory Birds Regulations*, C.R.C. 1978, c. 1035, s. 35(1).

(f) Canada Water Act

The *Canada Water Act*,¹⁸² although not expressly limited to fresh water, does not appear to have been intended to deal with ocean pollution. The Act recognizes the concept of water management and provides for the establishment of comprehensive water resources management programs, which may be implemented with one or more provincial governments having an interest, or directly by the federal government where the federal government has exclusive jurisdiction. The Act provides for the designation of “water quality management areas” with separate management agencies, but no such areas or agencies have yet been established. The Act prohibits persons from depositing “waste” in waters within a water quality management area, but since no such areas have been designated, the offence provision is not applicable at this time. A senior public service consultative committee has been established under this Act, and a number of research programs have been conducted under federal-provincial basin study agreements. However the Act does not appear to have any applicability to offshore oil and gas operations at this time.

(g) National Energy Board Act

As discussed above, the National Energy Board has concurrent jurisdiction with the offshore Board over pipelines extending outside the offshore area. Although the *National Energy Board Act*¹⁸³ does not specifically address pollution and debris resulting from the construction, operation or abandonment of such pipelines, a certificate of public convenience and necessity for a pipeline under section 52 of the Act would be made subject to terms and conditions designed to protect the environment.¹⁸⁴

¹⁸² R.S.C.1985, c. C-11

¹⁸³ R.S.C. 1985, c. N-7.

¹⁸⁴ Sections 37 and 54.

(h) Accord Act

The *Accord Act* applies to spills of crude oil that are not covered by Part XV of the *Canada Shipping Act*; these would include spills resulting from drilling or production operations.

Subsection 166(1) provides that “No person shall cause or permit a spill on or from any portion of the offshore area.” “Spill” is defined in subsection 165(1) as “a discharge, emission or escape of petroleum, other than one that is authorized pursuant to the regulations or any other federal law or that constitutes a discharge from a ship to which Part XV or XVI of the *Canada Shipping Act* applies.” Violation of this prohibition is made an offence by subsection 199(1), which provides that

Every person is guilty of an offence who

(a) contravenes this Part or the regulations;

(e) undertakes or carries on a work or activity without an authorization under paragraph 142(1)(b) or without complying with the approvals or requirements of such an authorization; or . . .

Subsection 199(2) provides for maximum penalties of \$100,000 or one year in prison, or both, on summary conviction, or \$1 million or five years in prison, or both, on conviction on indictment. There is a two year limitation period.¹⁸⁵

A justice or judge having jurisdiction in the territory where the accused is resident or carrying on business has jurisdiction even though the matter of the complaint did not arise in that territorial jurisdiction.¹⁸⁶

There have been no prosecutions under the “spill” provisions of the *Accord Act* or similar provisions in the *Newfoundland Accord Act* or *Canada Oil and Gas Operations Act*.

Regulations

The *Accord Act* provides that the Governor in Council may make regulations “prohibiting the introduction into the environment of substances, classes of substances

¹⁸⁵ Section 204.

¹⁸⁶ Section 206.

and forms of energy, in prescribed circumstances.”¹⁸⁷ No separate regulations have yet been made in respect of pollution, but pollution is covered to some extent in the regulations pertaining respectively to drilling operations and production operations.

The *Nova Scotia Offshore Petroleum Drilling Regulations*¹⁸⁸ provide as follows:

3. Every operator [*of a drilling installation*] shall ensure that all waste material, drilling fluid and drill cuttings generated at a drill site are handled in a manner that
 4. does not create a hazard to safety, health or to the environment; and
 5. is approved by the Board or any person designated by the Board.

The *Nova Scotia Offshore Area Petroleum Production and Conservation Regulations*¹⁸⁹ provide as follows:

8. (2) A production operations authorization is subject to the following requirements, namely, that
 - ...
 6. an environmental protection plan exists.
 16. (1) In order to ensure the safe operation of a development well, the operator shall operate the well in a manner that is consistent with these Regulations and that provides for
 - ...
 7. the protection of the environment
 49. (1) An operator [*of a production installation*] shall ensure that all waste material produced and stored at a production site is treated, handled and disposed of in accordance with the environmental protection plan.
 51. (2) An operator shall develop and submit to the Chief Conservation Officer an environmental protection plan that provides for the protection of the natural environment and includes
 - ...

¹⁸⁷ Paragraph 153(1)(g).

¹⁸⁸ SOR/92-676.

¹⁸⁹ SOR/95-190.

8. a description of equipment and procedures for treatment, handling and disposal of waste material;
9. compliance monitoring programs to ensure that the composition of spilled waste material is in accordance with the limits specified in the environmental protection plan;

Conditions attached to approvals

When the Cohasset Project was first developed, no regulations had been promulgated under the *Accord Act*, although a number of regulations were in draft form. During this time the Board exercised control over operations through conditions attached to work authorizations.¹⁹⁰ In some cases, the Board applied the provisions of the draft versions of certain regulations as conditions of approval of specific offshore operations.¹⁹¹ This technique was most recently applied in approving the Development Plan for the Sable Offshore Energy Project. In section 3.03 of the Decision Report, the Board stated as follows:

It is the policy of the Board that existing projects not be “grandfathered” when regulations or standards are amended. The Board will require that future

¹⁹⁰ Section 142 provides that the Board “may authorize in writing each work or activity proposed to be carried on, (i) subject to... such approvals... and such requirements... as the Board determines...”

¹⁹¹ For example, the Production Operations Authorization issued to Lasmco on June 2, 1992 in respect of the Cohasset Project contains the following condition:

The Operator shall comply with and be subject to the provisions of the following draft regulations as if they were in force with respect to the Nova Scotia offshore area, as well as any additional draft regulations, standards and guidelines that may be developed in the future and adopted by the Board:

- (a) Nova Scotia Offshore Petroleum Production and Conservation Regulations (draft dated January 30, 1991);
- (b) Petroleum Occupational Safety and Health Regulations - Nova Scotia (draft dated April 5, 1990);
- (c) Nova Scotia Offshore Certificate of Fitness Regulations (draft dated December 11, 1991);
- (d) Nova Scotia Offshore Petroleum Drilling Regulations (draft dated January 1992);
- (e) Nova Scotia Offshore Area Petroleum Diving Regulations (undated draft); and
- (f) Nova Scotia Offshore Petroleum Installation Regulations (draft dated October 11, 1990).

Such draft regulations, standards and guidelines may be revised from time to time and if adopted by the Board the revised versions shall apply on notice to the Operator and shall supersede any earlier versions. This condition shall remain in effect for each such draft regulation, standard or guideline until it is finally promulgated.

activities be assessed against regulations or draft regulations, standards and guidelines in place when the activity occurs.

The Board then imposed the following condition:

In addition to complying with all applicable promulgated regulations, the Proponents shall comply with the provisions of the following draft regulations as if they were in force with respect to the Nova Scotia offshore area:

Petroleum Occupational Health and Safety Regulations – Nova Scotia
(April 5, 1990 Draft)
Canada Oil and Gas Operations Regulations

The Proponents shall also comply with any additional draft regulations, standards and guidelines that may be developed in the future and adopted by the Board. Such draft regulations, standards or guidelines may be revised from time to time and, if adopted by the Board, the revised version shall apply and shall supersede any earlier versions, upon notice being given to the Proponents.¹⁹²

The validity of this technique has been confirmed in *Petro-Canada v. Can.-Nfld. Offshore Petroleum Board*.¹⁹³ In that case, the Canada-Newfoundland Offshore Petroleum Board had attached the following condition to a Drilling Program Authorization:

10. The operator shall, during the term of the Drilling Program Authorization, comply with the provisions of the following standards, draft regulations, and all modifications and amendments thereto as may be promulgated from time to time: Newfoundland Offshore Petroleum Drilling Regulations (draft) dated March, 1988 . . .

Petro-Canada had argued that the Board did not have the jurisdiction to incorporate such a condition. Mr. Justice L.D. Barry of the Newfoundland Supreme Court (Trial Division) stated:

¹⁹² Condition 15.

¹⁹³ 33 Admin. L.R. (2d) 202 at 229 - 230. See also *R. v. Boise Cascade Canada Ltd.* (1995), 17 C.E.L.R. (N.S.) 276, 24 O.R. (3d) 483, involving an alleged violation of the *Environmental Guidelines for Access Roads and Water Crossings* issued by the Ontario Ministry of Natural Resources. It was a condition of the defendant's work permit that it comply with the Environmental Guidelines. Although this was not the central issue in the case, the Ontario Court of Appeal based its reasons on the admission by the defendant that it had breached the Guidelines. The Guidelines were therefore made legally effective through the condition attached to the work permit.

I do not accept that submission.

Section 133(1)(b) of the legislation,¹⁹⁴ since amended, although clumsily worded, entitles the board to authorize, in its discretion, “such requirements . . . as the Board determines or as may be prescribed.” I do not interpret s. 144 of the legislation, authorizing the Lieutenant Governor in Council to make regulations requiring and prescribing the making of tests and the taking of samples, as removing from the board the authority to impose requirements in drilling authorizations regarding the making of tests and the taking of samples, where the Lieutenant Governor in Council has not yet enacted any such regulations. Neither do I interpret the omission in the initial legislation of an express reference to the board’s authority to incorporate by reference the standards or specifications of other organizations as barring the board from so incorporating the draft Newfoundland Offshore Petroleum Drilling Regulations. Whether they are regarded as draft regulations or just as conditions, the wording of s. 133(1)(b) is broad enough to permit the board to incorporate these by reference. The subsequent amendment of the legislation to authorize the Lieutenant Governor in Council to incorporate such standards or specifications by reference in regulations may require a different interpretation of the board’s authority under the present s. 134 (the former 133) but I need not decide this.

...

Dale Corp. v. Nova Scotia (Rent Review Commission) (1983), 149 D.L.R. (3d) 113 (N.S. C.A.), and similar authorities relied on by Petro-Canada do not apply here, since they are cases where authorities acted outside of the jurisdiction given by statute. Here, by s. 133(1)(b), the board is expressly authorized to impose requirements other than those which have been prescribed by regulation.

Although this technique may be valid, it is not the ideal approach. The Royal Commission on the *Ocean Ranger* Marine Disaster commented on this as follows:

Regulations issued under [the *Oil and Gas Production and Conservation Act*] have been rather modest in number and in the extent of their application. The drafting and promulgation of regulations are subjected to an unconscionably lengthy process with a consequent loss of flexibility. The prime instrument of control has been the application-permit process and stipulations in that process are being used instead of regulations and guidance notes. Indeed, instructions are often issued by word of mouth, telex, letter or other means. It is consequently difficult for industry to discover what controls are, in fact, being enforced. The application of law and regulations becomes a private matter between the regulator

¹⁹⁴ *The Canada-Newfoundland Atlantic Accord Implementation (Newfoundland) Act*, S.N. 1986, c. 37. The complementary federal statute is the *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3.

and the operator. An operator needs to know clearly the requirements which he and the other operators are expected to observe. These requirements, expressed primarily in regulations and explanatory guidance notes, need to be flexible to be responsive to changing technology but also possess the level of certainty required by those who are regulated.¹⁹⁵

Although this problem has to some extent been mitigated through the promulgation of a fairly comprehensive set of regulations, as noted above, there are no specific regulations dealing with waste treatment or pollution, and it is expected that in this area the main tool for ensuring satisfactory operational practices will continue to be the approval process; the Board will either not issue an approval until it is satisfied with the applicant's proposed procedures, or it will make the approval subject to appropriate conditions.

The advantage of this approach compared to the use of prescriptive regulations is flexibility. As noted in the Hickman report,¹⁹⁶ it takes a long time to make or amend regulations in the federal system. Guidelines allow regulators to adapt to specific situations, and to consider things such as location-specific factors and changes in technology.

Guidelines

In an attempt to provide industry with some guidance, the CNSOPB has issued various Guidelines.¹⁹⁷ Allowable levels of operational discharges are dealt with in the *Offshore Waste Treatment Guidelines* (September 1996),¹⁹⁸ published jointly by the

¹⁹⁵ T. A. Hickman, *et al.*, *Report Two: Safety Offshore Eastern Canada*, v. 2 (Ottawa: Supply and Services Canada Cat. No. Z 1-1982/1-2, 1985) at 151.

¹⁹⁶ *Ibid.*

¹⁹⁷ These are listed in Appendix 1 of the Sable Offshore Energy Project Decision Report, *supra*, note 10 at 70. This list is incomplete and does not include the *Offshore Waste Treatment Guidelines* (September 1996), the *Compensation Guidelines Respecting Damages Relating to Offshore Petroleum Activity* (September 1991).

¹⁹⁸ These Guidelines expressly supersede the *Guidelines for the Use of Oil Based Drilling Muds* published by the Canada Oil and Gas Lands Administration in November 1985 and the *Offshore Waste Treatment Guidelines* jointly published by the Canada Oil and Gas Lands Administration and the Canada-Newfoundland Offshore Petroleum Board in January 1989: see page 3 of the Guidelines. These Guidelines also effectively supersede the *Environmental Code of Practice for Treatment and Disposal of Waste Discharges from Offshore Oil and Gas Operations*, Environment Canada Report EPS 1/PN/2 (January 1990).

National Energy Board (which has replaced COGLA as the agency responsible for the regulation of oil and gas operations in areas under federal jurisdiction other than the Newfoundland and Nova Scotia offshore areas), the Canada-Newfoundland Offshore Petroleum Board and the Canada-Nova Scotia Offshore Petroleum Board.¹⁹⁹ The Guidelines indicate that authorizations will “normally” be subject to conditions in accordance with the Guidelines. The Guidelines state that they will be formally reviewed at least every five years to ensure that they reflect gains in scientific and technical knowledge, but may be reviewed more frequently. In fact, these Guidelines are currently being revised.²⁰⁰

Work is also underway to develop the *Offshore Chemical Selection Guidelines*, which will also be issued jointly by the National Energy Board, the Canada-Newfoundland Offshore Petroleum Board and the Canada-Nova Scotia Offshore Petroleum Board. These are currently in draft form and are being developed with the assistance of a government/industry working group comprised of representatives from

¹⁹⁹ This document was prepared in consultation with the Canadian Environmental Committee on Petroleum Activities (CECPA) which includes representatives of Coast Guard, Environment Canada and The Department of Fisheries.

²⁰⁰ The Terra Nova Project Environmental Assessment Panel questioned the adequacy of these Guidelines (which at that time had been revised only seven months earlier) and commented that the “clear implication” was that the reviewing agencies did not follow a precautionary approach in the preparation of the Guidelines: see the Panel’s report, *supra*, note 13 at 44. (The precautionary approach is a developing concept in international law, expressed as follows in Principle 15 of the *Rio Declaration*, *supra*, note 24: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”)

The Panel accordingly recommended that the Newfoundland Board undertake a review of these Guidelines (Recommendation #44) and the Board accepted this recommendation in its Decision Report (*supra*, note 14, at 71.) The Newfoundland Board indicated that this review would take into account the precautionary principle, recent advances in waste treatment technologies for offshore oil exploration and development, and the results of cumulative effects monitoring. The Nova Scotia Board will participate in this review, but in the meantime it has indicated that after December 31, 1999, standards for discharges of Low Toxicity Mineral Oil (LTMO) based drilling muds adhering to cuttings will be tightened from the current level of 15% by weight, set out in the *Offshore Waste Treatment Guidelines*, to 1%, if the use of LTMO-based mud is authorized at all. This new standard will be applied to the Sable Offshore Energy Project effective January 1, 2000 (see SOEP Decision Report, *supra* note 10, s. 3.3.4 and Condition #21, p. 52) and PanCanadian’s Cohasset-Panuke Project (letter from CNSOPB to PanCanadian dated December 18, 1997). It will be impossible to achieve this standard with current technology and the practical effect will be to ban LTMO-based mud unless cuttings are reinjected underground or brought to shore for disposal. The Newfoundland Board has also issued a letter to industry dated August 26, 1998 regarding the use of synthetic-based mud.

Environment Canada, the Department of Fisheries and Oceans, Hibernia Management and Development Company Ltd., PanCanadian Resources, Mobil Oil Canada Properties, Petro-Canada and the Canadian Association of Petroleum Producers.

These Guidelines will set out selection criteria for chemicals to be used in offshore drilling and process-related activities which may potentially be discharged into the marine environment. These Guidelines will normally be applied by industry in making decisions on the selection of chemicals and the offshore Boards will conduct periodic audits to ensure compliance with the Guidelines. The Guidelines will set out a series of decision steps which are intended to screen out chemicals which are listed prohibited substances, which do not meet certain criteria for disposal into the sea or which can be shown to pose an unacceptable risk to the marine environment. It is intended that the offshore Boards will enter into memoranda of understanding with other agencies or departments affected by the application of these Guidelines. In particular, it is intended through consultation with the Department of Fisheries and Oceans, that chemicals selected in accordance with the Guidelines will not be deemed to be “deleterious” substances for purposes of subsection 36(3) of the *Fisheries Act*.

4.2 Environmental offences

(a) Types of offences

In the 1978 case of *R. v. Sault Ste. Marie*,²⁰¹ the Supreme Court of Canada outlined three categories of offences.

(i) Mens rea offences

Mens rea offences require some state of mind such as intent, knowledge or recklessness, which must be proved by the prosecution beyond a reasonable doubt. Environmental offences will generally not be presumed to require the element of *mens*

²⁰¹ [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 7 C.E.L.R. 53, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, 21 N.R. 295.

rea unless there is a clear legislative intent; for example, the use of words such as “wilfully,” “intentionally,” “knowingly,” or “recklessly.”²⁰²

(ii) *Strict liability offences*

Strict liability offences involve negligence or a lack of reasonable care. Proof of the act *prima facie* proves commission of the offence, but the accused has a defence if he can show, on a balance of probabilities, that he either exercised due diligence (and was therefore not negligent) or that the act was committed under a reasonable mistake of fact. The onus is on the accused to prove the defence. Public welfare offences will normally be considered to be offences of strict liability unless there is a clear legislative intention to create an absolute liability offence or an offence requiring *mens rea*. Certainly if the legislation expressly provides for a defence of “due diligence,” “reasonable care,” or the like, the offence will be one of strict liability. Elaine Hughes states that while the case law is conflicting, use of the words “cause” or “permit” in a statute will likely lead the courts to characterize an offence as one of strict liability.²⁰³

(iii) *Absolute liability offences*

Absolute liability offences impose liability without fault and the defence of reasonable care is not available. There must be a clear legislative intent to create an absolute liability offence.

The court in *Sault Ste. Marie* listed four primary considerations to be used in determining legislative intent: the overall regulatory pattern; the subject matter of the legislation; the importance of the penalty; and the precision of the language used. In *Reference re Section 94(2) of Motor Vehicle Act (British Columbia)*²⁰⁴ the Supreme Court held that an absolute liability offence in respect of which there was a possibility of

²⁰² M. Jeffrey, “Environmental Enforcement and Regulation in the 1980’s: *Regina v. Sault Ste Marie Revisited*” (1984) 10 Queen’s L.J. 43 at 65.

²⁰³ E. Hughes, “Environmental Prosecutions: Characterizing the Offence” (1991) 1 J.E.L.P. 323.

²⁰⁴ [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536.

imprisonment infringed section 7 of the *Canadian Charter of Rights and Freedoms*,²⁰⁵ thereby eliminating many environmental offences from the absolute liability category. Further, as noted above, there is an assumption that public welfare offences, unlike “true” criminal offences, do not require *mens rea* unless the statute uses words such as “wilfully,” “intentionally,” “knowingly,” etc. As a result, most environmental offences will be characterized as strict liability offences.

(b) Defences

(i) Reasonable mistake of fact

An accused may avoid liability for a strict liability offence if he “reasonably believed in a mistaken set of facts, which, if true, would render the act or omission innocent.”²⁰⁶ While in normal criminal cases a defence based on mistake of fact will succeed if the accused honestly believed in the mistaken facts, even if the mistake was unreasonable,²⁰⁷ for the defence to succeed with respect to a strict liability offence, the mistake must not only be honest, but objectively reasonable.²⁰⁸

(ii) Due diligence

A defendant may be able to avoid conviction for a strict liability offence if he can show that he did all that any reasonable person would have done in the same circumstances to avoid a foreseeable risk of harm.²⁰⁹ The standard of care for this defence has been considered in *R. v. Gonder*,²¹⁰ in which the court commented that the determination of fault in a strict liability prosecution was “effectively identical” to

²⁰⁵ Part 1 of the *Constitution Act*, 1982, being Schedule B of the *Canada Act* 1982 (U.K.), 1982, c.11. Section 7 provides that “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

²⁰⁶ *R. v. Sault Ste. Marie*, *supra*, note 201.

²⁰⁷ In these cases, the defence simply operates to negate *mens rea*.

²⁰⁸ The leading case dealing with reasonable mistake of fact is *R. v. Chapin*, [1979] 2 S.C.R. 121.

²⁰⁹ *R. v. Sault Ste. Marie*, *supra*, note 201 at 374.

²¹⁰ (1981), 62 C.C.C. (2d) 326 (Y.T. Terr.Ct.).

determining liability for negligence in tort.²¹¹ Elaine Hughes has summarized the court's findings with respect to standard of care as follows:²¹²

The court in *Gonder* suggested that the following factors were of importance in determining the appropriate standard of care to be met by an accused:

1. "Is there a standard practice of care commonly acknowledged as a reasonable level of care and did the accused act in accord with that standard?"

The court emphasized that this is only one component of the test; other case law suggests that compliance with customary industry practice alone is not sufficient to constitute due diligence.

2. Are there "any special circumstances of the case which might require a different level of care other than the level suggested by the standard practice"?

In answering this second question, the court noted that five factors will be of importance:

- (a) the gravity of potential harm;
- (b) the alternatives available to the defendant;
- (c) the likelihood of harm;
- (d) the degree of knowledge or expertise expected of the defendant; and
- (e) the degree of control the accused has over the underlying causes.

Of these five factors, the most important seems to be the possibility of alternative courses of conduct by the accused. In the court's words:

Reasonableness of care is often best measured by comparing what was done against what could have been done. The reasonableness of alternatives the accused knew or *ought to have known* were available is a primary measure of due diligence. *To successfully plead the defence of reasonable care the accused must establish on a balance of probabilities there were no reasonable feasible alternatives that might have avoided or minimized injury to others.* [Emphasis added.]

In *R. v. Commander Business Furniture Inc.*,²¹³ the court noted the following factors to be considered in assessing due diligence:

²¹¹ *Supra*, note 210 at 331. For a discussion of the due diligence standard see N.J. Strantz, "Beyond Sault Ste. Marie: The Creation and Expansion of Strict Liability and the 'Due Diligence' Defence" (1992) 30 Alta. L. Rev. 1233 and T. Meadows, "Drawing Lines in the Quicksand" (1993) 3 J.E.L.P. 269.

²¹² E. Hughes, "The Reasonable Care Defences" (1991) 2 J.E.L.P. 214 (footnotes omitted).

²¹³ (1992), 9 C.E.L.R. (N.S.) 185 (Ont. Ct. Prov. Div.), aff'd (February 18, 1994), 179/93 (Ont. Gen. Div.).

1. the nature and gravity of the adverse effect;
2. the foreseeability of the effect including abnormal sensitivities;
3. the alternative solutions available;
4. legislative or regulatory compliance;
5. industry standards;
6. the character of the neighbourhood;
7. what efforts have been made to address the problem;
8. over what period of time and the promptness of the response;
9. matters beyond the control of the accused, including technological limitations;
10. the skill level expected of the accused;
11. the complexities involved;
12. preventive systems;
13. economic considerations; and
14. actions of officials.²¹⁴

Elaine Hughes notes that the courts have generally set a very high standard of care, and gives the following examples of circumstances in which the courts have found that there was a lack of due diligence, with the result that the defence failed:²¹⁵

Equipment failures:

- improper design and operation of equipment
- improper maintenance of equipment
- failure to provide emergency equipment
- failure to install safety devices

Employee training and supervision:

- failure to require independent contractor to do inspections
- failure to adequately train employees
- inadequate number of employees on the job
- failure to properly supervise employees

Company policy and operations:

- failure to take remedial steps regarding potential problem
- no reasonable efforts to ascertain cause of problem
- failure to control discharges to maximum possible extent
- treating a spill as insignificant
- failure to act quickly to remedy problem
- no investigation of potential consequences of one's operations

²¹⁴ As noted in S. Berger, *The Prosecution and Defence of Environmental Offences* (Toronto: Emond-Montgomery, 1994) at 5:37.

²¹⁵ Adapted for purposes of E. Hughes' article from E. Swanson and E. Hughes, *The Price of Pollution* (Edmonton: Environmental Law Centre, 1990), 165-66. Case citations included in original text.

- failure to establish proper operating policies

Miscellaneous:

- failure to anticipate normal natural hazards
- failure to take adequate security measures against vandals

Since the onus is on the accused to prove due diligence in prosecutions of strict liability offences, it has been argued that such offences violate the presumption of innocence guaranteed by subsection 11(d) of the *Charter*.²¹⁶ In considering a strict liability offence under the *Competition Act*²¹⁷ relating to false or misleading advertising, a majority of the Supreme Court found in *R. v. Wholesale Travel Group Inc.*²¹⁸ that a statutory due diligence defence which placed a reverse onus on the accused was constitutionally valid. Seven of the nine judges found that the provision violated subsection 11(d) of the *Charter*, but three of these judges found that the provision was nevertheless justified under section 1 of the *Charter*, which makes the rights and freedoms set out in the *Charter* subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Four of the seven judges who found that the provision violated section 11(d) of the *Charter* did not find that it was justified under section 1; however since two of the judges found that the provision did not violate subsection 11(d) of the *Charter*, in the result the reverse onus provision was held to be constitutionally valid.

(iii) *Did not commit act*

In all cases, the prosecution must prove that the accused committed the prohibited act. If the accused can show that the offence was not caused by his behaviour, but by an extraordinary natural event that he could not prevent or control (an “Act of God”),²¹⁹ by a latent (hidden) defect in equipment, or by someone else, he may avoid conviction.

²¹⁶ *Supra*, note 205.

²¹⁷ R.S.C. 1970, c. C-23.

²¹⁸ [1991] 3 S.C.R. 154.

²¹⁹ For a detailed discussion of this defence, see B. J. Stammer, “Nothing We Could Do: The Defence of Act of God in Environmental Prosecutions” (1993) 4 J.E.L.P. 93.

Elaine Hughes notes that use of the “Act of God” and latent defect defences has declined with the availability of the due diligence defence; if a person has done everything reasonable to guard against foreseeable events, or if the event is unforeseeable, presumably the due diligence defence will be available.

As a general principle of criminal law, a person is not responsible for the criminal acts of others unless he participates in the offence. This principle also applies to regulatory offences,²²⁰ although depending on the statutory wording, there may be liability even if the person committing the act is unidentified²²¹ or if the accused has failed to exercise due diligence in guarding against the acts of others.²²² Since corporations act through their directors, officers, employees and agents, the issue arises as to when the acts of such individuals can be attributed to the corporation to make the corporation criminally liable (the individuals themselves may of course also be personally liable). For *mens rea* offences, the acts and intentions of those individuals considered to be the directing minds of the company are considered to be those of the company. The directing minds of a company will usually be its directors and officers, but possibly could include certain employees depending on their functions and authority. In the case of strict liability offences, since there is no need to prove *mens rea*, the intentions of the directing minds are irrelevant and a company will be liable for the acts and omissions of all its employees and agents unless it can be shown that all reasonable care was taken.

A corporation may be liable as a party to an offence committed by someone else, typically an employee or contractor, unless “the act took place without the accused’s

²²⁰ *R. v. Sault Ste. Marie*, *supra*, note 201

²²¹ *e.g.*, subsection 668(1) of the *Canada Shipping Act*, which provides: “In a prosecution of a ship for an offence under this Part, it is sufficient proof that the ship has committed the offence to establish that the act . . . was committed by . . . any person on board the ship.”

²²² *e.g.*, *R. v. Cloverdale Paint & Chemicals Ltd.*, (1986), 4 F.P.R. 88, *affd* 1 C.E.L.R. (N.S.) 128, 25 C.R.R. 190 (B.C.C.A.) in which a company was found guilty under subsection 36(3) of the *Fisheries Act* of depositing or permitting the deposit of a deleterious substance under “any conditions” where it might enter water frequented by fish, after an unknown person opened a valve and released chemicals into a water course. At trial, it was held that this was foreseeable and that the company, in failing to take adequate security measures, had not exercised due diligence. The appeal court affirmed, noting that “any conditions” includes conditions under which a third party could foreseeably intervene.

direction or approval, thus negating wilful involvement of the accused.”²²³ The wilful involvement will be that of the “directing mind” of the corporation. However, many statutes prohibit not only direct acts of pollution, but also “permitting” pollution to occur. The two statutes most applicable to offshore operations contain such wording: the *Accord Act* provides that no person shall “cause or permit” a spill,²²⁴ and the *Fisheries Act* provides that no person shall “deposit or permit the deposit” of a deleterious substance in water frequented by fish.²²⁵ Even in the absence of such specific wording, it is clear from *Sault Ste Marie* that persons in authority, such as employers, have a duty to control the activities of persons under their authority, such as employees or potentially independent contractors. For strict liability offences, if a corporation is negligent in failing to prevent an occurrence which ought to have been foreseen, it may itself be guilty of an offence. In these cases it is not necessary to find that the corporation was a party to the offence committed by the employee or contractor; the corporation will itself be separately liable if it failed to take all reasonable care.

(iv) *Act is excused or justified*

A wrongful act may also be excused on the basis of necessity or if it is impossible to avoid, but these will be rare cases. The defence of statutory authority may also be available in situations where, for example, an accused is in violation of an environmental standard even though operations are in compliance with the terms of a permit authorizing a discharge. However this defence will also be available only rarely, as it has been held that an approval issued under one statute does not normally authorize the contravention of a different statute²²⁶ and in fact an approval issued under a particular section of a statute may not even authorize the contravention of a different section of the same statute.²²⁷

²²³ *R. v. Sault Ste. Marie*, *supra*, note 201.

²²⁴ Subsection 166(1).

