

The Shipowner and Oil Pollution Liability

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The shipowner's civil and criminal liability for oil pollution in Canadian waters, was, on September 21, 1971 substantially increased by the promulgation of regulations¹ which effectively brought into force some of the provisions of those amendments to the *Canada Shipping Act*² that now constitute Part XIX thereof. His responsibility to the Federal Government for the costs of remedying the effects of an oil spill will become a matter of strict liability where before it was limited to little more than moral obligation. In like manner, damages suffered by individuals and private concerns will become recoverable from the shipowner or his insurers by a statutory right of action with provision for guaranteeing payment where previously such claimants had only common law remedies on which to rely. The maximum penalty which may be imposed for the wrongful discharge of oil from a ship has been increased twenty times to the sum of \$100,000.00.

The purpose of this writing, after reviewing the circumstantial and legislative background which led to the introduction of Bill C-2³, will be to consider the weight and practical effect of the liability for marine pollution which Part XIX rests with the shipowner in light of the statutory failings which the amendments purport to remedy.

Background

Almost immediately following the grounding of the *Torrey Canyon* in March of 1967, national governments around the world, in an atmosphere of international concern, began principally for the first time to seek legislative clarification of their powers to both prevent and remedy the possible disastrous ramifications of oil spills which could threaten the environment of their coast and territorial waters. Most nations enacted statutory provisions which were intended only as "stop-gas" measures and then joined with the

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¹ Canada Gazette, Part II, Vol. 105, No. 19, Sept. 21, 1971, P.C. 1971-2005, SOR/71-495.

² R.S.C. 1970 C.S.-9.

³ Canadian Bill C-2.

United Kingdom in requesting that The International Marine Consultative Organization (IMCO) give consideration to an international convention on the subject. Although the conference which met in Brussels in November of 1969 adopted two conventions⁴, which if ratified by the various member nations would present a unified front in legislative terms to what is clearly an international problem, the flurry of unilateral activity which followed in the wake of the 117,000 tons of crude oil which were grounded and in large measure spilled on the Seven Stones Reef has prevailed and presently represents the inconsistent and largely unworkable body of international law governing oil spills at sea with which the shipowner and his insurers are confronted.

Like other nations Canada introduced new oil pollution legislation⁵ at that time but Parliament chose, in effect, to put the matter in abeyance pending the outcome of the Brussels Convention and thereafter this country took an active part in the efforts made to prepare the draft conventions. Canadian representatives were directly involved in the conference itself and the Minister of Transport himself stated Canada's position in addressing the Brussel's assembly on the first afternoon of the meeting. However it is perhaps of interest to note that of the seventy-three votes cast by the forty-nine member nations who adopted the two conventions, Canada's single vote was the only negative vote cast by any nation.

On February 4th, 1970 having been unable to persuade the international forum toward the adoption of articles which the Canadian government considered adequate to cope with the problems of oil pollution and with only "stop-gap" or interim legislation in force in this regard, Canada faced and suffered perhaps the worst maritime environmental disaster in the country's history. A royal commission was convened to fully investigate and report on the grounding on Cerberus Rock in Chatabucto Bay and perhaps the wording employed by the Honourable Mr. Justice Hart, the Chairman of the Commission, in his final report best describes the extent of the environmental devastation which affected almost two hundred miles of Canada's eastern coast.

... (The oil) stuck to everything it touched like a coat of wet paint an eighth of an inch thick. The shores once lined with rocks kept antisepitically clean by the action of the sea were now lined with black rocks destined

⁴ International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Public Law).

International Convention on Civil Liability for Oil Pollution Damage (Private Law).

⁵ Canadian Bill S-23.

to release a bit of their cover each time the temperature rose during the years ahead...⁶

The principal cause of the *Arrow's* grounding was established to have been improper navigation on the part of the master who brought his cargo of 16,000 tons of crude oil into unfamiliar but well-charted waters at virtually full speed without taking the appropriate fixes sufficient to enable him to hold his plotted course.⁷ However, the cause of the extent of pollution damage and the environmental devastation which flowed therefrom has been attributed principally to the total lack of preventative authority and remedial measures available both to the Federal government and to private concerns.