²²⁵ Subsection 36(3).

²²⁶ *Re Rayonier* (1974), 1 F.P.R. (11) 25 (B.C. Prov. Ct.), in which it was held that a provincial permit was not defence to a federal fisheries charge.

²²⁷ *R. v. Canadian International Paper Co.* (1974), 6 O.R. (2d) 378, 20 C.C.C. (2d) 557, 54 D.L.R. (3d)

(c) **Offences and offshore oil and gas operations**

The main statute creating offences applicable to pollution from offshore oil and gas operations is the *Accord Act*, which not only makes it an offence to spill oil, but more importantly makes it an offence to contravene the regulations or to conduct a work or activity without an authorization or without complying with the requirements of an authorization. While there have been no prosecutions under the *Accord Act*, the *Newfoundland Accord Act* or the *Canada Oil and Gas Operations Act*, it would appear that the offences created by these acts are offences of strict liability, allowing a defence of due diligence.²²⁸

It is not surprising that there have been no prosecutions under the *Accord Act*. The offshore oil and gas industry is regulated by specialized administrative agencies, being the offshore Petroleum Boards, that focus exclusively on this industry. As a result, there is a high degree of supervision of activities, beginning with the approval requirements and continuing thereafter with reporting requirements, inspections and audits. Given the nature of the corporations operating in the offshore, one would expect cases of deliberate non-compliance with regulatory requirements or deceptiveness to be rare. Accidental spills have occurred, but the Boards have so far chosen to negotiate improvements to operations and procedures or to issue directions rather than resort to prosecution. In cases of non-compliance the Boards can of course also revoke an authorization.

Although there has been some debate about whether it makes sense to ever impose criminal liability on corporations,²²⁹ modern regulatory regimes generally provide for the possibility of criminal sanctions as part of a range of available measures including licencing, inspection, remedial orders, injunctions, incentives and civil penalties. In the past, it was rare to resort to prosecution; instead, a conciliatory approach was generally used which involved the negotiation of agreements with industry to secure compliance or

723, 3 C.E.L.N. 199 (Ont. C.A.), in which it was held that an approval issued under one section of an act did not authorize the contravention of another section.

²²⁸ As noted above, the use of the words "cause or permit" in relation to the prohibition against spills would suggest strict liability.

²²⁹ See M. Bowden and T. Quigley, "Pinstripes or Prison Stripes? The Liability of Corporations and Directors for Environmental Offences" (1995) 5 J.E.L.P. 209.

the achievement of certain standards.²³⁰ However, more recently government has felt pressure to adopt “a more aggressive and litigious style of enforcement.”²³¹ For example, Linda Duncan, who did a term as Chief of Enforcement and Compliance of the Conservation and Protection Branch of Environment Canada, commented in a 1990 paper that Environment Canada had shifted its policy away from negotiation and the exercise of discretion towards stricter enforcement, including prosecution.²³² It is suggested that the relative use of prosecution depends in part on the approach and the culture of the agency charged with enforcement.

The objectives in sentencing environmental offenders (and thus in prosecuting in the first place) are not entirely clear. The most frequently stated objective is general deterrence.²³³ In some cases, “profit-stripping” fines may ensure that pollution is less profitable than compliance with environmental regulations. However, in the case of offshore oil and gas operations, the specific technologies and procedures employed in individual projects are scrutinized and approved by the regulator. If accidents or upsets nevertheless occur, despite the fact that an operator is in compliance with the Board’s operational requirements, it would seem pointless to prosecute. In fact, the threat of prosecution may be counterproductive if it discourages the reporting of incidents or “near incidents” and open dialogue with the regulator. Although prosecution should be available to the Board to be used in cases of deliberate non-compliance or other misconduct, it is suggested that the approach taken to date by the Board is preferable in cases of accidental discharges and upsets. Also, to ensure a consistent approach, it is

²³⁰ L.B. Huestis, “Enforcement of Environmental Law in Canada” in G. Thompson, M. McConnell and L. Huestis (eds.), *Environmental Law and Business in Canada* (Aurora, Ont.: Canada Law Book, 1993) at 245-248.

²³¹ *Ibid.* at 248.

²³² L. Duncan, “Is Environment Canada Serious About Enforcing Its Laws?” in D. Tingley, (ed.) *Into the Future – Environmental Law and Policy for the 1990’s* (Edmonton: Environmental Law Centre, 1990). See Environment Canada’s booklet, *Canadian Environmental Protection Act – Enforcement and Compliance Policy* (Ottawa: Minister of Supply and Services, Cat. No. En 40-356/1988E, May 1988). It is interesting to note that on the cover of this booklet and at the beginning of each section throughout the text, there is a picture of a gavel, suggesting a prosecutorial approach to violations. The policy lists a number of situations in which prosecution will *always* be pursued, one of which is when there is serious harm or risk to the environment (at 51).

²³³ J. Swaigen, “Sentencing in Environmental Cases” in L. Duncan (ed.), *Environmental Enforcement* (Edmonton: Environmental Law Centre, 1985) at 95.

suggested that other agencies having jurisdiction to lay charges, the two main ones being the Canadian Coast Guard and the Department of Fisheries and Oceans, should defer to the Board as the primary regulator.

4.3 Administrative problems

There is a great potential for confusion and uncertainty as a result of the fragmented and overlapping jurisdictions of the Board, the Canadian Coast Guard and the Department of Fisheries and Oceans over offshore oil and gas activities. Although section 4 of the *Accord Act* provides that the *Accord Act* and any regulations made thereunder will prevail in case of any inconsistency or conflict with any other Act or regulations, discharge standards are not set out in the regulations but rather are contained in the *Waste Treatment Guidelines*.

In any case, it is not clear whether regulations could be made under the *Accord Act* authorizing operational discharges that would be pollutants under the *Canada Shipping Act* or deleterious substances under the *Fisheries Act*. The *Accord Act* provides that the Governor in Council may make regulations prohibiting the introduction into the environment of substances, classes of substances and forms of energy,²³⁴ but it is not clear if a regulation prohibiting the discharge of, for example, produced water that contains more than 40 mg/L of dispersed oil, by implication authorizes the discharge of produced water if it contains oil in a lesser concentration. The *Accord Act* specifically contemplates only the authorization of petroleum discharges.²³⁵ Regulations expressly or impliedly allowing the discharge of other effluents in the course of operations would need to be valid under the general provision authorizing regulations “concerning the exploration and drilling for, and the production, processing and transportation of, petroleum and works and activities related to such exploration, drilling, production, processing and transportation.”²³⁶

²³⁴ Paragraph 153(1)(g).

²³⁵ Paragraph 153(1)(h).

²³⁶ Paragraph 153(1)(b).

Section 112 of the *Nova Scotia Offshore Petroleum Drilling Regulations*²³⁷ provides that all waste material, drilling fluid and drill cuttings generated at a drill site shall be disposed of in a manner approved by the Board, but does not explicitly give the Board the power to authorize the discharge of those materials into the marine environment. Furthermore this section requires, in addition, that the disposal of such materials must not create a hazard to the natural environment, suggesting that Board approval will not necessarily be sufficient by itself. An operator may therefore be unsure whether he can rely on an approval of the Board under the *Accord Act*, or whether in relation to operational discharges such as produced water, drilling mud or cuttings he also needs the approval of Coast Guard with respect to the *Canada Shipping Act* and Environment Canada with respect to the *Fisheries Act*.

An illustration of the problems that can arise as a result of overlapping jurisdiction and regulatory responsibility is an incident that arose in 1993 when Lasmo applied to the Board for approval to use oil-based drilling mud in drilling certain wells in connection with the Cohasset-Panuke Project. This would have resulted in the disposal into the sea of drill cuttings which, despite treatment, would have had some residual oil adhering to them. Before considering the application, the Board provided the application and supporting materials to Environment Canada for review and comment.²³⁸

The Board reviewed the application, including a technical justification, an examination of alternatives to drilling with oil-based mud, alternatives to the disposal of oiled cuttings into the marine environment and the potential “waste” of oil reserves if certain reserves could not be accessed except with the use of oil-based mud. The Board also consulted with Environment Canada, the Department of Fisheries and Oceans and various technical experts. The Board noted that the use of oil-based mud had been examined in the public hearing conducted as part of the original development plan

²³⁷ SOR/92-676; N.S. Reg. 137/92.

²³⁸ As noted above in the discussion of the *Fisheries Act*, responsibility for the administration of section 36 of the *Fisheries Act* had been delegated to Environment Canada.

approval and the Board proposed to allow the discharge of oily cuttings within the limits set out in the applicable Guidelines.²³⁹

The proposed discharges would have been in compliance with Environment Canada's own guidelines, entitled *Environmental Code of Practice for Treatment and Disposal of Waste Discharges from Offshore Oil and Gas Operations*,²⁴⁰ which had been developed in consultation with the Department of Fisheries and Oceans and the Canada Oil and Gas Lands Administration. Nevertheless, both Environment Canada and the Department of Fisheries and Oceans refused to agree to the proposal and indicated to the Board, as well as to the applicant directly, that the discharge of cuttings contaminated with oil-based drilling mud would constitute the discharge of a deleterious substance under subsection 36(3) of the *Fisheries Act* and further would be detrimental to fish habitat under section 35 of the *Fisheries Act*. This position was based in part on the view taken by the staff of those agencies that there were technical alternatives available to the applicant. These agencies had no particular expertise in oilfield operations and were essentially second-guessing the Board on matters within the specialized expertise of the Board, but in any case the evaluation of alternatives would presumably be irrelevant to a determination of whether or not a substance is "deleterious."

In the end the Board approved the use of oil-based mud despite warnings from Environment Canada and the Department of Fisheries and Oceans that the discharge of contaminated cuttings might be regarded as a contravention of the *Fisheries Act*. This left Lasmo with the question of whether it could rely on the Board's approval as a defence to a prosecution under the *Fisheries Act*. Potential defences might include the following:

²³⁹ *Guidelines for the Use of Oil-Based Drilling Muds* (Canada Oil and Gas Lands Administration, November 1985) and *Offshore Waste Treatment Guidelines* (Canada Oil and Gas Lands Administration and Canada-Newfoundland Offshore Petroleum Board, January 1989.)

²⁴⁰ Report EPS 1/PN/2 (Industrial Programs Branch, Environmental Protection, Conservation and Protection, Environment Canada, January 1990). This Code of Practice was authorized by subsection 8(1) of the *Canadian Environmental Protection Act*, which provides that the Minister of the Environment "shall formulate . . . (c) release guidelines recommending limits, including limits expressed as concentrations or quantities, for the release of substances into the environment from works, undertakings or activities; and (d) environmental codes of practice specifying procedures, practices or release limits for environmental control relating to works, undertakings and activities . . ."

- (1) An argument that the Board's decision prevails under section 4 of the *Accord Act*, which provides that the *Accord Act* and any regulations made thereunder will prevail in case of inconsistency or conflict with any other Act or regulations. It is suggested that this defence would not succeed, because the inconsistency here was not between two competing statutes or regulations, but between two administrative decisions. As a matter of statutory interpretation, there is a presumption that statutes are not inconsistent with each other, since if they were Parliament would presumably have repealed the inconsistent provision. Therefore any reasonable construction that avoids inconsistency will generally be preferred.²⁴¹ In any case, there is no conflict merely because approval from a second regulatory agency may be required in addition to approval from the Board. As a general matter, approvals from several different regulatory agencies may be required for a particular undertaking.
- (2) An argument that the Guidelines applied by the Board are "regulations" within the meaning of subsection 36(4) of the *Fisheries Act*, which provides an exception to the offence of depositing a deleterious substance if the "waste or pollutant is of a type, in a quantity and under conditions authorized by regulations . . . made by the Governor in Council under any Act other than [the *Fisheries Act*]." This defence must fail because the Guidelines, even if they are "regulations," which is doubtful,²⁴² were not made by the Governor in Council under any act (in fact, the Guidelines had not even been expressly adopted by the Board, although the Board considered them in making decisions). The *Nova Scotia Offshore Petroleum Drilling Regulations* would not be specific enough to meet the requirements of subsection 36(4) of the *Fisheries Act* as they do not specify the type or quantity of authorized

²⁴¹ P. Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville, Quebec: Editions Yvon Blais, 1991) at 293.

²⁴² The Environmental Assessment Review Process (EARP) Guidelines Order was found to be a regulation as defined in the *Interpretation Act: Canadian Wildlife Federation v. Minister of the Environment*, [1989] 3 F.C. 309; *Oldman River Society v. Canada* (1992), 7 C.E.L.R. (N.S.) 1 (S.C.C.).

pollutants or the conditions under which a pollutant may be discharged, these determinations being left to the Board.

- (3) A defence of due diligence. This would not be expected to succeed since the applicant had been put on notice that in the view of Environment Canada the oily cuttings would be a “deleterious” substance. (Assuming, of course, that Environment Canada is successful in proving the *actus reus*, i.e., that the cuttings are in fact a deleterious substance.) As discussed above, it has been held that a contravention of the *Fisheries Act* is not authorized by an approval issued under another statute.²⁴³
- (4) A defence of officially induced error.²⁴⁴ This defence would not succeed as the CNSOPB never represented to Lasmo that its approval would be sufficient and, in any case, reliance on such a representation by Lasmo would have been unreasonable in view of the position of Environment Canada as communicated directly to Lasmo.

In the end, Lasmo went ahead with the drilling program and Environment Canada did not pursue the matter.

This example raises two issues. The first is whether industry should be entitled to rely on published guidelines in planning activities that may require considerable lead time and preliminary work. In this case, Environment Canada had given no prior indication that it might no longer accept the standards set out in its own guideline. When Lasmo filed an application in reliance on the guideline, Environment Canada effectively required Lasmo to justify the standards set out in the guideline. It would be more satisfactory if notice were given to industry in general if standards are to be revised or reconsidered.

Second, it is inefficient and confusing to have two separate agencies making a decision on the same issue, particularly when the considerations that should be taken into account by each agency are identical. It would be more satisfactory if all matters relating to operational pollution were clearly left with the oil and gas regulatory agency, which

²⁴³ *Re Rayonier, supra*, note 226.

²⁴⁴ See *R. v. Cancoil Thermal Corp.* (1986), 11 C.C.E.L. 219 (Ont. C.A.) for a discussion of this defence.

would consult as necessary with other interested agencies or agencies having specialized technical expertise.

The Royal Commission on the Ocean Ranger Marine Disaster, noting the problem of competing jurisdictions, administrative overlaps and lack of coordinated, consistent policy, recommended that regulatory control over mobile offshore drilling units and the varied aspects of their drilling operations be consolidated within a single agency.²⁴⁵ This recommendation was made in the context of safety, but would apply equally to other regulatory matters, including the regulation of pollution.

In 1993 the federal Minister of Energy, Mines and Resources (now Natural Resources) established an Advisory Panel to conduct a review of the regulations administered by the Department of Energy, Mines and Resources, the National Energy Board and the Atomic Energy Control Board.²⁴⁶ This was conducted as an internal exercise by the staff of the Department and the two agencies, with the Panel assessing and commenting on the conclusions and recommendations brought forward by the internal review teams. The CNSOPB made a submission to the Panel outlining the problems that arose out of regulatory overlap. The Panel commented on this issue as follows:

From the Panel's perspective, the issue of regulatory overlap is a pervasive and persuasive one; an issue between federal and provincial jurisdictions and between departments and agencies of the federal government (as well as within provincial jurisdictions). Nowhere was the issue of regulatory overlap more apparent than in situations in which environmental protection was at stake, though considerable overlap was also apparent in matters affecting worker health and safety and the transportation of dangerous goods.

After making further comments and making a recommendation concerning overlap between federal and provincial authorities, the Panel continued as follows:

²⁴⁵ *Supra*, note 195, at 152.

²⁴⁶ In the February 1992 budget, having regard to concerns about national economic productivity and competitiveness, the government announced that departments and agencies would begin a systematic review of the regulations which they administer with a view to reducing the cost burden on regulated sectors and achieving public policy objectives at less cost to the taxpayer. The Department of Transport undertook a similar review which among other things touched upon overlap between requirements under the *Canada Shipping Act*, administered by the Canadian Coast Guard, and the Accord legislation administered by the offshore Boards.

Similarly, within a given jurisdiction, (e.g.: the federal government), it is difficult for industry to respond to competing mandates and inter-departmental overlap. The Panel notes that disputes on processes and mechanisms designed to achieve similar public policy objectives can place a significant regulatory burden on industry and place those affected at a competitive disadvantage. While resolving internal jurisdictional disputes does not fall within the terms of reference of the Panel, the issue is too important to ignore.

The Panel is of the view that there is a need to find and establish, from the top down, a vision of trans-department/agency goals and objectives that enable policy makers, regulators and others to find common cause and develop operating principles to incorporate that vision. For example, if all of the federal government organizations, which currently exercise jurisdiction over a single facet of industry operations, could consolidate their separate requirements within a single agency and eliminate duplicated regulations, a major regulatory step forward would have been taken. At the very least, the concept of a “lead agency” could be applied in these situations, allowing regulated organizations to respond to one regulator as a means of meeting the requirements of all regulators.

The Panel recommends that the Minister examine all mechanisms and processes that could improve inter-departmental and inter-agency consultation, consolidation and cooperation in order to reduce the regulatory burden on industry. It is the hope of the Panel that ministers within other jurisdictions would follow a similar course of action.²⁴⁷

An extensive, formal review has not taken place, however the Board has concluded memoranda of understanding (MOUs) with a number of agencies and is in the process of developing others.²⁴⁸ The Board has stated that even in cases where a formal MOU has not been concluded, it has established effective working relationships with other agencies.²⁴⁹

²⁴⁷ Minister’s Advisory Panel on Regulatory Review, *Report respecting regulations administered by Energy, Mines and Resources Canada, the National Energy Board and the Atomic Energy Control Board* (Ottawa: Energy, Mines and Resources Canada Communication Branch, 1993) at 11 – 12.

²⁴⁸ Subsection 46(1) of the *Accord Act* requires the Board to enter into memoranda of understanding (MOUs) with other agencies in relation to certain matters to ensure effective coordination and avoid duplication of work and activities. Such matters include, among others, environmental regulation and coast guard and other marine regulation. A list of MOUs completed or being developed or revised, and the status of each, is set out in the SOEP Decision Report, *supra* note 10, at s. 1.06 (p. 6).

²⁴⁹ *Ibid.*, at 7.

An MOU was concluded between the Board and the Canadian Coast Guard in 1995²⁵⁰ which deals with a number of areas of potential overlap. This includes a section on pollution prevention and enforcement which sets out the understanding of the two agencies with respect to the application of the *Canada Shipping Act* and the *Accord Act*, provides for an agreed project-specific demarcation point to be used in determining whether a discharge emanates from oil and gas activities (if so, the discharge would be a “spill” under the *Accord Act* instead of the *Canada Shipping Act*) and divides lead agency responsibilities with respect to both pollution prevention and enforcement (the Board is the lead agency with respect to pollution originating within the defined project zone, even if the pollution is a discharge to which the *Canada Shipping Act* applies).

A feature that was unfortunately not included in this MOU was a proposal²⁵¹ that the Board's inspector be appointed by the Minister of Transport as a pollution prevention officer (PPO) under the *Canada Shipping Act*. This proposal was in accordance with Recommendation 3-15 contained in the Final Report of the Public Review Panel on Tanker Safety and Marine Spills Response Capability.²⁵² The report stated as follows:

Apart from the Coast Guard, there are several agencies with pollution control responsibilities and operational capabilities. Consideration should be given to appointing selected personnel of these agencies as PPOs . . . The idea is to designate government personnel who are already in the field with surveillance or environmental responsibilities, in order to increase the number of PPOs and gain more effective enforcement.²⁵³

Under the Board's proposal, the Board inspector would be trained by Coast Guard and report to Coast Guard with respect to his responsibilities under the *Canada Shipping Act*. Details of this arrangement would be outlined in the memorandum of understanding. The consolidation of this function with respect to offshore drilling and production operations would eliminate duplication and ensure a consistent enforcement approach.

²⁵⁰ Memorandum of Understanding among the Canada-Nova Scotia Offshore Petroleum Board, the Canadian Coast Guard, a division of the Department of Transport (Canada), the Department of Natural Resources (Canada) and the Department of Natural Resources (Nova Scotia), signed by the parties on various dates between April 19, 1995 and October 2, 1995.

²⁵¹ First made by the Board to the Coast Guard on August 14, 1992.

²⁵² D. Brander-Smith *et al.*, Supply and Services Canada, Cat. No. EN21-91/1990E, 1990.

This approach is still under discussion and may be incorporated in a revised MOU between the Board and Coast Guard currently being drafted to reflect the restructuring of the Department of Transport and the inclusion of the Canadian Coast Guard under the Department of Fisheries and Oceans.

In any case, the preferable solution would be to exempt offshore oil and gas operations from the pollution provisions contained in Part XV of the *Canada Shipping Act* and to deal with these matters in a regulation under the *Accord Act*. The regulation of operational discharges from offshore oil and gas operations should not depend on whether a crude oil processing plant, for example, is located on a fixed offshore installation or on a mobile unit that may be legally characterized as a ship.

MOUs are also being developed with Environment Canada and the Department of Fisheries and Oceans in relation to environmental and fisheries matters and with the National Energy Board and the Nova Scotia Energy and Mineral Resources Conservation Board in relation to regulatory matters in respect of the Sable Offshore Energy Project. The appointment of Board inspectors as inspection officers under the *Fisheries Act* and the *National Energy Board Act* is being discussed and may be included as a feature of these MOUs.²⁵⁴

The Commissioner appointed by the Board to review the Sable Offshore Energy Project commented in his report that several intervenors expressed confusion or concern about the nature of the regulatory regime for managing various aspects of development and production activities, including, among other things, the respective roles of the Department of Fisheries and Oceans, Environment Canada and the Board with respect to environmental management.²⁵⁵ The Commissioner recommended that the Board attempt to complete all outstanding MOUs before the implementation of the Sable Offshore

²⁵³ *Ibid.* at 40.

²⁵⁴ Although not related to environmental matters, the Board and the Nova Scotia Department of Labour have agreed in a Memorandum of Understanding dated January 1, 1991, that the Board shall administer the Nova Scotia *Occupational Health and Safety Act*, R.S.N.S. 1989, c. 320 (now S.N.S. 1996, c. 7) in the offshore area and shall conduct inspections under that Act on behalf of the Department of Labour. The Nova Scotia *Occupational Health and Safety Act* applies in the offshore area by virtue of subsection 157(2) of the *Accord Act*.

²⁵⁵ Report of the Commissioner, *supra* note 136, at 21.

Energy Project and that it be given support in this regard by the Nova Scotia and federal governments.

Certainly it is essential that the various agencies agree upon their respective roles and coordinate their activities and policies. However, in the long term it would be preferable to have administrative responsibility for all offshore oil and gas activities vested exclusively in a single agency.

5. CIVIL LIABILITY AND COMPENSATION FOR DAMAGE FROM POLLUTION AND DEBRIS

5.1 Statutory liability

(a) Canada Shipping Act

As mentioned above, Part XVI of the *Canada Shipping Act* implements the 1969 *Civil Liability Convention* and the 1971 *Fund Convention*. This Part accordingly provides for civil liability and compensation for oil pollution from ships, including spills of unknown origin. However, it does not apply to “a drilling ship that is on location and engaged in the exploration or exploitation of the sea-bed or its subsoil, in so far as the discharge of the pollutant emanates from those activities.”²⁵⁶

The *Canada Shipping Act* also contains provisions limiting the liability of a shipowner and related parties for certain types of claims.²⁵⁷ These provisions were recently amended to implement Articles 1 to 15 of the *1976 Convention on the Limitation of Liability for Maritime Claims*,²⁵⁸ as amended by the Protocol of 1996.²⁵⁹ However, for purposes of these provisions, “ship” is defined as not including “a floating platform constructed for the purpose of exploring or exploiting the natural resources or the subsoil of the sea-bed.”²⁶⁰ Furthermore, Article 3 of the convention itself excludes claims for oil pollution damage within the meaning of the *1969 Civil Liability Convention*.

In general, therefore, the liability provisions of the *Canada Shipping Act* will not be applicable to drilling and production operations. However, if it is not possible to

²⁵⁶ Subsection 674(2).

²⁵⁷ Sections 575–584. For a discussion of these provisions, the international limitation of liability regime and the recent amendments see T.S. Hawkins, “Bill C-58 – The New Regime in Limitation of Liability” posted on the CMLA’s website: <http://home.istar.ca/~cmla>.

²⁵⁸ Treaty 695, London, November 19, 1976. 16 I.L.M. 606.

²⁵⁹ *An Act to amend the Canada Shipping Act (Maritime Liability)*, S.C. 1998, c. 6, assented to May 12, 1998, in force August 10, 1998.

²⁶⁰ Subsection 576(3).

attribute an oil spill to drilling or production operations, compensation may be available under the Ship-source Oil Pollution Fund established under Part XVI.²⁶¹

(b) Fisheries Act

The *Fisheries Act* provides for both criminal and civil liability if deleterious substances are deposited in waters frequented by fish without authorization. However the civil remedies under the Act²⁶² are only available to governments (federal or provincial) or to licensed commercial fishermen, and then only if the deposit does not constitute a discharge of a pollutant caused by or otherwise attributable to a ship, within the meaning of Part XV of the *Canada Shipping Act*.

In general, persons who at any material time own the deleterious substance, or have the charge, management or control of it, are absolutely liable (jointly and severally) for all reasonable costs incurred by government to counteract, mitigate or remedy any adverse effects, and all loss of income incurred by any licensed commercial fisherman to the extent that the loss was incurred as a result of the deposit or a resulting prohibition on fishing. (There is no liability if the occurrence was wholly caused by an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or an act or omission by another person with intent to cause damage.) In addition, other persons who cause or contribute to the causation of the deposit or danger thereof are also jointly and severally liable for such costs and loss of income according to their respective degrees of fault or negligence. There is a two year limitation period for bringing proceedings. These provisions do not limit or restrict any right of recourse that any person who is liable under these provisions may have against any other person.²⁶³

These provisions alone would not meet the general requirement of international law that a state must provide for effective and equal access by non-residents to its legal

²⁶¹ Ship-source Oil Pollution Fund Regulations, SOR/90-82. This is a fund to compensate for oil pollution damage financed by a levy on marine movements of oil.

²⁶² Section 42.

²⁶³ Subsection 42(5).

system for recourse for damage caused by pollution,²⁶⁴ as these remedies are not available to claimants generally, but only to licensed commercial fishermen and the federal and provincial governments. In particular, the strict liability provisions do not apply to foreign nationals who are damaged by transnational pollution. However, the Act specifically provides that the strict liability provisions do not affect or suspend any civil remedy,²⁶⁵ and therefore a foreign national or other claimant would be able to bring an action at common law or under the *Accord Act*, although this may require proof of fault or negligence (see discussion below).

(c) Accord Act

The *Accord Act* deals specifically with liability for spills²⁶⁶ and debris.²⁶⁷ Where a spill occurs in any portion of the offshore area, “the person who is required to obtain an authorization . . . in respect of the work or activity from which the spill . . . emanated is liable, without proof of fault or negligence, up to any prescribed limit of liability for (i) all actual loss or damage incurred by any person as a result of the spill...and (ii) the costs and expenses reasonably incurred by the Board or Her Majesty in right of Canada or the Province or any other person in taking any action or measure in relation to the spill...”²⁶⁸ Unlike the *Fisheries Act*, which provides for limited defences to the absolute liability, there are no statutory defences to the absolute liability provisions in the *Accord Act*. In addition,

all persons to whose fault or negligence the spill . . . is attributable or who are by law responsible for others to whose fault or negligence the spill . . . is attributable

²⁶⁴ See, for example, Principle 10 of the *Rio Declaration* and Article 235, paragraph 2 of the *Law of the Sea Convention*.

²⁶⁵ Subsection 42(8).

²⁶⁶ “Spill” is defined in subsection 165(1) as a discharge, emission or escape of “petroleum” (defined in section 2 as essentially crude oil or natural gas) other than an authorized discharge, emission or escape, or a discharge of a pollutant caused by or otherwise attributable to a ship (in respect of which the *Canada Shipping Act*, R.S.C. 1985, S-9, applies).

²⁶⁷ “Debris” is defined in subsection 165(2) as “any installation or structure that was put in place in the course of any work or activity required to be authorized under paragraph 142(1)(b) and that has been abandoned without such authorization as may be required by or pursuant to this Part, or any material that has broken away or been jettisoned or displaced in the course of any such work or activity.

²⁶⁸ Section 167.

are jointly and severally liable, to the extent determined according to the degree of the fault or negligence proved against them, for all actual loss or damage incurred by any person as a result of the spill . . .²⁶⁹

Similar provisions apply with respect to debris.²⁷⁰ “Actual loss or damage” is defined to include loss of income, including future income, and, with respect to any aboriginal peoples of Canada, loss of hunting, fishing and gathering opportunities.²⁷¹

The *Accord Act* specifically provides that these liability provisions do not suspend or limit (1) any legal liability or remedy for an act or omission by reason only that the act or omission gives rise to liability under these provisions, (2) any recourse, indemnity or relief available at law to a person who is liable under these provisions against any other person, or (3) the operation of any applicable law or rule of law that is not inconsistent with these provisions.²⁷²

A limit of \$30-million has been prescribed.²⁷³ It is not entirely clear if the *Accord Act* creates liability beyond that limit to the extent that negligence or fault can be shown; this issue is discussed later in the section dealing with damages.

Claims under these provisions may be made in any court of competent jurisdiction in Canada,²⁷⁴ within three years after the loss or damage occurred, but in no case later than six years after the spill occurred.²⁷⁵ The claims of persons incurring actual loss or

²⁶⁹ Paragraph 167(1)(b).

²⁷⁰ Subsection 167(2).

²⁷¹ Subsection 165(3).

²⁷² Subsection 167(4).

²⁷³ *Canada-Nova Scotia Oil and Gas Spills and Debris Liability Regulations*, SOR/95-123. Before these regulations were promulgated, the Board indicated in its 1992 *Guidelines Respecting Financial Responsibility Requirements for Drilling in the Newfoundland and Nova Scotia Offshore Areas* that for purposes of evidence of financial responsibility, the limit would be \$30 million (the amount prescribed for the Newfoundland offshore area in the *Canada-Newfoundland Oil and Gas Spills and Debris Liability Regulations*.) The Board clearly had no authority to prescribe the limit of liability; section 167 refers to a “prescribed limit of liability” and “prescribed” is defined in section 2 as “prescribed by regulations made by the Governor in Council.” Although it was certainly open to the Board to determine the amount of financial security that it would require operators to post, it is arguable that the absolute liability provisions of the *Accord Act* are not effective in the absence of a prescribed limit.

²⁷⁴ Subsection 167(3).

²⁷⁵ Subsection 167(5).

damage rank ahead of any claims of the Board or the governments for costs and expenses.²⁷⁶

The imposition of liability on persons “who are by law responsible for others” who are at fault or negligent imports the concept of vicarious liability. This doctrine normally arises in the context of an employer-employee relationship and holds the employer liable for damages caused by an employee acting in the course of his employment.²⁷⁷ An interesting issue is whether an operator could also be held liable for the actions of its contractors. Generally at common law a person is not responsible for the acts of an independent contractor or its employees.²⁷⁸ The rationale for this is that the person retaining the contractor lacks detailed control over the manner in which the contractor performs the work; therefore the contractor is the one best able to prevent the risks and absorb any losses. Generally the risk of accident is incidental to the contractor’s enterprise rather than that of the employer. The contractor may also be better able to carry insurance. However, as noted by Fleming, there has been a trend to encroach upon this principle.

In certain cases, the employer is said to be under a “non-delegable” duty in the sense that he cannot acquit himself from the duty of exercising reasonable care by entrusting the work to a contractor: the employer must actually ensure that the work is done properly. Fleming notes a category of these cases “where the work involves a high risk in the absence of special precautions, so that – perhaps for the sake of additional risk prevention—the employer should be encouraged to ensure its proper performance . . .”²⁷⁹ As a matter of oilfield practice, most contractors working at a drilling or production site will be subject to close direction and control from the operator. It is suggested that in many circumstances this direction and control will be great enough that the contractor is no longer exercising independent judgement, but is merely carrying out the directions of the operator in much the same manner as an employee. In these cases, the operator will

²⁷⁶ Subsection 167(3).

²⁷⁷ *Battistoni v. Thomas*, [1932] S.C.R. 144; *C.P.R. v. Lockhart*, [1942] 3 D.L.R. 529 (P.C.).

²⁷⁸ J. G. Fleming, *The Law of Torts*, 9th ed. (Sydney: Law Book, 1998) at 433.

²⁷⁹ *Ibid.* at 435.

likely be held liable for the acts of its contractors. However, even if an operator does not exercise close direction and control, the failure to do so in respect of hazardous activities may itself make an operator liable.

5.2 Liability and indemnity provisions in licence documents

As discussed, the *Accord Act* contains specific provisions dealing with liability for debris and spills or authorized discharges of petroleum. The Act also provides for the indemnity of the federal and provincial governments where either government has incurred costs in taking remedial action. Liability under these provisions attaches to the operator without proof of fault or negligence to an applicable limit of liability as prescribed by regulation and to all persons who were at fault or negligent, or were legally responsible for others who were at fault or negligent, to the extent of actual loss or damage.²⁸⁰ The Act provides that these provisions do not limit any recourse, indemnity or relief otherwise available at law, nor the operation of any other applicable law or rule of law that is not inconsistent. The *Accord Act* also contains financial responsibility requirements applicable to operators.

The liability provisions are contained in Part III, which deals generally with operations matters (equivalent to the *Canada Oil and Gas Operations Act*). There are no similar provisions in Part II (equivalent to the *Canada Petroleum Resources Act*), which deals with rights to explore for and produce oil and gas.

There are three types of such rights. An Exploration Licence confers the right to explore for, and the exclusive right to drill and test for, oil and gas; the exclusive right to develop the lands included in the licence in order to produce oil and gas; and the exclusive right to obtain a production licence. An Exploration Licence is issued for a term of up to 9 years.

If a “significant discovery”²⁸¹ is made on lands included in an Exploration Licence, the interest owner may apply for a declaration of significant discovery in

²⁸⁰ It is unclear whether liability is limited to the prescribed limit in cases of fault or negligence; see discussion herein under Damages.

²⁸¹ “Significant discovery” is defined in the legislation as a discovery indicated by the first well on a geological feature that demonstrates by flow testing the existence of hydrocarbons in that feature and,

relation to those lands in respect of which there are reasonable grounds to believe that the significant discovery may extend. A declaration of significant discovery entitles the interest owner to convert the portion of the Exploration Licence named in the declaration to a Significant Discovery Licence. A Significant Discovery Licence confers the same rights as an Exploration Licence, but remains in force indefinitely.

Those portions of an Exploration Licence or a Significant Discovery Licence named in a declaration of “commercial discovery”²⁸² may be converted to a Production Licence. In addition to the exploration and development rights conferred by Exploration Licences and Significant Discovery Licences, a Production Licence confers the exclusive right to produce oil and gas, and title to the oil and gas so produced.

There is nothing in the *Accord Act* that fixes liability on an interest owner simply because of his status as such. Of course the interest owner could be otherwise liable at common law, or could be liable if he is also the operator, or is at fault or negligent. However the drafters of the legislation apparently considered the question of statutory liability and saw fit to confine these provisions to Part III, which deals with operations and is generally directed at persons authorized to conduct works and activities. This makes sense because it is operations which will potentially result in damage, not the mere holding of title as an interest owner.

The former Canada Oil and Gas Lands Administration (COGLA) nevertheless included liability and indemnity provisions in its documents of tenure. These appeared to make the interest owner²⁸³ strictly liable for damages arising out of work conducted by him or with his consent, and provided for a general indemnity in favour of the Crown. Unlike the strict liability provisions of Part III, liability under these provisions was

having regard to geological and engineering factors, suggests the existence of an accumulation of hydrocarbons that has potential for sustained production. The area described in a declaration of significant discovery is referred to as a “significant discovery area” or “SDA.”

²⁸² “Commercial discovery” means a discovery of oil or gas that has been demonstrated to contain reserves that justify the investment of capital and effort to bring the discovery to production. The area described in a declaration of commercial discovery is referred to as a “commercial discovery area” or “CDA.”

²⁸³ “Interest owner” and “interest holder” are defined in section 49. An interest holder is a person registered as holding a share in an interest. The interest owner is the group of all interest holders who hold all the shares in an interest.

potentially unlimited. The inclusion of these provisions in licence documents has been continued by the Department of Indian Affairs and Northern Development (DIAND) and the Canada-Newfoundland Offshore Petroleum Board, and in a modified way with respect to the indemnity provision, by the Canada-Nova Scotia Offshore Petroleum Board. An example is a recent Call for Bids issued by the Canada-Newfoundland Offshore Petroleum Board.²⁸⁴ The form of exploration licence included as part of the Call for Bids contained the following provisions:

7. *Indemnity*

1. It is a condition of this Licence that the interest holders shall, in respect of that portion of the Lands to which each such interest holder's share relates, at all times, jointly and severally, indemnify and save harmless the Board as well as Her Majesty the Queen in right of Canada or in right of the Province of Newfoundland from and against all claims, demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, sustained, brought or prosecuted, in any manner based upon, occasioned by, or attributable to, anything done or omitted to be done by, through or under, or with the consent of the interest owner, or an interest holder, notwithstanding any agreement or arrangement entered into by an interest owner or interest holder which does or may result in the transfer, assignment or other disposition of the interest or a share therein, in the fulfilment of the terms and conditions made herein or in the exercise of the rights or obligations contained herein.
2. For greater certainty, interest holders in this Licence who do not hold shares with respect to that portion of the Lands in relation to which a claim, demand, loss, cost, damage, action, suit or other proceeding arises are not liable to indemnify the Board, Her Majesty the Queen in right of Canada or in right of the Province of Newfoundland under subparagraph (1).
3. For purposes of subparagraphs (1) and (2), "Her Majesty the Queen in right of Canada or in right of the Province of Newfoundland" shall not include a Crown corporation.
4. This clause shall survive this licence and will be incorporated into any significant discovery licence and production licence that arises therefrom.

²⁸⁴ Call for Bids No. NF98-1 (Closing date September 16, 1998).

8. *Liability*

1. An interest holder shall be liable under the provisions of this Licence, the Act, and the Regulations for all claims, demands, loss, costs, damages, actions, suits or other proceedings, in respect of any work or activity conducted, or caused to be conducted, by, through, or under, or with the consent of such interest holder. Any transfer, assignment, or other disposition of the interest, or of a share therein, shall not have the effect of discontinuing such liability in respect of such work or activity, related to the interest, or share therein, so disposed, that was conducted before that transfer, assignment, or other disposition was registered pursuant to the Act and Regulations. For greater certainty, liability, as aforesaid, does not relate to any work or activity conducted after such party ceases to be an interest holder in this Licence.

2. This clause shall survive this licence and will be incorporated into any significant discovery licence and production licence that arises therefrom.

These provisions are essentially the same as the standard indemnity and liability provisions contained in the model licence form used in the past by the former Canada Oil and Gas Lands Administration, with modifications to refer to the Board and the Crown in right of the province. The same provisions are used by the Department of Indian Affairs and Northern Development.²⁸⁵

The effect of the liability clause is unclear. On one interpretation, it does not increase the liability that would have otherwise attached to an interest holder under the Act, the regulations and the other provisions of the licence, but only provides that such liability, if any, shall not be discontinued by a transfer or assignment of the licence. This interpretation is suggested from the words “An interest holder shall be liable *under the provisions of this Licence, the Act, and the Regulations . . .*” If this is the intention the clause would seem to be unnecessary, as this would be true as a matter of law in any case.²⁸⁶ However, this intention is suggested by the historical development of this clause.

²⁸⁵ e.g., 1994 Beaufort Sea and Mackenzie Delta Call for Nominations closing April 8, 1994; 1994 Southern Northwest Territories Call for Bids closing November 30, 1994; 1994 Central Mackenzie Valley Call for Bids closing April 24, 1995; 1995 Southern Northwest Territories Call for Nominations closing November 23, 1995. The provisions concerning survival and the incorporation of these clauses into subsequent significant discovery and production licences were not in the original COGLA model licence form but have been included in recent forms used by DIAND and the Canada-Newfoundland Offshore Petroleum Board.

²⁸⁶ . With regard to the rights of the Board and the Crown, section 119 of the *Accord Act* specifically

Early exploration agreements under the former *Canada Oil and Gas Act* had contained a clause entitled “Transfer of Interests,” which provided as follows:

The Explorer [the interest owner] shall be and continue to remain liable under the provisions of the Agreement [the exploration agreement] unless and until such time as a transfer, assignment or other disposition in the approved form has been registered pursuant to the Oil Act [the Canada Oil and Gas Act or the Nova Scotia Offshore Oil and Gas Act].²⁸⁷

This is clearly not an attempt to impose additional liability, but simply provides that a transferee will not be recognized until the transfer is registered. A later version of this clause was entitled “Continuing Liability” and provided that:

An interest holder shall be and continue to remain liable under the provisions of the Agreement [the exploration agreement], the Act [the Canada Oil and Gas Act or the Nova Scotia Offshore Oil and Gas Act], and the Conservation Act [the federal Oil and Gas Production and Conservation Act or the Nova Scotia Oil and Gas Production and Conservation (Nova Scotia) Act] in respect of any work or activity conducted, or caused to be conducted, by, through, or under such interest holder, unless and until such time as a transfer, assignment or other disposition in the approved form has been registered with respect to the relevant interest, or share therein, pursuant to the Act.²⁸⁸

This clause is essentially to the same effect as the earlier version. It does not appear to create additional liability, but merely holds the interest holder to the requirements of the Agreement, the Act and the regulations until a transfer has been registered.

Wording essentially identical to the current provision quoted above appeared (perhaps not for the first time) in Exploration Agreements No. 352 and 353, both dated October 1, 1989. Instead of merely holding the interest holder liable under the licence, the Act and the regulations until a transfer is duly registered, the new wording made the interest holder liable for “all claims, demands, loss, costs, damages, actions, suits or other proceedings” and went on to provide that such liability would continue even after

provides that “[f]or greater certainty, the registration of an instrument (a) does not restrict or in any manner affect any right or power of the Board or of the Ministers under this Part, the regulations or the terms of any interest . . .”

²⁸⁷ e.g. EA 235, dated November 23, 1982; EA 269, dated May 1, 1985.

²⁸⁸ e.g., draft document for EA 283, dated September 26, 1986 (never executed).

registration of a transfer insofar as it related to work conducted before the transfer. This suggests the other possible interpretation, which is that this clause makes the interest holders of a licence liable for all damages resulting from work or activity on the licence, simply because of their ownership interest. Liability is for “all” damages, and therefore apparently unlimited.

There is no statutory basis in the *Accord Act* for including liability and indemnity provisions in documents of tenure. Possibly the Board could specify in a call for bids that such terms and conditions will be included in the licence and any further licences evolving therefrom. A bidder would then be taken to have agreed to such terms and conditions (the legislation allows the Board and the interest owner to agree on additional terms and conditions that are not inconsistent with the legislation).²⁸⁹

If, however, rights have already been acquired, for example in the form of a significant discovery licence, the Board, in issuing a subsequent interest such as a production licence to which the interest owner is entitled as of right, could not impose terms and conditions for which there is no basis in the legislation. Although the Board may prescribe the form of a production licence,²⁹⁰ it could not in so doing unilaterally impose substantive terms not provided for in the legislation. This issue arose when the production licences were issued for the Cohasset project. These production licences²⁹¹ were issued to replace pre-existing significant discovery licences which arguably were not subject to the liability and indemnity provisions.²⁹² The interest holders, Lasmo and Nova Scotia Resources Limited, objected to the inclusion of the standard liability and

²⁸⁹ Subsections 70(1), 76(4) and 84(4). The Board’s recent practice has been to include the following paragraph in its calls for bids: “The Exploration Licence for each parcel will be substantially in the form attached hereto as Appendix III. The submission of a bid in response to this call for bids shall constitute agreement to the terms and conditions set out in Appendix III.” (e.g., Call for Bids NS98-1, para. 3.) The form of exploration licence attached to recent calls for bids made by the CNOPB have included the following clause: “13. Agreement – The submission of a bid by the interest owner in response to the Call for Bids No. __ and its selection by the Board as the winning bid constitutes an agreement between the interest owner and the Board as to the terms and conditions contained herein.”

²⁹⁰ Subsection 84(4) and definition of “prescribed” in section 49.

²⁹¹ PL 2901 and PL 2902.

²⁹² Before the coming into force of the *Accord Act*, these significant discovery licences were exploration agreements under the *Canada Oil and Gas Act*. These contained liability and indemnity clauses but had never been executed by the interest holders. These exploration agreements became significant discovery licences by operation of subsection 130(3) of the *Accord Act*.

indemnity clauses. A compromise was reached which resulted in the inclusion of an indemnity clause²⁹³ but not a liability clause. It was recognized that the inclusion of such a clause would probably require the consent of the interest holders pursuant to subsection 76(4), and these production licences were therefore executed by the interest holders instead of simply being issued by the Board.

The intention of the *Accord Act* is clearly to provide for an objective and non-discretionary system for the disposition and management of rights. The legislation is different in this regard from, for example, the Alberta *Mines and Minerals Act*, which provides that the Minister shall determine the form of an agreement and that the form of an agreement may include any other terms and conditions the Minister prescribes.²⁹⁴

Even though the *Accord Act* allows the Board and an interest owner to agree on additional terms and conditions, it is submitted that the inclusion of liability and indemnity provisions should not depend on the voluntary agreement of a particular interest owner in cases where the interest owner is entitled to a subsequent interest as of right. These provisions are of a general nature and if they are to be included in any licence, they should be included in all. It would not be proper or satisfactory to extract agreement on these provisions from one interest owner and perhaps subsequently issue similar licences without these provisions to other companies who are not as agreeable or have more bargaining power.

In this regard the Nova Scotia and Newfoundland Boards are in a slightly different position from that of COGLA, which originated the current version of these clauses. COGLA, as an arm of the federal government, had a dual role as regulator and owner of the resources it managed. As such, it may have been appropriate for it to insist upon or to negotiate certain provisions in its capacity *as owner* of the resource, apart from its role as regulator. Today, DIAND and the Frontier Lands Management Branch

²⁹³ The wording of the indemnity clause is as follows: "The interest holders agree that they shall at all times jointly and severally indemnify the Federal Government, the Province and the Board from and against all actions, claims and demands that may be brought or made by any third party against the Federal Government, the Province or the Board by reason of anything done or omitted to be done by, through or under, or with the consent of the interest owner or an interest holder, in the exercise or purported exercise of the rights or obligations under this licence."

²⁹⁴ R.S.A. 1980, c. M-15, section 92.

continue to act in an ownership capacity. However the Nova Scotia and Newfoundland Boards are purely regulatory agencies which administer the resource in accordance with the legislation. They have no role as owners. The owners, being the federal and provincial governments, have presumably spoken through the legislation.

Recent Calls for Bids issued by the Canada-Nova Scotia Offshore Petroleum Board²⁹⁵ have provided for a form of exploration licence that contains an indemnity clause but not a liability clause:

8. Indemnity

(a) Holders of shares in this licence shall at all times jointly and severally indemnify the Board and Her Majesty the Queen in right of Canada and in right of the Province of Nova Scotia against

(i) all actions, claims and demands that may be brought or made by any person by reason of anything done or omitted to be done under this licence by, through or under the interest owner or an interest holder, in relation to those portions of the Lands with respect to which they hold shares; and

(ii) all costs that the Board or Her Majesty the Queen may incur in connection with any such action, claim or demand.

(b) For purposes of this section, the expression "Her Majesty the Queen" shall not include any Crown corporation.

(c) This section 8 shall survive this licence and will be included in any significant discovery licences and production licences that may result from this licence.

These Calls for Bids specifically provide that the submission of a bid shall constitute agreement to the terms and conditions set out in the form of exploration licence.²⁹⁶ Even though there is no direct statutory authority to include a provision of this nature in the licence, it would presumably be valid pursuant to subsection 70(1), which provides that an exploration licence may contain other terms and conditions agreed on by the Board and the interest owner.

²⁹⁵ See Call for Bids NS93-1, dated December 18, 1993 (closing date May 4, 1994) and subsequent calls to and including Call for Bids NS98-2, dated October 9, 1998 (closing date April 29, 1999).

²⁹⁶ Paragraph 3.

5.3 Liability at Common Law²⁹⁷

(a) Applicability of non-statutory remedies

As discussed above, both the *Accord Act* and the *Fisheries Act* provide for absolute liability in certain cases of pollution. In the case of the *Fisheries Act*, there is no monetary limit of liability, but claims based on the absolute liability provisions may be made only by governments and licensed commercial fishermen, and are limited in the nature of the damages that may be recovered. Essentially, governments can recover only remedial costs, and the claims of fishermen are limited to loss of income. In the case of the *Accord Act*, any person suffering “actual loss or damage” may claim under the absolute liability provisions, and in addition the governments, the Board or any other person may claim the reasonable costs of taking remedial actions. However, absolute liability under the *Accord Act* is limited to a cumulative amount of \$30-million for all claims. Fault or negligence must also be shown if recovery is sought from a party other than the operator.

The *Fisheries Act* provides that “[n]o civil remedy for any act or omission is suspended or affected by reason only that the act or omission is authorized under this Act, is an offence under this Act or gives rise to civil liability under this Act.”²⁹⁸ It is therefore clear that the existence of the absolute liability provisions does not impair any rights under common law, maritime law or any other statute.

The *Accord Act* is slightly different in this regard. It specifically provides that the statutory liability provisions do not suspend or limit any legal liability or remedy for an act or omission by reason only that the act or omission gives rise to liability under the *Accord Act*, or the operation of any applicable law or rule of law that is not inconsistent

²⁹⁷ In general, see E. Swanson, “The Common Law: New Developments and Future Trends” in D. Tingley (ed.), *Into the Future: Environmental Law and Policy for the 1990's* (Edmonton: Environmental Law Centre, 1990); B. Charles and D. VanderZwaag, “Common Law Approaches” in E.L. Hughes, A.R. Lucas and W.A. Tilleman II (eds.), *Environmental Law and Policy* (Toronto: Emond Montgomery, 1993); R. T. Franson and A. R. Lucas, *Canadian Environmental Law* (Toronto: Butterworths, 1976); A. M. Linden, *Canadian Tort Law*, 3rd ed. (Toronto: Butterworths, 1982); and J. G. Fleming, *The Law of Torts*, *supra*, note 278.

²⁹⁸ Subsection 42(8).

with the *Accord Act* provisions.²⁹⁹ However, since the *Accord Act* requires fault or negligence to establish liability on persons other than the operator, it is not clear that common law causes of action that are not based on fault or negligence will apply. These would include actions based on trespass, nuisance or the doctrine of *Rylands v. Fletcher*.

On one interpretation, such causes of action may be viewed as inconsistent with the statutory liability provisions requiring fault or negligence and are therefore not saved by paragraph 167(4)(c), which specifically does not apply to laws or rules of law that are inconsistent with the liability provisions. On another interpretation, such causes of action are not inconsistent, but may be available in addition to the statute, based on the express wording of the statute itself and on the principle that express and clear language will be required to derogate from any rule of common law that would otherwise be applicable. If this is the case, however, there is arguably no need for the statute to deal with liability based on fault or negligence, as such liability would exist in any case under the common law. However, the statutory tort is not necessarily the same as the common law in all respects; for example, the class of persons entitled to bring an action under the statute may be wider than those to whom a duty of care is owed under the common law. Also, since it is arguable that the common law does not apply in the offshore area beyond the territorial sea, the drafters of the Act may have felt that it was advisable to cover at least fault and negligence in the statute, without limiting recourse under any other causes of action that might be available.

The common law causes of action that would potentially be applicable to pollution from offshore oil and gas operations are discussed next.

(b) Trespass

Trespass to land is the direct interference with another's property without lawful excuse or justification and is actionable without proof of actual loss or damage.³⁰⁰ Although historically trespass was actionable in the absence of any wilful damage or negligence and with only a minimal requirement for intent, the recent trend has been to

²⁹⁹ Subsection 167(4).

³⁰⁰ *Entick v. Carrington* (1765), 19 State Trials 1029 (C.P.)

deny recovery for harm caused without intent or fault unless it results from an “ultra-hazardous” activity.³⁰¹ Generally, a voluntary and affirmative act will be required on the part of the defendant.³⁰² This will limit the use of this action in cases of accidental spills.

Furthermore, the requirement of *direct* interference is problematic in pollution cases in which the contaminant is carried onto the plaintiff’s land by air or water. In *Southport Corporation v. Esso Petroleum*³⁰³ oil was deliberately discharged from a ship under emergency conditions and washed up on the plaintiff’s land. Claims were made in trespass, nuisance and negligence. Lord Denning, writing for the majority of the Court of Appeal, which found liability in nuisance and negligence, commented that trespass was not applicable as the oil was not discharged directly on the land, but only carried there consequentially by the tide. Lord Morris dissented from this view, which was in any case *obiter*. The case was appealed to the House of Lords which restored the trial decision and denied damages, holding that the master had not acted negligently, that the discharge was necessary to protect the lives of the crew and that the affected property owners along the river had assumed the risk of damage done by persons exercising their right to use a navigable waterway. The point concerning the applicability of trespass was not decided.

In Canada, the drift of pesticide spray has been held insufficient to constitute trespass.³⁰⁴ Other cases have gone the other way; for example, in *Kerr et al. v. Revelstoke Building Materials Ltd.*,³⁰⁵ the Alberta Supreme Court found the operators of a sawmill liable in trespass for smoke, sawdust and fly ash contamination of a neighbouring motel. However, this situation involved a deliberate discharge that affected a neighbouring property. It seems unlikely that an action in trespass could be based on fouling or contamination resulting from distant operations.

Another limitation on the use of trespass is the requirement that the plaintiff be in actual possession of the land affected; a licence to use land will not be sufficient.

³⁰¹ Fleming, *supra*, note 278 at 46.

³⁰² *Ibid.* at 47.

³⁰³ [1953] 3 W.L.R. 773 (Q.B.D.); [1954] 2 Q.B. 182 (C.A.); [1956] A.C. 218 (H.L.).

³⁰⁴ *Newman v. Conair Aviation Ltd.* (1972), 33 D.L.R. (3d) 474 (B.C.S.C.).

³⁰⁵ (1976), 71 D.L.R. (3d) 134.

Although the holder of a legal (or perhaps equitable) interest in land in the nature of an easement or a profit à prendre, like a fishery, can sue in trespass for direct interference,³⁰⁶ the interests of fishermen in the Nova Scotia offshore area would not amount to interests in land.

In general, pollution cases can also be decided on the basis of nuisance and therefore the technical requirements of trespass are usually somewhat academic. While it is not necessary to show loss or damage in a trespass action, it is unlikely that substantial damages would be awarded in the absence of actual loss or damage, although an action in trespass could perhaps be useful in obtaining an injunction to prevent the continuation of pollution.

(c) Negligence

Negligence is the most common basis for liability for accidental damage. Fleming summarizes the elements of negligence as follows:³⁰⁷

1. A duty, recognized by law, requiring conformity to a certain standard of conduct for the protection of others against unreasonable risks.
2. Failure to conform to the required standard of care or briefly, breach of that duty. This element usually passes under the name of “negligence.”
3. Material injury resulting to the interests of the plaintiff.
4. Not only must the defendant’s breach of duty have been a cause of the injury, it must have been a “proximate cause.” This is generally referred to as the question of “remoteness of damage” or “proximate cause.”
5. The absence of any conduct by the injured party prejudicial to his recovering in full for the loss he has suffered. This involves a consideration of two specific defences, contributory negligence and voluntary assumption of risk.

³⁰⁶ Fleming, *supra*, note 278 at 50 (cases cited).

³⁰⁷ *Supra*, note 278 at 115.

The difficulty with negligence as a basis for liability is that the plaintiff must show that the defendant operator (in the case of offshore oil and gas operations) departed from a required standard of care, being the reasonable conduct of a prudent operator. Regulations and conditions of approval may serve as evidence of a required standard of care, such that a failure to comply with them may constitute negligence.³⁰⁸ However, even if a very high standard of care is imposed,³⁰⁹ it may be difficult for a plaintiff to show that an operator departed from the standard. In any case, a spill may occur even if an operator is not negligent.

It is unclear if, in cases of fault or negligence, there is any difference between the law applicable to the statutory tort and the common law. If there is, the statutory tort will be broader, since the *Accord Act* does not refer to the defences available at common law. For example, liability in negligence at common law requires that damages be reasonably foreseeable and that the defendant owe a duty of care to the person sustaining the loss or damage; whereas under the *Accord Act*, there is liability for “all actual loss or damage incurred by any person.”³¹⁰ (emphasis added).

(d) Nuisance

Nuisance may be either public or private. The distinction is expressed in the following statement by Lord Denning, which was quoted with approval by the Federal Court in *The Queen v. the “Sun Diamond”*³¹¹

The classic statement of the difference is that a public nuisance affects Her Majesty’s subjects generally, whereas a private nuisance only affects particular individuals. . . I prefer to look at the reason of the thing and to say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings

³⁰⁸ See *The Queen in Right of Canada v. Saskatchewan Wheat Pool* (1983), 143 D.L.R. (3d) 9, in which it was held that the breach of a statute was not an actionable wrong in and of itself, but might be evidence of negligence.

³⁰⁹ The required standard of care will depend in part on the potential for harm: *North York v. Kent Chemical Industries Inc. et al.*, (1985), 33 C.C.L.T. 184 at 202 (Ont. S.C.).

³¹⁰ Paragraphs 167(1)(b) and 167(2)(b).

³¹¹ [1984] 1 F.C. 3.

on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.³¹²

Public nuisance

Since the rights of the public in general are affected in the case of public nuisance, the law looks to the state to vindicate those rights. As a result, a person must be able to show a loss that is substantial, direct and different than that suffered by the community in general in order to bring a private action in public nuisance without the consent of the Attorney General; otherwise, only the Attorney General can bring an action.³¹³ Further, the Attorney General's discretion in deciding whether or not to sue or to allow a private action is absolute.³¹⁴

An example involving marine pollution is *Hickey et al. v. Electric Reduction Co. of Canada*,³¹⁵ a case in which commercial fishermen sued for damages after fish were killed by effluent from an industrial plant. The defendant made a preliminary objection that the pleadings only provided grounds for an argument that the defendant had created a public nuisance, the remedy for which was not available to the plaintiffs. It was held that "any person who suffers peculiar damage has a right of action, but where the damage is common to all persons of the same class, then a personal right of action is not maintainable." Here, the right of the fishermen to fish in the area was one that they enjoyed in common with all members of the public and therefore they could not establish the special or unique damage required for a claim in private nuisance. The result might perhaps have been different if the fishermen had special rights by virtue of their licences.

The United States District Court reached a different conclusion on similar facts in *Burgess v. M/V Tamano*,³¹⁶ a case involving damages arising out of an oil spill from a tanker in the coastal waters of the State of Maine. The Court acknowledged the rule of law "that a private individual can recover in tort for invasion of a public right only if he

³¹² *Attorney General v. P.Y.A. Quarries Limited*, [1957] 2 Q.B. 169 (C.A.) at 190.

³¹³ *Canada Paper Company v. A. J. Brown* (1922), 63 S.C.R. 243 (S.C.C.).

³¹⁴ *Grant v. St. Lawrence Seaway Authority*, [1906] O.R. 298 (Ont. C.A.).

³¹⁵ (1971), 21 D.L.R. (3d) 368 (Nfld. S.C.).