With respect to the lack of legislation of a preventative nature, the Commission found that government responsibility for oil spills was limited to the regulations⁸ made under the provisions of the *Canada Shipping Act*⁹ then in force which purported to adopt the 1954 International Convention for the Prevention of the Pollution of the Sea by Oil. The Convention was designed to prevent or control the deliberate or intentional discharge of oil into the sea and it did not establish any standards of navigation, construction or equipment nor did its adoption establish any authority for controlling the threat of a major oil spill such as that which arose out of the grounding of the *Arrow*.¹⁰

The powers extended to what might be termed the "policing force" (i.e. Steamship Inspectors) under the Oil Pollution Prevention Regulations then in force were directed primarily at gathering evidence to support prosecutions of ships' masters and owners from whose vessels there had been a wrongful or unlawful discharge of oil. There was no provision for regulating the standards to be met and maintained by vessels entering Canadian waters carrying large quantities of pollutant substances or prohibiting their entry should their condition be found to be sub-standard.

⁶ Final Report of the Royal Commission on Pollution of Canadian Waters by Oil and the Formal Investigation into the Grounding of the Steam Tanker "ARROW". (Information Canada Catalogue No. 21-1970/2).

⁷ Judgment of the Royal Commission Inquiry and Formal Investigation into Grounding of the Steam Tanker "ARROW" (Halifax, July 1970).

⁸ Canada Gazette, Part. II, Vol. 102, No. 19, Sept. 17, 1968, P.C. 1968-1788, SOR/68-434.

⁹ R.S.C. 1952, c. 29 as amended by S.C. 1956, c. 34, s. 25 and S.C. 1968-69, c. 53, s. 23.

¹⁰ *Op. cit.*, n. 6, at pp. 125 and 189.

The condition of the *Arrow*, one of the oldest vessels in the Onassis fleet, was found to be lacking both in terms of the navigational equipment carried on board and in terms of the operability of significant pieces of the vessel's auxiliary machinery¹¹. The Commission cited these failings as having contributed both to the initial grounding and to the extent of oil spillage. It recommended a new international agreement governing the standards to be maintained by vessels carrying pollutants on the high seas and the unilateral promulgation of regulations in this regard for ships passing through Canadian waters, as an interim measure, until such time as the international forum could be convened¹².

The obligation Canadian legislation imposed upon a master of informing government authorities when there had been or was likely to be a spill from his vessel was limited to reporting only lawful discharges of oil which had occurred and were unavoidable or intentionally made for the purpose of saving life or preventing the immediate loss of the ship¹³.

When the *Arrow* grounded on Cerberus Rock at 0935 hours on the morning of February 4th, 1970 there was no report made by the master to any Canadian government authority until almost noon and even then such was to the effect that neither the vessel nor any of her cargo was in any immediate danger. In fact it was not until after 1600 hours that the *Arrow* acknowledged her danger and need for assistance¹⁴.

The Commission viewed the time during which the *Arrow* twisted and grated on the rocks, with her engines full astern in a vain hope of being freed, as a loss of what are "crucial hours during a pollution incident which may be perhaps the only time when some successful avoiding action can be taken".¹⁵ The final report insists that the law *must* be changed in order that the decision as to whether or not there is a potential hazard is not left to the master of the ship who may very well tend to minimize his predicament.

In considering the efforts made to control the extent of pollution and remedy the damage done both to the coastal environment and

¹¹ *Ibid.*, at p. 122. The radar set was malfunctioning and ought not to have been used. The vessel was equipped with neither Loran nor Decca. The emergency diesel generator had not operated for sometime prior to the grounding.

¹² *Ibid.*, at p. 125.

¹³ Canada Gazette, Part. II, Vol. 102, No. 19, Sept. 17, 1968, P.C. 1968-1788, SOR/68-434, s. 6 (2).

¹⁴ *Op. cit.*, n. 6, at p. 12.