³¹⁶ 370 F. Supp. 247 (1973).

has suffered damage particular to him—that is, damage different in kind, rather than simply in degree, from that sustained by the public generally.” But the Court held that commercial fishermen and clam diggers had sufficiently alleged “particular” damage to support their private actions, even though the alleged interference was with their exercise of the public right to fish and dig for clams. Quoting Prosser, the Court stated that as a general principle, “pecuniary loss to the plaintiff will be regarded as different in kind ‘where the plaintiff has an established business making a commercial use of the public right with which the defendant interferes . . .’ ” However the Court denied the claims of businessmen based on a loss of customers indirectly resulting from the pollution of beaches in which they did not have proprietary interests, stating that “the injury of which they complain, which is derivative from that of the public at large, is common to all businesses and residents . . .” and that they could show no distinct harm.

Doubt has been cast upon the law as stated in *Hickey* by a decision of the Supreme Court of British Columbia in *Gagnier v. Canadian Forest Products Ltd.*³¹⁷ This was an action by a commercial crab fisherman and a fishing company against owners of a pulp mill for damages arising out of the closure of crab fishing grounds, allegedly as a result of pollution from the pulp mill. The claim was based alternatively on negligence, public nuisance, strict liability under the rule in *Rylands v. Fletcher* and statutory civil liability under the *Fisheries Act*. The defendant applied to strike out the statement of claim, arguing, among other things, that the plaintiffs could not claim in public nuisance unless they could show that they had suffered damage unique in type and degree. The judge rejected this, holding that it was not known at the stage of this application whether the plaintiffs had suffered differently from others or not. However, the judge went further and commented in *obiter* that *Hickey* was not binding on the court and that in any case, there was an argument based on a line of three decisions of the Ontario Court of Appeal,³¹⁸ “that the restriction on private recovery for public nuisance in *Hickey* is far too

³¹⁷ (1990), 51 B.C.L.R. (2d) 218.

³¹⁸ *Crandell v. Mooney* (1878), 23 U.C.C.P. 212; *Rainy River Navigation Co. v. Ont. & Minnesota Power Co.* (1914), 26 O.W.R. 752, 6 O.W.N. 533, 17 D.L.R. 850; and *Rainy River Navigation Co. v. Watrous Island Boom Co.* (1914), 26 O.W.R. 456, 6 O.W. N. 537.

narrow and that all that should need to be proved is a significant difference in degree of damage between the plaintiff and members of the public generally.”³¹⁹

The Queen v. the “Sun Diamond” was a case in which fuel oil was spilled into Vancouver harbour from a ship as a result of a collision. The federal government took charge of clean-up operations and paid compensation to various claimants. The Court found the defendants liable in public nuisance and also in private nuisance to the extent that the Crown was suing as the owner of private property damaged by the oil spill, and awarded “the entire cost of the water clean-up, whether within or outside the harbour limits, the costs of the beach and foreshore clean-up on all property belonging to the Crown, but not on private property, equipment damage and costs and expenses of cleaning, and payments made to various claimants, including fishermen, to the exoneration of defendants although such payments were voluntary in nature.”³²⁰

In keeping with the nature of public nuisance, the costs of cleaning up private property were not allowed. The court noted that “[p]rivate property owners of lands on the foreshore which might have been damaged by the oil spill would have had an action available to them against defendants for private nuisance and possibly for negligence.”³²¹ Although the court stated that the Crown had no authority to act on behalf of private individuals who might have had claims, and expressed the view that the Crown probably had no legal responsibility towards them had it failed to do so,³²² it nevertheless awarded damages for compensation paid voluntarily by the Crown to various claimants. The legal basis for this is unclear in the judgement. The court stated that “what was done was reasonable and appears to be a good example of the *parens patriae* principle with the Crown, through its agents, acting as what is referred to in civil law as ‘*bon père de famille*’ or ‘prudent administrator’ as this phrase is usually translated.”³²³ It is not clear whether the court, in making this comment, was referring to the Crown’s actions in

³¹⁹ At 230.

³²⁰ At 33.

³²¹ *Supra*, note 311 at 31.

³²² *Supra*, note 311 at 31.

³²³ *Supra*, note 311 at 32.

undertaking clean-up operations or in settling claims with about forty commercial fishermen to compensate them for fouled hulls and gear; and, if the latter, how the fishermen differed from other private individuals who may have suffered damage from the spill.³²⁴ Although the court did not explain this, it is suggested that the fishermen can be distinguished from the private property owners in that they did not have rights in land necessary to allow them to bring an action in private nuisance. In any case, it is clear that one event can give rise to claims in both public and private nuisance.

The right of plaintiffs to bring a class action in nuisance to oppose aerial pesticide spraying was upheld in *Palmer v. Nova Scotia Forest Industries*.³²⁵ The defendant argued that a class action in nuisance is in fact an action for public nuisance. The court was not persuaded that this was a case of public nuisance, because although it related to a group of persons, it did not relate to the public at large; but the court found that even if this *were* public nuisance, the allegation of a serious health risk was a matter of special damage to each of the plaintiffs, and was therefore sufficient to bring the case within the exception to the rule that only the Attorney General can sue for public nuisance. Again, this illustrates that the existence of a public nuisance does not deprive a person of the right to bring a private action if the damage suffered by that person is substantial, direct and different than that suffered by the community in general.

Private nuisance

An action for private nuisance may be brought if there is physical damage to property or the unreasonable interference with the use and enjoyment of property. The plaintiff in an action for private nuisance must have an interest in the land affected. This may be less than an ownership interest and could, for example, be in the nature of a licence providing for exclusive possession, an easement or a profit à prendre. However, a licensee not in possession, for example, would not have a sufficient interest.³²⁶

³²⁴ The payments to the fishermen only amounted to \$12,600 while clean-up costs were over \$600,000 and therefore this point was probably not pursued by the defendants.

³²⁵ (1983), 2 D.L.R. (4th) 397 (N.S.S.C.T.D.).

³²⁶ *Vaughan v. Halifax-Dartmouth Bridge Commission* (1961), 29 D.L.R. (2d) 523 at 535. (N.S.)

Accordingly, not all persons that may be affected by a spill will be able to sue in nuisance.

The interference need not be direct, as in trespass, so that acts which indirectly damage land or interfere with the use and enjoyment of land may be actionable; objectionable noises or odours, for example. It is not necessary to establish fault or negligence,³²⁷ and it is not a defence that the best available technology was used.³²⁸ The fact that government approvals have been obtained for facilities and that operations are in compliance with governmental directives and regulations is also not a defence; it has been held that this does not give a person “a licence to create a nuisance.”³²⁹ The defence of statutory authority will therefore only be rarely available; in most cases statutory language will be permissive rather than mandatory (for example, discretion will be given as to the specific method of operation) and the courts will assume that the legislature intended that the authority be exercised in a way that respects private rights.³³⁰ Also, it is no defence that the operations causing the nuisance are beneficial to the public; that they are conducted in a suitable place; or that the defendant only contributes to the nuisance, such that the defendant’s acts by themselves would not be a nuisance were it not for the independent acts of others doing the same thing.³³¹ Damage must be proven, but physical injury to health or property is not necessarily required; it is sufficient that there is interference with the use and enjoyment of property.³³²

Historically, a plaintiff alleging nuisance had to choose between seeking damages for compensation or abating the nuisance, these being alternative remedies. In the *Sun Diamond* case the defendants argued “that the Crown, having elected the remedy of abatement is unable to proceed with any other remedy, relying on the very ancient

³²⁷ *B.C. Pea Growers Ltd. v. Portage La Prairie*, [1966] S.C.R. 150 at 156; *Russell Transport v. Ontario Malleable Iron*, [1952] 4 D.L.R. 719 (Ont.).

³²⁸ *Bottom v. Ontario Leaf Tobacco*, [1935] 2 D.L.R. 699 (Ont. C.A.).

³²⁹ *Sullivan v. Desrosiers* (1987), 40 C.C.L.T. 66 (N.B.C.A.).

³³⁰ See also A.M. Linden, “Strict Liability, Nuisance and Legislative Authorization” (1966) 4 Osgoode Hall L. J. 196.

³³¹ *Walker v. McKinnon Industries Ltd.*, [1947] 4 D.L.R. 739 (Ont. H.C.).

³³² *Newman v. Conair Aviation Ltd.* (1972), 33 D.L.R. (3d) 474 (B.C.S.C.).

Baten's Case which held that a nuisance may be redressed by action, or by the party aggrieved entering and abating the nuisance, but in the latter case he shall not have an action nor recover damages . . .³³³ The court rejected this, stating:

Here we are dealing with the Crown which, through agents, took steps to abate the nuisance, and under contemporary conditions of increasing danger of serious ecological damage from oil spills, it is indisputable that this should be done immediately and is not an alternative remedy to claiming compensation for the damages caused by the spill.³³⁴

To found an action in nuisance, traditional law also required recurring interferences with rights, as opposed to a single occurrence or escape. However it is now clear from the decision of the Supreme Court in *Tock v. St. John's (City) Metropolitan Area Board*³³⁵ that a single act or occurrence may be sufficient to create a nuisance.

(e) Strict Liability and the Rule in *Rylands v. Fletcher*

*Rylands v. Fletcher*³³⁶ established a common law doctrine of strict liability for damages arising from the use of land. Under this doctrine, liability is not based on intent or negligence, but on the inherent risk of injury. The rule enunciated by Lord Blackburn is that “the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.”³³⁷

Strict liability in tort is different from strict liability for regulatory offences. As discussed above, a defence of due diligence is available to a defendant in a criminal prosecution for a public welfare offence of strict liability. However this defence is not available in a civil action in tort based on the doctrine in *Rylands v. Fletcher*. P. Bowal and N. Koroluk note that only five defences have been described in the jurisprudence

³³³ *Supra* note 311 at 29.

³³⁴ *Supra* note 311 at 29-30.

³³⁵ [1989] 2 S.C.R. 1181, 1 C.C.L.T. (2d) 113.

³³⁶ (1868), L.R. 3 H.L. 330.

³³⁷ (1866), L.R. 1 Ex. 265.

with respect to an action based on *Rylands v. Fletcher*: consent of the plaintiff, default of the plaintiff, act of God, deliberate act of a third party and legislative authority.³³⁸

The judgement in *Rylands v. Fletcher* was confirmed in the House of Lords, but in so doing Lord Cairns added the additional requirement of “non-natural use.”³³⁹ This element was considered in *Rickards v. Lothian*,³⁴⁰ in which the Privy Council stated:

It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be ordinary use of the land or such a use as is proper for the general benefit of the community.³⁴¹

The element of “non-natural use” has been problematic and has been the subject of considerable discussion by legal writers.³⁴² In Canada, there have been two approaches. Some cases have focused on whether or not the activity is dangerous, imposing strict liability for abnormally dangerous activities even if the activity is not unusual.³⁴³ The other approach has followed *Rickards* in requiring a “non-natural” use of land. The Supreme Court took this approach in *Tock v. St. John's (City) Metropolitan Area Board*,³⁴⁴ an action against a municipality for flood damage resulting from a sewer back up. The court found that the use of land to provide water and sewer service could not be held to constitute a non-natural use within the meaning of the rule in *Rylands v. Fletcher*. Mr. Justice LaForest noted that “non-natural” was a flexible concept capable of adjusting to a changing society.³⁴⁵

³³⁸ P. Bowal and N. Koroluk, “Closing the Floodgates: Environmental Implications of Revisiting *Rylands v. Fletcher*” (1994) 4 J.E.L.P. 310.

³³⁹ *Supra*, note 336 at 340.

³⁴⁰ [1913] A.C. 263 (P.C.)

³⁴¹ *Ibid.* at 280.

³⁴² e.g., A. M. Linden, *Canadian Tort Law*, 3rd ed. (Toronto: Butterworths, 1982) at 86.

³⁴³ See P. Bowal and N. Koroluk, *supra* note 338, at 325 for examples of cases. The authors note that this approach is in keeping with the United States application of the doctrine in *Rylands v. Fletcher*, where the courts have found strict liability in cases of “ultra hazardous operations.”: Restatement (Second) of Torts, § 519 (American Law Institute).

³⁴⁴ *Supra*, note 335.

³⁴⁵ *Ibid.* at 1189.

A recent House of Lords decision in *Cambridge Water Co. v. Eastern Counties Leather plc*³⁴⁶ has added the requirement of reasonable foreseeability of damage.

Commenting on the decision of Mr. Justice Blackburn in *Rylands v. Fletcher*, Lord Goff stated that

The general tenor of his statement of principle is therefore that knowledge, or at least foreseeability of the risk, is a prerequisite of the recovery of damages under the principle; but that the principle is one of strict liability in the sense that the defendant may be held liable notwithstanding that he has exercised all due care to prevent the escape from occurring.³⁴⁷

Lord Goff concluded that “foreseeability of damage of the relevant type should be regarded as a prerequisite of liability in damages under the rule.”³⁴⁸ If *Cambridge Water* is followed in Canada, *Rylands v. Fletcher* will be largely absorbed by the law of private nuisance;³⁴⁹ in fact Lord Goff stated that: “It would moreover lead to a more coherent body of common law principles if the rule were to be regarded essentially as an extension of the law of nuisance to isolated escapes from land, even though the rule as established is not limited to escapes which are in fact isolated.”³⁵⁰

An interesting aspect of the decision in *Cambridge Water* is the recognition that environmental pollution is a serious public policy concern which is the subject of considerable legislation, some of which implements the “polluter pays” principle.³⁵¹ After noting this, Lord Goff stated:

But it does not follow from these developments that a common law principle, such as the rule in *Rylands v. Fletcher*, should be developed or rendered more strict to provide for liability in respect of such pollution. On the contrary, given that so much well-informed and carefully structured legislation is now being put

³⁴⁶ [1994] 1 All E.R. 53.

³⁴⁷ *Ibid.* at 73.

³⁴⁸ *Ibid.* at 76.

³⁴⁹ Although the doctrine is not limited to cases involving damage to land or the interference with the use and enjoyment of land.

³⁵⁰ *Ibid.* at 76.

³⁵¹ Although there are various expressions of this principle, it is stated as follows in the *Rio Declaration*: “National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.” (Principle 16).

in place for this purpose, there is less need for the courts to develop a common law principle to achieve the same end, and indeed it may well be undesirable that they should do so.³⁵²

Lord Goff stated that:

. . . as a general rule, it is more appropriate for strict liability in respect of operations of high risk to be imposed by Parliament, than by the courts. If such liability is imposed by statute, the relevant activities can be identified, and those concerned can know where they stand. Furthermore, statute can where appropriate lay down precise criteria establishing the incidence and scope of such liability.

The doctrine in *Rylands v. Fletcher* in its classical formulation does not squarely apply to offshore oil spills. *Rylands v. Fletcher* involves the escape of a substance as a result of the “non-natural” use of land. It is arguable that an oil operator does not bring oil onto his “land.” An operator does not own the land included in an exploration licence, significant discovery licence or production licence. These licences only grant the operator certain rights which do not amount to ownership and may not even qualify as interests in land. Further, an operator does not acquire title to any petroleum until it is “produced” under a production licence.³⁵³ Therefore, any oil escaping as a result of operations under an exploration licence or significant discovery licence would not “belong” to the operator and arguably neither would oil escaping under a production licence in a blow out situation as it would not have been “produced.”

It is suggested that having regard to the absolute liability provisions of the *Accord Act*, the doctrine in *Rylands v. Fletcher* will be applied in a restricted manner. Although this statutory liability does not take the place of liability at common law, the courts will probably be reluctant to find strict liability beyond the statutory limit if doing so would require an expansion of these common law concepts to adapt them to the circumstances of offshore oil and gas operations.

³⁵² *Ibid.* at 76.

³⁵³ *Accord Act*, paragraph 83(1)(d).

(f) Summary

Although the common law rights of action are not foreclosed by the *Accord Act*, it is suggested that they will have limited application with respect to offshore oil and gas operations (as discussed above in section 3.2(b), the common law may not apply in the offshore in any case).

With respect to spills and debris, fishermen and others potentially having claims at common law face the difficulties and uncertainties described above, but will likely not need to rely on the common law, as claims for “actual loss or damage” are covered by the absolute liability provisions of the *Accord Act* and rank in priority to claims for the costs of remedial action and clean-up costs.³⁵⁴ Claims for actual loss or damage will likely fall within the \$30-million limit and, if so, will be fully covered by the statute. In any case, fishermen may be able to rely on the unlimited absolute liability provisions of the *Fisheries Act* and therefore will probably not need to resort to the common law.

However, costs for remedial action and clean-up costs, together with damage claims ranking in priority, could conceivably exceed \$30-million, particularly if the Board needs to take over operations and assume the costs of an offshore drilling unit and related support. If this is the case, the Board may have a claim in public nuisance for the amount in excess of \$30-million, although a more likely basis for recovering such excess costs would be under the *Fisheries Act*, which does not limit absolute liability for remedial costs. (The *Fisheries Act* refers to Her Majesty in right of Canada or a province, but Her Majesty could presumably take remedial action through the Board as agent.) If unlimited liability for remedial costs under the *Fisheries Act* is found to be inconsistent with the *Accord Act* within the meaning of paragraph 167(4)(c), the *Fisheries Act* would not give the Crown a right to costs in excess of \$30-million, but in that case there would presumably not be a claim for the excess in public nuisance either, since that “rule of law” – the expression used in paragraph 167(4)(c) – would also be inconsistent with the liability provisions *Accord Act*. As a result, it would appear that the only cases in which the Crown would need to rely on the common law to recover the costs of remedial action

³⁵⁴ Subsection 167(3).

in excess of \$30-million are those where the *Fisheries Act* does not apply: either because there is no deleterious substance being deposited in waters frequented by fish, as might be the case in the situation of a natural gas blowout, or because one of the statutory defences applies; essentially cases where the occurrence was wholly caused by war, acts of vandalism or “a natural phenomenon of an exceptional, inevitable and irresistible character.”³⁵⁵

It should be noted that the *Accord Act* provisions providing for liability in cases of fault or negligence only apply to “actual loss or damage” and do not expressly refer to the costs of remedial actions and clean-up, as do the absolute liability provisions. It is therefore arguable that the costs of remedial actions and clean-up are not recoverable under the fault or negligence provisions.

5.4 Liability of public authorities

If a spill results in part from the negligence of the Board, the Board may itself be jointly and severally liable under subsection 167(1)(b) as a person to whose fault or negligence the spill is attributable. Subsection 9(3) of the *Accord Act* provides that the Board has the legal powers and capacities of a corporation incorporated under the *Canada Business Corporations Act*,³⁵⁶ including those set out in section 21 of the *Interpretation Act*.³⁵⁷ Among other things, subsection 21(1) of the *Interpretation Act* provides that “[w]ords establishing a corporation shall be construed (a) as vesting in the corporation power to sue and be sued . . .”³⁵⁸ The Board is therefore capable of being sued in its own capacity, instead of, for example, as an agent of the Crown.

Section 17 of each of the federal and Nova Scotia *Accord Acts* provides that the governments will indemnify present and former board members, officers and employees in respect of any civil, criminal or administrative action or proceeding.³⁵⁹ These sections

³⁵⁵ Subsection 42(4).

³⁵⁶ R.S.C. 1985, c. C-44.

³⁵⁷ R.S.C. 1985, c. I-21.

³⁵⁸ The Nova Scotia version of the *Accord Act* is to the same effect, except that it refers to the Nova Scotia *Companies Act* and the Nova Scotia *Interpretation Act*.

³⁵⁹ Again, the Nova Scotia version of the *Accord Act* is to the same effect, except that it refers to

do not provide that the governments will indemnify the Board itself. However section 28 of each of the *Accord Acts* provides that each government shall pay half of the Board's budget and accordingly the governments of Canada and Nova Scotia are ultimately liable for any judgements that may be made against the Board, its members, officers or employees.

Canadian law³⁶⁰ with respect to the civil liability of public authorities has followed the decision of the House of Lords in *Anns v. Merton London Borough Council*,³⁶¹ even though the House of Lords subsequently departed from this decision in *Murphy v. Brentwood District Council*.³⁶² In *Kamloops v. Nielsen*, Madam Justice Wilson reformulated the general test for liability in tort enunciated by Lord Wilberforce in *Anns* as follows:

1. Is there a sufficiently close relationship between the parties . . . so that in the reasonable contemplation of [one person] carelessness on its part might cause damage to [the other] person? If so,
2. are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?³⁶³

In determining the second question, the Supreme Court, following *Anns*, has distinguished between policy decisions and operational decisions. A public authority will not be liable for policy decisions (unless they are made irrationally or are not *bona fide*)

indemnification by the province of Nova Scotia.

³⁶⁰ *City of Kamloops v. Nielsen et al.*, [1984] 2 S.C.R. 2, (1984), 10 D.L.R. (4th) 641; *Laurentide Motels v. Beauport (City)*, [1989] 1 S.C.R. 705, (1989), 94 N.R. 1; *The Corporation of the City of Vernon v. Manolagos (sub nom Rothfield v. Manolagos)*, [1989] 2 S.C.R. 1259, (1989), 63 D.L.R. (4th) 449; *Just v. British Columbia*, [1989] 2 S.C.R. 1228, (1989), 64 D.L.R. (4th) 689; *Swanson v. Canada* [1990] 2 F.C. 619, 124 N.R. 218; *Swinamer v. Nova Scotia*, [1994] 1 S.C.R. 445; and *Brown v. British Columbia*, [1994] 1 S.C.R. 420, 162 N.R. 161. See L. N. Klar, "The Supreme Court of Canada: Extending the Tort Liability of Public Authorities" (1990) 28 A.L.R. 648; L. A. Reynolds and D. A. Hicks, "New Directions for the Civil Liability of Public Authorities in Canada" (1992) 71 Can. Bar Rev. 1; D. K. Wilson, "Deep Pocket Justice—Recent Cases on Tort Liability of Public Authorities" (1991) 4 C.J.A.L.P 311; S. M. Wexler, "The Defence of Statutory Authority in Nuisance and the Policy/Operation Dichotomy in Negligence: *Tock v. St. John's Metropolitan Area Board versus Swinamer v. Nova Scotia (Attorney General)*, (1995) 17 *Advocates' Quarterly* 502.

³⁶¹ [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.).

³⁶² [1991] 1 A.C. 398, [1990] 2 All E.R. 908, [1990] 3 W.L.R. 414 (H.L.)

³⁶³ *Kamloops v. Nielsen*, *supra*, note 360 at 662 (cited to D.L.R.).

but may be liable in tort for operational decisions. Mr. Justice Cory attempted to summarize the distinction as follows in *Brown v. British Columbia*:³⁶⁴

True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.

The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

Mr. Justice Cory then went on to clarify two points which had been considered by the Supreme Court in *Just v. British Columbia*.³⁶⁵ The appellant had argued that (a) policy decisions ought to be limited to “threshold decisions,” or those broad initial decisions as to whether something will or will not be done, and (b) that the decision itself was unreasonable. Mr. Justice Cory rejected both of these submissions. He stated that limiting policy decisions to “threshold decisions” was “contrary to the principles of *Just*.” Repeating the point he made in *Just*, he noted that policy decisions can be made by persons at all levels of authority and that in determining if a decision is policy, it is the nature of the decision and not the position of the decision maker which is important. In answer to the second argument, Mr. Justice Cory repeated that policy decisions are not reviewable on a private law standard of reasonableness.

Although he agreed with the result reached by the majority in *Brown*, Mr. Justice Sopinka objected to the reasoning, as he did in *Just*. He disagreed that there was a statutory duty in this case and reasoned that if there were a statutory duty, there would be no reason to consider whether there was a private law duty using the “neighbour principle” of the first part of the test in *Anns*; it would then only be necessary to consider the distinction between policy decisions and operational decisions. However, he urged

³⁶⁴ *Supra*, note 360 at 441.

³⁶⁵ *Supra*, note 360.

the abandonment of this distinction as “the exclusive touchstone of liability,” noting that the distinction had been rejected in Great Britain and the United States.³⁶⁶

Based on the reasoning of Mr. Justice Sopinka, it is suggested that in the case of the Board it will not be necessary to examine whether or not there is a private law duty of care under the first part of the test in *Anns*, as the Board has a statutory duty under section 142.2 of the *Accord Act* to consider safety before authorizing work:

The Board shall, before issuing an authorization for a work or activity referred to in paragraph 142(1)(b), consider the safety of the work or activity by reviewing, in consultation with the Chief Safety Officer, the system as a whole and its components, including its structures, facilities, equipment, operating procedures and personnel.

It is suggested that “safety” would extend not only to the safety of personnel, but also to protection of the environment.³⁶⁷ The Board therefore clearly has a duty of care and it is suggested that this duty would extend to “any person” incurring “actual loss or damage” within the meaning of section 167. Section 142.1 provides that the Board may delegate any of the Board’s *powers* under certain specified sections, including section 142.2, but this would not allow the Board to abdicate its statutory *duty* by delegation.³⁶⁸

The regulatory approach used by the Board relies heavily on the operator using due diligence to ensure that operations are conducted safely. The *Accord Act* requires the operator to provide the Board with a declaration, stating that “the equipment and installations that are to be used in the work or activity to be authorized are fit for the purposes for which they are to be used, the operating procedures relating to them are

³⁶⁶ *Ibid.* at 424-425.

³⁶⁷ Section 138.1 of the *Accord Act* provides that the purpose of Part III (Petroleum Operations) “is to promote, in respect of the exploration for and exploitation of petroleum, (a) safety, particularly by encouraging persons exploring for and exploiting petroleum to maintain a prudent regime for achieving safety; (b) the protection of the environment; (c) the conservation of petroleum resources; and (d) joint production arrangements.” This would suggest that protection of the environment is distinct from safety, but in any case, an operational incident that has the potential to result in a spill will probably also be potentially hazardous to personnel.

³⁶⁸ In any case, if the Board delegates to one of its employees or officers, the federal and provincial governments are required to indemnify that person under section 17.

appropriate for those uses, and the personnel who are to be employed in connection with them are qualified and competent for their employment.³⁶⁹

In addition, the operator is required to provide a Certificate of Fitness issued by an approved certifying authority stating that the equipment or installation in question “is fit for the purposes for which it is to be used and may be operated safely without posing a threat to persons or to the environment in the location and for the time set out in the certificate.”³⁷⁰

The *Accord Act* provides that the Board or any delegate of the Board shall not be liable to any person by reason only of having issued an authorization in reliance on a Declaration of Operator or a Certificate of Fitness. The extent to which the Board chooses to look behind a Declaration of Operator or a Certificate of Fitness would probably be a policy decision in respect of which the Board would be immune from liability, but certainly *some* review is required by the Board and the Chief Safety Officer under section 142.2. The Board will therefore be potentially liable in tort for decisions that can be characterized as operational.

5.5 Damages

(a) Limit of liability

(i) Accord Act

The liability provisions of the *Accord Act* as originally passed in 1988 made an operator absolutely liable for oil spills and debris attributable to his work or activity up to the prescribed limit (whether or not the operator was negligent or at fault) and in addition made the operator liable potentially beyond that limit to the extent that negligence or fault could be shown, together with any other parties who were negligent or at fault. Since the paragraphs dealing with fault or negligence did not limit liability to the prescribed limit, and since those paragraphs referred to “all” actual loss or damage, it was generally accepted that liability was unlimited in cases of fault or negligence.

³⁶⁹ Section 143.1.

³⁷⁰ Section 143.2.

However, in 1992 the *Accord Act* was amended to add subsection 167(2.1). This provides that where the statutory liability provisions apply, no person will be liable for more than the greater of the prescribed limit for absolute liability for spills or debris (\$30-million) and the amount for which the person would be liable under any other law for the same occurrence. This subsection is not limited to the paragraphs dealing with absolute liability but applies to all of subsections 167(1) and (2), including the paragraphs creating liability in cases of fault or negligence.

It would therefore appear that liability under the *Accord Act* is now limited to \$30-million even if there is fault or negligence. Based on the wording of subsection 167(2.1), it would seem that in cases of fault or negligence, each person who is at fault or negligent will potentially be separately liable for up to \$30-million and that this limit will accordingly be multiplied by the number of persons who are held liable.

The limitation of liability even in cases of fault or negligence would appear to be a drafting error; it is suggested that the reference to “subsection (1) or (2)” should read “paragraph (1)(a) or (2)(a)” (the absolute liability provisions). It appears from the marginal heading that the purpose of this amendment was merely to prevent double recovery under both the absolute liability provisions and any other applicable law.

Alternatively, the drafters of this amendment may have assumed that in cases of fault or negligence the common law or maritime law will apply to allow recovery beyond \$30-million. If so, they may have intentionally restricted recovery under the statutory tort to the prescribed limit. However, as discussed above, there is some doubt about whether there even is such a thing as federal common law, and accordingly whether the common law will apply in most of the offshore area until provincial law is extended to the offshore by regulations under the *Oceans Act*. In any case, there may be a difference between the common law and the statutory tort created by the *Accord Act*. It would appear, based on the *Bow Valley* case³⁷¹, that maritime law will apply to offshore oil and gas operations even if the installations involved are not “ships,” but again, the application of maritime law may not necessarily give the same result as the statutory tort.

³⁷¹ *Supra* note 105.

(ii) Fisheries Act

Another issue that arises is whether the limit of absolute liability provided for in the *Accord Act* also operates as the limit of absolute liability under the *Fisheries Act*. Although liability under the *Fisheries Act* is restricted to the loss of income by fishermen and remedial costs incurred by governments, and is therefore of a more limited nature than the liability under the *Accord Act*, the amount of such liability is not limited. If combined damage claims under the absolute liability provisions of the *Accord Act* and the *Fisheries Act* exceed the limit, are fishermen and governments nevertheless entitled to claim full compensation under the *Fisheries Act*?

Subsection 42(7) of the *Fisheries Act* specifically provides that the civil liability provisions do not apply in respect of any deposit of a deleterious substance that, within the meaning of Part XV of the *Canada Shipping Act*, constitutes a discharge of a pollutant caused by or otherwise attributable to a ship. However there is no such exception for spills under the *Accord Act*, and therefore the liability provisions of the *Accord Act* and the *Fisheries Act* stand together.

Christian Yoder has examined this issue with respect to the *Canada Oil and Gas Operations Act* (formerly the *Oil and Gas Production and Conservation Act*) and the *Arctic Waters Pollution Prevention Act*.³⁷² He discusses the presumption of implied repeal of earlier enactments, and quoted the words of Lushington, J. in *The "India"*:

The prior statute would I conceive be repealed by implication, if its provisions were wholly incompatible with a subsequent one, or if the two statutes together would lead to wholly absurd consequences, or if the entire subject matter were taken away by the subsequent statute. Perhaps the most difficult case for consideration is where the subject matter has been so dealt with in subsequent statutes, that, according to all ordinary reasoning, the particular provision in the prior statute would not have been intended to subsist, and yet if it were left subsisting no palpable absurdity would be occasioned.³⁷³

In the case of the *Accord Act* it is not necessary to invoke a presumption of implied repeal, as the Act itself provides that it will prevail over other federal Acts in the

³⁷² C. G. Yoder, *Liability for Drilling- and Production-Source Oil Pollution in the Canadian Offshore* (Calgary: Canadian Institute of Resources Law, University of Calgary, 1986) 34-48.

³⁷³ *The "India"*, Br. & L. 221, 167 E.R. 345 at 346.

case of conflict or inconsistency.³⁷⁴ The issue is therefore whether the *Accord Act* is inconsistent with the *Fisheries Act* on this point. Since both Acts provide for liability for the loss of income of commercial fishermen, it would seem inconsistent to allow unlimited recovery under one Act but not the other. However it is arguable that the *Fisheries Act* provisions are not inconsistent as they are narrower, applying only to a certain class (commercial fishermen), a limited type of damage (loss of income) and a more limited type of occurrence (the deposit of a deleterious substance), whereas the *Accord Act* provisions apply to “all actual loss or damage” incurred by “any person” as a result of a spill or debris whether or not these constitute a deleterious substance. Furthermore, the *Fisheries Act* provides certain defences to absolute liability that the *Accord Act* does not.

Subsection 167(4) of the *Accord Act* provides that nothing in section 167 limits any legal liability or remedy by reason only that there is liability under section 167, and that nothing in section 167 limits the operation of any applicable law or rule of law that is not inconsistent with section 167. It is clear from subsection 167(2.1) that liability under another law can exceed the prescribed limit; this provision will prevent the aggregation of the \$30-million limit of absolute liability on top of any amounts for which a person would otherwise be liable.

However, to clarify this point, it is suggested that the *Fisheries Act* be amended to provide that the liability provisions do not apply in respect of spills within the meaning of the *Accord Act*, in the same way that the *Fisheries Act* provisions do not apply to discharges attributable to ships under Part XV of the *Canada Shipping Act*.

(b) Economic loss

(i) Common law and maritime law

In the past, pure economic losses resulting from a tort were generally not recoverable at common law in the absence of actual physical damage to property of the

³⁷⁴ Section 4.

plaintiff.³⁷⁵ This general exclusionary rule is usually traced back to the decision of the House of Lords in *Cattle v. Stockton Waterworks Co.*³⁷⁶ This was a claim by a contractor hired by a landowner to construct a tunnel through the landowner's land. A third party interfered with the land with the result that the contract became less profitable and the contractor sued the third party. Blackburn, L.J., although recognizing that the contractor had suffered a loss, stated that the courts would only redress the proximate and direct consequences of wrongful acts. If the court were to allow the claim, he said, it would "establish an authority for saying that, in such cases as that of *Fletcher v. Rylands* the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine, who in consequence of the stoppage made less wages than he otherwise would have done."³⁷⁷ The concern was the possibility of liability for claims which could not be reasonably foreseen – expressed by Cardozo C.J. as "liability in an indeterminate amount for an indeterminate time to an indeterminate class."³⁷⁸

Although it has been suggested that the *Cattle* case did not establish an absolute exclusionary rule and can be explained as simply an application of the traditional principles of proximity and remoteness,³⁷⁹ most decisions on the recovery of pure economic loss have treated the principle as an absolute rule, subject only to limited exceptions.³⁸⁰ Exceptions fell into the categories of negligent misrepresentation,³⁸¹ the negligent exercise of statutory power by a public authority,³⁸² the failure by a

³⁷⁵ See E. Gold, D. VanderZwagg, M. Doelle, "Economic Loss and Environmental Damages: Developments in Claims for Offshore Oil Pollution," (1991) 1 J.E.L.P. 129.

³⁷⁶ (1975), L.R. 10 Q.B. 453.

³⁷⁷ *Ibid.* at 457.

³⁷⁸ *Ultramares Corporation v. Touch*, 174 N.E. 441 at 444 (1931).

³⁷⁹ See, for example, the statement of Ritchie, J. in *Rivtow Marine Ltd. v. Washington Iron Works et al.*, [1974] S.C.R. 1189 at 1211.

³⁸⁰ See E. Gold *et al.*, *supra* note 375, and G. Todd Stanley, "Economic Loss in Maritime Law: On Course for Reevaluating the Exclusionary Rule," (1995) 53 U.T.L.Rev. 312.

³⁸¹ *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

³⁸² *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), overturned by *Murphy v.*

manufacturer to warn of a defective product,³⁸³ the negligent performance of a service³⁸⁴ and, under very limited circumstances, pure economic loss resulting from damage to the property of a third party, sometimes called relational economic loss.³⁸⁵

The Supreme Court recently had occasion to reconsider the principles governing relational economic loss in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*³⁸⁶ This case involved a claim for damages for economic loss suffered by two oil companies that had contracted a drilling rig from the rig owner. The rig was out of service for repairs as a result of a fire that was the subject of a separate claim by the rig owner against the builder of the rig and the supplier of a heat trace system which was the cause of the fire. The two oil companies sued for the day rates that they were obligated to pay to the rig owner during the period that the rig was out of service, as well as the cost of certain supplies to the rig. In the result, the Court denied recovery, but it took the opportunity to clarify the applicable principles.

Although the Court was not unanimous on some of the other issues raised in this case, Madame Justice McLachlin's analysis of the issue of relational economic loss was approved by the entire Court. Madame Justice McLachlin, referring to the decision of the Court in *D'Amato v. Badger*,³⁸⁷ summarized the reasons for the traditional rule that relational economic losses are generally unrecoverable as follows:

First, economic interests have customarily been seen by the common law courts as less worthy of protection than either bodily security or property. Second, relational economic loss presents the spectre of "liability in an indeterminate amount for an indeterminate time to an indeterminate class": *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444, per Cardozo C.J. Third, it may be more efficient to place the burden of economic loss on the victim, who may be better placed to anticipate and insure its risk. Fourth, confining economic claims to contract discourages a multiplicity of lawsuits.

Brentwood District Council, [1991] A.C. 398 (H.L.); *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2.

³⁸³ *Rivtow Marine Ltd. v. Washington Iron Works et al.*, [1974] S.C.R. 1189, 40 D.L.R. (3d) 530.

³⁸⁴ *Ross v. Caunters*, [1980] 1 Ch 297; *B.D.C. Ltd. v. Hofstrand Farms Ltd. et al.*, [1986] 1 S.C.R. 228, 26 D.L.R. (4th) 1, 1 B.C.L.R. (2d) 324.

³⁸⁵ *Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners)*, [1947] A.C. 265, [1946] 2 All E.R. 696 (H.L.); *Caltex Oil (Aust.) Pty. Ltd. v. The Dredge "Willemstad"* (1976), 11 A.L.R. 227 (H.C. of A.).

³⁸⁶ [1997] 3 S.C.R. 1210.

³⁸⁷ [1996] 2 S.C.R. 1071.

She noted that although the Court attempted to formulate a rule concerning the recovery of relational economic loss in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*,³⁸⁸ a split decision prevented the emergence of a clear rule. Two different approaches were taken that case. Mr. Justice La Forest started from a general exclusionary rule and set out exceptions where recovery would be permitted: (1) cases where the claimant has a possessory or proprietary interest in the damaged property; (2) general average cases; and (3) cases where the relationship between the claimant and property owner constitutes a joint venture. Madame Justice McLachlin relied on the two-step test based on the general principles of recovery in tort as set out in *Anns v. Merton London Borough Council*³⁸⁹ and adopted by the Supreme Court in *Kamloops (City of) v. Nielsen*:³⁹⁰ (1) whether the relationship between the plaintiff and defendant was sufficiently proximate to give rise to a prima facie duty of care; and (2) whether, if such a prima facie duty existed, it was negated for policy reasons and recovery should be denied.

Madame Justice McLachlin noted that despite the difference in approach, both she and Mr. Justice La Forest agreed on the following propositions: (1) relational economic loss is recoverable only in special circumstances where the appropriate conditions are met; (2) these circumstances can be defined by reference to categories, which will make the law generally predictable; and (3) the categories are not closed.

The Bow Valley case did not fall within any of the three categories set out by Mr. Justice La Forest, but since the categories are not closed, the Court went on to consider whether the right to recover contractual relational economic loss should nevertheless be recognized. In doing so, Madame Justice McLachlin applied the two-step test:

The first step is to inquire whether the relationship of neighbourhood or proximity necessary to found a prima facie duty of care is present. If so, one moves to the second step of inquiring whether the policy concerns that usually preclude

³⁸⁸ The "Jervis Crown" case: *Norsk Pacific Steamship Company Limited et al. v. Canadian National Railway Company* (1989), 26 F.T.R. 81 (F.C.T.D.); [1990] 3 F.C. 114 (F.C.A.); [1992] 1 S.C.R. 1021 (S.C.C.).

³⁸⁹ *Supra*, note 361.

³⁹⁰ *Supra*, note 360.

recovery of contractual relational economic loss, such as indeterminacy, are overridden.

With regard to the first step, the Court stated that “the decision as to whether a *prima facie* duty of care exists requires an investigation into whether the defendant and the plaintiff can be said to be in a relationship of proximity or neighbourhood. Proximity exists on a given set of facts if the defendant may be said to be under an obligation to be mindful of the plaintiff’s legitimate interests in conducting his or her affairs.” On the facts of the Bow Valley case, the Court found that a *prima facie* duty of care arose. However in considering the second step, the Court denied recovery for the policy reason that it did not want to create indeterminate liability. The Court stated that if the plaintiffs were permitted to recover, there was no sound reason to deny recovery to others having a contractual relationship with the rig owner, naming as a specific example the employees on the rig.

The Court recognized that while the problem of indeterminate liability was a policy consideration tending to negative a duty of care, the courts have recognized positive policy considerations tending to support the imposition of a duty of care. The Court gave two examples discussed by Mr. Justice La Forest in *Norsk*:³⁹¹ cases where there is the need to provide additional deterrence against negligence and cases where the plaintiff’s ability to allocate the risk to the property owner is slight, either because of the type of transaction or inequality of bargaining power. The Court found that neither of these two positive policy considerations applied in the Bow Valley case.

It is suggested that in cases of spills and debris, the principles enunciated in *Bow Valley* might allow directly affected parties, such as fishermen, to recover economic losses but that the secondary and tertiary claims of employees, processors and marketers would be too remote, based on the result in *Bow Valley* and the specific comments in that case with regard to rig employees and other parties having a contractual relationship with the rig owner.³⁹²

³⁹¹ *Supra*, note 388.

³⁹² See *Abramovic v. Canadian Pacific Ltd.* (1989), 69 O.R. (2d) 487 (H.C.), a case arising out of a train derailment at Mississauga, Ontario. This accident caused the explosion of propane tank cars and the rupture

(ii) *Accord Act*

It is not clear to what extent the liability provisions of the *Accord Act* extend the common law. The *Accord Act* imposes liability for “actual loss or damage,” which is defined to include loss of income, including future income, and, with respect to any aboriginal peoples of Canada, loss of hunting, fishing and gathering opportunities.³⁹³ The Act would therefore appear to create liability for pure economic loss, but it is not clear whether such claims and the classes of plaintiffs entitled make such claims would be limited by the common law principles discussed in *Bow Valley*, as subsection 167(4) provides that the liability provisions do not suspend or limit the operation of any applicable law or rule of law that is not inconsistent with those provisions.

Assuming, however, that the *Accord Act* creates a statutory right to recover pure economic losses resulting from spills or debris in cases where recovery for such losses would not be allowed at common law, a question that arises is whether damages for such losses are limited to the prescribed limit for absolute liability (\$30-million). Paragraphs 167(1)(b) and 167(2)(b) appear to create unlimited liability for “actual loss or damage” since these provisions refer to “all” actual loss or damage. However, as discussed above, subsection 167(2.1) provides that where the statutory liability provisions apply, no person will be liable for more than the greater of the prescribed limit (\$30-million) and “the amount for which the person would be liable under any other law for the same occurrence.” If a person would not be liable for pure economic loss at common law, it is therefore arguable that the *Accord Act* only creates such liability to a limit of \$30-million.

(iii) *CMI Guidelines*

At its 35th International Conference held at Sydney in 1994, the Comité Maritime International (CMI) adopted Guidelines on Oil Pollution Damage³⁹⁴ that contemplated

of a chlorine tank car, causing authorities to issue an evacuation order. As a result, 670 employees of Canadian Admiral Corporation Limited lost 40 hours of wages. An action by the employees was dismissed. See also *Stevenson v. East Ohio Gas Co.*, 73 N.E.2d 200 (C.A. Ohio, 1946); *Burgess v. M.V. Tamano et al.*, 370 F. Supp. 247 (1973); *State of Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (1985).

³⁹³ Subsection 165(3).

³⁹⁴ Reproduced as Appendix I in E. Gold, *Gard Handbook on Marine Pollution*, 2nd ed. (Arendal, Norway: Assuranceforeningen Gard, 1998).

compensation for pure economic loss. The introductory note to the Guidelines explains that the CMI has as its object the unification of maritime law and has been wholly or partly responsible for the preparatory work leading to several international conventions, including the 1969 *Civil Liability Convention*.

The introduction states that the Guidelines aim, first, to state the extent to which claims are thought to be recoverable under the law as applied in the majority of countries, also taking into account criteria developed by the International Oil Pollution Compensation Fund; secondly, to employ terminology whose meaning is understood and acceptable in countries with a variety of different legal traditions; and thirdly, to strike a satisfactory balance between the desire on the one hand for greater certainty as to the types of recoverable claim, and on the other the need to retain sufficient flexibility to deal on their merits with the many different types of claims which may be made in practice. The Guidelines do not alter legal rights in any way, but are intended “mainly to promote a consistent approach in cases of doubt as to what the relevant legal rights might be.”

The provisions of the Guidelines covering pure economic loss are as follows:

5. Pure economic loss may be compensated when caused by contamination by oil, but normally only as set out below. The loss must be caused by the contamination itself. It is not sufficient for a causal connection to be shown between the loss and the incident which caused the escape or discharge of the oil from the vessel involved in the incident.

6. (a) Pure economic loss will be treated as caused by contamination only when a reasonable degree of proximity exists between the contamination and the loss.

(b) In ascertaining whether such proximity exists, account is to be taken of all the circumstances, including (but not limited to) the following general criteria:

- (i) the geographic proximity between the claimant’s activities and the contamination;
- (ii) the degree to which the claimant is economically dependent on an affected natural resource;
- (iii) the extent to which the claimant’s business forms an integral part of economic activities in the areas which are directly affected by the contamination;
- (iv) the scope available for the claimant to mitigate his loss;
- (v) the foreseeability of the loss; and

- (vi) the effect of any concurrent causes contributing to the claimant's loss.

7. Whilst the result in practice of applying the foregoing general principles will always depend on the circumstances of the individual case, recovery will not normally extend:

- (a) to parties other than those who depend for their income on commercial exploitation of the affected coastal or marine environment, such as, for example, those involved in:
 - (i) fishing, aquaculture and similar industries;
 - (ii) the provision of tourist amenities such as hotels, restaurants, shops, beach facilities and related activities;
 - (iii) the operation of desalination plants, salt evaporation lagoons, power stations and similar installations reliant on the intake of water for production or cooling processes;
- (b) to parties claiming merely to have suffered:
 - (i) delay, interruption or other loss of business not involving commercial exploitation of the environment;
 - (ii) loss of taxes and similar revenues by public authorities.

8. Compensation may be paid for economic loss if it results from damage to, or loss or infringement of, a recognized legal right or interest of the claimant. Such a right or interest must be vested only in the claimant (or in a reasonably limited class of persons to which the claimant belongs) and must not be freely available to the public at large.

9. Compensation may be paid for the costs of reasonable measures taken by a claimant to prevent or minimize economic loss, where such loss would itself have qualified for compensation under the terms of these Guidelines. In determining what is reasonable for this purpose, it will normally be required that:

- (a) the costs of the measures were reasonable;
- (b) the costs of the measures were in proportion to the loss which they were intended to prevent or minimize;
- (c) the measures were appropriate and offered a reasonable prospect of being successful; and

- (d) in the case of a marketing campaign, the measures related to actual targeted markets.

It is suggested that the CMI guidelines broadly reflect the current state of Canadian common law: there must be a reasonable degree of proximity between the contamination and the loss to found a *prima facie* duty of care; if there is a reasonable degree of proximity, it will then be necessary to consider policy concerns such as indeterminacy to decide whether recovery for pure economic loss will be allowed. This will normally mean that the class of claimants will be limited to persons having suffered particular damage distinct from that suffered by the public at large, as is required to support an action in private nuisance. In any case, to the extent that the CMI Guidelines correctly reflect an international norm, the Guidelines themselves may influence the development of Canadian law.

(c) Non-economic environmental damage

The Supreme Court has taken a broad view of what constitutes the “environment.” In *Friends of the Oldman River Society v. Canada (Minister of Transport)*,³⁹⁵ Mr. Justice LaForest stated that the environment was not limited to the biophysical environment, but encompassed economic, social and health issues as well. However, traditional legal analysis has not provided a mechanism to value and provide recovery for general harm to the environment, including non-economic harm: what has been termed “environmental damages.”³⁹⁶

There are a number of problems. First, because the environment is so complex, it is generally difficult to establish a causal link between a pollution incident and a change to the environment. For example, an oil spill may kill large numbers of migratory birds, but it may be impossible to determine the impact of this on population patterns and distributions, which would be subject to natural variations due to any number of complex ecological interactions. Furthermore, because ecosystems undergo natural fluctuations, it

³⁹⁵ [1992] 1 S.C.R. 3, 7 C.E.L.R. (N.S.) 1.

³⁹⁶ H. J. Wruck, “Recovery of Environmental Damages: A Matter of Survival” (1993) 3 J.E.L.P. 143.

may be difficult to show that a particular effect on the environment is harmful, even if it is possible to relate an incident to an effect.

The second problem is establishing a value for the damage. This is particularly difficult when dealing with “non-use” values; for example, the value of non-commercial animal species or the simple desire of people to know that a pristine environment exists, even if they do not use it directly themselves. A number of approaches to valuation have been developed: (1) clean-up costs; (2) restoration and replacement costs; (3) market valuation; and (4) a value based on revealed behaviour. Various methodologies have been suggested with respect to the revealed behaviour approach, but the most accepted appears to be the so-called “contingent valuation methodology” (CVM), which attempts to estimate what value people attach to environmental quality and natural resources through structured surveys.³⁹⁷

The third problem relates to limitations in the use of the law of tort. As discussed, a private plaintiff is not able to bring action in public nuisance unless he has suffered particular damage that is substantial, direct and different than that suffered by the community in general.³⁹⁸ Although the Attorney General can bring an action in public nuisance, it may be difficult even for the Crown to obtain an award for environmental damages beyond clean-up costs in the absence of a proprietary interest in the environment.

As discussed, with respect to spills or debris, the *Accord Act* only allows recovery for “actual loss or damage incurred by any person.” The *Fisheries Act* is even more limited, providing only for recovery of loss of income incurred by commercial fishermen. Both Acts also provide for the recovery of reasonable clean-up costs and remedial costs,

³⁹⁷ See H. J. Wruck, *supra* note 396; Ontario Law Reform Commission, *Report on Damages for Environmental Harm*; and Dower and Scodari, “Compensation for Natural Resource Injury: An Emerging Federal Framework” (1987) 4 *Marine Resource Econs* 155.

³⁹⁸ The Final Report of the Public Review Panel on Tanker Safety and Marine Spills Response Capability, *supra*, note 252 at 101, recommended that:

The *Canada Shipping Act* be amended to give private citizens the right to commence a civil action for the benefit of the public for environmental damage caused by oil or chemical spills. Moreover, the definition of “environmental damage” to be set out in this amendment to the *Act* includes all types of loss, damage or harm currently embraced in that term in its usual and ordinary meaning presently.

but only to the extent that these are actually incurred. These acts therefore do not provide for recovery for environmental damages.

The *Canada Shipping Act* would potentially allow for environmental damages going beyond clean-up and remedial costs. As discussed above, Part XVI of the Act implements the 1969 *Civil Liability Convention* and the 1971 *Fund Convention*. Section 677 of the Act makes a ship owner liable for “oil pollution damage” as well as clean-up costs and the costs of remedial and abatement measures by a public authority or the Minister, to the extent that such costs are reasonable. “Oil pollution damage” is defined in relation to a ship as “loss or damage outside the ship caused by contamination resulting from the discharge of oil from that ship”³⁹⁹ and could conceivably be broadly interpreted by a court.

However, a broad interpretation has not been adopted by the IOPC Fund. In 1980 the IOPC Fund Assembly resolved that “the assessment of compensation to be paid by the IOPC Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models.”⁴⁰⁰ When the 1969 *Civil Liability Convention* and the 1971 *Fund Convention* were reconsidered in 1984, two Protocols were put forward which expressly recognized impairment of the environment in the definition of pollution damage. However, damages were limited to “costs of reasonable measures of reinstatement actually undertaken or to be undertaken” in restoring the environment and did not include damages related to non-use values such as the intrinsic value of the environment. This definition was followed in the 1992 Protocols, in which “pollution damages” is defined as follows:

1. loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of

³⁹⁹ Section 673.

⁴⁰⁰ H. J. Wruck, *supra* note 396 at 179. This followed the wreck of the Soviet tanker “Antonio Gramsci” and the application by the Soviet Union of legislation enacted in 1978 assessing environmental damages in its territorial sea on the basis of the quantity of oil spilled, without regard to clean-up or restoration costs. The IOPC Fund took issue with this, taking the position that a claimant must establish that it has suffered a quantifiable economic loss. See C. Redgwell, “Compensation for Oil Pollution Damage Quantifying Environmental Harm” (1992) 16 *Marine Policy* 90.

- profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;
2. the costs of preventive measures and further loss or damage caused by preventive measures.⁴⁰¹

Similarly, the CMI *Guidelines on Oil Pollution Damage*⁴⁰² provide as follows:

11. Compensation for impairment of the environment (other than loss of profit) shall be limited to the costs of reasonable measures of reinstatement actually undertaken or to be undertaken. It is not payable where the claim is made on the basis of an abstract quantification of damage calculated in accordance with theoretical models.

In view of the foregoing, a Canadian court may be reluctant to give a broad interpretation to “oil pollution damage” within the meaning of Part XVI of the *Canada Shipping Act* so as to include environmental damage.⁴⁰³ In any case, Part XVI of the *Canada Shipping Act* does not apply to discharges from oil and gas operations.⁴⁰⁴

⁴⁰¹ Article 1(6).

⁴⁰² *Supra*, note 394.

⁴⁰³ Although H. J. Wruck, *supra* note 396, notes that the Court of Appeal of Messina, Italy, in a 1989 decision concerning a spill from the Greek tanker *Patmos*, held that general environmental damages were recoverable by the Italian government and that such damages were consistent with the definition of “pollution damage” in the 1969 *Civil Liability Convention*.

⁴⁰⁴ Subsection 674(2).

6. FINANCIAL RESPONSIBILITY

6.1 Financial Responsibility Requirements

Financial responsibility requirements for oil and gas operations are contained in the *Accord Act*, the *Nova Scotia Offshore Petroleum Drilling Regulations*⁴⁰⁵ and the *Nova Scotia Offshore Area Petroleum Production and Conservation Regulations*.⁴⁰⁶

(a) Accord Act

The *Accord Act* provides that an applicant for an authorization “in respect of any work or activity in any portion of the offshore area shall provide proof of financial responsibility in the form of a letter of credit, a guarantee or indemnity bond or in any other form satisfactory to the Board, in an amount satisfactory to the Board.”⁴⁰⁷ The holder of an authorization must ensure that the proof of financial responsibility remains in force for the duration of the work or activity in respect of which the authorization is issued.⁴⁰⁸

The Board may pay out funds available under this security in respect of any claim for which proceedings may be instituted under the statutory liability provisions, whether or not such proceedings have in fact been instituted.⁴⁰⁹ Such payments may not exceed the amount prescribed for any case or class of cases, or determined by the Board in the absence of regulations. If a claim is sued for under the liability provisions of the Act, the amount of any such compensation payments received by the claimant is deducted from the award made pursuant to the action in respect of the same loss.⁴¹⁰ This is all supposed to be monitored by and subject to the review of a statutory committee consisting of

⁴⁰⁵ SOR/92-676.

⁴⁰⁶ SOR/95-190.

⁴⁰⁷ Subsection 168(1).

⁴⁰⁸ Subsection 168(1.1).

⁴⁰⁹ Subsection 168(2).

⁴¹⁰ Subsection 168(3).

members appointed by the federal and provincial governments and by representatives of the petroleum and fisheries industries, although no such committee has been set up.⁴¹¹

The *Accord Act* also provides that in authorizing any work or activity, the Board may make its authorization subject to “such requirements and deposits as the Board determines or as may be prescribed, including (a) requirements relating to liability for loss, damage, costs or expenses . . .”⁴¹²

(b) Regulations

The *Nova Scotia Offshore Petroleum Drilling Regulations* provide that “[e]very operator shall, prior to drilling or re-entering a well,

(a) furnish the Board with evidence of financial responsibility in a form and in an amount satisfactory to the Board or any person designated by the Board, for the purpose of ensuring that the operator terminates the well and leaves the drill site in a satisfactory condition in accordance with section 180;⁴¹³ and

(b) furnish the Board with evidence, in a form satisfactory to the Board or any person designated by the Board, that the operator is financially able to meet any financial liability that may be incurred as a result of the drilling of a well or of any operation in the well.⁴¹⁴

It will be noted that the “evidence of financial responsibility” referred to in paragraph (a) above is intended to operate as a guarantee (“for the purpose of *ensuring...*”) while the “evidence” referred to in paragraph (b) appears to merely require a demonstration that the operator is able to meet its financial liabilities.

The *Nova Scotia Offshore Area Petroleum Production and Conservation Regulations* provide as follows:

10. For the purposes of subsection 142(4) of the Act and in respect of an authorization issued pursuant to paragraph 142(1)(b) of the Act to carry on a work

⁴¹¹ Section 169.

⁴¹² Subsection 142(4).

⁴¹³ Section 180 relates to abandonment and provides that “[e]very operator shall ensure that on the termination of any well the seafloor is cleared of any material or equipment that could interfere with other commercial uses of the sea, unless the Board or any person designated by the Board, having been satisfied that no interference with the commercial use of the sea is reasonably likely to result, otherwise approves.”

⁴¹⁴ Section 72.

or activity in relation to the development of a pool or field or the production of petroleum, the operator shall, before the work or activity is started, submit to the Board

(a) evidence of financial responsibility, of a type and in an amount that is sufficient to ensure that the operator

(i) completes the work or activity, and

(ii) leaves the site where the work or activity was carried on in the state required by Part VII or by the Board pursuant to subsection 142(4) of the Act; and

(b) evidence that the operator is able to meet any financial liability that might be incurred in connection with the work or activity.

As with the Drilling Regulations, the “evidence of financial responsibility” referred to in paragraph (a) intended to operate as a guarantee while the “evidence” referred to in paragraph (b) goes to the ability of the operator to meet financial liabilities.

6.2 Guidelines and Practice

Both the *Accord Act* and the regulations provide that the evidence of financial responsibility shall be in a form and in an amount satisfactory to the Board. In 1992 the Canada-Nova Scotia Offshore Petroleum Board and the Canada-Newfoundland Offshore Petroleum Board jointly issued Guidelines outlining the requirements of both Boards with respect to drilling operations.⁴¹⁵ These Guidelines are currently being revised; on March 30, 1998, the two Boards jointly released, for comment, draft Guidelines intended to address financial responsibility requirements for *all* works and activities in the Newfoundland and Nova Scotia offshore areas (instead of just drilling operations). When finalized, these Guidelines will supersede the 1992 Guidelines.

⁴¹⁵ Canada-Nova Scotia Offshore Petroleum Board and Canada-Newfoundland Offshore Petroleum Board, *Guidelines Respecting Financial Responsibility Requirements for Drilling in the Newfoundland and Nova Scotia Offshore Areas* (February 1992).

(a) Draft Guidelines

Since the draft Guidelines reflect the current requirements of the Boards, the main features of these Guidelines will be described, followed by a discussion of certain issues arising out of them.

There are two main types of evidence of financial responsibility that the Board may require before authorizing a work or activity. The first is financial security which will give the Board immediate and direct access to cash to enable the Board to settle claims or to cover clean-up costs in the case of a spill. This is the evidence that operates as a guarantee. It is typically provided in the form of a letter of credit (although other instruments may be acceptable as well, including a guarantee by a financial institution, an indemnity bond or marketable securities). Insurance or evidence of financial capability will not be accepted if this type of security is required because they do not afford immediate and direct access to cash; in the case of insurance, for example, the insurer may raise defences to a claim and in any case there may not be an immediate settlement. The Board will typically require this type of security in an amount equal to the prescribed limit of absolute liability, i.e., \$30-million in Nova Scotia. This was the only type of security discussed in the 1992 Guidelines.⁴¹⁶

In addition to security which provides immediate and direct access, the Board will also require further evidence of financial responsibility in an amount that may exceed the \$30-million limit of absolute liability. This requirement is normally satisfied through insurance, but if a company has chosen to “self-insure” and has sufficient financial strength, the Board may accept a current audited financial statement as evidence that the

⁴¹⁶ The 1992 *Guidelines* state that the evidence of financial responsibility required by the *Accord Acts* “relates to liability for which proof of fault or negligence is not necessary, and is required to provide a source of funds as a contingency against claims resulting from seafloor debris or a petroleum spill.” The *Guidelines* accordingly provide that the evidence of financial responsibility must be in the amount of the prescribed limit of liability and must be in a form that affords access by the Boards for the purposes of claims settlement. The 1992 *Guidelines* suggest the following forms: a letter of credit; a guarantee by financial institution; an indemnity bond; an indemnity bond used in conjunction with a letter of credit or guarantee by a financial institution, the sum of which meets the applicable limit; securities or funds provided by a third party including an affiliate; or other arrangements acceptable to the Board. The *Guidelines* expressly state that in no event will insurance be acceptable as evidence of financial responsibility under the *Accord Act*. This restriction does not come from the legislation, which leaves the form of the financial security to the Board, but reflects the policy of the Boards.

company has the ability to meet its obligations. If the company is a subsidiary of a parent with substantial financial strength, the Board may accept a guarantee from the parent (or some other third party). In addition, a letter of credit or indemnity bond will be accepted, or some combination of the foregoing.