¹⁵ *Ibid.*, at p. 201.

to private interests, the Arrow Inquiry concluded that in addition to the lack of experienced personnel at the site in the five or six days immediately following the grounding there was as well an absence of any firm authority properly empowered to direct and co-ordinate the salvage and clean up operations.

On the second day following the initial impact section 495 (c) of the *Canada Shipping Act* was proclaimed¹⁷. As such the section empowered the Federal government to take charge of and if necessary destroy the tanker in order to curtail the threat of pollution. The proclamation was not conveyed to the government authorities at the site until the following evening and by then such value as there may have been in the government's authority was for the most part lost. The owners of the *Arrow* took advantage of the Minister's action to relieve themselves of the expense of salvaging the vessel and her cargo which they had initially undertaken despite the conflict in interest represented by potential claims for damage to shore property. The charterer and owner of the cargo, although fulfilling a moral obligation to render such assistance as they were able with respect to abating and cleaning up that which had spilled, was legally not in a position favourable to participating in deciding the fate of the wreck.

Accordingly, the responsibility for the cost of his proclamation fell directly upon the Minister, who having called the legislation into force, found he had neither an agency prepared to deal with the emergency nor the funds to finance such. The government had the power it required but had little or no means of practically and effectively implementing and exercising its authority. As the Commission points out, it was only through government intervention that the people who lived and worked in the area could have some say in the matter, but the government was not at the time in a position to represent them¹⁸; to do so would be to expend public funds which Parliament had not at the time appropriated.

Although the government had a moral obligation to the inhabitants of Canada's east coast, it is doubtful that it had any legal right of action against the owners of the *Arrow*. Curiously enough section 495 (d) of the *Canada Shipping Act*¹⁹ had been proposed but never enacted. The section would have made all expenses incurred by the government in removing or destroying the vessel and cleaning all

¹⁶ *Ibid.*, at p. 112

¹⁷ *Ibid.*, at p. 39.

¹⁸ *Ibid.*, at p. 114.

¹⁹ *Ibid.*, at p. 121.

property fouled as the result of the grounding a debt owed and due the Crown by the owners.

However, the fact that the *Arrow* was for all intents and purposes the principal asset of a Panamanian company would have made the debt virtually uncollectable. Certainly the task of pursuing the owners through the Panamanian courts would have rendered expenses incurred by private concerns clearly unrecoverable.

It was then, in the aftermath of this environmental disaster which occurred in circumstances of critical legislative deficiencies, that the Government introduced Bill C-2 for debate in the House of Commons. The resultant amendments to the *Canada Shipping Act* have been enacted with a two-fold purpose: firstly, to provide broad statutory powers directed toward the prevention of pollution by vessels sailing in Canadian waters and, secondly, to ensure recovery by both private and public concerns for costs and expenses incurred in remedying the effects of pollution incidents and the damages suffered therefrom.

Preventative Measures

The provisions of Part XIX relating to the prevention of oil pollution and the regulations which have been promulgated in accordance therewith constitute a body of legislative prohibition and control which to the shipowner represents the possibility of fines to a maximum of \$100,000.00 for each contravention or offence.

The previous lack of authority to regulate the flow and condition of vessels carrying pollutants through Canadian waters has in large measure been overcome by the provision for and appointment of pollution prevention officers²⁰. The broad discretionary powers extended to them under the *Act*²¹ permit the control of both the entry to and routing through our waters of all vessels carrying pollutants whether as cargo or only as fuel²². Further, a pollution prevention officer is entitled to require and be provided with information concerning the condition of the ship, its machinery and equipment, the nature and stowage of the cargo and any other

²⁰ *Canada Shipping Act*, R.S.C. 1970, c. S-9; An Act to Amend the Canada Shipping Act, R.S.C. 1970, 1st Supp., c. 38; An Act to Amend the Canada Shipping Act, S.C. 1970-71-72, c. 27, s. 740; Canada Gazette, Part II, Vol. 105, No. 19, Sept. 21, 1971, P.C. 1971-2005, SOR/71-495.