The draft Guidelines also require an operator to indemnify the Board and its members and employees regarding any claim that may be made against them with respect to any matter arising from the operator's work or activity. This is a questionable requirement which is discussed further below.

The draft Guidelines distinguish the following activities:

(i) Drilling

Since drilling operations have the potential to result in a spill or debris, financial security affording immediate and direct access to cash will be required, as described above, normally in the absolute liability amount of \$30-million. This will typically be in the form of a letter of credit.

In addition, the operator must demonstrate that it is able to meet any financial liability that may result from the drilling operation. The draft Guidelines use insurance terminology to describe the various coverages that may be provided for, including blowouts, deliberate well firing, making wells safe, cost of redrilling, cost of well control insurance for relief wells, removal of wreck and debris, evacuation expense and seepage and pollution cleanup. Normally insurance would be used to provide this evidence of financial responsibility, but as described above, other evidence may also be acceptable. The limits required for this type of financial security are set out in the draft Guidelines as follows:

- physical damage to property: the reinstatement cost
- removal of debris: 25% of the reinstatement cost of the property
- liabilities to third parties: up to \$300-million
- well control, making wells safe, pollution clean up, redrilling costs: up to \$350-million

These limits are separate from the \$30-million direct access security required in respect of absolute liability.

(ii) Development or Production

A development program will include a number of separate activities requiring work authorizations. The Guidelines indicate that an operator can deal with financial responsibility requirements one application at a time, or alternatively a single package of documentation can be filed which will apply to all authorizations that are contemplated for the entire development or for particular phases of the development.

The type of evidence of financial responsibility required will depend on the nature of the activities. For drilling activities, the same requirements set out above would apply. For other activities, the Guidelines state that the operator must demonstrate that it is able to meet any financial liability that may arise out of the work or activity, for example through insurance. The Guidelines do not suggest that security affording immediate and direct access to cash will be required for production operations, even though production operations could result in a spill or debris. However the Nova Scotia Board has required such security for production operations and the failure to mention this in the draft Guidelines is probably an oversight.

The draft Guidelines indicate that evidence of financial responsibility will be required to provide for liabilities in the following amounts:

- physical damage to property: the reinstatement cost
- removal of debris: 25% of the reinstatement cost of the property
- liabilities to third parties: up to \$300-million
- pollution clean up: up to \$350-million

The draft Guidelines also indicate that evidence of financial responsibility will be required to ensure that the work or activity is properly terminated and that the site is left in satisfactory condition. The Guidelines state that the form in which these requirements may be satisfied could include the types of security affording immediate and direct access to cash, such as a letter of credit or the other instruments described above; however the Guidelines do not state that this type of security will necessarily be required.

As for drilling activities, the draft Guidelines state that the Board will require the operator to indemnify it against any claims that may be made against the Board arising out of the operator's work or activity.

(iii) Decommissioning of a Production Installation

The draft Guidelines indicate that because each project and production installation is unique, requirements respecting evidence of financial responsibility will be dealt with on a case by case basis. One interesting feature of this section is a requirement that the operator must include “the manner and form in which any residual liability will be dealt with by the operator and interest owner, in the event any subsequent claims arise after such abandonment/decommissioning occurs, with respect to damages attributable to the operator’s work or activity.”

(iv) Other work or activity

Other work or activity includes things such as geological, geophysical or geotechnical programs, environmental programs and diving programs. For these activities, the draft Guidelines require that the operator demonstrate the ability to satisfy liabilities to a limit of \$10-million for: claims by any person relating to loss or damage to property, financial loss or injury or death; and claims by any person relating to the restoration and preservation of the natural environment, including the seabed.

The draft Guidelines suggest that the form of such evidence could be insurance , an audited financial statement, a corporate guarantee from a third party, including an affiliate, a letter of credit or indemnity bond or some other acceptable form. There is no requirement for security giving immediate and direct access to cash.

(b) Example of Financial Security – Cohasset Panuke Project

PanCanadian has posted financial security with the Canada-Nova Scotia Offshore Petroleum Board in the form of an irrevocable standby letter of credit in the amount of Cdn\$17.5-million. This letter of credit secures PanCanadian's statutory liabilities and abandonment obligations with respect to the Cohasset Project to the extent of 50% of any claim. Nova Scotia Resources (Ventures) Limited has posted separate security in the amount of \$17.5-million for its 50% interest. This consists of a demand promissory note guaranteed by the Province of Nova Scotia.

The total security in place for the Cohasset Project is accordingly \$35-million. The prescribed limit for purposes of the absolute liability provisions of the Accord Acts is only \$30-million but this amount was increased to secure abandonment obligations as

well. In determining an amount of \$35-million, the Board required \$25-million for abandonment obligations and \$10-million for spills. Lasmo had argued that \$30-million for spills was unnecessary as the oil was of a non-persistent nature and would readily evaporate from the surface of the ocean. Accordingly, any required spill response would be minimal and it was considered that potential damages from a spill would also be relatively low.

PanCanadian's letter of credit was recently amended to additionally apply to 100% of any claim not arising out of the Cohasset Project (i.e., exploratory operations conducted by PanCanadian in which NSRVL is not involved) for which the Board believes proceedings may be, or have been, instituted as provided for by section 159 of the Nova Scotia Accord Act and section 167 of the federal Accord Act. With this amendment, the Board accepted the existing letter of credit in the amount of \$17.5-million as financial security for the Grand Pre exploratory well recently drilled by PanCanadian.

In addition to the letter of credit, the CNSOPB requires insurance and has approved a package consisting of Control of Well, Operators Extra Expense, Seepage and Pollution and Umbrella Legal Liabilities with a limit of Cdn\$240-million (100% interest). The Board is named as an additional Assured on these policies. This insurance was originally put in place for the Cohasset Project but was also accepted for purposes of the Grand Pre well.

Copies of these policies were originally provided to the Board. Renewals have been evidenced by cover notes.

In addition, specific insurance for physical damage and third party liability is placed for major construction projects. No indemnity agreement has been filed.

(c) Issues

(i) Validity of Guidelines

There is no specific statutory authority for these *Guidelines*. The *Accord Act* provides that the Board may issue and publish guidelines and interpretation notes with respect to the application and administration of sections 45 (Benefits Plans), 142 (work authorizations) and 143 (Development Plans), and any regulations made under section

153 (regulations relating to operations).⁴¹⁷ These *Guidelines* arguably relate to work authorizations, as an authorization will presumably not be issued until the required financial security is in place.

The limits that can be placed on policy statements issued by a regulatory tribunal were recently considered in *Ainsley Financial Corp. v. Ontario (Securities Commission)*.⁴¹⁸ In that case the Ontario Court of Appeal found that a policy statement issued by the Ontario Securities Commission had a mandatory character and amounted to an attempt to impose a *de facto* legislative scheme, complete with detailed substantive requirements. The Court held that the Commission could not impose such a scheme without the appropriate statutory authority and that such policy statements must be like guidelines: intended to provide guidance but without binding effect:

. . . a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue *de facto* laws disguised as guidelines. The decision of Mr. Justice Iacobucci in the *Pezim* case is quoted as authority for that proposition, and particularly his statement that “by that I mean that their policies cannot be elevated to the status of law . . .”⁴¹⁹

If a regulator applies its own guidelines and policies in an automatic manner, the regulator may be binding itself instead of judging each case on its own merits. This also effectively elevates guidelines and policies to the “status of law.” This case has been criticized as having taken an unduly narrow view of the role of regulatory tribunals.⁴²⁰ In any case, with respect to financial responsibility requirements, the Board has so far not applied any requirements automatically, and it would appear that the draft guidelines would not offend *Ainsley*.

(ii) *Permitted purposes of financial security*

The 1992 *Guidelines* provided that evidence of financial responsibility was required only for purposes of the absolute liability provisions. These *Guidelines* were

⁴¹⁷ Section 156.

⁴¹⁸ (1994), 28 Admin. L.R. (2d) 1, 21 O.R. (3d) 104, 21 D.L.R. (4th) 79 (Ont. C.A.).

⁴¹⁹ At 7 (cited to Admin. L.R.).

⁴²⁰ See case comment by A. J. Roman (1996) 32 Admin. L.R. (2d) 28.

issued in February 1992, before the June 1992 amendments to the *Accord Act*.⁴²¹ Before these amendments were made, subsection 168(1) of the *Accord Act* referred to “financial responsibility for the purposes of subsections (2) and (3),” (which provide for the payment of claims in respect of spills or debris). The present language simply requires proof of financial responsibility, and does not expressly limit its purpose to the payment of claims in respect of spills or debris under section 167. Reading this section together with subsection 142(4), it would seem that the Board could now make the financial security accessible for other purposes, for example to pay costs claimed by the Board to properly abandon a well in circumstances where the claim does not amount to a claim for debris.

In any case, there is nothing in the Act that limits the application of the financial security to claims based on the absolute liability provisions of the *Accord Act*. Even if it is accepted that the security to be posted with the Board is accessible only to enable the Board to pay claims under subsections 168(2) and (3), those subsections refer to *any* claims under section 167, which also provides for liability for spills or debris based on fault or negligence. Section 168 provides that the amount of the security for financial responsibility shall be satisfactory to the Board; the Board could presumably require security in an amount that is either greater or less than the applicable limit of absolute liability. As a matter of policy, however, the Board has decided to require security in the same amount as the limit of absolute liability.

(iii) *Requirement to indemnify Board*

The draft Guidelines require the operator to sign an indemnity agreement containing the following provision:

In the event any injury, death, damage to property or to the environment occurs as a result of any work or activity conducted in relation to the Authorization, the Operator, as agent for the participating parties and interest owner of _____, shall indemnify the Board, its members, employees and delegates from and against any costs, claims, liabilities and expenses that may

⁴²¹ S.C. 1992, c. 35: *An Act to amend the Oil and Gas Production and Conservation Act and other Acts in consequence thereof.*

arise with respect to such injury, death or damage, except to the extent of any negligence or wilful misconduct on the part of such parties.

As discussed above, the form of exploration licence used by the Board provides that the holders of shares in the licence shall indemnify the Board and the federal and provincial governments against all claims that may be made by any person by reason of anything done or omitted to be done under the licence by the interest owner or an interest holder. There is no specific authority in the *Accord Act* for such a provision, but it would presumably be valid under subsection 70(1), which provides that an exploration licence may contain other terms and conditions agreed on by the Board and the interest owner. Recent Calls for Bids issued by the Board specifically provide that the submission of a bid shall constitute agreement to the terms and conditions set out in the form of exploration licence attached to the Call for Bids.

On this basis, it may be valid to require an indemnity from the interest holders, although unnecessary since the exploration licence already contains an indemnity provision. However the operator will not necessarily be an interest owner (although this is usually the case) and therefore the requirement for an indemnity from the operator goes beyond what is contemplated in the form of exploration licence. Furthermore, as discussed above, the existing significant discovery licences arguably have no indemnity obligation attached to them. In any case, the draft Guidelines require the operator to provide an indemnity even with respect to work conducted on Crown reserve area, for example a speculative geophysical survey.

Apart from the contractual basis for requiring an indemnity agreement from the interest holders under an exploration licence, the justification for requiring an indemnity as a general matter from an operator would have to be based on paragraph 142(4)(a) as a requirement “relating to liability for loss, damage, costs or expenses.”

It is not clear why the Board requires this indemnity, given the fact that under the form of indemnity agreement, the indemnity does not apply if the Board is negligent. In the absence of negligence, presumably no liability would attach to the Board in any case. If the Board is added as a defendant in a lawsuit because, for example, it approved the operation that resulted in injury or damage, and it eventually turned out that the Board was not negligent, the indemnity agreement would serve to protect the Board from costs,

but there would appear to be no reason why the operator should be responsible for the Board's legal fees in such a case.

Section 17 of the *Accord Act* provides that the governments will indemnify Board members and Board employees against costs, including amounts paid to settle an action or satisfy a judgement, reasonably incurred in respect of any civil, criminal or administrative action or proceeding that they may be parties to because of their position. Also, subsection 166(9) provides for limited immunity against personal liability in cases where Board staff or other persons take certain actions.

(iv) *Direct access to funds and requirement to name Board as additional insured*

In addition to the financial responsibility provisions of the *Oil and Gas Production and Conservation Act*⁴²² (which are essentially the same as those in the *Accord Act*), companies operating in Arctic waters also had to satisfy the financial responsibility provisions of the *Arctic Waters Pollution Prevention Act*.⁴²³ Under the AWPPA, the financial responsibility requirements were satisfied by operators posting insurance policies with loss payable to the operator and the Crown. However, COGLA, which administered the OGPCA, did not accept insurance as evidence of financial responsibility and generally required letters of credit.

The reason for this is that the financial responsibility requirements were expressed differently in the two Acts. The AWPPA provided that “[e]vidence of financial responsibility in the form of insurance or an indemnity bond shall be in a form that will enable recovery directly from the proceeds of the insurance or bond . . .” The OGPCA, like the *Accord Act*, does not refer to insurance and has no specific requirement for direct recovery. The *Accord Act* provides that the Board “may require that moneys . . . be paid out of the amount available under the . . . form of financial responsibility.” This suggests that the Board does not necessarily need to have direct access to the funds itself; otherwise, the Act would have stated that the Board itself may pay claims. Instead, the

⁴²² R.S.C. 1985, c. O-7.

⁴²³ R.S.C. 1985, c. A-12. The potential for double absolute liability requirements under both the *Oil and Gas Production and Conservation Act* and the *Arctic Waters Pollution Prevention Act* was dealt with by administrative agreement: see *Canada Gazette*, June 11, 1987, SOR/87-331.

Act merely enables the Board to “require” payment. However, there is nothing that prohibits the Board from requiring direct access and the examples of acceptable security listed in section 168, i.e., a letter of credit, guarantee or indemnity bond, are instruments of direct access. Since other forms of financial security need to be “satisfactory” to the Board, the Board would appear to have the discretion to require direct access.

As noted above, the Board will not accept insurance as evidence of financial responsibility with respect to the amount for which direct access is required. The draft Guidelines nevertheless require that the Board be named as an insured on the operator’s policies when these are used as further evidence of financial responsibility. The concern of the Board in this regard is not clear. There is a difference between being a “loss payee” under a policy of insurance and being a named insured. As a named insured, the Board will not necessarily obtain funds with which to settle claims, if such claims are made against the operator, as will normally be the case. If the Board is added to an insurance policy, it might thereby obtain protection in cases where it is liable together with the operator because of the fact that it negligently approved a particular operation, for example. However, as discussed above, the form of indemnity agreement required by the Board excludes negligence.

(v) Requirement for other interest holders to post security

As described above, the draft Guidelines require the operator to post an indemnity agreement and certain forms of financial security “on behalf of the participating parties and interest owner.” The financial security requirements in section 168 of the *Accord Act* apply to the “applicant for an authorization,” which will be the operator. It is also the operator that has absolute liability for spills and debris under section 167. However, section 167 also makes other persons liable for spills and debris if they are at fault or negligent, or “are by law responsible for others to whose fault or negligence” the spill or debris is attributable.

The issues, therefore, are whether an interest holder who is not the operator could potentially be liable, and whether the Board has the power to demand financial security from interest holders in addition to the operator. It is suggested that a non-operator will not be liable under the *Accord Act* merely because it holds an interest in the licence; however, as discussed, an interest holder could be held liable or have an indemnity

obligation under terms of the licence document. As discussed, it would seem that the inclusion of liability and indemnity provisions in licences is not supported by the *Accord Act*, and likewise the financial security requirements should only apply to the operator.

(vi) Requirement for property/redrilling insurance

The draft Guidelines require an operator to carry insurance for physical damage to property in the amount of the reinstatement cost, as well as insurance for redrilling costs. The rationale for these requirements had been that the government had an interest in ensuring that development projects were not prematurely terminated due to an accident, as this might result in otherwise economic reserves being left in the ground in cases where the remaining reserves did not justify reinstating the facility. It was originally suggested that the requirement for property insurance was justified by paragraph 10(a) of the *Nova Scotia Offshore Petroleum Production and Conservation Regulations*, which requires evidence of financial responsibility sufficient to ensure that the operator “completes the work or activity.” However, the Boards indicated in a recent meeting with representatives of CAPP that they now interpret “completes” as “terminates” and have indicated that they will remove the requirement for property and redrilling insurance from the Guidelines.

7. COMPENSATION PLANS

7.1 Early compensation plans

Two types of compensation plans have developed on the east coast: plans that deal with attributable damage, meaning damage in respect of which a responsible party can be identified; and plans that deal with damage that appears to be caused by offshore oil and gas activities, but which cannot be attributed to a particular operator.

(a) Unattributable damage: CPA Fishermen's Compensation Policy

To address the concerns of fishermen with regard to unattributable damage, the Offshore Operators' Division of the Canadian Petroleum Association (CPA)⁴²⁴ established a Fishermen's Compensation Policy in 1984.⁴²⁵

Development of this Policy was commenced by the East Coast Petroleum Operators' Association, which in 1982 formed the "Fisheries Advisory Committee" to work with the fishing industry in developing a mutually acceptable compensation policy for damage to vessels and gear as a result of oil and gas operations. This initiative was motivated by the desire of the petroleum industry to avoid the imposition of a government-drafted compensation scheme.⁴²⁶ The East Coast Petroleum Operators' Association was later merged with the CPA, and the Fisheries Advisory Committee was continued as a subcommittee of the Frontier Division of the CPA.⁴²⁷

Initially the Fisheries Advisory Committee did not intend to restrict the application of the compensation policy to unattributable damage. However, several

⁴²⁴ The Canadian Petroleum Association merged with the Independent Petroleum Association of Canada in 1992 and the continuing organization is now called the Canadian Association of Petroleum Producers.

⁴²⁵ The text of the policy is reproduced in *Contemporary Issues in Ocean Management and Development*, Vol. 1.B, Primary Documents (Halifax: Dalhousie University Marine Affairs Program) 503. For a discussion of the policy, see I. T. Gault, "Civil Liability for Pollution from Installations - Canada," in I. T. Gault (ed.), *Offshore Petroleum Installations Law and Financing: Canada and the United States* (London: Int'l Bar Assoc., 1986) 293.

⁴²⁶ R. A. Pashelka, "Fishermen's Compensation Policy of Canadian Petroleum Association" August 1989, presented at PetroPiscis 89 Conference, Bergen, Norway, October 1989.

⁴²⁷ *Ibid.*

member companies felt that since attributable damages were covered by a statutory compensation scheme, the existence of a second compensation scheme would result in conflicts which might affect parties' efforts to settle. The Fisheries Advisory Committee also felt that oil spills should not be addressed by the Policy. It was felt that the source of oil spills would be generally identifiable, and if not, might be ship-sourced and only indirectly related to oil and gas operations. The Committee noted that the *Canada Shipping Act* provided for compensation for ship-sourced oil pollution including unattributable oil spills.⁴²⁸

The CPA Fishermens' Compensation Policy was therefore designed to compensate fishermen only for damage or loss caused by debris of unknown origin. Claims for attributable damage were to be made directly to the responsible operator and would only be considered if the operator denied responsibility. The Policy was implemented through a memorandum of understanding among various fisheries associations,⁴²⁹ the Chair of the Offshore Operators Division of the CPA and the Chair of the Fisheries Advisory Committee.

The Policy covered loss of catch and damage to or loss of vessels, gear or equipment. Only commercial and subsistence fishermen were entitled to make claims; others in the industry who might be indirectly affected, such as plant workers, would not appear to have qualified as claimants. In addition, claimants were required to be Canadian citizens, landed immigrants or registered Canadian companies. Incidents were to be reported by the owner, operator or skipper of a fishing vessel to a federal Fisheries Officer, a provincial Fisheries Field Representative or a Justice of the Peace (in Newfoundland only). The owner, operator or skipper was then to file a single claim in respect of the incident on behalf of his entire crew.

Claims were to be filed with and assessed by one of three regional compensation boards. The "Newfoundland Inshore Board" dealt with claims arising out of incidents in the Newfoundland inshore area; the "Maritimes Inshore Board" covered the inshore areas

⁴²⁸ *Ibid.*

⁴²⁹ Atlantic Fishing Vessel Association, Eastern Fishermens Federation, Fisheries Association of Newfoundland and Labrador, Maritime Fishermen's Union and Newfoundland Fishermen, Food and Allied Workers Union.

of New Brunswick, Nova Scotia (including Sable Island), Prince Edward Island and Quebec; and the “Atlantic Offshore Board” dealt with incidents involving vessels over 100 feet long.

The filing of a claim under the Plan did not prevent a claimant from taking legal action, but a settlement would be paid only if the claimant discontinued other proceedings. If new evidence came to light afterwards, a claimant was free to take legal proceedings, but was required to return any duplicate compensation that he might receive. All negotiations, disclosures, material and evidence conducted or produced pursuant to the settlement process under the Plan were to be without prejudice and inadmissible as evidence adverse to the interest of the disclosing party in any court action.

Awards would be paid on an *ex gratia* basis, with no admission of liability by the Offshore Operators' Division of the CPA or its member companies. The Plan did not provide for any upper limit of compensation.

Although it seems to have been assumed by the Board, in considering the SOEP Development Plan application, that the CPA Policy is still in effect,⁴³⁰ there is in fact no administrative structure or funding arrangement in place. However, CAPP is currently formulating a new policy for unattributable damage, as discussed below.

(b) Attributable damage: Husky-Bow Valley Compensation Policy

In 1984, about the same time the CPA established its compensation policy for unattributable damage, Husky Oil Operations Ltd. and Bow Valley Industries Ltd. developed a complementary compensation policy for damage attributable to their east coast drilling program. This document consisted of a short statement of the companies' policy, together with an outline of the procedure to be followed by a claimant.

The policy stated that Husky-Bow Valley would recognize claims for damage to or loss of gear, equipment and vessels, and loss of income due to the incapacity of a fishing unit as a result of an incident. The compensation policy only applied to Canadian citizens, landed immigrants and Canadian companies who rely on fishing on a

⁴³⁰ See SOEP Development Plan Decision Report, *supra* note 10, s. 3.9.2, where the Board states: “. . . the Canadian Association of Petroleum Producers also has a fishery compensation policy in place for its East Coast operators which provides compensation for non-attributable damages.”

commercial or subsistence basis. Persons that might be indirectly affected, such as processors or marketers, were not covered by the policy. Claims were to be submitted by, or on behalf of, the owner, operator or the skipper of the fishing vessel directly to Husky-Bow Valley. Husky-Bow Valley would then either accept responsibility for the claim and offer a settlement, or reject the claim, giving reasons, together with any proposed settlement. If the claimant was not satisfied with the settlement offer, he could refer the claim to the appropriate Compensation Board established under the CPA Plan, and Husky-Bow Valley stated that it would abide by the recommendations of that Board.

This policy was designed as an optional settlement mechanism to avoid litigation, and did not affect the rights of a claimant to proceed with legal action. Of course, if a claimant accepted a settlement offer, he would be required to execute a release (the required forms of release were attached to the policy). Unlike the policy that Lasmo later developed, discussed below, this policy only covered claims of fishermen directly affected by physical damage, and as such did not expand the liability that Husky-Bow Valley would have had at law apart from the policy.

7.2 Statutory compensation plan for attributable damage

As noted above, the *Accord Act* contains a general scheme for compensation based on the financial security posted by an operator. Subsection 167(2) provides that the Board may require that payments be made out of funds available under this financial security in respect of any claim for which proceedings may be instituted under section 167 (which deals with liability for spills and debris), whether or not such proceedings have been instituted. This scheme is supposed to be overseen by a statutory committee established under section 169, consisting of members appointed by the federal and provincial governments and by the petroleum industry and the fisheries industry. However, no such committee has in fact been struck.

Unlike the industry schemes discussed below, which set up an optional arbitration procedure as an alternative to litigation, the statutory scheme does not prevent a claimant from pursuing his claim in court even if he accepts compensation from the Board. This is clear from subsection 168(4), which provides that any compensation paid by the Board shall be deducted from any award that may be made pursuant to a legal action brought under section 167. The right to go to court even if compensation is paid by the Board

would cover cases where the amount of financial security posted with the Board is not adequate to make full compensation, but a claimant's right to go to court is not prejudiced even if full compensation is awarded by the Board.

The Nova Scotia and Newfoundland Boards jointly issued Guidelines concerning compensation in September 1991.⁴³¹ These Guidelines discussed attributable and non-attributable damage and indicated avenues of compensation for each type of damage. In the case of attributable damage, the Guidelines note that a claimant may attempt to settle directly with the operator, make a claim to the Board for compensation to be paid out of the operator's financial security, or go to court. The Board has no legal basis for compensating non-attributable damage, but the Guidelines refer to the CPA Fishermen's Compensation Policy, which deals with gear and vessel damage resulting from debris, and Transport Canada's Ship-source Oil Pollution Fund, which provides compensation for damages caused by "mystery" oil spills.

The Guidelines set out a detailed procedure for making a claim with the Board for attributable damage, including a form of claim and instructions for completing it. This procedure requires a claimant to first attempt to settle a claim with the responsible operator before seeking recourse through the applicable Board. The Guidelines state that the overall compensation policy of the two Boards is to act as "back-up" for voluntary arrangements instituted by offshore operators.

The Guidelines expressly acknowledge that "there is no legislated requirement for offshore petroleum operators to establish a procedure for compensation."⁴³²

⁴³¹ Canada-Newfoundland Offshore Petroleum Board and Canada-Nova Scotia Offshore Petroleum Board, *Compensation Guidelines Respecting Damages Relating to Offshore Petroleum Activity*, September 1991. These Guidelines replaced an earlier brochure jointly issued by the Newfoundland and Nova Scotia Boards and the Canada Oil and Gas Lands Administration (COGLA) which described various potential sources of compensation and set out the procedure for making claims for damages resulting from offshore petroleum activity: *Compensation Information and Procedures Respecting Damages Relating to Offshore Petroleum Activity* (undated).

⁴³² Paragraph 2.2.1, p. 2.

7.3 Lasmo Fisheries Compensation Plan

The Fisheries Compensation Plan developed by Lasmo for the Cohasset-Panuke Project was the first on the east coast to address both drilling and production operations.⁴³³

(a) Requirement to have Plan

As part of the process for reviewing the development plan for the Cohasset Project,⁴³⁴ the Board appointed Mr. J. R. Pat Ellis as a commissioner for the purpose of conducting a public review.⁴³⁵ Although the *Accord Act* requires the Board to “promote and monitor compensation policies for fishermen sponsored by the fishing industry respecting damages of a non-attributable nature,”⁴³⁶ Mr. Ellis recommended that Lasmo establish a compensation plan for *attributable damage*:⁴³⁷

The establishment by the proponent of a compensation policy acceptable to the fishing industry and the Board is an important pre-requisite to gaining Board approval of the project. Development of the compensation package will require extensive negotiation and co-operation between the proponent and representatives of the fishing industry. The compensation plan must be comprehensive, clear and well understood by all concerned. Input to the public review focused on the importance of ensuring that the plan is in place before drilling begins, that it provide specific compensation for pre-emption of fishing activity, tainting and fouling of gear, and that it cover the activities of third parties involved in the project. The commission therefore recommends that:

LASMO and the fishing industry work together to develop a thorough and mutually acceptable attributable compensation plan prior to commencement of development drilling; that the Board consult with the Department of Fisheries and Oceans (DFO) prior to approving the plan, and that details of the plan be communicated to fishermen.

⁴³³ This project is now operated by PanCanadian Resources, but for purposes of discussing the Plan the original references to Lasmo will be retained.

⁴³⁴ Under section 143 of the *Accord Act*.

⁴³⁵ Pursuant to section 44 of the *Accord Act*.

⁴³⁶ Subsection 169(3).

⁴³⁷ Report of the Cohasset/Panuke Environmental & Socio-Economic Review Commission (Halifax: 1990) at p. 21.

LASMO's compensation plan clearly set out the conditions under which specific provisions will be made for the granting of compensation for pre-emption of fishing activity, tainting and fouling of gear due to condensate spills, or other eventualities resulting from the project.

The compensation package outline conditions under which provision will be made for losses to fishermen resulting from third parties associated with the project.

No reason was given in the report for requiring a compensation plan for attributable damage, nor why such a plan should benefit only fishermen. However Lasmo was negotiating such a plan in any case; this was important in obtaining support for the Cohasset Project from the fishing community (or at least its acquiescence). Fishermen constitute a powerful political group in Nova Scotia and their opposition might well have blocked the project.

Opposition from the fishing community to a 1986 proposal by Texaco Canada Petroleum Inc. to conduct drilling on Georges Bank created a political issue ahead of upcoming federal and provincial elections, and was a major reason why Texaco failed to get approval and why the governments imposed a moratorium on exploration on Georges Bank until at least January 1, 2000.⁴³⁸ The issues and events of that time are discussed in an interesting 1989 paper by Gordon Tidmarsh of Texaco.⁴³⁹ He states that an important concern of the fishermen was the establishment of a compensation policy for attributable damage:

An issue that was seen as vitally important to the fishermen was the provision of adequate compensation to insure that they would be protected financially in the event of gear or equipment damage, or loss of catch or fishing time, as a result of routine drilling activities or an accident resulting in an oil spill. The fishermen weren't satisfied with the provisions under the existing legislation or the fact that Texaco was a member of the Canadian Petroleum Association's fishermen's compensation policy for unattributable damage. They felt that if the fishery were severely damaged by a spill, they would not be able to recover their costs without a long arduous court case with no guarantees that claims would be fairly appraised even then.

⁴³⁸ *Accord Act*, section 141.

⁴³⁹ W. G. Tidmarsh, "Oil and Gas Exploration and the Fisheries of Georges Bank - a Continuing Conflict," presented at PetroPiscis 89 Conference, Bergen, Norway, October 1989.

Texaco Canada recognized this deficiency early in the process and began formulating a policy for attributable damage that recognized the value of the fishery to the region. The principal concern in formulating the plan was the recognition that expeditious settlement of uncontested claims was paramount. The plan contemplated the formation of an impartial board to adjudicate claims where the Company and the fishermen could not reach agreement. The plan also recognized the rights of fish plant workers to make claims if a spill interrupted normal processing activities, either through a direct impact on the facility itself or by eliminating or reducing supplies of raw material.

The plan was never presented to the various fishing groups operating in the Georges Bank area because events overtook the process. In developing the scheme, the Company recognized the need for flexibility and was prepared to discuss the details with fishermen before final adoption.

The Board accepted the recommendations of the Ellis Commission, stating as follows in its Decision Report:

Two of the principal regulatory objectives of the Board are to protect the fishery from potentially adverse effects associated with the activities of the oil and gas industry and to promote harmony between these two major offshore industries as a means of optimizing the economic opportunities associated with the marine environment. In attempting to achieve these objectives, it is a fundamental principle of the Board that, in the first instance, the two industries should attempt to resolve outstanding issues on a private and voluntary basis where environmental resources are not at risk.

...

Under the Implementation Acts, the Applicant is responsible for compensating fishermen for losses directly attributable to its actions. The Board also agrees with the recommendation of the Ellis Commission that the compensation plan must address questions relating to fouling of fishing gear, pre-emption of fishing activity, and tainting. The Applicant has met with representatives of the fishing community and has agreed to establish a compensation package for attributable damage to the fishery. It has also agreed to work with fishermen to develop an approach for compensation arising from loss of access to fishing grounds due to the presence of spilled oil relating to the Project.

The Board intends to offer assistance, if requested, to the parties in their efforts to develop a mutually acceptable compensation program and will only impose a program if such efforts fail.

The fishing industry has expressed concern that compensation may not be available to fishermen suffering losses from the activities of third parties employed on the project. The Ellis Commission has recommended that the

Applicant address this concern prior to the initiation of project construction. The Board agrees with this recommendation.⁴⁴⁰

The Board then imposed the following as a condition of approval of Lasmo's Development Plan:

Condition 7: Prior to conducting any project related offshore activities, the Applicant shall submit to the Board, for approval, a plan to compensate fishermen for attributable damage arising from the activities of third parties as well as its own activities. This plan shall reflect the input of the fishing community and it shall outline an approach to effectively communicate its provisions to that community.⁴⁴¹

(b) Description of Lasmo Plan

Although the Board only required Lasmo to develop a plan that reflected the input of the fishing community, as opposed to the approval of the fishing community, Lasmo in fact obtained the agreement of the major fishery organizations to the plan.⁴⁴²

(i) Lasmo Fisheries Liaison Committee

The Plan was negotiated through the "LASMO Fisheries Liaison Committee." This committee was formed in September 1990 and included all fishing industry representatives who had expressed concerns during the Ellis Commission hearings or who had asked to be involved. The Committee is continued under the Plan, which deals with representation on the Committee and the Committee's powers and duties, and sets out certain rules of procedure.

Among the most important duties of the Committee are the appointment of the Chair of the Compensation Board established under the Plan; the appointment of members of the Compensation Board for each claim; and the making of rules regarding the administration of the Plan and procedural matters for dealing with claims. The

⁴⁴⁰ *Cohasset-Panuke Project Development Plan Decision Report* (Halifax: Canada-Nova Scotia Offshore Petroleum Board, August 8, 1990).

⁴⁴¹ *Ibid.*

⁴⁴² LASMO Fisheries Compensation Plan dated June 1, 1992, signed by LASMO Nova Scotia Limited, Eastern Shore Fishermen's Protective Association, Andrew Henneberry, National Sea Products Limited, Eastern Fishermen's Federation, Nova Scotia Dragger Fishermen's Association, Stanley Purdy, Seafood Producers Association of Nova Scotia and Atlantic Herring Fishermen's Co-op Limited.

Committee is responsible for reviewing the Plan at least annually, may consider suggestions for revisions and may amend the Plan to incorporate agreed changes. The Committee may also make decisions to alter its membership. The Plan states that the Committee will be the forum for the fisheries industry and Lasmo to deal with matters of mutual concern. It also reviews the oil and gas observers program, which is an arrangement under which Lasmo hires a representative of the fisheries industry to act as an observer on its offshore facilities.

Lasmo had two representatives on the Committee, one of which acts as co-chair along with a representative elected by majority vote of the fisheries representatives. Except as otherwise provided in the Plan, all actions of the Committee must be approved by a majority of the voting representatives present at a meeting, and as well by Lasmo's voting representative. Lasmo therefore has a general right of veto with respect to the actions of the Committee.

(ii) Compensation scheme

The Plan is intended as an optional alternative to litigation and establishes an arbitration process for compensation claims against Lasmo made by "Claimants" for "Damage" from "Compensational Causes."

"Claimant" means a person or company employed or carrying on business in the Scotian Shelf commercial fisheries industry (harvesting, processing or marketing) or involved in subsistence fishing on the Scotian Shelf, who, if a person, is a Canadian resident or, if a company, is incorporated under the laws of Nova Scotia or Canada. Unlike the *Fisheries Act*, under which claims may only be made by licensed commercial fishermen, the Plan also includes persons in the processing and marketing sectors who may be affected, provided that they are Canadian residents.

"Damage" means a loss or damage to property or income, including loss of future income, that is substantiated and is quantified in monetary terms, but does not include loss for personal injury or death of any person, nervous shock, nor exemplary or punitive damages. Specific categories of damage set out in the Plan are: damage to or loss of fishing gear or equipment; damage to or loss of a fishing vessel; loss or deterioration of catch; loss or impairment of access to a fishing area; negative processing impacts; negative marketing impacts; and impairment or loss of fish stock. Compensation will not

be made for a general loss of access within an Exclusion Zone and a Restricted Zone around the project, as defined in the Plan, nor if the claimant or the fishing vessel was in the Restricted Zone without Lasmo's consent or was in the Exclusion Zone.

“Compensational Cause” means Damage caused by an activity of Lasmo, its co-venturer or their contractors in the operation of the Cohasset Project which is a release of “petroleum” or “debris” (as defined in the *Accord Act*), or is not authorized under the *Accord Act*. Damage from pollution resulting from authorized activities, such as the authorized disposal of drilling fluid or cuttings into the ocean, is therefore not covered. Also the damage needs to be attributable to the Project. The Plan states that non-attributable damage is dealt with by the Canadian Petroleum Association's policy,⁴⁴³ although Lasmo was never a participant in this plan.

The Plan does not establish an upper limit of liability, although arguably the statutory limit applies by implication, at least in cases where there is no fault or negligence.

(iii) *Procedure*

Under the Plan, a Claimant first makes his claim to Lasmo. If the claim is not satisfactorily resolved, the Claimant may refer his claim to a Compensation Board established under the Plan. At this point both parties may agree, in writing, that the decision of the Compensation Board will be binding. Lasmo will ordinarily agree to be bound by a decision of the Compensation Board if requested by the Claimant, but if Lasmo does not agree to be bound it will provide written reasons for this decision.⁴⁴⁴ If the non-binding option is chosen, proceedings under the Plan are without prejudice and either party may have its rights and liabilities determined by the Courts or otherwise. In that case the findings of the Compensation Board may not be introduced as evidence without the consent of both parties, and evidence adduced by one of the parties before the Compensation Board may only be adduced by the same party in any Court proceedings.

⁴⁴³ Plan, p. 5.

⁴⁴⁴ During negotiations, the fisheries representatives, particularly the Seafood Producers Association of Nova Scotia (SPANS), expressed serious concern about Lasmo's position that it did not wish to be bound to this procedure, but this aspect was eventually agreed to.

(iv) *Scope of claims covered by Plan*

The Lasmo Plan would compensate not only fishermen who are directly affected by pollution or debris, but also claimants such as fish processors and marketers who are indirectly affected. "Negative processing impacts" specifically include: increased processing costs; production interruption; on-going reductions in production; and plant shut-downs. "Negative marketing impacts" include: additional holding costs; price downgrading; product rejection; marketing interruptions; on-going reductions in volume; loss or impairment of markets; incremental costs to maintain consistency of market supply; and insufficient volume to support marketing structure.⁴⁴⁵ Lasmo also accepted responsibility for the health of fish stock, including reduction or elimination of fish stock and reduction or elimination of the reproductive capacity of fish stock.⁴⁴⁶

The definition of "Claimant" is broad enough to include employees of enterprises engaged in the Scotian Shelf commercial fisheries industry. Such employees would appear to have the right to claim for loss of income independently from their employers, who may themselves be only indirectly affected. The Plan specifically covers losses outside of Canada "to the extent that there is an ownership relationship with the Claimant, e.g., subsidiaries of Claimant companies, associated or affiliated Claimant companies, investment by Claimant companies or other relationships."⁴⁴⁷ Since this type of loss is covered outside Canada, pure economic losses within Canada based on ownership relationships are presumably covered as well, although not specifically mentioned.

The voluntary assumption of liability for economic losses suffered by almost anyone involved in the fishing industry, including processors and marketers and their employees, appears to go beyond what Lasmo's liability would otherwise be at law, as discussed above. The wide scope of the plan may have been influenced by the recommendations of the Hibernia Environmental Assessment Panel in January 1986 and the resulting Decision Report of the Newfoundland Board in June 1986. In its Decision

⁴⁴⁵ Plan, p. 15.

⁴⁴⁶ Plan, p. 16.

⁴⁴⁷ Plan, p. 16.

Report, the Board noted that the issue of a compensation program arose during the Panel hearings. The Board further noted that operators were individually responsible for losses directly attributable to their actions and that a program for non-attributable damage had been established through the CPA in consultation with fisheries interests. The Board then noted that

However, no protection is expressly provided for plant owners and workers who may experience loss of income as a result of an oil spill or, in the case of offshore trawler operations, as a result of being denied access to traditional fishing grounds.⁴⁴⁸

And that:

The Panel has recommended that government establish a comprehensive policy of compensation for all types of potential economic damage to fisheries interests including induced effects on the processing sector and loss of access to fishing grounds (Panel recommendation #35).⁴⁴⁹

These comments no doubt influenced the scope of coverage of the Lasmo Plan, which in turn no doubt influenced the later Hibernia and SOEP Plans.

7.4 Strait Crossing Development Inc.

Although quite different in both structure and purpose from the oil industry compensation plans, it is interesting to note the fisheries compensation programs that were next developed on the east coast. These were plans developed in connection with the construction of the Confederation Bridge between New Brunswick and Prince Edward Island.

Strait Crossing Development Inc. had obtained the right to design, build, finance and operate the bridge through a number of contractual arrangements with the federal government, including a Fisheries Compensation Agreement. This provided for the establishment of a Fisheries Liaison Committee, which was given a mandate to develop two compensation programs: the "Lobster Compensation Program" and the "Multi-Species Program." These two programs were eventually adopted in May 1994 and

⁴⁴⁸ Hibernia Decision Report 86.01, *supra* note 5, at 87.

⁴⁴⁹ *Ibid.*

following this demands for payment under the programs were made to Strait Crossing. However, Strait Crossing objected to the substance of the programs as developed by the Fisheries Liaison Committee and the matter wound up in court.⁴⁵⁰ The court summarized the issue as follows:

Strait Crossing argues that the programs are not valid because they do not conform to the mandate for their development, as defined in the FCA [Fisheries Compensation Agreement], i.e., they do not *compensate for anticipated loss of income* resulting from disturbance or dislocation caused by construction of the bridge. Instead, the applicant submits, the programs reflect what the FLC [Fisheries Liaison Committee] regarded as an “appropriate compensation program” and what was saleable to and acceptable by the fishers. This approach disregarded any considerations of “loss of income” criteria, the argument concludes, and therefore fell outside of the mandate given to the FLC under the FCA.⁴⁵¹

The case deals with the issue of when a court should interfere with the decision of a person or body to whom the parties to a contract have delegated the performance of a function. In the result, the court found that the Fisheries Liaison Committee had acted properly and that the two compensation programs were valid. Although the legal issue in this case is not particularly relevant to the development of oil industry compensation programs, the case is interesting as a demonstration of how extraneous social and political considerations can override legal principles in the area of fisheries compensation.⁴⁵²

7.5 Hibernia Management and Development Company

The next compensation programs to be developed on the east coast were two compensation programs in relation to the Hibernia Project, dealing respectively with oil spills⁴⁵³ and gear and vessel damage.⁴⁵⁴ Each program is structured in the same way. The

⁴⁵⁰ *Strait Crossing Development Inc. v. Canada (Attorney General)* (1995), 33 Admin. L.R. (2d) 9.

⁴⁵¹ At 17.

⁴⁵² It is interesting to note that Canning & Pitt Associates, Inc. acted as a consultant to the Fisheries Liaison Committee. Canning & Pitt Associates, Inc. also assisted in the development of the Hibernia and SOEP programs, and continue to assist in the development of the CAPP program for non-attributable damage.

⁴⁵³ Hibernia Management and Development Company – Commercial Fisheries Compensation Program – Loss resulting from Oil Spills – February 18, 1998.

programs provide that a claimant will first present a claim to HMDC, at which point HMDC will attempt to reach a settlement informally. If HMDC rejects the claim, or if it accepts the validity of the claim but agreement cannot be reached on the amount of the claim, a claimant may refer the claim to a compensation board established under each program. HMDC commits to participate in an arbitration process conducted by the compensation board and to abide by the decision of the board, if the claims are within stated limits (being the maximum amounts that a compensation board can award) as follows:

Gear and vessel damage: \$1-million to any claimant for any single claim

Oil spills: \$5-million in total for all claimants for any single spill. This limit applies to total monies actually awarded by the Compensation Board, irrespective of other settlements by HMDC in respect of the same spill.

If claims exceed these limits, HMDC may waive these limits and agree to use the arbitration process established by these programs, but it is not obligated to do so.

Use of the arbitration procedure established by the programs is entirely voluntary for claimants, who would also have the option of making a claim through the CNOBP or through the courts. However, if a claimant wishes to refer his claim to a compensation board under the program, it must agree to be bound by the results of the process.

Eligible claimants

Only “licensed and/or registered commercial fish harvesters and fish processors,” and, in the case of oil spills, aquaculturalists, are eligible to claim under these programs. Claims may only be made by the holder of the relevant licence (e.g. fishing licence or processing licence). Wages or shares of crew members and plant workers will be covered as part of the claim of a primary claimant, but it would appear that such parties have no right to bring a claim themselves. In case of disputed eligibility, the relevant compensation board may make a ruling. If a claimant is rejected on the grounds of

⁴⁵⁴ Hibernia Management and Development Company – Commercial Fisheries Compensation Program – Loss resulting from Gear and Vessel Damage – February 17, 1998.

eligibility, he may pursue the claim through another avenue, such as through the CNOBP or the courts.

Coverage

These programs cover (1) damage to fishing gear and vessels which is a direct consequence of project-related activities, and (2) all actual loss or damage to eligible claimants which results from the damaging of fishing gear or vessels or from an oil spill or authorized discharge from Hibernia's offshore production facility. "Authorized discharge" is defined as a discharge, emission or escape of *petroleum* that is authorized by regulation. Other operational discharges are therefore not covered by the program. "Spill" is defined as a discharge, emission or escape of petroleum other than one that is authorized pursuant to the regulations or any other federal law or that constitutes a discharge from a ship to which Part XV or XVI of the *Canada Shipping Act* applies. Accordingly, oil spills beyond the point of transfer into a tanker are not covered by the program (however, these are addressed by the *Canada Shipping Act*). The Programs specifically cover the following:

Gear and Vessel Damage:

1. all actual loss related to damage to fishing gear or equipment, including (but not limited to) the cost of
 - (a) repair
 - (b) cleaning
 - (c) replacing gear or equipment which is lost or damaged beyond repair.

2. all actual loss related to damage to a fishing vessel and related equipment, including (but not limited to) the cost of
 - (a) repair
 - (b) cleaning
 - (c) towing
 - (d) dry-docking
 - (e) renting or leasing a substitute vessel
 - (f) replacing a vessel which is lost or damaged beyond repair.

3. all actual loss to the harvester resulting directly from gear or vessel damage, including
 - (a) the estimated landed value (i.e. value at point of landing) of the fish caught and lost by a fishing vessel

- (b) the estimated landed value of the fish not caught because a vessel could not fish
 - (c) the reduction in the quantity of catch landed because the vessel could not fish as efficiently
 - (d) the reduction in landed value of fish caught which deteriorated or spoiled as a result of the damage.
4. all actual loss to a fish processor resulting directly from a gear or vessel damage incident.

Oil Spills:

1. actual loss of fishing income, including future income, resulting from
 - (a) loss of access to a fishing area affected by a spill
 - (b) reduced value of a catch to the harvester because of tainting or spoiling
 - (c) reduced value of a catch to a fish processor because of tainting or spoiling
 - (d) loss of market confidence or loss of buyers
 - (e) an inability to fish because of damage to gear or vessels due to contact with spilled oil
2. damage to fishing gear and equipment due to contact with spilled oil, including (but not limited to) the cost of
 - (a) repair
 - (b) cleaning
 - (c) replacing gear or equipment which is damaged beyond repair.
3. damage to a fishing vessel and related equipment due to contact with spilled oil, including (but not limited to) the cost of
 - (a) repair
 - (b) cleaning
 - (c) towing
 - (d) drydocking
 - (e) renting or leasing a substitute vessel

Claimants are required to mitigate their losses; a failure to mitigate may result in the reduction of an award. A portion of a claim may include reasonable expenses incurred directly by a claimant in discovering and assessing the damage and preparation costs may be allowed by the compensation board at its discretion. In the case of gear and vessel damage, the compensation board may apportion fault and adjust its award appropriately.

Each program states that the amount awarded should ensure that a claimant is no better or worse off than before the loss or damage occurred. The programs do not apply to any claim for loss of life or personal injury.

Procedure

The programs each provide for the establishment of a compensation board, including terms of reference, and address general matters of procedure with respect to making a claim and the conduct of a hearing before the compensation board. Detailed matters of procedure with respect to the hearing are to be determined by the compensation board. Although there is no reference to the *Arbitration Act* in the actual program document, the Notice of Claim form attached to the document specifies that the submission of a claim to the compensation board is an irrevocable submission to a binding claim resolution process under the provisions of the *Arbitration Act*, that the compensation board has all the powers conferred on an arbitrator under the *Arbitration Act* and that the *Arbitration Act* shall be followed with respect to procedure.

The compensation board is empowered to determine the eligibility of the claimant and the validity of the claim; whether HMDC is responsible for the loss or damage; and the amount of the award. The compensation board may retain outside experts to advise it.

If the compensation board finds that HMDC was not responsible for the loss or damage, the board will advise the CAPP Management Committee by letter. If the claimant chooses to file a claim under CAPP's non-attributable damage compensation program (discussed below), the compensation board will forward a copy of all written evidence to the CAPP Management Committee. Except for this, the findings of the Board may not be introduced as evidence in any other proceeding without the consent of both parties.

7.6 Sable Offshore Energy Project

In its early planning, SOEP established a Fisheries Liaison Committee which includes representatives of various offshore fisheries interests. It is co-chaired by representatives of SOEP (Dave North, Operations Manager) and the Seafood Producers Association of Nova Scotia (Roger Stirling, President). Through the Committee, SOEP and the fisheries interests negotiated an agreement consisting of a short statement of

seven principles that will “guide interactions” between the petroleum and the fishing industries.⁴⁵⁵ These principles address:

- (1) Gear and vessel loss and damage: covered by compensation program
- (2) The 500 m radius safety zone: the fisheries industry will not request compensation for loss of access in the 500 m safety zone immediately surrounding the platforms, as these areas have not been economically significant in the past
- (3) Fisheries observers: SOEP will fund an observer program which will be reconsidered after two years
- (4) Operational impacts beyond 500 m safety zone: “SOEP recognizes its responsibility to protect the fisheries industry from economic loss resulting from operational impacts beyond the 500 m radius safety zone, even if such loss is the result of activities permitted under law or by regulations (e.g. impacts caused by discharges including drill cuttings). Although SOEP will endeavour to prevent or mitigate any such impacts, it will compensate the fisheries industry fully and fairly for any actual economic loss incurred as a result of SOEP activities.”
- (5) Pipelines: criteria for trenching; agreement to indemnify fishing industry for any damage to pipeline and resulting consequential damages; agreement to compensate fishing industry for any damage to or loss of fishing gear; agreement to compensate fishing industry for any actual economic loss incurred as a result of pipelines and associated exclusion zones
- (6) Continuing liaison: agreement that SOEP-Fisheries Liaison Committee will “elaborate the above elements” and continue discussing issues

This agreement states that “[b]oth parties will request that these elements be made a condition of approval of the Sable Gas project.” The Joint Review Panel responded to this as follows:

⁴⁵⁵ SOEP-Fisheries Industry Agreement on Offshore Commercial Fisheries Issues dated April 14, 1997, filed as Exhibit B-1-51 in the Joint Review Panel proceedings to consider the Sable Gas Projects.

The fisheries industry asked the Panel to recommend making the agreement a condition of Project approval. The Panel is not disposed to recommend such a condition for three reasons. Firstly, the agreement has yet to be finalized and the Panel has no way of knowing what it would be recommending. Secondly, the agreement and the subsequent elaboration of a specific compensation program are the result of a voluntary approach that both parties have agreed to undertake. The imposition of an outside authority at this time seems contrary to the spirit of the agreed upon approach. Thirdly, the fisheries industry would in any event have access to compensation for portions of the offshore Project that fall under the NEB Act, which would include the offshore pipeline. In the event of Project-related damages, a legislated procedure exists whereby affected parties can seek compensation through a negotiator or arbitration committee appointed by the federal Minister of Natural Resources Canada. In addition to this process, there are other compensation mechanisms that would avoid redress to a civil court. As noted in the SOEP application, the Canada-Nova Scotia Accord Act provides a \$30 million absolute liability for any damages caused by spills or debris from or within the Project area. Finally, further protection is provided under federal fisheries legislation and the Canada Shipping Act.⁴⁵⁶

The CNSOPB agreed with the Panel on this point and declined to make the agreement a condition of approval. However, the Board stated that it would “closely monitor the interaction of the two industries and the effectiveness of the agreement and may require SOEP to undertake specific action in relation to fisheries in the future.”⁴⁵⁷

The Board specifically dealt with the issue of compensation programs as follows:

In addition to the mandatory regulatory requirements described above, there are two voluntary programs that have been put in place to protect the fishery. Through negotiations, the Proponents and the fishing industry have developed the SOEP Fisheries Compensation Program. It provides a simple, inexpensive and expeditious alternative to the legal system. In addition to this project specific program, the Canadian Association of Petroleum Producers also has a fishery compensation policy in place for its East Coast operators which provides compensation for non-attributable damages.

Given that the fishing industry and petroleum operators have been able to establish such programs on a voluntary basis, the Board does not believe that it is necessary to impose any further conditions regarding fishery compensation. However, as stated in Section 3.11.1 the Board intends to monitor these programs closely through its Fisheries Advisory Committee and other means. If it is

⁴⁵⁶ Joint Public Review Panel Report, *supra* note 7, at 59.

⁴⁵⁷ SOEP Decision Report, *supra* note 10, at 66 (section 3.11.1).

determined that these programs are deficient, the Board will take appropriate steps to address this issue.⁴⁵⁸

SOEI has at this point developed a program for gear and vessel damage⁴⁵⁹ which is essentially identical to the Hibernia program. As with Hibernia, a separate program is being developed for oil spill damage, but this is not yet complete.

7.7 Legal issues with respect to compensation plans for attributable damage

(a) Authority of Board to require compensation plan

As described above, the Board required Lasmo to develop a compensation plan as a condition of approving the Cohasset development plan. In doing so, the Board may have been influenced by the 1986 decision of the Newfoundland Board in respect of the Hibernia Development Plan.⁴⁶⁰ In dealing with fisheries compensation issues in section 3.11.2 of the Decision Report, the Newfoundland Board stated as follows:

The Board also urges discussion between the Proponent and representatives of those fishing interests potentially affected by an environmental accident arising from the Hibernia development to establish, in advance of the installation of facilities, a program to provide compensation for those economic losses which might consequentially occur.

The Board is prepared to arrange for such expert advice as may be necessary to achieve these purposes and, in the absence of agreement between the parties, to use its authority to impose the establishment of such a program.

The Nova Scotia Board took the same approach in its Decision Report on the Cohasset Project:

The Board intends to offer assistance, if requested, to the parties in their efforts to develop a mutually acceptable compensation program and will only impose a program if such efforts fail.⁴⁶¹

⁴⁵⁸ *Ibid*, at 61–62 (section 3.9.2).

⁴⁵⁹ Sable Offshore Energy Incorporated – Commercial Fisheries Compensation Program – Loss resulting from Gear and Vessel Damage – May 1, 1998. Document Control No. XA-Z00-L-80-0007-00-C1.

⁴⁶⁰ *Supra*, note 5.

⁴⁶¹ *Supra*, note 440.

The Board was apparently of the view that it had the authority to “impose” a voluntary compensation program. The *Accord Act* provides that the Board may approve a development plan “subject to such requirements as the Board deems appropriate or as may be prescribed.”⁴⁶² This broad language by itself would appear to allow the Board to require an operator to develop a compensation plan. However, since the Act already contains a compensation scheme for attributable damage, it seems questionable that the Board could require an operator to develop a parallel scheme.

The Act only refers to compensation policies in the context of unattributable damages; the Board is required to “promote” compensation policies in respect of such damages.⁴⁶³ Having regard to this “soft” language, the Board arguably could not *require* an operator to adopt a compensation policy for *unattributable* damages as a condition of approval; it could only promote or encourage such policies. If this is accepted, then *a fortiori*, the Board could not require an operator to develop a compensation policy for attributable damage, as the compensation of attributable damage is already fully addressed in the Act. While it would no doubt be to the advantage of an operator to establish a procedure for dealing with claims, it is another matter for the Board to require the operator to do so. It would seem that the Act sets out the legal remedies and that any voluntary settlement procedure should be exactly that: voluntary.

As noted above, when this issue recently came before the Board again in the matter of the SOEP Development Plan, the Board did not impose any condition with respect to a fisheries compensation program. It is submitted that this was the correct approach for the Board to take.

(b) Privity and enforceability

To the extent that certain indirect losses covered by these compensation plans would be too remote to entitle claimants to compensation at common law or under the statutory scheme, the enforceability of such plans may be important. As described above, the Lasmo Plan is structured as an agreement between Lasmo and certain fisheries

⁴⁶² Subsection 143(4).

⁴⁶³ Subsection 169(3).

organizations and other representatives. However the Plan is for the benefit of third party claimants who, although they are named in the Plan, are not parties to the contract. The Hibernia and SOEP Plans are not structured as signed agreements, but they were similarly the result of negotiations between the operators and certain fisheries organizations. It is a general principle of law that only a person who is a party to a contract can sue upon it.⁴⁶⁴

This rule has been abrogated in certain cases by legislation. For example, the *Insurance Act*⁴⁶⁵ provides that a life insurance policy is enforceable by the designated beneficiary, even though the beneficiary is not a party to the contract. Another example that is more closely analogous to this situation is that of a collective agreement; under the *Trade Union Act*⁴⁶⁶ an employee can claim the benefits of a collective agreement made between his employer and his union. However, there would appear to be no statute that would entitle third party claimants to enforce any rights under these compensation plans.

There are three other ways by which a third party can be given the benefit of a contract: (1) a debt or other legal chose in action can be assigned to a third party;⁴⁶⁷ (2) a contract may establish a trust that can be enforced by a third party beneficiary; and (3) a contract may be made by an agent on behalf of someone else (the agent's "principal"), who will then be bound by and have the benefit of the contract.

An argument might be made that the fisheries representatives agreed to the plans as agents for that class of people who qualify as claimants. A similar argument was considered in *Scruttons Ltd. v. Midland Silicones Ltd.*,⁴⁶⁸ which concerned the liability of stevedores for damage to goods where the bill of lading between the shipper and the

⁴⁶⁴ *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.* [1915] A.C. 847 (H.L.); *Scruttons Ltd. v. Midland Silicones Ltd.* [1962] A.C. 466, [1962] 1 All E.R. 1 (H.L.); *Canadian General Electric Co. Ltd. v. Pickford & Black Ltd.* [1971] S.C.R. 41, 14 D.L.R. (3d) 372 (S.C.C.); *Greenwood Shopping Plaza Ltd. v. Beattie*, [1980] 2 S.C.R. 228, 111 D.L.R. (3d) 257 (S.C.C.).

⁴⁶⁵ R.S.N.S. 1989, c. 231, s. 197: "A beneficiary may enforce for his own benefit . . . the payment of insurance money made payable to him in the contract or by a declaration . . ."

⁴⁶⁶ R.S.N.S. 1989, c. 475, s. 41: "A collective agreement entered into by an employer or an employers' organization and a trade union as bargaining agent is . . . binding upon . . . every employee . . . and [the] employer."

⁴⁶⁷ *Judicature Act*, R.S.N.S. 1989, c. 240, s. 43(5).

⁴⁶⁸ *Supra*, note 464.

carrier provided that neither the shipper nor anyone else would be responsible for damage during the course of transit. Lord Reid set out four requirements for the validity of an agency contract:

I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome . . .

These requirements were considered in *New Zealand Shipping Co. Ltd. v. A. M. Satterwaite & Co. Ltd.*,⁴⁶⁹ which, like *Scruttons*, also considered a clause limiting the liability of the carrier and stevedore. The stevedore was not a party to the contract, but the court held that the stevedore was nevertheless entitled to exemption from liability on the basis that the carrier had contracted as agent for the stevedore. This decision was explained as follows by the Supreme Court of Canada in *Greenwood Shopping Plaza Ltd. v. Beattie*:⁴⁷⁰

In that case, however, the stevedore was the carrier's agent in New Zealand and the Court concluded that the carrier had authority when entering into the contract of carriage to contract for the stevedore. In addition, it was considered that the stevedore, in performing the service of unloading the ship for the shipper, had given consideration.