²¹ An Act to Amend the Canada Shipping Act, S.C. 1970-71-72, c. 27, s. 740.

²² *Ibid.*, s. 741 (c) and s. 741 (d).

information relating to the administration of this legislation²³, providing his requirements are not unreasonable²⁴.

In the event that a spill does occur or a pollution prevention officer receives information of the danger of such, he has the authority to require all vessels within the area to report their positions²⁵. As well he is empowered to order any ship to clean up a pollutant whether or not that ship was responsible for the spill²⁶. The Act does however provide that compensation will be paid by the Crown for services rendered in compliance with such an order²⁷.

The regulations which came into force on September 21, 1971 were drawn in accordance with two sections of the *Act*.²⁸ The first section relates solely to the authority of the Governor-in-Council to make regulations prohibiting the discharge of pollutants generally and the duty imposed on a master from whose vessel a discharge does occur. The effect of the legislation in this regard is clearly two-fold: first, to prohibit the discharge of oil or an oily mixture²⁹ subject to three very limited exceptions³⁰ and secondly, to rest with the master of the vessel the heavy onus of notifying government authorities of any pollutant which is discharged from his vessel or even of the danger of such occurring³¹. The maximum fine of \$100,000.00 which may be imposed on a master who fails to report in contravention of the *Act* and regulations³² in this regard is of particular significance in view of the Royal Commission's criticism of both the prevailing statutory provisions and the conduct of the master of the *Arrow* in not reporting his predicament sooner than he did.

The second section of the *Act* under which the regulations of September 21, 1971 were made makes broad provision under which the Governor-in-Council can move to impose standards governing, amongst others, the stowage, types and quantities of pollutants that may be carried by vessels entering Canadian waters; the navigational and handling equipment to be maintained by such vessels; the number and qualifications of ship's personnel and the procedures

²³ *Ibid.*, s. 741 (a).

²⁴ *Ibid.*, s. 763 (1).

²⁵ *Ibid.*, s. 741 (e) (i).

²⁶ *Ibid.*, s. 741 (e) (ii).

²⁷ *Ibid.*, s. 741 (2).

²⁸ *Ibid.*, s. 737 and s. 739.

²⁹ *Ibid.*, s. 737 (1) and Regulation 5.

³⁰ *Ibid.*, Regulation 6 (1).

³¹ *Ibid.*, s. 737 (2), s. 739 (1) (b) and Regulation 7.

³² *Ibid.*, s. 762 (1).

and practices to be followed in loading, unloading, transferring and carrying pollutants including methods of retaining oily wastes on board. The section further provides for regulations prescribing the classes of substances that are pollutants and the form of records with respect to such that are to be kept on board all vessels to which Part XIX applies.

At the time of this writing, however, the regulations in force under this section,³³ apart from classifying oil as a pollutant, principally encompass and relate only to be provisions governing the practices and standards to be followed with regard to the bunkering and internal transfer of oil³⁴ and the records to be kept in respect thereof³⁵.

The offence and penal aspects of this legislation are contained in the *Act* itself. In order to enforce strict observance of the regulations, the Canadian Parliament, in addition to imposing a maximum fine of \$100,000.00 for any unlawful discharge of oil³⁶, has also imposed equivalent penal provisions for any contravention of those regulations enacted for the purpose of preventing oil spills whether or not a spill has occurred³⁷. Further, the same fine may be imposed for failing to provide a pollution prevention officer with such information as he may reasonably have required or to comply with any order he was properly empowered to have made³⁸.

Although there do not appear to have been any prosecutions under Part XIX for other than actual oil spills, it is in passing perhaps interesting to note that a charge can now be laid and a fine imposed where a vessel is found to have internally transferred a quantity of oil without plugging scuppers or, alternatively, without placing a watch on the recipient tank even if there were no spill at all³⁹. By the same token a master who fails to make a note of the uneventful and routine transfer in the vessel's oil record book could be subject to the same penalty⁴⁰. On the face of the statute the fine for either offence could be as high as \$100,000.00.