With respect to these compensation plans, the fisheries representatives presumably had no actual authority to contract for potential claimants, all of whom would not even have been ascertainable at the time. Although Lord Reid suggests in *Scruttons* that later ratification of the contract by a third party might suffice, the fourth condition remains a problem as there is no consideration moving from the claimants.

The Supreme Court in *Greenwood* also considered the trust exception, which is based on the principle that a right to a benefit under a contract is a property right that can

⁴⁶⁹ [1975] A.C. 154, [1974] 1 All E.R. 1015 (P.C.).

⁴⁷⁰ *Supra*, note 464.

be held on trust. The Court stated that “[a] common test applied to determine whether a trust has been created has been to pose the question whether the parties to the contract could change the contractual terms without reference to the alleged *cestui que trust* [beneficiary]. If the answer is yes, no trust has been created.” The Lasmo Plan provides that the Lasmo-Fisheries Liaison Committee will review the Plan at least annually and gives the Committee the power to amend the Plan “to incorporate agreed to changes.” Based on the test enunciated by the Supreme Court, the Plan therefore cannot be regarded as creating a trust in favour of potential claimants. The Hibernia and SOEP plans do not specifically provide for amendment, but presumably those plans could be changed with the agreement of the fisheries organizations, if not unilaterally by the operators.

Since it would appear that the agency and trust exceptions do not apply, it is at least questionable that these plans would be enforceable by claimants against the operators. Since a claimant would still have his rights under the statutory scheme and at common law, this will be an issue only to the extent that the operators voluntarily accept liability that they would not otherwise have. In this regard, the rights of claimants may depend on the good faith of the operators.

(c) Financial responsibility and access to security

None of these plans require the operator to carry insurance or to provide other evidence of financial responsibility to pay claims;⁴⁷¹ nor are they tied to the security posted with the Board.

⁴⁷¹ In this regard the these plans may be contrasted with the *Offshore Pollution Liability Agreement* (OPOL), a voluntary industry scheme established by North Sea operators in 1975. See W. T. Onorato, “A Regional Approach to Offshore-Sourced Oil Pollution Damage: The North Sea Voluntary Compensation Scheme (OPOL)” in M. J. Valencia *et al.* (eds.), *Shipping, Energy, and Environment: Southeast Asian Perspectives for the Eighties* (Halifax: Dalhousie Ocean Studies Programme, 1982) at 284. The text of OPOL, not including the most recent amendments, is also reproduced in *Contemporary Issues in Ocean Management and Development*, vol.1.B, Primary Documents (Halifax: Marine Affairs Program, Dalhousie University) at 490.

The OPOL scheme broadly parallels the *Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources*, 1977, in somewhat the same manner as TOVALOP (Tanker Owners’ Voluntary Agreement Concerning Liability for Oil Pollution) parallels the *International Convention on Civil Liability for Oil Pollution Damage*, 1969.

The plan is administered by an English corporation limited by guarantee, called “The Offshore Pollution Liability Association Limited” (the “Association”). Contracting parties accept strict liability for

Should an operator become insolvent as a result of a catastrophic accident and not have sufficient insurance coverage, the security posted with the Board may be all that will be available to satisfy claims. However this security will be paid out by the Board under the statutory scheme, not the operator's plan. While the Board may attempt to harmonize the two, this may be impossible if the total damages, remedial costs and expected abandonment costs exceed the amount of the security. In that event, claimants suffering direct damages may object to sharing the available funds with those claimants whose economic losses are considered to be too remote as a matter of law. It should also be noted that the class of claimants under the operators' plans is different from that under the statutory scheme; the latter is available to any person who incurs loss or damage, while the operators' plans are applicable only to claimants involved in the commercial fisheries industry.

As a practical matter, the limits applicable to the Hibernia and SOEP plans are sufficiently low that the statutory security should exceed any claims that may be brought under these plans. However, there is no limit specified in the Lasmo Plan, which is also broader in its scope.

pollution damage and the cost of remedial measures to a limit of \$60 million (U.S.) per incident, and agree to provide insurance or other evidence of financial responsibility for at least the same amount (\$120 million U.S. annual aggregate). Such other evidence may be a surety bond or guarantee issued by a surety company or guarantor acceptable to the Association, or if a party meets certain financial criteria it may qualify as a self-insurer. A party to OPOL makes the agreement applicable to specified offshore facilities by designating the licence under which the facilities are installed and operated. Evidence of financial responsibility must then be maintained with the Association during the period that operations are taking place.

Anyone may claim compensation for pollution damage (defined as direct loss or damage caused by contamination which results from a discharge of oil) and public authorities may in addition claim for the cost of remedial measures. To the extent that a contracting party is unable to meet its obligations, or if its insurer does not respond, the parties to OPOL agree to contribute proportionately to satisfy claims up to the limit of liability. For the purpose of calculating each party's contribution, offshore facilities are classified into units. Each party is responsible for its proportionate share based on the number of units that it operates relative to the total number of units (except those of the defaulting party). Claims are filed directly against the party concerned and the Association only becomes involved if the party responsible fails to pay. OPOL does not affect any remedies that may otherwise be available at law.

Although OPOL is a voluntary industry scheme, the United Kingdom requires licencees in its sector of the North Sea to be parties.

7.8 CAPP Compensation Program for Non-attributable Damage

As discussed, the 1984 CPA Fishermen's Compensation Policy for non-attributable damage, although never formally retracted, is, as a practical matter, no longer applicable because of the lack of an administrative structure and funding mechanism. Since the time that policy was established, the companies involved on the east coast have changed and activities have expanded to include production operations. CAPP, the successor to the CPA, is in the process of developing a new policy for non-attributable gear and vessel damage and a final proposal is now before the CAPP Executive Policy Group for consideration.⁴⁷²

Like the original CPA policy, the new CAPP policy will not apply to oil spills as these will generally be attributable to a particular operator and, if not, will be covered by the Ship-source Oil Pollution Fund under the *Canada Shipping Act*. The structure of the proposed program is broadly similar to the programs for gear and vessel damage established by HMDC and SOEP. Like those programs, eligible claimants are limited to duly licenced or registered commercial fish harvesters, aquaculturalists and fish processors. The scope of coverage is essentially the same as described above for the Hibernia gear and vessel damage program.

As for the Hibernia and SOEP programs, when a claim is made there will first be an informal attempt to settle it through discussion and negotiation. Claims will be presented to the Nova Scotia or Newfoundland Regional Manager of CAPP,⁴⁷³ who will review the claim and obtain the required information. The Regional Manager will then develop a recommendation for presentation to the "CAPP Compensation Committee," which will consist of three members appointed by the CAPP East Coast Committee and the two Regional Managers (*ex officio*). This committee will have the authority to settle (or refuse) claims. If the claim cannot be resolved, it may then be referred to the

⁴⁷² Canning & Pitt Associates, Inc., *Canadian Association of Petroleum Producers Compensation Program for Non-attributable Gear and Vessel Damage – Funding, Administration and Program Documents* (September 1998).

⁴⁷³ CAPP has established two regional offices on the East Coast: one in St. John's and one in Halifax, each of which is managed by a Regional Manager.

Compensation Appeal Board in the same manner as a referral to a compensation board under the Hibernia and SOEP programs.

A separate Appeal Board will be established for the Newfoundland and Nova Scotia offshore areas. Each Appeal Board will consist of three members, led by an independent Chairperson acceptable to both CAPP and the fishery industry representatives of the areas where the program will operate. The other members will be appointed respectively by the CAPP East Coast Committee and by the fisheries industry in the relevant region.

Administrative costs and damage awards will be paid by CAPP. A funding formula has not yet been agreed upon, but the following is proposed:

Administrative costs: these would include program management activities not related to a specific claim; costs of program information documents; communications costs; and annual retainers for Appeal Board members. These costs would be established in an annual budget and would be shared by participants in the program in proportion to each participant's percentage of total east coast acreage held under licence in the previous calendar year (regardless of activity level during the year).

Claims costs: these would include expenses incurred in assessing a particular claim and any compensation payments paid to claimants. These costs would be shared based on each participant's number of "activity days" in the previous calendar year. An activity day is any day or partial day during which a vessel operating on behalf of an operator transits a marine area, except for vessels under 45 feet in length and vessel activities wholly within a safety zone. This would include supply, service or cargo vessels (including tankers), survey or maintenance vessels, and construction vessels such as dredging or pipe-laying vessels. Operators who are not members of CAPP, such as geophysical survey companies or non-member oil companies, would be asked to pay a fee for every activity day that they generate. (Alternatively, such companies could join CAPP to avoid payments in advance of any claims.) It is doubtful if the Board would have the authority to make participation in the plan a condition of approval, since

the *Accord Act* merely requires the Board to “promote and monitor” compensation policies respecting damages of a non-attributable nature.⁴⁷⁴

To date, no claims have been made under the old CPA policy, and it is not expected that future claims will be significant as, in most cases, damage will be attributable.

7.9 Conclusion

The Hibernia and SOEP programs, being third-generation programs for the east coast, appear to be sound and workable and have gained acceptance by fisheries interests. These programs cover certain indirect damages that may be suffered in the processing sector, including loss of employment of plant workers, but are not as broad in this regard as the Lasmo Plan and arguably do not extend liability under the *Accord Act*. The Hibernia and SOEP programs are virtually the same, and will probably serve as the model for compensation programs for other operators.

Although the proposed CAPP program for unattributable damage provides for its own Appeal Boards, the CAPP subcommittee that developed this proposal has recommended that industry consider appointing common appeal boards to deal with both attributable and non-attributable claims. This would involve the establishment of one board for all operator programs and the CAPP non-attributable program. This makes sense, since it would avoid the duplication of proceedings in a case where an operator’s board finds that a claim is not attributable to the operator, and therefore should be referred to the CAPP program, or *vice versa*. It would also avoid the potential for conflicting decisions between boards, save administrative costs and ensure consistency in approach.

Although not mentioned in the CAPP recommendation, it would also make sense to develop a single compensation program for both attributable and non-attributable damage, that is adopted by all operators. The Hibernia, SOEP and CAPP programs are essentially the same, and could easily be consolidated into one universal program utilizing a common appeal board. (If separate boards are required for the Newfoundland

⁴⁷⁴ Subsection 169(3).

and Nova Scotia offshore areas for political reasons, it is suggested that these Boards at least have a common Chairperson and that the industry-appointed members be the same, to achieve consistency in approach.) PanCanadian, by agreement with the original signatories, would then replace the Lasmo program put in place in 1992 with the universal program. New operators would simply adopt the universal program. This program could be administered by a committee, established through CAPP, for example, which could make amendments from time to time as experience is gained or as new issues arise which should be addressed in the program.

CONCLUSIONS AND RECOMMENDATIONS

Although oil and gas exploration has been conducted offshore the east coast of Canada for some thirty years, operations have only recently entered the production phase. Oil is currently being produced in both the Nova Scotia and the Newfoundland offshore areas from the Cohasset-Panuke and Hibernia projects respectively, and construction is underway on the Sable Offshore Energy Project, which will be the first offshore gas production on the east coast. Other production projects based on known discoveries are being planned and oil and gas exploration activity has increased significantly recently. There is every indication that the east coast will soon become a major oil and gas producing area.

As activity increases, pollution of the marine environment from oil and gas activities will become more of an issue. The possibility of accidental spills and blowouts is not the only concern; the routine discharge of effluents as part of normal operations is potentially also a problem, particularly as cumulative effects from increased activity become significant. Although there are many possible types and sources of pollution from normal operations, the most serious are oil contained in produced water and oil-based drilling mud adhering to drill cuttings.

Under international law, Canada has the right to exploit the natural resources of its continental shelves and within its Exclusive Economic Zone. In contrast to the detailed regime of international law that has developed with respect to operational and accidental pollution from ships, there is presently no global conventional law dealing specifically with pollution from offshore oil and gas operations. However, there are general obligations under international customary law and the 1982 *Law of the Sea Convention*, and Canada has a legal framework in place that meets these general requirements.

Through the *Oceans Act*, Canada has extended the application of its federal laws beyond its territorial sea to marine installations and structures on its continental shelves and within its Exclusive Economic Zone. The *Oceans Act* also allows for the extension of provincial laws to the offshore, but regulations have not yet been promulgated to accomplish this. There is some doubt as to whether federal law includes the common law, and accordingly whether the common law presently applies to offshore installations and

structures. In any case, it would appear from the 1997 decision of the Supreme Court in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* that maritime law will generally apply to offshore oil and gas installations and mobile drilling and production units.

The main statutes governing oil and gas activities on the east coast are the two federal “Accord Implementation Acts” dealing respectively with the Nova Scotia and the Newfoundland offshore areas, and the two corresponding provincial acts. These Acts establish the Canada-Nova Scotia Offshore Petroleum Board and the Canada-Newfoundland Offshore Petroleum Board as the main regulatory agencies for oil and gas operations. However, other acts also apply to certain aspects of these operations: the main ones being the *Canada Shipping Act*, which applies to offshore mobile craft that fall within the definition of “ship,” and the *Fisheries Act*, which prohibits the discharge of deleterious substances into waters frequented by fish and the destruction or alteration of fish habitat. These acts overlap to some extent with respect to offshore oil and gas operations. These acts are also administered by separate agencies and as a result there is the potential for inconsistency and duplication of administrative effort in the regulatory approach taken by these agencies with respect to oil and gas operations.

The *Fisheries Act* provides for absolute liability for damages resulting from the deposit of a deleterious substance in waters frequented by fish, although only with respect to the claims of commercial fishermen and any claims that the Crown may have for clean-up or remedial costs. The *Accord Acts* also provide for absolute liability for spills and debris. Although the class of potential claimants is broader than under the *Fisheries Act*, liability under the *Accord Acts* is limited to a prescribed amount, currently set at \$30-million. The overlap between the *Fisheries Act* and the *Accord Acts* both with respect to liability and with respect to operational discharges is problematic. It is suggested that it would be better to deal with oil and gas activities by way of a comprehensive code contained in the *Accord Acts* and to make the *Fisheries Act* inapplicable to this sector.

There is a similar problem with respect to the *Canada Shipping Act*. In the oil and gas field, identical activities can be conducted using mobile offshore units that are classified as ships, and fixed installations that are not ships. Furthermore, there are hybrid units which float while in transit and are jacked-up when operational. There is no reason why the “industrial” activities of such units and installations, as opposed to the marine

aspects that relate uniquely to ships, should be governed by the *Canada Shipping Act*. Again, this has the potential to result in confusion, regulatory inconsistency and duplication of administrative effort.

The compensation plans recently established for the Hibernia and Sable projects were negotiated with representatives of the fishing industry and appear to be sound and workable. Standardization of compensation plans across the industry would be desirable for reasons of efficiency, and to assist in achieving a common understanding between the two industries. A single compensation appeal board or at least overlapping membership would promote consistency in applying the plans.

Unlike tankers, mobile craft engaged in offshore oil and gas operations work within the jurisdiction of only one state at a time and are subject to the domestic laws of that state. The non-transitory nature of these operations allows the state concerned to exercise full control. It is therefore suggested that a global international convention relating to pollution from these units is not necessary, although it may be useful to have a convention to deal in a uniform manner with the aspects of offshore craft as ships, as opposed to the industrial aspects of offshore activities. However, since pollution from offshore oil and gas operations can have regional effects, regional conventions with neighbouring states may be warranted. With the possibility of future operations in both Canadian and French sectors in the vicinity of the French islands of St. Pierre and Miquelon off the south coast of Newfoundland, consideration should be given to the negotiation of a bilateral treaty providing for environmental matters. In addition, if drilling is permitted to proceed in the Georges Bank area offshore Nova Scotia in the future,⁴⁷⁵ a treaty with the United States may be desirable, having regard to the moratorium on drilling in adjacent U.S. waters and possible concerns of the U.S. public, and fishermen in particular, regarding matters of liability and compensation.

⁴⁷⁵ Oil and gas exploration in the Nova Scotia offshore area is prohibited within an area that includes the Canadian portion of Georges Bank, until at least January 1, 2000: federal *Nova Scotia Accord Act*, section 141. A panel has been appointed to conduct a public review of the environmental and socio-economic impact of exploration and drilling activities in that area. This panel is required to report to the federal and Nova Scotia governments before July 1, 1999, after which the governments will consider whether or not to extend the moratorium.

Additional specific recommendations are as follows:

1. As Canadian offshore production develops and the regulatory regime matures, provisions of the various acts that touch on marine pollution, to the extent that they apply to offshore oil and gas operations, should be integrated into the legislation dealing specifically with that activity: the *Accord Acts*. In particular, the *Fisheries Act* should be amended to provide that the liability provisions do not apply in respect of spills within the meaning of the *Accord Acts*, in the same way that the *Fisheries Act* provisions do not apply to discharges attributable to ships under Part XV of the *Canada Shipping Act*.
2. As a result of what appears to be a drafting error, liability for damages caused by spills and debris under the *Accord Acts* is arguably limited to the prescribed limit for absolute liability, even in cases of fault or negligence. To correct this, it is suggested that in subsection 167(2.1) of the federal Nova Scotia *Accord Act* (and the corresponding provisions of the other *Accord Acts*) the reference to “subsection (1) or (2)” be amended to read “paragraph (1)(a) or (2)(a)”
3. Paragraphs 167(1)(b) and 167(2)(b) of the federal Nova Scotia *Accord Act* (and the corresponding provisions of the other *Accord Acts*) should be amended to include liability for clean-up and remedial costs in cases of fault or negligence in addition to “actual loss or damage.”
4. It is suggested that all operators adopt a single compensation program for both attributable and non-attributable damage, which uses a common appeal board. This program would be modelled after the Hibernia and SOEP programs for attributable damage and the draft CAPP program for non-attributable damage.
5. It is suggested that in revising the Financial Responsibility Guidelines, the Boards remove the requirement for operators to provide an indemnity agreement; the requirement for interest holders other than the operator to participate in providing financial security; and the requirement to name the Board as an insured in policies of insurance. The indemnity provision in licences (and, in the case of Newfoundland licences, the liability provision) should also be removed.

APPENDIX A: EXCERPTS FROM LAW OF THE SEA CONVENTION

Article 192 General obligation

States have the obligation to protect and preserve the marine environment.

Article 193 Sovereign right of States to exploit their natural resources

States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

Article 194 Measures to prevent, reduce and control pollution of the marine environment

3. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.
4. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.
5. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent:

. . .
6. pollution from installations and devices used in exploration or exploitation of the natural resources of the sea-bed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;

Article 208
Pollution from sea-bed activities
subject to national jurisdiction

7. Coastal States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with sea-bed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to articles 60 [artificial islands, installations and structures in the exclusive economic zone] and 80 [artificial islands, installations and structures on the continental shelf].
8. States shall take other measures as may be necessary to prevent, reduce and control pollution.
9. Such laws, regulations and measures shall be no less effective than international rules, standards and recommended practices and procedures.
10. States shall endeavour to harmonize their policies in this connection at the appropriate regional level.
11. States, acting especially through competent international organizations or diplomatic conference, shall establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment referred to in paragraph 1. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.

Article 214
Enforcement with respect to pollution
from sea-bed activities

States shall enforce their laws and regulations adopted in accordance with article 208 and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment arising from or in connection with sea-bed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to articles 60 and 80.

Article 235
Responsibility and liability

12. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

13. **States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.**
14. **With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.**

APPENDIX B: EXCERPTS FROM ACCORD ACT AND REGULATIONS

CANADA-NOVA SCOTIA OFFSHORE PETROLEUM RESOURCES ACCORD IMPLEMENTATION ACT (S.C. 1988, c. 28, as amended)

Requirements for authorization

142. (4) An authorization is subject to such approvals as the Board determines or as may be granted in accordance with the regulations and such requirements and deposits as the Board determines or as may be prescribed, including

- (a) requirements relating to liability for loss, damage, costs or expenses;
- (b) requirements for the carrying out of environmental programs or studies; and
- (c) requirements for the payment of expenses incurred by the Board in approving the design, construction and operation of production facilities and production platforms, as those terms are defined in the regulations.

Compliance with sub-section 168(1)

142.3 The Board shall, before issuing an authorization for a work or activity referred to in paragraph 142(1)(b), ensure that the applicant has complied with the requirements of subsection 168(1) in respect of that work or activity.

...

Definition of "spill"

165. (1) In sections 166 to 170, "spill" means a discharge, emission or escape of petroleum, other than one that is authorized pursuant to the regulations or any other federal law or that constitutes a discharge from a ship to which Part XV or XVI of the *Canada Shipping Act* applies.

Definition of "debris"

(2) In sections 167 and 170, "debris" means any installation or structure that was put in place in the course of any work or activity required to be authorized under paragraph 142(1)(b) and that has been abandoned without such authorization as may be required by or pursuant to this Part, or any material that has broken away or been jettisoned or displaced in the course of any such work or activity.

Definition of “actual loss or damage”

(3) In section 167, “actual loss or damage” includes loss of income, including future income, and, with respect to any aboriginal peoples of Canada, includes loss of hunting, fishing and gathering opportunities.

Immunity

(4) Her Majesty in right of Canada incurs no liability whatever to any person arising out of the authorization by regulations made by the Governor in Council of any discharge, emission or escape of petroleum.

Spills prohibited

166. (1) No person shall cause or permit a spill on or from any portion of the offshore area.

Duty to report spills

(2) Where a spill occurs in any portion of the offshore area, any person who at the time of the spill is carrying on any work or activity related to the exploration for or development or production of petroleum in the area of the spill shall, in the manner prescribed by the regulations, report the spill to the Chief Conservation Officer.

Duty to take reasonable measures

(3) Every person required to report a spill under subsection (2) shall, as soon as possible, take all reasonable measures consistent with safety and the protection of the environment to prevent any further spill, to repair or remedy any condition resulting from the spill and to reduce or mitigate any danger to life, health, property or the environment that results or may reasonably be expected to result from the spill.

Taking emergency action

- (4) Where the Chief Conservation Officer is satisfied on reasonable grounds that
- (a) a spill has occurred in any portion of the offshore area and immediate action is necessary in order to effect any reasonable measures referred to in subsection (3), and
 - (b) such action is not being taken or will not be taken under subsection (3),

the Chief Conservation Officer may take such action or direct that it be taken by such persons as may be necessary.

Taking over management

(5) For the purposes of subsection (4), the Chief Conservation Officer may authorize and direct such persons as may be necessary to enter the place where the spill has occurred and take over the management and control of any work or activity being carried on in the area of the spill.

Managing work or activity

(6) A person authorized and directed to take over the management and control of any work or activity under subsection (5) shall manage and control that work or activity and take all reasonable measures in relation to the spill that are referred to in subsection (3).

Costs

(7) Any costs incurred under subsection (6) shall be borne by the person who obtained an authorization under paragraph 142(1)(b) in respect of the work or activity from which the spill emanated and, until paid, constitute a debt recoverable by action in any court of competent jurisdiction as a debt due to the Board.

Recovery of costs

(7.1) Where a person, other than a person referred to in subsection (7), takes action pursuant to subsection (3) or (4), the person may recover from Her Majesty in right of Canada the costs and expenses reasonably incurred by that person in taking the action.

...

Personal liability

(9) No person required, directed or authorized to act under this section is personally liable either civilly or criminally in respect of any act or omission in the course of complying with this section unless it is shown that person did not act reasonably in the circumstances.

Recovery of loss, damage, costs or expenses

167. (1) Where any discharge, emission or escape of petroleum that is authorized by regulation, or any spill, occurs in any portion of the offshore area,

- (a) the person who is required to obtain an authorization under paragraph 142(1)(b) in respect of the work or activity from which the spill or authorized discharge, emission or escape of petroleum emanated is liable, without proof of fault or negligence, up to any prescribed limit of liability, for
 - (i) all actual loss or damage incurred by any person as a result of the spill or the authorized discharge, emission or escape of petroleum, and
 - (ii) the costs and expenses reasonably incurred by the Board or Her Majesty in right of Canada in taking any action or measure in relation to the spill or the authorized discharge, emission or escape of petroleum; and
- (b) all persons to whose fault or negligence the spill or the authorized discharge, emission or escape of petroleum is attributable or who are by law responsible for others to whose fault or negligence the spill or the authorized discharge, emission or escape of petroleum is attributable are jointly and severally liable, to the extent determined according to the degree of the fault or negligence proved against them, for all actual loss or damage incurred by any person as a result of the spill or the authorized discharge, emission or escape of petroleum.

Recovery of loss, damage, costs or expenses caused by debris

- (2) Where any person incurs actual loss or damage as a result of debris or the Board or Her Majesty in right of Canada or the Province reasonably incurs any costs or expenses in taking any remedial action in relation to debris,
 - (a) the person who is required to obtain an authorization under paragraph 142(1)(b) in respect of the work or activity from which the debris originated is liable, without proof of fault or negligence, up to any prescribed limit of liability, for all such actual loss or damage and all such costs or expenses; and
 - (b) all persons to whose fault or negligence the debris is attributable or who are by law responsible for others to whose fault or negligence the debris is attributable are jointly and severally liable, to the extent determined according to the degree of the fault or negligence proved against them, for all such actual loss or damage and all such costs or expenses.

No double liability

- (2.1) Where subsection (1) or (2) applies, no person is liable for more than the greater of the prescribed limit referred to in paragraph (1)(a) or (2)(a), as the case

may be, and the amount for which the person would be liable under any other law for the same occurrence.

Claims

(3) All claims under this section may be sued for and recovered in any court of competent jurisdiction in Canada and shall rank firstly in favour of persons incurring actual loss or damage, without preference, and secondly, without preference, to meet any costs and expenses described in subsection (1) or (2).

Saving

(4) Nothing in this section suspends or limits

- (a) any legal liability or remedy for an act or omission by reason only that the act or omission is an offence under this Division or gives rise to liability under this section;
- (b) any recourse, indemnity or relief available at law to a person who is liable under this section against any other person; or
- (c) the operation of any applicable law or rule of law that is not inconsistent with this section.

Limitation period

(5) Proceedings in respect of claims under this section may be instituted within three years after the day when the loss, damage, costs or expenses occurred but in no case after six years after the day the spill or the discharge, emission or escape of petroleum occurred or, in the case of debris, after the day the installation or structure in question was abandoned or the material in question broke away or was jettisoned or displaced.

Financial responsibility

168. (1) An applicant for an authorization under paragraph 142(1)(b) in respect of any work or activity in any portion of the offshore area shall provide proof of financial responsibility in the form of a letter of credit, a guarantee or indemnity bond or in any other form satisfactory to the Board, in an amount satisfactory to the Board.

Continuing obligation

(1.1) The holder of an authorization issued under paragraph 142(1)(b) shall ensure that the proof of financial responsibility remains in force for the duration of the work or activity in respect of which the authorization is issued.

Payment of claims

(2) The Board may require that moneys in an amount not exceeding the amount prescribed for any case or class of cases, or determined by the Board in the absence of regulations, be paid out of the funds available under the letter of credit, guarantee or indemnity bond or other form of financial responsibility provided pursuant to subsection (1), in respect of any claim for which proceedings may be instituted under section 167, whether or not such proceedings have been instituted.

Manner of payment

(3) Where payment is required under subsection (2), it shall be made in such manner, subject to such conditions and procedures and to or for the benefit of such persons or classes of persons as may be prescribed by the regulations for any case or class of cases, or as may be required by the Board in the absence of regulations.

Deduction

(4) Where a claim is sued for under section 167, there shall be deducted from any award made pursuant to the action on that claim any amount received by the claimant under this section in respect of the loss, damage, costs or expenses claimed.

Review committee

169. (1) A committee, consisting of members appointed by each government and by representatives of the petroleum industry and of the fisheries industry, is established by the joint operation of this Act and the Provincial Act to review and monitor the application of sections 167 and 168 and any claims and the payment thereof made under those sections.

Dissolution of committee

(2) The committee referred to in subsection (1) may be dissolved only by the joint operation of an Act of Parliament and an Act of the Legislature of the Province.

Promotion of compensation policies

(3) The Board shall promote and monitor compensation policies for fishermen sponsored by the fishing industry respecting damages of a non-attributable nature.

**NOVA SCOTIA OFFSHORE PETROLEUM DRILLING REGULATIONS
(SOR/95-188)**

Evidence of Financial Responsibility

72. Every operator shall, prior to drilling or re-entering a well,

(a) furnish the Board with evidence of financial responsibility in a form and in an amount satisfactory to the Board or any person designated by the Board, for the purpose of ensuring that the operator terminates the well and leaves the drill site in a satisfactory condition in accordance with section 180; and

(b) furnish the Board with evidence, in a form satisfactory to the Board or any person designated by the Board, that the operator is financially able to meet any financial liability that may be incurred as a result of the drilling of a well or of any operation in the well.

...

180. Every operator shall ensure that on the termination of any well the seafloor is cleared of any material or equipment that could interfere with other commercial uses of the sea, unless the Board or any person designated by the Board, having been satisfied that no interference with the commercial use of the sea is reasonably likely to result, otherwise approves.

**NOVA SCOTIA OFFSHORE PETROLEUM PRODUCTION AND
CONSERVATION REGULATIONS (SOR/95-180)**

Evidence of Financial Responsibility

10. For the purposes of subsection 142(4) of the Act and in respect of an authorization issued pursuant to paragraph 142(1)(b) of the Act to carry on a work or activity in relation to the development of a pool or field or the production of petroleum, the operator shall, before the work or activity is started, submit to the Board

(a) evidence of financial responsibility, of a type and in an amount that is sufficient to ensure that the operator

(i) completes the work or activity, and

(ii) leaves the site where the work or activity was carried on in the state required by Part VII or by the Board pursuant to subsection 142(4) of the Act; and

(b) evidence that the operator is able to meet any financial liability that might be incurred in connection with the work or activity.

...

De-commissioning

50. No person shall de-commission a production installation at a pool or field other than in accordance with the approved development plan or a requirement of an authorization issued pursuant to paragraph 142(1)(b) of the Act.

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