Since the fine for wrongful discharge of oil has been raised from \$5,000.00 to its present maximum, the prosecutions in the Provincial Court at Vancouver have resulted in fines ranging from a suspended

³³ *Ibid.*, s. 739 (j) and (1).

³⁴ *Ibid.*, Part III of the Regulations.

³⁵ *Ibid.*, Part IV of the Regulations and Regulations 30 and 31.

³⁶ *Ibid.*, s. 761.

³⁷ *Ibid.*, s. 764.

³⁸ *Ibid.*, s. 763 (1).

³⁹ *Ibid.*, Regulation 20 and s. 764.

⁴⁰ *Ibid.*, Regulation 31 and s. 764.

sentence⁴¹ for a spill which cost approximately \$2,000.00 to clean up to \$10,000.00⁴² for a spill which cost \$840.00 to remedy. At least in this jurisdiction there appears to have been very little consistency thus far in the penalties imposed.

Unlike the Admiralty Court, the Provincial Court is without the aid of assessors such that the shipowner must defend the charge laid and speak to the sentence imposed before a judge who, for the most part, is unable to appreciate the highly technical operations and workings of a ship's engine room from where most oil spills originate.

Fines tend neither to reflect nor relate to the cause or extent of the spill but rather are imposed on general principles of "punishment and deterrent". Again, without sufficient knowledge of the world of commerce and insurance in which the shipping community must operate, judges, in fixing penalties for relatively minor infractions of the regulations, are being misled in the presumption that the elements of punishment and deterrence are of any consequence at all. In fact, it may well be argued that the imposition of a fine for an accidental oil spill serves only to increase the cost of clean up which is by and large a substantial penalty in itself.

The risk of small, inadvertent oil spills having relatively little or no real detrimental effect is indeed great on even the newest and best run vessels. The problem is one of international concern. Shipowners and shipbuilders are endeavouring to reduce clean up expenditures by taking such steps as they are able to minimize the risk. Clearly, the imposition of fines in addition to the other expenses which arise whenever a small spill does occur serves only to add to the shipowner's difficulties in an area where he has at present only limited control.

It is perhaps of some significance that the penal provisions of this legislation provide for the prosecution of either the person responsible for the contravention of the regulations or the *ship* itself.⁴³ A ship may also be prosecuted for failing to provide information required by a pollution prevention officer or comply with such order as he may have made.⁴⁴

As such the statute appears to be the first instance in modern jurisprudence where provision is made for the prosecution of an inanimate object in the criminal courts. Matters of jurisdiction,

⁴¹ *R. v. M. V. Turandot*, Nov. 31, 1971.

⁴² *R. v. M. V. Holly*, Apr. 26, 1972.

⁴³ *Op. cit.*, n. 21, s. 761 and s. 764.

⁴⁴ *Ibid.*, s. 763.

service and appearance are covered by the *Act*⁴⁵ as well as the procedure to be followed in proving an offence against a ship.⁴⁶ However, evidentiary problems such as the admissibility of statements made by the master and crew in a criminal or *quasi*-criminal trial remain to be resolved by the courts.⁴⁷

In large measure the Government's concern for our coastal environment which developed out of the *Arrow's* grounding in Chatabucto Bay has given rise to a body of legislation which if properly utilized, should for the most part work effectively toward the prevention of maritime pollution. However the criminal liability of the shipowner for substantial fines which may be imposed under the penal provisions of the *Act* for each contravention of the regulations in the event of a minor accidental oil spill or internal misdemeanour where there has been no spill at all, may well constitute unrealistic and largely unfair measures of approaching one aspect of the problem for which the shipowner is presently without solution.

Remedial Measures

The provisions of Part XIX relating to the remedies available to both the Federal government and private interests following a pollution incident or the threat of such arising have been drawn and enacted with two considerations in mind. The first of these is the provision of a clear right of action against the shipowner for damages suffered as the result of the carriage of a pollutant on board his vessel and the second is the guarantee of payment should action ensue.

All reasonable costs incurred by the Federal government in repairing or remedying any condition that results from the discharge of a pollutant from a ship⁴⁸ in addition to all actual losses or damages suffered therefrom by either the Federal or Provincial Crown or by any other persons,⁴⁹ will by statute be recoverable from

⁴⁵ *Ibid.*, s. 768.

⁴⁶ *Ibid.*, s. 766.

⁴⁷ In this regard the Provincial Court of British Columbia at Vancouver has held in *R. v. M. V. Aran*, Feb. 2, 1972, (unreported) that in keeping with the holding in *The Soloway* (1885) 10 P.D. 137, only statements made by a ship's master are admissible as evidence against the vessel's owners and such must be statements of fact, not opinion, (i.e.) what the master did, saw or ordered.

⁴⁸ *Op. cit.*, n. 21, s. 743 (1) (a) and (c).

⁴⁹ *Ibid.*, s. 743 (1) (a) and (d).

the owner of the ship in an action in the Federal Court of Canada⁵⁰ if such is commenced within two years of the date of the discharge.

In keeping with the IMCO Convention⁵² the shipowner's liability will not depend on a proof of fault, but rather he will be held strictly liable for both clean up costs and damages generally unless he is able to establish one of four limited exceptions as having been the cause of or given rise to the discharge: an act of war or of God,⁵³ an act or omission of a third party (for whose conduct the shipowner is not responsible) done with the intention of causing damage and the negligence of any person or government in the improper installation and maintenance of navigational aids.⁵⁴ The only other exception will arise when the claimant is by his own conduct responsible for the pollutant being discharged.⁵⁵ While apart from these exceptions the shipowner will be subjected to strict liability, the *Act* expressly does not preclude him from maintaining and pursuing a right of recourse against a third party.⁵⁶

It is perhaps of some consequence that in preserving the Federal government's right to take charge of a potential pollution situation and to remove or destroy the offending vessel and its cargo if necessary,⁵⁷ having confirmed that the cost of such action shall be at the shipowner's expense,⁵⁸ Parliament has seen fit not to afford any exceptions from strict liability for the costs incurred in *this* regard. The result then is that if for any reason whatever a ship is deemed a pollution risk, the Federal Crown may incur any reasonable expense it considers necessary in dealing with the vessel and its cargo (including the sale of such) and thereafter proceed against the owner of the ship to recover its costs.

The IMCO Conference agreed to a limitation on liability related to the tonnage of the vessel involved to a maximum of approximately \$14,000,000.00 providing that the pollution incident was not the result of the actual fault or privity of the shipowner.⁵⁹ In like

⁵⁰ *Ibid.*, s. 743 (3).

⁵¹ *Ibid.*, s. 743 (4) (b). Article VIII of the IMCO Convention (private law) prescribes a limit of 3 years.

⁵² Private Law Convention *supra* Article III.

⁵³ *Op. cit.*, n. 21, s. 744 (1) (a) (i), "a natural phenomena of exceptional, inevitable and irresistible character".

⁵⁴ *Ibid.*, s. 744 (1) (b).

⁵⁵ *Ibid.*, s. 744 (1) (a).

⁵⁶ *Ibid.*, s. 744 (1).

⁵⁷ *Ibid.*, s. 738.

⁵⁸ *Ibid.*, s. 743 (2).

⁵⁹ Private Law Convention *supra*. Art. V (1) and (2).

manner Part XIX makes the same provision,⁶⁰ the result being, primarily, the insurable predetermination of the extent of a shipowner's liability.

Having reviewed the nature and extent of the shipowner's statutory liability for pollution or for the threat of such being attributable to his vessel, there remain two further significant considerations in this regard, the first of which, for Canada, represents a major step away from the agreement reached by the IMCO Conference and thereafter incorporated in the Convention.

In addressing the assembly at Brussels in November of 1969 the Honourable Minister of Transport for Canada in stating this country's position said:

Canada takes the view that pollution results primarily from the nature of the commodity and only incidentally from fault on the part of the carrier in its transportation.⁶¹

In keeping with this philosophy, presumably, despite such having been rejected by the other member nations of the international forum, Part XIX has been enacted to affix liability for pollution damage (and for the threat of such) to the owner of the pollutant cargo as well as to the shipowner.⁶² The *Act* provides that contingent upon the Governor-in-Council specifying by regulation the class of vessels to which the provision shall apply,⁶³ the cargo owner shall share liability with the shipowner on a joint and several basis.

While such may be an unfortunate departure from the international scheme, it could well serve to make the oil industry increasingly more cautious of the condition of the vessels employed to transport their cargo. To the shipowner, the provision means that at least in Canadian waters one-half of the aggregate burden of liability from marine pollution will be lifted from him and his insurers.

The other aspect of liability which bears some consideration is that in keeping with the articles of the IMCO Convention,⁶⁴ Part XIX appears to have stopped short of providing remedies to either the Crown or private interests for costs and damages

⁶⁰ *Op. cit.*, n. 21, s. 744 (4) (c).

⁶¹ Minutes of the opening addresses of the member nations at Brussels Nov. 10, 1969.

⁶² *Op. cit.*, n. 21, s. 743 (b).

⁶³ At the time of this writing it would appear that no regulations having this effect have yet been enacted.

⁶⁴ Private Law Convention *supra*. Art. I (1).

to be suffered from the majority of oil spills by indirectly limiting the shipowner's liability to discharges from ships that carry pollutants *only* "in bulk". In effect the result is that the Federal government will presumably be without any recourse to recover the cost of cleaning up even a very large spill unless the offending vessel is carrying a substantial quantity of a given pollutant.⁶⁵ In that the majority of oil spills on our coastal waters do not originate with tankers, private concerns will have to continue, for the most part, to rely on their common law remedies of a suit for damages framed either in nuisance or negligence which has in the past proved largely ineffective and unworkable.

Unlike the preventative measures of this legislation which are applicable to all deep sea vessels carrying pollutants through Canadian waters whether as cargo or as fuel, the remedial provisions of Part XIX unfortunately appear limited to vessels transporting pollutants in large quantity and as such the amendments to the *Canada Shipping Act* fail to meet or come to terms with the whole of the problem with which both the Federal government and private enterprise are confronted.

It was earlier suggested that the remedial aspects of Part XIX were enacted with two considerations in mind such that it now remains to consider briefly the provisions relating to the guarantee of payment to properly entitled claimants.

There are in this regard principally two measures which have been incorporated in the *Act*. The first, although not yet in force,⁶⁶ is in accordance with the articles of the IMCO Convention,⁶⁷ the statutory obligation of a shipowner to have and maintain a form of insurance or other financial guarantee sufficient to cover his maximum liability within the limitations prescribed under the *Act* (*i.e.* where the claim does not arise from a pollution incident which was caused by the actual fault or privity of the shipowner).⁶⁸ The guarantee must be of such form as will permit a claimant to pro-

⁶⁵ *Op. cit.*, n. 21, s. 743 (1). Although the term "in bulk" appears not yet to have been defined as provided by regulation (s. 739 (1) (p)) with respect to this section it is significant that the regulations relating to the Maritime Pollution Claims Fund have defined the term as being a quantity of pollutant in excess of 1000 Tons (Canada Gazette, Part II, Vol. 106, No. 4, Feb. 3, 1972, P.C. 1972-185, SOR/72-33, Regulation 2 (2)).

⁶⁶ Canada Gazette, Part II, Vol. 105, No. 14, July 28, 1971, SOR/71-321, An Act to Amend the Canada Shipping Act, 1970-71, c. 27, Proclaimed in force July 1, 1971 with the exception of s. 745 thereof.

⁶⁷ Private Law Convention Art. VII (1), *op. cit.*, n. 4.

⁶⁸ *Op. cit.*, n. 21, s. 745 (1).

ceed directly against the guarantor⁶⁹ who presumably may avail himself of all defences available to the shipowner with the exception of the shipowner's bankruptcy.

The obvious purpose of this measure is to overcome the problems faced by all claimants both public and private when forced to claim against a "one asset shipowner" whose ship is a total or unsalvageable loss.

The second means of guaranteeing payment contained in the provisions of Part XIX is designed to provide relief where either the polluter is unidentified or his liability exceeds the limitations of the guarantee he maintains. The newly constituted Maritime Pollutions Claims Fund (the Fund)⁷⁰ is by regulation⁷¹ promulgated under the *Act*⁷² to be built and maintained by a levy (presently 15¢)⁷³ on each ton of oil imported to and exported from Canada. In keeping with Canada's philosophy of resting the responsibility for preventing pollution at least in part with the oil industry, the burden of the levy is to be borne by the owner of the cargo and, of course, ultimately by the consumer.

When a claimant, whether he be the Crown or a private concern, has employed his best efforts to the satisfaction of the Administrator of the Fund in determining the identity of the polluter and recovering to the extent that he is able, he shall be entitled to receive full compensation from the Fund in consideration of his assigning his right of action or judgment as the case may be.⁷⁴

The remedial measures contained in Part XIX combine these two forms of guarantees to overcome the primary obstacles of jurisdiction, solvency and identity, which in the past have precluded claimants from pursuing their right to compensation for damages and incurred costs and expenses which have been related to and arisen from pollution incidents. The principal drawback however stems from the express provisions⁷⁵ that recovery under these schemes is to be contingent upon the claimant being in a position to maintain a right of action under the terms of Part XIX. In other words, again both the Federal government and private enterprise will be limited in relying upon these measures of

⁶⁹ *Ibid.*, s. 745 (2).

⁷⁰ *Ibid.*, s. 746 (1).

⁷¹ *Op. cit.*, n. 65.

⁷² *Op. cit.*, n. 21, s. 757 (1).

⁷³ *Op. cit.*, n. 65, Regulation 3.

⁷⁴ *Op. cit.*, n. 21, s. 745 (2) and s. 753.

⁷⁵ *Ibid.*, s. 750.

guaranteed payment to instances where their claim is against a shipowner whose vessel was carrying a pollutant in bulk. Regrettably, Parliament has not seen fit to extend even the relief available under the Fund to cover and include the substantial portion of pollution damages suffered by both persons and industry on the coasts of this country.

In summary, it might be said that while at least in some instances the preventative measures enacted as part of this amended legislation appear to rest with the shipowner criminal liability of unjustifiable weight, the remedial measures stop short of affixing civil liability sufficient to provide adequate relief to properly entitled claimants in the majority of pollution incidents. The fisherman whose boat, net and equipment are fouled by a substantial discharge of oil not being carried in bulk will now be in no better position legally to recover any damages or expenses he has suffered than he was under the previous legislation. The costs incurred by the Crown in cleaning up such a spill will under this legislation in its present form be no more the concern of the shipowner than such were recoverable from the owners of the *Arrow*. However, the fine which may be imposed for even the most minimal and accidental discharge, regardless of the absence of any detrimental effects, is a meaningless burden and governed only by the penal views of the particular judge before whom the offending vessel appears.

Apart from this significant inconsistency and the hardship worked on both shipowner and claimant thereby, the preventative and remedial measures of the Canada Shipping Act as amended with respect to the liability of the shipowner for oil pollution appear for the most part an effective means of dealing with a problem of international magnitude and concern on a unilateral basis. However to the shipowner and his insurers the enactment of Part XIX diminishes appreciably the advantages of international legislative consistency which would have followed from the ratification of the IMCO Convention by even a substantial number of the member nations. In that the United States has also enacted independent oil pollution legislation⁷⁰ it may well be that despite Canada having adopted several of the articles of the Convention, this country's unilateral statutory provisions may well discourage other nations from accepting the international format for preventing and remedying maritime pollution such that the shipowner will continue to be confronted with a patchwork of legislation governing his liability in this regard.

⁷⁰ Water Quality Improvement Act Pub. L. No. 91-224, (April 3, 1970).